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THE JURISPRUDENCE OF THE FIRST WOMAN JUDGE,
FLORENCE ALLEN: CHALLENGING THE MYTH OF
WOMEN JUDGING DIFFERENTLY

TRACY A. THOMAS*

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Judge Florence Allen, U.S. Court of Appeals for the Sixth Circuit (1938)

Judge Florence Allen is often called the “first” woman judge.¹ She was the first woman elected to a general trial court in 1920 on the Cuyahoga Court of Common Pleas in Cleveland, Ohio.² She was

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1. See JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN v* (1984).

2. *Id.* at 53–54, 56; *Florence Ellinwood Allen, THE SUPREME COURT OF OHIO & THE*

the first woman elected to a state Supreme Court, elected to the Ohio Supreme Court in 1922 and re-elected in 1928.³ She was the first woman appointed to a federal appellate court, nominated to the U.S. Court of Appeals for the Sixth Circuit in 1934 by President Franklin D. Roosevelt.⁴ She was the first woman to serve as chief judge of a federal appellate court, taking leadership of the Sixth Circuit in 1958.⁵ And, she was the first woman shortlisted for the U.S. Supreme Court, nominated for more than ten vacancies by four presidents from both parties.⁶

Florence Allen was a woman who broke gender barriers at every level of the judiciary during her forty years on the bench. This legacy is memorialized in the nation's first Social Justice Park, established in Columbus, Ohio, a mile from the Ohio Judicial Center where Allen served for more than a decade on the Ohio Supreme Court.⁷ The Social Justice Park also highlights Allen's pivotal role as an advocate for women's suffrage, a legacy that launched her into law and politics, and ultimately to the judiciary. Allen first joined the national woman's suffrage movement in New York City during law school at New York University.⁸ She became the key legal leader for the women's suffrage movement in Ohio, shepherding cases and challenging restrictions on women's right to vote.⁹ In the first election in which women had the right to vote after ratification of the Nineteenth Amendment in August 1920, Florence Allen became the first woman elected as judge, running as an independent but actively

OHIO JUDICIAL SYSTEM, <https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp> [<https://perma.cc/EJ9E-33LR>].

3. TUVE, *supra* note 1, at 66–67, 86–87.

4. *Id.* at v; *Florence E. Allen Named Federal Judge: First Woman to Get Place on Circuit Bench*, N.Y. TIMES, Mar. 7, 1934, at 9. The first woman jurist appointed to any federal court was Genevieve Cline, chair of the Ohio Republican Women, appointed to the United States Customs Court in New York City by President Calvin Coolidge in 1928. TUVE, *supra* note 1, at 88.

5. TUVE, *supra* note 1, at 189.

6. RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 16 (2020); Beverly B. Cook, *The First Woman Candidate for the Supreme Court—Florence Allen*, in *YEARBOOK 1981: SUPREME COURT HISTORICAL SOCIETY* 19 (1981).

7. Danae King, *Mural at New Park Honors Columbus' Social-Justice Pioneers*, COLUMBUS DISPATCH (Oct. 28, 2018), <https://www.dispatch.com/news/20181028/mural-at-new-park-honors-columbus-social-justice-pioneers> [<https://perma.cc/4R6W-B4SX>]; see WASHINGTON GLADDEN SOCIAL JUSTICE PARK, <https://www.socialjusticepark.org> [<https://perma.cc/5LLP-PNWE>]. Judge Allen spoke on this site of the historical Congregational Church made famous by community leader Rev. Washington Gladden immediately after her election to the Ohio Supreme Court in 1922. FLORENCE E. ALLEN, *TO DO JUSTLY* 74 (1965).

8. ALLEN, *supra* note 7, at 31.

9. N.R. Howard, *Miss Allen Talks of Women's Gains*, N.Y. TIMES, Mar. 25, 1934, at XX2.

supported by both Republican and Democratic women at the local and national level.¹⁰ Allen credited “the great woman movement” and the “sisterhood” for her success and judicial appointments: “the place didn’t come to me,” she said, “you gave it to me.”¹¹ The bipartisan amalgamation of suffrage women and their organizational networks would continue to lobby for Allen, securing her nomination to the federal appellate court, and endlessly campaigning for her nomination to the U.S. Supreme Court.¹²

Despite her importance as a key figure in legal history, little is known about Judge Allen’s life and jurisprudence. The sole biography of her life is out of print, Allen’s memoir is encased in glass in the Ohio Supreme Court library, and neither is readily available for purchase.¹³ It is difficult to typecast Judge Allen into a category of politics or jurisprudence. She described herself as a “liberal conservative,” capturing her progressive ideals but moderate inclinations.¹⁴ Allen is best known for her state decisions upholding municipal power, and her federal decisions endorsing New Deal–era authority of the federal government.¹⁵ She zealously advocated for women’s suffrage and women’s professional equality, yet did not support the Equal Rights Amendment.¹⁶ She supported the death penalty, but was a vocal advocate for anti-war and world peace.¹⁷ She served as a prosecutor, but proactively instituted protections for defendants like speedy trials and psychiatric evaluations.¹⁸ Allen endorsed unions, but supported businesses against unions.¹⁹ And her true passion

10. TUVE, *supra* note 1, at 53–56.

11. Judge Florence E. Allen, *Women in Public Office*, 44 WOMEN L.J., Feb. 22, 1958 at 4, 4; TUVE, *supra* note 1, at 136.

12. See Mary L. Clark, *One Man’s Token Is Another Woman’s Breakthrough? The Appointment of the First Woman Judges*, 49 VILL. L. REV. 487, 497, 500 (2004).

13. See ALLEN, *supra* note 7; Joan E. Organ, *Florence E. Allen and “Great Changes in the Status of Women,”* in BUILDERS OF OHIO: A BIOGRAPHICAL HISTORY 218 (Warren Van Tine & Michael Pierce, eds. 2003).

14. TUVE, *supra* note 1, at 126.

15. See *id.* at 92, 116–17, 126.

16. Like many progressive women supporting the labor movement, Allen approved of protective legislation for women workers, which was thought to be threatened by equal rights for women because labor laws of minimum wage and maximum hours were legally premised on women’s difference and weakness. See *Muller v. Oregon*, 208 U.S. 412, 420 (1908); Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the Next Logical Step*, 227, 234–37, in 100 YEARS OF THE NINETEENTH AMENDMENT (Holly J. McCammon & Lee Ann Banaszak, eds. 2018). Allen was also aligned with Maud Wood Park, Carrie Chapman Catt, and the League of Women Voters all of whom opposed Alice Paul and her ERA movement, due to Paul’s militantism during the suffrage movement. Boisseau & Thomas, *supra*, at 230; TUVE, *supra* note 1, at 30–35.

17. See ALLEN, *supra* note 7, at 56, 142.

18. See Clark, *supra* note 12, at 497.

19. See Arthur R. Landever, *Four Remarkable Ohio Lawyers: The Cronise Sisters of Tiffin, Florence Allen, and Cleveland Municipal Court’s “Hard-Boiled Mary”* 31–32

was the global peace movement, though she spent most of her career focused on narrow questions of local law.²⁰ These paradoxes reveal a moderate approach to judicial decision making, closely tied to facts and rules rather than politics or ideals.

Respected by her colleagues for what they called her “manly mind,” Florence Allen fit the conventional ideal of a cautious and thoughtful judge.²¹ When appointed to the federal appellate court, U.S. Attorney General Homer Cummings emphasized that Allen was “not appointed because she was a woman”; rather, he said “[a]ll we did was to see that she was not rejected because she was a woman.”²² Her gender was discounted rather than affirmatively embraced.²³ After becoming a judge, Judge Allen disappeared into the bench, believing strongly in the importance and appearance of impartiality.²⁴ Her decisions rarely evidence any greater cause or legal philosophy. Instead, they illustrate the careful, daily work of adjudicating cases one at a time on the facts and merits. She endorsed judicial restraint, efficiency and judicial management, and was acknowledged by colleagues and supporters for her hard work, “high morality,” intellect, and clear writing.²⁵

A key question at the time of Allen’s judicial appointment, as now, is whether women judge differently than men.²⁶ In Allen’s time, there was fear that a woman would be more moralistic, stemming from the prohibition and temperance movements, or more emotional or anti-intellectual in approach.²⁷ Today, studies have sought to find a connection between gender and judicial outcome.²⁸ Some studies have suggested that women jurists are more likely to support plaintiffs in sexual harassment, employment, and immigration cases, or vote more liberally in death penalty and obscenity cases.²⁹ Yet other studies have found little evidence that women

(Oct. 19, 1994) (manuscript), https://engagedscholarship.csuohio.edu/fac_articles/609 [<https://perma.cc/TR7D-V4EJ>]; TUVE, *supra* note 1, at 109.

20. See ALLEN, *supra* note 7, at 79–92, 142.

21. Clark, *supra* note 12, at 499 (citing Memorandum Prepared for Director of the Federal Bureau of Investigation by F.A. Tamm (Feb. 15, 1939)).

22. ALLEN, *supra* note 7, at 95.

23. See *id.*

24. See TUVE, *supra* note 1, at 67, 87.

25. *Id.* at 87, 115, 153.

26. See *id.* at 91–92, 125.

27. *Id.* at 30, 33, 37.

28. See Christina Boyd & Lee Epstein, *When Women Rule, It Makes a Difference*, WASH. POST (May 3, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050103406.html> [<https://perma.cc/95ZP-Z9AB>].

29. See *id.*; Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding the probability of a judge deciding in favor of the party alleging discrimination decreases when the judge

judge differently from men.³⁰ Judge Allen's record, as this Article will show, supports the second conclusion: that women judge no differently than men. In fact, Allen worked hard to refute any claim that women judged differently. She worked repeatedly to refute claims of women's judicial incompetency, and instead molded herself in the male norm to prove that women could "think like a man," which to her meant crafting clear, objective, authoritative decisions unencumbered by emotion or her former pro-woman idealism.³¹

This Article delves into the life and work of Judge Allen to provide insight to the contributions and jurisprudence of the first woman judge. For history questions what difference putting a woman on the bench might have made.³² Part I explores Allen's early influences on her intellectual development grounded in her progressive and politically active family, and her close network of female professional friends. Part II discusses her pivotal work with the women's suffrage movement, working with the national organizations in New York and leading the legal and political efforts in Ohio. This proactive commitment to gender justice, however, would not survive her ascension to the bench. Once on the court, few cases raised issues of women's rights, and in those that did, Allen offered only neutral support.³³ Instead, her initial entrée to the judicial profession on the common pleas court focused on judicial management, legal process, and being tough on crime, while supportive of defendant's rights.³⁴ Part III traces these cases, highlighting her notoriety as a judge against mafia and corrupt lawyers and judges. Part IV then analyzes Allen's jurisprudence from her decade on the state supreme court, following the wide variety of cases before her and tracking her developing reputation as a moderate, but politically inconsistent judge. Part V explores Allen's decisions from her twenty-five years on the federal court of appeals, reconciling her reputation as a Roosevelt

is male); Carrie Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 202, 208 (Jaya Ramji-Nogales et al. eds., 2009) (finding female immigration judges granted asylum at a rate of 53%, while male judges granted asylum at a rate of 37.3%); Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 759 (2000) (finding female judges on state supreme courts vote more liberally than male judges in death penalty and obscenity cases and increase likelihood that male judge will adopt the liberal position).

30. See Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 311–13 (2010) (finding little evidence that women judges vote differently than men).

31. See TUVE, *supra* note 1, at 91–92, 136.

32. See JEFFERSON & JOHNSON, *supra* note 6, at 210.

33. See TUVE, *supra* note 1, at 161.

34. ALLEN, *supra* note 7, at 47–48, 50–51.

liberal with her moderate and bipartisan decisions. The final section of the Article then analyzes Allen's judicial career, tracing her failed nominations to the U.S. Supreme Court and evaluating her limited legacy to the profession. Her once zealous advocacy of gender justice fizzled into simple polite encouragement of women in the legal profession. Overall, this story reveals the jurisprudence of the first woman judge, crafted carefully to reflect a moderate judge, fitting within the male-centric norms of the profession, and discarding any promise of women's advocacy on the bench.

I. EARLY INFLUENCES: PROGRESSIVE FAMILY AND FEMALE FRIENDS

Florence Allen was a tall woman, almost six feet, large boned, heavy, and athletic.³⁵ She was physically active, famously walking to work at five in the morning or over the lunch hour, regardless of weather.³⁶ As a child, Allen hiked the mountains in her home state of Utah, and preferred household chores like chopping wood that were manual rather than domestic.³⁷ As an adult, Allen continued her love of hiking during many summers in Colorado's Estes National Park and long country weekend walks on the east side of Cleveland, "clad in full knickers and men's hiking shoes."³⁸ Allen was often surrounded by dogs and continued her love of playing the piano, once thought to be a possible career.³⁹ She shared a background similar to many other judges of the time, coming from a Protestant family of English descent, from the professional middle class, and raised with a deep sense of social consciousness.⁴⁰

Two key influences emerge as important to her intellectual development and world-view. The first influence was her progressive family. Allen's family was politically active, with her father serving as a state and federal representative from Utah, and her mother leading national suffrage and motherhood organizations.⁴¹ Her family instilled an ethic of community, service, and contribution that fueled Allen's work ethic and demand for a public life.⁴² The second influence on Allen's professional and intellectual development was her close network of female friends. These friendships among political

35. See TUVE, *supra* note 1, at 12, 65.

36. See Florence Allen, Diary, in Florence E. Allen Papers, 1932–1936, Box 4, Folder 1 (on file with the Western Reserve Historical Society Archives) [hereinafter Allen Papers]; TUVE, *supra* note 1, at 81.

37. See ALLEN, *supra* note 7, at 14; TUVE, *supra* note 1, at 8.

38. See ALLEN, *supra* note 7, at 44; TUVE, *supra* note 1, at 81, 134.

39. Organ, *supra* note 13, at 220; TUVE, *supra* note 1, at 134.

40. TUVE, *supra* note 1, at 162.

41. See Cook, *supra* note 6, at 21–22; TUVE, *supra* note 1, at 6–7.

42. See ALLEN, *supra* note 7, at 2, 9–10.

leaders of the women's suffrage movement in New York City and Ohio pushed Allen towards a progressivism feeding her personal development as a professional, unmarried woman.⁴³ These women, many lawyers, activists, and lesbians, modeled an alternative model of women's role in society free from the domestic family. And it would be these women who would loyally support Allen throughout her life and career.⁴⁴

A. *Family, Service, and Community*

Florence Allen was born on March 23, 1884, in Salt Lake City, Utah, after her family relocated there from the Western Reserve of Northeastern Ohio.⁴⁵ Florence was born three years after the move, the third of six children.⁴⁶ Allen's father, Clarence Emir Allen ("Emir"), had been a professor of Greek and Latin at Western Reserve College in Hudson, Ohio.⁴⁷ He gained his five minutes of fame by being the first college baseball player in Ohio to throw a curve ball, helping Reserve beat Oberlin College 36 to 5 in 1877.⁴⁸ Emir was diagnosed with terminal tuberculosis, and the family moved to Utah as a last ditch effort to save his life, on the advice and help of his friend, Liberty Holden, founder of the *Cleveland Plain Dealer*.⁴⁹ The move worked, and Emir survived even after losing one lung, going on to study law and work as a mining manager.⁵⁰ He was elected seven times to the territorial legislature, making contributions to the law of workplace maximum hours laws, occupational safety, and public schools.⁵¹ Upon Utah's admission as a state, Emir was elected in 1895 as one of the first state representatives to the U.S. Congress.⁵² However, he served only one term, opposing, like other pro-silver

43. See Organ, *supra* note 13, at 218–27.

44. See *id.*

45. *Id.* at 219.

46. See TUVE, *supra* note 1, at 4.

47. ALLEN, *supra* note 7, at 2.

48. See Letter from J.P. Barden to Mrs. [Helen] Fitzmiller (May 14, 1936) (on file with the Western Reserve Academy Archives, Hudson, Ohio) (stating Allen learned the curve pitch while playing semi-professional baseball the summer before with the Keystones in Erie, Pennsylvania); Paul Packard, *The Historic Spot Which Witnessed the First College Curve* (c. 1938) (on file with the WRA Archives); *Grad Pitches First "Curve" in College Ball*, CLEVELAND PLAIN DEALER, c. 1970.

49. See ALLEN, *supra* note 7, at 2.

50. *Id.*

51. See Letter from Clarence Emir Allen to Hon. R.N. Baskin (Dec. 6, 1911) (on file in Allen Papers, Box 1, Folder 1) (discussing public school legislation); H.F. No.1 in the Utah House of Representatives, introduced by Clarence Allen (Jan. 14, 1890) (on file in Allen Papers, Box 1, Folder 1) (establishing free public schools).

52. JOAN SMYTH IVERSEN, *THE ANTIPOLYGAMY CONTROVERSY IN U.S. WOMEN'S MOVEMENTS, 1880–1925: A DEBATE ON THE AMERICAN HOME* 192 (1997).

dissenters, the Republican Party's endorsement of the gold standard and the 1896 Republican national convention nomination of Ohioan William McKinley for president, and he became entangled in the unsuccessful crusade to unseat Mormon Senator Reed Smoot.⁵³

Allen's mother, Corinne Tuckerman Allen, was a community activist.⁵⁴ She was one of the first women to attend Smith College, although she did not graduate.⁵⁵ A year before her death, in writing to Alice Stone Blackwell, the daughter of suffrage leader Lucy Stone, Corinne recalled that her father had been a classmate of Stone's at Oberlin College.⁵⁶ "She [Lucy Stone] converted my father to the principle of feminism and I was brought up a suffragist. My father educated me just the same as he would [have] a boy, believing that a woman needed intellectual training as well as a man."⁵⁷ She was, however, more aligned with the conservative branch of the women's movement, grounded in the politics of domesticity and a woman's proper role as leader in the home.⁵⁸

Corinne became a zealous anti-polygamy activist, railing against the polygamous practices she found in her new hometown of Salt Lake City.⁵⁹ Even after the Woodruff Manifesto in 1890 under which the Mormon Church renounced polygamy, Corinne believed the practice had simply gone underground and was still an immoral, prevalent practice in the society around her.⁶⁰ She would continue this anti-polygamy crusade into the 1920s, long after the national fervor had died down, believing the possible resurgence of polygamy to be a real threat.⁶¹ She used her platforms in leadership with the Mother's Congress (later the Parent Teacher Organization), and the Utah state woman's suffrage association to further this anti-polygamy zeal, seeking to oust Mormon women even while she had worked with them previously in Utah's early enfranchisement of women.⁶²

53. *See id.* at 214–15, 222.

54. *See ALLEN, supra* note 7, at 9–10.

55. Beverly Blair Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 *JUDICATURE* 314, 317 (1982); TUVE, *supra* note 1, at 3.

56. IVERSEN, *supra* note 52, at 246.

57. *Id.* at 247 (citing Letter from Corinne Allen to Alice Stone Blackwell, n.d. (c.1930) (on file in National Association of Woman Suffrage Association Papers (NAWSA), Library of Congress)).

58. *See id.* at 247.

59. *See* TUVE, *supra* note 1, at 7.

60. *See* IVERSEN, *supra* note 52, at 176, 252.

61. *See id.* at 246–52 (citing Mrs. Clarence E. Allen, *Have You Taught Your Child to be a Monogamist*, *CHILD WELFARE MAG.* 10 (Feb. 1916) (on file in Allen Papers, Box 1, Folder 1) (establishing a "Sex Morality Code" of the National Congress of Mothers and Parent Teacher Association for the monogamous "ideal of normal family life," which included opposition to sex education in the schools, and teaching children not to masturbate)).

62. IVERSEN, *supra* note 52.

Florence, at the age of twelve, moved back to the Cleveland area to live with her maternal grandparents while her father served in Washington, D.C. She attended her grandfather's New Lyme School, and then the Women's College of the Western Reserve University.⁶³ In high school, she emerged as a leader among her peers, called "Cousin Jo" by classmates for her resemblance to Louisa May Alcott's independent-minded character in the classic book, *Little Women*, who, like Jo, starred in school plays, often assuming the male lead.⁶⁴ For her "'swan song' as the editor of the high school literary journal, she wrote an editorial condemning sororities as undemocratic—though she herself had been a member of one."⁶⁵

In 1904, then age twenty, Florence went to Berlin for two years with her mother and siblings.⁶⁶ Her mother was there in part for her work with the International Congress of Women on suffrage, though Corinne used the occasion to crusade against polygamy and seek the exclusion of Mormon women from the suffrage movement.⁶⁷ While abroad, Florence studied music and piano, wrote music criticism for the *German Times*, and wrote a book of poetry, *Patris* (the Greek word for homeland).⁶⁸ Pre-war Berlin was a revolutionary place, with activism on women's suffrage, as well as early gay rights.⁶⁹ During this time, theater and music critic Theo Anna Sprungli spoke to the Scientific-Humanitarian Committee on the subject of "Homosexuality and the Women's Movement," helping to initiate a movement of lesbian activism.⁷⁰ Allen, however, did not like her time in Germany, feeling unfit for her dream of becoming a concert pianist, and growing to abhor much of German culture.⁷¹ She complained in her diary that German women did "unwomanly things" and that they overemphasized the physical aspects of marriage rather than the companionate and produced too many illegitimate children.⁷² Allen seemed to reject the emerging feminist focus on sex-positive rights of sexuality, not yet associating with any pro-woman ideals.

63. GRETA ANDERSON, MORE THAN PETTICOATS: REMARKABLE OHIO WOMEN 96 (2005).

64. *Id.* at 99.

65. *Id.*

66. Organ, *supra* note 13, at 220.

67. See IVERSEN, *supra* note 52, at 221.

68. See ALLEN, *supra* note 7, at 21–22; TUVE, *supra* note 1, at 19–20.

69. See Alex Ross, *Berlin Story: How the Germans Invented Gay Rights—More Than a Century Ago*, NEW YORKER (Jan. 19, 2015), <https://www.newyorker.com/magazine/2015/01/26/berlin-story> [<https://perma.cc/F8MT-NZRJ>]; ROBERT BEACHY, GAY BERLIN: BIRTH-PLACE OF A MODERN IDENTITY xvii–xix, 85–87 (2014).

70. Ross, *supra* note 69.

71. See ALLEN, *supra* note 7, at 21–22; TUVE, *supra* note 1, at 17.

72. TUVE, *supra* note 1, at 17; Florence Allen, Diary, Aug. 29, 1904 (on file in Allen Papers, Box 3, Folder 1).

B. *Finding Feminist Friends*

The twenty-two-year-old Florence Allen broke apart from her family in 1906, moving back to Cleveland and extended family while her parents and siblings returned to Utah.⁷³ She began the path of self-discovery, seeking an outlet for her intellectualism and a meaningful role in life.⁷⁴ At first alone, she ultimately gravitated to women reformers, first in the settlement house movement and then in the suffrage movement.⁷⁵ Female colleagues in law school and activists in New York City provided a more radical influence, shifting and shaping Allen's views more firmly in support of women and women's issues.⁷⁶

On her own in Cleveland, Allen flailed about for a way to support herself financially and intellectually.⁷⁷ She became a music critic for the *Plain Dealer* newspaper and a teacher of music, German, Greek, and history at Laurel School for Girls.⁷⁸ Her mind, however, hungered for "words and ideas," and she took graduate courses for a master's degree in political science at Western Reserve University.⁷⁹ Allen particularly liked Professor Augustus Hatton's courses in international law, comparative governments, and municipal law, and through taking those courses, it "came to her 'like a flash out of the blue'" that she wanted to be a lawyer.⁸⁰ Hatton encouraged her to enroll in law school.⁸¹

By that time, law had become one of the most prestigious professions, as lawyers and law schools had become professionalized, and "going to law school was one of the best routes to honor, acclaim and financial success."⁸² However, as the legal profession formalized through schools rather than apprenticeship, "women were squeezed out because law schools were not open to them."⁸³ "[T]he law remained

73. Organ, *supra* note 13, at 220.

74. *See id.*

75. *See id.* at 220–21.

76. *See id.* at 221–22.

77. *See* TUVE, *supra* note 1, at 21.

78. *Id.* at 18.

79. *Id.* at 21.

80. *Id.*; Betty Browning, *Interview with a Feminist—Florence Allen*, CHI. DAILY TRIB., Sept. 17, 1939, at G3.

81. TUVE, *supra* note 1, at 21.

82. *Id.*

83. *Id.* at 22. The first woman lawyer in Cleveland, Mary Spargo, began practice in 1885 after serving an apprenticeship with the law firm, Morrow & Morrow. JAMES HARRISON KENNEDY, A HISTORY OF THE CITY OF CLEVELAND: ITS SETTLEMENT, RISE AND PROGRESS 470 (1896). Spargo was admitted to practice by the Ohio Supreme Court, but had previously been refused an appointment as a notary public on the grounds that the constitution did not permit it. *Id.* A large portion of her clients were women, as she intended and expected, but also included male clients, and her work was not confined to "clerical or subordinate duties." *Id.*

a male fortress, with lawyers concerned mostly with aspects of private property, business incorporation, crime, and legal affairs,” subjects “with which women supposedly . . . should not be concerned.”⁸⁴ The long-prevailing assumption was that women were intellectually inferior to men and lacked a logical and rational mind.⁸⁵ Early feminist leaders, like Elizabeth Cady Stanton and Sarah Grimké, challenged these gendered assumptions from the early 1800s, seeking to advance women’s position through equal access to higher education.⁸⁶

Western Reserve Law School did not admit women at the time, so Allen looked elsewhere (although the other local school, Cleveland Law School, did admit women to its part-time evening program).⁸⁷ Allen enrolled at the University of Chicago Law School in 1909, one of only four women at the law school.⁸⁸ She was sometimes the only woman in a classroom of one hundred men and “found it an embarrassing ‘ordeal.’”⁸⁹ The rules of “ladies first” still applied, as a woman’s arrival at the door of a classroom prompted a dozen men to stand aside when she entered, a form of attention she did not care for.⁹⁰ Nevertheless, by the end of the winter quarter, Allen was ranked second in the class, and was recognized for having “a masculine mind,” ruled by reason rather than emotion.⁹¹ Allen noted in her diary that the renowned legal scholar and future dean of Harvard Law School, Roscoe Pound, then a professor at Chicago and known for his “orotund pomposity,” didn’t like women students, and “whale[d]” against one woman over contracts.⁹² She noted in her autobiography that “the four women in Chicago University Law School when I was there felt he discouraged us in our wish to practice law. He thought it was no field for a woman.”⁹³ Allen was

84. TUVE, *supra* note 1, at 22. Fifteen years later, in 1920, “when the proportion of women in the [legal] profession[] reached [its] peak, less than three per cent of the [] profession was female.” *Id.*

85. See Virginia G. Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414, 2416 (1990).

86. See Elizabeth Cady Stanton, *Address on Woman’s Rights* (Sept. 1848), in *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY* 94, 98 (Ann D. Gordon, ed. 1998); SARAH M. GRIMKÉ, *LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN* (1837).

87. See Landever, *supra* note 19, at 25.

88. See TUVE, *supra* note 1, at 21–22.

89. *Id.* at 22.

90. ANDERSON, *supra* note 63, at 100.

91. TUVE, *supra* note 1, at 22 (internal quotations omitted).

92. Joan Ellen Organ, *Sexuality as a Category of Historical Analysis: A Study of Judge Florence E. Allen, 1884–1966* 70 (Jan. 1998) (Ph.D. dissertation, Case Western Reserve University); DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 146 (1974); John Henry Schlegel, *Book Review, Roscoe Pound: Philosopher of Law*, 71 AM. POL. SCI. REV. 1656, 1656–57 (1977).

93. ALLEN, *supra* note 7, at 49.

unhappy in Chicago, where money was short and friends were few.⁹⁴ Jobs as a housemaid and then a library clerk “cataloging French and German legal treatises” were drudgery.⁹⁵ She did connect with Jane Addams and the Hull House Settlement, befriending and working a bit with the emerging social workers there.⁹⁶

Disillusioned in Chicago, in summer 1910, Allen transferred to New York University Law School.⁹⁷ NYU was one of the largest law schools in the country, and had by then admitted eighty-two women among its total enrollment of 600.⁹⁸ She first enrolled in the evening division, but soon transferred to the day division as she prioritized law school above work.⁹⁹ Women students at NYU met regularly and listened to speeches designed to compensate for their supposedly deficient life skills, for example to learn general business knowledge like reading a broker’s statement.¹⁰⁰ They were told “[t]hey must work the clock around day in and day out and be at the beck and call of business when it comes” rather than being detoured by “some side issue.”¹⁰¹ Women were also told they must compensate for the fact that the voice and physical appearance of the average women lawyer “does not produce the impression of authority and aggressiveness” which are key characteristics of a lawyer (defined as male).¹⁰²

Allen needed to support herself in law school, as the family’s limited budget was dedicated to her two brothers’ college education at Yale.¹⁰³ Allen first took a position with the immigrant settlement houses, building on her social work and connections from Hull House.¹⁰⁴ Allen worked for the New York League for the Protection of Immigrants under lawyer Frances Kellor and “dealt with matters of employment, education, naturalization, and living” conditions for immigrants.¹⁰⁵ Allen went to Ellis Island to meet newly arrived people, and lived and worked at the Henry Street Settlement in Manhattan.¹⁰⁶ That position did not last long, for Allen did not find the work satisfying, detested the living conditions and bug infestation in the settlements, and realized little financial remuneration in

94. See TUVE, *supra* note 1, at 22–23.

95. ALLEN, *supra* note 7, at 24.

96. See TUVE, *supra* note 1, at 23.

97. *Id.*

98. *Id.*

99. See *id.* at 24–25.

100. See *id.* at 25.

101. *Id.*

102. See TUVE, *supra* note 1, at 25.

103. See *id.*

104. See *id.* at 23.

105. *Id.*

106. *Id.*

a social work job that was based on women's volunteerism.¹⁰⁷ Allen found another job with the National College Women for Equal Suffrage that paid forty dollars per month, serving as an assistant secretary to suffrage leader Maud Wood Park, which brought Allen into the inner circle of the women's suffrage movement and launched her work as a zealous suffrage advocate.¹⁰⁸ She also gave paid lectures on current events to the New York Board of Education and private girls' schools.¹⁰⁹ Allen's time in New York was transformational. She established lifelong friends and colleagues from progressive suffrage circles who would be pivotal in her future legal work and judicial campaigns.¹¹⁰

These women provided an alternative social model for Allen, as many rejected conventional marriage for professional careers and some entered lesbian partnerships.¹¹¹ Allen herself never married or had children.¹¹² She had two long-term roommates: Susan Rebhan for fourteen years from 1922 to 1935, and then after Susan's untimely death from complications from the flu, thirty years with Mary Pierce.¹¹³ For a short time, all three women lived in the same household.¹¹⁴ Susan and then Mary served as social and professional secretary for Florence, taking on the cooking and homemaking work as well.¹¹⁵ When Judge Allen was asked about how she did housework, she retorted "I don't cook, or sew, or shop, for the simple reason that I haven't the time or energy for these things, any more than the men judges have."¹¹⁶ Susan attended Ohio State University Law School when Allen was on the Ohio Supreme Court.¹¹⁷ Mary worked as teacher at a private school in Cleveland, then as companion to Allen.¹¹⁸ Allen also left her estate to Mary.¹¹⁹

These domestic partnerships between Allen and a female partner, called "Boston marriages"¹²⁰ in the nineteenth century, as well

107. *See id.* at 24.

108. *See* TUVE, *supra* note 1, at 26.

109. *Id.*

110. *See* Cook, *supra* note 55, at 319.

111. *See* Organ, *supra* note 92, at 64, 71.

112. *Florence Ellinwood Allen*, *supra* note 2.

113. Organ, *supra* note 92, at 7.

114. *See id.* at 150.

115. *See* TUVE, *supra* note 1, at 63, 80.

116. Cook, *supra* note 55, at 318.

117. TUVE, *supra* note 1, at 80.

118. *Id.* at 131.

119. Organ, *supra* note 92, at 150.

120. Boston marriages were not unheard of among wealthy and privileged women of the late nineteenth and early twentieth century and gave women the opportunity to have close personal friendships based on equality and the freedom to pursue careers and political activism. *See* LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* 18–21 (1991).

as her close inner circle of lesbian friends have led some modern scholars to assume that Allen was gay.¹²¹ If true, Allen herself was not out about it.¹²² Nor is there any evidence in her biography or remaining public papers, although Allen and Mary culled those carefully before donation.¹²³ In her diary, Allen notes only that she talked “lesbianism and marriage,” during one weekend in the country, and read and circulated the book *Marriage as a Trade*, which argued for women to reject marriage in favor of a professional career.¹²⁴ However, any social acceptance of lesbianism that might have existed in the early century of New York City, quickly faded over the decades of Allen’s adulthood, increasing in social taboo and repression with the conservatism through the 1950s.¹²⁵ Therefore, it is not surprising that Allen, even if gay, would not have so identified, as the first lesbian judge appointed to a federal court was in 1994, and the first openly gay judge in Ohio was not until 2007.¹²⁶

After graduating from law school in 1913 at the age of twenty-nine, Allen moved back to Cleveland to earn a living.¹²⁷ She practiced law, opening her own office after other doors remained closed.¹²⁸ At one interview, garnered through family connections, the partner at the small firm dismissed her as an applicant, looking out the window at the lightly falling snow and saying he could never send a

121. See Organ, *supra* note 92, at 11–12; Karen O’Connor & Alixandra B. Yanus, *Women as Leaders in Lesbian Organizations*, in GENDER AND WOMEN’S LEADERSHIP: A REFERENCE HANDBOOK 245, 247 (Karen O’Connor ed., 2010); Sally J. Kenney, “It Would be Stupendous for Us Girls”: Campaigning for Women Judges Without Waiving, in BREAKING THE WAVE: WOMEN, THEIR ORGANIZATIONS, AND FEMINISM 1945–1985 209, 214–15 (Kathleen A. Laughlin & Jacqueline Castledine eds., 2011); LILLIAN FADERMAN, TO BELIEVE IN WOMEN: WHAT LESBIANS HAVE DONE FOR AMERICA—A HISTORY 20–21 (1999). Other evidence of Allen’s sexual orientation cited includes rumors about her unmarried status surrounding her U.S. Supreme Court candidacy and a letter Allen wrote to Marion Harron, a judge on the federal tax court in a reappointment battle and reputed lesbian, in which she cautions her colleague about “women like us.” See Organ, *supra* note 92, at 242.

122. See Kenney, *supra* note 121, at 209, 214–15.

123. See Organ, *supra* note 92, at 30.

124. See *id.* at 93, 148 (citing Florence Allen, Diary, June 4, 1920 & Nov. 20, 1923); see also CICELY HAMILTON, MARRIAGE AS A TRADE, at v–vii (1909).

125. See Organ, *supra* note 92, at 75 n.27, 231.

126. Andy Towle, *With Mary Wiseman, Ohio Gets Its First Openly Gay Judge*, TOWLE-ROAD (Oct. 31, 2007), <https://www.towleroad.com/2007/10/with-mary-wisem> [https://perma.cc/7TBG-FG4B] (appointed to Court of Common Pleas). The first lesbian federal judge was appointed in 1994 when President Bill Clinton appointed Deborah Batts to the Southern District Court of New York in Manhattan. See Jared Ham & Chan Tov McNamarah, Note, *Queer Eyes Don’t Sympathize: An Empirical Investigation of LGB Identity and Judicial Decision Making*, 105 CORNELL L. REV. 589, 607 n.85 (2020) (citing Henry J. Reske, *Appointment Breaks Barrier: First Openly Gay Federal Judge Assumes Duties*, ABA J. 29, 29 (1994)).

127. See TUVE, *supra* note 1, at 26, 35.

128. See *id.* at 40.

woman out in such weather.¹²⁹ Allen handled cases that came in the door, including legal aid referred work, and she served as lead attorney for the national and state women's suffrage movement.¹³⁰ Her first case was helping a woman divorce her abusive husband.¹³¹ She was appointed an assistant county prosecutor in Cleveland in 1919 by a Democratic administration, with the prosecutor allaying concerns about her gender by saying, "I consider that Miss Allen will do a man's job in our office. I rate her as the equal of virtually any male attorney."¹³² Allen became the first woman prosecutor in the country, and the first woman admitted to the Ohio Bar Association.¹³³

Allen handled one particularly notable case on behalf of women's rights, in *Employees v. Cleveland Railway Co.*¹³⁴ Three hundred women replaced street car conductors when the men left their jobs to fight in World War I, but lost their jobs upon the men's return.¹³⁵ The company initially refused to fire the women, but the union went on strike paralyzing Cleveland transportation for three days, and the company settled the strike by replacing the women.¹³⁶ Florence Allen became deeply involved in advising the "conductorettes" and filed a complaint with the National War Labor Board (NWLB), an alternative dispute resolution board providing both mediation and arbitration services to keep labor from striking during the war.¹³⁷ Initially the board summarily upheld the company's decision, allowing the replacement of the women by returning men, but recommended the company make "every effort" to assign the displaced women to other positions.¹³⁸ Allen petitioned for rehearing, which

129. *See id.*

130. *See* Howard, *supra* note 9.

131. *See* TUVE, *supra* note 1, at 40.

132. *Id.* at 53.

133. *Id.*; STEPHANE ELISE BOOTH, *BUCKEYE WOMEN: THE HISTORY OF OHIO'S DAUGHTERS* 84 (2001).

134. *See In re Employees*, N.W.L.B., No. 491 (Dec. 3, 1918), *rev'd after rehearing*, *In re Employees v. Cleveland Railway Co.*, N.W.L.B., No. 491 (Mar. 17, 1919), available in Bulletin of the U.S. Bureau of Labor Statistics, No. 287, *National War Labor Board*, 7, 304–05 (Dec. 1922), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0287_1922.pdf [<https://perma.cc/2GK5-Z8DS>].

135. *See* TUVE, *supra* note 1, at 49.

136. *See id.*

137. *Id.* (internal quotations omitted); *see* VALERIE JEAN CONNER, *THE NATIONAL WAR LABOR BOARD: STABILITY, SOCIAL JUSTICE, AND THE VOLUNTARY STATE IN WORLD WAR I* 150–51 (1983); Richard B. Gregg, *The National War Labor Board*, 33 *HARV. L. REV.* 39, 44–45 (1919). A general precept of the NWLB was that all women hired during the war were to receive equal pay for equal work. *See* Gregg, *supra*, at 43.

138. *See In re Employees v. Cleveland Railway Co.*, N.W.L.B., No. 491 (Mar. 17, 1919), *rev'd after rehearing*, available in Bulletin of the U.S. Bureau of Labor Statistics, No. 287, *National War Labor Board*, 7, 304–05 (Dec. 1922), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0287_1922.pdf [<https://perma.cc/2GK5-Z8DS>].

was granted based on her arguments that the “women did not have their day in court” as they were not permitted to be heard at the first meeting.¹³⁹

The NWLB, in an opinion by former President William H. Taft and Basil Manly, reversed its prior decision, finding an “injustice [had been] done” by the previous order and ordering that the company restore the remaining women seeking employment to their positions.¹⁴⁰ It relied on another decision by the same chairmen in a Detroit case reinstating women conductors against challenge by the union that it was a closed shop, finding the equities of the case supported the particular women, even though it agreed that there were reasons generally to conclude that women were less suited to conductor work demanding long hours and police enforcement duties.¹⁴¹ The board in the Cleveland case was also swayed by the factual realities that the railway had plenty of job vacancies, enough to hire the men and also retain the remaining sixty-four women.¹⁴² The company, however, ignored the recommendation of the non-binding NWLB, and the women lost their jobs.¹⁴³ However, when another labor exigency arose during World War II, the Cleveland street car companies again hired women as conductors, even though an Ohio law specifically prohibited women from working such long shifts.¹⁴⁴

Most of Allen’s biggest cases from her seven years of practice were related to advancing women’s suffrage in Ohio.¹⁴⁵ These cases used the legal system in a careful and precise way to guide women’s right to vote and challenge opponents at each painstakingly slow step of the process.¹⁴⁶

II. ADVOCATING FOR WOMEN’S SUFFRAGE

Florence Allen worked for the woman’s suffrage movement as an activist and attorney for a decade, from 1911 to 1920, during her late twenties and into her thirties.¹⁴⁷ She was familiar with and supportive of the demands for women’s suffrage from her childhood

139. *Id.* at 305.

140. *Id.*

141. *See id.*; CONNER, *supra* note 137, at 153, 156.

142. *See In re Employees v. Cleveland Railway Co., N.W.L.B., No. 491 (Mar. 17, 1919), rev’d after rehearing, available in* Bulletin of the U.S. Bureau of Labor Statistics, No. 287, *National War Labor Board*, 7, 305 (Dec. 1922), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0287_1922.pdf [<https://perma.cc/2GK5-Z8DS>].

143. *See* CONNER, *supra* note 137, at 156; TUVE, *supra* note 1, at 49.

144. *See* TUVE, *supra* note 1, at 156.

145. *See id.* at 35–36, 42–43.

146. *See id.* at 42–43.

147. *See id.* at 36.

in Utah, where her mother was active in the suffrage movement and where women had gained the right to vote.¹⁴⁸ The Utah territory granted women the right to vote in 1870, one year after Wyoming became the first state to grant women suffrage, in part to demonstrate that women were not oppressed under polygamy.¹⁴⁹ Suffrage leaders Elizabeth Cady Stanton and Susan B. Anthony came to Utah in 1871 to speak with women and herald one of the first states to grant the voting privilege.¹⁵⁰ The federal Edmunds-Tucker Anti-Polygamy Act of 1887, however, disenfranchised Utah women voters as a penalty for the territory's continued polygamy.¹⁵¹ Women's right to vote was restored in 1896 when Utah became a state after disavowing polygamy.¹⁵²

In 1911, when Allen first joined the ranks of active suffrage work, the women's suffrage movement was sixty-three years old.¹⁵³ Since July 19, 1848 at Seneca Falls, New York, women had been demanding the right of suffrage and the right to shared power and governance in society.¹⁵⁴ Initially focused on campaigns to reform the voting law of every state, the post-Civil War advent of the Fourteenth and Fifteenth Amendments constitutionalized the right to vote and provided a new opportunity to seek a Sixteenth Amendment for women's suffrage.¹⁵⁵ The first women's suffrage amendment was proposed in 1869, briefly introduced to Congress in 1878, and debated once in 1887, but otherwise languished dormant in congressional committee.¹⁵⁶ In 1875, the U.S. Supreme Court in *Minor v. Happersett* rejected suffrage leaders' additional argument that voting was already a right of federal citizenship protected by the newly enacted Privileges and Immunities Clause of the Fourteenth Amendment, and held instead that voting was a right of citizenship granted by the state.¹⁵⁷ Women activists continued to be split on the best strategy for suffrage.¹⁵⁸ Some like Elizabeth Cady Stanton and Susan B. Anthony called for a federal strategy of constitutional

148. *See id.* at 26.

149. *See* ELLEN CAROL DUBOIS, SUFFRAGE: WOMEN'S LONG BATTLE FOR THE VOTE 119 (2020); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 95–96 (2002).

150. *See* GORDON, *supra* note 149, at 97; IVERSEN, *supra* note 52, at 25.

151. *See* GORDON, *supra* note 149, at 166.

152. *See id.* at 201; IVERSEN, *supra* note 52, at 175.

153. *See* Report of the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19th and 20th, 1848 (1848).

154. *See id.*

155. *See* Lisa Tetrault, *Winning the Vote*, 40 HUMANITIES MAG. No. 3 (Summer 2019).

156. *See id.*

157. *See* *Minor v. Happersett*, 88 U.S. 162, 175 (1875).

158. *See* Tetrault, *supra* note 155.

amendment.¹⁵⁹ Others like Lucy Stone and Carrie Chapman Catt, leader of the merged National American Woman's Suffrage Association (NAWSA), focused on state campaigns, until 1916 Catt's "Winning Plan" embraced a two-track approach of a federal amendment priority accompanied by selective state strategies.¹⁶⁰ State campaigns over the decades achieved some scattered success by the early twentieth century when Allen joined the movement, with some states adopting school board suffrage, others municipal suffrage, and six Western states passing full suffrage.¹⁶¹

Ohio was a leading battleground in the state strategy for women's suffrage throughout this time.¹⁶² It had been one of the earliest states after Seneca Falls to organize at the grassroots level, with the Salem Convention on Woman's Rights in 1850, and the Akron Woman's Rights Convention in 1851.¹⁶³ Ohio women had sought an amendment to the state constitution as part of the constitutional convention to guarantee women's right to vote.¹⁶⁴ Reorganizing again after the Civil War, Ohio women secured school board suffrage in 1894, which was upheld by the Ohio Supreme Court in 1896.¹⁶⁵ A leader of the NAWSA national suffrage organization, Harriet Taylor Upton, lived in Youngstown where she moved the headquarters of the organization and helped focus the energy for suffrage in her home state.¹⁶⁶

Allen first became actively involved in women's suffrage through her job during law school working as assistant secretary to Maud

159. *See id.*

160. *See* Marjorie Spruill Wheeler, *A Short History of the Woman Suffrage Movement in America*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 9, 17 (Marjorie Spruill Wheeler ed., 1995); *see also* Tetrault, *supra* note 155.

161. ALLEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920*, at 231 (1981); *App. One: The Electoral Thermometer: Woman Suffrage Won by State Constitutional Amendments and Legislative Acts Before the Proclamation of the Nineteenth Amendment*, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* 375, 375 (Marjorie Spruill Wheeler, ed. 1995) (noting full suffrage granted in Wyoming (1890), Colorado (1893), Idaho (1896), Utah (1896), Washington (1910), and California (1911)). Later, two states, Arkansas and Texas, would also pass primary suffrage, allowing women to vote in primary elections. *Id.* at 376.

162. *See* TUVE, *supra* note 1, at 30.

163. *See* HISTORY OF WOMAN SUFFRAGE, Vol. I, Chap. VI, Ohio 103–04 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1880); FLORENCE E. ALLEN & MARY WELLES, *THE OHIO WOMAN SUFFRAGE MOVEMENT: "A CERTAIN UNALIENABLE RIGHT": WHAT OHIO WOMEN DID TO HELP SECURE IT* 10 (1952).

164. Marjorie Stanton, *The Woman Suffrage Movement in Ohio Prior to 1910*, at 41 (1947) (M.A. thesis, Ohio State University).

165. *See* State *ex rel.* Mills v. Board of Elec. Columbus, 6 Ohio Cir. Dec. 36 (Ohio Ct. App. 1895), *aff'd without decision*, 47 N.E. 1114 (Ohio 1896); *see also* Ralph H. Mikesell, *The Woman Suffrage Movement in Ohio 1910–1920*, 10 (1934) (M.A. thesis, Ohio State University); Stanton, *supra* note 164, at 48–49, 58.

166. *See* ALLEN & WELLES, *supra* note 163, at 38–39.

Wood Park, the leader of the National College Women's Equal Suffrage League.¹⁶⁷ Park believed that the women's suffrage movement would move faster if younger college women organized in support.¹⁶⁸ The twenty-seven-year-old Florence Allen worked with Park to schedule speakers and organize local chapters for college women.¹⁶⁹

In the summer of 1912, on break from law school, Allen came to Ohio to help Park campaign for an amendment to the Ohio Constitution granting women the right to vote.¹⁷⁰ Park and Inez Milholland (later to become the iconic lady on the white horse in the New York suffrage parade, and whom Allen also knew from NYU), had set up a college suffrage chapter in Cleveland in 1910.¹⁷¹ A state constitutional convention in 1912 gave women another opportunity to press for the vote by amendment.¹⁷² The campaign became known as the "Amendment 23" campaign because women's suffrage was Amendment 23 of 41 amendments presented to the legislature for special election schedule for September 3, 1912.¹⁷³ The culmination of the campaign was Ohio's first suffrage parade in Columbus of approximately 5,000 organized by the Ohio Woman's Suffrage Association (OWSA) on August 27, 1912.¹⁷⁴ OWSA made attempts to include Black suffragists by integrating the country delegations rather than have a segregated Black section, and by including two floats from Black suffragists.¹⁷⁵ Allen canvassed the state in mostly rural areas, giving ninety-two speeches in eighty-eight counties.¹⁷⁶ She traveled by trolley and buggy, giving speeches from literal soap boxes and automobile back seats.¹⁷⁷ She learned to deal with hecklers, and honed her arguments, essentially adopting the classic arguments of Elizabeth Cady Stanton by arguing that women were unjustly taxed without representation, mirroring the key American demand for freedom.¹⁷⁸ Allen's summer suffrage tour also established significant friendships among suffrage women of both parties that would serve

167. See TUVE, *supra* note 1, at 26.

168. See ALLEN, *supra* note 7, at 29.

169. See *id.* at 32; TUVE, *supra* note 1, at 26.

170. See TUVE, *supra* note 1, at 32–33.

171. See *id.* at 31.

172. See *id.*; see also Mikesell, *supra* note 165, at 12–14.

173. See ALLEN & WELLES, *supra* note 163, at 41; Eileen R. Rausch, "Let Ohio Women Vote": The Years to Victory, 1900–1920, 111–40 (1995) (Ph.D. dissertation, Notre Dame University); see also Mikesell, *supra* note 165, at 32–39.

174. See Rausch, *supra* note 173, at 131, 134 n.73; ALLEN & WELLES, *supra* note 163, at 46.

175. See BOOTH, *supra* note 133, at 68–69.

176. ALLEN, *supra* note 7, at 32.

177. See TUVE, *supra* note 1, at 33.

178. See *id.* at 32–34, 38.

her well for the rest of her life as active supporters in judicial campaigns.¹⁷⁹ The suffrage amendment, however, failed in the fall, with male voters rejecting it 335,000 to 295,000.¹⁸⁰



Florence Allen holds the flag outside of suffrage headquarters, Upper Euclid Ave., Cleveland (1912) (Library of Congress)

Allen returned to NYU, where she graduated second in her class in June 1913.¹⁸¹ During that senior year, she continued to work for women's suffrage in her spare time, giving speeches at the NAWSA convention in Syracuse and to other groups at Swarthmore, Cornell, Mount Holyoke, Barnard, and the Cleveland City Club.¹⁸² Allen marched in the massive suffrage parade to Washington, D.C. held on March 3, 1913 and organized by Alice Paul and NAWSA, "the largest peaceful protest ever assembled on D.C. streets to that point."¹⁸³ The suffragists intended to call out President Woodrow Wilson on the eve of his second inauguration for his opposition to suffrage, and they effectively upstaged him.¹⁸⁴ Lawyer Inez Milholland led the great parade down Pennsylvania Ave, "clad in a white cape astride a white horse, . . . [b]ehind her stretched a long line with nine bands, four mounted brigades, three heralds, about twenty-four floats, and more than 5,000 marchers."¹⁸⁵ Women from countries that had enfranchised women came first in the procession; then the pioneers, then sections celebrating working women grouped by occupation

179. *See id.* at 33.

180. *See id.* at 34.

181. *Id.* at 35.

182. *Id.* at 34.

183. Tetrault, *supra* note 155; TINA CASSIDY, MR. PRESIDENT, HOW LONG MUST WE WAIT? ALICE PAUL, WOODROW WILSON, AND THE FIGHT FOR THE RIGHT TO VOTE 45 (2019).

184. *See* TUVE, *supra* note 1, at 34–35; Tetrault, *supra* note 155; DUBOIS, *supra* note 149, at 188–94.

185. *Marching for the Vote: Remembering the Woman Suffrage Parade of 1913*, LIBR. OF CONG. RSCH. GUIDE, <https://guides.loc.gov/american-women-essays/marching-for-the-vote> [<https://perma.cc/DFU4-V97U>].

and dressed for work; then the state delegations; Black women were segregated at the back, though Ida B. Wells-Barnett challenged this arrangement by moving up to her state contingent half way through the parade.¹⁸⁶ Crowds, however, comprised mostly of men attending the inauguration, attacked the marchers and over one hundred women were sent to the hospital.¹⁸⁷ NAWSA had planned to present the president with a petition, but organizers shied away from such a direct gesture at the last minute.¹⁸⁸ Allen left the march and returned to New York where she tried, unsuccessfully, to persuade the board to change its mind about the petition.¹⁸⁹ In the aftermath of this lost opportunity, the young suffragist Alice Paul demanded more militant political action following the English suffrage tactics of Emmeline Pankhurst like pickets, attacks, and hunger strikes.¹⁹⁰ Paul formed the Congressional Union of NAWSA, which later spun off as the independent National Woman's Party (NWP).¹⁹¹ Allen stayed loyal to NAWSA, rejecting the militant action which she and other conventional suffragists found to be an embarrassment and an impediment to effective advocacy and persuasion.¹⁹²



Florence Allen, marching for women's suffrage (1913) (Kent State University Libraries, Ashtabula)

186. *Id.*; DuBOIS, *supra* note 149, at 191–92.

187. *See* Tetrault, *supra* note 155.

188. *See* TUVE, *supra* note 1, at 34.

189. *See id.*

190. *See id.* at 35, 41; DuBOIS, *supra* note 149, at 187–88.

191. *See* TUVE, *supra* note 1, at 35.

192. *See id.* at 35, 41.

After graduation in 1913, Allen returned to Cleveland, drawn by her suffrage friends and connections there.¹⁹³ Even as she struggled to find paying work, Allen served as the lead attorney for the state woman's suffrage association until her election to the bench in 1920.¹⁹⁴ In 1913, women had begun a second campaign to amend the state constitution for women's suffrage, building on the new opportunity for voter initiatives and referendums adopted in the most recent constitutional convention.¹⁹⁵ As World War I began in Europe, Allen took and passed the bar exam, and then traveled the state, circulating petitions to get the required number of signatures for a referendum.¹⁹⁶ When 176 suffragists, two from each Ohio county, tried to present the successful petition at the capitol, the secretary of state refused to appear, even though he had met the liquor industry for their proposed amendment hours before.¹⁹⁷ The president of the Ohio State University intervened to leave the petition with the secretary's office assistant.¹⁹⁸

The women kicked off the Ohio campaign with a pilgrimage to Salem, retracing the state origins of suffrage, and then held tea parties, garden parties, bake sales, and bazaars to raise money and support.¹⁹⁹ "They canvassed the people, they followed political meetings, they held street meetings, they did *everything*. Suffragists were uniquely unselfconscious. They kept no records for posterity. They did not realize that they were making history. Perhaps they were too busy."²⁰⁰ Allen canvassed rural Ohio again, now drawing larger audiences.²⁰¹ She engaged in a very public debate with anti-suffragist Lucy Price, who argued that women did not want the vote and wanted to remain protected in the home.²⁰² A large parade in Cleveland of several thousand people dressed in suffrage white provided visible support, but disappointedly did not include many business or industry women who feared the loss of their jobs.²⁰³ A few Black women, like Jane Hunter, founder of the Phillis Wheatley organization for housing and training underprivileged Black girls, also joined the

193. *See id.* at 35–36.

194. *See id.* at 36; *see also Florence Ellinwood Allen, supra* note 2.

195. *See ALLEN & WELLES, supra* note 163, at 46; Rausch, *supra* note 173, at 187; Mikesell, *supra* note 165, at 45–54.

196. *See TUVE, supra* note 1, at 36.

197. *See id.* at 37.

198. *Id.*

199. *See ALLEN & WELLES, supra* note 163, at 46; TUVE, *supra* note 1, at 38.

200. ALLEN & WELLES, *supra* note 163, at 46.

201. TUVE, *supra* note 1, at 38.

202. *See id.*

203. *See id.* at 39.

parade.²⁰⁴ Cleveland newspaper writers and most Protestant ministers were pro-suffrage, but strong anti-suffrage sentiment came from the industrialists who opposed protective labor legislation like minimum wage and maximum hour laws, and the liquor industry that feared women's temperance and reformers' vote for prohibition.²⁰⁵ Opponents were well funded, hosting picnics for working men with free beer, and plastering posters on trolleys and public spots.²⁰⁶ The women's suffrage amendment was defeated, more soundly than in 1912.²⁰⁷

After helping with women's suffrage nationally in 1915, campaigning in Boston and arranging speaking tours for English suffrage leader Emmeline Pankhurst, Allen turned her attention back to Ohio in 1916 where she led the efforts to gain municipal suffrage for women.²⁰⁸ The recent amendment to the Ohio state constitution gave home rule to municipalities, which created an opportunity for women to obtain suffrage in municipal or city council elections.²⁰⁹ The Illinois Supreme Court had upheld women's municipal suffrage the year before, and Allen thought that case as well as the Ohio Supreme Court case upholding school board suffrage provided good precedent for a similar result in Ohio.²¹⁰ Suffrage organizers selected the prosperous middle-class city of East Cleveland as their test case.²¹¹ Allen spent days in the office and library reading law books, constitutions and charters, and election laws.²¹² She was paid one hundred dollars to draft a new city charter for East Cleveland granting municipal suffrage for women, which was passed by the voters.²¹³ When the Board of Elections refused to allow women to vote, Allen filed a taxpayers' mandamus action with the Ohio Supreme Court.²¹⁴

"While the case was pending, Allen visited her family in Utah," and campaigned for President Wilson in Montana, directly contradicting the NWP's campaign against Wilson for his failure to

204. *See id.*

205. *See id.* at 30, 37–39, 52.

206. *See id.* at 39.

207. *See* TUVE, *supra* note 1, at 37–39; Rausch, *supra* note 173, at 231.

208. *See* TUVE, *supra* note 1, at 41.

209. ALLEN & WELLES, *supra* note 163, at 48–49.

210. *See* ALLEN, *supra* note 7, at 35; *see also* Scown v. Czarnecki, 106 N.E. 276, 277, 302 (Ill. 1914); *State ex rel. Mills v. Board of Elec. Columbus*, 6 Ohio Cir. Dec. 36, 38 (Ohio App. 1895), *aff'd without decision*, 47 N.E. 1114 (Ohio 1896).

211. TUVE, *supra* note 1, at 41.

212. *Id.*

213. *Id.* at 42, 46 n.54.

214. ALLEN, *supra* note 7, at 36; ALLEN & WELLES, *supra* note 163, at 49.

support a federal suffrage amendment.²¹⁵ In Montana, women were voting for the first time, and they would elect the first woman to Congress, Jeanette Rankin.²¹⁶ While in Montana, Allen received a wire notifying her that the East Cleveland case would be heard by the Ohio Supreme Court in a few days.²¹⁷ She recounted in her autobiography her rush to return to Ohio in time for the hearing.²¹⁸ While there were other capable lawyers to handle the argument, Allen had been the lead attorney on the case since the drafting of the charter.²¹⁹ She wanted to be the one to argue before the court.²²⁰ She caught the train in Great Falls, Montana, and reportedly gave explicit notice to the train company of her need for a timely arrival, citing potential losses of a thousand dollars from any delay, drawing on her law school training regarding establishing foreseeability for recovery of consequential damages.²²¹ She wired two friends from Chicago Law School, Alice Greenacre and Greta Coleman, who met her at the connecting station in Chicago with a suitcase of law books, which Allen reviewed overnight to Columbus in preparation for the argument.²²² The Ohio Supreme Court upheld the constitutional validity of municipal suffrage.²²³ The Court, however, delayed announcement of the decision until April, so women's votes in East Cleveland were not counted in the next election, though the cities of Columbus and Lakewood subsequently adopted women's suffrage charters.²²⁴

After the municipal suffrage success in the fall of 1916, Allen began to work on a presidential suffrage bill, providing limited voting rights for women in a presidential election.²²⁵ In 1913, Illinois became the first state to pass presidential suffrage for women by legislative enactment, which was upheld as constitutional.²²⁶ Politically, presidential suffrage seemed practically more obtainable, as in most states it was not subjected to public referenda like a state constitutional amendment, and those public campaigns were expensive and

215. See TUVE, *supra* note 1, at 42.

216. *Id.*

217. *Id.*

218. ALLEN, *supra* note 7, at 36–37.

219. *Id.* at 36.

220. *See id.*

221. *Id.* at 36.

222. *Id.* at 36–37.

223. *See State ex rel. Taylor v. French*, 117 N.E. 173, 177 (Ohio 1917).

224. *See ALLEN*, *supra* note 7, at 37.

225. TUVE, *supra* note 1, at 43.

226. *App. One: The Electoral Thermometer: Woman Suffrage Won by State Constitutional Amendments and Legislative Acts Before the Proclamation of the Nineteenth Amendment*, *supra* note 161, at 375; *see Scown v. Czarnecki*, 106 N.E. 276, 277 (Ill. 1914).

unsuccessful.²²⁷ Presidential suffrage would prove to be an effective strategy on the road to the Nineteenth Amendment, as North Dakota, Nebraska, Rhode Island, and Indiana passed presidential suffrage in 1917, working in tandem with Allen's efforts in Ohio, and ultimately seventeen states would pass presidential suffrage.²²⁸ In Ohio, Allen and her colleagues talked with every state legislator, and Democratic Representative James A. Reynolds of Cuyahoga County introduced the bill.²²⁹ Allen "did much legal work in connection with this [bill]," and handled the hearing before the Ohio Senate.²³⁰ In early February 1917, presidential suffrage passed both houses of the Ohio legislature and was signed into law by the progressive Democratic governor, James A. Cox.²³¹

Anti-suffragist petitions quickly began to circulate, calling for a referendum on the new law.²³² In the summer of 1917, as the United States entered World War I, Allen was checking the petitions and finding many fraudulent signatures easily identified by green ink and similar handwriting.²³³ Allen and the women's organizations filed lawsuits in four counties to challenge the petitions, and the courts threw out ninety percent of the signatures.²³⁴ However, the Board of Elections in the sixty-five other counties with allegedly fraudulent signatures refused to take action.²³⁵ The Ohio Supreme Court declined to hear the case, and the referendum went forward.²³⁶ Opposition to women's suffrage was bolstered by liquor interests and animosity to the suffragists triggered by Alice Paul's national pickets of the White House during a time of war and subsequent arrests.²³⁷ The referendum passed by a 144,000 majority, recalling the legislative grant and retracting presidential suffrage for women.²³⁸

227. See DUBOIS, *supra* note 149, at 184–85.

228. See *App. One: The Electoral Thermometer: Woman Suffrage Won by State Constitutional Amendments and Legislative Acts Before the Proclamation of the Nineteenth Amendment*, *supra* note 161, at 376–77 (including Texas (1918), Maine (1919), Missouri (1919), Iowa (1919), Wisconsin (1919), Tennessee (1919), Kentucky (1919)).

229. See ALLEN & WELLES, *supra* note 163, at 50–51.

230. ALLEN, *supra* note 7, at 37.

231. See ALLEN & WELLES, *supra* note 163, at 51 (noting passage in the House 72 to 50 and in the Senate 20 to 16).

232. See ALLEN, *supra* note 7, at 37.

233. *Id.* at 38; ALLEN & WELLES, *supra* note 163, at 51.

234. TUVE, *supra* note 1, at 43.

235. *Id.*

236. See *id.*

237. See ALLEN & WELLES, *supra* note 163, at 57; Mikesell, *supra* note 165, at 57; see also DORIS STEVENS, *JAILED FOR FREEDOM* 93, 211 (1920); Eileen L. McDonough & H. Douglas Price, *Woman Suffrage in the Progressive Era: Patterns of Opposition and Support in Referendum Voting, 1910–1918*, 79 AM. POL. SCI. REV. 415, 426–28 (1985).

238. See TUVE, *supra* note 1, at 43.

However, presidential suffrage was passed again in Ohio on June 16, 1919, by large majorities, the same day Ohio became the fifth state to ratify the Nineteenth Amendment.²³⁹ Attempts by liquor interests for a state referendum on federal constitutional amendments, upheld by the Ohio Supreme Court, briefly threatened woman's suffrage.²⁴⁰ The U.S. Supreme Court, however, held definitively that there could be no state public referendum on the ratification of a federal constitutional amendment by the legislature.²⁴¹ With Tennessee's ratification of the Susan B. Anthony Amendment on August 18, 1920, women's right to vote was included in the federal Constitution, and state presidential suffrage became irrelevant.²⁴²

During these final years of the suffrage movement, Allen had focused her efforts on practicing law.²⁴³ World War I also intervened, halting many women's suffrage efforts, including Allen's, as she switched to giving speeches to support the war effort.²⁴⁴ The war also affected Allen in other ways, as her brother, Emir, was killed in battle in 1918, and her other brother, Jack, a hot-air balloon surveyor in the war, returned home severely injured and died soon after.²⁴⁵ Allen's grief from the loss of her brothers to whom she was close would be a driving force in her developing advocacy for peace and a law against war.²⁴⁶ She would become an international speaker on the outlawry of war and the use of legal instruments and treaties to make war illegal.²⁴⁷

Looking back on her suffrage work many years later, Allen observed: "To the young men and women of today with their free companionship and equality of privilege, the subject of woman suffrage is as obsolete as a prehistoric animal."²⁴⁸ She commented that men and women now "buy cokes together, go to school together, plan their homes together, spend and save their money together, keep their checking accounts together, care for their babies together, and—vote together."²⁴⁹ "It is hard for them," she noted, "to realize that in the nineteenth century this free partnership was the rare

239. ALLEN & WELLES, *supra* note 163, at 52 (passing House 75 to 5 and Senate 27 to 3).

240. *See id.*

241. *See* Hawke v. Smith, 253 U.S. 221, 231 (1920); ALLEN & WELLES, *supra* note 163, at 52.

242. *See* ALLEN & WELLES, *supra* note 163, at 52.

243. *See* TUVE, *supra* note 1, at 49; ALLEN, *supra* note 7, at 39.

244. *See* TUVE, *supra* note 1, at 47–48; Rausch, *supra* note 173, at 264.

245. *See* TUVE, *supra* note 1, at 48; ALLEN, *supra* note 7, at 74.

246. *See* ALLEN, *supra* note 7, at 73–74.

247. *See id.* at 73–78; TUVE, *supra* note 1, at 67–72.

248. ALLEN & WELLES, *supra* note 163, at 5.

249. *Id.*

and not the usual thing,” and that all had been changed by “universal suffrage with all of its ramifications.”²⁵⁰

III. AN INDEPENDENT, TOUGH JUDGE ON THE TRIAL COURT

As soon as women gained the right to vote upon ratification of the Nineteenth Amendment in 1920, and were thus eligible for elective office, Florence Allen announced her candidacy for the Cuyahoga County Court of Common Pleas.²⁵¹ Allen had practiced in this court as an assistant county prosecutor, primarily handling the Grand Jury of criminal indictments, and was generally well regarded by colleagues and jurors (although many of the retired police officers who were common on the Grand Jury panel were not favorably inclined to the “innovation [of] a woman in charge of the proceedings.”)²⁵²

Allen ran as an independent because she had missed the primary, which occurred prior to the enfranchisement of women as voters and political candidates.²⁵³ She also explained that she ran as independent because she disagreed with the Democrats’ position endorsing the compulsory draft and she believed strongly in non-partisan judges.²⁵⁴ In addition, she calculated, correctly, that women of all parties would endorse her candidacy.²⁵⁵ Without the primary or party, Allen had to secure the judicial nomination by petition just two months before the election.²⁵⁶ The women’s suffrage machine immediately came to her aid and engaged the campaign.²⁵⁷ In the national election, which saw a Republican landslide when Ohio Republican Warren Harding defeated Ohio Democratic Governor James Cox for the presidency, the thirty-six-year-old Allen obtained the largest number of votes for her office.²⁵⁸ She candidly admitted her victory may have been due to “plunker votes” by which supporters voted only for her rather than the permissible four out of ten candidates, thus reducing the other candidates’ total votes.²⁵⁹

250. *Id.*

251. See ALLEN, *supra* note 7, at 40.

252. *Id.* at 39–40.

253. *Id.* at 41.

254. See TUVE, *supra* note 1, at 54.

255. See ALLEN, *supra* note 7, at 41; TUVE, *supra* note 1, at 55.

256. ALLEN, *supra* note 7, at 41.

257. See *id.*

258. See WESLEY M. BAGBY, THE ROAD TO NORMALCY: THE PRESIDENTIAL CAMPAIGN AND ELECTION OF 1920, 159–60 (1962); John M. Cunningham, *United States Presidential Election of 1920*, BRITANNICA.COM (Oct. 20, 2011), <https://www.britannica.com/event/United-States-presidential-election-of-1920> [<https://perma.cc/AQ46-FNAE>]; TUVE, *supra* note 1, at 56.

259. ALLEN, *supra* note 7, at 49.

Despite this non-partisan stance, Florence Allen was clearly a Democrat.²⁶⁰ In January 1920, while women were awaiting state ratification of the Nineteenth Amendment, Allen discussed her political views with a newspaper writer in an article entitled “Why I am a Democrat.”²⁶¹ She said that she was a Democrat because she believed a political party should exist to “render[] service to the people.”²⁶² Such service and humane progressive legislation, she argued, was achieved under Democratic President Woodrow Wilson in laws on child welfare and women in industry—for the first time in over forty years.²⁶³ For almost half a century, she chided, “one would have thought that only men, and adult men at that, peopled America.”²⁶⁴ Allen also cited Wilson’s plan of international peace and the pending League of Nations as a strong reason for her political affiliation.²⁶⁵ In addition, she noted the progressive Democratic mayor of Cleveland, Tom Johnson, as a reason for her support.²⁶⁶ The Democratic administration in Cleveland appointed Allen as a prosecutor, and a Democratic state representative introduced women’s presidential suffrage in Ohio, supporting Allen and her views.²⁶⁷

Allen’s progressive values mirrored those of her parents, who had worked for reforms of labor, education, and women’s rights, but Allen now saw those progressive values as residing with the Democrats, rather than the Republicans.²⁶⁸ This same shift would slowly start to occur nationally beginning in 1920, as the Republicans moved away from their role as reformers of the Progressive Era and towards a party representing businesses and conservatism.²⁶⁹ The majority of women, and men, however, were still strongly Republican in 1920, in contrast to Allen’s position.²⁷⁰ It would not be until the Democratic landslide of 1932 when social and moral reformers would fully align with the Democratic Party.²⁷¹ Allen’s former suffrage colleagues in NAWSA continued to endorse neutrality, reorganizing into the non-partisan League of Women Voters after the

260. “*Why I Am a Democrat*” *Discussed by Woman Lawyer*, ATLANTA CONST., Jan. 4, 1920, at 6 [hereinafter “*Why I Am A Democrat*”].

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. “*Why I Am a Democrat*,” *supra* note 260, at 6.

267. *See* TUVE, *supra* note 1, at 53–54.

268. *See id.* at 6–8.

269. *See* J. KEVIN CORDER & CHRISTINA WOLBRECHT, COUNTING WOMEN’S BALLOTS: FEMALE VOTERS FROM SUFFRAGE THROUGH THE NEW DEAL 127 (2016).

270. *See id.* at 128.

271. *See id.* at 218.

passage of the Nineteenth Amendment and continuing their bipartisan efforts.²⁷²



Florence Allen sworn in as a Common Pleas Judge for Cuyahoga County (Jan. 1, 1921) (Kent State University Library, Ashtabula)

When Florence Allen joined the Cuyahoga County Common Pleas Court in 1921, it was a chaotic place of corruption and sensationalism.²⁷³ Political bribes, for patronage or favors, were the norm and the era of Prohibition included corrupt police and Mafia involvement.²⁷⁴ Soap-opera-like cases were featured in the newspapers, and spectators often filled the courtrooms.²⁷⁵ Allen ran on a platform of cleaning up the courts, law enforcement and respect for law and order, “justice for all,” moral standards in the court, and instilling “business methods” such as efficiency and expediency in the court.²⁷⁶ Attorneys didn’t know what to make of a woman judge, and struggled with whether to call her “Miss” or “Mrs.” or “Ma’am” or “Your Honor.”²⁷⁷ Allen insisted that they call her “Judge Allen.”²⁷⁸

During her eighteen months on the court, Allen prided herself on clearing backlog, developing expertise among criminal judges, and imposing judicial administration at the court.²⁷⁹ One key focus of hers was to remedy the imprisonment of the complaining witness

272. TUVE, *supra* note 1, at 52.

273. *See id.* at 56–57.

274. *See id.* at 57; WESLEY M. OLIVER, *THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION* 39 (2018); ERIC BURNS, *1920: THE YEAR THAT MADE THE DECADE ROAR*, 126–27, 200–02 (2015); *see also* CHRIS M. SMITH, *SYNDICATE WOMEN: GENDER AND NETWORKS IN CHICAGO ORGANIZED CRIME* 86 (2019).

275. TUVE, *supra* note 1, at 57.

276. ALLEN, *supra* note 7, at 46.

277. TUVE, *supra* note 1, at 57 (internal quotations omitted).

278. *Id.*

279. *See* ALLEN, *supra* note 7, at 47–48, 50–51.

or victim during a criminal trial, an injustice she identified when the defendant made bail, but the complainant was imprisoned for their “protection.”²⁸⁰ Her solution was not to overturn the state statute or practice, but simply to expedite any case in which a witness was being held.²⁸¹ In another example of addressing delay, Allen recommended continuing criminal trials over the summer, rather than breaking for the usual summer delay, during which both defendants and witnesses remained in jail.²⁸² When the other eleven judges on the court refused, she traded assignments with a judge on the criminal court, rescheduled her vacation, and heard cases throughout the summer.²⁸³

Allen heard both civil and criminal cases, though she seemed to prefer the criminal cases based on her prosecutorial experience and interests of justice.²⁸⁴ Initially, her judicial colleagues proposed creating a separate divorce court division and appointing her there.²⁸⁵ Allen adamantly refused this attempt to confine her to women’s or family matters that were not a part of her platform or experience, commenting that “[s]ince I was unmarried, I thought these eleven men, most of them married, were better qualified than I to carry their share of this burden.”²⁸⁶ A *Cleveland News* editorial quipped: “[w]e certainly never expected to live long enough to hear a spinster decline appointment as a judge of a court of marital relations on the ground that she was ignorant of the subject.”²⁸⁷ During her eighteen months on the court, Allen handled 892 cases, 579 with hearings, including four murder trials.²⁸⁸ About 397 (or 44 percent) were divorce cases.²⁸⁹ Allen heard more divorce cases than any other two judges during that same period, despite her reluctance to become a domestic relations specialist.²⁹⁰ She reconciled the couple in 101 of these cases, saying that the divorce law was not too liberal or “evil,” but rather that such cases needed to be pending longer to allow for reconciliation.²⁹¹ Her advice for couples was not to enter into “hasty marriages,”

280. *See id.* at 46–47.

281. *See id.* at 47.

282. *Id.* at 52.

283. *See id.*

284. *See id.* at 51–52.

285. ALLEN, *supra* note 7, at 45.

286. *Id.*

287. *Id.* at 69.

288. *See id.* at 51–52.

289. *See Gives Rules for Happy Marriage*, Newspaper Clipping (Apr. 26, 1922) (on file in Allen Papers, Box 6, Folder 2).

290. *See id.*

291. *See id.* (internal quotations omitted).

provide for the wife to receive a regular allowance and be a “business partner” to the husband, and for the wife to be “sympathetic” and “never nag” her spouse.²⁹²

Allen’s other cases had a variety of weird factual contexts.²⁹³ In one case, a Mrs. Miller, accused of murdering her husband, either by mistaking him for a burglar or by premeditated threat, swooned several times to avoid taking the stand and being subjected to cross examination about her past.²⁹⁴ In another case, the defendant, accused of assault with the intent to rob, was arrested on the doorstep of St. Roses Catholic Church immediately after his own wedding.²⁹⁵ And in another case, a defendant tried to avoid a new state statute mandating minimum sentences by pleading guilty a day early, but discovered the law did not apply to his misdemeanor charge of housebreaking.²⁹⁶ Allen sentenced him to the maximum under the law of \$300 and six months in the workhouse, telling him “you deserve it.”²⁹⁷ Women served as jurors on many of Allen’s trials, newly eligible after the Nineteenth Amendment and expressly authorized under the Ohio constitution, unusual among states.²⁹⁸ Allen encouraged more women to embrace this civic duty, and found that women were neither more nor less emotional or intellectual than men.²⁹⁹ She did, however, adopt the practice of sequestering men and women separately, employing female bailiffs to supervise the women.³⁰⁰

Allen’s most notorious case as a trial judge was the case of “The Black Hand.”³⁰¹ Frank Motto, a gang leader who “terroriz[ed] men and women . . . of Italian birth” was convicted of murdering two business partners, then stealing the payroll funds they carried.³⁰²

292. *Id.* (internal quotations omitted).

293. See Notes from Testimony in Common Pleas Court 1921–22 (on file in Allen Papers, Box 11, Folder 1).

294. See *Woman Swoons at Murder Trial*, CLEV. PLAIN DEALER, Mar. 16, 1921.

295. See *Bride Hears Plea for Jailed Groom: Attorney Attacks Record of Detective Who Broke Up Wedding Party*, CLEV. PLAIN DEALER, Aug. 2, 1922.

296. *Seeks Leniency, Gets the Limit* (undated newspaper clipping) (on file in Allen Papers).

297. *Id.* (internal quotations omitted).

298. See ALLEN, *supra* note 7, at 56 (showing one example of Judge Allen’s cases with female jurors); Burnita Shelton Matthews, *The Woman Juror*, 15 WOMEN LAWYERS J. 15, 15–16 (1927); TUVE, *supra* note 1, at 59.

299. See GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 100 (2006); Joanna L. Grossman, Note, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1154 (1994).

300. TUVE, *supra* note 1, at 59; see also ALLEN, *supra* note 7, at 59 (recounting an instance of a female bailiff interacting with the female jurors).

301. ALLEN, *supra* note 7, at 55.

302. *Id.* at 55–56.

Judge Allen and members of the jury were threatened during the trial, receiving a paper with the printed black outlines of a hand saying “The day Motto dies, you die.”³⁰³ The jury convicted Motto, and Allen imposed the death penalty as dictated by state law.³⁰⁴ She was the first woman judge in the country to impose the death penalty.³⁰⁵ Allen reported that she “did not enjoy this task.”³⁰⁶ Elsewhere, she said was against capital punishment, but believed it was her judicial duty to enforce the law.³⁰⁷ While the Motto case was being appealed up the state courts, Allen moved with her friend to a new apartment.³⁰⁸ When Allen traveled, her friend reported periodically hearing someone around the house at night.³⁰⁹ When the women later prepared to move out and emptied storage lockers in the basement, they found a number of black hands outlining the walls.³¹⁰

Judge Allen believed that her most important case as a trial judge was the perjury trial of Judge McGannon.³¹¹ McGannon had been the Chief Judge of the Cleveland Municipal Courts, but had become involved with disreputable folks involved with bootlegging.³¹² A man was shot and killed in his car, but McGannon was acquitted by two juries.³¹³ It then came to light that witnesses had been bribed and threatened, and jurors had been tampered with.³¹⁴ Allen handled the following trial for perjury in which a key witness revealed that she had been paid to avoid testifying that she saw McGannon at the car and with something in his hand.³¹⁵ While the case was pending, McGannon’s wife claimed that she would issue a statement if her husband were found guilty, saying “I knew a few things in this case that have never come out. If they convict my husband, an innocent man, I will tell a few things.”³¹⁶ Ohio’s law of spousal incompetency at the time (and now) allowed a spouse to volunteer testimony, but prevented the compelling of that testimony against her

303. *Id.* at 56 (internal quotations omitted).

304. *Id.*

305. *Id.*

306. *Id.*

307. ALLEN, *supra* note 7, at 56.

308. *See id.* at 57.

309. *See id.*

310. *Id.*

311. *Id.* at 58.

312. *See id.*

313. ALLEN, *supra* note 7, at 58.

314. *See id.* at 59–60.

315. *See id.* at 61.

316. *Judge Is To Testify Today: McGannon To Defend Self Against Charge Made by Chief Witness for State*, CIN. ENQUIRER, Dec. 28, 1920, at 1 [hereinafter *Judge Is To Testify*].

spouse.³¹⁷ The state law of spousal incompetency allowed the spouse against whom the testimony is offered to prohibit that testimony in a criminal trial.³¹⁸ Thus, it seems Judge McGannon did not want his wife's statement in court.³¹⁹ Judge Allen sentenced McGannon to jail, and standing from her podium, lectured him on the particular wrongfulness of a judge, dedicated to upholding truth and justice, lying in the courts of law.³²⁰

Allen reported that she was reversed only three times.³²¹ One of these cases was her decision holding attorney Tim Long in contempt of court.³²² Long, a former prosecutor whom Allen had worked with, was defense counsel to a George Crawford who pled guilty to embezzling \$15,000.³²³ Crawford had no prior record, and Allen initially sentenced him to parole, and his wife sold some jewelry to make partial restitution.³²⁴ Attorney Long then lied in court, saying there was no other money in hiding, and that he had not received a fee.³²⁵ In the contempt hearing before Judge Allen, it was established that Crawford had deposited \$5000 into a bank account with a fictitious name, and given control of the account to Long as a legal fee.³²⁶ Allen sentenced Long to five days in jail for his contempt of lying to the court, and revoked Crawford's parole.³²⁷ The Ohio courts reversed, finding that Judge Allen improperly imposed summary contempt.³²⁸ Allen had thought her contempt penalty appropriate because the conduct occurred in front of her in court, but she acknowledged in her autobiography that she came to see the importance of restraint in issuing contempt because the judge personally feels the injury and may not have the usual objective distance to render judgment.³²⁹

Years later, Judge Allen noted that her eleven colleagues on the Court of Common Pleas granted her "every consideration," and offered

317. See Wilson R. Huhn, *Ohio's "Sacred Seal of Secrecy": The Rules of Spousal Incompetency and Marital Privilege in Criminal Cases*, 20 AKRON L. REV. 433, 435 (1987); see also *State v. Orth*, 86 N.E. 476, 477–78 (Ohio 1908) (holding that spouses can testify on behalf of each other, but not against each other).

318. See Huhn, *supra* note 317, at 436.

319. See *Judge Is To Testify*, *supra* note 316, at 1.

320. See ALLEN, *supra* note 7, at 62.

321. *Id.* at 52.

322. See *Long Given 5 Days in Contempt Case*, CLEV. PLAIN DEALER, Nov. 3, 1921.

323. See ALLEN, *supra* note 7, at 53; see also *Long Given 5 Days in Contempt Case*, *supra* note 322.

324. See ALLEN, *supra* note 7, at 53.

325. See *Long Given 5 Days in Contempt Case*, *supra* note 322.

326. See *id.*

327. *Id.*

328. See ALLEN, *supra* note 7, at 54.

329. See *id.*

her “friendship and cooperation.”³³⁰ That would not, however, be the case for the higher courts on which she would serve.³³¹

IV. MODERATION ON THE OHIO SUPREME COURT

Allen was elected to the Supreme Court in 1922, one of two judges (as they were then called).³³² Allen was the lone Democrat on the court and would remain so for most of her two terms of service.³³³ Allen had run again as a non-partisan candidate via petition; neither party supported her.³³⁴ The women of Ohio, however, did, as women of both parties voting as a united block secured her election in 1922 to one of two open seats on the Supreme Court of seven.³³⁵ Susan Rebhan, a teacher and principal from Youngstown, field secretary for the YWCA, and later Allen’s close friend, served as campaign manager.³³⁶ “Florence Allen clubs” formed all over the state using suffrage networks helped publicize her campaign based on the same platform she had for the common pleas court, emphasizing “politics should have no connection with the courts.”³³⁷ Allen’s physical appearance proved to be an asset, as her “hearty” physical size, outdated hairstyle, common sense shoes, and a voice with “masculine depth” suggested seriousness and strength of body and mind, and negated the stereotype of women as frail, flighty, and fashion focused.³³⁸

330. *Id.* at 52.

331. *See id.* at 79 (explaining the reaction of the other judges on Judge Allen’s first day).

332. *See* TUVE, *supra* note 1, at 67; *Florence Ellinwood Allen*, *supra* note 2. An Ohio Supreme Court jurist was called “Judge” prior to 1968 when a joint resolution amended the state Constitution to change the title to “Justice.” *See* H.J.R. No. 42, 107th Gen. Assemb., Reg. Sess. (Ohio 1968) (amending Art. IV, sec. 2).

333. The Court had shifted from majority Democrat in 1913 (five of seven justices) to the majority Republican by 1919, with only one Democrat by 1921, and would remain so until it began to shift back again after the Democratic sweep of 1932 and by 1934 had become majority Democrat (five of seven justices). *See Justices by Term Since 1913*, THE SUP. CT. OF OHIO, <https://www.supremecourt.ohio.gov/SCO/formerjustices/terms.asp> [<https://perma.cc/XRT4-4892>]; *see also Justices of the Supreme Court of Ohio 1803 to Present*, THE SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/SCO/formerjustices/default.asp> [<http://perma.cc/MZX3-2P9V>].

334. TUVE, *supra* note 1, at 63, 65.

335. *See Cleveland Woman Judge Elected to Supreme Bench*, ST. LOUIS DISPATCH, Nov. 10, 1922, at 1 (“[S]he had the support of the majority of the women.”). Mary Grossman was also elected to the Cleveland Municipal Court, scandalized by the McGannon case. TUVE, *supra* note 1, at 73 n.14.

336. *See* ALLEN, *supra* note 7, at 65.

337. *See id.* at 50.

338. *See* TUVE, *supra* note 1, at 65 (citing undated newspaper clipping in Allen Papers, Box 26, Folder 6).



Judge Florence Allen, Ohio Supreme Court (1923)

The resulting press celebrating Allen's successful election as the first woman in the country elected to a Supreme Court was a "veritable love feast," applauding her historical feat, underscoring her qualifications, and labeling her a "women's woman."³³⁹ However, at least one naysayer, the former mayor of Cincinnati, Edward Dempsey, protested her election, arguing that the results should not be certified because the Nineteenth Amendment gave women only the right to vote, not the right to hold public office.³⁴⁰ Once certified, Allen moved to Columbus, bought a big old house close to the courthouse, and her parents, sister Esther Gaw, now a single mom and Dean of Women Students at Ohio State University, brother Jack (before his death), and friend Susan moved in.³⁴¹

The six male judges on the Ohio Supreme Court did not know what to do with a female colleague. Allen noted graciously that "[t]here always is an adjustment when a new member enters a court[.]" and that was magnified by her gender.³⁴² She recounted how on the first day she heard cases and the judges retired to deliberation in the conference room, she "was aware of a certain uneasiness among the men[.]"³⁴³ She said to them, "[w]hile I don't smoke, myself . . . I shall be delighted if any of you will do so whenever he wishes[.]" to which they replied by lighting up pipes and cigars.³⁴⁴ Allen recalled that one fellow judge, James Robinson, was particularly opposed to her and to women generally in professional life,

339. *Id.* at 66–67.

340. *See id.* at 66. Several states like Iowa and Oklahoma did still prohibit women from holding public office. *Id.* at 73 n.16.

341. *See id.* at 78–80.

342. ALLEN, *supra* note 7, at 79.

343. *Id.*

344. *Id.*

though Allen said they eventually became friends.³⁴⁵ Even eight years later her colleagues didn't know what to make of her. When Allen cut her outdated long hair, worn in figure-eight top knot, into a very short style, one of her fellow judges told her she looked like a football player.³⁴⁶ Her haircut received media interest, with the newspaper commenting that although Judge Allen had long defied the trend of the "bobbed hair epidemic," she returned from summer vacation having "cast aside the long chestnut-colored tresses."³⁴⁷ The paper reported that her male colleagues were surprised, but refrained from comment, as "there was no statutory law on the subject of how a woman should wear her hair."³⁴⁸

Allen took the bench during a time when the type of cases appearing before the Supreme Court was quickly changing. Gone were the days of what she called "run-of-the-mine . . . case[s]" of private disputes or criminal prosecutions.³⁴⁹ Instead, as Allen noted, "the Ohio courts were now entering new and unexplored domains of the law."³⁵⁰ Progressive legislation of the early century and sweeping changes in Ohio's new 1912 state constitution triggered new disputes of original interpretation about the scope of governmental power and populist access to power.³⁵¹ Industrialization of steel and rubber, and the growth of the transportation and automobile industries all provided new sources of legal disputes and questions.³⁵²

Allen summarized her twelve years of jurisprudence on the Ohio Supreme Court as falling into six categories of cases: schools, municipal power, labor, taxes, jury questions (miscellaneous factual disputes), and worker's compensation.³⁵³ But at the heart of her jurisprudence, particularly in those opinions she authored, Allen was concerned generally with public law and the constitutionality of progressive legislation and governmental regulation.³⁵⁴ In her first

345. *See id.* Robinson was a Republican and a former county prosecutor and would become great-grandfather to President George W. Bush. *See* Daniel Nasaw, *The Bush Family Tree: Five Generations of an American Dynasty*, WALL ST. J. (June 15, 2015), <http://graphics.wsj.com/jeb-bush-family-tree> [<https://perma.cc/5J5K-797X>].

346. *See* Florence Allen, *Diary*, Oct. 1, 1929.

347. *Bobbed Locks Finally Win Judge Allen*, Dec. 22, 1929 (on file with author).

348. *Id.*

349. *See* ALLEN, *supra* note 7, at 80.

350. *Id.*

351. *See id.* at 80–81; TUVE, *supra* note 1, at 92.

352. *See* ALLEN, *supra* note 7, at 80.

353. *See id.* at 82–85.

354. *See, e.g., State ex rel. Bowman v. Bd. of Comm'rs of Allen Cnty.*, 177 N.E. 271, 280 (Ohio 1931) (Allen, J., dissenting after hearing), *appeal dismissed sub nom. Allen Cnty. v. Ohio*, 286 U.S. 526 (1932); *City of Cuyahoga Falls v. Beck*, 143 N.E. 661, 667 (Ohio 1924) (holding for city because taxpayers delayed too long in challenging sewer system and

cases, Allen upheld Cleveland's new city manager plan against constitutional challenge.³⁵⁵ The plan by which a city manager was hired by a city council elected by proportional representation had been strongly advocated by Allen and women's organizations like the League of Women Voters as a way to address corruption in government and efficiency over politicking.³⁵⁶ Allen's opinion was one of the first judicial decisions in the United States to uphold that form of municipal power, and hailed as the first supreme court decision written by a woman.³⁵⁷ The plan, however, was repealed in 1931, strongly opposed by both political parties.³⁵⁸ In another important decision on power, *Pritz v. Messer*, Allen wrote the opinion upholding the constitutionality of the zoning power under the home-rule provision and within the police power to protect the public morals, health, and safety.³⁵⁹ The United States Supreme Court held similarly three years later in the seminal case, *Village of Euclid v. Ambler Realty Co.*, but Allen had already recognized and articulated the validity of zoning laws as an exercise of police power.³⁶⁰

Allen also earned a reputation for her pro-labor decisions. She upheld the lawfulness of labor picketing, at least when unaccompanied by physical violence.³⁶¹ She supported the worker in several worker's compensation cases, upholding the general system but also allowing an injured employee to circumvent the compensation to sue

expense); *Fisher Bros. Co. v. Brown*, 146 N.E. 100, 108 (Ohio 1924) (validating constitutionality of taxation of commercial trucks by horsepower); *State ex rel. Ret. Bd. of State Teachers' Ret. Sys. v. Kurtz*, 144 N.E. 120, 123–24 (Ohio 1924) (upholding law creating retirement fund for state teachers); *Miller v. Korn*, 144 N.E. 773, 776 (Ohio 1923) (upholding inter-district spending of school funds as constitutional); *State ex rel. Masters v. Beamer*, 141 N.E. 851, 857 (Ohio 1923) (requiring county to provide public transportation for public school students); see also ALLEN, *supra* note 7, at 84, 90–91 (discussing a case upholding municipalities' power to establish utilities and power plants, and explaining the changes to *State ex rel. Bowman v. Bd. of Comm'rs of Allen Cnty.* Allen wrote the original opinion in the case, finding that county grossly abused its power by establishing a sewer system at taxpayer expense, but after rehearing sought by "every financial industry in the state," she ended up in dissent.); Florence Allen, *The Living Power of the Law*, Address to the Judicial Section of the Ohio State Bar Association (July 6, 1928) (on file in Allen Papers).

355. See *Reutener v. City of Cleveland*, 141 N.E. 27, 34 (Ohio 1923); *Hile v. City of Cleveland*, 141 N.E. 35, 37–38 (Ohio 1923), *writ of error dismissed*, 266 U.S. 582 (1924).

356. See TUVE, *supra* note 1, at 92–93.

357. See ALLEN, *supra* note 7, at 81–82.

358. See *id.* at 81; TUVE, *supra* note 1, at 92.

359. See *Pritz v. Messer*, 149 N.E. 30, 35 (Ohio 1925). *But see* *City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 845–46 (Ohio 1925) (invalidating zoning restriction prohibiting apartment building near private homes).

360. See *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 394–95 (1926); *Pritz*, 149 N.E. at 35.

361. See *LaFrance Elec. & Supply Co. v. Int'l Brother Elec. Workers*, 140 N.E. 899, 908 (Ohio 1923).

for damages.³⁶² These views mirrored that of her father, who had worked as a state legislator in Utah to pass a worker's compensation statute.³⁶³ Allen's decisions earned her the support of labor, which publicly endorsed her in her judicial re-election campaigning.³⁶⁴ But they also quickly cost her the support of labor in later nominations, when in a subsequent decision, she took the position against labor and voted to uphold a state building contract given to a non-union company.³⁶⁵ Allen's moderate decision making aggravated labor supporters who expected universal sympathy for union workers.³⁶⁶

Judge Allen had many random and funny cases as well. Cases including those of runaway horses on a highway, baseball foul ball injuries, and a wife suing a mistress for alienation of affection.³⁶⁷ The alienation case was found to be of public interest for Allen's concurring opinion limiting the scope of the restraining order against the mistress due to difficulty of enforcement.³⁶⁸ Allen noted that "this opinion was extensively quoted by professors in law schools throughout the country[,] as "[t]he combination of the interesting case and of a woman judge delivering herself of outspoken views as to how to handle a triangle was too much for the law professors to resist."³⁶⁹

During her first term on the court, Allen took a detour and ran for Senate in 1926 on a platform of peace.³⁷⁰ She had become a strong advocate for the "Outlawry of War," a peace movement focused on making aggressive war illegal by treaty or other international law.³⁷¹ Allen was not a pacifist, supporting both defensive and liberation

362. See *Indus. Comm'n. v. Polcen*, 169 N.E. 305, 306 (Ohio 1929); *Ohio Automatic Sprinkler Co. v. Fender*, 141 N.E. 269, 277 (Ohio 1923) (reversing past cases by a vote of four to three).

363. See ALLEN, *supra* note 7, at 80.

364. See, e.g., *id.* at 85 (explaining a worker's compensation case); see also Landever, *supra* note 19, at 31–32.

365. See TUVE, *supra* note 1, at 109; *State ex rel. United Dist. Heating, Inc. v. State Office Bldg. Comm'n*, 181 N.E. 129, 129 (Ohio 1932) (upholding the contract to a non-union company).

366. See TUVE, *supra* note 1, at 109.

367. See *Drew v. Gross*, 147 N.E. 757, 757 (Ohio 1925); *Cincinnati Baseball Co. v. Eno*, 147 N.E. 86, 87 (Ohio 1925); *Snedaker v. King*, 145 N.E. 15, 16–17 (Ohio 1934).

368. See *Snedaker*, 145 N.E. at 17 (Allen, J., concurring).

369. ALLEN, *supra* note 7, at 87.

370. See *id.* at 76–77.

371. For an overview of Judge Allen's views on the international peace movement, see *id.* at 74–78; TUVE, *supra* note 1, at 67–72; Florence E. Allen, *Peace Through Justice*, 35 WOMEN LAWYERS J. 6, 6–8, 36 (1949) (discussing the tragedy of World War II and the best methods for achieving peace); Florence E. Allen, *Address Before National Business and Professional Women* (July 1946) (on file in Allen Papers, Box 15, Folder 3). For a background on outlawing war through treaties, see for example OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* xiii (2017) (arguing that the Kellogg-Briand Treaty to outlaw war was a transformational movement in international relations).

wars.³⁷² But losing both of her brothers in World War I triggered a lifelong commitment to peace efforts, and she spoke often on the radio, to church congregations, and to women's and peace conventions on the topic.³⁷³ Her sincere and inspirational oratory had a "ministerial aura" to it, infused with Biblical references and personal daily parables.³⁷⁴ Allen believed that she could do more for change from the Senate, where she could make laws, rather than simply interpret them, and where she could engage on a broad international level.³⁷⁵

Allen initially received Democratic Party support, but when the past candidate, Atlee Pomerene, then the prosecutor of the Teapot Dome Scandal in Washington, stepped back in, the party dropped its support of Allen in favor of Pomerene.³⁷⁶ Allen had campaigned after work and during her lunch hour, gave speeches at dinners, toured the state in her Model T car named "Gypsy," and studied court briefs until four in the morning, all while arriving each day at the court by seven.³⁷⁷ The unions strongly endorsed her.³⁷⁸ "Labor is supporting [Judge Allen]," they said, "because she is comparably the best and biggest man available for the job. In brains, character and experience, she towers head and shoulders above the field."³⁷⁹ The Railway Labor Organization supported Allen because of her "progressive views and humane tendencies," and because of her record on the bench showing her "eminently fair to the interests of all classes, including labor."³⁸⁰ These endorsements and Allen's hard work and determinism, however, were not enough. The voters were no longer engaged by peace efforts, as eight years after the war they sought isolationism and distance from the past loss, and caused some to label Allen a "red," associating her with socialism and anti-patriotic action.³⁸¹ Pomerene won the primary, but lost the general election.³⁸² In commenting that Ohio had lost the opportunity to be the first state to have a woman U.S. Senator, *The Evening Star* national newspaper noted that, while the hopes of women across the country had "gone a-glimmering," Allen had no real chance to defeat the

372. See TUVE, *supra* note 1, at 70.

373. See ALLEN, *supra* note 7, at 73–74.

374. TUVE, *supra* note 1, at 71–72.

375. See *id.* at 75.

376. See *id.* at 75–76.

377. See *id.* at 75, 80–81.

378. See TUVE, *supra* note 1, at 77.

379. *Id.*

380. Official Endorsement of Judge Florence E. Allen for United States Senator by Railway Labor Organization (July 27, 1926) (citing the *LaFrance* decision upholding the right of labor to picket and the *Ohio Automatic Sprinkler* case enforcing occupational safety).

381. See TUVE, *supra* note 1, at 85; Florence Allen, Diary, Mar. 21, 1926.

382. See TUVE, *supra* note 1, at 78.

Republican candidate, though the “race would have been picturesque, . . . with the feminist element interjected.”³⁸³

After her defeat for the Senate, Allen ran again for a second term on the Ohio Supreme Court.³⁸⁴ This campaign was easy, as Allen had demonstrated her qualifications, and had gained acceptance as a serious, smart, and careful judge.³⁸⁵ Democrats and labor supported her candidacy, endorsing her because of her national reputation, experience, and progressive views.³⁸⁶ Ministerial associations and the press also strongly supported her.³⁸⁷ For the first time, women’s groups were less instrumental, as women’s clubs moved away from social causes to personal pleasures like lunch, bridge, and fashion.³⁸⁸

The National Association for the Advancement of Colored People (NAACP) supported Allen’s second campaign as well.³⁸⁹ It endorsed her because she was the only judicial candidate who was a member of the organization.³⁹⁰ The NAACP also supported her because of her vote on several judicial decisions, including one holding that it was lawful for a board of education to prohibit showing the controversial film “‘The Birth of a Nation’ because of its racism, and two others opposing school segregation.”³⁹¹

However, a later case regarding university segregation during Allen’s second term alienated the NAACP, which then subsequently opposed her nomination to the federal court.³⁹² In *Weaver v. Board*

383. *Pomerene Leading Florence E. Allen*, EVENING STAR, Aug. 11, 1926, at 8.

384. TUVE, *supra* note 1, at 86.

385. *See id.* at 87.

386. *See* Letter from D.B. Robertson, President, Brotherhood Locomotive Firemen & Enginemen to All Members of B.L.F.&E. Residing in the State of Ohio (Oct. 17, 1928) (on file in Allen Papers, Box 6, Folder 3).

387. *See* TUVE, *supra* note 1, at 87, 105.

388. *See id.* at 84–85.

389. *Id.* at 87.

390. *Id.*

391. *Id.*; *see* Bd. of Educ. of Sch. Dist. of Dayton v. State *ex rel.* Reese, 151 N.E. 39, 39 (Ohio 1926) (per curiam). In *Reese*, the Dayton School Board established separate classrooms for black children in mixed schools in 1912, a practice it had used in the nineteenth century, and then in 1918, assigned all black children at one school to a separate annex behind the main school building where white students attended. *Id.* Dayton ignored the Ohio Supreme Court’s court decree finding it illegal, and school segregation battles continued there for fifty years, culminating in a U.S. Supreme Court case on the appropriate scope of a desegregation remedy. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979), *aff’g*, Brinkman v. Gilligan, 583 F.2d 243, 249 (6th Cir. 1978).

392. *See* State *ex rel.* Weaver v. Board of Trustees of Ohio State University, 185 N.E. 196, 199 (Ohio 1933); Letter from Clayborne George, Legal Defense Committee of the Cleveland NAACP to Senator Robert Bulkley (Feb. 12, 1934) (on file in Allen Papers, Box 6, Folder 5) [hereinafter Letter from Clayborne George to Senator Robert Bulkley]; Letter from

of *Trustees*, a Black college student, Doris Weaver, sued Ohio State University for racial segregation in the housing component of her college clinical experience.³⁹³ Home economics majors like Weaver lived in a house with a student roommate.³⁹⁴ When no other student elected to live with Weaver, she was assigned to live with a white instructor in an adjacent house, rather than the main house.³⁹⁵ The Ohio Supreme Court's decision was unanimous in holding that discrimination laws could not reach social, intimate relations such as a roommate.³⁹⁶ By 1933, the Court had three Democrats, including a Chief Justice.³⁹⁷ The decision had been per curiam, but the NAACP still excoriated Allen for her passive acceptance of the decision and her refusal to dissent.³⁹⁸ "We believe that by this opinion, an opinion reeking and pregnant with racial discrimination, Judge Allen and her associates disbarred themselves from any further judicial consideration."³⁹⁹ Allen defended the decision on the facts in a response to the NAACP, and said she would "vote exactly the same," and that the decision was color blind as the "[same decision] would have been rendered in the case of any white girl."⁴⁰⁰ Decades later, Allen was still sensitive to the criticism of the case, and seemed to justify her decision by recounting in her autobiography the story of a Black friend from college, Mary Brown, who commented to Allen that she would not have brought such a lawsuit like Doris Weaver, but would have instead continued her studies to make the way easier for the next Black woman's success.⁴⁰¹

By 1932, Allen was frustrated with the Ohio Supreme Court.⁴⁰² She was "sick of the intolerable situation" and "arbitrary justice" arising from the control of the assignment of cases by Chief Justice

Florence E. Allen to Walter White, Secretary of the NAACP (Mar. 22, 1934) (on file in Allen Papers, Box 6, Folder 5) [hereinafter Letter from Florence E. Allen to Walter White].

393. See *Weaver*, 185 N.E. at 197.

394. See *id.*

395. ALLEN, *supra* note 7, at 91.

396. *Weaver*, 185 N.E. at 199.

397. See *Will Prettyman Stephenson*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.sconet.state.oh.us/SCO/formerjustices/bios/stephenson.asp> [<https://perma.cc/NY7N-YUF6>]; *Carl Victor Weygandt*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.sconet.state.oh.us/SCO/formerjustices/bios/Weygandt.asp> [<https://perma.cc/PL2Q-EBA6>]; *Charles Ballard Zimmerman*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.sconet.state.oh.us/SCO/formerjustices/bios/zimmerman.asp> [<https://perma.cc/96VS-J3AJ>].

398. See Letter from Clayborne George to Senator Robert Bulkley, *supra* note 392.

399. *Id.*

400. See Letter from Florence E. Allen to Walter White, *supra* note 392.

401. See ALLEN, *supra* note 7, at 92.

402. TUVE, *supra* note 1, at 103.

Carrington Marshall.⁴⁰³ Marshall had been elected Chief Justice in 1920, and served until 1932 during most of Allen's tenure.⁴⁰⁴ Marshall was a Republican, fifteen years Allen's senior, who had thirty years of general office practice as a lawyer.⁴⁰⁵ Allen had angered Marshall by calling him out in an opinion she wrote in a case involving the mishandling of school funds.⁴⁰⁶ She challenged Marshall's social and business ties to the case and endorsed the parties' request for recusal.⁴⁰⁷ In the opinion, Allen, and the other justices, criticized Marshall for setting himself on a pedestal and assigning cases so that opinions reflected his own personal views.⁴⁰⁸

Due to her frustration with the politics of the court and the lack of transparency, Allen again ran for legislative office, this time for the House of Representatives.⁴⁰⁹ She sought to capitalize on her popularity resulting from her 1928 judicial re-election in which she had won by a good margin even during a heavily Republican year.⁴¹⁰ As before, Allen also sought a larger platform on which to engage on the political and social issues of the day.⁴¹¹ While women and labor continued to endorse her, this time the press came out in opposition, preferring that she remain in the judiciary and criticizing her for abandoning her judicial duties and campaigning while on judicial salary.⁴¹² The issues chose her, with the repeal of prohibition and economic solutions to the Great Depression being the main discussion.⁴¹³ Allen offered little on these issues, being an avid supporter of Prohibition, she now weakly claimed she would support whatever the voters wanted, losing her the endorsement of an old suffrage ally, the Woman's Christian Temperance Union (WCTU).⁴¹⁴ Allen lost the 1932 election to a Republican, despite the Democratic landslide nationwide electing Franklin D. Roosevelt president.⁴¹⁵ But her

403. *Id.* at 103, 108; *see also* Florence Allen, Diary, Dec. 10, 1932.

404. *See* Michael Meckler, *Forgotten Ohio Chief Justice Died 60 Years Ago Today*, COLUMBUS DISPATCH (June 28, 2018), <https://www.dispatch.com/news/20180628/forgotten-ohio-chief-justice-died-60-years-ago-today> [<http://perma.cc/S7DU-Y7DX>]; *see also* Carrington Tanner Marshall, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/marshall.asp> [<http://perma.cc/7EW9-RYB8>].

405. *See* Carrington Tanner Marshall, *supra* note 404.

406. *See* ALLEN, *supra* note 7, at 88–90 (citing *State ex rel. Turner v. Marshall*, 176 N.E. 454, 455 (Ohio 1931)).

407. *See* Turner, 176 N.E. at 455.

408. *See* TUVE, *supra* note 1, at 99.

409. *See id.* at 103.

410. *See id.*

411. *See id.* at 104–05.

412. *See id.* at 105–06.

413. *See id.* at 103.

414. *See* TUVE, *supra* note 1, at 104.

415. *See id.* at 106.

candidacy put her on the national radar for another political appointment to federal court.⁴¹⁶



Judge John Gore, Judge Florence Allen, and Judge John Martin sitting in the TVA case, Chattanooga, Tennessee (1937)

V. A CONSERVATIVE LIBERAL ON THE FEDERAL APPELLATE COURT

President Franklin D. Roosevelt appointed Florence Allen to the United States Court of Appeals for the Sixth Circuit on March 23, 1934—her fiftieth birthday.⁴¹⁷ That same day, her fellow Ohio judicial colleagues gave her a surprise birthday cake, perhaps representing some acceptance of her into their ranks.⁴¹⁸ Allen became one of four judges then serving on the Sixth Circuit, one from each state in the circuit—Ohio, Michigan, Tennessee and Kentucky.⁴¹⁹ She would serve for twenty-five years on the federal bench, the last year as Chief Justice, becoming the first woman jurist to serve in this position.⁴²⁰

The federal appointment resulted, as before, from the active support and campaigning of national women's groups, bolstered by her strong political connections in Washington, D.C.⁴²¹ These included Attorney General Homer Cummings for whom Allen had worked campaigning for President Wilson in the West, and Judge

416. *See id.*

417. Howard, *supra* note 9; TUVE, *supra* note 1, at 110.

418. *See* TUVE, *supra* note 1, at 110.

419. *See* M. Neil Reed, Tom Vanderloo & Stephanie Wobkenberg, *A History of the United States Court of Appeals for the Sixth Circuit*, FED. LAW., Aug 2016, at 34, 36. The Sixth Circuit had only three judgeships for decades, but increased to four in 1928, six by 1940, and currently sixteen. *Id.*

420. *See* TUVE, *supra* note 1, at 111; Reed et al., *supra* note 419, at 36.

421. *See* TUVE, *supra* note 1, at 107–08.

Harold Stephens, a lifelong friend from Utah.⁴²² Former U.S. Supreme Court Justice John Clarke wrote in support: “As the daughter of my college classmate I have had an especial interest in Judge Florence Allen . . . I think her opinions equal if not superior to any others coming from the Ohio Supreme Court in recent years. You know of course of her thorough education and judicial methods.”⁴²³ Judge Will Stephenson, a colleague on the Ohio Supreme Court said, “There is no Court too big for Judge Allen.”⁴²⁴ Activism from the women’s division of the Democratic Party and support from First Lady Eleanor Roosevelt all converged to create the right political circumstances for the appointment of a woman.⁴²⁵

Opposition, however, came from former friends and allies. The NAACP strongly opposed her nomination over her vote in the *Weaver* race discrimination case.⁴²⁶ Some labor groups dropped their support of Allen because of her inconsistent and sometimes moderate decisions in union cases.⁴²⁷ The FBI background report prepared at the time of Allen’s nomination revealed that

[a] large minority of prominent members [of the] Cleveland Bar and U.S. District Judges [redacted] strongly oppose appointment, alleging applicant is not qualified to hear [cases which] involved patent, tax, admiralty and other matters before Circuit Court and has no knowledge of Federal practice and is untrained, unethical and politically ambitious with aspirations to U.S. Supreme Court.⁴²⁸

The report continued that “[m]any members term her appointment as lamentable, laughable, disastrous and would make the Circuit Court appear ridiculous and would lower the high traditions of that bench,” although it noted that “[m]any members admit a natural prejudice against women in the judiciary, particularly Federal, as being naturally unqualified.”⁴²⁹ The report, however, also observed that “[s]ome members of Cleveland Bar favor her appointment alleging able, fair,

422. ALLEN, *supra* note 7, at 93; TUVE, *supra* note 1, at 110.

423. ALLEN, *supra* note 7, at 94.

424. *Id.* at 95.

425. *See* TUVE, *supra* note 1, at 110.

426. *Id.* at 109; *see also* Organ, *supra* note 92, at 167–69. Allen’s suffrage colleague, Black lawyer Jane Hunter, wrote to Allen with her support and apologizing for the NAACP men. Organ, *supra* note 92, at 168.

427. *See* TUVE, *supra* note 1, at 109.

428. Clark, *supra* note 12, at 499 (quoting Memorandum Prepared for Director of the Federal Bureau of Investigation by F.A. Tamm (Feb. 15, 1939)).

429. *Id.* (internal quotations omitted).

independent, conscientious, judicious, legal mind and well qualified in every respect.”⁴³⁰

President Roosevelt proceeded with the nomination, and the Senate confirmed her unanimously, although “without enthusiasm.”⁴³¹ Dinners and banquets were held in her honor, recognizing this historic accomplishment of a woman on the federal appellate court.⁴³² Her nomination, however, would prove to be an isolated event rather than a trend.⁴³³ Allen herself reflected years later that she thought Roosevelt may have appointed her only for “shock effect.”⁴³⁴

Allen’s colleagues on the federal court were unwelcoming and exclusionary.⁴³⁵ Allen recounted that she was told that when her appointment was announced, one judge “went to bed for two days.”⁴³⁶ Judge Xenophon Hicks refused to write her a polite congratulatory note, and avoided looking at her during their first working sessions, signaling his strong opposition to women on the bench.⁴³⁷ When sitting as a group for argument in Cincinnati, the male judges took lunch at the University Club and other establishments that excluded women, while Allen walked during lunch “to get rid of the stuffiness.”⁴³⁸ Her male colleagues criticized her work, Allen thought unfairly, being overly critical on trivial matters and sending her “mean letters.”⁴³⁹

Allen worked hard to prove herself.⁴⁴⁰ She knew none of her colleagues wanted a woman on the court, but thought that if she work conscientiously, as she had in the past, that she could change that initial reaction.⁴⁴¹ In her first session on the court, she “asked one or two pertinent questions, and in the conference after the cases I expressed myself in the normal way,” but otherwise did not assert herself except to vote.⁴⁴² Early in her tenure, she fell down a flight of stairs at the courthouse, landing on her face and breaking several teeth and battering her face.⁴⁴³ When the presiding judge, Charles Moorman, moved to postpone the case scheduled for the next day, a big Detroit bank case involving a number of lawyers already on the

430. *Id.*

431. TUVE, *supra* note 1, at 110 (internal quotations omitted).

432. *See id.*

433. *Id.*

434. *Id.* at 111 (internal quotations omitted).

435. *See ALLEN, supra* note 7, at 95.

436. *Id.*

437. *See id.* at 95, 97.

438. TUVE, *supra* note 1, at 116 (internal quotations omitted).

439. *Id.* (internal quotations omitted).

440. *See ALLEN, supra* note 7, at 96.

441. *See id.* at 95–96.

442. *Id.* at 97.

443. *Id.* at 97–98.

trains headed for Cincinnati, Allen refused to postpone.⁴⁴⁴ Sensitive to the expense during this latter part of the Depression, Allen continued the case despite how she looked, with her face bandaged and wrapped in adhesive tape.⁴⁴⁵ Her fortitude in carrying on, even with a bandaged face, won over Judge Hicks a bit, and they were able to work together on the court.⁴⁴⁶

Allen handled a variety of cases typical of a federal appellate court at the time.⁴⁴⁷ These included a heavy docket of labor cases after the adoption of the National Labor Relations Act in 1935 mandating fair collective bargaining practices, and the Fair Labor Standards Act of 1938 establishing a minimum wage, maximum hours, and no child labor.⁴⁴⁸ Allen's decisions went both ways on these cases, ruling sometimes for labor, sometimes for management.⁴⁴⁹ She heard a consumer case from the Federal Trade Commission regarding misleading statements about a quack medicine called "Glyoxylyde," a case challenging the illegal seizure of a liquor still during Prohibition, a case where a defendant coerced a young man not to register for the draft, a civil suit for malicious prosecution against a witness in an oil property case, and a case about a fraudulent housing loan.⁴⁵⁰ She struggled with an opinion she wrote upholding the denaturalization of a woman alleged to be a communist, focusing on the defendant's

444. *See id.* at 98.

445. *See id.*

446. *See ALLEN, supra* note 7, at 98.

447. *See, e.g.,* Niepert v. Cleveland Illuminating Co., 241 F.2d 916, 916–17 (6th Cir. 1957) (negligence boat pier); Poliafico v. United States, 237 F.2d 97, 101–02 (6th Cir. 1956) (narcotics); Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 820 (6th Cir. 1953) (government contracts); Deupree v. Levinson, 186 F.2d 297, 299 (6th Cir. 1950) (admiralty).

448. *See* National Labor Relations Act, 29 U.S.C. §§ 151–69; Fair Labor Standards Act, 29 U.S.C. §§ 203, 206–07.

449. *Compare* NLRB v. Hoppes Mfg. Co., 170 F.2d 962, 964 (6th Cir. 1948) (for labor upholding NLRB); NLRB v. Packard Motor Car Co., 157 F.2d 80, 86 (6th Cir. 1946) (for union holding foremen are employees eligible for bargaining unit); NLRB v. Salant & Salant, Inc., 183 F.2d 462, 465 (6th Cir. 1950) (for union upholding NLRB that company failed to bargain in good faith); Emulsified Asphalt Prods. Co. v. Mitchell, 222 F.2d 913, 914 (6th Cir. 1955) (for labor holding company must comply with FLSA), *with* NLRB v. Bill Daniels, Inc., 202 F.2d 579, 586 (6th Cir. 1953) (for management holding car agencies need not comply with FLSA); Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731, 742 (6th Cir. 1950) (for management holding no evidence employee fired for union activity); Ohio Power Co. v. NLRB, 176 F.2d 385, 386 (6th Cir. 1949) (for management holding supervisors are not eligible employees for bargaining unit); Midland Steel Prods. Co. v. NLRB, 113 F.2d 800, 805–06 (6th Cir. 1940) (for management reversing NLRB).

450. *See ALLEN, supra* note 7, at 99–101; *see also* Koch v. Fed. Trade Comm'n., 206 F.2d 311, 314 (6th Cir. 1953) (misleading drug advertisements); Cardinal v. United States, 79 F.2d 825, 826 (6th Cir. 1935) (liquor still); Devine v. Patteson, 242 F.2d 828, 829 (6th Cir. 1957) (witness case), *cert. denied*, 355 U.S. 821 (1957).

contempt of court and refusal to answer questions.⁴⁵¹ And she heard “innumerable tax cases.”⁴⁵²

Judge Allen also heard a number of patent cases, in days before the creation of the Federal Circuit Court of Appeals that since 1982 has heard all patent appeals.⁴⁵³ Patent cases were prevalent in the Sixth Circuit, which covered the automotive, steel, and machine tool industries that “w[ere] alive with patent activity.”⁴⁵⁴ Allen’s first written opinion on the Sixth Circuit was in a patent case, where she dissented from the finding of patent invalidity.⁴⁵⁵ Allen’s clear opinion, relying on extensive precedent, found that invention sufficient to establish the validity of the patent for an oil refining still.⁴⁵⁶ Despite this first case, Allen noticed that she was not being assigned to sit on any patent cases.⁴⁵⁷ She requested the assignment from Judge Moorman, who balked, until Allen explained she was not requesting any special case, but rather to not be excluded from any class of cases.⁴⁵⁸ She emphasized that she had the experience necessary to hear such cases, citing her father’s work as a manager of the silver mines, and her familiarity with industrial situations from her Ohio court days.⁴⁵⁹ After that, Allen reported, she “wrote many opinions in patent cases, a number of which the Supreme Court affirmed or refused to review.”⁴⁶⁰ After 1952, the U.S. Supreme Court

451. See *Brown v. United States*, 234 F.2d 140, 141–42 (6th Cir. 1956).

452. ALLEN, *supra* note 7, at 101; see *Wexler v. Comm’r of Internal Revenue*, 241 F.2d 304, 304 (6th Cir. 1957) (taxing profits for horse race betting), *cert. denied*, 354 U.S. 938 (1957); *Auto. Club of Mich. v. Comm’r of Internal Revenue*, 230 F.2d 585, 586 (6th Cir. 1956) (taxing auto club income as commercial not recreational activity), *aff’d*, 353 U.S. 180 (1957); *Rogers v. Comm’r of Internal Revenue*, 111 F.2d 987, 988 (6th Cir. 1940) (tax penalties); *McInerney v. Comm’r of Internal Revenue*, 82 F.2d 665, 665–66 (6th Cir. 1936); *Rudolph Wurlitzer Co. v. Comm’r of Internal Revenue*, 81 F.2d 971, 972 (6th Cir. 1936), *cert. denied*, 298 U.S. 676 (1936); *Miller v. Hocking Glass Co.*, 80 F.2d 436, 436 (6th Cir. 1935), *cert. denied*, 298 U.S. 659 (1936).

453. See TUVE, *supra* note 1, at 157; see also John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 276 (2002).

454. ALLEN, *supra* note 7, at 102.

455. See *A.O. Smith Corp. v. Petroleum Iron Works Co.*, 73 F.2d 531, 539–41 (6th Cir. 1934) (Allen, J., dissenting).

456. *Id.*

457. ALLEN, *supra* note 7, at 102.

458. *Id.*

459. See *id.* at 102–03.

460. *Id.* at 103; see, e.g., *Nat’l Latex Prods. Co. v. Sun Rubber Co.*, 274 F.2d 224, 228 (6th Cir. 1959), *cert. denied*, 362 U.S. 989 (1960); *Cold Metal Process Co. v. Republic Steel Corp.*, 233 F.2d 828, 831 (6th Cir. 1956) (upholding validity of patents for rolling steel into thin strips), *cert. denied*, 352 U.S. 891 (1956); *Great Lakes Equip. Co. v. Fluid Sys.*, 217 F.2d 613, 614 (6th Cir. 1954) (upholding validity and infringement of patent for system for electronically heating fluid); *Am. Fork & Hoe Co. v. Stampit Corp.*, 125 F.2d 472, 473 (6th Cir. 1942); *Gen. Motors Corp. v. Swan Carburetor Co.*, 88 F.2d 876, 878 (6th Cir. 1937), *cert. denied*, 302 U.S. 691 (1937), *rehear’g denied*, 302 U.S. 777 (1937) (patent

declined to hear most patent cases, leaving the appellate courts and decisions like Allen's as the final word on patent law.⁴⁶¹ Patent lawyers were "aghast" when Allen was first appointed to the federal court, but quickly did "an about face and were among her most conspicuous advocates" appreciating her expertise.⁴⁶² Potter Stewart, future Supreme Court Justice who sat on the Sixth Circuit with Allen from 1954 to 1958, used Allen's opinions as research and learned patent law from her.⁴⁶³

Early in her federal career, Judge Allen had the opportunity to decide one of the few cases that would come before her implicating women's rights. The case *Walker v. Chapman* challenged the constitutionality of Ohio's minimum wage law for women.⁴⁶⁴ A federal statute required a three-judge court at the district level to hear any case which sought to enjoin a state law; Allen was the circuit judge joined by two district judges.⁴⁶⁵ The final decision in *Walker* was designated per curiam, but the writing clearly reflects Allen's style, intellect, and moderated reasoning.⁴⁶⁶ *Walker* seemed to be an easy case of striking down Ohio's wage law for women, as the U.S. Supreme Court had expressly invalidated such protective laws for women in the 1923 case, *Adkins v. Children's Hospital*.⁴⁶⁷ The Court held in *Adkins* that the Nineteenth Amendment represented a structural change of all protective laws for women, not just voting, and thus mandated equality of treatment in wage legislation.⁴⁶⁸ The Court affirmed that holding a few months before *Walker*, in a 5-4 split decision in *Morehead v. New York*.⁴⁶⁹ Allen, however, carefully following the clues laid out in *Morehead*, adopted the key argument of Chief Justice Hughes' dissent: that the D.C. wage legislation in *Adkins* could be distinguished from the legislative standard in the

infringement); see also Florence E. Allen, *Invention American Style*, 40 J. PAT. OFF. SOC'Y 312, 318 (1958).

461. See Duffy, *supra* note 453, at 273, 291-96 (2002) (suggesting the mid-century decline in hearing patent cases may be in part attributable to 1952 Patent Act); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6 (1989).

462. TUVE, *supra* note 1, at 158.

463. See *id.* at 157.

464. 17 F. Supp. 308, 309 (S.D. Ohio 1936) (per curiam).

465. See 28 U.S.C. § 2281 (repealed 1976).

466. See *Walker*, 17 F. Supp. at 309.

467. See *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 560-62 (1923).

468. See *id.* It thus disagreed with its prior decision in *Muller*, upholding protective legislation of maximum working hours for women because they were different from men, as women were physically weak and small, effected by maternity and menstruation, and burdened by housework demands. *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

469. *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587, 618 (1936).

New York law in *Morehead*.⁴⁷⁰ Allen used this dicta as her guide, distinguishing Ohio's minimum wage standard from *Adkins* by its non-vague description of a "fair wage" for reasonable value, and thus, upheld the law.⁴⁷¹ She adopted the moderate path of reconciliation, rather than engaging with the constitutional claims on the merits of gendered legislation.⁴⁷² Four months later, a split Supreme Court explicitly overruled *Adkins* on the merits in its decision in *West Coast Hotel v. Parrish* by Chief Justice Hughes, finding it to be a departure from true principles of employment and thus upholding women's minimum wage laws.⁴⁷³ One year later, Congress adopted the Fair Labor Standards Act, extending the minimum wage to all employees, shepherded by Roosevelt's first female secretary of labor, Frances Perkins.⁴⁷⁴ Allen's decision thus foreshadowed the trend in the law, and was consistent with her suffrage and labor background generally in favor of protective legislation for women and workers.

Three years into her federal tenure, Judge Allen was tapped for what would become one of the most important cases of her career, the Tennessee Valley Authority (TVA) case.⁴⁷⁵ Congress had recently extended the three-judge court procedure to decisions seeking to enjoin a federal statute.⁴⁷⁶ Allen was selected for the TVA case when two of the other Sixth Circuit judges had personal conflicts with the case, and a third had a serious illness.⁴⁷⁷ In the TVA case, nineteen power plants sued the New Deal Tennessee Valley Authority that sought to control the water of the Tennessee region with a dam for unfair competition for its plan to sell the generated power to municipalities and impoverished people.⁴⁷⁸ The case was a slog of voluminous exhibits, testimony, and attorneys, with filings designed to delay and confuse.⁴⁷⁹ Allen with her hallmark judicial efficiency,

470. *See id.* at 618–21 (Hughes, C.J., dissenting); *see also id.* at 631 (Stone, J., dissenting) (stating he would not make the differences between the statutes the sole basis of decision).

471. *See Walker*, 17 F. Supp. at 309–11.

472. *See id.*

473. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937).

474. Fair Labor Standards Act, 29 U.S.C. § 206 (1938); *United States v. Darby*, 312 U.S. 100, 121–26 (1941) (upholding FLSA as valid exercise of Commerce Clause); *Boisseau & Thomas*, *supra* note 16, at 237.

475. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 21 F. Supp. 947, 950 (E.D. Tenn. 1938), *aff'd*, 306 U.S. 118 (1939).

476. *See* 22 U.S.C. § 2282 (repealed 1976). This law extended the pre-existing Section 2281, which required a three-judge court to enjoin a state law. Today, a three-judge court is required only for apportionment of congressional districts. 28 U.S.C. § 2284(a).

477. *See TUVE*, *supra* note 1, at 118.

478. 21 F. Supp. at 950.

479. *See TUVE*, *supra* note 1, at 119–21.

streamlined the evidence and controlled the parties and the case.⁴⁸⁰ Her written decision wholeheartedly endorsed the power of the federal government to create the TVA and regulate the navigable waters.⁴⁸¹ It was hailed as a victory for liberal governance and New Deal legislation at a time when the U.S. Supreme Court had been striking down much of President Roosevelt's attempted economic legislation.⁴⁸² The Supreme Court upheld the TVA legislation, and the case put Allen in the national spotlight.⁴⁸³ Decades later, however, the TVA project became a target for modern liberals who challenged the environmental consequences of the project for endangered species.⁴⁸⁴

Another Judge Allen opinion similarly upheld New Deal legislation, although this time in dissent. In *Filburn v. Helke*, Allen dissented from a decision enjoining a federal statute regulating and penalizing the oversupply of wheat, finding the legislation to be a valid exercise of the interstate commerce power.⁴⁸⁵ The majority opinion, authored by district Judge Duffel, in another three-judge trial court, focused on the equities and retroactivity of the case, and the unfairness of significantly penalizing an Ohio farmer when he had little warning of the change in law.⁴⁸⁶ "Judge Allen alone anticipated *Filburn's* pivotal constitutional issue."⁴⁸⁷ Allen relied heavily on Supreme Court cases upholding New Deal agricultural programs, and quoted extensively from Congressional findings to uphold the law even as it regulated intrastate commercial activity.⁴⁸⁸ The Supreme Court reversed, and upheld the law in the law school classic, *Wickard v. Filburn*, accepting Allen's view of the case.⁴⁸⁹ "*Filburn* is regarded today as the high-water mark of the New Deal's constitutional revolution . . . perhaps the most far reaching example of Commerce Clause authority over intrastate activity."⁴⁹⁰

In the mid-1950s, Allen shepherded several important decisions on race discrimination. The Supreme Court had decided *Brown v. Board of Education* in 1954, finding racial segregation of public

480. *See id.* at 120.

481. *See Tenn. Elec. Power Co.*, 21 F. Supp. at 960–61.

482. *See TUVE, supra* note 1, at 122.

483. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 147 (1939).

484. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 156 (1978) (enjoining construction of dam to protect endangered species of fish); KENNETH M. MURCHISON, *THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT* 4–5 (2007).

485. 43 F. Supp. 1017, 1020 (S.D. Ohio 1942) (Allen, J., dissenting), *rev'd sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942).

486. *Id.* at 1018–19.

487. Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation and Commerce*, in *CONSTITUTIONAL LAW STORIES* 69, 83 (Michael C. Dorf ed., 2d. ed. 2009).

488. *See Filburn*, 43 F. Supp. at 1020–23 (Allen, J., dissenting).

489. *See* 317 U.S. 111, 128–29 (1942).

490. Chen, *supra* note 487, at 92 (internal quotations omitted).

schools unconstitutional and in a subsequent decision ordered integration with “all deliberate speed.”⁴⁹¹ In two cases, Judge Allen ruled against school districts failing to follow the remedial dictate of *Brown* to use all deliberate speed to end segregation in schools.⁴⁹² Unlike some other courts and with some dissenting opinion, she also issued injunctions ordering the conduct to stop.⁴⁹³ In a related decision, Judge Allen authored one of the Sixth Circuit’s most notable cases: *Detroit Housing Commission v. Lewis*.⁴⁹⁴ In *Detroit Housing*, she held that racial segregation in Detroit’s public housing was unconstitutional, becoming the first case in the nation to so hold.⁴⁹⁵ Detroit had maintained separate all-white and all-black housing, and maintained separate eligibility lists resulting in vacancies in the white housing but wait lists for black housing.⁴⁹⁶ Unlike Allen’s past decision in *Weaver* that had earned her such criticism, this time Allen took action to remedy the housing segregation on the basis of race.⁴⁹⁷

During her twenty-five years on the federal bench, Allen was known for her intellect, clear writing, and work ethic.⁴⁹⁸ She became Chief Judge of the Sixth Circuit during her final term in 1958.⁴⁹⁹ Allen continued her interest in international issues, giving numerous speeches and working on various transnational and global initiatives, including a tour of a women’s prison in Spain, a series of lectures in Mexico, and authoring the book, *The Treaty as an Instrumentality of Legislation* in 1952.⁵⁰⁰ This work increased her visibility beyond the bench, giving Allen a national personality as the first woman judge.⁵⁰¹

VI. SHORTLISTED

Judge Allen’s visibility translated into putting her on the short list for a possible nomination to the U.S. Supreme Court.⁵⁰² Allen

491. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954), *further relief ordered by* 349 U.S. 294, 301 (1955).

492. See *Clemons v. Bd. of Educ. of Hillsboro, Ohio*, 228 F.2d 853, 858 (6th Cir. 1956), *cert. denied sub nom. Bd. of Educ. v. Clemons*, 350 U.S. 1006 (1956); *Booker v. Tennessee Bd. of Educ.*, 240 F.2d 689, 694 (6th Cir. 1957), *cert. denied*, 353 U.S. 965 (1957).

493. See *Clemons*, 228 F.2d at 858; *Booker*, 240 F.2d at 694.

494. 226 F.2d 180, 181 (6th Cir. 1955).

495. *Id.* at 183.

496. *Id.* at 181 n.2.

497. See *id.* at 183.

498. See TUVE, *supra* note 1, at 153.

499. Justice Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 283 (1995).

500. See TUVE, *supra* note 1, at 130, 181; *cf.* Hon. Florence Allen, *Women Lawyers of the World Go Into Action*, 37 *WOMEN L.J.* 13 (1951).

501. See Cook, *supra* note 6, at 22; *cf.* TUVE, *supra* note 1, at 194–95.

502. See Cook, *supra* note 6, at 19.

became the first woman formally considered for the highest court in the nation.⁵⁰³ She was considered for more than twelve vacancies by four Presidents: Democratic Presidents Franklin D. Roosevelt and Harry Truman, and Republican Presidents Dwight Eisenhower and Herbert Hoover.⁵⁰⁴ Allen coveted and pursued the nomination through self-candidacy and active supporters, but it remained out of reach. She was realistic though, telling her supporters:

Do not block in the future too optimistically because there are some things that will never happen in our lifetime. . . . when my friends delightfully tell me that they hope to see me on the Supreme Bench of the U.S., I know . . . that will never happen to a woman while I am living⁵⁰⁵

Allen's name first came up for a possible candidacy on the Supreme Court early in her federal career when the TVA case put her name in the public eye.⁵⁰⁶ Rumors circulated in January 1938 that President Roosevelt was toying with the idea of appointing a woman, lobbied by his wife, First Lady Eleanor Roosevelt.⁵⁰⁷ In response, *Life* magazine ran a story and prominent picture of Allen.⁵⁰⁸ President Roosevelt had appointed the first woman to the cabinet, Frances Perkins as Labor Secretary, and there was hope that he would be open to more appointments.⁵⁰⁹ Allen's name would be proposed to fill four vacancies that Roosevelt would ultimately fill with Hugo Black, Stanley Reed, Felix Frankfurter, and William O. Douglas.⁵¹⁰ The timing of this first approach, however, during the TVA case was both a gift and a curse; while the case elevated her name to national status, her decision wholeheartedly endorsing FDR's New Deal made an appointment look like political payback, an impression Roosevelt wanted to avoid.⁵¹¹

Allen and her supporters continued the campaign for her nomination, writing letters and lobbying politicians.⁵¹² Allen gave speeches, and wrote a book, *This Constitution of Ours*, designed to show her

503. Kenney, *supra* note 121, at 211.

504. JEFFERSON & JOHNSON, *supra* note 6, at 16–17. There is also evidence that Allen recommended for appointment by Republican President Calvin Coolidge as early as 1924. *Id.* at 17.

505. Cook, *supra* note 6, at 19.

506. See TUVE, *supra* note 1, at 122.

507. See *id.* at 122–23.

508. *Id.* at 123.

509. *Id.* at 107.

510. See Cook, *supra* note 6, at 28.

511. See TUVE, *supra* note 1, at 122, 125.

512. See Cook, *supra* note 6, at 26–28.

expertise in federal subject matter.⁵¹³ The book was based on a series of lectures Allen gave at Bryn Mawr during a leave from the appellate court.⁵¹⁴ Allen thought that speaking about the Constitution was not controversial, and thus could maintain her semblance of judicial impartiality.⁵¹⁵ The book was geared to the average public citizen rather than legal scholars, and was an idealistic history lesson more appropriate for high school students.⁵¹⁶ It offered little insights into her jurisprudence or ideals, and the publisher did little to promote it.⁵¹⁷ Instead, the publisher pressed for her for an autobiography, something Allen was reluctant to do for many years.⁵¹⁸

There are several theories as to why Allen was not appointed to the Supreme Court. First, socially, the country may not have been ready for a woman.⁵¹⁹ “The public did not accept a woman’s seat on the Court, and the politicians, the legal professionals and the justices themselves did not perceive women lawyers as eligibles in the candidate pool.”⁵²⁰ Still, women’s groups continued to lobby heavily for Allen’s appointment. India Edwards, director of the Women’s Division of the Democratic National Committee, begged President Truman to choose Allen.⁵²¹ Truman told Edwards that he thought it would be a good idea to have a woman Supreme Court Justice, especially one of Allen’s reputation and capability.⁵²² However, he wanted to consult Supreme Court Justice Fred Vinson first about “how he and the other Justices would feel about having a woman in their group.”⁵²³ Vinson reported that he and his colleagues “would not be willingly to have a woman as a Justice[,]” as “[s]he would make it difficult for them to meet informally with robes, and perhaps shoes, off, shirt collars unbuttoned.”⁵²⁴ Edwards also thought that the old line about there being no women’s restroom also added into their decision.⁵²⁵

Allen’s failed nomination may have also been because she was not liberal enough to get the Democratic nomination. Her decisions as well as her presentation were that of a moderate. Roosevelt wanted

513. See TUVE, *supra* note 1, at 145–46 (citing FLORENCE E. ALLEN, THIS CONSTITUTION OF OURS (1940)).

514. *See id.*

515. *See id.* at 145.

516. *See id.* at 149.

517. *See id.* at 148–49.

518. *See id.* at 150–51.

519. Cook, *supra* note 55, at 314.

520. *Id.* at 315.

521. See TUVE, *supra* note 1, at 163–64.

522. *Id.* at 164 (citing INDIA EDWARDS, PULLING NO PUNCHES: MEMOIRS OF A WOMAN IN POLITICS 171 (1977)).

523. *Id.*

524. EDWARDS, *supra* note 522, at 171–72.

525. *Id.* at 172.

a “pronounced liberal” and party stalwart.⁵²⁶ Allen’s quiet progressivism, and sometimes moderation, as well as her public speeches on safe topics did not fit this standard. Allen described herself as a “liberal-conservative,” which *Time* magazine called “middle-of-the-roadish.”⁵²⁷ Her great liberal causes of women, suffrage, and peace were “passé” and old fashioned and did not appeal to the modern liberals or judicial concerns.⁵²⁸ Thus, there was no political advantage to be gained by nominating Allen.⁵²⁹

Several other suggestions have been made for why Allen did not receive the nomination. Some say that she was less qualified for the position than those appointed who had Ivy League credentials, business practice, and top political experience.⁵³⁰ These elite biases would be significant barriers to women’s judicial appointment in the decades to come as these were the areas that most excluded women, whereas state practice, small firms, and other practice areas were devalued.⁵³¹ Allen, however, seems qualified even by these highbrow standards, given her education at Chicago and NYU, prosecutorial experience, and decades of judicial experience on matters of constitutional and patent import. Other critiques at the time mentioned her support for another federal judge who challenged the income taxation of judges, her “spinster” status, and that she had a bad reversal record, even though that was not true.⁵³²

Being “shortlisted” was another historic accomplishment for Allen, even though she would never receive the nomination. It paved the way for women nominees, opening up the judicial pipeline for women, however narrow and leaky.⁵³³ Nine more women were formally shortlisted for the Supreme Court nomination over the next forty years.⁵³⁴ But it would be almost fifty years until a woman would be appointed to the U.S. Supreme Court. In 1981, President Ronald Reagan nominated Arizona state judge, Sandra Day O’Connor to be the first woman Justice.⁵³⁵ Reagan, faced with a dramatic political shift and gender gap of women voting Democrat in large numbers, pledged during the campaign to appoint the first woman

526. TUVE, *supra* note 1, at 126 (internal quotations omitted).

527. *Id.*

528. *See id.*

529. *See id.* at 169–70.

530. *See* Cook, *supra* note 55, at 319–24.

531. Clark, *supra* note 12, at 489, 494.

532. *See* TUVE, *supra* note 1, at 124–25.

533. *See* Ginsburg & Brill, *supra* note 499, at 281; Meg Penrose, *The Way Pavers: Eleven Supreme Court-Worthy Women*, HARV. J.L. & GENDER ONLINE 1, 3 (2018).

534. *See* JEFFERSON & JOHNSON, *supra* note 6, at 38, 74.

535. *See* LINDA HIRSHMAN, *SISTERS IN LAW*, at xiv (2015).

justice.⁵³⁶ O'Connor was hailed as the perfect first woman on the Court because she was able to get along with the all-male institution without causing problems.⁵³⁷ She didn't challenge the status quo, was moderate in decorum and ideology, conversationally put her male colleagues at ease, hosted luncheons, and organized aerobics in the Court basement.⁵³⁸ In contrast to the next woman appointed to the Supreme Court, Ruth Bader Ginsburg, O'Connor did not make waves or challenge legal and social norms, and thus seemed to ease the transition, at least for the men. The feisty Ginsburg arrived with her subversive ideology of gender equality, fierce determination for women's rights, and demand for a better office on a separate floor apart from the other Justices.⁵³⁹

CONCLUSION: THE GAVEL'S GLASS CEILING

Despite Allen's deliberate efforts to be a role model and open up the judiciary and public office for women, she instead became a token.⁵⁴⁰ Acutely aware of her role as an historic first, Allen wrote articles and spoke to many women's and business associations encouraging women to enter the profession.⁵⁴¹ Allen was not one "to pull up the ladder behind her" but rather was one personally committed to bringing more women up the ranks with her.⁵⁴²

However, Allen's desired legacy for women in the law would be muted and delayed. As Justice Ruth Bader Ginsburg remarked, "[a]fter Allen's retirement in 1959, the appellate bench would remain entirely male until 1968."⁵⁴³ No other woman would be appointed as a federal appellate judge until thirty-four years after Allen, when Shirley Hufstедler was selected for the Ninth Circuit in 1968.⁵⁴⁴ No other woman was appointed to the Sixth Circuit for another forty-five years, until Cornelia Kennedy was appointed in 1979.⁵⁴⁵ A woman

536. Cook, *supra* note 55, at 323.

537. See HIRSHMAN, *supra* note 535, at xv.

538. See *id.* at xv, 147.

539. See *id.* at xv.

540. See TUVE, *supra* note 1, at 198–99, 203, 205; JEFFERSON & JOHNSON, *supra* note 6, at 129–31.

541. See, e.g., Allen, *supra* note 11, at 4, 22.

542. See *id.* at 22.

543. Ruth Steinhardt, *Ruth Bader Ginsburg: "We Are Far From Perfection" Social Progress May Be Slow, Supreme Court Justice Told An Audience at GW, but "We Have Traveled A Considerable Distance,"* GW TODAY (July 25, 2017), <https://gwtoday.gwu.edu/ruth-bader-ginsburg-%E2%80%98we-are-far-perfection%E2%80%99> [<https://perma.cc/G4KG-3UE4>].

544. See Janet Cooper Alexander, *Shirley Mount Hufstедler, Pioneer*, 69 STAN. L. REV. 623, 623 n.4 (2017).

545. See Douglas Martin, *Cornelia G. Kennedy, A Pioneering Federal Judge, Dies at 90*,

would not be appointed to the federal district court in Ohio until 1980, when Ann Aldrich (another six-foot-tall NYU Law graduate) was appointed to the Northern District in Cleveland.⁵⁴⁶ A big change on the federal courts came when President Jimmy Carter made gender and racial diversification of the federal courts a priority and created judicial merit task forces, resulting in the appointment of forty women to the federal courts.⁵⁴⁷ At the state level, it would be sixty years after Florence Allen until another woman served on the Ohio Supreme Court when Blanche Krupansky was temporarily appointed in 1981, and Alice Robie Resnick was elected in 1989.⁵⁴⁸

Florence Allen broke the judicial glass ceiling that, eventually, led to more women on the courts. However, one hundred years after Allen first took the bench, only thirty-five percent of judges in the state and federal courts are women.⁵⁴⁹ There are some aberrations, as the Ohio Supreme Court in 2019 had a majority of women, and the Summit County Court of Common Pleas in Akron, Ohio, is all female.⁵⁵⁰ Yet overall, women have not achieved more than minority status on the judiciary. There is a recognized “gavel gap” between

N.Y. TIMES (May 23, 2014), <https://www.nytimes.com/2014/05/25/us/cornelia-g-kennedy-pioneering-federal-judge-dies-at-90.html> [http://perma.cc/C65A-U36D].

546. See Tracy A. Thomas, *The Struggle for Gender Equality in the Northern District of Ohio*, in JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE NORTHERN DISTRICT OF OHIO 165, 181 (Paul Finkelman & Roberta Sue Anderson, eds. 2012). No woman was appointed to any federal district court until 1949, when President Harry Truman appointed Burnita Shelton Matthews to the United States District Court for the District of Columbia. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on US Trial Courts*, N.Y. TIMES, Apr. 28, 1988, at D27.

547. See Sally J. Kenney, *Choosing Judges: A Bumpy Ride to Women’s Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499, 1512 (2012); see also Clark, *supra* note 12, at 490–92; Mary L. Clark, *Changing the Face of the Law: How Women’s Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243, 245 (2002).

548. See *Justices by Term Since 1913*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/SCO/formerjustices/terms.asp> [https://perma.cc/QV8J-K55W].

549. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT’L WOMEN’S LAW CTR. (2016), <https://nwl.org/resources/women-federal-judiciary-still-long-way-go> [https://perma.cc/5QQG-4PLJ] (reporting 36% of appellate judges and 33% of district court judges); *The American Bench 2019 Report*, NAT’L ASS’N OF WOMEN JUDGES, <https://www.nawj.org/statistics/2019-us-state-court-women-judges> [https://perma.cc/68JN-QBPD] (reporting 33% for state trial judges, 39% for state appellate judges, and 36% for state supreme court justices).

550. See *2019 US State Court Women Judges*, NAT’L ASS’N OF WOMEN JUDGES, <https://www.nawj.org/statistics/2019-us-state-court-women-judges> [https://perma.cc/TTW6-SXZE]; Stephanie Warsmith, *Say, “Girls Rule!” Summit County’s All-Female Bench Marks Milestone with Portrait*, AKRON BEACON J. (June 30, 2019), <https://www.beaconjournal.com/news/20190628/say-girls-rule-summit-countys-all-female-bench-marks-milestone-with-portrait> [https://perma.cc/AP3V-H67Z].

the percentage of women on the bench and the percentage of women in the general population and women entering law schools.⁵⁵¹

Women's proportional representation on the courts is important for political legitimacy and accountability in reflecting the populace controlled by the laws decided there.⁵⁵² Women judges may also see issues differently, informed by their different life experiences better reflecting the case situation, as Justice Sonya Sotomayor recognized in commenting that she viewed cases from the perspective of a "wise Latina woman."⁵⁵³ Other studies have suggested that women jurists build consensus on appellate panels and empathize with plaintiffs in sexual harassment, employment, immigration, death penalty, and obscenity cases, bringing a balance to a skewed system.⁵⁵⁴ At the end of the day, more than tokenism then is needed in diversifying the bench. One woman was not simply enough to significantly alter the male-centric law or the profession. Allen's own success depended upon assimilation, not contradiction. So how many women judges will it take—when will there be enough women on the judiciary? Justice Ruth Bader Ginsburg's answer was, "when there are nine."⁵⁵⁵ Judge Florence Allen opened the gate, and one hundred years later, there is still a judicial path waiting for other women to follow.

551. *The Gavel Gap*, AM. CONST. SOC'Y, <https://gavelgap.org> [<https://perma.cc/9HES-89PD>].

552. See SALLY KENNEY, *GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* xii (2012).

553. Hon. Sonia Sotomayor, *A Latina Judge's Voice*, Judge Mario G. Olmos Memorial Lecture at Univ. Cal. Berkeley Law School (2001), in 13 *BERKELEY LA RAZA* L.J. 87, 92 (2002).

554. See Boyd & Epstein, *supra* note 28; Boyd et al., *supra* note 29, at 406 (finding the probability of a judge deciding in favor of the party alleging discrimination decreases when the judge is male); Menkel-Meadow, *supra* note 29, at 208 (finding female immigration judges granted asylum at a rate of 53%, while male judges granted asylum at a rate of 37.3%); Songer & Crews-Meyer, *supra* note 29, at 750 (finding female judges on state supreme courts vote more liberally than male judges in death penalty and obscenity cases and increase likelihood that male judge will adopt the liberal position). *But see* Dixon, *supra* note 30, at 313 (finding little evidence that women judges vote differently than men).

555. *When Will There Be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question*, PBS NEWSHOUR (Feb. 5, 2015), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court> [<https://perma.cc/6PM2-RD8F>].