Introduction

Timothy S. Huebner

The *Journal of Supreme Court History* has long prided itself on publishing a wide variety of articles covering subjects from all different time periods. For nearly fifty years, the *Journal* has included articles about landmark cases and justices—of course—but it has also published essays about litigants, clerks, members of the Supreme Court bar and the Supreme Court staff, as well as architectural features of the Court building. In recent years, moreover, we have published articles about the early history of the justices' robes and about a D.C. house, which played an especially important role in the Court's history. Over the decades, the *Journal* has served up, as my esteemed predecessor Mel Urofsky used to say, "a smorgasbord" to its readers. This issue is no different.

M. Henry Ishitani offers an insightful historical treatment of the constitutional issues surrounding disqualification for elective office. The issue arose out of the American Civil War, when the constitutional rights and status of ex-Confederates came before the Court. In Ishitani's telling, *The Test Oath Cases* (1867) played a significant role in shaping the constitutional contours of Reconstruction. Ishitani received the inaugural Henry J. Abraham Early Career Research Grant, established in 2023, which helped support the research for this article. He is currently completing a Ph.D. in the Department of History at Yale and has a fellowship this fall with the University of Tulsa School of Law.

The Civil War and Reconstruction cast a long shadow over the nation, particularly with regard to race relations. When the potential promise of Reconstruction failed to be realized, the struggle for Black Americans to secure their rights and preserve their dignity continued during the era of Jim Crow segregation. In the midst of it, as Terence Walz tells us, Eugene Brooks made his mark. A messenger to Chief Justices Morrison R. Waite and Melville W. Fuller, Brooks became a fixture at the Court for decades while he also rose to prominence within D.C.' s Black community. Walz, an independent scholar based in Washington, D.C., provides a compelling assessment of a previously unknown member of the Court's staff.

Helen J. Knowles-Gardner gives us a striking account of *NAACP v. Alabama ex rel. Flowers* (1964). A landmark in the jurisprudence of freedom of association, the case involved the state of Alabama's attempt to compel the organization to turn over its membership lists. Knowles-Gardner tells the story

of the case through the eyes of the legendary Supreme Court journalist Anthony Lewis. Having thoroughly mined Lewis's notes, she offers a multi-layered narrative that has a moment-by-moment, on-the-ground feel. The essay brings readers close to the events of the day—both in the courtroom and in the state of Alabama—while also offering a detailed account of the procedural complexities of the case. Knowles-Gardner, in addition to serving as Managing Editor of the *Journal*, is the Research Director at the Institute for Free Speech.

The other major struggle for justice during the 1960s, apart from the Civil Rights Movement, involved the efforts of women to secure their rights. While the Warren Court earned a reputation for furthering the rights of Black Americans, it failed to advance women's rights in *Hoyt v. Florida* (1961), where it upheld a state law that all but excluded women from service on juries. Isabel Miller tells the fascinating story of the case by focusing on Dorothy Kenyon, one of the attorneys. According to Miller, despite failing to convince the justices in *Hoyt*, with her amicus brief Kenyon laid a foundation for later protections of the rights of women under the Equal Protection Clause of the Fourteenth Amendment. Miller is a 2024 graduate of Georgetown University Law Center.

Finally, Donald Grier Stephenson, Jr. offers another edition of the "Judicial Bookshelf." Over the years, Grier has been indefatigable in his commitment to this regular feature of the *Journal*, and this installment includes discussions of two works—a volume on FDR's Court-packing Plan, and a biography of Justice Frank Murphy. Stephenson is the Charles A. Dana Professor of Government, Emeritus, at Franklin & Marshall College.

This will be the last Introduction I write as chair of the Board of Editors of the *Journal*. Several months ago, I decided to resign from my position as Editor when I took over the job of Provost and Vice President of Academic Affairs at Rhodes College. Regrettably, I just cannot carry out all the tasks associated with both positions. Careful readers may remember that last year I announced in these pages that I was stepping down from administrative work (after serving a stint as Associate Provost at Rhodes) to return to full-time teaching and writing. Career trajectories sometimes take unexpected turns, though, and several months after my return to the classroom I received my new appointment, which I could not refuse. Rhodes College is very special to me. Not only have I spent nearly the entirety of my career as a historian there, it also lays claim to a bit of Supreme Court history itself. The *alma mater* of both Abe Fortas, Class of 1930, and Amy Coney Barrett, Class of 1994, the College takes pride in the significant contributions it has made—and is making—to the life of the nation.

While I am pleased to be a part of the leadership at Rhodes, I am certainly proud of the nearly four years I spent editing the *Journal*, and I hope to contribute essays in the future. In the meantime, the new chair of the Board of Editors, Professor Ross E. Davies of Antonin Scalia Law School, is doing a terrific job in the role. An outstanding scholar and editor with a range of publications to his credit, Ross is surrounded by a stellar supporting cast, including Helen Knowles-Gardner (Managing Editor), Mike Ross (Associate Editor), Grier Stephenson, and Clare Cushman (Executive Editor). Thanks to all of them for their outstanding work. And, most importantly, thanks to all of you for reading!

"Judge" Eugene Brooks: Supreme Court Messenger, Proponent of Black Awareness, 1881–1926

Terence Walz

Eugene Brooks was working as a bellhop at Arlington House in 1881 when his friend Jim Burke, a barber at the Willard Hotel, was cutting the hair of the newly confirmed Associate Justice Stanley Matthews of the Supreme Court of the United States. Matthews casually mentioned that the Court was looking for a suitable man to fill a vacancy on their messenger staff. Burke recommended Brooks, and his recommendation was accepted by the Court's marshal, who oversaw staffing. Soon after, Brooks left his work at the hotel and began his career at the Supreme Court as the "messenger" for Chief Justice Morrison R. Waite. He was thirty-one years old, and his and his family's life were dramatically transformed.[1]

Beginnings

Eugene Brooks, a native Washingtonian, was born on October 14, 1849, the son of Eugene Francis Brooks and Emma Juliana Burwell. Neither of these families can be traced earlier in federal censuses, but both were apparently free Blacks. Burwell is a well-known name in Virginia, and Eugene's mother, who was probably also known as Julia, may have had family roots there; she seems to have been born in the District around 1835, and became a mother at an early age. In the 1870 census "Julia Brooks," then aged thirty-five, is listed as "keeping house" with Eugene Brooks, aged nineteen, a "waiter at hotel" and a woman who may have been a lodger. This could be the earliest record of Eugene Brooks before he worked for the Supreme Court, and one of the few documented references to his mother. His father, Eugene Francis Brooks, may have already died. Brooks was a popular name in the African-American community in the District; many in the nineteenth century hailed from nearby Maryland, and this may have been

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where Eugene's father came from. What little information is known about the parentage of Eugene Brooks comes from information provided on the not always reliable Findagrave website of Woodlawn Cemetery, Washington, D.C., where Eugene Brooks is buried. Except for the possible reference to them in the 1870 census, information about his family's origins remains uncorroborated by other documentary sources.[2]

Whether Eugene (Jr.) had any formal education in the local schools or was educated at home by his mother is unknown, but somewhere along the line he learned to read and write. The 1870 census indicates that in his early twenties he was working as a waiter, quite possibly employed at the National Hotel on Pennsylvania Avenue that was frequented by members of Congress and justices of the Court. One of his colleagues would have been Jim Burke, an African-American barber who later recalled their friendship. Burke subsequently moved to the Willard Hotel and Brooks moved to the Arlington Hotel, which, when it was erected in 1868, was the poshest in the city.[3]

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Working as a hotel waiter at the National or the Arlington, by the early 1870s Brooks had earned enough money to consider marriage, and in 1873 he and Oceana Everett, another Washingtonian, were married by Rev. Jeremiah E. Rankin, a celebrated preacher at the First Congregation Church whose parishioners included Frederick Douglass, John Mercer Langston, and Senator Blanche Bruce. These were among the most influential and powerfully connected Blacks in the City at this time. (Rev. Rankin went on to become the sixth president of Howard University.) Over the course of the next seven years, the Brooks family had five children: Norman Eugene (1875), Musette (1876), Everett Alphonzo (1878), Oceana (1879), and Covita (1880). All survived to adulthood except Covita who was stricken by "cholera infantum" and died soon after (as noted in the 1880 census by the census taker).[4] In the 1870 census Oceana Everett was listed as "at school," and although she may not have received a high school education, she participated fully in Eugene's life and held a prominent position in their church and as an activist in her own right. Her mother, Catherine J. Everett, who was born in 1828 in Washington, was a dressmaker by profession; both she and her daughter were light-skinned, according to the 1870 census.[5] From information in the Washington directories for the 1873 period, it would seem that the young couple first resided in the home of Oceana's mother.[6] In her older age, Catherine Everett earned money as a nurse and lived with the Brooks family until she died in 1914.[7]

Joining the Court's Staff

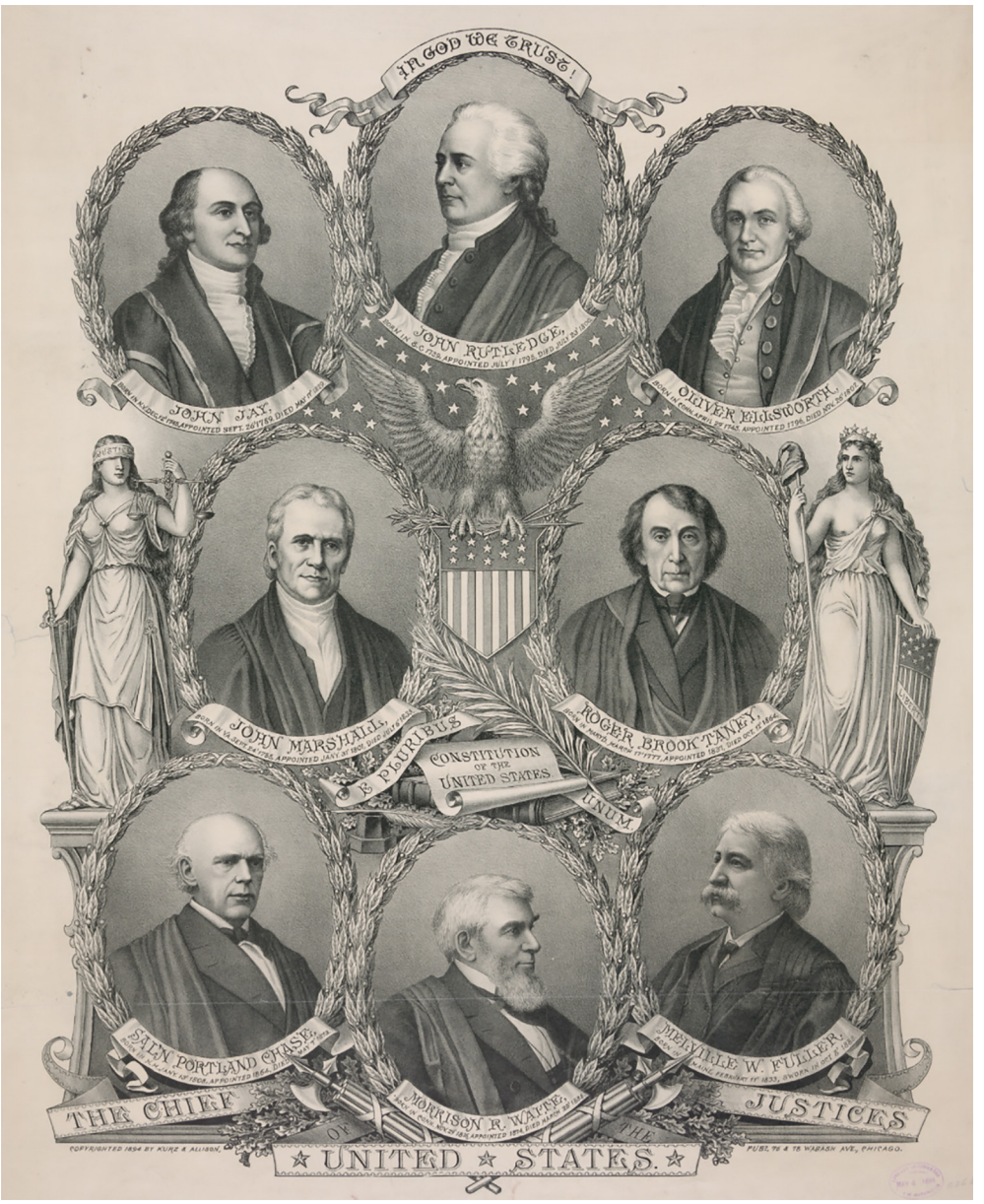
According to records of the Supreme Court, Brooks was hired as a messenger in 1881 and was assigned to Chief Justice Waite. When Waite died in 1888, Brooks joined the staff of his successor, Melville Weston Fuller.[8] His pay in the early days working for the Court would have been less than what was paid toward the end of the century, but by then it was $3 a day, or about $90 a month for the months the Court was in session, enough to allow him to purchase a house and to provide for his family.[9]

The duties of a messenger varied according to the justice he was assigned to (working for married justices often demanded extra duties). Messengers were considered "body-servants," and waited upon the justices not only at the Court, but also, when necessary, at their homes. At the Court they were responsible for seeing that the justices were enrobed before proceeding into the Court chambers at twelve noon during Court sessions, and also bringing their luncheon during the appointed break at 2 p.m. They would arrange for carriages or other means of transportation to take the justices home, and then accompany them back to their residences with court briefs the justices needed to study. They were also available to perform any number of personal errands as required by the justices. As Matthew Hofstedt has written, they were often asked to transmit official Court papers between the justices and to the Capitol, but never once were any of them known to betray information they might have learned about the decisions that the justices made.[10]

In March 1888, when Chief Justice Waite fell ill with pneumonia, he insisted upon attending the Court, which was in session, in case his wife, who was away, might read about it in the newspapers and become worried. Brooks accompanied Waite home from the Court and nursed him until the doctor and a professional nurse arrived. Despite the efforts of various doctors and aides in attendance, Waite died.[11] President Grover Cleveland nominated Melville Weston Fuller to the position, but Fuller was not confirmed by the Senate until the summer. He was formally installed in October 1888.

Brooks was assigned to the new chief justice and, while waiting for the Fullers to arrive, he was asked to look after the house that they had decided to rent. During September, the newly appointed chief justice's wife Molly Fuller and her eldest daughter Mamie came to Washington to inspect the house the chief justice had rented on upper 14th Street—a place called "Belmont" but locally known as "Barber's Castle" after the builder, Amzi Barber.[12] On the evening they arrived, they drove to the house and saw that the lights were on. They knocked and were let in by "the colored man, Brooks and his son," Molly wrote in a letter to her husband describing her trip. This was the first meeting between Brooks (and his son, Norman) and members of the Fuller family.[13]

For the next twenty-two years, Brooks was virtually a daily companion of the chief justice during the court terms that lasted from October to June. He would have been responsible for enrobing the justice in the Court's cloak room, seeing to the preparation of the chief's lunch (Fuller was known for favoring simple "New England" food), arranging for his carriage when he wasn't taking the streetcar (a favorite mode of transportation for the chief justice), or perhaps feeding the parrot that Fuller would occasionally bring to Court.[14] A primary duty would have been to take the briefs of court cases the "Chief" would assign to various justices from the Court to his home or to other places in the capital after cases were assigned to individual justices. Once he moved into his home on F Street, purchased in 1896,[15] the chief justice began holding meetings of the justices in the South Parlor of the house on Saturdays (the room where



This 1894 illustration features head-and-shoulders portraits of chief justices, flanked by allegorical female figures of Justice and Liberty. Brooks worked as a messenger for two of these chief justices—Morrison R. Waite and Melville Weston Fuller.

Chief Justice John Marshall convened the justices who boarded at the house during the 1832 and 1833 Terms). After a discussion of the upcoming cases, assignments would have been made and cases allotted to the justices according to their special expertise. Brooks would have then been asked to distribute the cases throughout the city. Fuller tended to distribute the assignments on Mondays, after observing the Christian sabbath. This would have suited Brooks very well since he was an active churchgoer himself.

While waiting for Chief Justice Fuller and his family to arrive in Washington in 1888, Brooks was asked to look after this house that they had decided to rent on upper 14th Street—a place called "Belmont" but locally known as "Barber's Castle" after the builder, Amzi Barber. When the newly appointed chief justice's wife Molly, and her eldest daughter Mamie, arrived in September to inspect the house, they were let in by "the colored man, Brooks and his son." This was the first meeting between Brooks (and his son, Norman) and members of the Fuller family.

Brooks and the chief justice seem to have got on very well, although this is not surprising, given the genial and easy-going nature of both. During the early stages of their relationship, Brooks and his family were living at 1706 V Street, within walking distance of the chief justice's house when he moved to 1800 Massachusetts Ave. In the 1892 Washington Directory, Brooks gave his address as "1800 Massachusetts Ave.," although it seems unlikely that he was living there since he had a wife and four children—but if they were, it would only have been temporary. The following year he was back at 1706 V Street. In 1896, when the chief justice moved to 1801 F Street, Brooks and his family moved to a house they bought at 1437 Pierce Place, where they lived until 1910.[16]

Brooks seems also to have got on well with the other justices and their clerks/stenographers, who may have fed him information from time to time to give to the "Chief." In May 1907, for example, Fuller wrote the following to Justice Holmes: "My messenger, Brooks [underscored], has just called my attention to an item in the issue of 'Law Notes' for May stating that my friend Collins Master of the Rolls has been 'promoted' to be 'Lord of Appeal in Ordinary' in succession to Lord Davey."[17] Someone in the Court who read *Law Notes* remembered that the chief justice had worked closely with Sir Robert Collins when he was one of the members of the British Venezuela Commission in 1898 (and that the chief justice had been the American arbitrator). This was the kind of tidbit that was passed on to Brooks for him to relay/give to the "Chief."[18]

The domestic staff of the Fuller house at the end of the nineteenth century consisted of four Black women, one of whom was cook while the others served as house servants,

cooks, or nurses. Both the chief justice and Mrs. Fuller relied heavily on the assistance of one of them in particular—Julia Brooks (no relation), who worked for the Fullers from the early nineties until her marriage in 1903.[19] We can assume that when Eugene accompanied the chief justice, he entered and exited via the front door of the house and did not use the side door that the servants used. The chief justice was solicitous of the staff who worked for the Court, including the Black messengers, and would call, like the other justices, on sick members and attend the funerals of departed ones.[20]

Activism for a Better Life, and Promotion of Black Culture in the District

Just before being employed as a messenger—or Court attaché, as some Black journalists preferred to call the position[21]—Brooks joined one of the masonic lodges established for African Americans that had grown by leaps and bounds after the Civil War. The Grand United Order of Odd Fellows was founded in 1843 in the United States as separate from the Independent Order of Odd Fellows, the white organization that then discriminated against African Americans.[22] The chief aim of the organization was to provide for widows, orphans, and the sick, helping with the cost of funerals and making charitable contributions where needed to indigent family members. The earliest of the Black lodges in the District of Columbia was founded in Alexandria in March 1846, followed by the formation of a Union Friendship lodge in Washington City in September. It was considered the mother lodge of all the other city lodges. Its founders included John Cook, Sr., one of the pre-eminent African-American leaders in the District in the post Reconstruction period.[23]

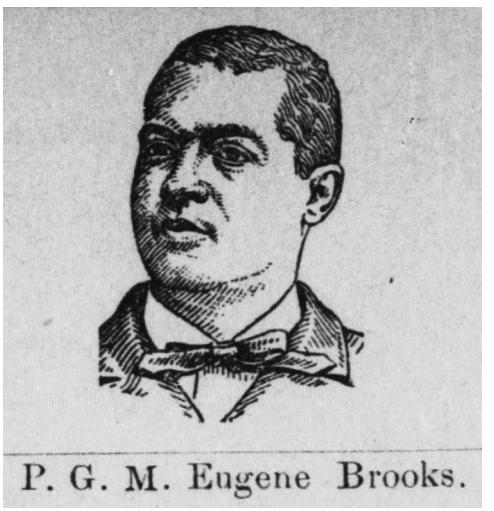
Brooks joined the newly formed Mt. Olive Lodge in 1880 and soon became the treasurer. It was one of several dozen lodges

This illustration is entitled "Off the Bench." It depicts Brooks working as a Supreme Court messenger for Chief Justice Melville W. Fuller. It appeared in *Leslie's Weekly* on June 14, 1894.

of the Grand United Order that were established in the District of Columbia by the end of the century, totaling more than 2,000 members.[24] At Mt. Olive lodge, Brooks showed an aptitude for finance and organization, and his work there and in the larger organization was the subject of a profile that ran in 1889 in *The Leader*, a short-lived African-American newspaper published in Alexandria by Magnus Robinson and Frederick Douglass, Jr.[25] Brooks was appointed chairman of the organizers planning the celebration of the forty-fourth anniversary of the founding of Grand United Order in 1889.[26] As reported in white and African-American papers, some 3,000 members marched in impressive array from the lodge headquarters near C Street up Pennsylvania

Avenue to the White House where the marchers were reviewed by President Benjamin Harrison and other high ranking government officials. As a leading organizer, Brooks' head was sketched, among other leaders, for the *Washington Post*'s report.[27] Marchers, led by Grand Marshal Magnus Robinson, included members of lodges from nearby cities and states. For several years Brooks contributed his organizing and financial skills to the success of these yearly marches, but as the 1890s progressed, he lessened his participation in masonic events and turned his energies elsewhere.

By the end of the year Eugene had also joined several "relief associations." Early on he was treasurer of the United Aid Society, and was also elected vice president of one of the newer and more energetic ones, the Frederick Douglass Relief Association, which included many elite Blacks among its membership.[28] Like many of the relief associations, it provided funds for members on sick leave and a death benefit.[29] Toward the end of the century the organization was particularly keen to agitate for useful and appropriate employment for the growing number of educated young Black men and women who had graduated from high school and needed jobs.[30]



Brooks was heavily involved in his community, and Washington, D.C. newspapers often made mention of his activities. His work at Mt. Olive lodge was the subject of this 1889 profile that ran in *The Leader*, a short-lived African-American newspaper published in Alexandria by Magnus Robinson and Frederick Douglass, Jr.

Brooks and William H. Bruce, also a Supreme Court messenger, combined energies to form yet another benevolent association called United Friends Association and, in 1914, purchased a property for the use of the association.[31] Bruce, who was a decade older than Brooks, had been brought up in Virginia and early emerged as a leader in improving the lives of young Blacks. He had been one of the founders of the Douglass Club in Alexandria,[32] benefiting the local Black community. Later he and his wife are found hobnobbing with the District's African-American elite, passengers on a cruise in 1884 down the Potomac on the steamer "W. W. Corcoran" headed to Glymont, a resort popular among Blacks at the time.[33] (It is interesting to note that Brooks was not among the passengers on this trip, suggesting that he was not yet associating with this elite.) Of the work of the United Friends Association little is known and perhaps little came of it. By the time it had been formed, Bruce seems to have fallen on hard times. In 1919, he committed suicide, reportedly despondent over his finances and his and his wife's poor health.[34]

Other relief associations Brooks belonged to were the Men's Cliff Rock Relief Association and the Ladies Cliff Rock Relief Association, among the many relief associations that sprung up in the city during this time.[35] As pointed out by Andrew Hilyer in his survey of these benevolent associations, the percentage of Blacks who participated in them was higher as a group than their white counterparts, and reflected an awareness of the problems of the poor in the African-American community. But they were nonetheless a relatively small group of individuals and

not nearly as rich as members of the white community. Given the enormous numbers of impoverished Blacks seeking refuge in the city in the decades following the Civil War, these organizations could hardly keep up with the need for financial assistance and, consequently, were unfairly criticized for not doing enough.[36]

But the most important organization Brooks joined was St. Luke's Episcopal Church, which was established by the charismatic Dr. Alexander Crummel, a major early abolitionist voice and leader in the civil rights movement who was also a strong proponent of African-American self-help and separate economic development.[37] He had come to Washington to minister to St. Mary's Episcopal Mission in Georgetown in 1872 and then set up St. Luke's Episcopal Church in 1876, the first independent African-American Episcopal church in the city. The church held its first communion in 1880. It was designed by Calvin T. S. Brent, the first Black architect in the District of Columbia. Crummel served as minister there until his retirement in 1894. Brooks was elected a vestryman in 1897 and became treasurer in 1910.[38] Soon he was using his organizing skills on behalf of the church, helping to arrange for streetcars to be made available to parishioners participating in an annual picnic outing to Lake View Park.[39] Oceana enlisted as a member of the Ladies Auxiliary and at times hosted "all-you-can-eat" pancake parties at their home for an admission fee of five cents to benefit the ladies' work.[40] The Register of the church was Shermonte Lewis, son of John Archibald Lewis, another Supreme Court messenger. Among its ranking members was Daniel Murray, assistant librarian of Congress and a leading intellectual force in the local community.[41]

The Brooks family made their home at 1437 Pierce Place in northwest Washington where weddings of family members were celebrated along with funerals of friends and family. The house was within walking distance of St. Luke's. Mrs. Brooks' mother lived with them until her death in 1914.[42] They also rented rooms to old friends and colleagues. John Craig, a fellow messenger at the Supreme Court, was boarding there in 1900, according to the census. When he died in 1908, the funeral was held at the Brooks home and was attended by the pastors of the A.M.E. Church and St. Luke's Episcopal Church, as well as Chief Justice Fuller and Justice Holmes.[43] In 1910, the Brooks family decided to move to another townhouse at 1832 13th Street, near T Street, where they would remain the rest of their lives.[44]

Due to his work with the masonic lodges, and St. Luke's Church, and especially with the highest-ranking member of the Supreme Court, Brooks emerged at the turn of the twentieth century as a prominent figure in Washington's African-American community. He was invited to attend an imposing banquet honoring Judson Lyons, the new Register of the Treasury—one of the few high government positions opened to Blacks—along with a throng of prominent personalities.[45] He was made an honorary member of the select Cosmos Club in 1899—not to be confused with the present-day Cosmos Club but clearly an imitation of it[46]—along with such local Black aristocrats as former Senator P.B. Pinchback, John F. Cook, Jr. (former District of Columbia tax collector), Jerome Johnson, Henry C. Baker, Dr. John R. Francis (head of the Freedman's Hospital), and Professor R.H. Terrell (lawyer, and principal of the M Street High School). While the club existed, it continued to attract members of Black "society."[47] Brooks started attending events of the Pen and Pencil Club, one of the best-known societies for African-American men in the country that started out as a literary society but turned its focus to social matters. Of Brooks' attendance at a picnic of the society in August, a columnist for the *Colored American* noted that "'Judge' Eugene Brooks

looked as happy as if he had disposed of another Porto Rican discussion."[48] The allusion in this case was to the *Downes v. Bidwell* case in which the Supreme Court ruled in May 1901, deciding that the Constitution did not necessarily apply to territories such as Puerto Rico which had been annexed in 1900.[49] Clearly his special link to the chief justice was widely known and admiringly felt—and also earned him the label "judge."

Early on, Brooks was drafted to help with efforts by the local Black community to welcome out-of-towners coming to Washington for presidential inaugural ceremonies. In light of existing discriminatory practices in most hotels and restaurants, Brooks, among many local citizens, wanted to be sure guests were received with dignity. In 1897, he was among the members planning a reception for Blacks attending the first of the two McKinley inaugurals. Daniel Murray was one of many prominent Blacks on the committee. In 1901, Murray angled for an appointment on the executive committee of the inaugural festivities, but was not given a seat; he was allowed to organize a "public comfort no. 2 committee," charged with "looking after all the colored organizations and visitors coming to the inaugural ceremonies."[50] The committee then organized a gala ball held at the Washington Light Infantry Armory.[51] At this event, Brooks served on the Reception Committee. As the *Washington Bee* reported,

> The most brilliant and fashionable ball ever given in this city was given by the Inaugural Welcome Club at the Washington Light Infantry Armory on last Tuesday evening, March 5th. The occasion was a welcome to strangers by the citizens of Washington and the residents of the States temporarily residing in the city. There were over four hundred guests present, presenting the best society in the United States.[52]

Brooks served in similar capacities on subcommittees "for Colored Citizens" for the Roosevelt and Taft inaugurals, although under Wilson inaugural festivities were not held. Under Harding, there was a similar omission, but Brooks, in his capacity as president of the Oldest Inhabitants (Colored), organized a gala anyway (see below).

Brooks' work on the Inaugural Reception Committee in 1901 must have impressed Andrew Hilyer, an African-American lawyer and businessman who served on the committee with him. When Hilyer's wife Mamie returned from England where she met the British-Sierra Leonean composer Samuel Coleridge-Taylor, she became enthusiastic about his music and was impressed by the success he enjoyed. Once at home, she headed a committee to form the Samuel Coleridge-Taylor Choral Society with the purpose of inviting the composer to come to Washington to direct one of his widely praised and performed choral oratorios.[53] Many prominent Black figures in Washington were asked to join the executive committee, including Brooks. Incorporation papers were filed in 1903, with Brooks among leading personalities that included John F. Cook and Daniel Murray, and prominent musicians and performers John T. Layton, Harriet Gibbs, and Marie Johnson, all of whom served on the Board of Managers.[54] As soon as the society was formed, a performance of Coleridge-Taylor's work "Hiawatha" was planned for the spring. It was performed in 1904 at the Convention Hall before a huge crowd of 3,000 and a choral body of 200 "colored" singers. The audience included a sprinkling of cabinet members and diplomats. Out of towners came for the performance, including a reporter from the *New York Times* who was enthralled by the performance. In his account of it, he wondered about its larger implications—that [white] people expecting to hear an imperfect choral group because of the color of their skin left wondering if they

had ever heard such good music in the city before.[55]

Brooks was named vice president of the Board of Managers of the Choral Society in 1905, and additional performances of the oratorios were commissioned in 1906. Coleridge-Taylor returned to conduct the concerts, staying at the home of a friend who invited members of the Society, including Brooks, to greet him.[56] However, the concerts were performed in a smaller venue, the American Methodist Episcopal Church on M Street, and, consequently, revenues from the event failed to meet expenditures. Nonetheless, the hope of its members—that Coleridge-Taylor's presence and the performance of his music would inspire young African-American men and women to follow in his footsteps—was fulfilled. Music had become a great component of the city's Black culture and remained an abiding part of both Eugene and Oceana Brooks' lives.[57]

Increasingly Brooks was recognized as a member of the Black elite of the city. He and Oceana were invited to important weddings and social occasions that were attended by leaders of the community. Often, they were accompanied by their daughter Musette, who was then in her twenties and a popular teacher in the public schools.[58]

Of special importance for Brooks were the words and teachings of Booker T. Washington, the most prominent African-American leader at the turn of the century, who put forward a go-slow program of integration between the two races that emphasized self-improvement through educational and economic achievement. This contrasted with the approach of W.E.B. DuBois who sought to challenge the political structure.[59] Without any personal statement on his feelings, it would accord with Brooks' own easy and personally successful accommodation with establishment whites, whether in service at hotels or at the Supreme Court. It was in line with both his and his wife's emphasis on the importance of education in advancing their futures. When Washington came to the city in 1904 to address an audience of elite Blacks at the Odd Fellows Hall on his beliefs for a way forward for the Negro race, Brooks attended.[60] The following year, Eugene and Oceana traveled to New York to listen to Washington speak at a business convention.[61] There can be little doubt that Brooks' understanding of progress for his people paralleled Washington's teachings.

Brooks, like many prominent Blacks, closely followed the progress of the state of Liberia, which, along with the kingdom of Abyssinia (Ethiopia), withstood the onslaught of European control. Liberia was one of the few states where African Americans were allowed to serve as members of the foreign service.[62] It had also been where Alexander Crummel, Brooks' early pastor at St. Luke's, had worked as a missionary and whose life and teachings influenced the later Pan Africanist movement. Brooks attended a mammoth gala reception and dinner at the Masonic Lodge on 19th Street in 1909 given for the U.S. minister to Liberia, Ernest Lyon, Bishop I. B. Scott, the Missionary bishop of the Methodist Church to Africa, and Washington. The speakers applauded the efforts of both Blacks and whites to support the success of the government and to help spread Christianity in Liberia. A letter from President William Howard Taft, applauding the efforts of all, was read out at the banquet. It was considered by local papers to have been the greatest gathering of notable Blacks ever assembled in the city.[63]

When it was announced that the 300th anniversary of the founding of the American colony at Jamestown would be celebrated with a fair and exhibition, Brooks joined a group of prominent local Americans of African origin anxious to right a wrong that had been made in previous celebrations. In both 1876 and 1893 there was a failure to include exhibitions highlighting the achievements

of African Americans since the founding of Jamestown in 1607. Spearheaded by the Negro Development and Exposition Company of Richmond, Brooks was named to the board of managers—Daniel Murray was vice president—and the local group raised a modest sum of money for the exhibition hall. Fortunately, the U.S. government earmarked $100,000 for construction expenses, and the project was able to proceed. The resulting exhibition was one of the best attended at the hall and drew attention to the achievements of African Americans over the last 300 years. The exhibits were many and included a variety of crafts made by Black businesses, paintings and exhibitions of folk singings by renowned choruses from Black colleges.[64] It seems very likely that Eugene and Oceana traveled to Jamestown to view the exhibition.

Death of the Chief Justice and Greater Attention to Cultural Activities

In 1910, Chief Justice Fuller died while he was at his summer home in Maine. His spirits had been dealt a blow when Molly, his wife of nearly forty years, died in 1904, and his mental deterioration in later years was noticed even by President Taft. Brooks, who worked with him every day while he was in Washington, must also have been aware, and one wonders if he was asked to perform any special duties in the chief justice's final years. After the chief's death, Brooks was assigned to work at the Supreme Court marshal's office rather than to a specific justice, and his duties may have lessened. He would have been sixty-one at the time of Fuller's death. Less onerous duties would have allowed him time to devote himself more energetically to work outside the Supreme Court. It was also this year that Brooks and his wife moved from their home on Pierce Place (now Swann Street) to a new house at 1832 13th Street—still in the U Street Corridor section of the city where many prominent Blacks lived—where they would remain the rest of their lives.[65]

Between the end of the Civil War and the beginning of the twentieth century, the population of Washington city almost quadrupled, jumping from 75,000 in 1860 to 278,000 in 1900. Much of the population growth was in the Black community, as thousands moved to the city in hopes of better jobs and living conditions. In the white community, the reaction to the influx of immigrants during the Civil War and newly wealthy people from all over the country in later decades of the century persuaded the older generation of residents to form an association to preserve the traditional ways and particular histories of Washington. The association, known as the Oldest Inhabitants of the District of Columbia, was formed in 1865, by a group of leading citizens, among them John Carroll Brent, Benjamin Ogle Tayloe, and Peter Force, all members of the white elite. William Corcoran, a banker, art collector and philanthropist, was an early member.[66]

There was a similar if delayed response from the Black inhabitants of Washington at the turn of the century, and in 1912 they formed their own association, also called the Association of the Oldest Inhabitants of the District of Columbia, although amended with added parentheses "(Colored)." The association, which was incorporated in 1916 when it had some 153 members, was formed with the object "to cement and strengthen the interests and associations arising out of a common residence for a long period; to keep alive the reminiscences of the past; to stimulate social and fraternal communion and to promote intercourse and friendship among its members."[67] The founding president was Jerome A. Johnson, a Civil War veteran and a well-known stalwart of the older generation of African Americans; Brooks was one of the five vice-presidents of the organization in the early days. From the beginning, the organization was embraced by the African-American

newspaper *The Washington Bee*, which, in a column, praised its goals of preserving the "Negro's" history and what the community had already achieved. The writer William C. Chase (who was undoubtedly the paper's editor) proudly pointed to member Meshach Nugent's remark that when his uncle died in 1861, the Supreme Court "adjourned" in order to attend the funeral, and that Blacks had fought in the militia defending Washington during the War of 1812.[68] The AOI (Colored) made an effort to mark the emancipation of its citizens on April 16 every year with a celebratory banquet, and the event was considered a highpoint of the organization's calendar year.

John Paynter, a clerk in the Treasury Department and a descendant of one of the enslaved people who tried to escape on the steamboat *Pearl* in a famous incident in 1847, was named "historian" of the association at an early point. In a booklet prepared for the 1914 annual April meeting, he paid homage to Benjamin Banneker, the mathematician and astronomer who had helped Pierre L'Enfant lay out plans for the city of Washington, and used his life of achievement as a model for other African Americans to retrieve the genius and achievements of other as yet unknown men and women of the city. He pointed with pride to what had already been accomplished in fifty years of freedom, but also noted that the "abominable" practice of segregation now being implemented by the Wilson Administration should in fact be viewed as a blessing in disguise. Blacks should respond with proper indignity to this assault on their pride, and Paynter noted with satisfaction that the association had donated $25 to the newly created National Association for the Advancement of Colored People in fighting acts of segregation.

In 1916, Johnson stepped down and Brooks was elected president.[69] During the following six years with the organization, Brooks brought a new energy to the group; he seems to have emphasized its cultural and social programs rather than political efforts to provide the city of Washington with strong, even independent, institutions, free from government control. In this, the group greatly differed from its "white" counterpart, which often submitted proposals for providing Washingtonians with the vote and with statehood.[70] In his effort to revitalize the organization, Brooks planned annual picnics in parks in Anacostia, worked with churches to provide special programs on the cultural history of African Americans, and invited featured speakers at the AOI's regular meetings to discuss the outstanding contributions by local Blacks or to discuss the state of race relations in other parts of the country. The *Washington Bee* usually covered the AOI's activities, citing among other events a "monster meeting" that Brooks was preparing to celebrate Emancipation Day in 1918.[71] In 1917 it drew attention to the invitation that the AOI (Colored) had received to meet with the AOI (White), and that "pleasant words" had been exchanged. Brooks and his fellow members were shown a 20-foot section of the survey chain that had been used by Benjamin Banneker in the original surveying of the District. Another meeting between the two groups took place in 1919.[72]

The declaration of war on Germany in April 1917 was followed by the enlistment of almost 400,000 African Americans in the military. Their contribution to the war effort and treatment by the army became a rallying point for the Black community in the District, as members demonstrated their wish to be treated as full citizens. At the "monster meeting" mentioned above, Brooks and the AOI (Colored) invited Emmett Scott, a special representative of Secretary of War Newton Baker, Jr. and the highest ranking African American in the Wilson government, to talk about reports that Blacks were being discriminated against in the army and subjected to unfair treatment. Scott answered heated

questions posed to him in a mild and earnest manner, and he was able to ease the tension in the room. He said that the secretary of war was doing everything he could "to make the lot of the Negro soldier a happy one."[73] In fact, Blacks in the military continued to be treated badly, and reports of their situation were the subject of meetings of the AOI in 1919. Regardless, Brooks made a donation to the war effort on behalf of the AOI (Colored) by subscribing to a $100 bond in April.

But that summer, tensions between Black soldiers (back from the front or on leave from their camps) and whites erupted in the worst race riot Washington had witnessed in eighty years. Gangs of white men, reacting to rumors that a Black had raped a white soldier's wife, roamed Black neighborhoods torching businesses and houses while the police stood by doing little or nothing to stop the rampage. After four days the National Guard was called in to quell the riot. The riot was only part of the racial unrest that broke out all over the country that summer. The AOI under Brooks raised $135 as a contribution to the defense fund for African Americans who were charged with offenses during the riot. We can only imagine the horror that Brooks, his family, and his friends felt at the events unfolding in their hometown.[74]

We do not know the full extent of Oceana's participation in the activist world of late nineteenth-century Washington, but she was a member of the "Mother's Meeting" standing committee of the Colored Women's League of the United States, founded by leading "aristocrats of color" in 1892, including Mary Church Terrell, a teacher at the M Street School. Terrell was also a founding member of the National Association for the Advancement of Colored People.[75]

Parenting with Purpose

During the time that Eugene was working as a Messenger for the Supreme Court and with the secure salary it provided, his children were being put through the city's schools. Like many Black parents, Eugene and Oceana wanted their children to have the advantages of education that would lead to better jobs, and, in Washington at the end of the nineteenth century, that usually meant the civil service for men and teaching in the public schools for women. The Brooks children appear to have followed the typical trajectory for elite Black families.

Eugene's eldest son, Norman, graduated from the public school and then attended the business school, perhaps at night, from which he graduated in 1892. There he would have studied accounting and shorthand, usually required for young men and women pursuing a career in the civil service. With this training, he then enrolled in Howard University's Pharmaceutical College, possibly with the idea of going into the medical field. However, he seems to have been offered a civil service job in the Treasury Department (through his father's connections?). This seems to have been his career, and he was given raises along with other civil services in 1904, for example.[76] He married, lived in various parts of the city during his life, and like his father, joined relief associations that provided aid to poorer families during periods of sickness and help cover funeral costs.[77] He remained a member of St. Luke's Church. Only fifty, he died in 1925. He and his wife had no children.

The Brooks' eldest daughter Musette, and their son Everett Alphonzo, both graduated in 1894 from the new "colored" high school built on M Street and then known as the M Street School.[78] Musette became a high school teacher, presumably at the M Street School, before marrying. Everett entered Howard University's dental college but dropped out when he, too, decided to teach in the high school before becoming a postal worker, his occupation for the remainder of his life.[79]

In 1895, however, in an incident that underlined the city's racist history, Everett and a friend of his named Arthur Lynch were standing on the corner of Pierce and 14th Streets, near where the Brooks family home was, when they were arrested by a policeman for "loitering with the intention to commit a crime." They were taken to the police station but were released because, according to the report in the *Evening Star*, "they were respectable and evidently meant no offence." Perhaps the police were reminded that Everett's father worked for the chief justice of the United States. Regardless, the judge commended the policeman for "endeavoring to break up the practice of lingering on street corners."[80] The repercussions of this incident must have registered strongly with the family, providing a shock to Eugene who may have expected his association with the city's powerful whites to provide him and his family protection from such personal affrontery.

Musette Brooks was married at the Brooks home in 1904 to a lawyer named Eugene Monroe Gregory, who had been educated at Harvard, then took a law degree at the Columbia School of Law in the District. Gregory completed a year at Harvard University Law School the the following year (1898–99), but he decided to take a job in Washington teaching history at the M Street School, where he met Musette. The couple subsequently moved to Trenton, where Gregory joined a law practice and later became the principal of a successful school for training young Black men in industrial and manual work in Bordentown, New Jersey.[81]

In New Jersey, Musette joined several African-American social clubs, and through them helped organize women to campaign for the vote in 1915 when an amendment for women's suffrage was put on the ballot in the general election. Although the amendment failed to attain voter approval, Musette continued to work with activists and helped form the Federation of Colored Women's Clubs, which became a major force in advancing the women's suffrage issue in the state. The Nineteenth Amendment was ratified in 1920. By then, Musette had joined the NAACP and was working on other issues when she suddenly died in 1921.[82]

The youngest Brooks daughter, Oceana Everett Brooks, became a teacher after graduating from high school. For many years she lived with her parents on Pierce Street and then 13th Street. In the late twenties, she married Robert Henry Marshall, who joined the Supreme Court as a laborer in 1926 and then became a Messenger, working in the Robing Room from 1927 until 1956.[83] His employment at the Court shows the respect the Marshal's office retained for Eugene Brooks. Oceana remained a teacher throughout her life and was a member of several charitable groups and clubs, including the Masonic lodge for colored women known as Prince Hall Chapter No. 5, the Helping Hand Club of the Baptist Church, and the Teachers' Benefit Association. She died in 1957. None of the children of Eugene and Oceana Brooks had children of their own.

A Life Well Lived

Born into poverty in the District, Eugene Brooks made his way in the confusing post-Civil War period through the ranks of positions permitted to Blacks—waiter, hotel clerk, bellhop—and by luck, to a position as Messenger to the second ranking person in the country, the chief justice of the United States. Through this connection he was inherently linked to the glorified world of the justices and members of the highest political class. The proximity to people in power elevated his stature in the local African-American community and allowed Eugene and Oceana to join "the old families" of color. At this time, Washington was the center of the Black aristocracy in the United States.[84]

Taft, Jurists Go To Funeral Of Messenger

(Preston News Service)
Washington, March 5.—A striking tribute to the worth of one of its older messengers was paid Thursday by the United States supreme court when Chief Justice Taft and Associate Justices Van Deventer and McReynolds, representing that tribunal, attended the funeral of Eugene Brooks, and the court as a body sent a beautiful floral piece.

When Eugene Brooks died on February 21, 1926, this funeral notice appeared in the *St. Paul Echo* (St. Paul, MN). It indicates that several justices attended the funeral, and that the Court sent a magnificent floral piece. The article concluded by noting that Brooks' "service dated back to Chief Justice Waite, and he was intimately known by all the great jurists that have since stepped across the stage of the court."

As the twentieth century progressed, Brooks must have been saddened by the steady infringements on privileges for Blacks, the segregation of facilities in government offices ordered by the Wilson administration, and the growing tensions between the races as Blacks assumed a larger presence in the army and the work force. Brooks may have rejoiced, as many Black leaders in Washington did, in saying farewell to Woodrow Wilson. As president of the AOI (Colored), Brooks had forgone inaugural balls during the two terms of the Wilson administrations, but with the new Harding administration elected in 1920, a great gala was organized at the Convention Center was March 1921. It was the last year of Brooks' term as president. The Black elite of the town turned out for the event, and Brooks asked Mrs. Daniel Murray, wife of an assistant librarian at the Library of Congress and a personage in her own right, to help him lead the grand march. It was no doubt a highlight of his term as president and of his life in a member of the "old families."[85]

During the remaining few years, Eugene and Oceana kept their distance from the more radical politics of the Black community. They never became members of the Washington branch of the NAACP, despite the work their daughter did as a member in New Jersey. While he retained his position in the Marshal's office at the Supreme Court, Eugene settled into retirement in his activities outside the office. Sadly, two of the couple's children died at young ages, Musette in 1921, and Norman in 1925. Both were buried in Woodlawn Cemetery in Washington, DC, where Eugene joined them the following year.[86] Many prominent Black Washingtonians are buried there, although, today, the cemetery has fallen into disrepair.[87]

When Eugene Brooks died on February 21, 1926, funeral notices appeared in several local papers. According to an out-of-town newspaper, the *St. Paul Echo*, the funeral service on March 5 was attended by Chief Justice Taft, and Associate Justices Willis Van Devanter and James Clark McReynolds, and the Court sent a magnificent floral piece. It was "a striking tribute to the worth of one of its oldest messengers," the article observed. As the funeral notice concluded, "His service dated back to Chief Justice Waite, and he was intimately known by all the great jurists that have since stepped across the stage of the court."[88]

ENDNOTES

[1] Adapted from the reminiscences of Jim Burke, as told to the *Washington Post* in 1907 and rerun in the *Washington Bee*, January 5, 1907, 4. Burke, who started out as a barber at the National Hotel and then worked at the Willard, had the ear of a number of Supreme Court justices who were his clients. This article contributes to an important body of scholarship about Supreme Court "messengers." The pioneering articles on the "messengers" are Matthew Hofstedt, "Afterword: A Brief

History of Supreme Court Messengers," *Journal of Supreme Court History* 39, no. 2 (July 2014): 259–63, and Todd C. Peppers, "Arthur A. Thomas: A Hero of a Valet," *Journal of Supreme Court History* 46, no. 3 (November 2021): 271–279.

[2] "Eugene Brooks," Find a Grave, https://www.findagrave.com/memorial/180047057/eugene-brooks (last accessed July 13, 2024).

[3] Thomas J. Carrier, **Images of America: Washington, D.C.—A Historical Walking Tour** (1999), 77.

[4] Notation in the 1880 census by the census taker: "dec" and "cholera infantum." It was called the "scourge of childhood."

[5] Catherine is listed as "Kate Everett"; she and her daughter "Ociana" are ticked "white."

[6] This was at 1224 Eye Street.

[7] *Evening Star*, January 20, 1914, 8. The 1880 census indicates both Catherine's mother and father were also native Washingtonians. In the 1900 census, her profession is given as "nurse."

[8] I am grateful to Matthew Hofstedt, Curator, Supreme Court of the United States, for this information.

[9] Matthew Hofstedt pointed out to me in an email that the messengers were not paid during the months the justices were not in Washington, and that there was no pension plan for them once they left work.

[10] For the duties and a short history of the messengers, see Hofstedt, "Afterword." Even Arthur A. Thomas, the messenger for Associate Justice Oliver Wendell Holmes, Jr., who weighed in on the personal aspects of the justice with newspaper reporters from time to time, never betrayed a confidence. Peppers, "A Hero of a Valet."

[11] "Too Many Doctors?" *Evening Leader*, March 26, 1888, 1.

[12] "Lost Washington: Belmont," Greater Greater Washington, https://ggwash.org/view/3975/lost-washington-belmont (last accessed July 13, 2024).

[13] Letter from Molly to Melville Fuller, September 20, 1888, Box 1, File Fuller, Mary Ellen Coolbaugh (1874–1893), Melville Weston Fuller Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter MWF-LC).

[14] See the reminiscences of one of Fuller's grandnieces: "Melville Weston Fuller United States Supreme Court Chief Justice 1888–1910," JC Fuller, PA, https://jcfullerpa.homestead.com/Tid-Bits.html (last accessed July 13, 2024). For an anecdote regarding the chief justice's habit of riding streetcars, see the *Morning Times*, February 7, 1896, 5.

[15] 1801 F Street, now known as the DACOR Bacon House.

[16] Pierce Place was renamed Swann Street in 1910 with part of the effort to standardize street names in the District.

[17] Letter from Fuller to Holmes, May 16, 1907, General Correspondence, General, Group II, Box 14, folder 41, Fuller, Melville Weston, Correspondent, March 20, 1906—May 23, 1910, Mark De Wolfe Howe research materials relating to life of Oliver Wendell Holmes, Jr., Harvard Law School Library, Historical & Special Collections.

[18] When Great Britain acquired British Guyana from the Netherlands, the western boundary with Venezuela was established along a line that did not meet with the approval of the Venezuelans. They protested it violated the Monroe Doctrine and demanded the United States intervene. Eventually a boundary commission was established, to which Chief Justice Fuller was appointed. It rendered a verdict in favor of the existing boundary in 1899. "Venezuela Boundary Dispute, 1895–1899," Department of State Office of the Historian, https://history.state.gov/milestones/1866-1898/venezuela (last accessed July 13, 2024).

[19] Julia witnessed the will that Molly Fuller made in December 1898. Illinois, U.S. Wills and Probate Records, Record of Wills, Book 68–69, 1910, Book 70, 1910–11. She signed as "Julia V. Brooks." She may be the Julia mentioned in a letter Melville Fuller wrote his wife after returning from the circuit in October 1893. Letter from Melville to Molly Fuller, October 5, 1893, Family Correspondence. Mary Ellen Coobaugh Fuller Correspondence, MWF-LC.

[20] Fuller called on the sick Ananias Herbert, a Supreme Court messenger, in 1890. See *Washington Bee*, March 22, 1890, 2; he attended the funeral of John Craig, a Messenger, in 1908. See *Washington Bee*, January 11, 1908; *Washington Herald*, January 4, 11. On the long ties between the Supreme Court and the occupants of 1801 F Street, see Terence Walz, "If Walls Could Talk: The Supreme Court and DACOR Bacon House Two Centuries of Connections," *Journal of Supreme Court History* 47, no. 2 (2022): 20–6.

[21] For an early use of the title, see *Washington Bee*, March 22, 1890, mentioning that Chief Justice Fuller attended the service of Annanias Herbert, "one of the oldest Court attaches of the Supreme Court."

[22] The African-American order received its charter from the British organization of the same name. On the proliferation of secret societies, such as the Odd Fellows, among African Americans, see Willard B. Gatewood, **Aristocrats of Color: The Black Elite, 1880–1920** (1991), 212.

[23] A history of the early period is sketched in *The Leader*, October 26, 1889, 2.

[24] Brooks was elected an officer as early as 1884. See *Washington Bee*, September 27, 1884. There are twenty-four lodges listed in William H. Boyd, **Boyd's Directory of the District of Columbia, 1897. Together with a Compendium of its Governments, Institutions and Trades, to which is Added a Complete Business, Street and Congressional Directory** (1897).

[25] *The Leader*, October 26, 1889, 2; it used the profile run two weeks earlier in the *Post*. On *The Leader*, see James P. Danky and Maureen E. Hady, eds., **African American Newspapers and Periodicals** (1999), 333.

[26] *The Leader*, June 15, 1889, 2.

[27] "Colored Odd Fellows," *Washington Post*, October 17, 1889, 6.

[28] *The Leader*, October 26, 1889, 2; *Evening Star*, October 14, 1899, 12; *Colored American*, October 21, 1899, 6. The president was Samuel W. Watson, a chief figure in the Grand Order of Odd Fellows; other members included Addison Syphax, of the influential District family; Robert H. Terrel, professor of Latin at the Black high school, husband of Mary Church Terrel, later one of the key African-American activists in the city; Richard Henry Nugent, a Pullman railroad conductor; J. A. Johnson, another vestry member of St. Luke's; and David A. Clark, a past director of the Grand Order of Odd Fellows.

[29] For the work of the numerous relief associations at the turn of the twentieth century, see Andrew F. Hilyer, **The Twentieth Century Union League Directory: A Compilation of the Efforts of the Colored People of Washington for Social Betterment . . . A Historical, Biographical, and Statistical Study of Colored Washington at the Dawn of the Twentieth Century and After a Generation of Freedom** (1901).

[30] The proceedings of a meeting of the association in 1898 makes the point, with addresses by leading members of the association, including Brooks: *Colored American*, March 19, 1898, 2.

[31] I am grateful to Matthew Hofstedt for this information; see also *Evening Star*, November 11, 1914, 15.

[32] Not to be confused with a local African-American baseball team that had a large fan base in the District area in the 1880s.

[33] *Washington Bee*, July 12, 1884, 3; on Glymont, see "Potomac River Landings During the Steamboat Era," Jaybird's Jottings, https://jay.typepad.com/william_jay/2019/05/potomac-river-landings-during-the-steamboat-era.html (last accessed July 13, 2024).

[34] *Evening Star*, June 3, 1919, 21.

[35] Little is known about these last two organizations which were formed after 1900.

[36] See Hilyer, **The Twentieth-Century Union League Directory**; Gatewood, **Aristocrats of Color**, 50–1; and Constance McLaughlin Green, **The Secret City: A History of Race Relations in the Nation's Capital** (1967), 144–5.

[37] An admiring article on him was included in W.E.B. DuBois, **The Souls of Black Folks** (1903), chapter 12.

[38] On Brooks' vestrymen election, see *Washington Post*, April 20, 1897, 7; on the importance of the church in African-American history, see Gatewood, **Aristocrats of Color**, 218; on the church, see "St. Luke's Episcopal Church," National Park Service, https://www.nps.gov/places/st-lukes-episcopal-church.htm (last accessed July 13, 2024).

[39] *Colored American*, September 1, 1900. Lake View Park had recently been opened over the District line in Maryland, located a few miles east of Glen Echo which was for whites only.

[40] *Washington Bee*, March 7, 1908.

[41] Murray's life is the subject of a recent biography by Elizabeth Dowling Taylor, **The Original Black Elite: Daniel Murray and the Story of a Forgotten Era** (2017).

[42] Pierce Street was renamed Swann Street in 1910.

[43] *Washington Bee*, January 11, 1908; *Washington Herald*, January 4, 11, 1908. Craig's will stipulated that the money not distributed to relatives should be left to Eugene Brooks.

[44] *Washington Bee*, April 9, 1910, 5.

[45] *Evening Star*, May 20, 1898, 16.

[46] Catewood, **Aristocrats of Color**, 227.

[47] *Colored American*, December 2, 1899, 6; *Colored American*, May 15, 1900, 6.

[48] Catewood, **Aristocrats of Color**, 214; *Colored American*, August 3, 1901, 12.

[49] 182 U.S. 244 (1901).

[50] Taylor, **The Original Black Elite**, 219.

[51] Archie Lewis, another Supreme Court messenger, was also high up in this organization, as was his son, Shermont Lewis.

[52] *Washington Bee*, March 9, 1901, 5.

[53] Generally, see Ellsworth Janifer, "Samuel Coleridge-Taylor in Washington," *Phylon* 28, no. 2 (1967): 185–96.

[54] *Colored American*, January 10, 1903, 12.

[55] *Evening Star*, November 17, 1904, 15; Janifer, "Samuel Coleridge-Taylor in Washington," 191.

[56] *Washington Bee*, December 1, 1906, 1.

[57] Oceana attended the reception marking Thomas Johnson's long service as head of music at St. Luke's Church, *Colored American*, March 10, 1900, 14. Eugene and Oceana attended (with many from the African-American elite) a benefit concert given by Joseph Douglass, grandson of Frederick Douglass, for the Manassas, Virginia, Industrial School, *Washington Bee*, May 22, 1915, 5; they went to Baltimore to hear a musical event at the Frederick Douglass High School with their daughter's brother-in-law James Montgomery Gregory, later head of the drama department at Howard University, *Afro American*, May 31, 1918.

[58] See *Colored American*, March 3, 1900, 11; *Colored American*, December 14, 1901, 4; *Colored American*, August 1, 1903, 6; *Colored American*, January 9, 1904, 4; *Evening Star*, April 13, 1904, 5 (party marking twenty-five years of service of William Duiguid as personal servant/valet of C.C. Clover, president of the Riggs National Bank, known to presidents, senators,

Supreme Court justices); *Washington Bee*, January 7, 1905 (wedding of the daughter of William Chase, editor of the *Washington Bee*); *Washington Bee*, December 20, 1 (eightieth birthday of James Wilkinson, mason, assistant law librarian at the Library of Congress).

[59] For a reassessment of Washington's work, see Robert J. Norell, **Up from History: The Life of Booker T. Washington** (2011). Also see the website of the National Museum of African American History & Culture for information about Washington and his 1895 Atlanta speech where his ideas were set forth, "Booker T. Washington and the 'Atlanta Compromise,'" National Museum of African American History & Culture, https://nmaahc.si.edu/explore/stories/booker-t-washington-and-atlanta-compromise (last accessed July 13, 2024).

[60] *Evening Star*, March 18, 1904, 18. Washington was introduced by Judge Robert Terrell, one of the pre-eminent African-American figures.

[61] *Washington Bee*, August 19, 1905, 5.

[62] Another was Haiti.

[63] *Washington Bee*, November 27, 1909, 1.

[64] Lucy Brown Franklin, "The Negro Exhibition at the Jamestown Ter-Centennial Exposition of 1907," *Negro History Bulletin* 38, no.5 (1975): 408–414.

[65] *Washington Bee*, April 9, 1910, 5.

[66] Kathryn Allamong Jacob, **Capital Elites: High Society in Washington, D.C. after the Civil War** (1994), chapter 8.

[67] I am grateful to Nelson Rimensynder of the New Columbia Archives, a past president and current resident historian of the Oldest Inhabitants of the District of Columbia, for providing me with a copy of the incorporation, which comes from the files of the U.S. House Committee on the District of Columbia. Records of the African-American organization for the period 1942–72, housed in the Moorland-Spingarn Research Center, Howard University; older records seem to have been lost.

[68] On the otherwise unattested claim by Meshach Nugent, see "Rev. Eli Nugent (c. 1785–1861)," Archives of Maryland (Biographical Series), https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/016200/016274/html/16274bio.html (last accessed July 13, 2024). Nugent was a well-respected preacher whose death was noted by the *National Republican*, February 26, 1861.

[69] *Washington Bee*, April 24, 1915, 4.

[70] This information was provided to me by Nelson Rimensnyder, historian of the Association.

[71] *Washington Bee*, March 23, 1918, 5.

[72] *Washington Bee*, June 23, 1917, 4; *Washington Bee*, June 30, 1917, 1; *Evening Star*, July 5, 1919, 2 (which mistakenly reports it was the first meeting between them).

[73] *Washington Bee*, April 27, 1918, 1.

[74] On the "Red Summer" in the District, see Derek Gray, **The NAACP in Washington, DC: From Jim Crow to Home Rule** (2022), 76–82.

[75] On the League, see Gatewood, **Aristocrats of Color**, 242; on Mary Church Terrell, see Mary Church Terrell, National Women's Hall of Fame, https://www.womenofthehall.org/inductee/mary-church-terrell/ (last accessed July 13, 2024); her papers are in the Library of Congress, including the Annual Report of the Colored Women's League, 1897–98 where Oceana's name is mentioned.

[76] His pay was increased from $720 to $900. *Evening Star*, August 19, 1904, 12.

[77] *Evening Star*, December 4, 1925. He was a member of the Banneker Relief Association (one of the oldest in the District, if not the oldest), the Elder Men's Relief Association, and the Columbia Aid Relief Association.

[78] Mary Church Terrell, "History of the High School for Negroes in Washington," *Journal of Negro History* 2, no.3 (1917), 252–66. It became known as the M Street School, then the Dunbar High School, noted for sending many of its graduates to higher education.

[79] *Washington Times*, June 17, 1894, 3. Musette and Everett are both listed as teachers in the 1899 directory of Washington.

[80] *Evening Star*, September 4, 1895, 5. The Black Code, which regulated the lives of both free and enslaved Blacks, was abolished in 1862. It had given policemen the right to accost Blacks for any reason and demand to see their papers. Nor were Blacks allowed to congregate outside their homes after ten o'clock at night.

[81] *Evening Star*, June 24, 1904, 5.

[82] Generally, see Beth Zak-Cohen, "Suffrage for All: The Contribution of Immigrants and African Americans to New Jersey's Suffrage Movement," *Garden State Legacy Magazine* 47 (2020).

[83] Information provided by Matthew Hofstedt.

[84] Gatewood, **Aristocrats of Color**, 39.

[85] *Washington Bee*, March 18, 1921, 4; Taylor, **The Original Black Elite**, 372.

[86] Oceana died in 1935.

[87] "Woodlawn Cemetery," DC Historic Sites, https://historicsites.dcpreservation.org/items/show/47 (last access July 13, 2024); "'Hallowed Ground': Sororities Work to Preserve Black DC Cemetery," NBC Washington, https://www.nbcwashington.com/news/local/hallowed-ground-sororities-work-to-preserve-black-dc-cemetery/3090335/ (last accessed July 13, 2024).

[88] *St. Paul Echo*, March 6, 1926, 4; *Evening Star*, February 23, 1926, 2; *Washington Times*, February 24, 1926.

"The ct is disposed to consider the merits…Wow!": Anthony Lewis Takes Us Inside the Oral Arguments in *NAACP v. Alabama ex rel. Flowers* (1964)

Helen J. Knowles-Gardner

Tuesday March 24, 1964, was a pleasant spring day in the nation's capital, with the temperature climbing up to seventy degrees.[1] Inside the Supreme Court, the justices gathered to hear oral arguments in three cases. One of those arguments came in *NAACP v. Alabama ex rel. Flowers*.[2] Almost eight years earlier, on June 1, 1956, the attorney general of Alabama secured a temporary restraining order, immediately prohibiting the National Association for the Advancement of Colored People (NAACP) from doing business in the state.

As part of the exceptionally protracted litigation that followed, Alabama tried to compel the association to turn over copies of its membership lists as a condition of returning to the Heart of Dixie. Everyone—the NAACP and Alabama alike—knew what would happen to those (mostly) Black Americans if their membership in the organization was disclosed to the state government. On June 30, 1958, in *NAACP v. Alabama ex rel. Patterson*,[3] the Supreme Court unanimously ruled that such action was prohibited by the Constitution's First and Fourteenth Amendment guarantees of associational freedom.

This didn't make a blind bit of difference in Alabama, where the attorney general, his assistants, and complicit state judges, just kept acting as if they were bound by neither the Supreme Court nor the Constitution. Indeed, not even three decisions from the

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nation's highest court (*Patterson*, and then two *per curiam* decisions without oral argument in 1959 and 1961)—all unanimous, and all in favor of the NAACP—could effect a change in the legal and judicial status quo in Alabama. Adopted in 1939, the state's motto is *audemus jura nostra defendere* (we dare defend our Rights). And so they did. As one historian observes, this litigation demonstrated that "the Alabama courts would go to any lengths to protect white supremacy."[4]

Inside the courtroom on March 24, 1964, the justices were determined to issue a ruling that would bring this litigation to an end and allow the NAACP back into Alabama after an eight-year absence. This is the story of those oral arguments, as told using the notes taken by *New York Times* Supreme Court correspondent Anthony Lewis. They were arguments that caught even the highly experienced and Pulitzer Prize-winning journalist off guard.[5]

A Classic Repeat Player

Marc Galanter's classic 1974 article "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change"[6] has rightly been described as "one of the most influential pieces of legal scholarship ever written."[7] It has shaped the analytical thought processes of an entire generation of legal scholars; and its influence has spread well beyond its original field of social science.[8] As Galanter explained: "Most analyses of the legal system start at the rules end and work down through institutional facilities to see what effect the rules have on the parties." Galanter wanted "to reverse that procedure and look through the other end of the telescope." He asked us to "think about the different kinds of parties and the effect these differences might have on the way the system works," because parties are of varying sizes with different levels and types of resources at their disposal. And while "some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims others do so only rarely."[9] This sounds commonsensical to most legal scholars today, but fifty years ago it was a revolutionary way of looking at these aspects of law and society.

The two principal types of actors whom Galanter identified were the "one-shotters" (OS)—"who have only occasional recourse to the courts," and the "repeat players" (RP)—"who are engaged in many similar litigations over time."[10] As Galanter explained at great length, the "repeat player" and the "one-shotter" generally "play the litigation game differently."[11]

There is a rich body of scholarship demonstrating the myriad ways in which the NAACP is an excellent example of a RP.[12] The "Legal Department Case Files" of the NAACP papers at the Library of Congress serve to underline the extent to which the association was involved in so many of the defining Supreme Court civil rights cases of the 1950s and 1960s: *Brown v. Board of Education of Topeka* (1954);[13] *Brown II* (1955);[14] *Cooper v. Aaron* (1958);[15] *Gomillion v. Lightfoot* (1960);[16] *Griffin v. School Board of Prince Edward County* (1964);[17] and *Powell v. McCormack* (1969),[18] to name but a few. And that's only a small sampling of decisions by the nation's highest court; when you add in lower federal court and state court cases, the list grows exponentially.

Also not listed above are the following four important Supreme Court associational freedom decisions in which the NAACP was also involved: *Bates v. Little Rock* (1960);[19] *Shelton v. Tucker* (1960);[20] *Louisiana ex rel. Gremillion v. NAACP* (1961);[21] and *NAACP v. Button* (1963).[22] As I have shown elsewhere, this quartet of cases had two things in common with *Patterson*: (a) they all involved regulations that "fall within the traditional purview of state [power],"[23] and (b) all these statutes were *applied* in an abusive way by southern states, with the *direct* and

obvious goal of suppressing the work of the NAACP.[24]

Massive Resistance

Patterson, and all the other aforementioned cases, were to a large extent the result of the post-*Brown* southern strategy of "massive resistance," a strategy that was in so many ways a sadly inevitable consequence of the litigation successes of the "repeat player" NAACP.

Born of southern anger at *Brown*, and a desire to defiantly reject desegregation, this strategy found a formal institutional voice in Senator Harry F. Byrd (D-VA), who had been governor of Virginia before being elected to the Senate in 1932. On Saturday February 25, 1956, he called for the "'Southern States'" to engage in organized "'massive resistance'" to *Brown*, and expressed the belief that "'in time the rest of the country will realize that racial integration is not going to be accepted in the South.'"[25] In Virginia there followed, in short order, the enactment of a series of laws designed to ensure that the state's schools would not be integrated, laws known as the Stanley Plan (after the state's Governor Thomas B. Stanley).[26] Nationally, an almost immediate response to Byrd's clarion call was the crafting (and signing by 101 members of Congress) of the "Declaration of Constitutional Principles"—which history has come to remember by its less formal name, the "Southern Manifesto." This was "a dramatic announcement of the quickening pace of resistance politics," and "was a blatant challenge to the legitimacy of *Brown*."[27] It was an unabashedly "calculated declaration of political war against the Court's decision."[28]

One of the weapons of this war was the enactment of new state statutes, and the interpretation of existing ones, designed to severely limit the work of the NAACP. As that organization observed in its Petition for a Writ of Certiorari in *Patterson*, these laws exemplified the ongoing "hostility against all who seek compliance with the decisions of this Court on the question of the illegality of state-imposed racial segregation."[29]

During the spring of 1957, Theodore Leskes, an attorney for the American Jewish Committee, prepared an extensive memo outlining the growing associational freedom threat. He used material primarily provided by Jack Greenberg, one of the NAACP's lawyers (in 1961, Greenberg succeeded Thurgood Marshall as Director-Counsel of the NAACP's Legal Defense Fund).[30] Entitled "The New Threat to Freedom of Speech, Press, and Voluntary Associations," the memo summarized "the various litigative and legislative devices currently being employed in eight southern states," and demonstrated "the wide variety of techniques adopted" by those states following the "Dixie pattern" set by Alabama (and Louisiana).[31] At the end of May, the American Jewish Congress published an expanded and more detailed analysis of these "devices" and "techniques." *Assault Upon Freedom of Association*—a forty-seven-page pamphlet—laid bare the implications of this threat:

> Every American has a stake in the struggle of the NAACP to survive and continue its work. Freedom of association, like the freedoms of speech, press and conscience which it implements, exists primarily for the benefit of the people at large. It protects the people's right to hear, to know, to be informed, so that they may properly exercise their rights and fulfill their obligations as citizens.

Continuing, the pamphlet explained that "[i]n sum, the racial issue in the South has assumed a new dimension. At first, only the constitutional guaranty of equality was challenged. Today, the fundamental rights of expression are in jeopardy."[32] The truth of this

conclusion—and the ability of the NAACP lawyers to successfully fight back against this "new dimension"—was made clear in the victories achieved in *Patterson*, *Bates*, *Shelton*, *Gremillion*, and *Button*.

From *Patterson* to *Flowers*

Although the NAACP prevailed in *Patterson*, it ultimately took three other rulings by the nation's highest court—*NAACP v. Alabama* (1959),[33] *NAACP v. Gallion* (1961),[34] and *Flowers*—before the association was able to return to conducting business in Alabama. It was eight years of massive litigious resistance. Consequently, the story of the oral arguments in *Flowers* certainly did not begin in 1964.

In many ways, instead, the *high court's* involvement in the *Flowers* oral arguments began six years earlier, on Wednesday June 25, 1958, with Felix Frankfurter's prescience. That day, Justice Frankfurter received his draft copy of the solo dissenting opinion that his colleague Tom C. Clark intended to file in *Patterson*.[35] It was an eleventh-hour draft; the Term was ending, and the decision in *Patterson* would be handed down five days later. At the January 17 Conference, the vote in *Patterson* had been 9–0 to reverse (ruling for the NAACP);[36] and the Conference notes of Justices William O. Douglas and Harold H. Burton do not indicate that Clark made any remarks beyond casting his vote.[37] But sometime between then and late June, Clark had a change of heart.

Adequate and Independent State Grounds

When the Supreme Court is confronted with a request to review the judgment of a state court, the justices must first determine whether the case falls within their jurisdiction. The justices do not have the authority to hear an appeal of a state court decision that solely involves questions of state law. However, this does not mean that the Court is automatically empowered to hear such an appeal if it also involves a question of federal law. Instead, as the Court observed in 1935, "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."[38] This is the adequate and independent state grounds doctrine. Although the Court has not provided one set formula for determining exactly what is "adequate" and what is "independent," there are myriad reasons why state courts dismiss cases that raise federal claims, including one which is pertinent here. A state court will often dismiss that claim if the claimant has (in the court's opinion) failed to comply with state law procedures. As we will see below, this is why Clark wished to see *Patterson* remanded back to the Supreme Court of Alabama.

Were the justices expecting to receive Clark's last-minute draft dissent? The answer is unclear. Did a suspicion that Clark was rethinking his position come in mid-May in a memo to Justice John Marshall Harlan (the author of the opinion for the Court in *Patterson*), a memo in which Clark apologized that he was "not ready" in the case, and that he "will try to be so next week"? Not really, because in that memo Clark mentioned *Patterson* in the same breath as two other cases, so it would be wrong to read too much into this one piece of correspondence.[39] Similarly, although clues to the timeline of Clark's thinking might also be found in memos written by one of his law clerks (discussed below), those memos are undated. Therefore, absent a clear timeline all that we are left with are the drafts of Clark's dissent.

In order to understand the substance of Clark's disagreement with Harlan's majority reasoning, the best place to start is with the Texan's similar dissent, three years earlier, in *Williams v. Georgia*, because in both

cases the focus of Clark's concern was the adequate and independent state grounds doctrine.[40] In *Williams*, a capital case, the Black petitioner was convicted and sentenced to death by an all-white jury chosen using a method deemed by the Court, in *Avery v. Georgia* (1953),[41] to be a denial of equal protection. The Court reached its decision in *Avery* a couple of months after the trial and conviction of Williams; however, Williams' lawyer did not initially use *Avery* to raise a constitutional objection to the selection of his client's jury. Instead, it was not until after the first appeal failed that this basis for a new trial appeared in an extraordinary motion for a new trial. The six-justice Supreme Court majority that remanded *Williams* back to the state courts for reconsideration did so based on its interpretation of Georgia law, and prior state court decisions. The majority—which spoke through an opinion written by Frankfurter—rejected the Georgia Supreme Court's conclusion that Williams' conviction should stand because the lawyer had inadequately defended his failure to challenge the jury selection *at the time* (before the trial began). As Frankfurter explained:

> The Georgia courts have indicated many times that motions for new trial after verdict are not favored, and that extraordinary motions for new trial after final judgment are favored even less. *But the Georgia statute provides for such motion*, and it has been granted in 'exceptional' or 'extraordinary' cases. The general rule is that the granting or denying of an extraordinary motion for new trial rests primarily in the discretion of the trial court, and the appellate court will not reverse except for a clear abuse of discretion. In practice, however, the Georgia appellate courts have not hesitated to reverse and grant a new trial in exceptional cases.[42]

This, Frankfurter concluded, was an "exceptional case," especially because of the temporal proximity of the decision in *Avery*. Therefore, the Supreme Court had jurisdiction to hear the case because Williams' motion involved a question of constitutional law.

"To borrow a phrase from Mr. Justice Holmes," began Clark's dissent, "the opinion of the Court 'just won't wash.'"[43] As Justice Sherman Minton observed in his separate dissent, the principal point of disagreement stemmed from divergent readings of Georgia law. The dissenters adopted an interpretation of the state's laws that was—in their view—rightfully respectful of the bounds of federalism. Wrote Minton,

> We do not sit as a legal critic to indicate how we think courts should act. If a federal constitutional right is not presented, we have no duty to perform. There was no denial of equal protection of the law or of due process. This case was disposed of by the Georgia Supreme Court altogether on state grounds. In such circumstances, our duty is clear.[44]

Three years later, Clark was the only *Williams* dissenter left on the Court, and there was never any doubt that the two new justices (William J. Brennan, Jr., and Charles E. Whittaker) would sign on to Harlan's opinion in *Patterson*. Early in the opinion-writing process, after Harlan indicated he would no longer be writing a *per curiam* opinion, Brennan expressed his strong approval for his colleague's merits arguments.[45] And while Whittaker heavily annotated his copy of Clark's June 25 draft dissent (Whittaker's papers suggest that this was just his style when reading), he was unpersuaded by its content, and noted at the top of the document "I stand with JMH's majority opinion 6-25-58."[46] Although we do not know when Clark decided that he could no longer "stand" with Harlan's opinion, what we do know is that the June 25

draft is the only one that he shared with his colleagues. In essence, as we will see, Clark's dissent in *Patterson* was a very short version of his *Williams* opinion.

The *Patterson* Litigation

Patterson began on June 1, 1956, when Alabama's Attorney General John M. Patterson obtained a temporary injunction that prevented the NAACP from doing any further business in the state. For good measure, the unabashedly white supremacist Montgomery County circuit court judge Walter B. Jones added (on his own initiative, because it was not requested by Patterson's office) to the injunction a provision that further prevented the NAACP from "[f]iling with the Department of Revenue and the Secretary of State of the State of Alabama any application, paper or document for the purpose of qualifying to do business within the State of Alabama."[47] The attorney general sought to oust the NAACP because of its failure to register as a foreign corporation. The judge sought to make the ouster permanent by preventing the NAACP from remedying that situation by registering.

Three days after the NAACP filed its July 2 motion to dissolve the temporary injunction, the state upped the legal ante, and in doing so it brought the U.S. Constitution into the equation. On July 5, Patterson's office filed a motion requiring the NAACP to produce a long list of documents, including a list of the names and addresses of all current members of the NAACP who resided in Alabama.[48] When the NAACP invoked the Constitution in defense of its refusal to disclose its membership lists, Jones responded by finding the association to be in "brazen" contempt of court,[49] for which he imposed a $10,000 fine as punishment. Failure to comply by midnight on July 31 would result in a tenfold increase in the fine ($100,000 in 2024 would be approximately $1,120,000).[50] This increase took effect after the Alabama Supreme Court refused to hold an emergency hearing on the matter.

In a further move that would become legally crucial (and lay bare the extent to which the state court system was determined to see the NAACP gone from Alabama, *permanently*), when the Alabama Supreme Court did hold a hearing the following day (by which time the contempt order had gone into effect), it ruled against the NAACP on the ground that the association had failed to follow the proper judicial procedures. Namely, it had failed to submit its petition in the form of a petition for a writ of certiorari (the issuance of which would have automatically stayed Jones' order).[51] Ultimately, it was this action that resulted in *Patterson* finding its way up to the nation's highest court. And it was also the action that led Clark to write his draft solo dissent, the dissent that generated a memo from Frankfurter to Clark.

Saving One's "Powder" for a Day that Hopefully Won't Come

"The Supreme Court of Alabama," began Clark's draft dissent, "found it unnecessary to review the validity of the court order disobeyed by petitioner, because petitioner proceeded by writ of certiorari rather than by writ of mandamus." Clark expressed his

> agree[ment] with the majority, in view of the previous State of Alabama law on certiorari review of contempt judgments, that this procedural disposition of petitioner's claim does not constitute an adequate state ground of decision in this case.[52]

But that was as far as he would go. Because of the adequate and independent state grounds doctrine, he would have vacated, rather than reversed, the Alabama Supreme Court's decision, remanding the case back to that tribunal to let *it* consider the constitutional issues raised by the case.

If Clark felt so strongly about dissenting in *Patterson*, why did he ultimately withdraw the opinion? At some point during the dissent-drafting process, Robert P. Gorman, one of Clark's October 1957 Term clerks, wrote the justice three memos about *Patterson*. From his research, he reached several important conclusions:

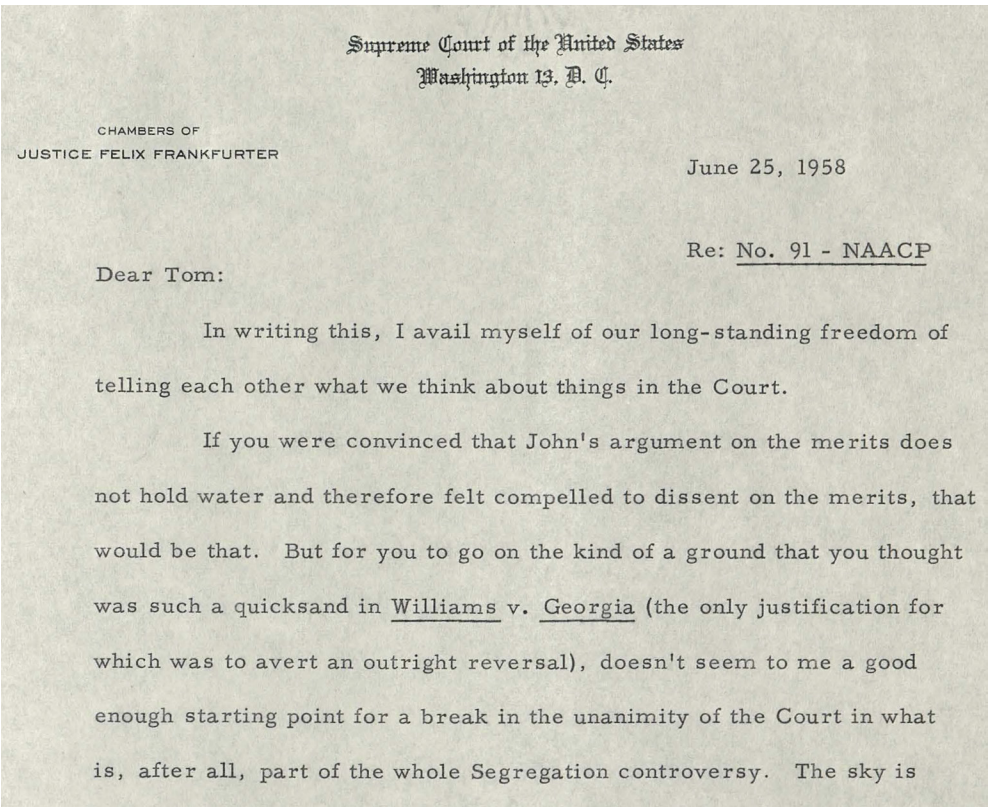
> *Procedure*: Harlan was right that the state judicial precedents did not support Alabama's interpretation of its own procedural rules. The legal interpretive conclusion reached by Alabama is one that "no reasonable person in the State could ever be held to know . . . unless he were gifted with immense prophetic powers."
>
> *Merits*: Harlan was also right on the merits.
>
> *Policy*: Anything short of unanimity from the justices of the nation's highest court would "tragic[ally]" serve to "strengthen resistance to integration."[53]

Despite the detailed nature of Gorman's research, Clark remained unpersuaded. That was, until he heard from Frankfurter.

Upon receiving his copy of Clark's draft dissent, Frankfurter immediately wrote a memo responding to his colleague's arguments. There was an important prescience about that memo. In a November 1954 letter to his good friend Learned Hand (Senior Judge of the United States Court of Appeals for the Second Circuit), Frankfurter described many of his colleagues. By this time, Clark and Frankfurter had been colleagues for just over five years. Frankfurter described Clark as "'very friendly in the slap-on-the-back-fashion, in a shallow way no fool, but of course he was without adequate equipment when he came here and no intellectual drive to make up for it now.'"[54]

This was an unfair assessment of Clark, who was Frankfurter's colleague for another eight years (Frankfurter retired in August 1962). When Clark left the Court in 1967 (upon his son's appointment as President Lyndon B. Johnson's attorney general),[55] his departure did not leave the same kind of immense liberal hole in the Court's jurisprudence that occurred when, for example, Justice Douglas retired in 1975. As one of his biographers observes, although Clark was "by no means either the spiritual or intellectual leader of the Warren Court,"[56] this does not mean that he was either "without adequate equipment" when he joined the Vinson Court, or an unimportant member of the succeeding Warren Court. Quite the opposite; he "evolved into an integral part of it, writing decisions that were central to its legacy of enhanced individual rights." He just did not always make the classic Warren Court liberal headlines because he balanced "the Court's broad egalitarian goals with his own general conservative nature and principles of judicial restraint"—hence his judicial behavior in *Patterson* (and *Flowers*).[57]

Frankfurter began his "Dear Tom" *Patterson* missive by availing himself of their friendship and a "long-standing freedom," between the two, "of telling each other what we think about things in the Court."[58] Had Clark taken issue with the majority's decision on the merits, Frankfurter would not have written his memo; but it was Clark's desire to *repeat* what he had said *in dissent* in *Williams* that irked Frankfurter. The substance of his response to the draft *Patterson* dissent mirrored Gorman's policy observation that a failure to show unanimity would "tragic[ally]" serve to "strengthen resistance to integration." The adequate and independent state grounds doctrine simply "doesn't seem to me a good enough starting point for a break in the unanimity of the Court in what is, after all, part of the whole Segregation controversy," wrote Frankfurter. Continuing, the justice wrote:



Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

June 25, 1958

Re: No. 91 - NAACP

Dear Tom:

In writing this, I avail myself of our long-standing freedom of telling each other what we think about things in the Court.

If you were convinced that John's argument on the merits does not hold water and therefore felt compelled to dissent on the merits, that would be that. But for you to go on the kind of a ground that you thought was such a quicksand in Williams v. Georgia (the only justification for which was to avert an outright reversal), doesn't seem to me a good enough starting point for a break in the unanimity of the Court in what is, after all, part of the whole Segregation controversy. The sky is

Five days before the Court issued its June 30, 1958, decision in *NAACP v. Patterson*, Justice Frankfurter wrote to Justice Clark. His memo situated the First Amendment freedom of assembly case within the broader sociopolitical climate. Frankfurter successfully persuaded his colleague to withdraw his proposed solo dissent, thereby enabling the Court to issue a unanimous decision in the case.

> The sky is none too bright anyhow. The mere fact that you are dissenting on the ground that the State's interests have not been adequately put to us—though I thought at the time that the State's interests were put to us on the merits very effectively—would be blown up out of all proportion to what you yourself would subscribe to.
>
> Many years ago, in reading the heavy volumes of John Morley's 'Life of Gladstone,' I was struck by almost the single critical remark that Morley made of his hero, to wit: 'On occasion even Mr. Gladstone forgot that the interpretation of an act is as important as the act itself.' And so I wish you to consider whether the use that is bound to be made of what you have written is worth the price of registering what I well appreciate is a torturing difficulty for you in this particular case.

In closing, Frankfurter's point could not have been clearer: "Save your powder for the day—I hope it never may come, but it well may—that you will have to fire a real shot."[59]

In 1953, Frankfurter pushed for reargument of *Brown* when "unanimity looked all but impossible" that year.[60] It is true that,

> from the vantage point of time . . . it is hard to imagine how the South

> could have fought *Brown* any harder than it did, and it is difficult (although not as difficult) to believe that the North, after the changes in the postwar nation, would have come to the southern position just because one or two justices took it.[61]

However, the justices did not have the benefit of a crystal ball with which to see into the future. And, it was all too clear to them, in the America in which they were living in the 1950s, that "[t]he South would have loved a dissent" in *Brown*—"indeed many southerners wrote to the Court after *Brown* asking for a copy of the dissenting opinion which they supposed had been issued."[62] As one legal historian accurately observes:

> The achievement of unanimity in *Brown* and afterward only partially accomplished the desired objectives. In fact, unanimity . . . operated in time to obscure rather than enhance the Court's decisions in the area. Indeed, the Court's continuing desire to be united outweighed its responsibility to be persuasive on enough occasions that it has been recently asked if, on balance, unanimity was worth the price. *The question, which is now compelling in hindsight, is anachronistic: to the judges faced with Brown and its aftermath, the costs of disunity were much too high to accept*.[63]

When Frankfurter urged Clark to "Save your powder" for another day, his reasoning was coming from the same place as his desire, five years earlier, to see *Brown* reargued in hopes of achieving a united judicial front.

Just hours before the Court announced the decision in *Patterson*, in a June 30 memo Clark informed his colleagues that he was withdrawing his dissent in the case. Frankfurter was delighted. He quickly wrote "I congratulate you! FF" on his copy of the piece of correspondence and sent it back to Clark.[64] Clark's change of mind enabled the Court to speak with one unified voice—the crucial unanimity that Gorman and Frankfurter had both emphasized.

Ultimately, Alabama didn't care whether the ruling was 9–0 or 8–1. In ways that are laid out below, the state doggedly used every procedural maneuver it could think of (or conjure up) to ensure that the NAACP was not victorious within the walls of its courts. Imagine how much more stubborn the state would have been (and could have afforded to be) if just one member of the Court publicly expressed his desire to open the adequate and independent state grounds door.

Therein lies the prescience of Frankfurter's memo.

Richmond M. Flowers

By the fall of 1962, when Alabamians went to the polls to elect a new attorney general, the NAACP had been absent from the state for over six years (a move that, amongst other things, seriously impeded its voting rights advocacy). In May 1963, when the NAACP's General Counsel, Robert L. Carter, filed his petition for certiorari, that document was accompanied by a Motion for Substitution of Party because Alabama now had a new attorney general. The litigation was now *National Association for the Advancement of Colored People, a corporation*, *Petitioner v. State of Alabama ex rel. Richmond M. Flowers Attorney General of the State of Alabama, Respondent.*[65]

On June 20, 1963, Alabama filed its short brief in opposition to certiorari.[66] Soon thereafter, the *University of Pennsylvania Law Review* reached out to the state attorney general's office requesting a copy of the brief. When one of the law review's associate editors returned the brief in October, he also enclosed the galley proofs of the comment-style article forthcoming in the November issue of the publication.[67] In short, the article

laid bare the same things that others would emphasize time and again over the next seven months. Namely, that the state's procedural arguments were exceptionally weak and unsupported by precedent, and there was little doubting that Alabama had violated the constitutionally protected associational freedom rights of the NAACP. As the article concluded,

> The procedural history of the present case indicates a deliberate attempt on the part of the Alabama courts to evade a decision on the NAACP's constitutional claims, in an effort seemingly designed to thwart Supreme Court review of the substantive issues. The deprivation of liberty caused by the present holding indicates that these efforts are not likely to succeed.[68]

The author of the article was right.

On January 22, 1964, the Chief Deputy Clerk of the Supreme Court informed Flowers that arguments in the litigation bearing his name would probably be heard the week of March 2 (most likely March 5).[69] The attorney general could have argued the case himself. It would not have been his first time standing before the justices of the nation's highest court. On November 3, 1963, two days after his fifty-fifth birthday, Flowers participated in the oral arguments in the legislative reapportionment case *Reynolds v. Sims*.[70] And he had fond memories of the occasion. When Flowers took his seat after arguing, the opposing counsel "pushed a little note across the table that said, 'In all my experience, I have never seen the entire court as attentive as they were to your arguments. Congratulations!'" Flowers "'saved that note for years. I showed it to somebody one time, and I said, "Here's a note Archibald Cox wrote." They looked at it and said, "Sure, and I'm George Washington."'"[71]

So why didn't Flowers argue *Flowers* a few months later? It was not for lack of availability; the attorney general traveled to Washington, D.C. with one of his assistant attorneys general, Gordon Madison, and sat in on the arguments.[72] The choice of Madison to argue the case probably reflected two things—Flowers' attitude towards the case (as compared to the attitudes of his immediate predecessors), and Madison's extensive involvement in the litigation.

Pictured here, at a 1966 press conference in Montgomery, is Richmond M. Flowers. As Alabama's attorney general (1963–1967), Flowers was the named respondent in *NAACP v. Flowers* (1964). Although in court he and his staff defended Alabama's efforts to oust the NAACP, he was far less committed, than his predecessors, to the segregationist and white supremacist principles in which those efforts were grounded.

It is entirely possible that Flowers had significant misgivings about the litigation that bore his name, but to understand this, we first need to know more about Flowers. Dr. Martin Luther King, Jr. once asked Richmond Flowers, "Were you ever a segregationist?" To which Flowers replied, "'Of course I was. All my life I was. I was raised in a segregated society, and would be less

than honest if I didn't admit to you I enjoyed all the emoluments of a segregated society.'" Flowers then followed this response by saying: "'But things have changed, the law has changed, cultures have changed, habits have changed, and I'm going to do what I can to see that my children are not segregationists, because it will just cause them unhappiness. The strict segregationist is not going to have anything but trouble from here on out.'"[73] Refusing to toe the "'strict segregationist'" line came at immense personal and professional cost for Flowers.[74]

As the author of a biography of Flowers explains:

> The 1962 election was critical for Alabama. Massive resistance had collapsed in much of the South, and most of the states of the old Confederacy were progressing in relative peace and harmony toward more equitable treatment of black citizens. The civil rights movement had gained momentum and strength, with growing support from the federal government, and significant change was inevitable. The question was whether the people who realized this could gain control of state government and could steer things in a more constructive direction.[75]

On January 14, 1963, in Montgomery, the state capital of Alabama, a study in contrasting inauguration speeches laid bare two facts. First, in November 1962 the people of Alabama chose a governor who would do anything but acknowledge the growing "momentum and strength" of Black voices raised in support for civil rights. Second, in the same election cycle the voters selected a new attorney general who would try and "steer things in a more constructive direction." The January 1963 "'inaugural speeches'" given by Governor George Wallace and Attorney General Richmond Flowers "'were just as far apart as they could possibly be.'"[76] On the one hand, there was Wallace famously declaring "Segregation today, segregation tomorrow, segregation forever." On the other hand, there was Flowers predicting that "'Alabama's soul will soon be laid bare before the world' . . ."[77] and generating telling headlines such as "Flowers Opposes Defiance of U.S." and "Flowers Takes Sharp Issue With Wallace."[78] As a *Birmingham News* column succinctly but rather understatedly observed on inauguration day: "The two officials who will be most directly tied to the problems of racial tensions over the next four years in Alabama . . . do not see exactly eye to eye on how to meet those problems."[79]

While on the campaign trail, Flowers stated that he was "'unalterably for segregation,'" and he promised "to 'defend our time-honored customs,'" but he did not reveal the true complexity of his views.[80] "Very little attention was paid in the press to the race for attorney general,"[81] and so Flowers subsequently felt free to break from Wallace.

Flowers "'wasn't willing to argue that integration was a good thing . . . only that it was federal law and had to be obeyed . . .'"[82] This made it difficult for him to do his job, including defending Alabama's continued defiance of the high court's *three* rulings in favor of the NAACP. He of course did his job, but perhaps his views about obeying federal law (including Supreme Court rulings) contributed to his decision to delegate the job of arguing before the justices in *Flowers*.

So, if not Flowers, then who would argue the case? On January 27, 1964, Flowers informed the Court that Assistant Attorney General Gordon Madison would present the state's oral argument.[83]

Gordon Madison

On October 1, 1952, Alabama's attorney general appointed former state senator (and great-great-great nephew of the nation's

fourth president) Madison to fill a vacancy in his office after the death of another assistant attorney general.[84] Earlier that year, there was extensive speculation that Madison would receive a presidential appointment to a new federal district judgeship to be created that year[85] (the seat never materialized because the relevant legislation died in Congress that spring);[86] and when Madison joined the attorney general's staff there were rumors that Madison would use this appointment as a stepping stone to the attorney generalship.[87] However, Madison remained an assistant attorney general, serving in that capacity until his retirement in 1974.[88]

The available evidence suggests that Madison did not become intimately involved in the NAACP litigation until Patterson became governor in January 1959. In his memoir, Robert Carter writes that he is "sure" that "[t]he brains behind the state's maneuvers" against the NAACP were the brains of Edmon L. Rinehart.[89] This is accurate. From 1955 through until early 1956 Rinehart was indeed the assistant attorney general who took the lead in this litigation.

Edmon (Ted) Loftin Rinehart was born in New York City in 1920 and educated at Princeton and then at Harvard Law School.[90] Between receiving his undergraduate degree (majoring in English) in 1942, and attending Harvard, Rinehart served as an officer with the 10th Field Artillery Battalion, 3rd Infantry Division, seeing action in North Africa and Europe during World War II.[91] He was held as a German prisoner of war from January 1944 until the end of the conflict. His military reactivation during the Korean War saw him stationed in Frankfurt, Germany (as part of the JAG Corps), which is where he met fellow officer John M. Patterson.[92] The two men were essential legal personnel in an Army short of JAG officers, and they became good friends; after the war they remained in contact.[93] Indeed, today the Patterson and Rinehart families are still very close.[94]

After the assassination of his father, John Patterson reached out to Rinehart, asking him to come to Alabama, ostensibly to help with the legal fight against corruption in Phenix City.[95] Not until much later in their lives did Rinehart, and his children, learn that

Alabama assistant attorney general Gordon Madison (center), who argued the *Flowers* case in the Supreme Court, is pictured here, in 1961, with Louisiana's attorney general Jack P. F. Gremillion (left) and Georgia's assistant attorney general E. Freeman Leverett (right). They gathered at a New Orleans courthouse for a hearing on the constitutionality of Louisiana's ongoing efforts to resist the desegregation of its schools.

Patterson had actually recruited his friend because he knew that he needed an experienced lawyer—with the caliber of training that came with a Harvard Law School education—to help him confront the civil rights litigation he knew the attorney general's office would soon become embroiled in.[96]

Rinehart was one of only three outsiders that Patterson brought into the attorney general's office.[97] And he was neither a southerner nor a segregationist. As the attorney general's office letterhead from January 1956 indicates, Rinehart was initially hired as a Legal Research Aide, listed quite distinctly and separately from the assistant attorneys general (of which at the time there were eleven). In January 1956, MacDonald Gallion was listed as the senior assistant attorney general.[98] A future attorney general who served two nonconsecutive terms, 1959–1963 (succeeding Patterson) and 1967–1971 (succeeding Flowers), Gallion was Patterson's principal deputy because the attorney general "kept his father's promise to . . . make him senior assistant attorney general."[99] At some point, Rinehart went from research aide to assistant attorney general, and took the legal lead representing Alabama in the NAACP litigation from its official inception on June 1, 1956 through until early 1959 (when Patterson became governor in January 1959, and Rinehart became his commissioner of insurance). Rinehart wrote the lion's share of the briefs in *Patterson*, and ultimately argued the case before the Supreme Court in January 1958.

The evidence suggests that upon Rinehart's departure from the attorney general's office, it was Madison who began to take a lead role in the litigation as it now proceeded under the new attorney general Gallion. Certainly, by 1960 Madison was heavily involved in the case,[100] and by November 1961 he was recognized as the principal assistant attorney general "handling the state's case."[101] Madison maintained this status as the calendar turned to 1963 and Flowers replaced Gallion. It is reasonable to assume that Madison was asked to argue *Flowers* because he was the assistant attorney general with the most detailed understanding of the case.

On March 6, Madison was informed that he was to be ready to participate in the *Flowers* oral argument on Monday March 23.[102] Ultimately, those arguments took place on Tuesday March 24, in two sittings, one before lunch lasting seventy minutes, and then one for another eleven minutes when the court reconvened in the afternoon.

Anthony Lewis

In the audience, that day, was one very familiar face, the *New York Times* Supreme Court correspondent Anthony Lewis. That newspaper's 2013 obituary of Lewis ran under the headline "Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85."[103] One might add that just as Tony Lewis "brought law to life," he also brought life to the law. The *New York Times* Supreme Court correspondent from 1955 through 1964, he "transformed American legal journalism."[104] As one scholar observes, Lewis "'had an incredible talent in making the law not only intelligible but also in making it compelling.'" He was a journalist who instinctively knew how to write for all the people—laypersons and experts alike. "'His articles were virtual tutorials about currents in legal thinking, written with ease and sweep and an ability to render complex matters accessible.'"[105] It was superlative work for which Lewis won his second Pulitzer Prize in 1963.

Lewis' ability "to better explain and translate legal jargon into phrases and concepts that laypeople could more easily understand"[106] makes his handwritten notes the perfect analytical tool for unpacking the oral arguments in *Flowers*. And putting those arguments in layman's language is particularly important because "so much of the

As the *New York Times* Supreme Court correspondent from 1955 through 1964, Anthony Lewis transformed reporting on the nation's highest court. He explained the work of the justices in ways easily understandable by the general public. Lewis is pictured here in 1963, the same year he won his second Pulitzer Prize.

pressing salience" of the *Patterson* and *Flowers* decisions "is buried beneath procedural questions."[107] When the justices gathered on March 24, 1964, their eighty-minute colloquy with the two lawyers was consumed by complex discussions of legal procedure. The set of handwritten notes that Lewis scribbled while he sat in the courtroom and listened to these dense dialogues provides the perfect roadmap for seeing the fundamentally salient forest through the abundance of procedural *pinus palustris* (the state tree of Alabama).

"Cut[ting] Alabama Legal Tangle"

Lewis wrote about *Flowers* on four occasions for the *New York Times*—on October 15, 1963 (discussing the granting of certiorari in the case); on March 25, 1964 (recapping the oral arguments); and on June 2 and 6 (about the Court's decision). The decision to hear *Flowers* did not headline his reporting of the actions taken by the Court on October 14; instead, the focus was on an order pertaining to the states' implementation of the 1963 decision in *Gideon v. Wainwright*.[108] Nevertheless, Lewis devoted a considerable amount of space to discussing the significance of *Flowers* "in the race relations area."[109] Lewis' article about the oral arguments in *Flowers* ran under a very accurate and telling headline: "Ban on N.A.A.C.P. Due for a Ruling: High Court Indicates it Will Cut Alabama Legal Tangle."[110]

The first point that the journalist made in the notes he took during the arguments was the first point that the NAACP's lawyer made when he stepped up to the lectern to address the justices. "If the Court please," said Robert Carter, "this cause is here for the fourth time and what petitioner hopes is the final time."[111] Scribbled Lewis: "Carter 'This case is here for the fourth time, and we hope for the last time.'"[112]

Carter argued before the justices for just over half an hour. For the first seven of those thirty-one minutes, he spoke uninterrupted as he recapped the past eight years of litigation.[113] In his notes, Lewis wrote the following, which serves as a testament to the lengthy and procedural quagmire that this litigation had become (largely because of the actions of Alabama):

> June 1, 1956: Temporary restraining order, by Judge Jones, barred NAACP from functioning in Ala. No notice or hearing.
>
> Claim that NAACP was not registered as foreign corp—injunx also barred registering. State had mentioned NAACP action re (1) Lucy, (2) Montgomery bus boycott.
>
> June, 1958: Sup Ct set aside contempt for not producing names of members.
>
> June, 1959: Sup Ct reversed Ala reaffirmation.
>
> Oct., 1961: Sup Ct directed Fed trial unless state began by Jan. 2, 1962.

> Dec., 1961: Judge Jones heard case and made temp injunx permanent.
>
> Feb. 28, 1963: Ala Sup Ct said NAACP had not followed rules for Argument section of its brief by not specifying errors and lumping them together, in which case good must fall with any bad.[114]

With his trademark clarity, in his article the next day Lewis was able to distill this procedural maneuvering into three sentences that would give the layperson an easily understandable summary of Alabama's legal machinations:

> The N.A.A.C.P. has been barred from Alabama since June 1, 1956, by a series of state court orders. It has never been able to get a final determination on the merits from the Alabama courts on whether it is legally entitled to resume operating there. The Alabama Supreme Court has avoided deciding the question by ruling that the N.A.A.C.P.'s lawyers have made procedural mistakes.[115]

In October 1961, when this litigation came to them for the third time, the justices issued a unanimous *per curiam* opinion that ran to less than 150 words. The Court vacated and remanded the decision of the United States Court of Appeals for the Fifth Circuit, sending it back to that tribunal,

> with instructions to direct the District Court to proceed with trial of the issues unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued.[116]

Twice the state had rebuffed the justices' efforts to force their hand in this litigation; and now, five years after the issuance of the original injunction, and three Supreme Court rulings later, Alabama was *again* being asked to give the NAACP "an opportunity to be heard on its motion to dissolve" that injunction.

On December 27, 1961, with the clock counting down to the January 2, 1962, deadline, Judge Jones presided over the first of three days of arguments and testimony.[117] He issued his ruling at the end of the third day and, entirely predictably, the NAACP lost again. This time, however, Jones upped the legal ante; he now ordered the *permanent* exclusion of the NAACP from Alabama.[118] Rejecting all of the overwhelming evidence to the contrary, he ruled that the NAACP had continued to do business in Alabama (under the guise of other organizations); the *temporary* injunction had not stopped them, so it was now time to make it permanent.[119]

And then the wheels of justice ground to a halt. On March 19, 1962, the NAACP filed an Assignment of Errors with the Supreme Court of Alabama, followed a few weeks later by an extensive (thirty-six page) appeal of Jones' imposition of the permanent injunction. Ten months later, the court finally issued a ruling in the case. The unanimous court went out of its way to emphasize that it had "one set of rules for all litigants, and all are treated alike, regardless of whom they may be. We are not a court which treats most litigants one way, but has favored and special treatment for the litigant who comes into court on an alleged racial issue."[120] As the *Flowers* oral arguments made very clear, the first of these two sentences was simply not true. The Alabama Supreme Court had one set of rules that it interpreted and applied differently depending on who it was interpreting it for, and applying it upon. The second sentence was also inaccurate. Despite its claims to the contrary, *Flowers* made it clear that the state court did provide "favored and special treatment for the litigant who comes into

court on an alleged racial issue" *if that litigant was white*.[121]

In ruling against the NAACP, the state supreme court explained that its rules required,

> . . . that the argument section of an appellant's brief contain 'argument with respect to errors assigned which counsel desire to insist upon.' The rule plainly states that—assignments of error are to be argued in the argument section of a brief.[122]

The NAACP had done this; however, ". . . many of them are without merit because they present nothing for review." This, in and of itself, was "not a violation of any of the rules of appellate procedure." The problem, as the Alabama Supreme Court saw it *in this one case*, was that this violated the tribunal's "rule of long standing and frequent application that where unrelated assignments of error are argued together and one is without merit, 'the others will not be considered.'"[123] For all intents and purposes, discussion of this point consumed the remainder of the *Flowers* oral arguments.

Continuing to summarize, in note form, Carter's argument, Lewis wrote:

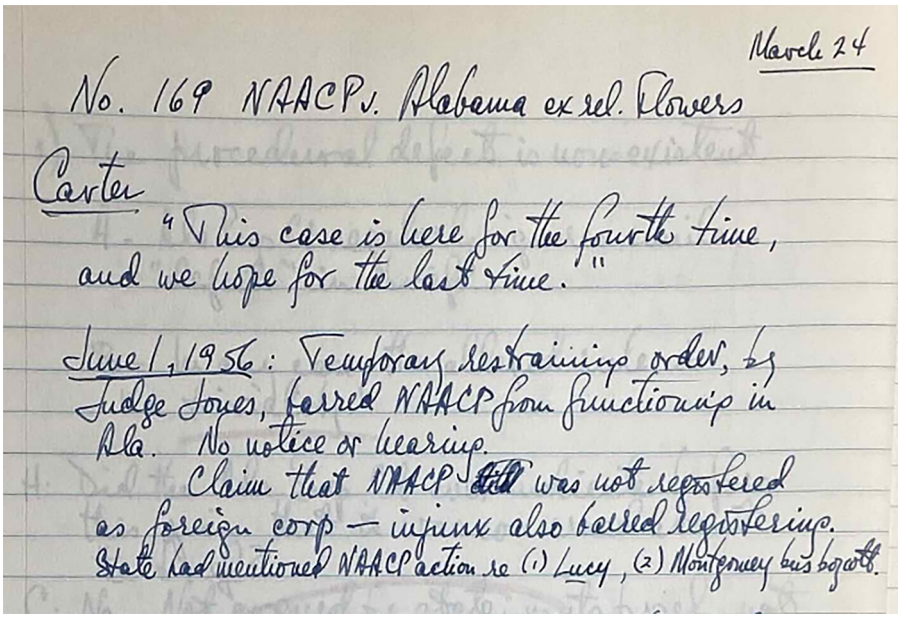
> (1) The procedural defect is non-existent.
> A—Ala Sup Ct regularly ignores similar 'defects' in briefs.
> B—In any case, the alleged rule is 'a triviality.'[124]

In various places in his notes, Lewis underlined or circled words in red pencil. "Triviality" was the first word to which he applied such highlighting treatment. The Alabama Supreme Court had frequently ignored the "rule of long standing and frequent application that where unrelated assignments of error are argued together and one is without merit, 'the others will not be considered.'"[125] As Carter explained: "It has held in case after case, that even though the rules are not complied with, that the rules are merely directory . . ."[126]

Although the Oyez.org transcript of the *Flowers* oral argument does not tell us who asked the first question about this aspect of the state court's handling of the case, Lewis does. It was Harlan who asked, "did the Alabama Supreme Court at any point until its opinion disposition of the case indicate that it was concerned about the brief?"[127] Lewis' notes were even more succinct than Carter was in answering this question: "C: No. Not argued by state in its brief, not mentioned by ct during oral argument."[128] Lewis circled this in red pencil.

This question was followed by a lengthy discussion about what these procedural obstructionist tactics meant for the litigation. Justice Potter Stewart semi-rhetorically asked Carter whether construing the merits of the Alabama foreign corporation registration statute—and its application to the NAACP—was something the state courts should handle. "And this is something which the Supreme Court of Alabama has never—has never expressed its views on, so I gather," he noted.[129] Lewis summarizes the next part of the colloquy very well:

> C: The Sup Ct of Ala, I suggest from the past history, will never reach the merits of this case—because it knows the injunx cannot be sustained on the merits.
>
> [Correct answer is that punishment so exceeds crime that it amounts to denial of 1st Amend rts.]
>
> And C now gives that answer.
>
> You can't use tortured construx of regis stat to bar out activities any more than you can use barratry stat, or tax (Bates), or conspiracy (La. V. NAACP).


March 24

No. 169 NAACP v. Alabama ex rel. Flowers

Carter

"This case is here for the fourth time, and we hope for the last time."

June 1, 1956: Temporary restraining order, by Judge Jones, barred NAACP from functioning in Ala. No notice or hearing.

Claim that NAACP ~~Ala~~ was not registered as foreign corp — injunc also barred registering.

State had mentioned NAACP action re (1) Lucy, (2) Montgomery bus boycott.

This is the first page of the notes that Anthony Lewis took during the March 24, 1964, oral arguments in *Flowers*. The notes provide us with a unique tool for understanding the dialogue that ensued, that day, between the lawyers and the justices.

> Ala is attempting to bar review on the merits by this ct. by reading decisions on procedural grounds.
>
> Unless this ct in this case is prepared to issue a detailed decree which will give petr the rt to resume op in Ala w out the necessity of implementing that decree in the Ala cts, we think the cause will be here for a fifth time.[130]

Lewis circled numerous elements of these notes.

When it was Madison's turn to step up to the lectern, Lewis began his notes the way he had when Carter addressed the justices—with a short summary of counsel's first substantive point: "The State of Ala doesn't consider that the merits of this controversy are before this ct at this time."[131] Almost three minutes later, during which time no justice had asked any questions, Madison moved on to address whether the state supreme court had "reasonably and not arbitrarily" applied its rules in the case.[132]

It is Lewis who confirms for us the identity of the member of the Court who questioned Madison about one important point. The state assistant attorney general expressed his belief that the state supreme court had handled the case just the way the lawyer had been taught, four decades earlier in law school, that it would (and always would). And, indeed, "we have a distinguished member of this court who probably, still, knows more about Alabama practice than I do who could say one way or the other about it himself."[133] Justice Hugo L. Black took the bait. But he did not help Madison. Noted Lewis: "B: If 10 assignments of error are grouped and one is found inadequate, the ct doesn't consider the other 9?"[134] Black asked this rhetorical question with a note of incredulity in his voice. He then proceeded to ask Madison question after question, all of which were designed to expose the Alabama court's

obstructionist tactics. And other justices followed Black's lead. As Lewis notes, Chief Justice Earl Warren finally intervened, wanting to know just why Alabama had not previously raised these points about the content of the NAACP's brief: "CJ: Why didn't u question the validity of this brief?"[135]

The final question that Madison faced was asked by Justice Stewart, who expressed frustration with the actions of the Alabama Supreme Court. He just "didn't understand the chain of reasoning of the opinion" of that tribunal. Madison's response was the final thing he said as his time expired. "It is most difficult sometimes for me out here to give an explanation as to why a court did a certain thing or its reasons for it. Sometimes I know, and sometimes I do not."[136] It was a stunning concession.

By 1964, Lewis was extremely familiar with the work of the Warren Court, an institution that he "revered."[137] Indeed, " '[y]ou cannot talk about the legacy of the Warren court and not talk about Tony Lewis . . . He was just part and parcel of it' "; " '[h]e was almost the 10th justice of the Warren court. He was careful in his journalism, but his ethos was clearly the same as the Warren court.' "[138] And the respect was mutual. For example, during the oral arguments earlier in the year in *New York Times v. Sullivan*,[139] Justice Byron R. White sent Lewis a note from the bench that playfully read "tony—I thought you would disqualify yourself from reporting this one, Byron."[140]

In his memoir James (Scotty) Reston, the *New York Times* Washington Bureau chief at the time, tells the following story:

> . . . the Court on Mondays would sometimes hand down as many as a dozen or more decisions. Even on the *Times* we couldn't give a lot of space to all of them, and decided to summarize a few in our own words. When I asked Judge Frankfurter what he thought of this idea, he denounced it as a cheeky presumption. Nevertheless, Tony Lewis quietly and carefully produced the summaries and the *Times* printed all of them. The next morning Justice Frankfurter called me at home. 'I can't believe what that young man achieved,' he said. 'There aren't two justices of the Court who have such a grasp on these cases.'[141]

It is therefore noteworthy that as the end of the *Flowers* oral arguments came into sight, Lewis did not anticipate the way in which the chief justice would conclude the proceedings.

Before the Court adjourned for lunch, Madison made a suggestion. Perhaps seeking to provide the justices with an option that he did not believe they would pursue, the lawyer stated that if the Court did wish to rule on the merits of the case, it should have the entire record before it. Summarized Lewis:

> M: If you're going to pass on the merits, then you ought to have before you the whole 1347-page record that was before the Ala Sup Ct—and you ought to give us new chance to brief and argue the merits.[142]

After Carter finished his post-lunch, ten-minute rebuttal, the chief justice took the unusual step of addressing both attorneys: "Mr. Madison, in your argument this morning, you suggested that if the court was disposed to consider the merits, that it should view the entire record in the case."[143] What Warren said next prompted Lewis to write the following in his notes:

> CJ 'The ct is disposed to consider the merits.' Directs—or rather invites—Madison to send up the entire record.
>
> 20 days to brief the merits.
> 20 for Carter to reply.
> No further oral argument.
>
> ---

> Wow!
>
> ---
>
> C had, in rebuttal, noted Madison's difficulty in explaining the rules. If he can't, who can?![144]

The entire record of the case—bound into three volumes—found its way from Alabama to the Supreme Court of the United States nine days later, on April 2.[145]

Two newspapers published in Montgomery—the white daily *Montgomery Advertiser* and the Black weekly *Alabama Tribune*—provided starkly contrasting reports of the oral arguments in *Flowers*. The *Alabama Tribune* focused on the shortcomings of Madison's performance with an article that ran under the headline "Justice and the NAACP . . . 'Sometimes I Know and Sometimes I Don't Know,'" choosing to focus readers' attentions on the assistant attorney general's infamous closing words. The article was written by a staff reporter for the National Newspaper Publishers Association, an organization of Black newspaper publishers. The article's first dozen words reinforced the approach suggested by the headline: "An Alabama assistant Attorney General found himself defending decisions he didn't understand Tuesday . . ." Although the article summarized the case and described numerous elements of Carter's exchanges with the justices, Madison's oral argument performance was the focus, and the author appeared to relish the opportunity to highlight the attorney's weaknesses.[146]

Writing for the *Advertiser* as its legislative correspondent, one journalist, a well-connected fixture in Washington, D.C.,[147] penned a front-page article that gave the oral arguments a very different, far more positive spin in favor of Alabama. Yes, it did mention that Madison "was subjected to intensive questioning," and that "Madison admitted that his arguments had been 'pretty well shot away' by the justices' queries." That, however, was buried deep in the article, and followed by a paragraph emphasizing (with more accompanying quotations) that the justices "also gave Carter a hard time." The emphasis was not on the oral arguments themselves, but rather Warren's directive at the end of the lawyers' presentations. Under the headline "Alabama Given More Time in Case Against NAACP," the article focused on Warren's decision to set the twenty-day deadline for the state to furnish the court with a copy of the complete record in the case. Astonishingly, the journalist wrote that "[t]he move was interpreted by court observers as giving Alabama time to strengthen its case against the NAACP."[148] As we have seen, this was far from the truth.

The Court Decides

To quote the late, great Yogi Berra, "it was déjà vu all over again." While Justice Harlan was drafting his opinion for the unanimous Court in *Flowers*,[149] Justice Clark was equivocating, again. Just as he had done six years earlier in *Patterson*, Clark felt it necessary to write separately (from the record it is not clear whether he voted to deny certiorari in *Flowers* at the justices' Conference on October 7, 1963).[150]

As his papers reveal, this time the solo opinion that Clark penned in *Flowers* was a concurrence, and like the *Patterson* draft dissent, it was short (only seventy-five words) and it got straight to the point. *However*, when one considers it together with his draft opinion in *Patterson*, the intended *Flowers* opinion reads like a dissent:

> MR. JUSTICE CLARK concurs in the holding of the Court that the nonfederal procedural ground relied upon by the Supreme Court of Alabama (the asserted failure of petitioner's brief to conform to the rules of that court) is inadequate. However, since that court has not passed on the merits, he believes that orderly

> procedure requires that the judgment be vacated and the case remanded to the Supreme Court of Alabama for decision on the merits.[151]

In essence, Clark's objection to the Court's disposition of *Flowers* was no different from the complaints he lodged, *in dissent*, about the outcome in *Patterson*.

Three drafts of the *Flowers* concurrence exist in Clark's papers—one handwritten on yellow legal paper, one typed, and then one formatted and printed to look just like a finished Supreme Court opinion (minus the final date). What those drafts tell us is that the concurrence went virtually unchanged from start to finish. Clark's OT63 clerk who worked on the case added a small amount of requisite language to the draft paragraph that Clark had given him. Yet, all that really changed was the verb tense—from past to present; and the addition of the words "asserted" and "However."[152]

Although this *Flowers* concurrence shared the same fate as Clark's *Patterson* dissent, there was one final significant difference between the two draft opinions. Unlike in *Patterson*, Clark did not circulate his draft in *Flowers*. Two identical copies of the formatted and printed opinion are in Clark's files—one bears a handwritten note in the margin: "This has not been circulated"; the other has two blue pencil lines drawn across it and handwritten at the top, again in blue pencil, are the words "I joined JMH." We do not know why Clark decided to withdraw, rather than circulate, his concurrence. All we know is that he did. This meant that on Monday June 1, 1964, when Justice Harlan announced the decision in *Flowers* (exactly eight years after Judge Jones issued the original temporary injunction ousting the NAACP from Alabama), his opinion spoke for the nine justices, in unanimity.

Harlan brought his opinion to a close with a paragraph that signaled the Court's utter frustration with Alabama:

> The judgment below *must* be reversed. In view of the history of this case, we are asked to formulate a decree for entry in the state courts which will assure the Association's right to conduct activities in Alabama without further delay. While such a course undoubtedly lies within this Court's power . . . we prefer to follow our usual practice and remand the case to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion. Such proceedings should include the prompt entry of a decree, in accordance with state procedures, vacating in all respects the permanent injunction order issued by the Circuit Court of Montgomery County, Alabama, and permitting the Association to take all steps necessary to qualify it to do business in Alabama. *Should we unhappily be mistaken in our belief that the Supreme Court of Alabama will promptly implement this disposition, leave is given the Association to apply to this Court for further appropriate relief.*[153]

It should be clear that this paragraph echoed numerous points made throughout the oral arguments, and the significance of the date of the *Flowers* decision was not lost on anyone who knew the history of the litigation.

The NAACP Returns to Alabama

The NAACP was ecstatic. Upon receipt of one particular congratulatory telegram, the NAACP's Executive Director penned a thank you note that said the organization was "encouraged to know that the way is" finally "being opened for us to return to Alabama." Continuing, he wrote: "It goes without saying that we will make every effort to do so as quickly as is legally possible."[154]

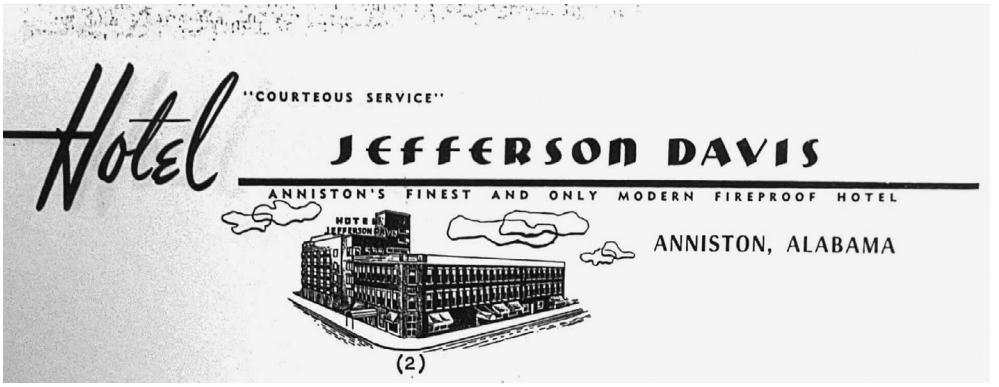
The Supreme Court issued its official mandate to the Alabama Supreme Court on June 29, 1964. On August 27, the state court issued a terse *per curiam* opinion, continuing to refuse to become involved in the merits of the case. It instead simply fulfilled its duty of notifying the lower courts of the action taken by the nation's highest court.[155] The opinion was accurately described by the NAACP's Deputy Executive Director, as "snotty."[156] On September 11, 1964, the Montgomery Circuit Court issued an order dissolving the original June 1 injunction.[157]

The NAACP was chomping at the bit, ready to return to the Heart of Dixie. Regional representatives began meeting to discuss reentry strategies at the beginning of August, but even before the ruling in *Flowers* plans had begun to be made in anticipation of a favorable and decisive ruling from the Supreme Court. As the NAACP's Regional Director observed in text underlined twice at the bottom of an August memo, "we will be READY."[158] However, Alabama most certainly was not ready to allow the NAACP to resume business within its borders. Despite the court order, things were "proceeding slowly,"[159] and it was not until early November that the time finally came for the NAACP to return to the Fourth Ave, Birmingham offices that it had so hurriedly vacated over eight years earlier.[160]

The official process of reorganizing, restoring, and rebuilding the NAACP in Alabama began in Birmingham, on Saturday October 31, 1964. As the organization's Membership Secretary stated in a memo, the "principal purpose" of the gathering was to "reassure our people regarding our legal position in the State and to launch the statewide reorganization campaign."[161] In pursuit of this goal, the organization made "steady progress."[162] It was not a cheap undertaking; "special expenses" were incurred.[163] However, the success was tangible. By the beginning of 1965 twelve chartered units had been established in cities across the state, charters for three additional units were pending, and four colleges—the Tuskegee Institute, Niles College, Daniel Payne College, and Talladega College—had chapters. Plans were in place for representatives from the new units to meet in Birmingham in February.[164]

Everyone knew that the rebuilding process would not be smooth sailing. "Our old problems of police brutality, intimidation, violence, denial of the vote, and all other aspects of racial discrimination and segregation are all there waiting for us," observed the Regional Director.[165] NAACP Field Secretary Syd Finley encountered this atmosphere in November 1964 when he traveled to Anniston to try and reorganize a branch in that city. Writing "[f]or the benefit of future staff members journeying," to the city, Finley noted that he was staying at the Jefferson Davis Hotel. "Service and treatment . . . has been courteous," he observed, although "a note reading 'Get out Nigger' was left on my door the third morning I was at the hotel." Although, as he wrote with ("smiles") in a postscript, he "couldn't resist the use of the hotel's" stationery for this piece of correspondence.[166]

Located sixty-five miles east of Birmingham, at the time Anniston was home to approximately 32,000 people, and considerable racial violence. "The general reaction and response of Negroes in the Anniston area to reorganizing the NAACP Branch is extremely good," wrote Finley. "Many of the communities [*sic*] leadership feel they can once again become active with a responsible Civil Rights organization, as they have felt very little has been accomplished" and that there remained "many unresolved problems." In this one sentence, about one particularly troublesome location in the state, Finley perfectly captured (a) why Alabama had sought to permanently oust the NAACP; (b) the effects of the NAACP's lengthy absence from the state; and (c) the need for the association to get itself back up and running in an expeditious manner.



This is the letterhead of the Jefferson Davis Hotel in Anniston, Alabama. In a November 1964 letter to one of his NAACP colleagues, Field Secretary Syd Finley "couldn't resist the use of the hotel's" stationery for his correspondence when he traveled to the town, sixty-five miles east of Birmingham, to try and reorganize a branch of the association in that city.

Conclusion: "AWAKE ALABAMA!"

On July 31, 1965, thirteen months after the decision in *NAACP v. Alabama ex rel. Flowers*, the first issue of the newsletter of the State of Alabama N.A.A.C.P. Conference rolled off the presses. The association's new president was clear in his message to members in the Heart of Dixie—"Divided we are weak. Together we are strong." It was imperative that the members "AWAKE ALABAMA!"[167]

The NAACP's organizational strength and unity in Alabama, even when it was ousted from that state, was ultimately aided, four times over, by a strong and united Supreme Court. Sixty years later, the arguments in *Flowers* serve as a stark reminder of (a) the (primarily procedural) Alabamian roadblocks that resulted in the litigation going back up to the nation's highest court so many times, and (b) the determination of the justices to force the hand of the state in 1964, one last, and decisive, time.

The following year, Richmond Flowers, the Alabama attorney general listed as respondent on the Court's 1964 decision, expressed an optimism that the South was increasingly open to embracing "'the three R's of reason, responsibility and respect for the law.'"[168] The notes that Anthony Lewis took during the oral arguments in *Flowers* help us to understand that with respect to the NAACP's status in Alabama, the state would only start to embrace "'the three R's of reason, responsibility and respect for the law'" after the justices successfully cut through the "legal tangle" that consisted of one procedural roadblock after another.

The Citizens' Council—a white supremacist organization founded in July 1954, in Indianola, Mississippi[169]—considered the NAACP to be "the most threatening enemy to white supremacy." Using language that would be echoed in writings and statements issued across the South, the Council redefined "the organization's acronym as the 'National Association for the Agitation of Colored People.'"[170] The NAACP had not been able to formally 'agitate the colored people' of Alabama—it had not been able to conduct business within the confines of that state—for eight years. *Flowers* changed that and, as such, had profoundly important, multifaceted consequences for the Civil Rights Movement in particular, and freedom of assembly more generally.

It is thanks to Lewis' reporting that we, the outside historical observers of the Court's work, have a much better understanding of just how the justices achieved that goal in *Flowers*.

> Lewis was a translator, an ambassador, who in the Warren Court era fashioned himself as the People's Solicitor General; he was the advocate for the little guy before the high court, and an advocate to his readers about what the Court should be doing for the little guy. With sophisticated legal analysis and an eye for jurisprudential trends and shifts, his beat was the Constitution, as much as the Court. And as a consequence, his fingerprints are all over the doctrine he was covering.[171]

And so, perhaps we should give the final words to Lewis.

Writing in the *New York Times* a few days after the decision in *Flowers*, Lewis observed that "more than anything the limitations imposed on state power" by the Court in *Brown*, *Reynolds v. Sims*, and *Patterson* and *Flowers*, to name just four examples, "reflect our society's judgment on what are its deepest values." That is how it should be, because "[t]hose values are, after all, what is enshrined in the open phrases of the Constitution."[172] Wise words, indeed.

ENDNOTES

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[1] National Centers for Environmental Information Climate Data Online archive, available at https://www.ncdc.noaa.gov/cdo-web/

[2] 377 U.S. 288 (1964). The other two were *Publishers' Association of New York City v. New York Mailers' Union Number Six*, 376 U.S. 775 (1964) (the remaining forty-two minutes of the arguments that had commenced the previous day), and *Baggett v. Bullitt*, 377 U.S. 360 (1964).

[3] 357 U.S. 449 (1958).

[4] Lucas A. Powe, Jr., **The Warren Court and American Politics** (2001), 306.

[5] Part 11: Box 10, Annual File, Supreme Court, Notes, October Term 1963 (3 of 4) [hereafter Lewis *Flowers* notes], Anthony Lewis Papers [hereafter ALP-LC], Manuscript Division, Library of Congress, Washington, D.C.

[6] Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (1974): 95–160.

[7] Shauhin A. Talesh, "Foreword: Why Marc Galanter's 'Haves' Article is One of the Most Influential Pieces of Legal Scholarship Ever Written," in **Why the Haves Come Out Ahead: The Classic Essay and New Observations**, ed. Marc Galanter (2014), iii.

[8] Talesh, "Foreword."

[9] Galanter, "Why the 'Haves' Come out Ahead," 97.

[10] Galanter, "Why the 'Haves' Come out Ahead," 97.

[11] Galanter, "Why the 'Haves' Come out Ahead," 98.

[12] For example, see the following books Mark V. Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961** (1994); Mark V. Tushnet, **The NAACP's Legal Strategy Against Segregated Education, 1925–1950** (2005); Charles L. Zelden, **The Battle for the Black Ballot: *Smith v. Allwright* and the Defeat of the Texas All White Primary** (2004); Peter Charles Hoffer, **The Search for Justice: Lawyers in the Civil Rights Revolution, 1950–1975** (2019); Barrett J. Foerster, **Race, Rape, and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era** (2012); Gary L. Ford, Jr., **Constance Baker Motley: One Woman's Fight for Civil Rights and Equal Justice under Law** (2018); and the following articles, Steven C. Tauber, "On Behalf of the Condemned? The Impact of the NAACP Legal Defense Fund on Capital Punishment Decision Making in the U.S. Courts of Appeals," *Political Research Quarterly* 51, no. 1 (1998): 191–219; Steven C. Tauber, "The NAACP Legal Defense Fund and the U.S. Supreme

Court's Racial Discrimination Decision Making," *Social Science Quarterly* 80 (1999): 325–340.

[13] 347 U.S. 483 (1954).

[14] 349 U.S. 294 (1955).

[15] 358 U.S. 1 (1958).

[16] 364 U.S. 339 (1960).

[17] 377 U.S. 218 (1964).

[18] 395 U.S. 486 (1969).

[19] 361 U.S. 516 (1960).

[20] 364 U.S. 479 (1960).

[21] 366 U.S. 293 (1961).

[22] 371 U.S. 415 (1963).

[23] 371 U.S. at 438.

[24] Helen J. Knowles-Gardner, "The First Amendment to the Constitution, Associational Freedom, and the Future of the Country: Alabama's Direct Attack on the Existence of the NAACP," *Seattle University Law Review* 48, no. 1 (2024): 1–56.

[25] Quoted in "Byrd Bids South Unite to Support Interposition," *Richmond Times-Dispatch*, February 26, 1956.

[26] Generally, see Numan V. Bartley, **The Rise of Massive Resistance: Race and Politics in the South During the 1950's** (1997), chapter 7.

[27] Bartley, **Rise of Massive Resistance**, 116.

[28] Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (1962, 1986), 256.

[29] Petition for Writ of Certiorari, *National Association for the Advancement of Colored People v. State of Alabama, ex rel. John Patterson, Attorney General* (No. 57–91), Appendix C, 22.

[30] Richard Severo and William McDonald, "Jack Greenberg, a Courthouse Pillar of the Civil Rights Movement, Dies at 91," *New York Times*, October 12, 2016.

[31] "The New Threat to Freedom of Speech, Press, and Voluntary Associations," memo written by Theodore Leskes, May 7, 1957, in NAACP papers [hereafter NAACP-LC], Group III, Box J4: NAACP 1956–65, Inc Fund, Administrative File, Folder: NAACP Prevention from doing business in states 1956–1958, LC.

[32] **Assault Upon Freedom of Association: A Study of the Southern Attack on the National Association for the Advancement of Colored People** (1957), 45.

[33] 360 U.S. 240 (1959).

[34] 368 U.S. 16 (1961).

[35] *NAACP v. Alabama*, 1957 term record of circulation 1958, Box A210, Folder 4, Tom C. Clark Papers, Tarlton Law Library, The University of Texas at Austin [hereafter TCC-UTA].

[36] *NAACP v. Alabama*, 1957 term docket sheet 1957–1958, Box C73, Folder 5, TCC-UTA.

[37] *NAACP v. Alabama*, January 17, 1958, conference notes, Box 1186, Supreme Court File, Case File, Nos. 85–99 Argued Cases O.T. 1957, Papers of William O. Douglas, LC [hereafter WOD-LC]; *NAACP v. Alabama*, January 17, 1958, conference notes, Box 296, Folder 12, Supreme Court File, Case File, October Term 1957, Law Clerks' Memoranda Appellate Docket: Nos. 89–92, Papers of Harold H. Burton, LC. It appears that Justices Harlan and Brennan similarly did not make any substantive Conference remarks about the case. See *NAACP v. Alabama* 1957 Term conference notes undated, Box A60, folder 5, TCC-UTA.

[38] *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

[39] *NAACP v. Alabama*, 1957 term record of circulation.

[40] 349 U.S. 375 (1955).

[41] 345 U. S. 559 (1953).

[42] 349 U.S. at 383–4 (italics added).

[43] 349 U.S. at 393 (Clark, J., joined by Reed and Minton, JJ., dissenting).

[44] 349 U.S. at 407 (Minton, J., joined by Reed and Clark, JJ., dissenting).

[45] See memo from Brennan to Harlan, May 8, 1958, Part I, Box 12, Folder 3, Case File, O.T. 1957, Opinions, No. 57–91, *NAACP v. Alabama*, Papers of William J. Brennan, LC [hereafter WJB-LC].

[46] See the June 25, 1958, draft of Clark's dissent in Box 3, Folder 10, Justice Charles Evans Whittaker Supreme Court Papers Collection, MS-0315. University of Missouri-Kansas City Special Collections and Archives [hereafter CEW-UMKC].

[47] Decree for Temporary Restraining Order and Injunction, reprinted in Petition for Writ of Certiorari, Appendix B, 10a–11a.

[48] Interlocutory Decree on Motion of the State to Require Respondent to Produce Certain Books, Papers and Documents, reprinted in Petition for Writ of Certiorari, Appendix B, 12a.

[49] Associated Press, "N.A.A.C.P. Balked in Alabama in Moves to Halt $100,000 Fine," *New York Times*, July 31, 1956.

[50] Decree Adjudging Respondent in Further Contempt and Fixing Punishment Therefor, reprinted in Petition for Writ of Certiorari, Appendix B, 17a–18a.

[51] George Whittington, "NAACP Plans to File Higher Appeal on Fine," *Montgomery Advertiser*, August 1, 1956; Petition for Writ of Certiorari, 11.

[52] June 25, 1958, draft of Clark's dissent.

[53] The three memos that Gorman wrote for Justice Clark are in Box A66, folder 9, TCC-UTA.

[54] Quoted in Brad Snyder, **Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment** (2022), 602.

[55] For an excellent discussion of this, see Craig Alan Smith, "Make Way for Tomorrow: How Justice Tom C. Clark Departed from and (Almost) Returned to the Supreme Court," *Journal of Supreme Court History* 46, no. 1 (2021): 81–106.

[56] Alexander Wohl, **Father, Son, and Constitution: How Justice Tom Clark and Attorney General Ramsey Clark Shaped American Democracy** (2013), 155

[57] Wohl, **Father, Son, and Constitution**, 155 (and more generally chapter 9).

[58] Memo from Frankfurter to Clark, June 25, 1958, Box 102, folder 7, NAACP v. Alabama (1958), TCC-UTA.

[59] June 25, 1958, memo from Frankfurter to Clark.

[60] Powe, **Warren Court and American Politics**, 23.

[61] Powe, **Warren Court and American Politics**, 45–6.

[62] Powe, **Warren Court and American Politics**, 45.

[63] Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958," *Georgetown Law Journal* 68 (1980): 87 (italics added).

[64] Frankfurter's copy of Clark's memo to the Conference, June 30, 1958, *NAACP v. Alabama*, 1957 term, Box A66, folder 9, TCC-UTA.

[65] *National Association for the Advancement of Colored People, a corporation*, *Petitioner, v. State of Alabama ex rel. Richmond M. Flowers Attorney General of the State of Alabama, Respondent*, October Term, 1962, Motion for Substitution of Party, May 28, 1963; Notice of filing of writ of certiorari, May 29, 1963, both in Office of the Attorney General, Civil Rights Case Files, SG20669 [hereafter SG20669]—NAACP v. State of Alabama United States Supreme Court, Alabama Department of History and Archives [hereafter ADHA].

[66] *National Association for the Advancement of Colored People, a corporation, Petitioner, v. State of Alabama ex rel. Richmond M. Flowers Attorney General of the State of Alabama, Respondent*, October Term, 1962, No. 1141, copy in SG20669—NAACP v. State of Alabama United States Supreme Court, second folder, ADHA.

[67] Letter from Benjamin Lerner to Gordon Madison, October 22, 1963, SG20669—NAACP v. State of Alabama United States Supreme Court, ADHA.

[68] "Case Comments: Federal Courts—Alabama Supreme Court Affirms Decree Ousting NAACP from State Without Reaching Merits," *University of Pennsylvania Law Review* 112, no. 1 (1963): 150–1.

[69] Letter from E.P. Cullinan to Richmond M. Flowers, January 22, 1964, SG20669—NAACP v. State of Alabama United States Supreme Court, ADAH. The papers of Justice Hugo L. Black confirm that the case was originally scheduled for that first week of March. "For Argument—February-March Session," January 21, 1964, Box 375, Folder 6, Case File, Oct. term, 1963, Lists—arguments and assignments, 1963–1964, Papers of Hugo Lafayette Black, LC.

[70] 377 U.S. 533 (1964).

[71] John Hayman, **Bitter Harvest: Richmond Flowers and the Civil Rights Movement** (1996), 199. For an excellent biography of Archibald Cox, see Ken Gormley, **Archibald Cox: Conscience of a Nation** (1997). In a previous article published in the pages of this *Journal*, I discussed Cox's role in the 1963–1964 reapportionment cases. Helen J. Knowles, "May It Please the Court? The Solicitor General's Not-So-'Special' Relationship: Archibald Cox and the 1963–1964 Reapportionment Cases," *Journal of Supreme Court History* 31, no. 3 (2006): 279–297.

[72] Ramona Martin, "Supreme Court Delays NAACP Arguments," *Alabama Journal*, March 5, 1964.

[73] Hayman, **Bitter Harvest**, 115.

[74] Hayman, **Bitter Harvest**; Dennis Hevesi, "Richmond Flowers is Dead at 88; Challenged Segregation and Klan," *New York Times*, August 11, 2007.

[75] Hayman, **Bitter Harvest**, 174.

[76] Hayman, **Bitter Harvest**, 183.

[77] Hayman, **Bitter Harvest**, 183.

[78] UPI, "Flowers Opposes Defiance of U.S.," *Birmingham Post-Herald*, January 15, 1963; Associated Press, "Flowers Takes Sharp Issue With Wallace," *Troy Messenger*, January 14, 1963.

[79] Ted Pearson, "Clash on Racial Issue Now Appears Certain," *Birmingham News*, January 14, 1963.

[80] Hevesi, "Richmond Flowers is Dead."

[81] Hayman, **Bitter Harvest**, 179.

[82] Hevesi, "Richmond Flowers is Dead."

[83] Letter from Gordon Madison to E.P. Cullinan, January 27, 1964, SG20669—NAACP v. State of Alabama United States Supreme Court, ADAH.

[84] "Gordon Madison to be Garrett's Aide," *Decatur Daily* (Decatur, AL), August 28, 1952; "President's Descendant Retiring From AG Staff," *Montgomery Advertiser*, March 26, 1974.

[85] Geoffrey Birt, "New Federal Judgeship Being Talked for Alabama," *Alabama Journal*, April 10, 1952.

[86] "Federal Judgeships," in **CQ Almanac 1952** (1953), 239–40.

[87] Geoffrey Birt, "J. Gordon Madison Named Assistant Attorney General," *Montgomery Advertiser*, August 28, 1952.

[88] "President's Descendant Retiring." Madison died in October 1981. "Former Assistant AG Madison Dead at 80," *Montgomery Advertiser*, October 20, 1981. He is very briefly mentioned, in connection with *Lee v. Macon County Board of Education*, a 1960s integration lawsuit that he was involved in as a lawyer for the state, in Pat Boyd Rumore, **From Power to Service: The Story of Lawyers in Alabama** (2010), 238.

[89] Robert L. Carter, **A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights** (2005), 152–3.

[90] "Memorial: Edmon L. Rinehart '42," *Princeton Alumni Weekly*, November 13, 2013, https://paw.princeton.edu/memorial/edmon-l-rinehart-'42 (last accessed July 3, 2024).

[91] Rinehart oral history interview; Edmon L. Rinehart Collection (AFC/2001/001/4647), Veterans History Project, American Folklife Center, Library of Congress, https://www.loc.gov/item/afc2001001.04647/ (last accessed May 31, 2024).
[92] "Rinehart, Edmon," *Montgomery Advertiser*, June 14, 2013.
[93] Warren Trest, **Nobody But the People: The Life and Times of Alabama's Youngest Governor** (2008), 111–2.
[94] Author's telephone interview with Christine Rinehart Taft, January 25, 2024.
[95] Rinehart Taft interview.
[96] Rinehart Taft interview.
[97] The other two were MacDonald Gallion and Noel Baker. Trest, **Nobody But the People**, 182.
[98] Letter from John Patterson to the NAACP, January 30, 1956, Part V, Box 23, Folder 3: NAACP Legal Department Case Files, Background Information, Alabama, *NAACP v. Alabama*, Related Cases, *State ex rel. Patterson v. NAACP*, 1956 Jan–June, NAACP-LC.
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[100] Al Stanton, "Gallion Thinks Court to Dump NAACP Suit," *Birmingham News*, June 28, 1960; "New State vs. U.S. Struggle Brewing," *Dothan Eagle*, July 13, 1960; "Court Airs 1st State Attack on Civil Rights Act Today," *Montgomery Advertiser*, January 16, 1961.
[101] Trudy Cargile, "Hearing Continues—Ban on NAACP Remains in Effect," *Birmingham News*, December 27, 1961. Also see "Dec. 27 Hearing Date Set on Merits of NAACP Case," *Montgomery Advertiser*, November 14, 1961.
[102] Letter from John F. Davis to Gordon Madison, March 6, 1964, SG20669—NAACP v. State of Alabama United States Supreme Court, ADAH.
[103] Adam Liptak, "Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85," *New York Times*, March 25, 2013.
[104] Liptak, "Anthony Lewis."
[105] Ronald K.L. Collins quoted in Liptak, "Anthony Lewis."
[106] Andrew Cohen, "The Life and Death of Anthony Lewis, a 'Tribune of the Law,'" *The Atlantic*, March 25, 2013, https://www.theatlantic.com/national/archive/2013/03/the-life-and-death-of-anthony-lewis-a-tribune-of-the-law/274332/ (last accessed July 3, 2024).
[107] Email from Allen Dickerson to the author, January 19, 2024.
[108] 372 U.S. 335 (1963).
[109] Anthony Lewis, "High Court Hints at Retroactivity of Counsel Rule," *New York Times*, October 15, 1963.
[110] Anthony Lewis, "Ban on N.A.A.C.P. Due For a Ruling," *New York Times*, March 25, 1964.
[111] *National Association for the Advancement of Colored People v. Alabama ex rel. Flowers*, Oral Argument—March 24, 1964 (Part 1), Oyez.org, https://www.oyez.org/cases/1963/169 (last accessed January 5, 2024) [hereafter *Flowers* oral argument].
[112] Lewis *Flowers* notes.
[113] *Flowers* oral argument.
[114] Lewis *Flowers* notes.
[115] Lewis, "Ban on N.A.A.C.P. Due For a Ruling."
[116] 368 U.S. at 16.
[117] Associated Press, "Alabama N.A.A.C.P. Gets Hearing Today," *New York Times*, December 27, 1961.
[118] Associated Press, "Alabama Court Bans All NAACP Activities," *Washington Post*, December 30, 1961.
[119] "Alabama Court Bans."
[120] *National Association for the Advancement of Colored People v. State*, 274 Ala. 544, 545 (1963).
[121] 274 Ala. at 545.
[122] 274 Ala. at 546.
[123] 274 Ala. at 546.
[124] Lewis *Flowers* notes.
[125] 274 Ala. at 546.
[126] *Flowers* oral argument.
[127] *Flowers* oral argument; Lewis *Flowers* notes.
[128] Lewis *Flowers* notes.
[129] *Flowers* oral argument.
[130] Lewis *Flowers* notes.
[131] Lewis *Flowers* notes.
[132] *Flowers* oral argument.
[133] *Flowers* oral argument.
[134] Lewis *Flowers* notes.
[135] Lewis *Flowers* notes.
[136] *Flowers* oral argument.
[137] Liptak, "Anthony Lewis."
[138] Ronald K. L. Collins quoted in Liptak, "Anthony Lewis"; "Pulitzer Prize-winner Anthony Lewis Dies at 85," updated March 25, 2013, https://apnews.com/general-news-68766ed9ed57477495e044f2d54d1ce0 (last accessed July 3, 2024).
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[140] Part II, Box 10: Annual File, Supreme Court, Justice White, Byron R., 1962-1964, ALP-LC.
[141] James Reston, **Deadline: A Memoir** (1991), 204.
[142] Lewis *Flowers* notes.
[143] *Flowers* oral argument.
[144] Lewis *Flowers* notes.
[145] See letter from Gordon Madison to John F. Davis, Clerk of the U.S. Supreme Court, April 2, 1964, SG20669—NAACP v. State of Alabama United States Supreme Court, ADAH.
[146] "'Justice and the NAACP . . .' Sometimes I Know and Sometimes I Don't Know," *Alabama Tribunal*, April 10, 1964.

[147] "Estelle Gaines Wood," *Washington Post*, July 17, 2022.

[148] Estelle Wood, "Alabama Given More Time in Case Against NAACP," *Montgomery Advertiser*, March 25, 1964.

[149] Douglas' docket sheet indicates that in *Flowers* the justices all voted to reverse (ruling in favor the NAACP). Docket sheet for *Flowers*, Box 1299, Supreme Court File, Case File, O.T. 1963, Administrative Docket Book, Orig. #16, No. 1-229, WOD-LC.

[150] The papers of Justices Douglas and Brennan note that Clark did vote to deny. Docket sheet for *Flowers*, Box 1299, Supreme Court File, Case File, O.T. 1963, Administrative Docket Book, Orig. #16, No. 1-229, WOD-LC; Docket sheet for *Flowers*, Part I, Box 94, Folder 8, Case File, O.T. 1963, Administrative File, Dockets 63-103 to 63-274, WJB-LC. *However*, Clark's own docket sheet for the case indicates that all nine justices voted to hear the case. *NAACP v. Alabama ex rel. Flowers*, docket sheet, Box C79, Folder 8, TCC-UTA.

[151] *National Association for the Advancement of Colored People v. Alabama ex rel. Richmond M. Flowers, Attorney General*, Justice Clark's formatted and printed draft concurrence, Box A159, Folder 8, TCC-UTA.

[152] The drafts are in Box A159, Folder 8, TCC-UTA.

[153] 377 U.S. at 310 (italics added).

[154] Letter from Roy Wilkins to John Lewis, June 9, 1964. Also see the telegram from John Lewis, June 1, 1964. Both in Box 12, Branch files/voting, folder 9 "NAACP Ban," the Dr. Howard Robinson Collection, Alabama State University Archives, Levi Watkins Learning Center, Montgomery, AL [hereafter HRC-ASU].

[155] *National Association for the Advancement of Colored People v. State of Alabama*, Appeal from Montgomery Circuit Court, 3 Div. 996 A, Special Term, 1964. See the documents in SG20669—Untitled Folder No. 2, ADAH.

[156] Memo from Gloster Current to Roy Wilkins, September 14, 1964, Box II, pt. 2 of 2. Folder 53 "Alabama reorganization," HRC-ASU.

[157] Order, September__, 1964, *State of Alabama ex rel. Richmond M. Flowers, Attorney General of the State of Alabama v. National Association for the Advancement of Colored People*, Circuit Court of Montgomery County Alabama, No. 30468; and Letter from Fred D. Gray to Gordon Madison, September 8, 1964; both in SG20669—Untitled folder #4, ADAH.

[158] Memo from Ruby Hurley to Roy Wilkins, August 3, 1964, in Box II, pt. 2 of 2. Folder 53 "Alabama reorganization," HRC-ASU.

[159] September 14 memo from Current to Wilkins.

[160] Memo to Roy Wilkins, John Morsell, Henry Lee Moon, Lucille Black, and Dolores Branche, November 10, 1964, in Box II, pt. 2 of 2. Folder 53 "Alabama reorganization," HRC-ASU.

[161] Memo from Lucille Black to Roy Wilkins, October 29, 1964, Group III, Box C1: Alabama State Conference, 1964–65, NAACP-LC.

[162] Memo from Gloster B. Current to Roy Wilkins, January 19, 1965, Group III, Box C1: Alabama State Conference, 1964–65, NAACP-LC.

[163] Letter from John A. Morsell to John W. Nixon, May 19, 1965, Group III, Box C1: Alabama State Conference, 1964–65, NAACP-LC.

[165] January 19, 1965, memo from Current to Wilkins.

[165] Memo from Ruby Hurley to Gloster Current, June 11, 1964, in Box II, pt. 2 of 2. Folder 53 "Alabama reorganization," HRC-ASU.

[166] Letter from Syd Finley to Gloster Current, November 22, 1964, in Box II, pt. 2 of 2. Folder 53 "Alabama reorganization," HRC-ASU.

[167] "State of Alabama N.A.A.C.P. Conference 'News and Action,'" I, no. I (July 31, 1965), 1. In Group III, Box C1: Alabama State Conference, 1964–65, NAACP-LC.

[168] UPI, "Flowers Says South Needs Three R's to Have Future," *Naugatuck Daily News* (Naugatuck, CT), November 19, 1965.

[169] Stephanie R. Rolph, **Resisting Equality: The Citizens' Council, 1954–1989** (2018), 13.

[170] Rolph, **Resisting Equality**, 56–7 (quoting from a pamphlet of the Association of Citizens' Councils of Mississippi).

[171] Dahlia Lithwick, "Anthony Lewis," *Missouri Law Review* 79, no. 4 (2014), 971.

[172] Anthony Lewis, "States Rights Redefined by High Court," *New York Times*, June 7, 1964.

An End to Rebel "Punishment": The *Test Oath Cases* and the Constitutional Politics of Confederate Disqualification

M. Henry Ishitani

On July 3, 1866, Chief Justice Salmon P. Chase wrote to his friend and colleague, Justice Samuel F. Miller. The chief was worried about a major leak at the Supreme Court, a breach involving three pending cases. Weeks before, the leak had come from Reverdy Johnson, a Democratic Senator from Maryland and co-counsel in two of the three cases at issue. Johnson had leaked the Court's decision, and done it before the Court had even come to a formal vote on the cases. In the time since, the leak had rocketed through the halls of Congress and around the nation.[1]

Yet how had Johnson come by the decision? How had he dared to report not only the Court's vote, but also the actual principal substance of the eventual opinion—all expressed before the chief justice and other dissenters like Miller even knew of it themselves? Could any "other explanation" be possible besides a conspiracy at the Court? All of these questions prompted the fretting in Chase's letter to Miller:

> [The Reverdy Johnson leak] may well amaze any body, unless there was, what I will not believe, a secret arrangement among five of the Judges that the Missouri oath cases should be decided against the oath without any opportunity for fair consultation among the Judges, and one or more of the parties understanding was sanguine enough to take the success of the scheme for certain & spoke of what was agreed to be done as a fact accomplished. . . . If it be true as [Reverdy Johnson] says that a judge

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> was elected to prepare the opinion this also must have been agreed on in the caucus! Is this possible? Can it be possible? On the other hand, how could Johnson have manufactured the story from whole cloth?[2]

Leaks of Supreme Court decisions are by no means a new, twenty-first-century phenomenon.

For example, as we have seen in the pages of this *Journal* earlier this year, in the 1940s the journalist Drew Pearson printed "predictions" about the outcomes in three cases, prompting considerable discussion, at the Court, about just who was responsible for these leaks to a member of the fourth estate.[3] This article contributes to the body of scholarship about these important moments in Supreme Court history by telling the story of the constitutional politics surrounding the three *Test Oath Cases* of 1866 (*Ex parte Garland*, *Cummings v. Missouri*, and *Garesché v. Missouri*),[4] the decisions which were the subjects of Senator Johnson's leak.

A Politicized Leak at the Court?

Taken in the narrowest legal sense, the *Test Oath Cases* established that it was unconstitutional for either Congress or a state constitutional convention to create qualifications that deprived persons of the right to practice one's "lawful avocation" based on past conduct that had not been individually condemned in a court of law. In particular, neither attorneys like Augustus H. Garland and Alexander Garesché, nor pastors and priests like Reverend John A. Cummings could be barred from their professions based on their previous actions and statements in service of the Confederacy.[5]

In 1866, however, the *Test Oath Cases* stood for much more. Republican newspapers and Congressional leadership condemned the combined decisions as another "Dred Scott." Indeed, Representative Thaddeus Stephens (R-PA) went so far as to say that the decision was even more dangerous to the security of the Union than the infamous 1857 decision.[6] Justice Stephen J. Field's opinions in the *Test Oath Cases* would be written extremely broadly to condemn not only restrictions on legal and pastoral practice, but also disqualifications from any "office of honor, trust or profit" in the country based on past conduct. Rather than merely securing the ex-rebels' right to serve as lawyers or priests, the opinions clearly supported their attempts to reclaim government office in the nation they had tried to violently reject. And then there was the secondary holding expanding the pardon power; with this holding, the Court weighed in heavily on the side of President Andrew Johnson in his efforts to resist congressional disqualification of the former Confederates.[7]

There was nothing coincidental about Senator Johnson leaking the *Test Oath Cases* decisions in the final weeks of Senate deliberations over the Fourteenth Amendment. This marked one bold move in a much broader effort to sway not only the debate over Section Three, but the election of 1866 and therefore the pivotal moment of the struggle between Congress and President Andrew Johnson over control of Reconstruction. Immense political pressures were at play in and around the Court, generating the kind of fraught circumstances in which such a serious breakdown in judicial propriety and confidentiality could occur.

More importantly still, in the long term, Reverdy Johnson's effort to delegitimate such disqualifications succeeded. Due to the leak, from the very moment of its passage Section Three, and the system of state and federal disqualifications it capped, were already transforming in institutional and public perspectives. It went from being viewed as a moderate plan for entrusting the rebuilding

of southern democracy to loyal, integrated hands, to being perceived as a millstone of legitimated white southern grievance. Consequently, the second great opportunity for transforming southern society—through the securing of loyalist power in the state governments themselves—began to be lost with the political machinations surrounding the *Test Oath* decisions. Leaking those decisions was far from inconsequential, for either the Court or the country.

The Political Stakes: Democratic Disqualification

While "disqualification" has long been a legal term,[8] recent work in political science has developed the word into a concept, with "democratic disqualification" covering the range of different legal mechanisms used to bar existing political actors from returning to formal political power.[9] In this sense, disqualification represents something distinct from the kind of political exclusion we more typically think of, whereby classes of persons who have essentially never been admitted to formal political power in a democracy—for example women and Black Americans in antebellum America—continue to be kept from political office.

Long a focus of study for the Confederate-sympathizing school of Dunning historians,[10] the different ways in which the Confederates were disqualified from political power has attracted less attention from revisionism and its heirs, who have trended instead toward centering Black experiences and organizing in their analysis of Reconstruction politics.[11] When Confederate disqualification has received attention, it has done so in bits and pieces, with legal scholars focusing on the wartime[12] and Reconstruction test oaths,[13] expulsions,[14] statutory and common law quo warranto suits,[15] impeachments,[16] and Section Three's Fourteenth Amendment disqualifications.[17] When the focus is placed on these *specific* examples, one detrimental effect is the failure to bring a common frame of analysis to the different mechanisms used to exclude Confederates from officeholding across the entire period of the Civil War and Reconstruction. The analytical focus ends up being on the trees rather than the forest.

A more holistic analysis shows that the Union gradually built a vast and interlocking apparatus of state and federal disqualifications as the Civil War progressed. Disqualifications permeated throughout each layer of American political life throughout the War, from officeholding and voter disqualifications of Confederate abettors and draft dodgers by Nevada, Minnesota, West Virginia, Kentucky, Colorado, Idaho, Kansas, Maryland, Nevada, Oregon, the District of Columbia, New York, Ohio, Pennsylvania, Arkansas, and Missouri;[18] to other states (including California) imposing test oaths that barred Confederate-aiding lawyers;[19] to the federal purge of Maryland's legislature;[20] to the famous congressional "ironclad oath" which excluded from the federal legislature, office, bar, and juries those who had ever aided the Confederacy;[21] to President Lincoln's executive order disqualifying and disfranchising Union Army deserters.[22] Disqualifications were implemented at every level of government, from local town councils and county courthouses all the way up to Congress itself.[23]

Emerging though they did in all kinds of different forms and from many different governments and political actors, these disqualifications shared a common wartime justification—security for the Union and its adherents and the inculcation of further loyalty to the cause throughout the body politic. And whereas the Union Army and federal government also made several hundred political arrests and tried citizens before military tribunals during the war, disqualifications could be applied on a broader basis, bringing a much wider range of federal, state, and local actors into the cause of Union and Reconstruction.[24]

As open army-to-army conflict gradually came to an end, then, these disqualifications presented one of the great questions of early Reconstruction. To what extent did the Constitution permit continuing governmental efforts to bar former rebels from holding positions of political power in society?

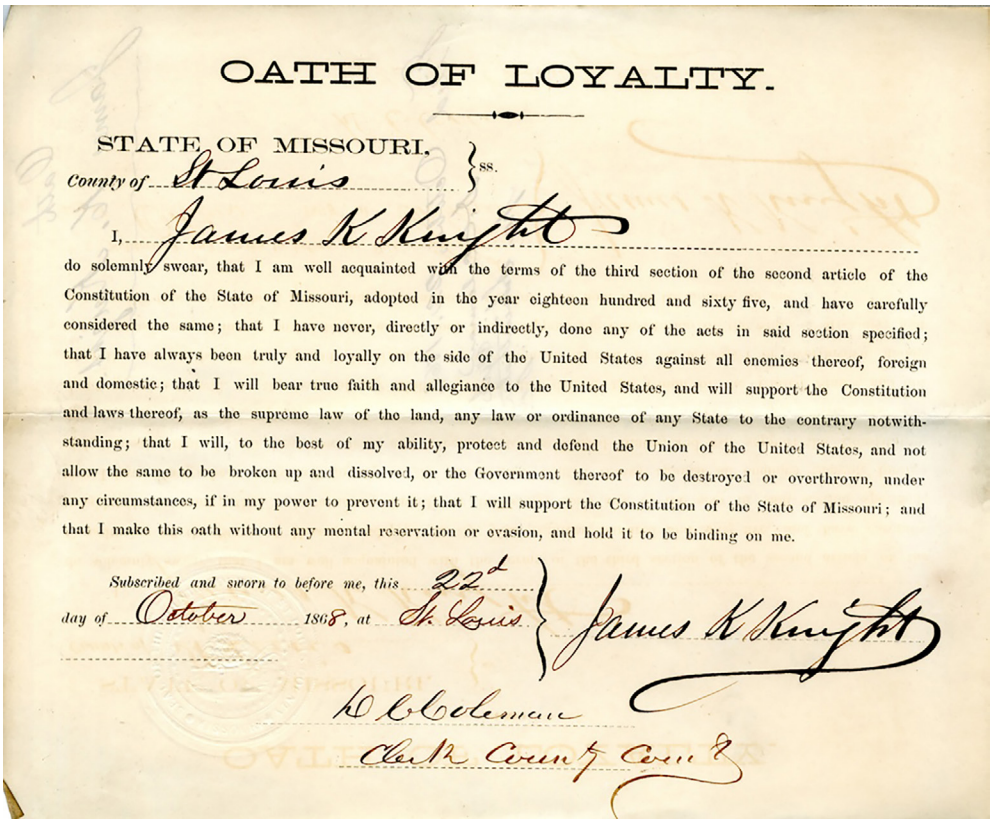
The Political Stakes: Border State Disqualification

Policies of disqualification were enacted widely throughout the Union, but it was in the border states that disqualifications reached their peak intensity. While serving as the Unionist governor of Tennessee, for instance, Andrew Johnson applied a stringent loyalty oath to remove the mayor of Nashville, as well as the city council and virtually all other municipal officers. The future president applied the same policies to Confederate-sympathizing clergymen, barring them from preaching unless they took the oath of loyalty. This is a policy that was followed elsewhere in the Union during the war.[25] And Andrew Johnson would use an even more restrictive oath to limit the membership of the Tennessee Unionist Constitutional Convention of 1864 to citizens of proven loyalties. On June 5, 1865, the newly constituted legislature formalized these restrictions, disqualifying all those who had ever "been engaged in armed rebellion against the authority of the United States voluntarily" from the franchise, except those "honorably discharged" from or serving in the Union Army.[26]

West Virginia, Maryland, and Kentucky applied similar restrictions. Soon after forming an independent state government in 1863, West Virginia imposed a strict test oath barring abettors of the Confederacy from holding office or the franchise, adding a further restriction from legal practice on February 14, 1866. Likewise, Kentucky barred all former aiders and abettors of the Confederacy from holding office or voting in the state. And in October of 1864, Maryland ratified a new state constitution with an ironclad-style oath for voters and officeholders. These states each developed significant voter registration systems, backed by election judges and questionnaires.[27]

Yet it is Missouri that went the furthest. Following years of brutal backwoods massacres and bushwhacker guerilla warfare,[28] Charles D. Drake and the radical Republican leadership of western Missouri succeeded in enacting a strict disqualification regime as part of the Missouri Constitution of 1865.[29] Promulgated to the people for ratification the day before Robert E. Lee's surrender at Appomattox, the Missouri Constitution brought many of these other disqualification policies together under one extremely strict test oath. Not only state officeholders, but voters, ministers, members of the state bar, and corporate officers all had to swear that they had never "been in armed hostility to the United States" and the "government of the State"; that they had never "manifested [their] adherence to the cause" of the nation's "enemies"; that they had never submitted to Confederate service "except under overpowering compulsion"; that they had not given aid or encouragement to persons so engaged; and that they had never left the state or been enrolled as a southern sympathizer in order to avoid the draft. Controversial from the moment of its proposal at the Convention, the provision nevertheless was highly popular among the loyalist voters of eastern Missouri and attained ratification with the rest of the Constitution in June 1865.[30]

None of these disqualification practices were unique to Missouri. However, the state did formalize a wider range of disqualifications than any other Union government. Accordingly, Missouri saw an unprecedented bloom of legal challenges. These received substantial political support from conservative Unionists like the powerful Blair family,[31] who allied with the tens of thousands



OATH OF LOYALTY.

STATE OF MISSOURI, } ss.
County of St Louis }

I, James K Knight

do solemnly swear, that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof, as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the Government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.

Subscribed and sworn to before me, this 22d day of October 1868, at St Louis } James K Knight

H B Coleman
Clerk County Court

Missouri formalized a wider range of disqualifications than any other Union government. Accordingly, Missouri saw an unprecedented bloom of legal challenges. Two of the three 1866 Supreme Court *Test Oath Cases* emerged from those challenges. This is the loyalty oath of James K. Knight of Missouri, County of St. Louis, signed October 22, 1868.

of disqualified ex-Confederates against the state constitution. Two of the three 1866 Supreme Court *Test Oath Cases*—the subject of Reverdy's leak—emerged from challenges to this constitution, brought respectively by a lawyer and a Catholic priest who had been barred by Missouri officials from legal and pastoral practice due to their known Confederate sympathies and refusals to take the oath. These were the cases of *Missouri v. Garesché*[32] and *Cummings v. Missouri*.[33]

These cases heralded a much broader wave of disqualification challenges. As *Garesché* and *Cummings* were working their way through the state courts, Missouri conservatives and ex-Confederates brought further challenges specifically to the political disqualifications regarding voting and officeholding. The conservative former Union General Francis Blair, Jr. even brought his own challenge to the voting restriction based on his argument that he could not honestly take the test oath due to his wartime rejection of secessionist Governor Claiborne Fox Jackson's Confederate pretender government.[34] These challenges to the state's political disqualifications resounded throughout the South, with the Missouri cases echoing first in similar suits brought in West Virginia[35] and Tennessee.[36] Thus, *Garesché* and *Cummings* came to the Supreme Court not simply as a limited challenge to the application of test oaths to professional practice but as the spearpoint of a much more sweeping

challenge to the fragile system of loyalist control across the region.[37]

Electoral Stakes

Claims that loyalty oaths were unconstitutional ran headlong into the Republican Reconstruction program, which looked to rely heavily on political disqualifications.[38] As both Missouri's ratification of the 1865 Constitution and West Virginia's February 1866 extension of disqualification to the state bar showed, there was little sign that the governments of the Union would soon bring their disqualification policies to an end with the surrender of the remaining largescale Confederate armies.

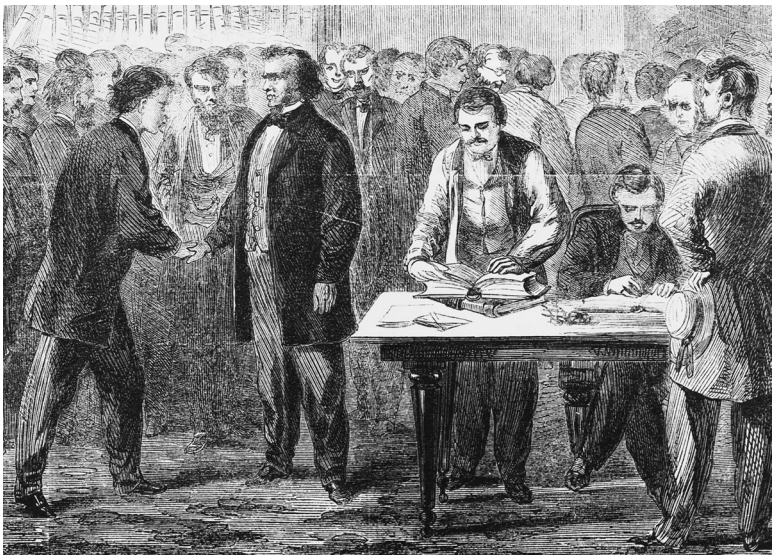
Instead, both congressional Republicans and the vulnerable Republican parties of the border and southern-occupied states were gripped by a great fear. Readmission of the former Confederates and their state governments to political representation would return the "Slave Power" planter class to its longstanding antebellum position of political domination—and not only over vulnerable southern Black and loyalist communities. Bolstered by the support of both northern "copperhead" Democrats and a Thirteenth Amendment that had added the full Black population to counts of congressional representation without securing Black suffrage, southern Democrats openly plotted to extend their ascendancy to Congress itself. What loomed was the very real possibility that the rebel leadership could reverse the gains of a war won through "bullets" and Union sacrifice by achieving a superiority in "ballots" gained through manipulating the exclusion of the Black vote.[39]

Another Threat to Radical Reconstruction: The Presidential Pardon

President Andrew Johnson contributed significantly to these fears. Following President Lincoln's death on April 15, 1865, and his own ascension to the presidency, Johnson soon began to pivot sharply away from his wartime reputation for making "treason odious." By enacting largescale amnesties of the Confederates, he not only brought an end to the first great opportunity for bringing significant social change to the South; that is, through the reappropriation of confiscated planter property to the freedmen who had worked the great estates as slaves.[40] His amnesties also looked likely to secure ex-Confederate officeholders against disqualification and other Unionist interventions. For example, in November of 1866, the governor-elects of Mississippi and South Carolina sought pardons from President Johnson immediately following the elections, as they feared removal and potential arrest and confiscation of estate otherwise.[41]

By making the pardons of the wealthiest and most politically influential ex-Confederates contingent upon special application to him through his favored provisional governors, Johnson achieved a powerful degree of influence with the southern elite, whose "tangible obligations to the Executive and the nation" he might leverage to his re-election. Witnesses before the congressional Committee on Reconstruction reported that Johnson's pardons had only "drawn" pardoned rebels "to President Johnson personally, and to the democratic party," while failing to bring them "one whit closer to the government . . . considered apart from the person of the Executive." Indeed, southerners "mistook lenience as evidence of weakness and not as evidence of [national] generosity." Before they had "appeared crushed and penitent"; but once they obtained their pardons "most of them became arrogant, aggressive, and abusive of the national government," something that was especially true of the "wealthy class" of whom Johnson required "special pardons."[42]

Johnson extended hundreds of pardons to other state officeholders as well, solidifying ex-Confederate and conservative control over



After ascending to the presidency in April, 1865, Andrew Johnson soon began to pivot sharply away from his wartime reputation for making "treason odious." He did this by, in part, extending hundreds of pardons to other state officeholders, solidifying ex-Confederate and conservative control over provisional state governments. This image of Johnson pardoning rebels at the White House appeared on the cover of *Harper's Weekly* in October 1865.

the provisional state governments. Unsurprisingly, these administrations soon distinguished themselves by imposing a "second slavery" in the form of the Black Codes, whose prohibitions on Black testimony, travel, and employment autonomy, as well as abuses toward white Unionists, provoked outrage throughout the North just as the thirty-ninth Congress prepared to open in December 1865.[43] Moreover, the Johnson administration's policies not only bolstered the position of ex-Confederates within the provisional governments. They also threatened any future disqualification system that Congress might require in the process of reconstituting new state governments for readmission.

For one, it remained entirely unclear how the presidential pardon might interact with federally imposed disqualifications. Did a pardon excuse a prospective officeholder or voter from taking the "ironclad" oath or from other federal means of disqualification? Lincoln's first attorney general, Edward Bates, had determined that "[b]y a pardon and amnesty . . . not only is the punishment of that personal guilt remitted, but the offense itself is effaced," ostensibly returning pardoned rebels to the same state of political existence that they had occupied prior to their rebellious actions. Congressional Democrats expanded upon this maximalist view of the pardon, arguing that the oath should not be required of any federal juror, lawyer, officeholder, or congressional representative that had received a presidential pardon.[44] And even if this maximalist version of the pardon (which reached beyond punishment to cleansing away the very legal fact of one's participation in an offense) was rejected, surely any restriction denoted a "punishment" would be reached.[45]

It was on this theory that *Ex parte Garland*, the third of the three *Test Oath Cases*, arose.[46] While Garesché and *Cummings* had challenged the Missouri Constitution's professional disqualification provisions, Augustus Hill Garland attacked the similarly retrospective federal ironclad oath as it applied to

members of the federal bar. Garland was a leading Arkansas lawyer and prominent ex-Confederate Senator who would later serve as United States Senator and Attorney General for Grover Cleveland, the first Democratic President since James Buchanan. As a leading Arkansas citizen and initial opponent of secession, Garland sought readmission to the federal bar based on his special pardon from President Andrew Johnson and the claimed unconstitutionality of the oath.[47]

Meanwhile, in the same last weeks of 1865 that the Court accepted *Ex parte Garland* and the other *Test Oath Cases* for review, dozens of ex-rebel Congressmen-elect began to arrive in Washington, D.C. Working on the maximalist theory of pardon, the southern provisional governments sent a slate of ex-Confederate delegates to Congress, including ten Confederate generals, nine Confederate congressmen, and even the Vice President of the Confederacy, Alexander H. Stephens.[48] What portended then was an alliance struck between conservative Unionists like Andrew Johnson and the southern political elite, united in defense of whites-only government through opposition to the essential combination of policies that could still challenge it: ex-Confederate disqualification and Black suffrage.[49] Such an alliance could easily reach a veto-proof minority if not a majority itself, hamstringing any possible movement against the southern provisional governments and their Black Codes.[50]

Famously, radical and moderate Republicans came together to break the momentum of Johnson's provisional governments by refusing to seat the southern delegates in December of 1865, thereby effectively disqualifying the provisional state governments themselves, rather than individual delegates, from the political representation they claimed. Yet at best this desperate measure could only protect Congress itself from the intrusion of rebel delegates and their program of renewed white supremacy and payment of Confederate debts. It did nothing to clear rebels from the states, where most of the governance that directly affected people's lives took place. The Union Army had exercised its military authority on an ad hoc basis to remove, arrest, and replace civil officials throughout the occupied South during the period of open warfare. But Congress would have to build and sustain a more comprehensive and enduring program of disqualifications if it hoped to secure civil rights for and political empowerment and self-protection of the freedmen and their Unionist allies throughout southern communities.[51]

Thus, as 1866 opened and as the Johnson Administration became ever more hostile to any further movement on Reconstruction, it was clear that some formalized system of southern disqualifications would be essential to secure congressional policies. Congress had one powerful disqualification tool at its disposal in the federal ironclad oath. And the states, especially the border states, offered examples of how such disqualification mechanisms could be used to construct a broader system of electoral administration for the South, with "registry laws" and systems for checking officeholder qualifications.[52] But could those disqualifications be sustained?[53]

Is Disqualification Constitutional?

Significant questions remained as to the viability of these disqualifications, including but also stretching beyond those surrounding the presidential pardon. Were the state and federal test oaths restricting access to the vote, political positions, jury, bar, and pastorate legitimate regulations of the suffrage, officeholding, and the professions? And did they stand together, or did some sufficient basis exist for distinguishing between the different targets of disqualification? Or were they politically-enacted punishments, and thus presumptively unconstitutional "bills of attainder" that criminally punished a person

through legislative action, or perhaps "ex post facto" laws that created or changed the penalties for a past criminal offense? Urged initially in the courts by *Garland* and *Cummings* co-counsel, Reverdy Johnson, these arguments soon echoed in the halls of Congress, pushed forward again and again by Johnson and other Democrats.

What Senator Johnson was orchestrating, in other words, was not merely a set of legal cases, but a multi-pronged and multi-targeted campaign across different fora of constitutional politics. And not just in Congress and the courts, but in the elections themselves as well. After all, Republicans in and out of Congress faced yet another issue: once persons were legally disqualified, by what means could their exclusion from these positions of power be maintained against perjury? The ever-present Johnson intensified this concern with his other widely publicized argument that it was impossible to perjure oneself morally or legally by means of an "unconstitutional oath."

Following Reverdy Johnson's example, Democrat political leaders and newspapers actively encouraged ex-Confederates to take such oaths, even offering specific instructions and justification for how to pressure their way past registrars and election judges. Without firm control over the administration of these oaths in different localities, it was entirely possible for former Confederates to force their way back into elections and officeholding by means of faked "Reverdy Johnson oaths," especially as the question of their constitutionality hung in the balance.[54]

Perhaps most important of all, would the public be willing to accept that these laws were constitutionally legitimate? Or would it be difficult (or impossible) to convince the populace that these laws were something more than a wartime necessity? In 1866 it was clear that the "American people do not intend to give up all that they have gained by the war—and they do intend that loyal men should govern the country." And it was far from inevitable that a majority of the justices would view these disqualifications laws as legislated criminal punishment. There was certainly sociopolitical precedent for viewing the laws as nonpunitive, intended only to secure "incapacitation" of a recognized public threat rather than retribution.[55] But would this view prevail, especially if a leading institution of constitutional legitimacy like the Supreme Court called the constitutionality of the oaths into question?[56]

In early 1866, Congress began to craft a disqualification regime that might extend beyond the readmission of the southern states to congressional representation. This regime would find three main points of basis in American law. The first would be within the disqualificatory provisions of the constitutions of most, although not all, of the southern states. As has been described, the border states were already pioneering this form, which would be much replicated under congressional Reconstruction. A second, federal foundation would be found in Congress's continuation of the 1862 ironclad oath for federal jurors, officials, and officers, which by 1864 had been extended to senators and representatives as well.[57] Finally, a third basis would be established in the Constitution itself. Section Three of the Fourteenth Amendment would apply interfederally, barring ex-Confederates who had held state or federal office before the war from both state and federal officeholding.

The *Test Oath Cases* took aim squarely at the first two legal foundations for Confederate disqualification. Yet they also targeted its third basis, in Section Three of the Fourteenth Amendment. If ex-Confederates could establish the basic unconstitutionality of disqualification as found in its federal statutory and state constitutional forms, then the political legitimacy of Section Three could itself begin to crumble, reduced from a necessary and legitimate political safeguard to a merely punitive partisan vengeance upon the South.

Section Three of the Fourteenth Amendment

The congressional framers of the Fourteenth Amendment were fully aware of the threat posed by the *Test Oath Cases*. They knew it was the leading instrument in the effort to recharacterize political disqualification as unconstitutional punishment. Again, the cases were submitted to the Court in December of 1865 just as the thirty-ninth Congress opened and made its exclusion of the southern delegations. The Court heard the cases in April of 1866, in the same weeks that the Committee on Reconstruction published its first draft of the Fourteenth Amendment (including Section Three), alongside a further federal officeholding disqualification bill. And Congress was soon echoing with the same arguments that Reverdy Johnson had posed in the Court, that such disqualifications were in violation of the original Constitution's prohibition on *ex post facto* criminal punishments and bills of attainder.[58] As Senator Daniel Clark (R-NH) would point out, "[e]very Democrat in Congress and out of it is for the [oath's] repeal." They "deny its legality [and think it] a nullity, and that if required to take it the verist traitor could do so and yet escape the pains and penalties of perjury, [as] Rebels all say that it is no oath, not being warranted by the Constitution."[59]

Under the pressure of conservative attacks, the Senate framers chose to craft Section Three as a self-consciously moderate provision, one that abandoned the initial push of House leadership to disfranchise all members of the secessionist army and governments from all federal elections until July 4, 1870. Instead, the Section would only restrict access to officeholding, albeit at both the federal and state level. The prohibition would be removable only by a two-thirds vote of each house, and it would only stand against those persons who had sworn an official oath of loyalty to the Constitution prior to their having "engaged in insurrection or rebellion against the [United States] or given aid or comfort to the enemies thereof."[60]

With this wording, the Senate Framers sought to tailor constitutional disqualification away from covering all the "misguided masses of the South" and toward the specific persons whom in Republican party ideology were the most significant continuing threat for their demonstrated treachery and continued "weight" in Southern society. Those persons being the "Slave Power" leadership class who had controlled most political positions in the antebellum South, who had betrayed prior oaths of loyalty to the Union, and who had had the greatest role in starting the war in the first place.[61]

Yet despite its comparative moderacy of approach, Section Three was stalked by the same punishment question as threatened the more expansive state and federal test oaths. In both the House and the Senate, Republicans repeatedly denied that either the test oath or the Fourteenth Amendment constituted *de facto* punishment of the rebels. Instead, Republicans insisted again and again that there was no criminal punishment, only a merited "safeguard" for the Union against rebels.[62]

"[I]n any other Government on earth," the Senate framers noted, the Confederate leadership "would be hung or banished, and their property would be confiscated." Indeed, some Republicans had previously urged that targeted treason prosecutions and criminal punishment of "the most prominent and most wicked" be sought as an additional deterrent measure alongside the more general and nonpunitive "safeguard" of disqualifications.[63] But that kind of program of substantial punishment for treason was already well on its way to being fully surrendered by the fecklessness[64] and political opportunism of the Johnson administration. Now, Congress "only propose[d] that, having attempted to ruin, [the Confederate leadership] shall

not now rule."[65] Despite being the major cause of more than "250,000" Union military deaths, rebel generals like "Lee, Johnston, Wade Hampton, [and] Moseby" would not be punished—and not even constitutionally removed from their rights of suffrage—but only politically disarmed from harming the Union and its loyal citizens further through control over the reins of state power. Section Three would remove their ability to hold office. They would be allowed to "remain in the country, retain their property, and enjoy with us the equal protection of the laws, but they shall not govern loyal men."[66]

The Framers admitted that disqualification was sometimes included by both the states and Congress as an additional penalty attached to criminal punishments. But they denied that this was the purpose in this case, where disqualifications for disloyalty stood separately as a regulation of the qualifications of officeholding. Instead, the provision was defined by its "security" purpose. As Senator Waitman T. Willey (R-WV) declared:

> I will state what I understand to be [the] purpose [of this amendment]. It is not to punish the men who engaged in the rebellion for the crime which they have committed . . . but, not being penal in its character, it is precautionary. It looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense. It is designed to prevent a repetition of treason by these men, and being a permanent provision of the Constitution, it is intended to operate as a preventive of treason hereafter . . .[67]

Indeed, Section Three was explicitly an abandonment of punishment in favor of other "safeguards" for peace. "Here, as in every other proposition contained in this amendment, nothing is demanded for vengeance, but everything for security." The "guilt or innocence of the party was not the matter at issue," Willey insisted, for "we [a]re not trying them for their crimes, but we [a]re providing security for the future peace of the country."[68] Senator William Windom (R-MN) would build on Willey's argument, claiming:

> We insist upon nothing for revenge; no blood, no executions, no banishments, no confiscations. We ask no indemnity for the past, for that is impossible. The dead cannot be revived; broken hearts cannot be healed. The horrors of Andersonville and Belle Isle can have no atonement in this world. But we do demand security for the future. In this, and this alone, consists our offense.[69]

And beyond its non-punitive security purpose, the form of the amendment was solely civil in its application rather than criminal. As Senator John B. Henderson (R-MO) explained, criminal "punishment means to take away life, liberty, or property [which] are absolute or inalienable rights . . . [and which] ought never to be taken away without due process of law." By contrast, the Amendment and other disqualifications were only "act[s] fixing the qualifications of officers." And since "[o]ffice is the creation of Government," the "right" to it was "not absolute but conventional," and subject to civil not criminal law. "The Government created it and [therefore] the Government can take it away" without incurring the restrictions of criminal law. Indeed, the "American courts," Henderson pointed out, had never seen it "as a punishment when conventions and Legislature deprived incumbents of their offices." Rather, as a house commentator contended, the practice of disqualification was longstanding under the federal Constitution, with the constitutionality of the continuing state disqualifications of British loyalists effectively affirmed twice in federal law by Congress in both the Washington and Jefferson administrations.[70]

Rather than presenting unconstitutional and illegitimate punishments, Section Three's proponents argued, disqualifications offered hope:

> For if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control it, and in that event the long-anticipated political millennium, in which the secession lion and the Democratic lamb shall lie down together on downy beds of power, will be as far removed as ever.[71]

Paired with Black suffrage in the South, Congress could block the avowed plan of the "Traitors [to] not only vote twice, once for themselves and once for the negro, but [to] also [access] the highest official positions in the Government they have tried to destroy." While not criminally "punished" for their treason, such men would at least "not make or execute laws for loyal men" and especially not for the much-praised "Black soldiery" who had saved the Union war effort.[72]

Continuing "Traitor" rule had real negative effects on the ground. The year since Appomattox had presented "indubitable evidence" of continued southern intransigence, with,

> their lamentations for the 'lost cause;' their insults to the national flag; their toasts and public demonstrations in honor of the most obnoxious leaders of the rebellion . . . their mobbings of black loyalists . . . their murders of Unionists, and destruction of their dwellings, schoolhouses, and churches . . . [and] their reënactment of vagrant laws and slave codes for freedom [as a] reëstablish[ment of slavery] in fact and with increasing cruelty.

The Committee on Reconstruction had already taken hundreds of pages of testimony as to these southern abuses.[73]

Constitutional disqualification therefore presented a real, lasting model of response, one that could endure against changes in Congress, the Court, and presidency while capping the wider-sweeping statutory and state-based disqualifications. In a nation still profoundly committed to federalist principles of state rule and with a wary view of sustained federal power, rebel disqualifications offered the possibility that the local loyal could predominate in state officeholding. From there, they could apply the well-established institutions of state power—the courts, militia, and state criminal law—to breaking the long fever of rebel violence, reducing the need for direct federal intervention, even as the congressional remedy incentivized repentance as a path for acceptance back into the political fold.[74]

This, then, was the world of disqualification politics into which the *Test Oath Cases* dropped. As congressional Republicans looked toward fully implementing their disqualification program in 1867, they hoped for democratic legitimation from the public in the November elections. And they feared the Court's intervention on the side of Andrew Johnson and his emerging, self-avowedly white supremacist coalition with former Confederates.

The Justices Intervene

Chief Justice Salmon P. Chase had sought to limit the Court's exposure to the turmoil over disqualification, especially in the leadup to the pivotal elections of November 1866. Beginning with the spread of Johnson's leak in late May of 1866, however, the Court was pulled inexorably into the political maelstrom. Finally, at the turn of 1867, Justice Field's narrow majority produced a pair of politically damaging yet legally ambiguous

decisions, whose consequences would play into the unravelling of Section Three and, in time, the rest of Reconstruction's disqualification order.

Chief Justice Chase's efforts to limit the immediate political effect of the *Test Oath* decisions were hardly the result of any strong commitment to an apolitical judiciary. Indeed, the Republican Party founder and former Treasury Secretary was known by nearly everyone in Washington but himself to be an inveterate seeker of the presidency. As his friend and fellow Justice Miller would later put it, it was this all-consuming political "ambition" that eventually "warped, perverted, [and] shrivelled" his "warm heart," undermining both his indisputable talents as a jurist and statesman and, in the leadup to the 1868 election, his decades of proud commitment[75] to the cause of Black freedom.[76] Chase had succeeded Roger B. Taney to the position immediately following the failure of his second, 1864 attempt to secure the Republican presidential nomination. Throughout 1866, Chase remained primarily allied with the Republicans, especially in his well-publicized championship of Black suffrage, but he would soon begin his shift toward seeking the Democratic nomination in 1868.[77]

In April of 1866, however, the Chief Justice wanted to avoid a direct confrontation with the Republicans of Congress, especially in the leadup to the November elections. After initial reluctance, especially over Section Three, Chase had come to support the Republican Party's core Fourteenth Amendment electoral plank.[78] He therefore almost certainly wished to delay any judicial challenge to the disqualifications that undergirded both Section Three and the broader Republican Reconstruction program.

It was that political impulse which seems to have led Chief Justice Chase, working together with the other eventual dissenters,

The Chase Court (1864–1873) heard the *Test Oath Cases*. This first group photograph taken of the justices that comprised that Court included Clerk of the Court D.W. Middleton (standing at left). Justice Stephen J. Field, who wrote the controversial opinions for the Court in the *Test Oath Cases*, is seated furthest right.

Justices Miller, Noah Swayne, and David Davis, to seek a postponement of the decisions in the *Test Oath Cases* from the March 1866 Term until the December Term, after the pivotal midterm elections. That choice to delay was only narrowly secured. Justice Field had pushed to resolve all three of the decisions that Term. However, as the judicial Conference bogged down in "hours" of debate over *Ex parte Garland*, Field "at last, moved to continue th[at] case till the next term" so as to at least settle *Cummings* and *Garesché*. Justice Miller, however, "expressed the opinion that as the first [Test Oath] case had been continued these should be also." Chase supported this view. With the weight of the chief justice's opinion on their side, the future dissenters then managed to pressure Justice Robert C. Grier to join them in voting for postponement of the remaining *Test Oath Cases* (although, that vote was itself nearly undone on the last day of the Term).[79]

The Leak

Reverdy Johnson's leak undermined this small victory of Conference maneuvers. Coming a bare ten days before the Senate's passage of the Fourteenth Amendment and amidst fierce ongoing debate over both Section Three and the federal test oath, it seemed clear that the leak was calculated to shake the legitimacy of Section Three and the broader system of disqualifications. Both the Republican framers and their Democratic opponents knew full well that the "test oath and this bill [of amendment] stand constitutionally upon exactly similar foundations." An attack on the legitimacy of the test oath disqualifications could therefore not help but target the Amendment as well. Indeed, Reverdy Johnson and other Democrats directly referenced the Court's leaked decision in debates over both Section Three and the test oath, presenting it as a common basis to reject both policies. Widely reprinted in newspapers throughout the nation, the leak marked a well-aimed thrust in the electoral struggle over an essential plank of both the 1866 Republican platform and the party's broader program for southern reconstruction.[80]

Upon reading one of the many news reports of the leak in the first days of June 1866, Justice Miller swiftly posted it to the chief justice, along with his analysis of the situation. In particular, Miller tied the Court's internal contestation over the *Cases* to the political situation within and beyond Missouri. The "political contest" in that state between "the radicals and their opponents; the latter including every returned rebel in the State" had reached an existential point, one centered on the question of whether or not the disqualifications implemented by the state's "stringent [test] oath" were or were not unconstitutional punishments. The national "parties" themselves perceived that the contest over this question would "settl[e] the future of that state for years to come, not only in its political relations but as affecting the personal safety of the respective parties."

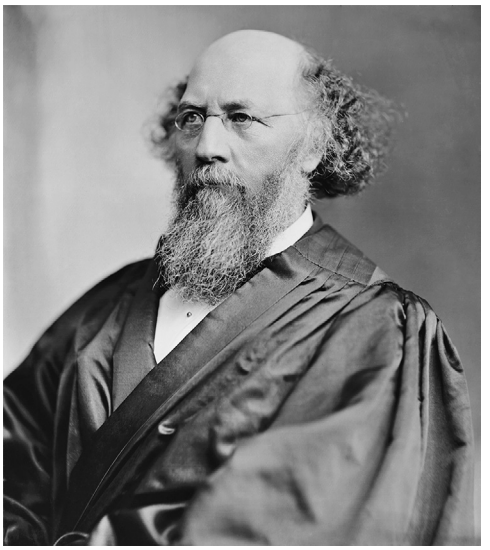
Senator Reverdy Johnson (D-MD) leaked the decisions in the *Test Oath Cases*. He had originally voted in favor of the federal test oath for lawyers before later decrying it as unconstitutional. He had also served as John Sanford's attorney before the Supreme Court in claiming ownership over Dred Scott.

Indeed, this "[u]ndoubtedly . . . was the purpose arrived at by the motion of Judge Field, that we should decide this case" while allowing the temporary postponement of the "congressional oath case."[81]

And what was true of Missouri could easily come to be true of the rest of the border state disqualifications, and from there those of the rest of the nation. Miller feared that Reverdy Johnson's "assertion; that the Sup. Court of the United States has decided it to be in Conflict with the Constitution of the United States" was already beginning to "tell[] with fatal effect on the radicals" in Missouri. Its confirmation by the Court could threaten the political legitimacy of disqualifications more broadly. Justice Miller had long supported disqualification measures like the test oaths, not as a means of punishment or "gratification of resentment for the crime," but as a reasonable and indeed necessary way for a state to keep those who had "misled" others "to ruin" from "exercis[ing any] legitimate influence on popular opinion." Like most other Republicans, he "believe[d] in the policy of committing the political power of the rebellious states to other hands than those which have caused the rebellion."[82]

Now, Justice Miller clearly wanted to deny the accuracy of the leak—released by a man whom he privately loathed as an "old political prostitute . . . hated by all loyal men worse than a thousand times than they hate many honest rebels." But he feared that "the story . . . might be confirmed by" Senator Johnson and his co-conspirators.[83]

Chief Justice Chase wrote back almost immediately with his own fears that five justices (implicitly those who would soon form the Court's majority, Field, Grier, Clifford, Nelson, and Wayne) had come together in a "caucus or conference separate from the other Judges & with the intention of controlling the disposition of the causes." Certainly, the signs surrounding the eventual opinion-writer, Justice Field, were suspicious. Not



Stephen J. Field rose to prominence in California as a deeply conservative, albeit firmly Unionist Democrat. He was elected to the California Supreme Court in 1857. Six years later, President Abraham Lincoln nominated Field to a newly created seat on the Supreme Court of the United States.

only was Field the prime mover in pushing for the decision to be decided in April. He had also risen to prominence in California as a deeply conservative, albeit firmly Unionist Democrat. Indeed, their shared origin in the Democratic Party was a significant bond between him and Chief Justice Chase, who considered Field his closest friend and most respected intellectual peer on the Court. Nor was there only motive, there was also an obvious means and opportunity for the leak—David Dudley Field, the other lead counsel in *Cummings* alongside Senator Reverdy Johnson, was Justice Field's elder brother (as well as a famous legal reformer).[84]

Possibly recognizing the suspicious nature of the circumstances, Justice Field wrote directly to his friend, the chief justice, assuring him that he "read [the report] with amazement" and wholeheartedly condemned the "conduct of [Reverdy] Johnson" as not only "indefensible" but "merit[ing] severe rebuke." With the clear disqualification connection

between the *Cases* and the Fourteenth Amendment likely in mind, Field immediately pivoted to discussing "[t]he proposed amendments to the Constitution, prepared by the Committee on reconstruction," assuring Chase of his support. Chase did not immediately reply, "hardly knowing what to say," as he put it to Justice Miller. He would not make a direct accusation of his close friend, even while he cited this same correspondence to Miller as they discussed the possibility of a secret caucus.[85] And other options for the leak were certainly possible.[86]

Yet as the November electoral results rolled in, Chase could not help but recognize how questions as to the legitimacy of disqualification threatened the Republican grip on national politics. Relieved though he was by the party's overall victory over Andrew Johnson-aligned conservatives, the chief justice would still write to a friend about his worries about the consequences of the leaked case. Chase was sure that Reverdy Johnson's home state of Maryland in particular had been lost to the Democrats due to the senator's machinations against the disqualifications.[87] The "loose [voter] registration" allowed by Maryland's Governor Thomas Swann,[88] he declared, "and the looser morality taught by Reverdy Johnson that the oath of loyalty is unconstitutional and, therefore, may be taken falsely with a good conscience, contributed largely to the result—indeed secured it at this time."[89] If the Court gave further credence to this position, then ex-Confederates throughout the South were likely to follow the pattern of Maryland, pushing their way back into voting booths and offices as the state and national executives stood by, uncertain as to, or lacking the legal requirement and power to actually enforce the oaths.

The Justices Decide

At last, in the two months immediately following the elections, the Court released its two majority opinions[90] in the *Test Oath Cases*. The opinions came mere weeks after the justices' other bombshell opinion in *Ex parte Milligan*, where the Court had united in denying the validity of a federal military tribunal trying an American citizen in Illinois without prior authorization by federal statute. The unnecessarily broad five-justice majority opinion written by Justice Davis had been lambasted in the Republican press, as it denied any capacity not only of an unauthorized executive, but of Congress itself to organize any military tribunals of citizens in states where the judiciary deemed the regular courts sufficiently open. Thus, the Court was already being pulled into direct conflict with Congress when the further "thunderclaps" of the *Test Oath Cases* were heard.[91]

Reverdy Johnson, Montgomery Blair, Augustus H. Garland, David Dudley Field, and the other co-counsel had put forward a wide range of arguments on behalf of the petitioners, including General Francis Blair Jr.' s claim that Missouri Unionists had themselves violated the terms of the state test oath, given their resistance to the state's secessionist governor.[92] Yet their principal bill of attainder, *ex post facto*, and presidential pardon-based arguments had all come premised on a common commitment to the idea that the tests oaths—in effect if not in "form"—necessarily constituted criminal punishment through their "deprivation of political and civil rights."[93] And it was this principle that Field came to endorse in a broad and sweeping way:

> The theory upon which our political institutes rest is, that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that *in the pursuit of happiness all avocations, all honors, all positions are alike open to every one* . . . Any deprivation or suspension of any of these

> rights for past conduct is punishment, and can be in no otherwise defined. Punishment not being, therefore, restricted . . . to the deprivation of life, liberty, or property, *but also embracing deprivation or suspension of political* or civil rights, [the] disabilities prescribed by the provisions of the [Congressional Ironclad Act and] Missouri Constitution [are] in effect punishment.[94]

In this manner, Justice Field collapsed the boundaries that typically separated criminal punishment as a distinct mode of state penalization from other forms of state-enacted limitations. This was true as regarded the core circumstances of the cases themselves. For instance, Justice Miller's dissent asked, what separated the circumstances of *Garesché* and *Garland*—where a lawyer refused to swear an oath that he had never "voluntarily borne arms" or "voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government" before being admitted to the bar—from a "law . . . which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath"? Under Field's reasoning, the dissent argued, such a law "would result in punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before." Yet "civil proceedings" of this kind, "which affect private rights retrospectively," had already been found allowable by the Marshall Court in *Watson v. Mercer*.[95] The attorney who refused to swear such an oath did not thereby establish their guilt for criminal prosecution, they only surrendered the privilege that the state had granted them to practice law.[96]

Moreover, Field's opinions assumed that the addition of the test oath as a prerequisite for legal practice must necessarily be understood as punitive in intent and function rather than as establishing a legitimate qualification of demonstrated loyalty. "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession" but to the Court, "the acts" referred to by the oaths appeared to the Court to "have no possible relation to their fitness for those pursuits and professions."[97]

Yet how could this be so, asked the dissent, when the "continuance of the right" of attorneys[98] to practice before a court was widely held to a standard of "good moral character," one that could be and often was overthrown "upon evidence of bad moral character, or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications"? What else was this demonstration of basic "loyalty" to the state but a reasonable showing of moral character, that one had not supported that same state's (and the nation's) violent overthrow? "History show[ed]," after all, that "for ages past, the members of the legal profession have been powerful for good or evil to the government," being "by the nature of their duties, the moulders of public sentiment on questions of government," the principal aides in "the construction and enforcement of the laws" and the body from which "are necessarily selected the judges who expound the laws and the Constitution." To "suffer treasonable sentiments to spread here unchecked, [wa]s to permit the stream on which the life of the nation depends to be poisoned at its source." Indeed, "if all the members of the legal profession in the States in insurrection had possessed the qualification of a loyal and faithful allegiance" who could doubt that "we should have been spared the horrors of the Rebellion"?[99]

It could not be the mere permanency of the restriction that made it a punishment. After all, it was certainly *not* true that "every one" could serve as a member of the bar, or as a local justice of the peace, or as president of the United States for that matter. Is

the natural-born citizen clause thus a "punishment to all those naturalized citizens who can never attain that qualification?" the dissent asked. Are "the qualification" of "nearly all the States . . . that the voter shall be a *white male* citizen . . . a punishment for all the blacks who can never become whites"? It was well-known that several of the states had previously afforded Blacks the right to vote before instituting whites-only restrictions. Had that disqualification been unconstitutional punishment?[100]

And if all of this was true for lawyers, how much truer should it yet be for state and federal officeholders? Surely, the state had a reasonable interest in requiring that its own agents swear that they had not previously tried to violently overthrow the state? Yet with its repeated language embracing "[t]he deprivation of any rights, civil or political," "[d]isqualification from office," and a "debar[ment] from the offices of honor or trust," Field's opinion collapsed the different targets of the state and federal test oaths together. Although the cases themselves had no application to any "political" rights of the petitioners, the Court went out of its way to sweep political disqualification into its decision.[101]

Worse, Field's opinion was written in a way that suggested that service with the Confederacy against the Union could not possibly constitute a real demerit of "character" or trustworthiness, but only a past difference of opinion. All that was properly required for admission to the state or federal bars was that an attorney supply sufficient "evidence of their possessing sufficient legal learning and" that "their private and professional character is fair."[102] According to the majority, one's support for a violently treasonous cause had no bearing on that kind of "character," so narrowly drawn, and against the constitutional authority of Congress to "ordain and establish" and otherwise regulate the "inferior courts" of the federal judiciary as it so chose.[103] And any limitation placed upon it then became a meritless, vengeful punishment.

Understanding Justice Field's reasoning

Why then did Field draw such a broad definition for "punishment" against such a narrow bound for legitimate considerations of character? Beyond the background of national party politics that we have already covered, Field's personal political experience also bears mentioning. In 1849, an up-and-coming young lawyer named Stephen J. Field had himself been disbarred and imprisoned by a partisan California district judge for what Field took to be mere reasons of "party . . . prejudice" and "personal vengeance." After multiple *habeas* petitions and other legal proceedings—not to mention a gunpoint standoff between the judge's sheriff and the county judge that ordered Field be freed—Field finally managed to get the state supreme court to overturn that disbarment. Seventeen years later, Justice Field directly alluded to these events in his *Ex parte Garland* opinion, citing the same page of his own California Supreme Court decision[104] that itself relied solely on the precedent set in his own disbarment case.[105]

It is clear that this episode—whose explanation takes up an extensive part of his autobiography[106]—continued to trouble Field throughout his legal career. The months of disbarment and disputes with the judge had "ruin[ed]" his previously prosperous early legal practice in California. He undoubtedly experienced his disqualification from the state bar as a vengeful political punishment, even as it took place in antebellum circumstances that were far removed from those present in the border states and the South in the immediate aftermath of army-to-army conflict. Indeed, throughout his long judicial career Field would continue to fiercely oppose the use of anything short of "presentment or indictment of a grand jury" in the

disbarment of attorneys—even one who literally led a lynch mob to break into the local jail and hang a Black man before the steps of a federal courthouse.[107]

Additionally, Field would have known that many of his former colleagues among the lawyer leadership of the California Democratic party had withdrawn from the state during the war, due to their own refusal to take that state's test oath, debilitating a once-dominant political organization.[108] That provision had been upheld by the California Supreme Court in *Cohen v. Wright*, decided in July 1863, a mere two months after Field had left his position on that court to take up his appointment to the Supreme Court of the United States.[109] Now, Field had the chance to draw a stark line against such practices.

In any case, once this "punishment" was found, the rest of the Court's opinion could then proceed to identifying the test oaths as a "bill of attainder" and "ex post facto" as well as making them removable by means of pardon. Much scholarly debate already exists over each of these individual characterizations, each of which itself stretched the legal category involved beyond traditional common law definitions.[110] Yet each of these moves depended upon the first, fundamental characterization of disqualification as punishment. This, as the dissent recognized, was "the fatal vice in the reasoning of the majority . . . this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime."[111]

Consequences

Scholars have correctly noted that the *Test Oath Cases* came to have only a limited immediate impact in terms of Supreme Court caselaw. The reason for that is simple. Justice Wayne, one of the five justices in the majority, died in July of 1867, before the wave of challenges specific to officeholding disqualifications could be heard at the Supreme Court. The underlying state supreme courts in these cases[112] had effectively ruled Field's wide-ranging statements against "officeholding" and other "political" disqualifications to be mere dicta, thereby sustaining the disqualification regimes of both the border and reconstructed state constitutions. After Wayne's death, the Supreme Court was left at a 4–4 impasse and Congress temporarily shrank the Court to block any Johnson appointments. Therefore, the issue languished at the Court for nearly three years. Finally, on January 31, 1870, the Court issued an opinion-less 4–4 decision affirming the holdings of the underlying courts that officeholding and voter disqualifications were non-punitive, without creating a national precedent. Thus, one of the most politically fraught struggles between the justices in Court history came to an end.[113]

As a result of that lack of opinion, this line of successor decisions failed to be included in the *United States Reports* and came in time to be largely "lost to [the] view" of scholars. Even the one commentator who has correctly tied these cases to their *Test Oath* antecedent, Charles Fairman, was limited by doctrinal hindsight. This led Fairman to decry the "indignation" of Republicans at *Cummings* and *Garland* as "misinformed" and overly "exaggerated." After all, in time, the actual extension of the Court's prohibition to *political* disqualifications upon officeholding and suffrage came to be understood by most courts and scholars as mere dicta against the holding that did last, that *civil* disqualifications from one's "lawful avocation" are unconstitutional punishment.[114]

Yet that was *not* how the case was primarily understood at the time. Instead, Republican newspapers took the *Test Oath Cases* to be a frontal assault on congressional Reconstruction, intended to "prevent . . . Congress

or the States from making loyalty a qualification for office." Congressional Republicans responded by introducing a series of bills challenging the Court's authority, including by requiring a unanimous or two-thirds bench in order to overturn federal statutes. Even moderate Republican newspapers declared that such a bill was "imperatively necessary now, when a bare majority of the Court . . . have attempted to usurp the legislative power[] and to rescue the belligerent rebel States from the just terms of peace which the nation demands," and that the decisions showed that "it is the deliberate purpose of the Supreme Court to usurp the legislative powers of the Government, to defeat the will of the loyal men of this nation. . . ." Indeed, the majority's decision *would* have presented exactly this kind of attack on Reconstruction if Justice Wayne had merely survived another six months longer than he did.[115]

Instead, while the Field decisions' assault on Reconstruction's political disqualifications did stall out at the Supreme Court itself, their effects spread further into the broader politics in ways that Court-focused scholars has typically missed. Three aspects of this consequence are worth briefly highlighting here.

First, the politics of anti-disqualification would continue to play out among the Court's membership, even though it never again attained expression in a full Supreme Court opinion. In particular, Chief Justice Chase soon came to recognize the possibilities represented by a public embrace of Confederate amnesty. Already at the turn of 1867, Chase was suggesting such a new direction to Andrew Johnson, with a rejection of the "third . . . disfranchisement section" in favor of one "providing for general amnesty." Throughout that year, Chase shifted gradually toward adopting such a pro-amnesty position for himself, before finally making a full public embrace of "universal amnesty" on April 19, 1868, in his negotiations with the Democratic leadership for the party's 1868 presidential nomination.[116]

This transition translated into Chase's circuit decisions as well. Two of these cases—*Case of Davis* (the treason trial of Jefferson Davis)[117] and *Case of Griffin*[118]—have recently attracted much scholarly and juridical attention for what they can tell us about the original understanding of Section Three disqualification. The cases remain much debated.[119] But it is obvious that the outcomes of each were highly favorable to the ex-Confederate parties in each case and that their reasoning closely followed the Field majority opinion.[120] In *Davis*, Chase not only embraced but actually fed the defense the argument that Section Three officeholding disqualification *was* in effect criminal punishment for Davis' treason, and that it therefore blocked any further federal treason prosecution due to the Fifth Amendment rule against double jeopardy.[121]

In *Griffin*, meanwhile, Chase again held that the officeholding disqualifications of Section Three constituted "punishment" that contradicted the "spirit and general purpose" of the Bill of Attainder and Ex post Facto clauses, finding in this a sufficient reason to deny the automatic application of Section Three disqualification without further congressional action.[122] While the broader political effects of this circuit decision will require further study to fully understand, it is clear that the decision prevented the application of Section Three to hundreds of state and local officials throughout Chase's circuit of Virginia and Maryland.[123] One pair of leading Section Three scholars has gone so far as to describe Chase's opinion in *Griffin* as a "knee-capping [of] the Fourteenth Amendment." And while both decisions did occur in the months immediately following Chase's failed 1868 run for the Democratic presidential nomination, they both happened to align with the political platform that he championed during that run. That is, states' rights and universal

Confederate amnesty, with universal suffrage granted and in theory secured by "the States themselves," not by "outsiders."[124]

Second, the Field decisions became a major legitimator of the Johnson administration's resistance to congressional disqualifications under military Reconstruction, destabilizing both the federal and succeeding state constitutional disqualification orders. In March of 1867, Congress finally made its decisive move, enacting the first two of the Military Reconstruction Acts subjecting the southern states to military governance and heightened requirements prior to their requalification for full congressional recognition and representation. These acts depended heavily upon a broad-based disqualification of former Confederates from membership in or voting for the new state constitutional conventions required by Congress.[125]

Andrew Johnson's Attorney General, Henry Stanbery, soon turned to Field's condemnation of such political disqualifications as a crucial weapon of response, issuing an official Opinion on May 24, 1867, that drastically narrowed the application of the congressional disqualifications. Citing Field's broad statements on the punitive nature of "political" as well as "civil" disqualifications, Stanbery declared that "[t]he characteristics of [Congress's disqualifications] are, therefore, retrospective, penal, and punitive." As such, the "rule of construction" that punishments must be narrowly construed required that "[w]here, from the generality of [the] terms of [Congress's] description, or any other reason, a reasonable doubt arises, that doubt is to be resolved against the operation of the law and in favor of the voter" and candidate for officeholding. Applying this constructed standard, Stanbery denied that a whole host of former-Confederates whom Congress plainly meant to include could be disqualified, including the thousands who had held "judicial office, or other executive offices, or public employments as are of a purely civil character," among others.[126]

Congress was forced to reply, pushing through a "Third Reconstruction Act" centered specifically on rejecting Stanbery's *Test Oath*-based construction of the first two Reconstruction Acts in favor of their "true intent."[127] Yet much damage had already been done by the Johnson Administration, aided and abetted by the Court's overbroad decision. Between the Field opinions themselves and Stanbery's circular, as well as Johnson's wide-ranging pardons and his interference with appointments to the military governance of the South, ambiguity and confusion would reign over much of the disqualification regime enacted by Congress.[128]

That uncertainty would persist and spread into the state constitutional conventions, leading several conventions to either make the mistake[129] of rejecting Confederate disqualifications or to have their disqualificatory provisions stripped away by conservative Union military governors.[130] In either case, the result in states like Georgia and Virginia would be a rapid fall of the Black-supported Republican governments to the violently renewed white supremacy of Redemption. Likewise, Missouri would see many disqualified voters take "Reverdy Johnson Oaths" in the elections of 1868, as false rumors that the Supreme Court had followed through by overturning the oath requirement for voters swept through the state. And other state courts would take up Field's extension of the constitutional bar to political disqualifications, paving the way to redemption by voiding their states' restrictions on ex-Confederate officeholding and voting.[131]

Third, and finally, the idea of southern "punishment," of a northern vengeance upon a helpless South, soon became the primary rallying cry of the national Democratic party and its KKK terrorist paramilitary wing. With legitimation provided by the Supreme

Court and the arguments of anti-disqualification advocates like Reverdy Johnson, southern Democrats and their allies argued that northern "punishment" was accomplished through the disqualification of the "natural" white planter leadership in favor of "Negro government."[132]

Indeed, the system of ex-Confederate disqualifications and Black suffrage did in fact make space for a time for a first entrance of Black Americans into a real degree of political power in the South. Yet, before the Black citizenry could actually exercise that power as effective state action in their own defense, much of state and local government collapsed into passivity, with ex-Confederates pushing their way back into office through "Reverdy Johnson oaths," the constitutional uncertainty of disqualifications, and the lax enforcement of moderate Republican governors seeking ex-Confederate votes against their radical inter-party rivals.[133]

This cry against southern "punishment" would in turn find a tragically ironic partner among a major breakaway part of the northern anti-slavery coalition, led intellectually by former leading anti-slavery advocates like Gerrit Smith, Horace Greeley, and Henry Ward Beecher. Before the Court's *Test Oath* rulings, these figures were already opposed to the attempted treason prosecution of Jefferson Davis and other Confederate leaders. A mixture of evangelical principles and political opportunism led them to prioritize shared national "guilt" over questions of Black political access and security. And they wholeheartedly opposed any kind of "punishment" of the South. With the Court's characterization of even the moderate safeguard of office-holding disqualifications as "punishment," this group would be pulled toward opposition against Section Three and the rest of the Republican program of disqualifications.[134]

Some would resist that equation.[135] Others, however, like leading newspaper editor Horace Greeley, would come to embrace it, following the path of "universal amnesty" presidential politics, pioneered by Chief Justice Chase in 1868, to the 1872 joint presidential nomination of the Democratic Party and a splinter faction of the Republican Party. Thus, the liberal Republican movement would blossom into its full national expression, forcing the surrender of Section Three and most of Reconstruction's remaining disqualifications before collapsing under the weight of its own contradictions.[136]

Conclusion

It is in moments of the highest political pressure that the Supreme Court is most likely to diverge from its norms of judicial propriety. The fact that the *Test Oath Cases* decision was prematurely leaked highlights the volatility of this critical moment in our constitutional history. In 1866, the Court buckled and split under the issue of ex-Confederate disqualification, as it considered a series of cases which brought into question both the security and the democratic character of the nation. These decisions would have consequences, as the weight of public opinion and legal interpretation began its slow shift away from the long-suffering recipients of southern abuses and back toward the nation's prodigal insurrectionary sons. Here, in the Court's choice to affirm the idea of southern "punishment" as much as anywhere, the Lost Cause began to take root.

ENDNOTES

[1] Johnson was lead counsel for petitioners in both *Ex parte Garland*, 71 U.S. 333 (1867), and *Cummings v. Missouri*, 71 U.S. 277 (1867) the two of the three *Test Oath Cases* that received Supreme Court opinions. Democratic Missouri Congressman John Hogan seems to have first leaked the decision in a St. Louis election speech on May 1, 1866. Hogan then sent Senator Johnson a letter asking him to confirm the substance of Hogan's leak, with Johnson then providing confirming details in a reply letter. Hogan provided this letter to the

National Intelligencer, a conservative Washington, D.C. paper. The publication of the letter was then picked up widely by newspapers across the country. Alexander J.P. Garesché, the lawyer litigant in the third *Test Oath Case*, *Missouri v. Garesché*, 35 Mo. 256 (1865), followed this up by publishing his own claim that the "oath has been voted on, has been decided illegal, for reasons which annul it for every class of the community, and that at the next term of the Supreme Court such will be the decision." Johnson would repeat similar claims in Congress during the Fourteenth Amendment debate. Charles Fairman, **History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–88** (1971), 151–3; *Missouri Statesman*, June 15, 1866. Also see, for example, "The Supreme Court and the Missouri Test-Oath," *Baltimore Sun*, June 2, 1866; *Missouri Statesman*, June 8, 1866; *Cong. Globe*, 39th Cong., 1st Sess. 2491, 2915–16, 3244.

[2] John Niven, ed., **The Salmon P. Chase Papers, Volume 5: Correspondence, 1865–1873** (1998), 119–20 (hereafter **Chase Correspondence**).

[3] Abby R. West, "Drew Pearson's 'Predictions': Assessing the Stone Court's Press Leaks," *Journal of Supreme Court History* 49, no.1 (2024): 66–84.

[4] *Garesché* was dismissed without opinion. See Fairman, **Reconstruction and Reunion**, 151–3, 240.

[5] John Norton Pomeroy, **An Introduction to the Constitutional Law of the United States: Especially Designed for Students, General and Professional**, 7th ed. (1883), 340-2; Fairman, **Reconstruction and Reunion**, 241-6.

[6] *Dayton Journal*, January 31, 1867; Fairman, **Reconstruction and Reunion**, 245; Harold Melvin Hyman, **Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction** (1954), 113; Stephen J. Field, **Personal Reminiscences of Early Days in California, With Other Sketches** (1880), 187–8 (describing the reaction of the "*Daily Chronicle*, of Washington" and the "*Press*, of Philadelphia" to the "Dred Scott Number Three" of *Ex parte Garland*).

[7] 71 U.S. at 329; 71 U.S. at 396–7. Also see Hyman, **Era of the Oath**, 113–4 (describing the majority decisions as "thunderclaps in the already turbulent atmosphere of partisan politics" that "threatened the bases of Radical legislation then under way" and that were condemned by leading Republican newspapers and thought leaders like Wendell Phillips as proof that "the Supreme Court and the President [were] leagued against Congress and loyalty"); William A. Russ, Jr., "The Lawyer's Test Oath During Reconstruction," *Mississippi Law Journal* X (1938), 161–2.

[8] See, for example, the following legal definitions of the noun "disqualification": "1. Something that incapacitates, disables, or makes one ineligible . . . 2. The act of making ineligible; the quality, state, or condition of being ineligible . . . 3. A punishment that may be imposed after an official has been impeached and removed from office, precluding the official from holding another office or enjoying any benefits of having held office." **Black's Law Dictionary**, 10th ed. (2011), 593–4.

[9] Tom Ginsburg, Aziz Z. Huq, and David Landau, "Democracy's Other Boundary Problem: The Law of Disqualification," *California Law Review* 111 (2023), 1635–40.

[10] For example, see **William Archibald Dunning, Reconstruction: Political and Economic, 1865–1877** (1907), 109–23, 174–219; William A. Russ, Jr., "Congressional Disfranchisement, 1866–1898," (Ph.D. dissertation, University of Chicago) (1933); William A. Russ, Jr., "Disfranchisement in Maryland (1861–67)," in **Archives of Maryland**, ed. J. Hall Pleasants (1932), 50; William A. Russ, Jr., "The Negro and White Disfranchisement During Radical Reconstruction," *Journal of Negro History* 19, no. 2 (1934); William A. Russ, Jr., "Radical Disfranchisement in North Carolina, 1867–68," *North Carolina Historical Review* 11 (1934); William A. Russ, Jr., "Radical Disfranchisement in Texas, 1867–70," *Southwestern Historical Quarterly* 38, no. 1 (1934); William A. Russ, Jr., "Radical Disfranchisement in Mississippi (1867–70)," *Mississippi Law Journal* 6 (1934); William A. Russ, Jr., "Registration and Disfranchisement Under Radical Reconstruction," *Mississippi Valley Historical Review* 21 (1934); William A. Russ, Jr., "The Lawyer's Test Oath During Reconstruction," *Mississippi Law Journal* 10 (1937). Also see James G. Randall, **Constitutional Problems Under Lincoln** (1926), 96–117; Jonathan Truman Dorris, **Pardon and Amnesty Under Lincoln and Johnson: The Restoration of the Confederates to Their Rights and Privileges, 1861–1898** (1953); Harold Hyman, **To Try Men's Souls: Loyalty Tests in American History** (1959), 139–266.

[11] Eric Foner, "Reconstruction Revisited," *Reviews in American History* 10, no. 4 (1982). Also see, for example, W.E.B. DuBois, **Black Reconstruction in America** (1935); Kenneth M. Stampp, **The Era of Reconstruction** (1965); Eric Foner, **Reconstruction, America's Unfinished Revolution 1863–1877** (1988); also see David M. Blight, **Race and Reunion: The Civil War in American Memory** (2001) (describing the process of North-South reconciliation and reimagining of the Civil War through and after Reconstruction).

[12] See William A. Blair, **With Malice Toward Some: Treason and Loyalty in the Civil War Era** (2014) (concluding his study of Civil War treason and loyalty politics with only a brief analysis of Section Three and the disqualification politics of the late-1860s).

[13] Hyman, **Era of the Oath**, 139–266. Also see Dorris, **Pardon and Amnesty**.

[14] Dorian Bowman and Judith Farris Bowman, "Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint," *Syracuse Law Review* 29 (1978).

[15] Sam D. Elliott, "When the United States Attorney Sued to Remove Half the Tennessee Supreme Court: The Quo Warranto Cases of 1870," *Tennessee Bar Journal* 49, no. 8 (2013); Gerard N. Magliocca, "Amnesty and Section Three of the Fourteenth Amendment," *Constitutional Commentary* 36 (2021).

[16] Richard L. Aynes, "The Impeachment and Removal of Tennessee Judge West Humphreys: John Bingham's Prologue to the Johnson Impeachment Trial," *Georgia Journal of Southern Legal History* 2 (1993); Michael Les Benedict, **The Impeachment and Trial of Andrew Johnson** (1999).

[17] Magliocca, "Amnesty and Section Three."

[18] Jonathan W. White, "'To Aid their Rebel Friends': Politics and Treason in the Civil War North, 432, 541–3 (Ph.D. dissertation, University of Maryland, College Park) (2008), available online at CORE, https://core.ac.uk/works/40453558/ (last accessed July 22, 2024); Hyman, **Era of the Oath**, 116–8; Blair, **With Malice Toward Some**, 282–6.

[19] Robert J. Chandler, "California's 1863 Loyalty Oaths: Another Look," *Arizona and the West* 21, no. 3 (1979).

[20] Blair, **With Malice Toward Some**, 170–1.

[21] An Act to Prescribe an Oath of Office . . . (Ironclad Act) (July 2, 1862), 12 Stat. 502–03; An Act Defining Additional Causes of Challenge and Prescribing an Additional Oath for Grand and Petit Jurors . . . 12 Stat. 430–31 (June 17, 1862); An Act Supplementary . . . , 13 Stat. 424 (January 24, 1865); also see Hyman, **To Try Men's Souls**, 157–9.

[22] Blair, **With Malice Toward Some**, 268–303 (executive order passed pursuant to an Act of Congress, March 3, 1865 (13 Stat. 490–91)); also see White, "'To Aid their Rebel Friends,'" 514–5.

[23] The Confederacy and its states also relied on test oaths and other disqualification mechanisms to remove those deemed disloyal from government. See the examples discussed in Hyman, **To Try Men's Souls**, 118–38; "The Border Ruffian Code in Kansas" (1856) (YA Pamphlet Collection, Library of Congress), https://catalog.hathitrust.org/Record/009591678 (last accessed July 17, 2024); Michael A. Ross, **Justice of Shattered Dreams** (2003), 28, 57, 81; James L. Haley, **Sam Houston** (2002), 388–96.

[24] Blair, **With Malice Toward Some**, at 311–44 (listing details on political arrests and court martials made during the War).

[25] It should be noted that the First Amendment prohibition against government interference with religious practice had not yet been applied to the states at this time, prior to the passage of the Fourteenth Amendment and the development of the Supreme Court's twentieth century doctrine of incorporation. See *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. 589 (1845).

[26] Paul H. Bergeron, **Andrew Johnson's Civil War and Reconstruction** (2012), 22–6, 54–98; "An Act to Limit the Elective Franchise," in **Tennessee Public and Private Acts** (1865), 32–6.

[27] Fairman, **Reconstruction and Reunion**, 247; **West Virginia Statutes** (1866), 19; Aaron Astor, **Rebels on the Border: Civil War, Emancipation, and the Reconstruction of Kentucky and Missouri** (2012), 168–207; Russ, "Disfranchisement in Maryland," 309, 318–21.

[28] Astor, **Rebels on the Border**, 76-93, 121–45.

[29] The Drake Constitution's disqualifications were built on the oath of past loyalty developed by Missouri's 1862 Constitutional Convention, which had itself been employed by Union General Henry Halleck to restrict nonjurors' activities in the state and especially around Union lines. Hyman, **Era of the Oath**, 37.

[30] See Missouri Constitution of 1865, Article II, Sections 3, 6, 7, 9, and 14; Astor, **Rebels on the Border**, 168–207; "Missouri State Archives—Missouri Constitutions, 1820–1945," Office of the Secretary of State, Record Group 5; Missouri State Archives, Jefferson City, available online at Missouri Digital Heritage, https://cdm16795.contentdm.oclc.org/digital/collection/p16795coll1#:~:text=Designed%20to%20exclude%20all%20but,Missouri%20(71%20U.%20S.%20277 (last accessed July 18, 2024).

[31] Francis Blair, Sr. served as a key conservative Unionist advisor to Abraham Lincoln. His son, Francis Blair, Jr., served as a Union general and would become the Democratic vice-presidential nominee in 1868, sinking the campaign of Horatio Seymour with his virulently racist predictions about Black rule and miscegenation in the South. Montgomery Blair served as Postmaster-General from 1861–1864. Each were heavily involved in border state politics, especially in Missouri and Maryland. Hyman, **Era of the Oath**, 110–11; Foner, **Reconstruction**, 340–3.

[32] 35 Mo. 256 (1865).

[33] 71 U.S. 277 (1867).

[34] *Blair v. Thompson*, 41 Mo. 63 (March term, 1867); *State ex rel. Wingate, Attorney General v. Warren Woodson*, 41 Mo. 227 (July term, 1867).

[35] *Ex parte Hunter*, 2 W. Va. 122 (1867).

[36] *Ridley v. Sherbrooke*, 3 Coldwell (43 Tenn.) 569 (1866).

[37] See Fairman, **Reconstruction and Reunion**, 151–2, 246–8, 613–8.

[38] Hyman, **Era of the Oath**, 113.

[39] Mark A. Graber, **Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War** (2023), 132–9 (citing Representative John

R. Kelso from Missouri that "[i]f the rebels are allowed to vote, their ballots will be cast for our destruction, as their bullets have heretofore been, and it may be with more fatal effect"); also see Graber, **Punish Treason, Reward Loyalty**, 166 ("We'll unite with the opposition up North, and between us we'll make a majority. Then we'll show you who's going to govern this country") and ("We must strike hands with the Democratic party of the North, and manage them as we always had"); and Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997), 115.

[40] Foner, **Reconstruction**, 159–61, 176–201. See John Syrett, **The Civil War Confiscation Acts: Failing to Reconstruct the South** (2005).

[41] Bergeron, **Andrew Johnson's Civil War and Reconstruction**, 80–3.

[42] Office of the President, Proclamation 134, Granting Amnesty to Participants in the Rebellion, with Certain Exceptions (May 29, 1865), American Presidency Project, https://www.presidency.ucsb.edu/documents/proclamation-134-granting-amnesty-participants-the-rebellion-with-certain-exceptions (last accessed July 22, 2024); Dorris, **Pardon and Amnesty**, 108–18, 225, 316–20; Report of the Joint Committee on Reconstruction, 39 Cong. 1st Sess., Part II (Sub-Committee on Virginia, North Carolina, South Carolina), 3, 87–8, 171; Report of the Joint Committee, Part IV (Sub-Committee on Florida, Louisiana, Texas), 85.

[43] Dorris, **Pardon and Amnesty**, 108–18, 189–90, 208–10, 225, 316–20; Foner, **Reconstruction**, 176–227.

[44] See, for example, *Cong. Globe*, 39th Cong., 1st Sess. 2916 (Democratic Senator Doolittle contending that "precedents prove that the operation of the pardon was to clear the party pardoned from the obligation to take that oath. . . .")

[45] Syrett, **The Civil War Confiscation Acts**, 129. See also the further expansion of the maximalist view of the pardon by Attorney General Augustus Garland and others. Magliocca, "Amnesty and Section Three," 124–7; Zachary J. Broughton, "I Beg Your Pardon: *Ex parte Garland* Overruled; The Presidential Pardon is No Longer Unlimited," *Western New England Law Review* 41, no. 1 (2019).

[46] 71 U.S. 333 (1866).

[47] As a high Confederate official and Confederate States Army general, Garland came within the category of wealthy and influential rebels excluded from Andrew Johnson's general May 29, 1865 pardon proclamation. The proclamation instead required that he specially apply to the President for pardon, which he duly received in July of 1865. Proclamation 134, Granting Amnesty to Participants in the Rebellion, with Certain Exceptions (May 29, 1865); *Ex parte Garland*, 71 U. S. 333, 337 (1866); Ross, **Justice of Shattered Dreams**, 132. Also see Magliocca, "Amnesty and Section Three," 124–7, and Beverly Nettles Watkins, "Augustus Hill Garland, 1832–1899: Arkansas Lawyer to United States Attorney General" (Ph.D. dissertation, Auburn University) (1985), available online at ProQuest, https://www.proquest.com/openview/5f2807d9ad3a190d84df9d4fb70eefb5/1?pq-origsite=gscholar&cbl=18750&diss=y (last accessed July 21, 2024).

[48] Foner, **Reconstruction**, 225; Ross, **Justice of Shattered Dreams**, 112–3; also see *Cong. Globe*, 39th Cong., 1st Sess. 3069 (Congressman Clarke systematically reviewing the seven states that had just been deemed "reconstructed" by President Johnson and noting that every state governor, twelve of the fourteen senators, and thirty-three out of the thirty-five representatives elected could not take the test oath due to having been active rebels).

[49] See, for example, Bergeron, **Andrew Johnson's Civil War and Reconstruction**, 148–75 (describing how "Black suffrage, combined with Rebel disfranchisement, resulted in remarkable success for" Republicans in Tennessee up until the collapse of disqualification beginning in 1870); Astor, **Rebels on the Border**, 178–80, (describing a kind of "negative franchise" by which Black Missourians were able to gain political influence by providing evidentiary aid in the disqualification of ex-Confederates from voting and officeholding).

[50] President Johnson himself did not actively contest the right of Congress to "judge of the qualifications of its members, to adopt such tests of loyalty as it chooses, and to exclude from its deliberations every man who cannot stand that test as disqualified." *Cong. Globe*, 39th Cong., 1st Sess. 3244; Graber, **Punish Treason, Reward Loyalty**, 165–9. Hyman, **Era of the Oath**, 137; Foner, **Reconstruction**, 225; also see *Cong. Globe*, 39th Cong., 1st Sess. 3168 (Congressman Windom pointing out that "Their admission will establish the right of their districts to representation, however disloyal the people may be. This right once established, and the test oath repealed, what will follow? . . . [A]ided by their northern Democratic allies, everybody knows that it would be an utter impossibility to expel Jeff. Davis himself should he be elected.")

[51] Graber, **Punish Treason, Reward Loyalty**, 163–9; Foner, **Reconstruction**, 236–43.

[52] *Cong. Globe*, 39th Cong., 1st Sess. 2512; Foner, **Reconstruction**, 61–2; also see *Cong. Globe*, 39th Cong., 2536 (Congressman Eckley citing the example set by Maryland, Missouri, Tennessee, and West Virginia in the creation of their systems of political disqualification).

[53] See, for example, *Cong. Globe*, 39th Cong., 1st Sess. 3244 (Senator Eldridge questioning the ability of Congress to sustain the test oath where "the Supreme Court, as it is intimated they have, should have come to the conclusion that the test oath, as it is called, is unconstitutional and void").

[54] The "Reverdy Johnson Oath" line of argument seems to have first emerged out of Maryland disqualification politics during the War. It paralleled Confederate attitudes toward Union oaths. As historian Anne Rubin has noted, many rebels "convinced themselves that oaths taken out of necessity or coercion were not necessarily binding." Anne Sarah Rubin, **A Shattered Nation: The Rise and Fall of the Confederacy, 1861–1868** (2005), 95–100;
"President Johnson's Plenary Power," *Chicago Tribune*, June 23, 1865; also see "Reverdy Johnson's Doctrine on Oaths of Allegiance," *New York Times*, June 7, 1865; "The Way They Did It," *Raftsman's Journal*, November 14, 1865; "The Elections," *Rutland Weekly Herald*, November 15, 1866; "The Doctrine of Election," *Buffalo Commercial*, April 7, 1865 (citing the *Cincinnati Gazette*, April 7, 1865); Astor, **Rebels on the Border**, 178.
[55] See, for example, *Cong. Globe*, 38th Cong., Sess. 1, 2102–06 (Congressman Samuel Shellabarger (R-OH) defending Confederate disqualifications and noting the prior explicit acceptance of Congress of the state disqualifications of loyalists in the first federal Naturalization Acts); Marijke Malsch, et al., "Disqualification from a Profession or an Office: Nature and Actual Practice," in **Incapacitation: Trends and New Perspectives**, eds. Marijke Malsch and Marius Duker, (2012), 171 (noting that "[s]ome European countries regard disqualification as a penalty, such as France and Belgium, while others have given disqualification the place of a 'measure' in their codes, such as Germany" and that "[d]isqualifications can be found in laws other than penal codes, and they are also included in the disciplinary rules of a number of occupational groups").
[56] **Chase Correspondence**, 116 (Stephen J. Field to Salmon P. Chase, June 30, 1866).
[57] *Cong. Globe*, 38th Cong., Sess. 1, 231–320 (January 25, 1864).
[58] *Cong. Globe*, 39th Cong., 1st Sess. 2105, 2491, 2916–17, 2920, 3066.
[59] *Cong. Globe*, 39th Cong., 1st Sess. 2105.
[60] United States Constitution, Fourteenth Amendment, Section 3; 39th Cong., 1st Sess. 3170–71; **Foner, Reconstruction**, 253–4; Fairman, **Reconstruction and Reunion**, 134; Walter Stahr, **Salmon P. Chase: Lincoln's Vital Rival** (2022), 547–8.
[61] *Cong. Globe*, 39th Cong., 1st Sess. 3170–71; Graber, **Punish Treason, Reward Loyalty**, 142, 167.
[62] See for example, *Cong. Globe*, 39th Cong., 1st Sess. 2883–4, 2918–9, 2962, 2980; also see Hyman, **Era of the Oath**, 93 (" [House and Senate Republicans] described the oath as the last bulwark against the return of ex-rebels to power, the barrier behind which Southern Unionists and Negroes protected themselves.")
[63] This was the view expressed, for example, by Justice Miller in a letter to his brother-in-law in Texas. Samuel F. Miller to William Pitt Ballinger, August 31, 1865, Box 1, folder 2, Samuel Freeman Miller Correspondence, Manuscript Division, Library of Congress, Washington, D.C. (hereafter SFM-LC).
[64] See, for example, Robert Icenhauer-Ramirez, **Treason on Trial: The United States v. Jefferson Davis** (2019), 171–3, 184–5, 259–61, 298–300 (describing the disastrous incompetence of the federal prosecution of Jefferson Davis).
[65] *Cong. Globe*, 39th Cong., 1st Sess. 3170.
[66] *Cong. Globe*, 39th Cong., 1st Sess. 3036; *The Nation*, January 17, 1866 (cited in Fairman, **Reconstruction and Reunion**, 246).
[67] *Cong. Globe*, 39th Cong., 1st Sess. 2918.
[68] *Cong. Globe*, 39th Cong., 1st Sess. 2920.
[69] *Cong. Globe*, 39th Cong., 1st Sess. 3171; also see Foner, **Reconstruction**, 230 ("only a handful of Radical leaders [sought treason prosecutions]. Rather than vengeance, the driving force of Radical ideology was the utopian vision of a nation whose citizens enjoyed equality of civil and political rights, secured by a powerful and beneficent national state.")
[70] *Cong. Globe*, 39th Cong., 1st Sess. 3031–36, 2105–2106.
[71] *Cong. Globe*, 39th Cong., 1st Sess. 3170.
[72] See, for example, *Cong. Globe*, 39th Cong., 1st Sess. at 46, 222, 304, 339, 517, 833, 1159, 1256, 1839, 3170–71; Remarks of Hon. Enos Clarke, of St. Louis 14 (March 12, 1866).
[73] *Cong. Globe*, 39th Cong., 1st Sess. 3170; Graber, **Punish Treason, Reward Loyalty**, 178–94; also see Journal of the Joint Committee on Reconstruction, 39 Cong. 1st Sess. (1866).
[74] *Cong. Globe*, 39th Cong., 1st Sess. 3036.
[75] See Stahr, **Salmon P. Chase**, 61–310 (covering Chase's long career as an anti-slavery lawyer, and politician and founder of the Republican Party).
[76] Justices Field and Miller were the only two justices to actively lobby Lincoln to appoint Chase to the chief justiceship, an effort he appreciated. Fairman, **Reconstruction and Reunion**, 515; Stahr, **Salmon P. Chase**, 515. The chief justice greatly respected Miller's opinion, seeing him as "beyond question the dominant personality . . . upon the bench, whose mental force and individuality [were] felt by the Court more than any other." Ross, **Justice of Shattered Dreams**, xv.
[77] Chase's correspondence suggests that he began meeting with prominent Democrats to discuss his potential nomination in May of 1867. See Fairman, **Reconstruction and Reunion**, 515–21.
[78] Stahr, **Salmon P. Chase**, 549; see **Chase Correspondence**, 90–2 (Salmon P. Chase to Wendell Phillips, May 1, 1866).
[79] **Chase Correspondence**, 108–9 (Samuel Miller to Salmon Chase, June 5, 1866).

[80] *Cong. Globe*, 39th Cong., 1st Sess. 2883, 2916, 3244; Fairman, **Reconstruction and Reunion**, 209–11; also see Fairman, **Reconstruction and Reunion**, 1384 (describing the "iron-clad oath" as a "parallel matter" to the disqualification from officeholding imposed by Section 3).

[81] **Chase Correspondence**, 108–9 (Samuel Miller to Salmon Chase, June 5, 1866).

[82] **Chase Correspondence**, 108–9 (Samuel Miller to Salmon Chase, June 5, 1866); Samuel Miller to William Pitt Ballinger, August 31, 1865, Box 1, folder 2, SFM-LC; also see Astor, **Rebels on the Border**, 179–80 (describing how Missouri conservatives succeeded in linking their own battle against Radicals to the struggle between President Johnson and the congressional Republicans, drawing national significance to the state battle).

[83] Samuel Miller to William Pitt Ballinger, February 6, 1867, Box 1, folder 4, SFM-LC; **Chase Correspondence**, 108–9 (Samuel Miller to Salmon Chase, June 5, 1866).

[84] Field is widely considered to be the godfather of economic substantive due liberty and the corporate-friendly, laissez-faire conservatism of the late 19th-early 20th century Court. Chase and Field actively supported each other's nominations, with Chase considering Field "like a brother, for he is one of our best men and dear to me." Chase often "claimed to be essentially a Democrat," with a "lifelong" commitment to that party's ostensible principles of states' rights and universal suffrage. Stahr, **Salmon P. Chase**, 515–6, 578–80; Kens, **Justice Stephen Field**, 96; A.F. House, "Mr. Justice Field and Attorney General Garland," *Arkansas Law Review* 3 (1948), 268; Bernard Schwartz, **A History of the Supreme Court** (1993), 150–76; **Chase Correspondence**, 110–12 (Salmon Chase to Samuel Miller, June 9, 1866).

[85] **Chase Correspondence**, 115–6 (Stephen Field to Salmon Chase, June 30, 1866), 119–120 (Salmon Chase to Samuel Miller, July 3, 1866).

[86] Charles Fairman, for instance, observes that Orville H. Browning, then Secretary of the Interior, noted in his diary on March 25, 1866, that the ailing Justice Grier had informed him as to his expectation as to the Court's decision in both the *Milligan* and *Test Oath Cases*. Grier gave an accurate account of the *Test Oath* vote. Fairman, **Reconstruction and Reunion**, 159–60.

[87] The *New York Tribune* thought the same, observing that "the rebels of Baltimore have revenged themselves on the laws by perjuring themselves . . . [through taking] the 'iron-clad oath' and vot[ing]. Thus they carried out Reverdy Johnson's opinion that the oath was unconstitutional and might be falsely taken" while also using "pistols" to "deter Union men from voting." "The Elections," cited in the *Rutland Weekly Herald*, November 15, 1866.

[88] Under the Maryland system, election judge appointments were controlled by the governor, leading to its collapse when Governor Swann decided to swing to the Democrats and Andrew Johnson.

[89] **Chase Correspondence,** 136–7 (Salmon Chase to Benjamin Rush Cowen, November 8, 1866). The House of Representatives would commence its own investigation of the Maryland election, following reports that federal troops had in fact aided the governor in "overriding the constitution and laws thereof, and securing the votes of rebels and persons disqualified." D. Appleton, **The American Annual Cyclopædia and Register of Important Events of the Year** (1867), 199–200.

[90] These two majority opinions received a single dissenting opinion, filed for *Ex parte Garland. Garesché* was then dismissed in favor of petitioner in accordance with the other two decisions.

[91] Hyman, **Era of the Oath**, 113. Fairman, **Reconstruction and Reunion**, 114-22, 224–9.

[92] Under established federal law, secessionist state administrations did not constitute any kind of recognizable state government. This argument therefore seems a strange one to make in federal court; it was ignored by Justice Field's opinions. 71 U.S. at 284; 67 U.S. at 635; also see *Texas v. White*, 74 U.S. 700 (1869) (affirming the illegality and non-recognizability of secessionist governments).

[93] 71 U.S. at 286.

[94] 71 U.S. at 322 (emphasis added).

[95] 33 U.S. 88 (1834).

[96] *Ex parte Garland*, 71 U.S. 333, 393–5 (1866) (Miller, J., dissenting).

[97] 71 U.S. at 319.

[98] Again, the analysis regarding a minister like Father Cummings would differ greatly today, due to the development since 1925 of First Amendment doctrines applying to the states rather than just to the federal government. *Gitlow v. New York*, 268 U.S. 652 (1925) (applying First Amendment free speech protections to the states).

[99] 71 U.S. at 394–6 (Miller, J., dissenting).

[100] 71 U.S. at 394–6 (Miller, J., dissenting).

[101] 71 U.S. at 318–22; see Stephen J. Field, **Personal Reminiscences of Early Days in California With Other Sketches** (1880), 118 (noting the widespread opinion in "the Northern Press" that "the opinion of Justice Field against the test-oath, like that against military trials in time of war, goes outside of the immediate case in issue; and indulges upon test-oaths in general.")

[102] Yet Justice Field would not be convinced when Myra Bradwell used this same language in arguing for her right as a female citizen to join the state bar of Illinois. *Bradwell v. Illinois*, 83 U.S. 130, 134–5 (1873).

[103] 71 U.S. at 378, 383–84 (Miller, J., dissenting) (citing Article III, §1, that "[t]he judicial power of the United

States shall be vested in one Supreme Court and such inferior courts as the Congress may, from time to time, ordain and establish," and the Judiciary Act of 1789, that "in all the courts of the United States the parties may plead and manage their causes personally; or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein").

[104] *Fletcher v. Daingerfield*, 20 Cal. 427, 430 (1862).

[105] *People v. Turner* 1 Cal. 143, 150–51 (1850); Field, **Personal Reminiscences**, 41, 70 (1880); Hubert Howe Bancroft, **Chronicles of the Builders of the Commonwealth: Historical Character Study** (1892), 403–8.

[106] Field, **Personal Reminiscences**, 41–123, 22 exhibits D-H.No.I.; also see Hubert Howe Bancroft, Draft Notes for Biographical Sketch of Stephen Field 15–20, Stephen J. Field Papers, Berkeley University Bancroft Library (written based in part on interviews with Justice Field) (published later in 1886 as part of Chapter VI, Advent and Agency of Law, in Bancroft, **Chronicles**).

[107] *Ex parte Wall*, 107 U.S. 265, 266–71 (1883) (federally barred attorney J.B. Wall was accused by eyewitnesses of leading the lynching and denied "every opportunity to explain his presence and action" to the federal judge. The decision was an 8–1 decision against Field's sole, twenty-nine-page dissent). Justice Field's biographers do not appear to make any mention of the case. See, for example, Kens, **Justice Stephen Field**; Carl Brent Swisher, **Stephen J. Field: Craftsman of the Law** (1963).

[108] Chandler, "California's 1863 Loyalty Oaths," 215.

[109] 22 Cal. 293 (1863).

[110] See, for example, Pomeroy, **An Introduction**, 329; Raoul Berger, "Bills of Attainder: A Study of Amendment by the Court," *Cornell Law Review* 63, no. 3 (1978); Zechariah Chafee, **Three Human Rights in the Constitution of 1787** (1956); Broughton, "I Beg Your Pardon"; Harold J. Krent, "Conditioning the President's Conditional Pardon Power," *California Law Review* 89, no. 6 (2001), 1674–5; Edward S. Corwin, **The President: Office and Powers, 1787–1957—History and Analysis of Practice and Opinion** (1957), 202.

[111] 71 U.S. at 392 (Miller, J., dissenting).

[112] *Ridley v. Sherbrooke*, 3 Coldwell (43 Tenn.); *Blair v. Ridgely*, 41 Mo. 63 (March term, 1867); *State ex rel. Wingate Attorney General v. Warren Woodson*, 41 Mo. 227 (July term, 1867).

[113] Hyman, **Era of the Oath**, 113–5; Fairman, **Reconstruction and Reunion**, 240–50.

[114] Fairman, **Reconstruction and Reunion**, 612–8. But see the twentieth century revival of a broader concept of the *Test Oath Cases* with scholars like Raoul Berger citing the *Test Oath Cases* for the continuing proposition that political disqualifications are unconstitutional, despite other scholars considering Field's language on the point merely dicta. Berger, "Bills of Attainder," 390–4; compare with Fairman, **Reconstruction and Reunion**, 244–6. Other scholars have critiqued this and other aspects of Field's decision as well. See, for example, Pomeroy, **An Introduction**, 329 ("The [office-holding disqualification] provisions . . . may be of very doubtful policy . . . but they are not bills of attainder."); Osmond K. Fraenkel, **Our Civil Liberties** (1944), 182; Charles G. Haines, **The American Doctrine of Judicial Supremacy** (1911), 280–2; Corwin, **The President**, 202.

[115] Hyman, **Era of the Oath**, 117–8, and 112–20 (describing the uncertainty and condemnation with which the case was received and the Nevada and Arkansas Supreme Courts' affirmations of Field's argument for prohibiting political disqualifications); Fairman, **Reconstruction and Reunion**, 244–5, 612–8.

[116] **Chase Correspondence**, 139–41 (Salmon Chase to Wager Swayne, December 4, 1866), 161–2 (Salmon Chase to Gerrit Smith, June 25, 1867), and 205–7 (Salmon Chase to Alexander Long).

[117] 7 F. Cas. 63, 102 (C.C.D. Va. 1867).

[118] 11 F. Cas. 7 (C.C.D. Va. 1869).

[119] See, for example, *Anderson v. Griswold* 7–8, 14, 49–61, 2023 CO 63 (No. 23SA300) (December 19, 2023); *Anderson v. Griswold* 2–7 (Samour, J. dissenting); Mark Graber, amicus brief, 2 (780AE5A95093E) in *Anderson v. Griswold* (No. 23SA300); Magliocca, "Amnesty and Section Three," 100–8; William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," *University of Pennsylvania Law Review* 172 (2024): 644–59; Josh Blackman and Seth Barrett Tillman, "Sweeping and Forcing the President into Section 3," *Texas Review of Law and Politics* 28 (forthcoming 2024), 1, 2, 55–155; M. Henry Ishitani, "The Fourteenth Amendment is *Not* a Bill of Attainder: Uncovering the Fundamental Contradictions in Chief Justice Chase's Argument That Section Three Is Not Self-Executing," *Harvard Law Review* Blog, January 28, 2024, https://harvardlawreview.org/blog/2024/01/section-three-is-not-a-bill-of-attainder/ (last accessed July 21, 2024).

[120] And even more closely Attorney General Stanbery's exegesis of the Field opinion.

[121] Magliocca, "Amnesty and Section Three," 100–01; Cynthia Nicoletti, **Secession On Trial: The Treason Prosecution of Jefferson Davis** (2017), 294–9.

[122] Both of these cases contradict Chase's position with the *Test Oath* dissenters and his maintenance of the position that state officeholding disqualifications were not unconstitutional punishment through the cases of *Ridley*, *Ridgley*, and *Woodson*. See Ishitani, "The Fourteenth Amendment is *Not* a Bill of Attainder."

[123] Also see Sam D. Elliott, "The Quo Warranto Cases of 1870" (noting that Chase's opinion was widely circulated

among Tennessee conservatives struggling against federal and state disqualification and arguing that "Radicals in Congress" sought to "eliminat[e] Chase's objection in Griffin" through the Enforcement Act of 1870, which empowered federal district attorneys to file writs of quo warranto to remove persons disqualified from office by Section Three).

[124] Baude and Paulsen, "The Sweep and Force of Section Three," 49; also see Fairman, **Reconstruction and Reunion**, 515–57; **Chase Correspondence**, 205–7 (Salmon Chase to Alexander Long).

[125] Membership in these conventions would require that a candidate pass the federal ironclad oath standard, while registration as a voter for those candidates would require passing the Fourteenth Amendment's Section Three standard of not having aided the rebellion after formerly taking an oath as a state or federal officer to support the Constitution. An Act to Provide for the More Efficient Government of the Rebel States (First Reconstruction Act), 14 Stat. 428-430, c.153 §§ 5–6 (March 2, 1867); An Act Supplementary . . . (Second Reconstruction Act), 15 Stat. 2–5, c.6, §§ 1, 4, 6 (March 23, 1867).

[126] **Official Opinions of the Attorneys General of the United States**, 12: 141–168 (May 24, 1867); also see William A. Russ, Jr., "Registration and Disfranchisement Under Radical Reconstruction," *Mississippi Valley Historical Review* 21, no. 2 (1934), 163, 165 (describing the attempts by southern newspapers to interpret Congress's Acts as excluding "mayors, aldermen, recorders, sheriffs, clerks of courts, constables, and justices of the peace" among other local officials from the remit of the Reconstruction Acts' voter qualifications).

[127] An Act Supplementary… (Third Reconstruction Act), 15 Stat. 14–16, c.3 (July 19, 1867).

[128] See, for example, Hyman, **Era of the Oath**, 115–20 (describing the uncertainty of both "lawyers" and "laymen" over the effects of the decisions); William A. Russ, Jr., "Radical Disfranchisement in Texas, 1867–70," *Southwestern Historical Quarterly* 38, no. 1 (1934), 45 (citing the highly conservative Johnson appointee, General Winfield Scott Hancock's argument for reversing the limits on officeholding enforced by Radical General Phillip Sheridan, given that "[g]rave differences of opinion exist among the best informed and most conscientious citizens of the United States, and the highest functionaries of the National Government, as to the proper construction to be given to the acts of Congress prescribing the qualifications entitling persons to be registered as voters"); Joseph G. Dawson, III, **Army Generals and Reconstruction: Louisiana, 1862–1877** (1982) (describing the unevenness by which different Union generals enforced disqualifications in Louisiana); James L. McDonough, "John Schofield as Military Director of Reconstruction in Virginia," *Civil War History* 15, no. 3 (1969); Foner, **Reconstruction**, 271–345.

[129] See, for example, Edmund L. Drago, **Black Politicians and Reconstruction in Georgia: A Splendid Failure** (describing the "great blunder" of "inexperienced" Black politicians at the Georgia Constitution, who having opposed Confederate "disabilities" were subsequently "stung" by the "frozen adder [taken] to their bosom," being expelled from the state legislature in 1868).

[130] McDonough, "John Schofield," 238–40, 255; see Schofield to Grant, April 21, 1868, Box 48, John McAllister Schofield Papers, LC (successfully urging President Grant to require the separation of the Virginia constitution's disqualification provision before it could be submitted to the people for ratification, as he thought that "ignorant blacks and equally ignorant or unprincipled whites" like those who made up the convention "majority" largely incapable of holding the states' political positions).

[131] George C. Rable, **But There Was No Peace: The Role of Violence in the Politics of Reconstruction** (1984), 95–191; Drago, **Black Politicians and Reconstruction in Georgia**, 47–56, 141–159; McDonough, "John Schofield"; Jack P. Maddox, Jr., **The Virginia Conservatives, 1867–1879: A Study in Reconstruction Politics** (1970); Hyman, **Era of the Oath**, 112–20; see, for example, *Davis v. McKeeby*, 5 Nev. 369 (1870); also see *Rison et al. v. Farr*, 24 Ark. 161 (1865).

[132] Rable, **But There Was No Peace**, 95–162 (describing how armed groups like the KKK largely succeeded in their "counterrevolutionary" purpose of destroying the Republican party in the South using a "classical guerrilla warfare strategy"); James Shepherd Pike, **The Prostrate State: South Carolina Under Negro Government** (1874), 272; see Bergeron, **Andrew Johnson's Civil War and Reconstruction**, 149, 164–5; Foner, **Reconstruction**, 497–511.

[133] See, for example, Eric Foner, **Freedom's Lawmakers: A Directory of Black Officeholders During Reconstruction** (1993); Foner, **Reconstruction**, 346–411; Russ, "Radical Disfranchisement in Texas," 42–5 (describing white protests against Black officials and jurors in Texas); Icenhauer-Ramirez, **Treason on Trial**, 242–54 (describing Judge Underwood's reliance on Black jurors in Virginia).

[134] Gerrit Smith, "No More Punishment of the South!," (November 6, 1866) (Reel 74, Microfilm #3998, Gerrit Smith Collection, Syracuse University Libraries); Gerrit Smith to William Lloyd Garrison, "Let Us Deal Impartially With the Sinning South and the Sinning North" (March 20, 1867) (Reel 74, Microfilm #3998, Gerrit Smith Collection, Syracuse University Libraries); Henry

Ward Beecher, "The Amendment to the Constitution," December 1866, Library of Congress, https://www.loc.gov/resource/gdcmassbookdig.amendmenttoconst00beec/?sp=3&st=image&r=-1.014,-0.248,3.027,1.593,0 (last accessed July 23, 2024).

[135] See, for example, Gerrit Smith to Horace Greeley, October 1, 1872, (Smith turning against both his earlier opposition to Confederate disqualification and Greeley's campaign as the Democratic nominee for president), Syracuse University Libraries Digital Collections, https://digitalcollections.syr.edu/Documents/Detail/gerrit-smith-to-horace-greeley./2469 (last access July 23, 2024).

[136] James M. Lundberg, **Horace Greeley: Print, Politics, and the Failure of American Nationhood** (2019), 145–174; Robert W. Burg, "Amnesty, Civil Rights, and the Meaning of Liberal Republicanism, 1862-1872," *American Nineteenth Century History* 4, no. 3 (2010); Benjamin F. Butler, "The Policy of Vengeance," *New-York Tribune*, December 16, 1869, (critiquing and denying Greeley's characterization of Congressional disfranchising policy as "vengeance" rather than for security), https://www.proquest.com/news/docview/572509486/B40BD1A4BA944426PQ/1?accountid=15172&sourcetype=Historical%20Newspapers; Horace Greeley, "A Second Letter to Gen. Butler: Reconstruction—Vengeance," *New-York Tribune*, December 20, 1869, https://www.proquest.com/news/docview/572517014/B40BD1A4BA944426PQ/2?accountid=15172&sourcetype=Historical%20Newspapers; also see Drago, **Black Politicians and Reconstruction in Georgia**, 56–7 (conservative carpetbagger J.E. Bryant declaring to former Confederate Vice President Stephens that "I was taught to regard the Southern people as *rebels* who should be punished . . . As I became acquainted with the Southern people, I was satisfied that they were honest, and, although they might be technically guilty of treason, they were not morally guilty. . . . At first I favored disfranchisement. Now I favor Universal Amnesty. . . . Your writings have done much to change my views.")

"Our Leading Feminist": Dorothy Kenyon and the Origins of Equal Protection for Women in *Hoyt v. Florida*

Isabel Miller

"How can we have a true cross section of the community to draw upon without women?" asked Dorothy Kenyon in 1961.[1] The exclusion of women from the jury box had bothered Kenyon for years. When she started her career as a lawyer in 1917, she could represent a client in court but she, and most other women, could not serve on a jury. By 1957, three states still completely banned women from sitting on juries in state court and nineteen others used gendered eligibility requirements to restrict women from jury service.[2] After decades of advocacy, Kenyon needed a way to bring the issue of equal jury service for women to the national stage.[3] She found her opportunity in Gwendolyn Hoyt's murder trial.

Gwendolyn Hoyt, her husband Clarence, and their eight-year-old son lived together in Tampa, Florida. In 1956, Clarence, a captain in the Air Force, transferred to Miami.[4] Gwendolyn wanted to move to Miami to be with him, but Clarence forbid her.[5] After his transfer, Clarence's behavior changed. He found reasons not to come home, made secret telephone calls, and failed to hide the lipstick on his shirt.[6] After months of abandonment, Gwendolyn could not take it anymore. On September 18, 1957, she lied and told Clarence that their son was gravely ill in the hopes that he would return home.[7] He arrived in Tampa the next day but refused to talk to her.[8] Desperate, enraged, and afraid, Gwendolyn took their son's baseball bat and struck Clarence on the head.[9] The damage was irreparable. Gwendolyn Hoyt was arrested and put on trial for murder. She pleaded not guilty and not guilty by reason of insanity.[10] All the members of the jury in Hoyt's trial were

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men.[11] After a quick deliberation, the all-male jury found Hoyt guilty.[12]

In 1957, the Florida Constitution permitted women to serve as jurors, but the law automatically excluded women from jury duty unless they took the time to go to the courthouse and ask to be placed on the jury list. In Hillsborough County, Florida, where the trial took place, the county clerk created a list of 10,000 eligible jurors each year.[13] In 1957, and for at least four years prior, the clerk limited the number of women on that list to only ten or twelve despite having around 220 eligible women registered for jury service.[14] No women served on any jury in 1956, and the clerk did not add any women to the jury list in 1957.[15]

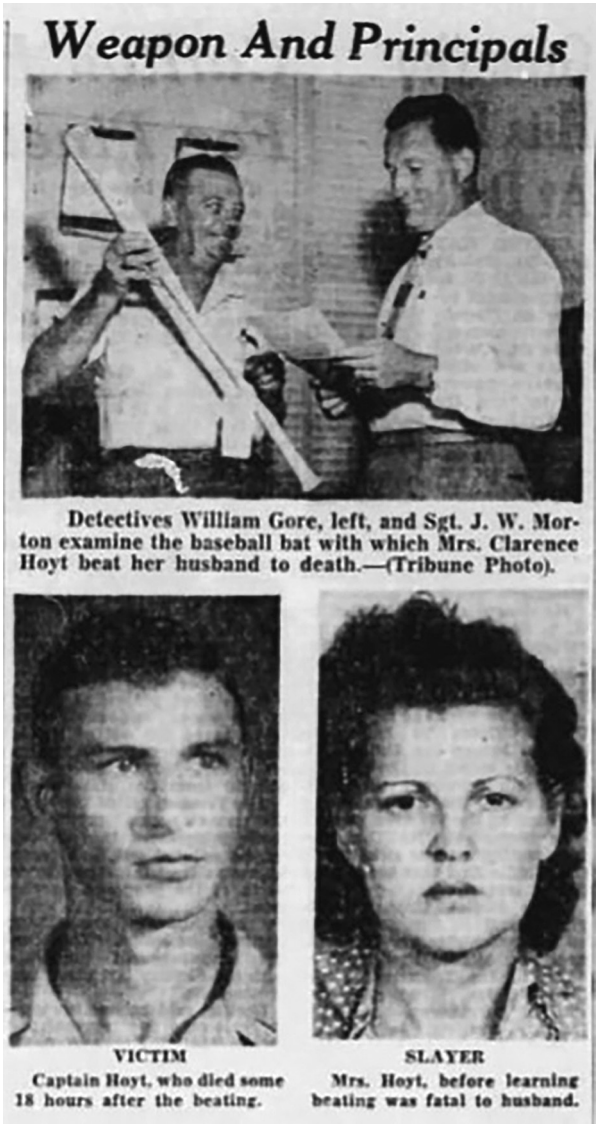
Hoyt's attorneys objected to the exclusion of women from her jury, raising the issue at both her trial and on appeal to the Florida Supreme Court.[16] Both courts held that there was no constitutional issue with the system of selecting jurors or convicting Hoyt with an all-male jury. The Florida Supreme Court underscored its ruling by denying a petition for rehearing. Hoyt then appealed to the Supreme Court of the United States in 1960, arguing that Florida's law on jury eligibility and Hillsborough County's application of the law violated the Equal Protection Clause of the Fourteenth Amendment and the right to an impartial jury and due process of law under the Fifth and Sixth Amendments.[17] Herbert Ehrmann, a renowned public interest attorney and experienced criminal defense lawyer, took the case *in forma pauperis*.[18] Ehrmann was no stranger to high profile cases (he represented Nicola Sacco and Bartolomeo Vanzetti, two Italian immigrants at the center of a sensational death penalty appeal, in 1926 and 1927), but he needed help convincing the nation's highest court that excluding women from jury service violated the Equal Protection Clause.[19] On January 11, 1961, Raya Dreben,[20] a young female attorney working with Ehrmann to prepare the case, reached out to the American Civil Liberties Union (ACLU) to ask if the organization would be willing to submit an amicus curiae brief in favor of Hoyt's case.[21]

In a memo a few months later, Melvin Wulf, the assistant legal director of the ACLU, wrote, "Would not our leading feminist, Kenyon J., be the appropriate attorney."[22] That "leading feminist"—Kenyon—was immediately interested. She called Wulf back late that night to express her desire to work on the project.[23] Kenyon was particularly invested in expanding access to jury service for women. By 1961, she had worked on the issue for over thirty years.[24] Within days, Kenyon joined Ehrmann and Dreben in preparing Hoyt's case for the Supreme Court.

The Warren Court is most remembered for its decisions expanding constitutional rights, particularly in cases involving race and the rights of criminal defendants. As *Hoyt v. Florida* involved the rights of a historically marginalized group, women, and their ability to access their civil rights at trial, it fit well within the Warren Court's interests and presented an opportunity for the justices to extend the protection of the Fourteenth Amendment to issues of gender discrimination.[25] Kenyon's involvement in Gwendolyn Hoyt's case is the story of how a crusading female lawyer laid the foundations to protect the rights of all women under the Equal Protection Clause of the Fourteenth Amendment.

Dorothy Kenyon and the Fight for Jury Service for Women

Dorothy Kenyon always knew she wanted to be a lawyer. As a young girl in New York City, she asked her father, a lawyer, if girls could be lawyers. When he answered, "why not, my dear," she later recounted that, "it was all settled, and she gave a hop, skip, and a jump along the sidewalk, clutched her



This clipping from the *Tampa Tribune* typifies the gendered way in which the Florida newspapers covered the Hoyt murder trial. Gwendolyn is labeled as a "slayer," and she is outnumbered by men—including two detectives who are smiling while handling the baseball bat that was the weapon in the case.

father's hand a little tighter and decided on a career."[26] She attended Smith College in Northampton, Massachusetts, where she graduated Phi Beta Kappa in 1908.[27] She then returned to New York and attended New York University Law School, graduating in 1917.[28] After law school, she worked as an attorney in New York City and started a law firm with Dorothy Straus, another female attorney.[29] Kenyon developed a reputation as a "crusader for social reform," engaging in campaigns addressing employment policy, living standards for the working class, and women's rights.[30] Among these issues, she emerged as a leader in the fight to expand access to jury service to women. She viewed this as an essential next step in affording women all the privileges of citizenship following their

enfranchisement through the ratification of the Nineteenth Amendment.[31]

Beginning in New York, Kenyon led efforts to overturn laws excluding women from jury service.[32] In a 1935 memo to the New York Judicial Council, she argued that "the woman's point of view is needed in the jury box as elsewhere if the court room is truly to reflect the world outside it."[33] Justice cannot be administered by an all-male jury because "[a] jury is in theory a cross section of the community," and "it is hard to justify it as a typical cross section of the community, of one's neighbors or even one's peers, with one-half of the population omitted from it."[34]

Two years later, in 1937, New York amended its law governing juror eligibility. For the first time women would be permitted to serve as jurors.[35] However, the state did not fully equalize jury service for men and women. Instead, it created a permissive system in which women *could* serve as jurors *but* had to register with the court first.[36] Kenyon argued that New York should adopt a compulsory system because a permissive system would not actually enable women to be jurors as court clerks and jury commissioners refused to put women's names on the jury rolls even when women wanted to serve.[37] In her words, "[p]ermissive service is not even half a loaf; in our judgement it is less than nothing at all. For it gives us the illusion that we have women jury service whereas actually we have not."[38]

Women's rights activists in New York compromised on permissive service because "[t]hat will give us a chance to find out whether women want to serve or not."[39] Many women did want to serve, including Kenyon. When the secretary of the commission drew names to create the first jury list that included women on September 9, 1937, Kenyon's name was one of the first drawn along with the names of sixteen other women.[40] She served as a juror in the New York Supreme Court later that year.[41]

When Hoyt's lawyers asked if the ACLU would be willing to file an amicus brief in their client's case, Melvin Wulf, the assistant legal director of the ACLU, immediately inquired as to whether Dorothy Kenyon, the organization's "leading feminist," was interested. Kenyon had long sought to expand access to jury service for women, and eagerly accepted the assignment. Kenyon is pictured here in a publicity photograph.

In 1938, Judge Benedict Dineen, then a judge on the municipal court for the third district, won his election for the New York Supreme Court, leaving a vacancy in his previous post.[42] Mayor Fiorello La Guardia appointed Kenyon to succeed him.[43] Kenyon welcomed women jurors into her courtroom; almost all of the cases she heard as a municipal judge included women in the jury.[44] As a mid-term appointment to the municipal court, Kenyon had to be elected in November 1939 to maintain her judgeship. Her competency and kindness garnered her significant support among the community, but she lost to a Tammany Hall-backed candidate.[45] Nevertheless, the experience of serving as a judge stayed with her; she continued to use the name Judge Kenyon throughout her life. Serving as a judge provided her with a unique perspective—she experienced jury service as a juror, lawyer, and judge, allowing her to

understand the full scope and importance of the role.

After her judgeship, Kenyon returned to her advocacy work, including her leadership position with the ACLU. Her connection to the ACLU stretched back to the 1920s when she served as an executive committee member; she joined the Board of Directors by 1933.[46] At the time of the *Hoyt* case, she served as the secretary on the Board of Directors and as the Director of the Equality Committee which worked on women's rights.[47] As the Equality Committee Director, Kenyon led the ACLU's opposition to the Equal Rights Amendment (ERA). Initially introduced in Congress in 1923, the ERA aimed to protect the rights of women by amending the Constitution to prohibit laws that denied or abridged people's rights on account of sex.[48] Kenyon considered it a shortsighted measure that would "freeze mathematical equality" into the laws by treating all classes exactly the same without addressing societal bias against women or permitting legislation that benefited women.[49] As she wrote in a 1954 magazine article, "there is no short road to freedom, and this pleasant sounding amendment is just another illusion along the way."[50] She argued that women's rights should instead be protected under the Equal Protection Clause of the Fourteenth Amendment.[51] After the Supreme Court found segregation in public schools to be an unconstitutional violation of equal protection in *Brown v. Board of Education of Topeka*,[52] Kenyon hoped that the Court would be ready to hold that the Fourteenth Amendment also protected women from discrimination.[53] She urged the ACLU's Board of Directors to push for cases that would lead to an expanded interpretation of equal protection.[54] *Hoyt v.*

By 1957, only three states still completely banned women from sitting on juries in state court. However, even when women did achieve the right to undertake such service, the newspaper coverage was often dominated by stereotypical articles and images. This photo, from 1955, shows the first female grand jurors in Harris County, Texas, receiving a celebratory cake.

Florida provided Kenyon and the ACLU with an opportunity to advance this position at the Supreme Court.

Kenyon Rises to the Occasion

Dorothy Kenyon wrote the ACLU's *Hoyt* amicus brief largely by herself. Rowland Watts, the ACLU's legal director, communicated with the general counsel for the Florida Civil Liberties Union, Tobias Simon, about working on the brief. Although Simon was happy for the Florida branch to be connected to the brief, he was more than happy for the "National [branch]" to "do all the work and pay all the costs . . ."[55]

Kenyon began writing the brief in earnest in May 1961, and, after a flurry of research and writing, had a completed draft ready by July.[56] When she initially submitted the draft, she commented to Wulf that she "wasn't very proud of it."[57] She worried that it was too long, lacked sufficient citations, and focused too much on background information about the history of the feminist movement.[58] No one else agreed.

In a July 24 letter, Watts informed Kenyon that he was tremendously impressed with her draft.[59] Herbert Ehrmann congratulated Watts on the excellent job that his "young ladies" did on the brief.[60] After receiving a copy of Kenyon's brief, Simon was similarly enthused:

> I have never met Judge Dorothy Kenyon, but after reading her brief I would like to meet her . . . One can take the typical male egotistical position and speak lightly of the question that is involved in this case. Unfortunately, we do not realize how important this question is; and the importance is only brought home when the plight of Gwendolyn Hoyt is realized. Judge Kenyon has risen to the occasion, and her brief speaks the issues involved eloquently.[61]

The ACLU submitted the brief to the Supreme Court in August 1961; only minimal changes were made to Kenyon's original draft.

Making the Equal Protection Argument

Kenyon's brief stood in stark contrast to the brief for the appellant submitted by Dreben and Ehrmann. While they concentrated on the effects of an all-male jury on Hoyt as a defendant,[62] Kenyon focused on the unconstitutionality of the Florida statute, addressing the fact that the rights of *all* female Floridians were at stake.[63] Florida excluded women from equal participation in jury service in two ways. First, by establishing additional eligibility requirements that only applied to women, the law created separate classifications for men and women, thereby placing extra burdens on women that men did not face.[64] Second, the county court's application of the law restricted women from jury service by limiting the number of women on the jury rolls to only ten per year.[65]

In making the all-important equal protection argument in *Hoyt*, Kenyon drew comparisons between racial discrimination and discrimination based on sex. She highlighted the recent precedent set in *Hernandez v. Texas*, which reinforced the principle that people could not be excluded from jury service due to their race.[66] Earlier cases like *Strauder v. West Virginia* (1879),[67] *Norris v. Alabama* (1935),[68] and *Smith v. Texas* (1940)[69] held that Black people could not be systemically excluded from jury service. In *Hernandez*, a case involving the exclusion of Mexican Americans from juries, the Court expanded its interpretation of the Fourteenth Amendment.[70] In his opinion for a unanimous court, Chief Justice Earl Warren held that the Fourteenth Amendment protected any distinct class facing legal discrimination.[71] He found that the history of excluding Mexican Americans from jury service in Texas and the differential application of the law between white

people and Mexican Americans violated the Equal Protection Clause.[72]

In her *Hoyt* amicus brief, Kenyon argued that women, like Black people and people of Mexican descent, constituted a distinct class that Florida had singled out for unreasonable—and therefore unconstitutional—differential treatment.[73] She knew the Warren Court's reputation for strong opinions in favor of expanding civil rights protections on the basis of race, and drew parallels between racial and gender discrimination to appeal to the justices.[74] "'We cannot turn the clock back to 1868 when the amendment was adopted,'" she wrote, echoing Warren's famous words in *Brown*.[75] "The same reasoning surely applies to women who too have had to fight a slow and painful battle during the last century and a half for recognition and status . . . " she continued.[76] This reference was a reminder to the justices that they had taken the affirmative steps to undo a system of historic and entrenched inequality once before, and now they had the power to do so again.

Kenyon observed that in 1961 the most common reason for excluding women from jury service was the belief that it would take women away from their primary roles and responsibilities as wives and mothers.[77] As Justice E. Harris Drew of the Florida Supreme Court wrote in his opinion upholding the conviction of Hoyt, "whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends."[78] Kenyon used statistical evidence to rebut this argument. She noted that as of 1961, women made up thirty-three percent of the American workforce, and that this included thirty percent of all married women.[79] Additionally, only eleven years (roughly twenty percent) of an average woman's adult life would be "needed for or given over to baby-sitting" should she have children, leaving nearly fifty years where she would be as free as any man to serve on a jury.[80] Kenyon wrote her brief as a woman who never married, never had children, and worked as a lawyer for over four decades. Her demographic evidence showed that a significant number of American women were similarly untethered from the domestic sphere. In the face of these statistics, one could hardly make a *reasonable* argument that jury service would deprive society of female caregivers.

Defining a Woman's Place

Historically, defining women by their roles as wives and mothers served to deprive them of their civil rights. In her brief, Kenyon described the development of trial by jury in England as a right held exclusively by free men, explicitly prohibiting both enslaved people and women.[81] When the English civil rights were incorporated into the Constitution, Americans also adopted the doctrine of coverture which prevented married women from possessing legal rights, including the right to serve on a jury.[82] Kenyon described coverture as swallowing up women's legal existence after marriage as their husband's legal status subsumed their personhood.[83] Women had no right to property, earnings, control over their children, or political and civil rights; as Kenyon explained, this reduced women to the position of chattel.[84] Without civil rights, a woman could be forced to endure trauma without recourse as she had no legal standing to plead to the state for her protection without her husband speaking for her.[85] Thus, focusing on women's traditional roles as wives and mothers stripped women of their legal and civil rights, including the right to serve on juries.[86]

Although Kenyon described coverture as a historical doctrine, the legal restrictions on women's rights and personhood were a familiar part of her world. Born in 1888, she was barely two generations removed from the

women's rights convention in Seneca Falls in 1848 and came of age at the height of the women's suffrage movement.[87] And in 1873, nearly fifteen years before Kenyon's birth, the Supreme Court held in *Bradwell v. Illinois* that women did not have a right to become lawyers because, as Justice Joseph P. Bradley stated in his infamous concurrence, "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[88]

Kenyon's personal experiences also made her acutely aware of recent progress towards recognizing women's legal rights. As she wrote in her brief, "[w]omen can hold property in their own right. They can pay taxes (there has never been any difficulty about that); but they can vote and legislate as well which assures that there is no taxation without representation."[89] She noted that women increasingly had access to education, including college and graduate school, enabling them to enter into previously barred professions, like the law.[90] Kenyon concluded that these legal advances during her lifetime showed that, "women are now full-fledged emancipated citizens with most of the privileges and immunities and responsibilities appertaining thereto," and, as citizens, they must be equally granted all the rights and responsibilities of citizenship, including jury duty.[91]

The Supreme Court Takes Hoyt's Case

Hoyt v. Florida came to the Supreme Court on the miscellaneous docket.[92] The Court dismissed the vast majority of miscellaneous cases unless at least four justices found the case sufficiently important to hear. Chief Justice Warren showed the earliest interest in taking Hoyt's case. Prior to the vote on whether to hear the appeal, Warren assigned one of his law clerks, Joseph Bartlett, to draft a memo analyzing whether the Court should hear it. Bartlett found that the case presented a substantial federal question, namely whether Florida's system of selecting jurors violated the Equal Protection Clause.[93] He argued that Hillsborough County arbitrarily excluded women from juries by limiting their number to only ten per year, making the law unconstitutional as applied.[94] Warren agreed that the court's method of selecting women jurors arbitrarily and systematically excluded women.[95] Furthermore, the Chief found the effect of excluding women jurors to be particularly injurious to the appellant, Gwendolyn Hoyt, as a woman charged with murdering her husband.[96] Due to these systemic and personal harms, Warren entered the justices' Conference on January 6, 1961 believing that the Court needed to grant the appeal. Five members of the Court—Felix Frankfurter, John Marshall Harlan, Tom C. Clark, Charles E. Whittaker, and Potter Stewart—voted to deny certiorari.[97] However, as only four votes are required to grant certiorari—and those votes were provided by Chief Justice Warren and Justices Hugo L. Black, William O. Douglas, and William J. Brennan, Jr.—the Court took up the case and scheduled it for oral argument in October.

After the Court agreed to hear the case, Warren assigned a second clerk, Timothy Dyk, to analyze the issues again. Dyk concluded that the Court should find the statute unconstitutional because it violated the Equal Protection Clause by creating separate and arbitrary requirements for women to be eligible for jury service.[98] Dyk relied heavily on Kenyon's brief, citing it four times in his memorandum.[99] He pointed out that the Court had never formally decided whether the Equal Protection Clause applied to discrimination on the basis of sex, making a law completely excluding women from jury service potentially permissible.[100] However, he argued that once Florida allowed women to serve as jurors, it violated the Constitution because there was no reasonable basis for creating different eligibility requirements for men and women.[101]

In support of this position, Dyk referred to Kenyon's argument that state laws permitting, rather than requiring, women to become jurors effectively excluded them from jury service.[102] Dyk then addressed the counter-argument set forth by the Florida Supreme Court—namely, that forcing women to serve on juries would be detrimental to society by taking women away from their responsibilities as homemakers.[103] Again, Dyk turned to Kenyon's brief, borrowing her argument that the option for a judge to exercise his or her discretion in dismissing any potential juror for hardship would sufficiently protect any women for whom jury service would actually impede maternal duties.[104]

The Court heard oral arguments in Hoyt's case on October 19, 1961. Herbert Ehrmann argued on behalf of Hoyt, and George Georgieff, Florida's assistant attorney general, presented the state's case.[105] The lack of women at the counsel tables was glaringly obvious. Raya Dreben and Dorothy Kenyon traveled to Washington but were merely members of the audience in attendance at the Court that day.[106] Gwendolyn Hoyt did not have sufficient funds to attend.[107]

George Georgieff argued on behalf of Florida when the *Hoyt* case reached the Supreme Court. When Chief Justice Warren questioned whether jury service restrictions should apply to all women including unmarried and childless women, the assistant attorney general said "this is unfortunately a man's world and . . . I'm afraid it's going to remain one."

Georgieff began his statement with an apology: "I'd like to thank the indulgence of the ladies in the audience and of course my good wife wherever she happens to be for the things I'm about to say. They might not square with what women would think."[108] He went on to say that women as a class could never be equal to men because "they are the ones that do have all of these infirmities that no amount of ascension on the social scale can erase."[109] The infirmities included the expectation that women be the ones to "raise these children, to prepare the food, to keep the home, and to do other things that women customarily do and to this day do."[110] For Georgieff, the societal belief that women should be confined to the domestic sphere justified keeping them out of the jury box. When Warren questioned the application of these restrictions to all women, including unmarried and childless women, Georgieff reaffirmed his view, saying "this is unfortunately a man's world and . . . I'm afraid it's going to remain one."[111]

Ehrmann also emphasized women's traditional connection to the home and family. In arguing that the perspective of women jurors as a class would be different from men, thereby injuring Hoyt, Ehrmann stated that, "[w]omen emphasize more the home, children, husband, their approach is far [more] emotional."[112] Paradoxically, women were also chastised for their lack of political activism outside of the home. Justice Frankfurter questioned whether the additional requirements for women in jury service resulted

from women's political preferences and voting habits in the state. "If they [women] really wanted to be called like men," Justice Frankfurter asked, "there'd be no trouble about getting that legislation through even in Florida, would it?"[113] Ehrmann ducked the politics question, saying that he did not know where the power to control the legislature lay, and that "I am not here urging the rights of women to serve on juries. I am here defending a woman who is sentenced to thirty years at hard labor." Nor did he address the facial challenge to the statute that Kenyon's brief emphasized.[114]

The following day, the justices met to discuss and vote on the case at Conference. Three justices, Warren, Black, and Douglas favored reversing the Florida Supreme Court's decision. Black argued that the statute violated the Equal Protection Clause.[115] Warren did not want to go that far. He proposed a narrow decision based on the particular facts of the case.[116] Rather than finding Florida's additional eligibility requirements for women facially unconstitutional, Warren wanted to reverse the Florida Supreme Court's decision, arguing that Hillsborough County's policy limiting the number of women on the jury roll to only ten was tantamount to unconstitutional exclusion.[117] He also found the particular injury to Hoyt as a female defendant persuasive in a case where a woman's perspective mattered.[118]

The other five justices disagreed. Frankfurter and Whittaker argued that the statute was both facially constitutional and constitutional as applied to Hoyt because it did not purposefully or systematically exclude women and the county's system of selecting jurors was not arbitrary.[119] Frankfurter also distinguished the case from *Hernandez,* indicating that he did not believe that

The Warren Court issued a unanimous ruling in *Hoyt v. Florida* (1961). Justice John Marshall Harlan, II (back row, second from the left) authored the Court's opinion. Justice William O. Douglas (front row, far left) wrote a crucial concurrence that was joined by Chief Justice Earl Warren (front row, center) and Justice Hugo L. Black (front row, second from left).

discrimination on the basis of race and sex were due the same protection under the Fourteenth Amendment.[120]

At the end of the Conference, Warren indicated that he intended to dissent. Consequently, the job of assigning the majority opinion fell to Frankfurter, the senior associate justice in the majority. He assigned the case to Justice Harlan.[121] In his opinion, Harlan wrote that Florida's statute governing juror eligibility was constitutional, both facially and as applied to Hoyt.[122] Even though it was not a direct issue in the case, Harlan also reaffirmed that states could constitutionally limit jury duty to only men.[123] In the case of permissive service for women, as in Florida, Harlan wrote that states could differentiate between groups as long as the categorization was reasonable.[124] Harlan credited Florida's explanation as reasonable because "woman is still regarded as the center of home and family life."[125] Additionally, he argued that it was within Florida's police powers to protect women from jury service, leaving it to each individual woman to prove to the state that serving on a jury would not injure herself or society.[126]

Harlan rejected the argument that discrimination on the basis of sex was analogous to discrimination based on race. He stated that Hoyt's case was not one in which "the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusion from jury service."[127] This was because "there is present here neither the unfortunate atmosphere of ethnic or racial prejudice which underlay the situations depicted in those cases nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced."[128] He considered, and rejected, the possibility that the statute could have been unconstitutional if it differentiated by income, writing "[n]or is there the slightest suggestion that the list was the product of any plan to place on it only women of a particular economic or other community or organizational group."[129] Harlan did not completely foreclose the possibility that women as a class could be protected under the Equal Protection Clause, but his opinion indicated that women's rights activists would face significant legal hurdles in attempting to prove that women should receive such protection.[130]

The *Hoyt* Opinions

On November 14, 1961, Harlan circulated his majority opinion to the other justices.[131] After reading the draft, Justice Douglas drafted and circulated a two-sentence concurrence that read as follows:

> We cannot say from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex. Hence, we concur in the result, for the reasons set forth in Part II of the Court's opinion.[132]

After meeting privately with his colleague, Justice Black agreed to sign on to Douglas' concurrence.[133] Douglas subsequently invited Warren to join the concurrence as well.[134] This invitation would have profound consequences.

Recall that at the justices' Conference, Warren advocated for overturning Hoyt's conviction because limiting the number of women on the jury roll to only ten was tantamount to excluding women.[135] Additionally, Warren consistently found the statute's application to Hoyt as a woman defendant to be particularly troubling.[136] However, Warren reversed his position,[137] and joined Douglas' concurrence.[138] Dyk told the chief justice that concurring in the application of the statute logically required one to find the statute facially valid, as argued in Part I of Harlan's opinion, but Warren was not troubled by the logical inconsistency.[139] Warren preferred to wait for future cases on the same issue,

thereby retaining the option to factually distinguish later cases from *Hoyt*.[140]

As a result, the Court unanimously upheld Florida's jury system as constitutional. By forgoing the option to issue a dissenting opinion in favor of signing on to Douglas' concurrence, Warren indicated an attitude of disinterest in the case. This attitude was shared by other justices as well. Frankfurter wrote that Harlan, "gave this more consideration and time than it deserved," on his copy of Harlan's opinion.[141] Just how much time was "deserved"? After all, Justice Harlan announced the opinion in *Hoyt* on November 20, 1961, a mere month after oral arguments.[142]

The press reacted negatively to the Court's decision in *Hoyt*. Many authors hypothesized that women jury service would soon become the norm.[143] Noted trial attorney Louis Nizer wrote an opinion piece for the *New York Times* arguing that male attorneys should want women jurors because "women jurors reveal themselves to a male lawyer a little more readily than men." Even though "[t]he sexual factors involved are exceedingly thin . . . they can be detected as indeed they can be at any social gathering when one senses a little admiration or, on the other hand, disapproval between guests of opposite sexes."[144]

Kenyon did not publish a written response to the Court's decision, preferring to put her energy into advocacy efforts to create greater opportunities for women in the future.

The Path to Equal Protection

Kenyon's amicus brief in *Hoyt* took on a second life thanks, in part, to the pioneering efforts of the Black feminist lawyer, Pauli Murray. On August 15, 1962, Murray, a member of President John F. Kennedy's Commission on the Status of Women, contacted the ACLU to request a copy of Kenyon's *Hoyt* brief as a part of her research about how to use the Fourteenth Amendment to dismantle discrimination on the basis of sex.[145] She ended her letter by expressing hope to the ACLU that the Commission could "count on you for guidance and assistance in developing a sound constitutional argument in this important field of human rights."[146]

This image is part of an 1891 caricature entitled "The growing field of woman's work. A short look ahead." The image is captioned "The only way to keep men from trying to evade jury duty—have mixed juries, as above." As the story of the *Hoyt* case demonstrates, heavily gendered societal, and jurisprudential views of jury service persisted in the U.S. well into the twentieth century.

In the spring of 1963, Murray approached the ACLU again to propose a litigation strategy for achieving equal rights for women.[147] In a memorandum she argued that the Fourteenth Amendment was a better avenue than the ERA because it would eliminate the unreasonable barriers to women's participation in society while preserving legal distinctions that reasonably protected women as a historically underprivileged group.[148] She used laws regulating women jurors as the preeminent example of an unreasonable barrier because they excluded *all* women in an effort to protect mothers from the burdens of jury service.[149]

Murray proposed forming a committee of specialist women's rights lawyers to lead the fight and maximize the chances of a successful outcome in court.[150] She particularly emphasized the importance of having experts write amicus briefs because "a valuable public service can be rendered by filing amicus curiae briefs which help to broaden

the perspective of the various courts."[151] She identified Kenyon's brief in *Hoyt* as the only example of a Supreme Court amicus brief supporting the rights of women since Louis D. Brandeis' brief in support of a maximum hours law for working women in *Muller v. Oregon* (1908).[152] She also hypothesized that future cases regarding jury service may have more favorable outcomes than *Hoyt* because three justices concurred separately and two justices in the *Hoyt* majority, Whittaker and Frankfurter, had since left the Court.[153]

As the leader of the ACLU's Equality Committee, Dorothy Kenyon enthusiastically endorsed Murray's proposal at an ACLU Board meeting on April 1, 1962.[154] The Board unanimously agreed to her proposal.[155] This vote initiated a sustained effort by the ACLU to fight for women's rights using the Equal Protection Clause of the Fourteenth Amendment. As an organization experienced in constitutional litigation, the ACLU perfectly fit the role of a dedicated group of experts that Murray imagined in her proposal.[156]

Murray joined the ACLU as a member of the Board of Directors in 1965.[157] Working with Mary Eastwood, an attorney with the Department of Justice, Murray expanded on the connections between racism and sexism in the seminal work *Jane Crow and the Law*, in which she argued that the Equal Protection Clause protected women from "separate but equal" discriminatory treatment.[158] In 1966, Kenyon and Murray assisted in the successful litigation of a case in Alabama, *White v. Crook*, arguing that the state's system of selecting juries systematically excluded Black citizens *and* women citizens of all races.[159] Murray and Kenyon authored the section of the brief focusing on exclusion from jury service on the basis of sex, again arguing that the practice violated the Equal Protection Clause and drawing connections between exclusion on the basis of sex and exclusion based on race.[160] The case was the first time a federal court declared a male-only jury service system unconstitutional.[161]

Other lawyers soon joined the ACLU's women's rights project, including future Supreme Court Justice Ruth Bader Ginsburg.[162] In 1971, ten years after the Court's decision in *Hoyt v. Florida,* Ginsburg and the ACLU returned to the Supreme Court in *Reed v. Reed* to argue that an Idaho law preferencing men over women in deciding who would administer estates violated the Equal Protection Clause.[163] Dorothy Kenyon did not work on that case; she was eighty-three years old and terminally ill.[164] Ginsburg credited both Kenyon and Murray in her brief as a sign of respect for what the two trailblazers started.[165]

In 1975, three years after Kenyon's death, the Supreme Court held in *Taylor v. Louisiana* that the systematic exclusion of women from jury service through automatic exemptions and additional eligibility requirements, like that used by Florida, was unconstitutional, explicitly overruling *Hoyt*.[166] Subsequent decisions in *Duren v. Missouri* (1979)[167] and *J.E.B. v. Alabama* (1994)[168] confirmed that there is no significant state interest in excluding women from jury service and that the Equal Protection Clause bars the exclusion of jurors on the basis of sex. These decisions came too late for Gwendolyn Hoyt. But they vindicated the position that Dorothy Kenyon took in her case, a position that spoke for the rights of *all* women.

A Missed Opportunity

In *The Warren Court and American Politics*, Lucas (Scot) A. Powe argued that the Court's decision in *Hoyt* was inevitable, because "the Court does not create social movements; it responds to them. It took Betty Friedan and the sexism of the civil rights movement to create the modern women's movement."[169] Dorothy Kenyon's amicus brief in *Hoyt* shows that activism around equal

rights for women preceded that "movement." *Hoyt* was a missed opportunity for the Warren Court. It could have cemented its civil libertarian legacy by defending the rights of women in addition to its work protecting people's civil rights from racial discrimination. But in *Hoyt*, the Court chose not to follow the path Kenyon asked them to take.

Even though Kenyon could not persuade the justices that women deserved equal access to jury service, she laid out a jurisprudential roadmap for securing women's rights under the Equal Protection Clause. Her arguments in *Hoyt* showed that the Fourteenth Amendment's Equal Protection Clause was a viable option for achieving equal rights for women.[170] Kenyon's work in *Hoyt* also informed future methods of litigating. Following *Hoyt,* the ACLU far more frequently filed amicus briefs in support of women's rights, and this became an important part of the organization's issue advocacy.[171] Dorothy Kenyon's work in *Hoyt* laid the groundwork for those later successes, making *Hoyt* a seminal case in the fight for women's rights.

ENDNOTES

[1] Dorothy Kenyon and Phyllis Shampanier, Brief for the Florida Civil Liberties Union and the American Civil Liberties Union as Amici Curiae supporting the Appellant, *Hoyt v. Florida*, 368 U.S. 57 (1961), 12 (hereafter *Hoyt* ACLU Amicus Brief).

[2] U.S. Department of Labor, Women's Bureau, "Property and Political Rights of Women," Washington, D.C., June 23, 1958, in American Civil Liberties Union Records, Years of Expansion, 1950–1990 Collection, MC #001 Box 1142, Folder 23, Equal Rights Amendment: 1958-1959, Department of Special Collections, Princeton University Library (hereafter ACLU-PU).

[3] *Hoyt* ACLU Amicus Brief, 13.

[4] Transcript of Record, June 15, 1960, *Hoyt v. Florida*, 368 U.S. 57 (1961), 37 (hereafter *Hoyt* Transcript).

[5] *Hoyt* Transcript, 37.

[6] *Hoyt* Transcript, 37.

[7] *Hoyt* Transcript, 38.

[8] *Hoyt* Transcript, 38.

[9] *Hoyt* Transcript, 38.

[10] *Hoyt* Transcript, 30.

[11] *Hoyt* Transcript, 44.

[12] *Hoyt* Transcript, 30.

[13] *Hoyt* Transcript, 28.

[14] *Hoyt* Transcript, 13.

[15] *Hoyt* Transcript, 19-20

[16] *Hoyt* Transcript, 31.

[17] *Hoyt* Transcript, 50.

[18] Letter from Herbert Ehrmann to Melvin L Wulf, Re: *Hoyt v. Florida*, April 3, 1961, Box 1142, Folder 28, ACLU-PU; Linda K. Kerber, **No Constitutional Right to be Ladies: Women and the Obligations of Citizenship** (1998), 165.

[19] Herbert B. Ehrmann, **The Case That Will Not Die: Commonwealth vs. Sacco and Vanzetti** (1969), 402. Dorothy Kenyon, Herbert B. Ehrmann, and future Supreme Court Justice Felix Frankfurter were all involved in the defense of Sacco and Vanzetti. "Sacco-Vanzetti Case and 1927 Wiretap Order on Felix Frankfurter with Typescript Telephone Conversations," August 15–20, 1927, Felix Frankfurter Papers, Box 215, Folder 6. Harvard Law School Library, Historical & Special Collections.

[20] Raya Dreben later became a judge on the Massachusetts Appeals Court. See Raya Spiegel Dreben interview transcript, 2021. Radcliffe College Alumnae Oral History Project of the Radcliffe Club of San Francisco,1981–2022, Folder #E.54-E.83. Schlesinger Library, Radcliffe Institute.

[21] Letter from Raya Dreben to ACLU, January 11, 1961, Box 1142, Folder 28, ACLU-PU; Kerber, **No Constitutional Right to be Ladies**, 167.

[22] Memorandum by Melvin Wulf, April 4, 1961, Box 1142, Folder 28, ACLU-PU.

[23] Note of Phone Message from Dorothy Kenyon to Melvin Wulf, April 4, 1961, Box 1142, Folder 28, ACLU-PU.

[24] "Women Ask Jury Duty: Get Little Hope at Albany that Bills will be Passed," *New York Times*, February 18, 1932.

[25] *Goesaert v. Cleary*, 335 U.S. 464 (1948); Justin Driver, "The Constitutional Conservatism of the Warren Court*," California Law Review* 100, no. 5 (2012): 1114–24 (2012). For a comprehensive story of the fight for equal jury service for women and *Hoyt*, see Kerber, **No Constitutional Right to be Ladies**, 124–220, and Samantha Barbas, "Dorothy Kenyon and the Making of Modern Legal Feminism," *Stanford Journal of Civil Rights & Civil Liberties* 5, no. 2 (2009).

[26] "The News about a West Side Woman," October 23, 1939, Box: 4, Folder: 1-5, Dorothy Kenyon Papers, Sophia Smith Collection, Smith College, Northampton, Mass. (hereafter DKP-SSC).

[27] "The News about a West Side Woman"; Dorothy Kenyon Gets Bench Post: Woman Lawyer Accepts Offer of

Appointment Made by Mayor Last Month," *New York Times*, January 8, 1939.

[28] "Dorothy Kenyon Gets Bench Post"; Kerber, **No Constitutional Right to be Ladies**, 169.

[29] Kerber, **No Constitutional Right to be Ladies**, 169.

[30] "The News about a West Side Woman."

[31] Dorothy Kenyon, "Jury Duty—What It Means," February 4, 1938, Box 19, DKP-SSC.

[32] Dorothy Kenyon, "Brief Submitted to the Judicial Council by the New York League of Women Voters on Behalf of Jury Service for Women on the Same Terms as Men," 1935, Box 32, Folders 1–3, at 5–6, DKP-SSC.

[33] Kenyon, "Brief Submitted," 7.

[34] Kenyon, "Brief Submitted," 6-7.

[35] "The News about a West Side Woman."

[36] Kenyon, "Brief Submitted," 4. In 1935, only ten states mandated compulsory jury service for women. New York, eleven other states, Alaska, and the District of Columbia, had a permissive system. Kenyon, "Brief Submitted," 3.

[37] Kenyon, "Brief Submitted," 9.

[38] Kenyon, "Brief Submitted," 9–10.

[39] Kenyon, "Jury Duty—What It Means," 4.

[40] "First Women Put on Jury Lists Here," *New York Times*, September 9, 1937.

[41] "The News about a West Side Woman."

[42] "Dorothy Kenyon Gets Bench Post."

[43] "Dorothy Kenyon Gets Bench Post"; "Judge Kenyon Praised: La Guardia Strongly Urges Her to Return to Bench," *New York Times*, October 18, 1939.

[44] "The News about a West Side Woman."

[45] "Tammany scores," *New York Times*, November 9, 1939.

[46] Letter from the Office of Mrs. Norrie to Mr. Bailey, April 29, 1926, Microfilm Reel #48; "Land of the Pilgrims Pride: 1932–1933," June 1933, Microfilm Reel #97, 69. Both in the Rodger Baldwin Years, 1912-1950, ACLU-PU.

[47] Memorandum-To: ACLU Board, From: Equality Committee, Subject: Proposed Text of Equal Rights Amendment for Women, May 19, 1960, Box 1142, Folder 26, ACLU-PU; Dorothy Kenyon, "Meeting Minutes: Application of the Fourteenth Amendment to Equal Rights for Women," April 1, 1963, Box 1143, Folder 9, ACLU-PU.

[48] U.S. Department of Labor, Women's Bureau, "Equal Rights Amendment," May 1961, Box 1143, Folder 9, ACLU-PU.

[49] Dorothy Kenyon, "Equal Rights for Women," *Civil Liberties* (June 1954), 2; also see Dorothy Kenyon, "Restatement of ACLU Opinion in Favor of Women's Rights," June 15, 1955, 1. Both in Box 22, DKP-SS.

[50] Kenyon, "Equal Rights for Women," 2.

[51] Memorandum-To: ACLU Board, From: Equality Committee.

[52] 347 U.S. 483, 492 (1954).

[53] Kenyon, "Equal Rights for Women," 2.

[54] "Equality Committee Minutes," December 1, 1959, Box 1142, Folder 23, ACLU-PU.

[55] Letter from Tobias Simon to Roland Watts, Re: *Hoyt v. Florida*, January 17, 1961, Box 1142, Folder 28, ACLU-PU.

[56] Letter from Melvin Wulf to Dorothy Kenyon, Re: *Hoyt v. Florida*, May 10, 1961, Box 1142, Folder 28, ACLU-PU.

[57] Letter from Dorothy Kenyon to Melvin Wulf, Re: *Hoyt v. Florida* Amicus Brief, July 19, 1961, Box 1142, Folder 28, ACLU-PU.

[58] Kenyon to Wulf, July 19, 1961.

[59] Letter from Rowland Watts to Dorothy Kenyon, Re: *Hoyt v. Florida*, July 24, 1961, Box 1142, Folder 28, ACLU-PU.

[60] Letter from Herbert Ehrmann to Rowland Watts, Re: *Hoyt v. Florida*, September 26, 1961, Box 1142, Folder 28, ACLU-PU.

[61] Letter from Tobias Simon to Roland Watts, Re: *Hoyt v. Florida*, July 28, 1961, Box 1142, Folder 28, ACLU-PU.

[62] Raya Dreben and Herbert Ehrmann, Brief for the Appellant, *Hoyt v. Florida* 368 U.S. 57 (1961) (No. 31), 21–3.

[63] *Hoyt* ACLU Amicus Brief. Phyllis Shampanier did not write the brief. The ACLU added her as an author so that the Florida Civil Liberties Union could be included in the filing. The Florida Civil Liberties Union selected Shampanier as a "woman cooperating attorney" for the optics. Letter from Rowland Watts to Tobias Simon, Re: *Hoyt v. Florida*, July 24, 1961, Box 1142, Folder 28, ACLU-PU.

[64] *Hoyt* ACLU Amicus Brief, 3.

[65] *Hoyt* ACLU Amicus Brief, 6.

[66] *Hoyt* ACLU Amicus Brief, 6–7; *Hernandez v. Texas*, 347 U.S. 475, 477 (1954); also see Gabriel Valle, "A Hero Forgotten: Gus Garcia and the Litigation of *Hernandez v. Texas* (1954)," *Journal of Supreme Court History* 48, no. 1 (2023), 46.

[67] 100 U.S. 303 (1879).

[68] 294 U.S. 587 (1935) (holding that the systemic exclusion of Black people from jury service violates the Equal Protection Clause); also see *Patterson v. Alabama*, 294 U.S. 600 (1935) (finding that the systemic exclusion of Black people from jury service violated the defendant's rights under the Equal Protection Clause). The Supreme Court first held that excluding Black people from jury service violated the Equal Protection Clause in *Strauder*. While the Court reaffirmed that holding in *Norris*, courts, particularly those in southern states, continued to use facially race-neutral methods to effectively exclude Black people from jury service well into the 1960s. See Alexis Hoag, "An Unbroken Thread: African American Exclusion from Jury Service, Past and Present," *Louisiana Law Review* 81, no. 1 (2020), 64–5.

[69] 311 U.S. 128, 129 (1940).
[70] 347 U.S. at 477.
[71] 347 U.S. at 478.
[72] 347 U.S. at 479-80.
[73] *Hoyt* ACLU Amicus Brief, 11 (quoting *Hernandez*).
[74] Dorothy Kenyon, "The Role of the Supreme Court: The Great American Gamble," Speech Delivered at Brown University (Typescript), March 1960, Box 22, 10, DKP-SS.
[75] *Hoyt* ACLU Amicus Brief, 12 (quoting 347 U.S. at 492).
[76] *Hoyt* ACLU Amicus Brief, 12.
[77] *Hoyt* ACLU Amicus Brief, 4.
[78] *Hoyt* Transcript, 33.
[79] *Hoyt* ACLU Amicus Brief, 25.
[80] *Hoyt* ACLU Amicus Brief, 25.
[81] *Hoyt* ACLU Amicus Brief, 8.
[82] *Hoyt* ACLU Amicus Brief, 20–2.
[83] *Hoyt* ACLU Amicus Brief, 13.
[84] *Hoyt* ACLU Amicus Brief, 21.
[85] *Hoyt* ACLU Amicus Brief, 20–1. The limitations on women's legal rights continued into the 1950s and 1960s, particularly in many southern states like Florida. Of particular importance to Hoyt's case, married women in Florida, like Hoyt, had no legal ability to decide where their family lived as Florida gave that privilege to the husband. Because of this, Hoyt could not move with her husband after he relocated for his job without his approval. Linda K. Kerber, "Why Diamonds Really are a Girl's Best Friend: Another American Narrative," *Daedalus* 141, no. 1 (2012), 89, 94. Married women in Florida also could not manage their own property without proving their competency in court and obtaining the right to be a "free dealer." Divorce proceedings in the 1950s required a showing of fault, and decisions about alimony, child support, and custody typically favored men. Joan S. Carver, "Women in Florida," *Journal of Politics* 41, no. 3 (1979), 951.
[86] *Hoyt* ACLU Amicus Brief, 13.
[87] *Hoyt* ACLU Amicus Brief, 22–3; Kerber, **No Constitutional Right to be Ladies**, 169.
[88] 83 U.S. 130, 141 (1873) (Bradley, J., concurring). In the same year, the Illinois legislature passed a law permitting women to work in most jobs, including the law, but prohibited women from joining the military, working on road construction, and serving on juries. Bradwell's lobbying efforts helped to get the bill passed, but she did not become a licensed attorney herself. Believing that she had fulfilled all the requirements for bar admission, Bradwell waited for the state bar to rectify its own mistake. In 1890, the Illinois Supreme Court granted her a law license retroactive to 1869. Jill Norgren, **Rebels at the Bar: The Fascinating, Forgotten Stories of America's First Women Lawyers** (2013), 42–3; John Lupton, "Illinois Supreme Court History: Myra Bradwell," Illinois Courts, https://www.illinoiscourts.gov/News/1331/Illinois-Supreme-Court-history-Myra-Bradwell/news-detail/#:~:text=Before%20the%20judgment%20in%20the,allowed%20women%20to%20become%20lawyers (last accessed July 21, 2024).
[89] *Hoyt* ACLU Amicus Brief, 24.
[90] *Hoyt* ACLU Amicus Brief, 24.
[91] *Hoyt* ACLU Amicus Brief, 24 (referencing the United States Constitution, Fourteenth Amendment, Section One).
[92] Miscellaneous Docket: *Hoyt v. Florida*, No. 126, January 6, 1961, Box 375, Folder 2, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter EW-LC).
[93] Joseph Bartlett, Memorandum on No. 126 Misc. 1960 Term, *Hoyt v. Florida*, 5–6, Box 216, Folder 1, EW-LC.
[94] Bartlett, Memorandum.
[95] Bartlett, Memorandum, 1.
[96] Bartlett, Memorandum, 1.
[97] Miscellaneous Docket: *Hoyt v. Florida*, No. 126.
[98] Timothy Dyk, Bench Memo: No. 31 1961 Term, *Hoyt v. Florida*, 14, Box 219, Folder 4, EW-LC.
[99] Dyk, Bench Memo, 6, 7, 9, 12.
[100] Dyk, Bench Memo, 10.
[101] Dyk, Bench Memo, 10–11.
[102] Dyk, Bench Memo, 6; *Hoyt* ACLU Amicus Brief, 5.
[103] Dyk, Bench Memo, 11.
[104] Dyk, Bench Memo, 12; *Hoyt* ACLU Amicus Brief, 14.
[105] Anthony Lewis, "Court Backs Curb on Women Jurors," *New York Times*, November 21, 1961.
[106] Kerber, **No Constitutional Right to be Ladies**, 170.
[107] Kerber, **No Constitutional Right to be Ladies**, 170.
[108] Transcript of Oral Argument, *Hoyt v. Florida* 368 U.S. 57 (1961), Oyez.org, https://www.oyez.org/cases/1961/31 (last accessed July 21, 2024) (hereafter *Hoyt* oral argument transcript).
[109] *Hoyt* oral argument transcript.
[110] *Hoyt* oral argument transcript.
[111] *Hoyt* oral argument transcript.
[112] *Hoyt* oral argument transcript.
[113] *Hoyt* oral argument transcript. Women had very limited political influence in Florida, with only two women elected to prominent political positions between 1920 and 1960, and few proposals from women's lobbying groups being enacted into law during this period. Carver, "Women in Florida," 944.
[114] *Hoyt* oral argument transcript.
[115] William O. Douglas, Notes at Conference, October 20, 1961, Box 1269, No 31: *Hoyt v. Florida* Folder, Papers of William O. Douglas, LC (hereafter WOD-LC).
[116] Douglas, Notes at Conference.
[117] William J. Brennan, Notes at Conference: No. 31, *Hoyt v. Florida*, Box I: 60, Folder 6, Papers of William J. Brennan, Jr. (hereafter WJB-LC).
[118] Brennan, Notes at Conference.

[119] Brennan, Notes at Conference; Douglas, Notes at Conference.
[120] Douglas, Notes at Conference; 347 U.S. at 475.
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[122] 368 U.S. at 65, 69.
[123] 368 U.S. at 60.
[124] 368 U.S. at 61.
[125] 368 U.S. at 62.
[126] 368 U.S. at 62–3.
[127] 368 U.S. at 68.
[128] 368 U.S. at 68.
[129] 368 U.S. at 69.
[130] 368 U.S. at 63.
[131] Draft of Justice Harlan's Majority Opinion in *Hoyt v. Florida*, November 14, 1961, Box I: 67, Folder 9, WJB-LC.
[132] William O. Douglas, Draft of Concurrence for No. 31: *Hoyt v. Florida*, Box 1269, No. 31: Hoyt v. Florida Folder, WOD-LC.
[133] Memorandum to the Chief Justice from Justice Douglas, Re: No 31-*Hoyt v. Florida*, November 16, 1961, Box 484, *Hoyt v. Florida* Folder, EW-LC.
[134] Memorandum from the Chief Justice to Justice Douglas, Re: No 31-*Hoyt v. Florida*, November 16, 1961, Box 484, *Hoyt v. Florida* Folder, EW-LC.
[135] Douglas, Notes at Conference.
[136] Douglas, Notes at Conference; Brennan, Notes at Conference; Bartlett, Memorandum, 1 (noting Warren's annotations on the first page emphasizing the arbitrary application of the statute and the particular injury to Hoyt as a woman).
[137] Douglas, Draft of Concurrence; Memorandum from the Chief Justice to Justice Douglas.
[138] Douglas, Draft of Concurrence for No. 31, *Hoyt v. Florida*; 368 U.S. at 65–9.
[139] Timothy B. Dyk, **The Education of a Federal Judge** (2022), 47.
[140] Dyk, **The Education of a Federal Judge**, 47.
[141] Felix Frankfurter, Annotations on Draft of Draft Opinion for *Hoyt v. Florida*, November 14, 1961, Box 534, John Marshall Harlan Papers, Princeton University Library Special Collections.
[142] Court Calendar—Monday, November 20, 1961, November 20, 1961, Box 125, Agendas for the Court O.T. 1961–1965 Folder, EW-LC.
[143] "Women on the Jury," *Washington Post*, November 26, 1961.
[144] Louis Nizer, "Verdict on Women as Jurors," *New York Times*, March 11, 1962.
[145] Letter from Pauli Murray to ACLU, Re: *Hoyt v. Florida*, August 15, 1962, Box 1142, Folder 28, ACLU-PU. This article uses she pronouns to refer to Pauli Murray as the article only discusses Murray's later life and Murray used she/her pronouns most frequently at that time. However, he/him and they/them pronouns may also be appropriate as Murray showed an expansive understanding of their gender-identity throughout their life. See Rosalind Rosenberg, **Jane Crow: The Life of Pauli Murray** (2017), xvii, 2–3, 6; "Context about Pronouns & Gender," Pauli Murray Center for History and Social Justice, https://www.paulimurraycenter.com/pronouns-pauli-murray (last accessed July 21, 2024).
[146] Letter from Pauli Murray to ACLU.
[147] Letter from John Pemberton, Jr., to Esther Peterson, Re: Presidents Commission on Women's Rights, April 1, 1963, Box 1143, Folder 9, ACLU-PU; Rosenberg, **Jane Crow**, 257.
[148] Pauli Murray, "A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se," December 12, 1962, Box 1143, Folder 9, at 6, 16, ACLU-PU.
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[150] Murray, "A Proposal," 32.
[151] Murray, "A Proposal," 33.
[152] Murray, "A Proposal," 31; 208 U.S. 412 (1908).
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[154] Equality Committee—Meeting Minutes: Application of the Fourteenth Amendment to Equal Rights for Women, April 1, 1963, Box 1143, Folder 9, ACLU-PU; Letter from Alan Reitman to Pauli Murray, April 3, 1963, Box 1143, Folder 9, ACLU-PU; Rosenberg, **Jane Crow**, 260.
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[156] Rosenberg, **Jane Crow**, 257.
[157] Rosenberg, **Jane Crow**, 257.
[158] Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," *George Washington Law Review* 34 (1965), 232, 233–5, 238–9.
[159] *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966).
[160] Brief in Support of Intervenor's Findings of Fact, Conclusions of Law and Decree (December 1, 1965), *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966), 32, 35, Civil Rights Litigation Clearinghouse, https://clearinghouse.net/doc/96030/ (last accessed July 21, 2024); Pauli Murray, **Song in a Weary Throat: An American Pilgrimage** (1987), 365.

[161] Letter from Ruth Bader Ginsburg to William Brennan, March 25, 1981, Box II:111, Folder 2, WJB-LC.

[162] Patricia Bell Scott, **The Firebrand and the First Lady**: **Portrait of a Friendship—Pauli Murray, Eleanor Roosevelt, and the Struggle for Social Justice** (2016), 329.

[163] 404 U.S. 71, 74 (1971).

[164] Pauli Murray, "Obituary for Dorothy Kenyon," 1972, *Dorothy Kenyon Papers*, Box 7, Folder 4, DKP-SSC; "Judge Dorothy Kenyon is Dead; Champion of Social Reform, 83," *New York Times*, February 14, 1972.

[165] Brief for the Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 71–4); "Supreme Court Justice Ruth Bader Ginsburg in Conversation with Charlie Rose," https://www.youtube.com/watch?v=LOUzTd-Ge_g (last accessed July 25, 2024); Murray, **Song in a Weary Throat**, 364–5.

[166] 419 U.S. 522 (1975).

[167] 439 U.S. 357 (1979).

[168] 511 U.S. 127 (1994).

[169] Lucas A. Powe, Jr., **The Warren Court and American Politics** (2000), 180; Driver, "The Constitutional Conservatism," 1116.

[170] See *Reed*, Brief for the Appellant, 14–24; Brief in Support of Intervenor's Findings of Fact, Conclusions of Law and Decree, Dec. 1, 1965, *White*, 251 F. Supp. at 35; 404 U.S. at 74.

[171] "Timeline of Major Supreme Court Decisions on Women's Rights," ACLU, https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf (last accessed July 21, 2024).

The Judicial Bookshelf

Donald Grier Stephenson, Jr.

By the time Frank Murphy (about whom much more will be said below, in the second book reviewed in this article) became a justice in early 1940, as the fifth of President Franklin D. Roosevelt's appointees to the Supreme Court, only four of his new colleagues (James Clark McReynolds, Charles Evans Hughes, Harlan Fiske Stone, and Owen J. Roberts) had been sitting during what surely must have felt like a seismic event—the president's audacious move against the Court in 1937. Roosevelt's decision to attempt to change the Court's jurisprudence by way of enlarging its roster is the subject of **Vaulting Ambition: FDR's Campaign to Pack the Supreme Court** by Michael Nelson, who teaches history at Rhodes College.[1]

Vaulting Ambition

Vaulting Ambition is one of the earliest entries in a new series on landmark presidential decisions being developed by the University Press of Kansas under the general editorship of Professor Nelson. The goal of the series is the publication of books that "focus on individual decisions, rather than broad policy agendas," such as "a presidential initiative . . . or a decision made in response to a crisis or external circumstance."[2] Following the format of the books in the long-running series on landmark Supreme Court decisions published by the Kansas Press, Nelson's book includes a thorough bibliographic essay. Happily, however, Nelson's series departs from the format of the landmark cases series by including endnotes. In this book these are organized by chapter across nineteen pages. Inclusion of the citations adds substantially to both the richness and usefulness of the book.

In addition to noticing such beneficial features, a reader will also find that Nelson's book is pleasingly deceptive. Its twenty pages of frontmatter, that include a foreword,[3] preface, and prologue, are followed by barely eighty-seven pages of text. Yet the reader will soon realize just how much Nelson has packed into that small space. **Vaulting Ambition** may be light in page count, but it is heavy in substance and insight. What one might at the outset expect to be a quick read

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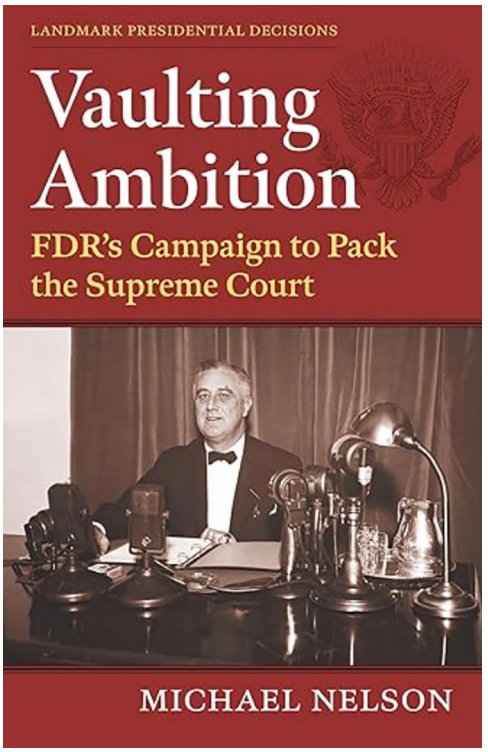


soon becomes a companion for an evening or two, as well as a handy reference for later use.

As some readers of this *Journal* are aware, and as Nelson's bibliographic essay makes clear, his book joins a list of books about the Court-packing fight that began in 1938 with **The 168 Days**, a journalistic account by Joseph Alsop and Turner Catledge.[4] Nelson's account, along with Laura Kalman's **FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism**, is among the most recent.[5] Nonetheless, aside from including what are the essential elements in the story of what transpired, Nelson's approach to this often-chronicled episode seems distinctive in at least two respects. First, Nelson focuses more on the president's decisions than on the responses by Congress and the Court. As he explains, "I say *decisions* because the court-packing effort involved a series of them, including whether to take any action at all."[6] Second, "while keeping the court-packing effort front and center, I approach it in the context of FDR's larger campaign to embed the New Deal in the major institutions of national government and politics." The latter had to do with making what he hoped would be lasting change not just to public policy but also to Congress, the Democratic Party, and even the overall executive branch.[7]

The author develops his narrative and analysis through six chapters. The first three:

> trace the dramatic events that set the stage for this campaign: FDR's rise to power, the ambitious set of New Deal legislative accomplishments that marked his first term, the resistance to these efforts by the Supreme Court, and the president's growing conviction that he and Congress needed to do something to remove the court as an obstacle.[8]

Chapters four and five lay out a series of seven decisions FDR made in his efforts against the Court. A reader may think of this list as an outline of the story that unfolds.

- Decision 1: Pack the Court—plus
- Decision 2: Present the Court-packing decision as something other than it was
- Decision 3: Take for granted the support of congressional Democrats
- Decision 4: Go public with a different justification for the Court bill
- Decision 5: Attack the justices for acting politically, but underestimate their political savvy
- Decision 6: Do not compromise—until it is too late
- Decision 7: Sacrifice the executive reorganization bill to campaign for the Court bill[9]

As a conclusion, chapter six probes the question as to whether FDR succeeded, and offers sage advice to any president who begins

a second term following a landslide win. It is also here that the reader again makes the connection with the book's title that was first noted in the volume's Prologue.[10] In Shakespeare's *Macbeth*, Macbeth compares excessive ambition to a rider who vaults so powerfully onto a horse that the rider "o'erleaps" it and instead lands on the ground. As the story Nelson tells perhaps suggests, it is an admonition that justices and presidents alike might profitably ponder. Moreover, as a counterfactual to the story Nelson relates, one wonders how Court history might have evolved had two or three of the most senior justices decided in early 1937 that it was time to leave the Court.

Justice and Faith

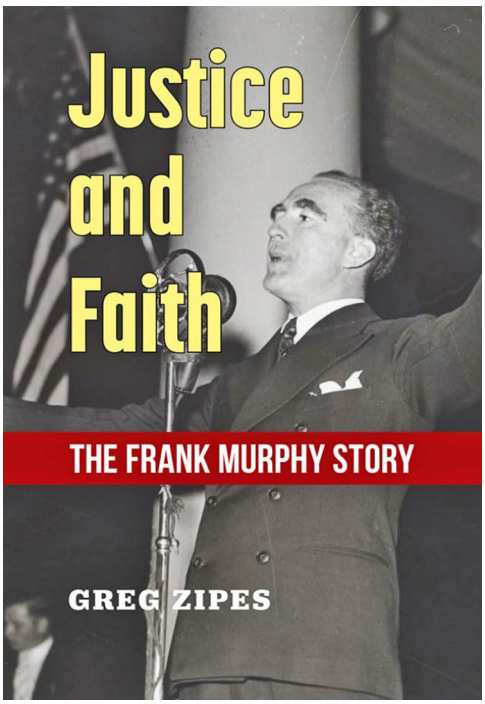
Among all members of the Court who have completed their service, Frank Murphy, the eightieth and the only justice to have been born in Michigan, is notable in several ways. Two that merit attention are dealt with in **Justice and Faith: The Frank Murphy Story** by Greg Zipes, an attorney who is also an adjunct faculty member in the School of Professional Studies at New York University.[11] First, Murphy reached the Court with a résumé strikingly different from that of recent high court appointees. With only a small handful of exceptions, presidents since the 1960s have generally adhered to a judicial model when selecting nominees for the Supreme Court. That is, they have preferred those with experience as a judge, usually a judge on one of the federal appeals courts. Indeed, with the exception of Justice Elena Kagan, every member of the current Court reached the bench via a judgeship on one of the United States Courts of Appeals, and she was serving as Solicitor General at the time of her nomination. Furthermore, no current justice has ever held elective office. Indeed, one suspects that were a president—at the next vacancy—to nominate someone without judicial experience the opposition party would profoundly object to precisely that fact. Yet many presidents have instead followed what might be termed a political model when selecting justices. With the political model presidents have not excluded those with judicial experience but have also looked beyond the bench to legislators and administrators of various kinds. Consider the two models alongside what might be labeled a résumé for Murphy provided by the Federal Judicial Center:

- Private practice, Detroit, Michigan, 1914–1917, 1922–1923
- U.S. Army first lieutenant, 1917–1919
- Chief assistant U.S. Attorney, Eastern District of Michigan, 1919–1922
- Candidate for U.S. House of Representatives from Michigan, 1920
- Professor of law, University of Detroit, 1922–1927
- Judge, Detroit Recorder's Court, 1923–1930
- Mayor, Detroit, 1930–1933
- Governor general, Philippine Islands, 1933–1935
- High commissioner, Philippine Islands, 1935–1936
- Governor, Michigan, 1937–1938
- Attorney General of the United States, 1939–1940
- Associate Justice, Supreme Court of the United States (1940–1949)[12]

Thus, as he did in filling other vacancies on the high court, President Roosevelt adhered heavily to the political model. Moreover, to demonstrate that Murphy's career path was hardly an outlier in terms of selection criteria generally preferred also by President Harry S. Truman[13] and by President Dwight D. Eisenhower, at least initially, consider the bench that decided *Brown v. Board of Education*.[14] Aside from Chief Justice Earl Warren, there were Justices Hugo L. Black, William O. Douglas,

Stanley F. Reed, Felix Frankfurter, Robert H. Jackson, Harold H. Burton, Tom C. Clark, and Sherman Minton. Strikingly, the bench in 1954 was not populated mainly by former judges. In fact, there was only one justice in 1954 who reached the Court with any significant judicial experience. Instead, one sees a Court staffed by (a) one governor who had also been a vice-presidential candidate on his party's ticket in 1948; (b) three United States senators; (c) one regulatory agency chair; (d) one law school professor; (e) two attorneys general; and (f) one solicitor general. That is a mixture of career paths that has not been seen on the Court since the 1960s.

Justice Murphy remains notable in a second way as well. While his time on the Supreme Court was barely nine and a half years (cut short in 1949 by his death), probably no other associate justice with a tenure of comparable length—with the probable exception of Benjamin N. Cardozo—has received as much and as thorough scholarly book treatment. One first notes J. Woodford Howard's substantial **Mr. Justice Murphy: A Political Biography** (1968).[15] Almost a decade later, the University of Michigan Press published the first of what became a three-volume biography by Sidney Fine: **Frank Murphy: The Detroit Years** (1975).[16] Production of volume two—**The New Deal Years**—switched to the University of Chicago Press in 1979.[17] Publication of volume three, **The Washington Years** (1984), returned to Ann Arbor.[18]



Zipes' book thus benefits substantially from the efforts of those who came before. Indeed, one wonders whether part of the title he chose for his book was inspired by the name of the last chapter in Howard's book: "A Militant Faith." A prospective reader might then wonder what more needs to be known or said about the justice. More directly, that person might ask Zipes why he wrote this book. A possible answer—aside from the obvious one for any writer, that a consequential life is exciting to explore and therefore to share—is that the author wished to introduce Murphy to a new generation of readers. More than five decades have passed since Howard probed this Roosevelt loyalist with a background so varied and stunning that some might have expected him to become America's first Roman Catholic president.[19] Howard's book also appeared at the tail end of the Warren Court, whose record of decisions expanding civil liberties and civil rights meshed easily with Murphy's own view of the Constitution and what he perceived as the Court's duty to expand its protections. Similarly, it has been four decades since the appearance of the last volume in the Fine series.

Nevertheless, even with such scholarly attention and "Murphy's involvement in many of the defining moments that created modern America," Zipes wonders in the Preface "why those who should know better ignored or marginalized his accomplishments?" This question then leads to a second one: "Why is he largely unknown by the American public? These are questions I seek to answer in this

book."[20] While the author poses what may be an impossible challenge for himself, a reader is tempted to suggest that even if Murphy generally remains unknown to the public today, that is a fate he shares with others in his generation, including some justices, who were perhaps similarly or even more accomplished. Perhaps the blame, if any, lies not with scholars or journalists, but with an inattentive or largely indifferent public. Even those who recognize Murphy's name as one belonging to a Supreme Court justice probably would not know that it was Murphy who, as Attorney General, established the civil rights division of the Department of Justice, as future justice Thurgood Marshall reminded readers in 1950.[21] The cumulative result is that Zipes may well have felt as if his writing was like paddling upstream. "Much of the conventional wisdom about Murphy is negative: He was strange. He lacked intellectual heft. He was lazy." Well into the book, the author notes that for many years after his death, Murphy's "decisions were seen as unduly provocative and off-the-cuff, and the substance of his opinions have [*sic*] largely been forgotten."[22] This view thus led the author "to debunk many of these falsehoods that latched onto Murphy and so hurt his historical standing . . . and reintroduce a man I have grown to admire greatly."[23]

In Zipes' telling, Murphy's story unfolds in twenty chapters. These are followed by a bibliography of six pages and an index of sixteen pages. A separate index of cases with citations would have been helpful. Enriching the narrative and analysis are thirteen grayscale photographs following page 138, that range from Murphy as an infant in Sand Beach, Michigan on the shores of Lake Huron in 1890, to Ann Harding, an on-and-off girlfriend and Academy Award nominee, to Edward Kemp, a lifelong companion from Murphy's college years until the justice's death. Moreover, in what is a true rarity among recently published books, endnotes appear at the conclusion of each chapter. Nonetheless, any future printing of Zipes' book should correct the sentence noting President Roosevelt's "desire to pack the court back in 1938."[24] As was apparent earlier in this essay, FDR might well have still harbored such feelings in 1938, but his ill-fated legislative attempt was launched in 1937, as an earlier mention by Zipes made clear.[25]

Zipes's admiration for his subject—hardly uncommon for any biographer—does not mean, however, that he portrays Murphy as short on faults or misjudgments. Such examples appear in the fifth chapter that covers Murphy's time in private practice and his entry into politics. It is here that the reader encounters "two men crucial to his later political successes."[26] One was Father Charles Coughlin who had a parish not far from Detroit. Although initially an ardent supporter of President Roosevelt, the priest soon wove an antisemitic tone into his speeches on the radio all while pushing the president to appoint more Roman Catholics to high office, with Murphy soon being a direct beneficiary. As Zipes reports, Coughlin and Murphy maintained a close friendship "even in spite of their vast differences," so much so that at Murphy's death, the family asked Coughlin to give a eulogy at the funeral.[27]

Murphy's second important connection was with Walter Chrysler, founder of the automobile corporation. Although Murphy turned down Chrysler's offer to be legal counsel for the company, he did accept "a sizeable retainer fee from Chrysler at the beginning of 1929." At the time, Murphy was a criminal court judge, and state law did not allow a judge to engage in private practice or to "be in any way connected with any attorney or firm of attorneys engaged in such practice."[28] Zipes notes that this was not just a theoretical conflict, since as a judge he decided disputes between unions and car companies. Furthermore, as governor of Michigan during the

General Motors strike of 1937, Murphy held stock in the company. Nonetheless, Zipes adds that "it does appear that Murphy never sold out the working man." Even after becoming a Supreme Court justice, he "employed a publicist and accepted money and gifts in exchange for speeches to various groups." According to the author, Murphy was being "quite conventional—a politician who liked fancy shiny objects and who believe his personal habits would not affect his ability to work for the less privileged."[29]

Although **Justice and Faith** discusses a host of legal issues and focuses on a member of the Supreme Court, the book is not without humor. It is in chapter sixteen, which covers Murphy's initial year as a justice, that the author describes his subject's questionable efforts to do his part for the war effort. Indeed, as a justice, Murphy enlisted in the infantry and trained at Fort Knox, all while drawing the salary of a justice. His enlistment prompted some merriment at the Court with Justice James F. Byrnes writing "when you return, I promise to salute you and if I were large enough to wear your uniform, I would borrow it from you."[30] Murphy's maneuvers prompted the Department of Justice to issue guidance that barred sitting federal judges from serving in the Army or Navy. In 1942, Murphy's continued insistence on serving in some capacity led General George C. Marshall to announce that officers who wished to enter training could not be older than forty-seven (recall that Murphy was born in 1890). In 1944, remembering his years in colonial administration, Murphy begged the president to have him inserted covertly into the Japanese-occupied Philippines on a secret mission. This request reached General Marshall, who explained to Roosevelt that the plan was not a good idea. One can only imagine that attention to such matters was exactly how the future originator of what later came to be known as the Marshall Plan did not want to spend his time. Zipes believes that even though Murphy and Roosevelt had regular contact, this episode may well have ended it in that that they had little interaction during the last year of the president's life.

Even someone merely perusing the book will quickly sense the author's strong interest in Murphy's denunciation, especially in *Korematsu v. United States*,[31] of the Roosevelt administration's policies for Japanese-Americans during the Second World War. Indeed, it is no exaggeration to suggest that the author believes the justice's stance in these cases marks perhaps one of his greatest contributions as a member of the Court. Murphy's position in the case stands in contrast to those supporting the administration—Justices Black, Douglas, Reed, Rutledge, Stone, and Frankfurter. That conclusion seems plausible not only from chapters seventeen and eighteen that examine the cases in detail, but even from the Preface. It is in the latter that the reader is alerted to the fact that Murphy "used the word racism—or some variation thereof—in three different cases on the same day in December 1944." For Zipes that is sufficient evidence "that his word choice was not a fluke."[32] Moreover, the author contends that Murphy "was the only Supreme Court justice to use that word during his time on the Court, or for many years thereafter."[33] (Aside from *Korematsu*, the other two cases Zipes specifically examines are *Ex parte Mitsuye Endo*[34] and *Steele v. Louisville & Nashville Railroad Company*,[35] the latter being a labor case involving Black Americans that had nothing to do with Japanese-Americans.)

For Zipes, the most famous passage in Murphy's *Korematsu* dissent was his declaration that "[a]ll residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States."[36] This was the same passage, as Howard's biography notes, that the *Christian Century* believed should be "engraved in stone."[37]

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

NELSON, MICHAEL. *Vaulting Ambition: FDR's Campaign to Pack the Supreme Court* (Lawrence: University Press of Kansas, 2023). Pp. x, 124. ISBN: 978-0-7006-3412-5 (paper).

ZIPES, GREG. *Justice and Faith: The Frank Murphy Story* (Ann Arbor: University of Michigan Press, 2021). Pp. xviii, 329. ISBN: 978-0-472-03853-4 (paper).

ENDNOTES

[1] Michael Nelson, **Vaulting Ambition: FDR's Campaign to Pack the Supreme Court** (2023).

[2] "Landmark Presidential Decisions," University Press of Kansas, https://kansaspress.ku.edu/search-grid/?series=landmark-presidential-decisions (last accessed July 5, 2024).

[3] The Foreword is written by Barbara Perry. However, the sentence on page ix is incorrect in stating that "until 1937, the nation's highest tribunal had to make do with courtroom space in the Capitol." The Supreme Court's building was completed in 1935, at which point the Court moved from the Capitol. "Building History," Supreme Court of the United States, https://www.supremecourt.gov/about/buildinghistory.aspx (last accessed July 5, 2024).

[4] Joseph Alsop and Turner Catledge, **The 168 Days** (1938).

[5] Laura Kalman, **FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism** (2002).

[6] Nelson, **Vaulting Ambition**, xii.

[7] Nelson, **Vaulting Ambition**, xiv.

[8] Nelson, **Vaulting Ambition**, xiii.

[9] Nelson, **Vaulting Ambition**, xiii-xiv.

[10] Nelson, **Vaulting Ambition**, xx.

[11] Greg Zipes, **Justice and Faith: The Frank Murphy Story** (2021).

[12] "Murphy, Frank," Federal Judicial Center, https://www.fjc.gov/history/judges/murphy-frank (last accessed August 6, 2024).

[13] Truman's four appointments to the Supreme Court reflect a mix. While Fred M. Vinson and Sherman Minton had some judicial experience, their résumés tipped more heavily to elective office and administrative positions. Harold H. Burton had been mayor of Cleveland and a senator from Ohio. Tom C. Clark had been Attorney General. Neither Burton nor Clark came to the Court with any judicial experience.

[14] 347 U. S. 483 (1954).

[15] J. Woodford Howard, **Mr. Justice Murphy: A Political Biography** (1968).

[16] Sidney Fine, **Frank Murphy: The Detroit Years** (1975).

[17] Sidney Fine, **Frank Murphy: The New Deal Years** (1979).

[18] Sidney Fine, **Frank Murphy: The Washington Years** (1984).

[19] According to Eugene Gressman, Murphy's clerk for five years, Murphy once said he had heard from Jim Farley that he was one of FDR's top three choices to succeed him had the president not sought a third term. However, the accuracy of this report must be balanced against the fact that it reached Gressman third hand. Zipes, **Justice and Faith**, 296.

[20] Zipes, **Justice and Faith**, vi–vii.

[21] Zipes, **Justice and Faith**, 190.

[22] Zipes, **Justice and Faith**, 192.

[23] Zipes, **Justice and Faith**, vii.

[24] Zipes, **Justice and Faith**, 285.

[25] Zipes, **Justice and Faith**, 269.

[26] Zipes, **Justice and Faith**, 40.

[27] Zipes, **Justice and Faith**, 41.

[28] Zipes, **Justice and Faith**, 41.

[29] Zipes, **Justice and Faith**, 42.

[30] Zipes, **Justice and Faith**, 224.

[31] 323 U. S. 214 (1944).

[32] Zipes, **Justice and Faith**, viii.

[33] Zipes, **Justice and Faith**, viii.

[34] 323 U.S. 283 (1944).

[35] 323 U.S. 192 (1944).

[36] 323 U.S. at 242 (Murphy, J., dissenting); Zipes, **Justice and Faith**, 262.

[37] Howard, **Mr. Justice Murphy**, 335.

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Illustrations

Page 196, C.M. Bell photographer, Library of Congress, https://www.loc.gov/item/2016705936/

Page 198, Kurz & Allison lithographer, Library of Congress, https://www.loc.gov/item/2002712186/

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Cover Image: Justice John Marshall Harlan II, Associated Press photograph, February 17, 1955, collection of Helen Knowles-Gardner.

Errata

In Timothy S. Huebner's Introduction in 49.2, the following error needs correction:

Page 104: first column, second line, "Candace Gray Jackson" should be "Candace Jackson Gray"