

(S)ELECTION OF GEORGIA SUPREME COURT
JUSTICES: DEMOCRACY—OR DYNASTY?

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I. INTRODUCTION

A. *From Yesterday to Today: Georgia’s Path Not Quite to the “Missouri Model”*

More than a few times since he arrived in Georgia from New York some thirty-five years ago, the author has heard Georgia attorneys quote the now-late, always legendary, Professor Perry Sentell, Jr., of the University of Georgia Law School: “There’s the majority rule. There’s the minority rule. *Then* there’s the *Georgia rule*.”¹ There is a distinct flavor to Georgia law’s approach to most things. The not infrequent imperiousness of this flavor certainly seems to justify the nickname Georgia acquired years ago that establishes an odd kinship with New York: “The Empire State of the South.”² But the distinctive

¹ I wish to thank my former colleague on Georgia’s Formal Advisory Opinion Board for several years, C. Bradford “Brad” Marsh, Esq., Swift Currie LLP, Atlanta, Georgia, for the most compellingly expressed exposition of that statement. *See also In Memoriam: R. Perry Sentell, Jr.*, UNIV. OF GA. SCH. OF L. (Jan. 29, 2021), <http://www.law.uga.edu/news/53969> [<https://perma.cc/H3MV-5FGP>].

² Even a Georgia Court of Appeals opinion once invoked this moniker in the context of a common understanding of its context and significance. In *Seabolt v. Cheesborough*, 193 S.E.2d 238 (Ga. Ct. App. 1972), Judge H. Sol Clark, provided a bravura description of the case whose verdict was being appealed:

Bang! went the rifle as the hunter shot at a wild turkey. The elusive bird was missed, the velocity of the bullet then speeding it through the trunk of a small tree from which fragments of the shattered projectile ricocheted and hit two other nimrods who were themselves in the underbrush and previously unseen by the shooter. Thus was provided

Georgia twang does not always sound in the text of law; sometimes it dwells in its practical application in the context of political realities.

Thus, Georgia is not so unlike New York in the selection of its high court judges. After a series of ugly election brawls—one of which swept the (in)famous Sol Wachtler to the New York Court of Appeals, prompting Governor Hugh Carey to appoint a blue-ribbon commission (whose members included Cyrus Vance and Ruth Bader Ginsburg) to recommend replacement of elections for the Court of Appeals by a Judicial Nominating Commission and gubernatorial appointment with New York Senate Confirmation—left political carnage in their wake, New York abolished partisan judicial elections.³ In the domain of how one becomes a Georgia Supreme Court Justice, the basic approach in the Georgia Constitution and the Georgia Code has remained constant—but given the practical application of those rules in changing political realities, the results belie this superficial consistency.⁴

In a history of the Georgia appellate courts, completed some thirty years ago, the authors—Court of Appeals Judges Sol Clark and Braswell Deen—observed that in the sphere of establishing and developing its appellate courts, Georgia was a fiercely skeptical maverick:

The history of appellate courts in Georgia shows a consistent reluctance to have them at all and, when necessity demands their creation, a consistent determination to keep them as small as possible. The Supreme Court was not

the setting for this case of first impression on the Georgia law applicable to a sport so popular in our State that in the last fiscal twelve-months period our Game and Fish Commission issued 314,720 resident and 10,918 nonresident hunting licenses.

Id. at 240. The court also included a footnote that observed: “The transcript discloses the trial judge instructed the jury to have Coca-Colas during their recess. This could happen only in the Empire State of the South.” *Id.* at 241 n.3. Judge Clark was well-known for his wit and style, something that cannot be said for most of the current appellate judiciary in Georgia. See Judge H. Sol Clark, *Judicial Humor(?): A Personal Reminiscence*, TRIAL, June 1984, at 68–69, 71. Indeed, the tenor reminds one of New York Appellate Division Justice Rubin’s freewheeling opinion in *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (App. Div. 1991). See Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from the Roberts Court to Learned Hand—Segmentation, Audience, and the Opportunity of Justice Sotomayor*, 13 BARRY L. REV. 29, 48–50 (2010) (discussing Justice Rubin’s *Stambovsky* opinion).

³ See Susan Arbetter, *Why Does New York Have a Judicial Nomination Commission?*, SPECTRUM NEWS 1 (Apr. 20, 2023, 8:19 PM), <https://spectrumlocalnews.com/nys/central-ny/news/2023/04/20/why-does-new-york-have-a-judicial-nomination-commission-> [<https://perma.cc/YPK6-UDLM>]; see also John D. Feerick & Cyrus Vance, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 9 PACE L. REV. 199, 236–37 (1989).

⁴ See discussion *infra* Sections II.B, II.C.

established until 1845, seventy years after Georgia became a state. Until the Supreme Court was established, Georgia was the only American commonwealth having a judicial system without an appellate court. At its creation, the first bench consisted of three Justices elected by the House of Representatives. During the first fifty years, the workload imposed upon the three Justices increased steadily.⁵

The selection of high-court judges in Georgia followed an arduous path over the next 120 years.⁶

B. The Plan of the Work

In the two sections (II and III) following this one, the author will trace the remarkably peculiar path the creation of the Georgia Supreme Court and the (s)election of its justices have taken since colonial days. In Section IV, the author will demonstrate how these forces—grounded in law and politics—have shaped a modern system that portends *dynasty* among the justices of Georgia’s Supreme Court at the expense of *democracy*.

II. FROM “NO COURT” TO AN ELECTED COURT: THE PECULIAR HISTORICAL DEVELOPMENT OF SUPREME COURT SELECTION IN GEORGIA

A. Seventy Years with No State Supreme Court

Any account of judicial selection in Georgia must begin in the colonial era, for Georgia, like New York, was one of the Thirteen Colonies.⁷ In a 1980 *Texas Law Review* article, the Executive Director of the American Judicature Society noted that, in colonial days, the Executive, in the form of the Crown, selected judges.⁸ This,

⁵ See *Court History*, GA. CT. OF APPS., <https://www.gaappeals.us/history/> [<https://perma.cc/B45E-9KSC>]. This page also informs us that “[t]he original research and writing of the history of the Court of Appeals was principally completed by Judge H. Sol Clark in 1977-1978,” and “has been revised and updated since then, primarily by Presiding Judge Braswell D. Deen, Jr., in 1990 with contributions by the other Judges on the Court.” *Id.*

⁶ See discussion *infra* Sections II.B, II.C.

⁷ See *The 13 Colonies*, HISTORY, <https://www.history.com/topics/colonial-america/thirteen-colonies> [<https://perma.cc/82Y2-HXVF>] (Sept. 3, 2024).

⁸ Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1081 (1966). To those not well acquainted with the political inheritance from English history and practice that informed America’s founding, it might seem surprising to speak of monarchies having “branches.” But to understand English history, from Magna Carta (1215) to the Glorious Revolution (1688) and the English Bill of Rights (1689), requires much more nuance

than the traditional, rough understanding of monarchy as equivalent to autocracy. As Stephen Calabresi has pointed out, however, “the American concept of the constitutional separation of powers had its roots in seventeenth- and eighteenth-century English and colonial American constitutionalism.” Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 529 & n.12 (2012).

Englishmen at this time—and from 1607 to 1776 the American colonists were Englishmen—believed that their constitution was among the world’s best. Englishmen thought they had inherited what certain ancient Greek and Roman philosophers had called a “Mixed Regime.” A Mixed Regime was one that combined elements of monarchy, aristocracy, and democracy so as to obtain the best features of each of those pure regime types while avoiding the worst.

....

The great advantage of a Mixed Regime that combined the powers of the One, the Few, and the Many was that the three social classes represented by the monarch, the aristocrats, and the commoners could check and balance one another, thereby increasing the chance that each social class would rule justly.

Id. at 529–30 (footnotes omitted). Thus, “Power was dispersed in a Mixed Regime rather than concentrated in the hands of one social class.” *Id.* at 530. Furthermore, “it was the idea of a Mixed Regime with a system of checks and balances that was to become the parent of the idea of the separation of powers,” and it is noteworthy that “[b]oth systems share the same premise that ‘power tends to corrupt and absolute power corrupts absolutely.’” *Id.* at 531 (footnote omitted). Indeed, “Many Englishmen thought that the King, the House of Lords, and the House of Commons each represented the three great estates of English society—the One, the Few, and the Many,” and that “[a]ll three estates were subordinate to the law and to the ancient constitution of King Edward the Confessor, including even the King.” *Id.* at 532 (footnotes omitted). As another scholar described the evolution:

Separation of powers can be comprehended only as the outcome of the struggle of the British Parliament with the crown. Its theory embodies the victory of the former. After the Glorious Revolution, the king seldom interfered with acts of Parliament. Since 1707 he has no longer withheld royal assent from legislative bills. Likewise has he for some time abstained from intruding in the sphere of the courts: Equity is no longer the king’s prerogative exercised to develop new law or indeed to counteract the law courts, but rather a system of courts, a branch of the independent judiciary with which the king must not meddle. He is now subject to the “law,” that is, to the law as interpreted by the courts. It is probably true that this development “has merely substituted the judge’s prejudice for the king’s.” Yet it is one of the pillars on which rest modern constitutional and administrative law.

Reginald Parker, *Separation of Powers Revisited*, 49 MICH. L. REV. 1009, 1013 (1951) (footnotes omitted). In accordance with this unique English political heritage, as Professor Calabresi and his co-authors observe that:

Americans in the seventeenth and eighteenth centuries also believed that they lived in a colonial version of the Mixed Regime. Every colony eventually came to have a royal governor, appointed by the King of England, who represented the interests of the One; a Governor’s Council, usually appointed by the Governor with the King’s consent to advise him, who represented the interests of the Few; and a popularly elected lower House of the Colonial Legislature, which represented the interests of the Many and most especially the interests of those who paid taxes. The English Mixed Regime structure was thus replicated in the American colonies from 1607 until 1776.

Calabresi et al., *supra*, at 532–33 (footnotes omitted). As realized in the colonial governments, “only the popular house of the legislature represented the people, the often-predominating gubernatorial powers possessed legislative, executive, and judicial elements, and the functionally differentiated judiciary was kept less than completely separate.” Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 216 (1989). “Although the colonists and the colonial legislatures were in fact highly autonomous from London, their constitutional conflicts concerned the separation and mixing of powers that differed sharply as to the local and distant sources of their respective authority.”

in fact, was one of the grievances—the ninth, in a lengthy list—that the Colonies enumerated against King George III in the Declaration of Independence:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

Id. Among these conflicts was disagreement over how judges in the various colonies should be selected and retained, a conflict which featured an ongoing tug-of-war between the assertion of the power by royal governors and the demand for more say-so in the process by colonial legislatures and assemblies. See GEORGE A. WASHBURNE, *IMPERIAL CONTROL OF THE ADMINISTRATION OF JUSTICE IN THE THIRTEEN AMERICAN COLONIES, 1684-1776*, at 20–31 (1923); see, e.g., Scott D. Gerber, *The Origins of an Independent Judiciary in North Carolina, 1663-1787*, 87 N.C. L. REV. 1771, 1774 (2009) (observing that “the conflict in North Carolina between the executive and the assembly over control of the courts was among the most vitriolic of any in the British American colonies”); Anton-Hermann Chroust, *The Legal Profession in Colonial America*, 33 NOTRE DAME L. REV. 51, 56–58, 70, 88–89, 94–95 (1957) (discussing judicial tenure and selection in colonial Massachusetts, Connecticut, and New Hampshire); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1112–14, 1119–25, 1130–38, 1139–42 (1976) (describing the conflict between royal governors and colonial assemblies in Pennsylvania, New York, and the Carolinas); see also Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1111 (2009) (“The Glorious Revolution of 1688 had brought King William and Queen Mary to the throne as monarchs who agreed to disown the executive power over the judiciary exercised by King James. The Act of Settlement of 1701, agreed to by the monarchy, declared that their judges would serve for the period of their ‘good behavior’ and be removable only by address of Parliament.” (footnotes omitted)); W.A. Speck, *The Structure of British Politics in the Mid-Eighteen Century*, in *A COMPANION TO THE AMERICAN REVOLUTION* 3, 4 (Jack P. Greene & J.R. Pole eds., 2000) (“There were statutory restrictions on the powers of appointment and the dissolution of Parliament. For example, judges could only be appointed on good behavior and not at the pleasure of the Crown, so that they could not be dismissed arbitrarily.”); Jack P. Greene, *Ongoing Disputes over the Prerogative, 1763-1776*, in *A COMPANION TO THE AMERICAN REVOLUTION*, *supra*, at 173, 174 (“[T]he Board of Trade responded by issuing a categorical general instruction prohibiting governors of all colonies from appointing judges during good behavior and thereby setting the stage for similar altercations in New Jersey, South Carolina, and North Carolina during the following decade. In all these colonies, the local political establishments lost the battle for colonial judicial independence. Deeply resented, this defeat was attributed by colonial leaders to an aggressive prerogative that was bent upon depriving colonists of constitutional protections routinely enjoyed by Britons in the home islands.”); Damon C. Woods, *The Selection of Judges*, 19 A.B.A. J. 187 (Mar. 1933) (“In all but two of the original thirteen colonies the appellate and superior trial judges had been appointed by the Governor for life tenure; in Rhode Island and Connecticut they were chosen for life by the colonial legislature.”). See generally SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787*, at xv, 41–324 (2011) (“[C]hronicl[ing] how each of the original [thirteen] states and their colonial antecedents treated their respective judiciaries.”); JOHN F. BURNS, *CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTHERN AMERICAN COLONIES* (1923) (including discussion of a variety of issues concerning the colonial judiciary). For a general view of the ways in which the legal profession in the colonies was not merely an English replicant, but rather surprisingly heterogeneous, see generally Mark Lipnickey, *The English Roots of American Legal Regulation: An Examination of Early Legal Regulation in Virginia, Massachusetts, and New York*, 34 GEO. J. LEGAL ETHICS 1131 (2021).

....

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.⁹

It is not surprising, therefore, that Georgia was one of the seven newly-defined states which made its legislative branch, not its executive branch, responsible for judicial selection.¹⁰ In 1812, however, Georgia became the first state in the new Nation to provide for judges—trial court judges—to be elected by popular vote,¹¹ such as that concept was understood in a slave state which largely disenfranchised its inhabitants, slave and free.¹² This started a trend of elected trial judges.¹³ But it was a populist faction in an equally dystopian slavery state, Mississippi, that, during its Constitutional Convention of 1832, implemented the notion of electing appellate judges as well, an innovation that did not sit well with the appellate judges of the era.¹⁴

⁹ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

¹⁰ See Winters, *supra* note 8, at 1081–82, 1082 n.3.

¹¹ GA. CONST. art. III, § 4 (1812); *Georgia Constitution of 1798 as Amended Through 1849*, 19 CURRENT & HIST. GA. CONSTS. & RELATED MATERIAL, 791, 802–03 (2024); see also Winters, *supra* note 8, at 1082; EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 108 (1944).

¹² See, e.g., Martin J. Hershock, Book Review, 18 J. EARLY REPUBLIC 178 (1998) (reviewing ANTHONY GENE CAREY, PARTIES, SLAVERY, AND THE UNION IN ANTEBELLUM GEORGIA (1997)); Richard N. Wright, *Ambivalent Bastions of Slavery: The “Peculiar Institution” on College Campuses in Antebellum Georgia*, 80 GA. HIST. Q. 467, 470 (1996); CHARLES C. BOLTON, POOR WHITES OF THE ANTEBELLUM SOUTH: TENANTS AND LABORERS IN CENTRAL NORTH CAROLINA AND NORTHEAST MISSISSIPPI 131 (1994); Peter Wallenstein, “More Unequally Taxed than Any People in the Civilized World”: *The Origins of Georgia’s Ad Valorem Tax System*, 69 GA. HIST. Q. 459, 465 (1985). Ironically, Georgia was the only one of the original thirteen colonies founded with an express prohibition on slavery in its charter. See, e.g., Betty Wood, *James Edward Oglethorpe, Race, and Slavery*, in OGLETHORPE IN PERSPECTIVE: GEORGIA’S FOUNDER AFTER TWO HUNDRED YEARS 67 (Phinizy Spalding & Harvey H. Jackson eds., 1989) (“The prohibition of chattel slavery was the cornerstone of the Georgia Plan, and it was this dramatic departure from what, by the 1730s, was the norm everywhere else in British North America that made the early settlement of Georgia unique in the annals of colonial American history.”). After General Oglethorpe’s departure from the Georgia Colony in 1743 for England, however, the forces within the Colony agitating for slavery to be permitted began to gain ground, until that position won British recognition in 1751. See *id.* at 77.

¹³ See Winters, *supra* note 8, at 1082.

¹⁴ See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1083 (2010); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993); John W. Winkle III, *Constitution of 1832*, MISS. ENCYCLOPEDIA (Apr. 13, 2018), <https://mississippiencyclopedia.org/entries/constitution-of-1832/> [https://perma.cc/HT7Z-PL3M].

In 1832, when Mississippi's constitutional convention transferred the power to select all state judges from the legislature to the voters, some observers were incredulous. Although Indiana and Georgia had been electing trial judges for years, the election of appellate judges seemed beyond the pale. "Our constitution," warned a former member of Mississippi's highest court, "is the subject of ridicule in all the States where it is known. It is referred to as a full definition of mobocracy."¹⁵

New York was to follow suit—as would a good number of other states.¹⁶ "As the nation approached the Civil War," one commentator has observed, "two of every three states elected their lower courts and three of every five states elected their supreme courts."¹⁷

Predictably, however, Georgia cut its own jib in a *different* direction.

The state had no appellate court—*none* whatsoever—until the 1835 Georgia Constitution empowered the Georgia Legislature to

¹⁵ Nelson, *supra* note 14, at 190 (footnote omitted).

¹⁶ *Id.* at 192 nn.14–15, 193. Indeed, one memorably-named New York delegate, a Mr. Conrad Swackhamer, invoked Mississippi as an example during a floor speech in the 1846 New York Constitutional Convention. *See id.* at 193 & n.23. Swackhamer faded into obscurity thereafter, but rose again to some attention in 2021, when an autograph album of delegates to the 1846 Convention that he had compiled was put up for action. *See Printed & Manuscript Americana*, SWANN AUCTION GALLERIES, <https://catalogue.swanngalleries.com/Lots/auction-lot/-NEW-YORK--Autograph-album-compiled-at-the-1846-New-York-Con?saleno=2580&lotNo=184&refNo=780662> [<https://perma.cc/MKY9-KL8G>]. As the auction house related, "This artfully arranged album was compiled by delegate Conrad Swackhamer of Brooklyn, a 31-year-old mechanic and one of the few artisans among the lawyers and gentleman farmers at the convention." *Id.*

¹⁷ Nelson, *supra* note 14, at 190.

create one.¹⁸ Yet, the legislature did not act.¹⁹ Several times during this period in published writings, Georgia's governors implored the legislature to enact a bill establishing a Supreme Court, and to then appoint its justices.²⁰ The legislature ignored and dawdled for nearly a decade. And in December 1841, the General Assembly adopted a Joint Resolution that provided:

Whereas, It is the duty of the Representatives of the people
to conform to their wishes, and

¹⁸ Joseph P. Lamar, *A Unique and Unfamiliar Chapter in Our American Legal History*, 10 A.B.A. J. 513, 516 (July 1924) (reprinting Joseph P. Lamar, Assoc. J., History of the Establishment of the Supreme Court of Georgia, Address Before the Georgia Bar Association (1907)). After a law practice and legislative career, Lamar served on the Georgia Supreme Court for a brief few years (1901-1905), originally by gubernatorial appointment, then by winning an election. See *Joseph R. Lamar, Brilliant Jurist, Is Dead at Post*, MORNING UNION, Jan. 3, 1916, at 1, <https://cdnc.ucr.edu/?a=d&d=MU19160104.2.20> [<https://perma.cc/YX5C-3DPG>]; William Pruden, *Joseph Rucker Lamar*, NEW GA. ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/government-politics/joseph-rucker-lamar-1857-1916/> [<https://perma.cc/3N93-N6JL>]. About Justice Lamar, it has been written, "Lamar proved to be a pedestrian justice, lacking imagination and creativity" and he "died after five years of service, leaving hardly a strand in the fabric of the law." *Joseph R. Lamar*, OYEZ, https://www.oyez.org/justices/joseph_r_lamar [<https://perma.cc/EMK6-A5L5>]. There's something to that. The poor man could not even enjoy the dignity of having his name correctly stated by the ABA Journal's editors. He was Joseph Rucker Lamar. See *Joseph Rucker Lamar, 1911-1916*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/associate-justices/joseph-rucker-lamar-1911-1916/> [<https://perma.cc/RQ85-SMK9>]; Lamar, *supra*, at 513. One cannot imagine how the "R" became a "P". A contemporary California newspaper, however, made a more favorable assessment of the man. See *Joseph R. Lamar, Brilliant Jurist, Is Dead at Post*, *supra*, at 1 ("Early in his service on the Supreme Court bench, he became recognized as one of the most powerful members. His opinions were finished works of logic. Applications for rehearings were rare, in cases [he] decided.").

¹⁹ Lamar, *supra* note 18, at 514. Justice Lamar explained this extraordinary delay by observing that:

The public mind of the entire country was hostile to all courts, and especially to Supreme Courts. The opposition was fanned at home and abroad, from State as well as federal sources, and it was particularly acute in Georgia, which was then being sued by Chisholm, and where the State was denying the jurisdiction of the Supreme Court of the United States. Out of the conflict precipitated by the decision in that case came the eleventh amendment to the Constitution of the United States, denying to a private person the right to sue a State.

The antagonism to appellate tribunals thus engendered was kept alive in Georgia by the litigation in the United States Supreme Court, growing out of the efforts to quiet the title to the Indian lands in North Georgia, and the heated discussion which arose when the writ of error was served on the Governor in the case of the Indian "Corn Tassel," who had been convicted in the State Court for the murder of another Indian and sentenced to death, and the subsequent litigation known as the Case of the Missionaries, in which Georgia refused to appear when served with a writ of error, and in which she had the support of President Jackson against the mandate of the Supreme Court.

Id.

²⁰ *Id.* at 513-16.

Whereas, Doubt exists relative to the will of the people of Georgia in relation to a Supreme Court for the correction of errors; therefore be it

Resolved, By the Senate and the House of Representatives of the State of Georgia, That the people be, and they are, hereby *requested* to endorse on their tickets, “Court or no Court” at the next annual election for members of the Legislature, and the managers are hereby required to transmit a statement of the votes polled for and against the said Supreme Court.²¹

Out of the over 33,717 votes cast, “No Court” won by margin of about 6,000 votes.²² While that would seem to have doomed an implementing act for decades, the Georgia Governor, who was strongly in favor of a bill to create the court, Charles James McDonald,²³ did his own analysis of the returns, and launched a devastating retort to the ballot results, which reinvigorated other supporters of a Supreme Court bill in the legislature, and led to its crafting, negotiating, and passage in 1845:

The popular vote in regard to the establishment of a Court for the correction of errors, cannot be taken as decisive evidence of the opinions of the people on that subject. Not one-half of those who attended the polls cast their votes for or against the measure. Of the minority who did vote, there was a majority of six thousand and ninety-one against it; thirteen thousand eight hundred and thirteen voting for, and nineteen thousand nine hundred and four against it. From the general apathy and in difference which prevailed in regard to the question, it may be safely inferred that the people are content that their representatives carry into the effect the Constitution.²⁴

²¹ *Id.* at 516–17.

²² *Id.* at 517.

²³ *Charles James McDonald*, FIND A GRAVE (Oct. 7, 2003), <https://www.findagrave.com/memorial/7958258/charles-james-mcdonald> [<https://perma.cc/TS6K-RYYR>]. Governor McDonald himself became a Justice of the Georgia Supreme Court, serving from 1856 to 1859. See Henry R. Jackson, Eulogy Upon the Life and Character of the Honorable Charles J. McDonald (Apr. 20, 1861) (speech available at Stuart A. Rose Manuscript, Archives, and Rare Book Library Repository at Emory University Libraries, Atlanta, Georgia).

²⁴ Lamar, *supra* note 18, at 517.

The Supreme Court bill passed on December 10, 1845; the three justices of the Georgia Supreme Court were appointed, and the Supreme Court of Georgia finally held its first session on January 26, 1846.²⁵ As Justice Joseph Lamar observed to the State Bar of Georgia some sixty years later, “Georgia had at last adjusted her judicial system to the model of her sisters, and seventy years after the Declaration of Independence had made her a State, she organized a Supreme Court.”²⁶

This first Georgia Supreme Court saw its most (in)famous judges. Famous for their facility with law, ratiocination, and legal developments in other parts of the country (against which they largely reacted), and infamous for their die-hard, saturated-to-the-soul slavery jurisprudence.²⁷ Massachusetts had its Lemuel Shaw; New York had its Chancellor Kent; but Georgia had their equal in intellect and elegance in Joseph Henry Lumpkin.²⁸ His extensive and fanatical slavery jurisprudence, however, sunk him to the bottom of collective memory outside of Georgia²⁹—until Justice Scalia fished from the depths Lumpkin’s remarkable, tour-de-force opinion in *Nunn v. State*,³⁰ in which Lumpkin held that the Second Amendment of the U.S. Constitution applied *directly* to the states,³¹

²⁵ See *id.*

²⁶ *Id.*

²⁷ See, e.g., John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571, 589 (1982) (“Judge Eugenius Nisbet of Georgia often spoke to Northern lawyers through his opinions, apparently seeking to address the abolitionist bar as well as his judicial colleagues on the free-state courts.”).

²⁸ See, e.g., *id.* at 578–79; ALFRED L. BROPHY, UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF THE CIVIL WAR 212 (2016); Watson Jennison, *Rewriting the Free Negro Past: Joseph Lumpkin, Proslavery Ideology, and Citizenship in Antebellum Georgia*, in CREATING CITIZENSHIP IN THE NINETEENTH-CENTURY SOUTH 41, 42 (William A. Link, David Brown, Brian Ward & Martyn Bone eds., 2013); Mason W. Stephenson & D. Grier Stephenson, Jr., “To Protect and Defend”: *Joseph Henry Lumpkin, the Supreme Court of Georgia, and Slavery*, 25 EMORY L.J. 579, 580 (1976). He has not attracted top-tier biographers. See PAUL DEFOREST HICKS, JOSEPH HENRY LUMPKIN: GEORGIA’S FIRST CHIEF JUSTICE 1 (2002).

²⁹ See HICKS, *supra* note 28, at 150.

³⁰ *Nunn v. State*, 1 Ga. 243 (1846).

³¹ See *id.* at 250. This was a proposition already rejected as to the Bill of Rights in its entirety by Chief Justice John Marshall in *Barron v. Baltimore*, 32 U.S. 243 (1833):

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the [C]onstitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

and struck down a Georgia statute that prohibited carriage of concealed weapons.³²

B. A Civil War, a Reconstruction, a Brief Embrace of Elected Justices, and a Twenty-Year Return to Legislative Selection of Justices

But changes in selection of Georgia's Supreme Court justices continued to swing on a political pendulum. During 1865-1877, that pendulum was powered primarily by the "before," "during," and "after" phases of military reconstruction that resulted from Georgia's choice to join the treasonous rebellion known as the American Civil War.³³ The Georgia Constitution of November 1865, written to fulfill congressional conditions on readmission to the Union,³⁴ established

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This [C]ourt cannot so apply them.

Id. at 250. Justice Lumpkin made no mention of Marshall's precedent whatsoever.

³² See *District of Columbia v. Heller*, 554 U.S. 570, 585 n.9, 589, 612–13, 626, 629 (2008) (citing *Nunn*, 1 Ga. at 250–51). For an insightful critique of both Lumpkin's opinion in *Nunn* and Justice Scalia's reliance on it (and other antebellum southern cases) in *Heller*, see generally Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015). Justice Lumpkin's baleful influence from the nineteenth century is thereby reanimated in the twenty-first. See *id.* at 134–35 ("While *Nunn* represents one perspective on the constitutionality of public carry restrictions, it falls woefully short of reflecting a national consensus. Indeed, the value of cases like *Nunn* is greatly diminished by the fact that a great many Americans in the antebellum years lived outside the South, in places less enthusiastic about public carry and more accepting of public carry restrictions. Rather than relying on regional case law derived from the antebellum South, whose gun culture and jurisprudence were influenced by the culture of slavery and honor, judges seeking historical guidance in public carry cases today can and should seek guidance from the alternative tradition that presumed the constitutional soundness of broad public carry restrictions.").

³³ See William Harris Bragg, *Reconstruction in Georgia*, NEW GA. ENCYCLOPEDIA (Sept. 30, 2020), <https://www.georgiaencyclopedia.org/articles/history-archaeology/reconstruction-in-georgia/> [<https://perma.cc/KRE3-Y9TZ>]; CHARLES S. BULLOCK, III & RONALD KEITH GADDIE, *The Georgia Constitution*, in GEORGIA POLITICS IN A STATE OF CHANGE 35, 35–48 (2011), <https://www.pearsonhighered.com/assets/samplechapter/0/2/0/5/0205864678.pdf> [<https://perma.cc/3MRU-4ARG>] (providing an overview of the ten constitutions the State of Georgia has created and ratified during its history). The enduring power of Justice Lumpkin is amply demonstrated by the fact that he continued to hold his position on the Georgia Supreme Court without interruption as it passed from being a state of the rump "Confederate States of America" to a militarily occupied territory. See HICKS, *supra* note 28, at 146–49.

³⁴ LEWIS NICHOLAS WYNNE, THE CONTINUITY OF COTTON: PLANTER POLITICS IN GEORGIA, 1865–1892, at 1–6 (1986) ("The men who were chosen as delegates" to the 1865 Constitutional Convention "had the onerous and unwanted task of writing a constitution that would acknowledge the outcome of the Civil War," specifically to achieve agreement "on three critical issues: nullification of the secession ordinance, confirmation of emancipation, and repudiation of the state's war debt."); see also Georgia, *The New State Constitution—The Disposition of Slavery—Proceedings of the Convention*, N.Y. TIMES (Nov. 19, 1865),

that the justices of the Georgia Supreme Court were to be elected by the General Assembly to terms of no less than six years.³⁵

Three years later, another Georgia Constitution, of 1868, the first adopted in the Reconstruction Era, brought a new selection regime: for the first time, popular vote was mandated, and the terms were doubled to twelve years.³⁶ This change was the product of a new political control by Republicans who wanted to remove the planter-class-political-influence root and branch—and part of that would be to remove sovereignty over Georgia Supreme Court judgeships from the legislature, where the old guard had dominated, and place it in the hands of the groups who could vote in Reconstruction Georgia.³⁷

By 1877, the pendulum had swung back to the approach of the 1865 Constitution: chosen by the General Assembly and terms six years.³⁸ The pendulum had swung back to the place where it started. And for nineteen years, the Georgia Supreme Court continued to be a body appointed by the Georgia Legislature.³⁹ Yet, when the decades of the 1880s and 1890s had nearly elapsed, change came again—and this time, stayed.

<https://timesmachine.nytimes.com/timesmachine/1865/11/19/90523738.pdf>
[<https://perma.cc/5SUR-FRN7>].

³⁵ See *Constitution of the State of Georgia, 1865*, GA. ARCHIVES, <https://vault.georgiaarchives.org/digital/collection/adhoc/id/1807> [<https://perma.cc/PV7M-S4M8>] (article IV, section 1 deals specifically with the Georgia Supreme Court). Photographs of the handwritten original 1865 Constitution are available online from the State of Georgia Archives at <https://vault.georgiaarchives.org/digital/collection/adhoc/id/1782> [<https://perma.cc/AV4Y-MF2G>].

³⁶ WALTER MCELREATH, *A TREATISE ON THE CONSTITUTION OF GEORGIA* 163 (1912). The strong influence of the treason and racism that pervaded Georgia in the nineteenth and early twentieth centuries is significant; but directly linking its effect to the see-saw changes in selection of Georgia Supreme Court justices is more elusive. See, e.g., *id.* at 148.

³⁷ See WYNNE, *supra* note 34, at 33–35 (“In contrast to the 1865 convention, which had met for only thirteen days, the convention of 1867-68 lasted for almost four months. During this time, Republicans used the floor of the convention hall as a platform to launch a campaign for voter support. Assured of control of the convention and backed by the military and Congress, they conducted an intense assault on the old planter elite.”).

³⁸ See *Judicial Selection in Georgia*, BALLOTPEdia, https://ballotpedia.org/Judicial_selection_in_Georgia [<https://perma.cc/Y7DV-XDC8>]. The 1877 Constitution has been called by some writers “the Restoration Constitution”—a politically weighted term. See MELVIN B. HILL & G. LAVERNE WILLIAMSON HILL, *THE GEORGIA STATE CONSTITUTION* 15 (2d ed. 2018). In fact, the 1877 Constitution came about when the end of Reconstruction removed federal oversight and saw the Democrat party return to prominence, resulting in the political elements in the state, who wanted to return to an approximation of the Antebellum Status Quo Ante, gaining the upper hand. See, e.g., *id.* at 15–17.

³⁹ See *Judicial Selection in Georgia*, *supra* note 38.

C. The Big Change—Elected Justices Henceforth and Forever

In 1896, an amendment to article VI, “The Judiciary,” of the 1877 Georgia Constitution, “provided for the popular election of judges of the Supreme Court, increased the number of judges to six, and authorized the Court to determine cases when sitting either as a body or in two divisions of three judges each, under such rules as the General Assembly should prescribe.”⁴⁰ Contemporary commentary on the forces and considerations driving this final break with the long-standing Georgia practice of legislatively appointing the Supreme Court justices is hard to come by.⁴¹ The most that was said provides a context that suggests a movement toward disempowering the legislature in favor of direct popular sovereignty:

The terms of the judges of the Supreme and Superior Courts were reduced to six and four years, respectively, and the selection of these judges and the solicitors was changed from the former method of appointment by the governor with the consent of the Senate, to election by the General Assembly. By an amendment ratified at an election held on October 5, 1898, the judges of the Superior Court and the solicitors general were made elective by the people.

Largely on account of the provision for direct appeal from the city courts of the State, first made in the Constitution of 1868 and repeated in the present Constitution, and in consequence of the great increase in the number of such courts, the mass of business in the Supreme Court became so great by the year 1893 that an amendment was proposed increasing the number of Supreme Court judges to five, but the amendment was defeated on its submission. Finally, the necessity grew so urgent that by an amendment proposed in

⁴⁰ ALBERT BERRY SAYE, A CONSTITUTIONAL HISTORY OF GEORGIA 1732–1968, at 297 (rev. ed. 1970). Georgia constitutional amendments are a challenging, labor-intensive study in general. *See, e.g.*, JOE SCHEUER, LOCAL AMENDMENTS TO THE CONSTITUTION OF GEORGIA: CONUNDRUMS CONTINUED AND CURIOSITIES CURTAILED, at i (2018 ed.), <https://www.accg.org/library/LCABook.pdf> [<https://perma.cc/N5A5-2BSP>] (“One of the more curious features of local government law in Georgia is the fact that under the 1877, 1945, and 1976 Constitutions there existed a class of amendments thereto which were neither general in nature nor uniform throughout the state but which were purely local in terms of their applicability.”); *see also* Stephens v. Reid, 6 S.E.2d 728, 731–32 (Ga. 1939) (recounting the history of the Georgia Supreme Court selection approaches).

⁴¹ *See, e.g.*, MCELREATH, *supra* note 36, at 564–68 (providing rather unilluminating commentary). In fairness to McElreath, he warns his reader in the Preface, “the primary purpose [is] to exhibit the fundamental law of the state,—not to furnish a commentary upon it.” *Id.* at iii.

an act approved on the 16th day of December, 1895, and ratified at an election held on the 7th day of October, 1896, the number of justices was increased to six *and they were made elective by the people in the same manner as the governor and other State House officers*. This amendment was carried into effect by the Act of December 17, 1896⁴²

At the same time, however, Georgia was completing, *de jure*, the *de facto* denial of the right to vote that Black citizens of the state had won in Reconstruction.⁴³ Popular sovereignty and popular elections must be understood in the context of those times as exclusionary and racist, not inclusive and fair.⁴⁴

After 1896, the system of popular election for the Georgia Supreme Court continued. But as it has been recently observed, “[e]lections have consequences.”⁴⁵ The episode in that populist era, of an elected Georgia judiciary, that stands out most is the Georgia Supreme Court’s decision⁴⁶ in 1914: a 4-2 vote to affirm the conviction of Leo

⁴² *Id.* at 173 (emphasis added) (footnote omitted).

⁴³ See, e.g., Dewey W. Grantham, Jr., *Georgia Politics and the Disfranchisement of the Negro*, 32 GA. HIST. Q. 1, 1 (1948); Russell Korobkin, *The Politics of Disenfranchisement in Georgia*, 74 GA. HIST. Q. 20, 21 (1990).

⁴⁴ See, e.g., Malinda Maynor, *People and Place: Croatan Indians in Jim Crow Georgia, 1890–1920*, 29 AM. INDIAN CULTURE & RSCH. J. 37, 38 (2005) (discussing regional custom around non-white voting “after North Carolina passed a new constitution, which declared that ‘free Negroes, free mulattos, and free persons of mixed blood’ could not vote”). Maynor’s article recounts how little had changed in Georgia some fifty years after the emancipation of enslaved Blacks, describing in detail how violence erupted when a Croatan man tried to get a haircut at a barbershop in Statesboro, Georgia, which further sparked Ku Klux Klan activity. *Id.* at 52; see also, e.g., Joseph L. Bernd, *White Supremacy and the Disfranchisement of Blacks in Georgia, 1946*, 66 GA. HIST. Q. 492, 492 (1982); *On This Day—Mar 02, 1948: White Residents Wage Terror Campaign to Intimidate Black Voters in Georgia*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/mar/2> [<https://perma.cc/45JT-WR7D>]; *The Lynching of Leo Frank: A Jewish Community’s Sense of Security Takes a Jolt*, HAARETZ (Aug. 25, 2018), <https://www.haaretz.com/jewish/features/2018-08-25/ty-article/.premium/the-lynching-of-leo-frank-a-jewish-community-embattled/0000017f-f6c0-d47e-a37f-fff26e50000> [<https://perma.cc/3LF4-SJXL>].

⁴⁵ See, e.g., Callie Crossley, *By Now, We Should Know that Elections Have Consequences, and So Does Not Voting*, GBH NEWS, <https://www.wgbh.org/news/2017/11/05/politics-government/now-we-should-know-elections-have-consequences-and-so-does-not-voting> [<https://perma.cc/FA2E-UPWL>] (May 7, 2018); Steve Oney, *What Jon Ossoff Means for the South and Its Buried Jewish Past*, WASH. POST (Jan. 18, 2021), <https://www.washingtonpost.com/opinions/2021/01/18/what-jon-ossoff-means-south-its-buried-jewish-past/> [<https://perma.cc/RG2D-6YZ2>] (comparing a more recent Georgian election to acts occurring in Georgia’s past, specifically the Leo Frank lynching).

⁴⁶ *Frank v. State*, 80 S.E. 1016 (Ga. 1914). The case quickly drew the attention of the *Harvard Law Review’s* student editors, see *Recent Cases*, 27 HARV. L. REV. 753, 762 (1914), who were at first academic in their reaction, see *Due Process of Law in the Frank Case*, 28 HARV. L. REV. 793, 793–95 (1915), but later expressed more skepticism about the Georgia proceedings, see *Mob Domination of a Trial as a Violation of the Fourteenth Amendment*, 37 HARV. L. REV. 247, 247–50 (1923).

Frank at a sensationalized murder trial that U.S. Supreme Court Justice Oliver Wendell Holmes described as so polluted by the outside influence of public pressure—displayed daily, immediately outside, and sometimes even inside, the trial courtroom in Atlanta—that he saw the Georgia Supreme Court as derelict in its duty “to declare lynch law as little valid when practiced by a regularly drawn jury as then administered by one elected by a mob intent on death.”⁴⁷

It is sobering to recollect that while the Georgia Supreme Court was denying Leo Frank even the benefit of a new trial not dominated by a mob atmosphere—leaving Governor John Marshall Slaton to commute Leo Frank’s capital sentence as he sensed even the trial judge “with that awful sense of responsibility, which probably came over him as he thought of that Judge before whom he would shortly appear, calls to me from another world to request that I do that which he should have done”⁴⁸—a brilliant Jewish Judge of the New York Court of Appeals, Benjamin Nathan Cardozo, was producing the first of his many masterpiece opinions that would elevate the New York Court of Appeals of his tenure (1914-1932) to the greatest state high court in the country.⁴⁹ The Storrs Lectures given by Judge Cardozo

⁴⁷ Frank v. Magnum, 237 U.S. 309, 349–50 (1915) (Holmes, J., dissenting). Justice Hughes, concurring with Holmes in his dissent, was a staunch foe of other legal abuses practiced in the southern states of that era. See, e.g., Bailey v. Alabama, 219 U.S. 219, 244–45 (1911); William Loughrey, *Charles Evans Hughes: GF-Bred Civil Rights Hero*, CHRONICLE (Jan. 18, 2016), <https://www.glensfallschronicle.com/charles-evans-hughes-gf-bred-civil-rights-hero/> [<https://perma.cc/AKC8-SJUJ>]. For those unfamiliar with the trial in the case in *State v. Frank*, a readily accessible source is Douglas O. Linder, *The Trial of Leo Frank: An Account*, FAMOUS TRIALS, <https://www.famous-trials.com/leo-frank> [<https://perma.cc/U3QS-E3GV>], and the masterful and modern accounting of this tragedy is STEVE ONEY, *AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (2003). That one of the leaders of the mob who drove twelve hours to kidnap Frank from a prison farm, after Governor John Marshall Slaton had commuted Frank’s capital sentence to life imprisonment, and return him to a lynching in Marietta, Georgia, had recently been (and would again be) a sitting, elected superior court judge has made many modern Georgians more than anxious to forget this infamous chapter in Georgia’s twentieth century judicial history. See Kathy Sawyer, *A Lynching, A List, and Reopened Wounds*, WASH. POST, June 20, 2000, at A1; see also *Newton Augustus Morris Letter: Biographical Note*, UNIV. OF GA. LIBS. (2008), <https://sclfind.libs.uga.edu/sclfind/view?docId=ead/RBRL165NAM.xml;brand=default> [<https://perma.cc/8KXJ-9VN7>] (noting that Judge Morris “served as superior court judge of the Blue Ridge Circuit, which included Cobb County, from 1909 to 1912 and 1917 to 1919” and “was allegedly one of the leaders behind the lynching of Leo Frank in 1915”); Oney, *supra* note 45.

⁴⁸ *The Leo Frank Trial: Clemency Decision of Governor John M. Slaton*, FAMOUS TRIALS (1995), <https://www.famous-trials.com/leo-frank/35-clemencydecision> [<https://perma.cc/N9C3-CH53>]; see also Stephen J. Goldfarb, *The Slaton Memorandum: A Governor Looks Back at His Decision to Commute the Death Sentence of Leo Frank*, 88 AM. JEWISH HIST. 325 (2000).

⁴⁹ See generally *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); *Wagner v. Int’l Ry. Co.*, 133 N.E. 437 (N.Y. 1921); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921); Meredith R. Miller, *One Judge’s Legacy and the New York Court of Appeals: Mr. Justice Cardozo and the Law of Contracts*, 34 *TOURO L. REV.* 263, 263 (2018); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39

in 1921, later collected as *The Nature of the Judicial Process*,⁵⁰ show a depth and subtlety that blazed a trail into the twentieth century,⁵¹ while the justices of the Georgia Supreme Court remained both initially un-Reconstructed⁵² and often mired in the mindset of the nineteenth century past.⁵³ That is not to say, however, that the

COLUM. L. REV. 372, 372–73 (1939). But even he, in his New York City law practice days, represented a Shubert theater in New York and argued for enforcement of a New York segregation law. See ANDREW L. KAUFMAN, *CARDOZO* 104–08 (1998) [hereinafter KAUFMAN, *CARDOZO*]; Andrew L. Kaufman, *Cardozo*, 34 *TOURO L. REV.* 7, 9, 12 (2018); RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 44–52 (1997). The Georgia Supreme Court first mentioned Judge Cardozo when it cited one of his New York precedents. See *Bd. of Comm'rs v. Mass. Bonding & Ins. Co.*, 165 S.E. 828, 833 (Ga. 1932) (“In an opinion written by Mr. Justice Cardoz[o], now a Justice of the Supreme Court of the United States, the court said . . .” (citing *Yawger v. Am. Sur. Co.*, 106 N.E. 64, 65–66 (N.Y. 1914))).

⁵⁰ For appreciative appraisals of this iconic volume, see, e.g., Ruggero J. Aldisert, *The Nature of the Judicial Process: Revisited*, 49 *U. CIN. L. REV.* 1, 1 (1980); David A. Nelson, *The Nature of the Judicial Process Revisited*, 22 *N. KY. L. REV.* 563, 564 (1995); Joel K. Goldstein, *The Nature of the Judicial Process: The Enduring Significance of a Legal Classic*, 34 *TOURO L. REV.* 159, 159 (2018).

⁵¹ See, e.g., John C.P. Goldberg, *Rediscovering The Nature of the Judicial Process: A Comment on Professors Abraham's and White's Doctrinal Forks in the Road*, 34 *YALE J.L. & HUMAN.* 99, 107, 112 (2023); Goldstein, *supra* note 50, at 159, 161, 173; Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 *ST. MARY'S L.J.* 965, 967–68 (1993); Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 *YALE L.J.* 195, 195–200 (1961).

⁵² Ex-Confederate soldiers continued to make up a portion of its membership in the first two decades of the twentieth century, including Justices Henry Gray Turner (1903-1905), William A. Little (1897-1903), and Thomas Jefferson Simmons (1887-1905). See H.B. FANT, TURNER, HENRY GRAY 1–2 (1996), <https://www.ncpedia.org/printpdf/7588> [<https://perma.cc/X74T-ZM8K>]; *Justice Little Leaves Supreme Court*, *ATL. CONST.*, Jan. 5, 1903, at 4; *Little Funeral Set in Columbus Today*, *ATL. CONST.*, Feb. 28, 1924, at 10; *Thomas J. Simmons Succumbs to Death*, *ATL. CONST.*, Sept. 13, 1905, at 7.

⁵³ The namesake of “the” (in)famous Justice Lumpkin—Joseph Henry Lumpkin II served on the Georgia Supreme Court from 1905-1916. *The Supreme Court of Georgia History: Associate Justices*, *SUP. CT. OF GA.*, <https://www.gasupreme.us/court-information/history/> [<https://perma.cc/VZA5-MQEM>]. His achievements are so obscure that he hasn't earned either a Wikipedia entry or a squib in the New Georgia Encyclopedia. He lives for a decision on death—more precisely, on the incompetent handling of a corpse by a railroad during shipment of the coffin containing the corpse, which the railroad left on a platform, unprotected from a rainstorm:

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently

popularly elected Georgia Supreme Court of the early twentieth century did not sometimes issue opinions that were contrary to those expectations.

For example, in *Pavesich v. New England Life Insurance Co.*,⁵⁴ the Georgia Supreme Court held, as summarized by the Reporter of Opinions, that:

The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage.⁵⁵

disposing of the remains of the departed which furnish one ground of difference between men and brutes.

Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905). The opinion is lengthy and scholarly with a deep dive into history going back to 750 A.D. and provides more attention for a corpse than capital defendants got before the gallows or plaintiffs injured by the actions of corporate agents. For a contextual discussion of the case, see SALLIE TISDALE, *ADVICE FOR FUTURE CORPSES (AND THOSE WHO LOVE THEM): A PRACTICAL PERSPECTIVE ON DEATH AND DYING* 156–57 (2019). For the general obsessive fetish for the dead, for extended mourning, and for cemeteries in the wake of the Civil War, see generally DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008).

⁵⁴ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). *Pavesich* was authored by the colorfully appellationed Justice Andrew Jackson Cobb. Other than the opinions he left behind, little is readily knowable about the author of this celebrated opinion. We are told that he served on the Georgia Supreme Court for a decade: 1897-1907. See *The Supreme Court of Georgia History: Associate Justices*, *supra* note 53. A photo of him, including his earthly dates (1857-1925) is found online, where he is described as “jurist and legal educator.” *Andrew Jackson Cobb*, WIKIDATA, <https://www.wikidata.org/wiki/Q55720910#> [<https://perma.cc/ELT7-KJJD>]. That conforms with the far-above-average opinion written in *Pavesich*. Another source lists quite a bit of public service activities, including Justice Cobb’s stint while in Atlanta for the Supreme Court as a lecturer at a YMCA Law School in Atlanta. See *Andrew Jackson Cobb*, PRABOOK, https://prabook.com/web/andrew_jackson.cobb/1070003 [<https://perma.cc/3G7X-4CVC>]. After 1907, he returned to Athens, Georgia, to resume his law practice; he served, in 1913, on a legislative revision commission addressing procedure in Georgia’s courts. The University of Georgia holds a collection of his papers. See *Andrew Jackson Cobb Papers*, DIGIT. LIBR. OF GA., https://dlg.usg.edu/record/dlg_turningpoint_harg1376-077-023 [<https://perma.cc/95BE-SSRR>]. It appears that Justice Cobb was well aware of the landmark article on privacy rights, see Samuel B. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), for, we are told by Professor Kahn that “[s]oon after the decision was announced, [Justice] Cobb wrote a flattering letter to then private attorney Louis Brandeis, calling his attention to this, the first opinion to recognize the right to privacy, and expressing Cobb’s confidence that it would, before long, become the norm.” Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 756–57, 757 n.14 (2005). “Cobb’s letter is referred to by Brandeis in two letters. Letter from Louis Brandeis to Andrew Jackson Cobb (Apr. 17, 1905), and Letter from Louis Brandeis to James Bettner Ludlow (Apr. 20, 1905).” *Id.* at 757 n.13. That Justice Cobb both read law review articles and corresponded with their authors places him a cut above the typical judge of the age.

⁵⁵ *Pavesich*, 50 S.E. 68 [Reporter’s Syllabus], 122 Ga. 190 at 191.

But in so doing, the Court recognized a much broader set of privacy principles, as summarized by the Reporter of Opinions.⁵⁶ Ninety-three years later, the Georgia Supreme Court relied on the *Pavesich* case to declare Georgia's statute criminalizing sodomy between consenting adults unconstitutional.⁵⁷ In its own time, *Pavesich* was part of an intense debate that started with a

⁵⁶ See *id.* The Court's opinion, as summarized by the Reporter of Opinions, sets forth a set of maxims that *might well*, had such maxims been written today, sink a federal judicial nominee appearing before the Senate Judiciary Committee of the latter 2010s or the 2020s (see Raymond J. McKoski, *The Refusal of Supreme Court Nominees to Discuss Legal, Political, and Social Issues at Senate Confirmation Hearings: Ethical Obligation or Survival Strategy?*, 73 S.C. L. REV. 27, 42 (2021) (citing judicial oaths, the "duty of impartiality," the ABA Model Code of Judicial Conduct, and strategies to "avoid disqualification from future cases" as reasons for nominees' "refusal to engage in judicial philosophy")):

[1.] The absence, for a long period of time, of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle, the courts cannot give a remedy; but where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles.

[2.] A right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as by judges in decided cases.

[3.] The right of privacy is embraced within the absolute rights of personal security and personal liberty.

[4.] Personal security includes the right to exist and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.

[5.] Personal liberty includes not only freedom from physical restraint, but also the right "to be let alone," to determine one's mode of life, whether it shall be a life of publicity or of privacy, and to order one's life and manage one's affairs in a manner that may be most agreeable to him, so long as he does not violate the rights of others or of the public.

[6.] Liberty of speech and of the press, when exercised within the bounds of the constitutional guaranties, are limitations upon the exercise of the right of privacy.

[7.] The [C]onstitution declares that the liberty of speech and of the press must not be abused, and the law will not permit the right of privacy to be asserted in such a way as to curtail or restrain such liberties. The one may be used to keep the other within lawful bounds, but neither can be lawfully used to destroy the other.

[8.] The right of privacy may be waived either expressly or by implication, except as to those matters which law or public policy demands shall be kept private; but a waiver authorizes an invasion of the right only to such an extent as is to be necessarily inferred from the purpose for which the waiver is made. A waiver for one purpose, and in favor of one person or class does not authorize an invasion for all purposes or by all persons and classes.

Pavesich, 50 S.E. 68 [Reporter's Syllabus], 122 Ga. at 190–91.

⁵⁷ *Powell v. State*, 510 S.E.2d 18, 20, 22–24, 26 (Ga. 1998) (quoting *Pavesich*, 50 S.E. at 194, 196). As the late Justice George Carley wrote in *King v. State*:

This right of privacy guaranteed by the Georgia Constitution is far more extensive than that protected by the Constitution of the United States. In this state, privacy is considered a fundamental constitutional right and is "recognized as having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts."

King v. State, 535 S.E.2d 492, 494 (Ga. 2000) (internal citations omitted) (first citing *Powell*, 510 S.E.2d at 22; and then quoting *Ambles v. State*, 383 S.E.2d 555, 557 (Ga. 1989)).

much-less-enlightened New York Court of Appeals decision in *Roberson v. Rochester Folding Box Co.*⁵⁸ That debate raged on for

⁵⁸ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). The tenor of the three-judge dissent itself demonstrates that the majority opinion here was at the trailing end, rather than the leading edge, of judicial enlightenment about the right to privacy. See *id.* at 557 (Gray, J., dissenting). Judge Gray explained the trend of more enlightened thought on the subject, by first observing that:

If the right of privacy exists, and this complaint makes out a case of its substantial violation, I think that the award of equitable relief by way of an injunction preventing the continuance of its invasion by the defendants will not depend upon the complainant's ability to prove substantial pecuniary damages [under existing precedent]

Id. at 560. But rather, “[w]hen, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief.” *Id.* at 561. “In the social evolution,” Judge Gray observed,

with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence if equity were powerless to extend the application of the principles of common law or of natural justice in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions.

Id. at 561. An early commentator on *Roberson* observed that the majority opinion “is in reality the opinion of four judges, directly overruling the conclusions of eight others, three of whom dissent from the final judgment” and that:

If we must accept this decision as meaning that “the conscience” of equity has now become so hardened and that great remedial system in its turn become so bound, by precedent, that the law affords no relief to admittedly just demands because the case is “concededly new” and “no precedent for such action is to be found,” then our system of precedent has become a barrier rather than an aid to justice.

An Actionable Right of Privacy? *Roberson v. Rochester Folding Box Co.*, 12 YALE L.J. 35, 36–37 (1902). Two more recent commentators have further noted that, “after a popular outcry against the [*Roberson*] decision, the New York legislature passed a privacy tort statute allowing people to sue for invasion of privacy where their ‘name, portrait, or picture’ was used without consent ‘for purposes of trade.’” Daniel J. Solove & Neil M. Richards, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1192–1193 (2010) (footnote omitted) (citing N.Y. CIV. RTS. L. §§ 50–51 (McKinney 1903); see *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 392–93 (N.Y. 2018) (discussing statutory rejection of *Roberson*). New Jersey quickly joined Georgia in rejecting *Roberson*. See *Vanderbilt v. Mitchell*, 67 A. 97, 100–01 (N.J. 1907); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394–95 (N.J. Ch. 1907).

Roberson’s majority opinion is one of the lesser lights in the career of Albany Law School’s own Chief Justice Alton Parker. See Robert M. Mandelbaum, *Alton Brooks Parker*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/alton-brooks-parker/> [<https://perma.cc/N4GM-C4QF>]. Judge Parker also had the misfortune to accept his party’s nomination to oppose Theodore Roosevelt in the 1904 election, where “Roosevelt trounced Parker at the polls[,] earn[ing] 5,084,442 votes to Theodore Roosevelt’s 7,628,785. The electoral vote was 336 to 140.” *Great American Biography: Alton B. Parker*, CONST. L. REP., <https://constitutionallawreporter.com/great-american-biographies/alton-b-parker/> [<https://perma.cc/3XP7-XQWK>]. But Parker’s name lives on even to twenty-first century contracts students in American law schools as the author of the very quirky-but-celebrated staple of 1L year, *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891). Celebrated though the case is, the author, who also teaches contracts, is of the strong opinion that poor Parker bungled that case as well, for reasons similar to those stated in Jeremy Telman, *A Series of Takes on Hamer v. Sidway, Part I*, CONTRACTSPROF BLOG (Sept. 28, 2020), https://lawprofessors.typepad.com/contractsprof_blog/2020/09/a-series-of-takes-on-hamer-v-

some thirty years in the high courts of other states who considered whether their state was to be a *Roberson* or *Pavesich* jurisdiction.⁵⁹ By the 1930s, *Pavesich*'s approach was winning the day.⁶⁰ Dean Prosser himself attributed the momentum to the *Pavesich* case.⁶¹ Furthermore, the case has had a significant impact in Georgia law, and not just in the area of torts.⁶²

sidway.html [https://perma.cc/V5HP-DBV3]. See also Douglas G. Baird, *Reconstructing Contracts* (Coase-Sandor Inst. for L. & Econ., Working Paper No. 11, 1992), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1410&context=law_and_economics [https://perma.cc/LK8P-D7G3].

⁵⁹ See Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should Be All Ears for Pavesich*, 42 BRANDEIS L.J. 751, 753–55 (2004).

⁶⁰ *Id.* at 755. As Professor Peikoff writes:

Other state courts soon were asked to follow the *Pavesich* court's lead. Wrote Dean Prosser of these early decisions, "For the next thirty years there was a dispute as to whether the right of privacy existed at all, as the courts elected to follow the *Roberson* or the *Pavesich* case." Finally, however, the right's widespread adoption was ensured. By the end of the 1930s the Restatement of Torts included coverage of the right to privacy, and early opinions following the *Roberson* decision were being overturned.

Id. at 755 (footnote omitted).

⁶¹ While the article on "The Right to Privacy" that a young Louis Brandeis published with Warren is often seen as the catalyst, see *id.* at 753–54, law review articles don't have the gravitas of judicial opinions, particularly those opinions thoroughly analytic and persuasively expounded:

Scholars credit the Warren and Brandeis article for the American legal system's virtually unanimous adoption of the right to privacy. However, Dean Prosser notes that the effect of the article was not by any means immediate. It seems that it was not until after the *Pavesich* decision that the movement in favor of the right gained momentum. Maybe it was the mere fact that some court of final appeal had taken the lead that encouraged the adoption of the right throughout the United States; and it just so happens that only the *Pavesich* court had the courage to do so.

Id. at 755 (citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384 (1960)). The Warren and Brandeis article is Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis's collaboration extended to the formation of the veritable Nutter, McClendon & Fish LLP law firm in Boston, but also, less happily so, to management of a Warren family trust that led to Warren's 1910 suicide and a scandal for Brandeis. See Mopsy Strange Kennedy, *Brawling Brahmins*, N.Y. TIMES, June 3, 1990, at 28 (review of MARTIN GREEN, *THE MOUNT VERNON STREET WARRENS: A BOSTON STORY 1860-1910* (1989)), <https://www.nytimes.com/1990/06/03/books/brawling-brahmins.html>

[https://perma.cc/8VQG-6WV3]; see also R. Lisle Baker & Peter Scott Campbell, *Louis D. Brandeis and the Formation of a Positive Professional Identity*, 56 SUFFOLK U. L. REV. 275, 285 (2023).

⁶² See, e.g., Michael B. Kent Jr., *Pavesich, Property and Privacy: The Common Origins of Property Rights and Privacy Rights*, 2 J. MARSHALL L.J. 1, 3 (2009). A similar legacy can be claimed for *Mitchell v. Langley*, 85 S.E. 1050, 1053 (Ga. 1915), in which the Georgia Supreme Court is credited with being the first court in the Nation to recognize a common law cause of action for tortious interference with inheritance—a tort reflected in the Second and Third Restatements and still divisive in its reception among state high courts and probate scholars. See, e.g., John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 337, 367, 369 (2013). Compare *Estate of Osguthorpe v. Rudd (In re Estate of Osguthorpe)*, 491 P.3d 894, 908 (Utah 2021) (recognizing the tort), with *Briggs v. Briggs (In re Briggs)*, 931 N.W.2d 510, 517 (S.D. 2019) (rejecting the tort).

Yet, the court that issued *Pavesich* was also capable of issuing *appalling* opinions in other cases, such as one in 1907 from which the following passage is quoted:

The question has never heretofore been directly raised in this State as to whether it is an insult to seriously call a white man a negro, or to intimate that a person apparently white is of African descent. We have no hesitation, however, after the most mature consideration of every phase of the question, in declaring our deliberate judgment to be that the willful assertion or intimation embodied in the declaration now before us constitutes an actionable wrong. We [cannot] shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen, either by legislation or by judicial decisions, is repugnant to every principle underlying our republican form of government. Nothing is further from our purpose. Under our benign institution, "every man is the architect of his own fortune;" every citizen, white and [B]lack, may gain, in every field of endeavor, the recognition his associates may award. That is his right and his own concern. But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality. This fact was recognized by two of the leaders on opposite sides of the question of slavery, Abraham Lincoln and Alexander H. Stephens. The former on numerous occasions declared that it was no part of the proposition even of the abolitionists to attempt to establish a condition of social equality between an inferior and superior race. And Alexander H. Stephens declared that the Southern Confederacy was based upon the acknowledged superiority of

the Caucasian race over the Negro. The distinction and inequality are recognized in Holy Writ.⁶³

⁶³ *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E. 899, 901 (Ga. Ct. App. 1907). This is an example of a “racial defamation case,” a peculiarly poisonous feature of “law” in the Jim Crow southern states at the turn of the twentieth century. See Kahn, *supra* note 54, at 775–81. The alleged defamer in the *Wolfe* case was a streetcar conductor who had been co-opted by both the State of Georgia and his employer to enforce one of Georgia’s segregation statutes. See *Wolfe*, 58 S.E. at 900. The Reporter’s syllabus on this point has—to us in the twenty-first century—a truly Orwellian cast about them:

[2.](a) In enforcing Penal Code, § 527, requiring the separation of races, the conductor is still the agent and servant of the corporation, and the liability of the corporation for his acts as such is not diminished by the delegation of police power. The police power is granted to better enable the corporation to discharge its duty of protecting its passengers, but the burden of exercising extraordinary diligence in the protection of the passenger is not lightened. (By Hill, C.J., and Powell, J.: If an honest mistake be made after extraordinary diligence has been exercised, the carrier would not be liable).

[3.](c) The courts can take judicial notice of social status and of the superiority and inferiority of races, without affecting the civil rights of the citizen. An existent fact, which is per se the subject neither of legislation nor of adjudication, can be judicially known and recognized as a fact.

Wolfe, 58 S.E. 899 [Reporter’s Syllabus], 2 Ga. App. 499, 499–500. Of course, it should also be noted that the U.S. Supreme Court Justice from whose pen the ink flowed in the infamous majority opinion of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was a Northeasterner, educated at Yale and Harvard: Justice Henry Brown. See *Justice Henry Billings Brown*, JUSTIA, <https://supreme.justia.com/justices/henry-billings-brown/> [<https://perma.cc/CXL6-3M2R>]; *Henry Billings Brown*, 3 GREEN BAG, 91, 91–92 (1891). See generally Robert J. Glennon Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553 (1973). The prejudice that permeated the judiciary in the era of the *Plessy* and *Wolfe* decisions was deeply seated and not absent from any section of the country. Indeed, even Benjamin Cardozo, New York’s most venerated judge since Chancellor James Kent, apparently did not balk at arguing an appeal for a theater owner (fourteen months before he first took the bench) in an effort to overturn the theater owner’s conviction for violating a New York statute that made racial discrimination in public accommodations a crime. KAUFMAN, CARDOZO, *supra* note 49, at 104–08 (noting that in defending “the Schuber[t] [Theater’s] policy of segregated seating,” attorney Cardozo “exerted his ingenuity to think of every argument, however technical or rhetorical, to obtain that result”). Indeed, even in states, such as Pennsylvania, whose legislatures had enacted statutes designed to eliminate the badges and incidents of slavery in public accommodations, the “courts restricted the statute’s applicability to a narrow range of discriminatory conduct to preserve, in their view, the integrity of common law, property rights, and the United States Supreme Court’s restrictive construction of the fourteenth amendment.” David McBride, *Mid-Atlantic State Courts and the Struggle with the Separate but Equal Doctrine: 1880-1939*, 17 RUTGERS L.J. 569, 571 (1986). Among many judges of the South, however, there was a virulent, personal commitment to maintaining the badges and incidents of slavery even after Emancipation. See TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS 1790-1890*, at 8 (1999) (“After the war, southerners clung to antebellum notions of paternalism and white supremacy” and “in their continued devotion to the Democratic Party and the ideals of the Lost Cause, southern state judges adhered to southern orthodoxy on racial issues.” (footnote omitted)); Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 485–87, 490 (1994) (observing that southern “[s]tate judiciaries did nothing to upset the intrinsic inequality of southern society” for decades following the end of Reconstruction and that southern “[s]tate courts defied and circumvented executive and constitutional decrees”).

In the twenty-first century, one can only read such outrageous language from a state's highest court with a dropped jaw. The fact that the justices actually believed such screed and ratiocinations only serves to make matters worse for them.

On the whole, then, the Georgia Supreme Court from 1896 well through the twentieth century, until the early 1980s, reflected the general disenfranchisement-politics of the era.⁶⁴ That was further exacerbated in Georgia through its "county unit system" for statewide elections that persisted into the early 1960s.⁶⁵ Given that Georgia's 159 counties is second only to Texas's 254, the county unit system favored the numerous rural counties over the growing metropolitan areas of the state, and as a result, "candidates for statewide office" were "beholden to local leaders, who had effective control of the unit votes of their counties."⁶⁶ This, in turn, allowed rural interests in Georgia to dominate, leading to an era that some scholars have called

Even more benignly motivated members of the bar in the late nineteenth and early twentieth centuries became culpable in extending antebellum prejudice. The phenomenon of lawyers advancing the machinery of racism while proclaiming that they are just doing their jobs by collaborating with a racist legal system has been called out for what it is—the accommodation of evil. See Malcolm Gladwell, *The Courthouse Ring*, NEW YORKER (Aug. 3, 2009), <https://www.newyorker.com/magazine/2009/08/10/the-courthouse-ring> [<https://perma.cc/V3ST-EQVF>]. As Professor Lance McMillian has described Gladwell's position, "Gladwell made waves in the pages of *The New Yorker* by arguing that, far from being a bright spot of racial enlightenment in a time of darkness, Atticus Finch instead made an immoral peace with the world of Jim Crow Alabama." Lance McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell's Critique*, 77 TENN. L. REV. 701, 702, 703 (2010) (describing Gladwell's position, but disagreeing with it). The author agrees with Gladwell, however, as more than a few members of the organized bar in many parts of the country had "made an immoral peace with the world of Jim Crow" as it existed in their own jurisdictions. See generally THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION AND STRUGGLE OUTSIDE OF THE SOUTH (Brian Purnell & Jeanne Theoharis with Komozi Woodward eds., 2019); RICHARD ARCHER, JIM CROW NORTH: THE STRUGGLE FOR EQUAL RIGHTS IN ANTEBELLUM NEW ENGLAND (2017). For the author's views on how such an immoral peace can become "legal monumentalism," which is a "process of historical denial," see generally Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas—A Countermemory Reply to Instrumentalism*, 67 ALB. L. REV. 965, 967–68, 977–87, 989–94 (2004).

⁶⁴ A very interesting firsthand account of what things were like in Atlanta appears in, Bernard Taper, *A Reporter at Large: A Meeting in Atlanta*, NEW YORKER (Mar. 9, 1956), <https://www.newyorker.com/magazine/1956/03/17/a-meeting-in-atlanta-thurgood-marshall> [<https://perma.cc/7V6P-C9K8>].

⁶⁵ See HERBERT M. KRITZER, JUDICIAL SELECTION IN THE STATES: POLITICS AND THE STRUGGLE FOR REFORM 128 (2020).

⁶⁶ *Id.* at 128–29.

the “Rule of the Rustics.”⁶⁷ This did little to produce either an enlightened or remotely diverse Georgia Supreme Court.⁶⁸

The future of minority voting started with Congress passing, and President Johnson signing, the Voting Rights Act of 1965.⁶⁹ Some thirty years after the Voting Rights Act was enacted, a leading plaintiff’s attorney in the voting rights arena made the following observations about the impact of the Act on Georgia elections:

The Voting Rights Act profoundly changed southern politics. Prior to the 1960s, [B]lack[people] were minimally involved in politics in the South. While there were exceptions in some areas, and [B]lack[people] freely voted in the 1950s in some places, for the most part politics was considered “white man’s business.” That changed as a result of the civil rights movement in the 1960s and, in particular, the adoption of the Voting Rights Act. Black voter registration increased markedly. Today, the rate of [B]lack voter registration is on par with that for whites. In fact, if one accounts for socio-economic differences, the rate of white voter registration is no higher than that for [B]lack[people]. The key provision that drove this political revolution was the ban on literacy and “understanding or interpretation” tests.

⁶⁷ *Id.* at 129. A major study in 1949 pointed out that in 1946, for example, there were 14,092 popular votes per unit vote in the most populous county (Fulton, which embraces a fair share of the City of Atlanta) compared to a mere 132 popular votes per unit vote in Chattahoochee County, the least populous Georgia county in 1946. *Id.* at 128 n.7 (citing V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 119 (1949)).

⁶⁸ The county unit system, which Georgia had employed since 1898 and which Georgia codified in 1917, finally met its end in *Gray v. Sanders*, 372 U.S. 368 (1963). See KRITZER, *supra* note 65, at 129 n.9. Justice Douglas, writing for an eight-justice, majority found the county unit system violated the Fourteenth Amendment’s Equal Protection, because although that system gave every qualified voter one vote, in counting votes, it employed a methodology which in end result weighted rural votes more heavily than urban votes and weighted some small rural counties heavier than other larger rural counties. See *Gray*, 372 U.S. at 379–81. Only the Eisenhower appointee, Justice Harlan, dissented. See *id.* at 382 (Harlan, J., dissenting); *John M. Harlan II*, OYEZ, https://www.oyez.org/justices/john_m_harlan2 [<https://perma.cc/W7W6-MQFM>]. The Court thereby upheld the propriety of issuing an injunction by a three-judge federal district court, which included both the legendary Judge Elbert P. Tuttle as well as President Carter’s future U.S. Attorney General, Griffin Bell. See *Sanders v. Gray*, 203 F. Supp. 158, 158, 171 (N.D. Ga. 1962); see also ANNE EMMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION (2011); JACK BASS, UNLIKELY HEROES (1981).

⁶⁹ See Jesse J. Holland, *Things to Know About the Voting Rights Act of 1965*, AP NEWS, <https://apnews.com/general-news-united-states-government-united-states-congress-ac55149b65544f4c8d2439ca6c2d831f> [<https://perma.cc/6D7F-HKJ2>] (Aug. 5, 2015, 6:36 PM). The impact of the Voting Rights Act in Georgia politics and for Georgia’s non-white voters is ably narrated in David F. Walbert, *Georgia’s Experience with the Voting Rights Act: Past, Present, and Future*, 44 EMORY L.J. 979 (1995).

Since 1965, African-American candidates for public office in Georgia and elsewhere in the South have met with increasing success. There were almost no [B]lack officeholders in 1965. Today, while the numbers fall short of proportional representation, the increases have been dramatic. Three factors have driven this political revolution. First is the change in attitudes and politics that has transpired since the elimination of formal segregation. Second is the increase in [B]lack voter registration. Third is the elimination of election practices that allowed local white voting majorities to defeat [B]lack candidates who were preferred by [B]lack voters.⁷⁰

But this sanguine picture of progress turns out not to be quite so rosy when we cast our eye to judicial elections—particularly for the Supreme Court of Georgia. No minority candidate has won a seat on the Georgia Supreme Court through a general election without first having been appointed by a Georgia governor.⁷¹ Being appointed by

⁷⁰ Walbert, *supra* note 69, at 979–80.

⁷¹ The first African American judge to reach the Georgia Supreme Court was the very experienced Georgia Court of Appeals Judge, the Honorable Robert Benham, who was appointed by then-Governor Joe Frank Harris in 1989. Sarah Grace Davis, *Robert Behnam*, NEW GA. ENCYC. (May 31, 2013), <https://www.georgiaencyclopedia.org/articles/government-politics/robert-benham-b-1946/> [<https://perma.cc/4424-JX6Z>]. In 1984, Governor Harris had appointed Benham to the Court of Appeals. *September 25: Robert Benham*, TODAY IN GA. HIST., <https://www.todayingeorgiahistory.org/tih-georgia-day/robert-benham/> [<https://perma.cc/3V8F-V4RB>]. He won a subsequent election to become the first African American to win an election to statewide office in Georgia since Reconstruction. *See id.*; *see also Robert Benham (Georgia)*, BALLOTPEdia, [https://ballotpedia.org/Robert_Benham_\(Georgia\)](https://ballotpedia.org/Robert_Benham_(Georgia)) [<https://perma.cc/WS8S-V7HB>]; *Portrait Unveiling of Former Chief Justice Robert Benham*, SUP. CT. OF GA. (Mar. 20, 2023), <https://www.gasupreme.us/03-20-2023-portrait-unveiling-of-former-chief-justice-robert-benham/> [<https://perma.cc/82LZ-E2ZB>]. After Judge Behnam's appointment to the Supreme Court in 1989, he stood for election in 1990 as an incumbent on the Georgia Supreme Court. Robert Behnam, *Reflections on My 1st Judicial Election Amid Racial Tensions*, LAW360 (Oct. 28, 2020, 4:35 PM), <https://www.law360.com/articles/1323092/reflections-on-my-1st-judicial-election-amid-racial-tensions> [<https://perma.cc/TW2H-2N7R>]; *see* Davis, *supra*. Indeed, thirty years later, Justice Benham recalled:

Then-Gov. Joe Frank Harris, who was also from my hometown of Cartersville, had actually given me a slight advantage on the ballot. He'd appointed me to fill a vacant court seat, but I had to quickly run for reelection to keep it. His appointment gave me the (i) next to my name—*meaning I was the incumbent* . . . [which] would give me a boost on the ballot

Benham, *supra* (emphasis added). The succeeding African American lawyers who became justices of the Georgia Supreme Court were first appointed to the Court by a Georgia governor: Justices Leah Ward Sears (appointed in 1992); Harold Melton (appointed in 2005); and Verda Colvin (appointed in 2021). *See* REBECCA SHRIVER DAVIS, JUSTICE LEAH WARD SEARS: SEIZING SERENDIPITY 63–66 (2017) [hereinafter DAVIS, SEARS]; *Harold Melton to Become New Chief Justice*, SUP. CT. OF GA. (Apr. 16, 2018), <https://www.gasupreme.us/4-16-18-harold-melton-chief/> [<https://perma.cc/Y79F-FJPC>]; *Justice Verda M. Colvin*, SUP. CT. OF GA., <https://www.gasupreme.us/court-information/biographies/justice-verda-m-colvin/>

a sitting governor also ensures that the political machine assembled by that governor can be put at the disposal of a judicial incumbent when his or her time to first face the voters comes.⁷² Voting Rights Act litigation over the results of judicial elections in the federal appeals circuit that encompasses Georgia has recognized and confirmed the lesson that “[i]n judicial elections, incumbency and name recognition are the primary factors behind electoral success.”⁷³

[<https://perma.cc/7LLL-GGLV>]. It is worth noting that New York’s first African American Court of Appeals judge was Fritz Alexander (appointed by Governor Mario Cuomo in 1985), and Sheila Abdus-Salaam became the court’s first African-American female judge when Governor Andrew Cuomo appointed her in 2013. See *Fritz Winfred Alexander, II*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/fritz-winfred-alexander/> [<https://perma.cc/H8HW-PUM3>]; Alan Feuer & William K. Rashbaum, *Mystery and Melancholy Surround the Death of a Judge Found in the Hudson*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/13/nyregion/sheila-ayub-salaam-new-york-judge-hudson-river-committed-suicide.html> [<https://perma.cc/V97E-DSGQ>].

⁷² See DAVIS, SEARS, *supra* note 71, at 71; see also discussion *infra* Section III.B.2. The challenge is not an easy one:

In Georgia, although the governor can appoint justices to fill interim vacancies on the Supreme Court, appointees must win an election to remain in office. Nonpartisan judicial elections for appellate court judges are held on Georgia’s primary date . . . [B]ecause the contest would be a statewide election, [Justice] Sears-Collins would have to run and win in counties that had never elected a [B]lack official. She would have to “depend on the good ol’ boy network to deliver for her in areas where the homeboy network” could not.

DAVIS, SEARS, *supra* note 71, at 71 (footnote omitted). Georgia’s numerous counties—second only to Texas’s—create another hurdle. In recalling her first Supreme Court election in 1992, Justice Sears, “who had originally planned to run a ‘shoe leather and sweat’ campaign to win reelection to the Fulton County Superior Court, joked to a reporter that all she had to do [now] was add 158 more counties.” *Id.* at 72 (footnote omitted); see KRITZER, *supra* note 65, at 128. This brings to mind the author’s own experience when members of the Georgia Bar nominated him for consideration by the Judicial Nominating Commission for a vacancy on the Georgia Court of Appeals in the early 2000s. There were over thirty nominees, and the Commission invited each one to appear before them for dialogue. The Commission would whittle down the list to three to five nominees to forward to the governor for his final selection. See *Process, JUD. NOMINATING COMM’N*, <https://jnc.georgia.gov/about-us/process> [<https://perma.cc/227R-RN8J>]. The author had expected a somewhat friendly reception, since one of his former partners at the Kilpatrick & Cody law firm, Sheffield Hale, was the Chair of the Commission. See *F. Sheffield Hale Biography*, BUCKHEAD COAL., <https://thebuckheadcoalition.com/member/f-sheffield-hale/> [<https://perma.cc/F5AF-86UD>]. Chairman Hale was—and is—a true gentleman. However, others were not so generous. Early in the author’s interview with the Commission, another member pointedly asked, “how do you—a law professor—plan to be ready to run a political campaign, when you’ve never held office before, on a statewide basis within a year after appointment?” The author knew at that moment that he had no chance with that crowd, no matter how he answered that question. Ultimately, Governor Roy Barnes received a shortlist with the name of Harris Adams, a sitting state court judge, whom the Governor selected for the vacancy. See *Judge A. Harris Adams Biography*, BALLOTOPEDIA, https://ballotpedia.org/Harris_Adams [<https://perma.cc/A9R5-FNUB>].

⁷³ *Nipper v. Smith*, 39 F.3d 1494, 1504 (11th Cir. 1994) (en banc) (quoting *Nipper v. Chiles*, 795 F. Supp. 1525, 1538 (M.D. Fla. 1992)) (affirming the dismissal of a challenge to the system used to elect judges to Florida’s Fourth Judicial Circuit). At the time of this writing, the Voting Rights Act was dealt a major blow by the U.S. Eighth Circuit Court of Appeals, in a decision that may very well permit a hostile U.S. Supreme Court to deliver a coup de grâce. See *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (“Did

We develop this point in the next section, in which we explore how further changes in Georgia politics, in the judicial nomination process, and in the size of the Georgia Supreme Court have combined to make elections a mere (though expensive) *formality* and the creation of one-party judicial dynasties (even in a “non-partisan election” setting) the *reality*.

III. THE MODERN, (S)ELECTED GEORGIA SUPREME COURT AND THE ROLE OF GUBERNATORIAL INTERIM APPOINTEES: BOTH TO DRIVE—AND TO HALT—PROGRESS

A. *The Georgia Judicial Nominating Commission*

Governors exercised the power to appoint justices of the Georgia Supreme Court when vacancies occurred between judicial elections without any particular constraints, until Georgia’s seventy-sixth Governor, Jimmy Carter, inaugurated the practice of using a Judicial Nominating Committee (JNC) to screen candidates for an intra-election Supreme Court vacancy and provide a list of recommended nominees.⁷⁴ While not binding on the governor,⁷⁵ the process makes the selection of justices more transparent, and it creates an opportunity for public and press scrutiny if the governor ignores the list and chooses from left field.⁷⁶ The Executive Order

Congress give private plaintiffs the ability to sue under § 2 of the Voting Rights Act? Text and structure reveal that the answer is no, so we affirm the district court’s decision to dismiss.” (footnote omitted). See generally Nick Corasaniti, *Federal Court Moves to Drastically Weaken Voting Rights Act*, N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/us/politics/voting-rights-act.html> [https://perma.cc/8KAA-2HVJ]; Joel Mathis, *Is the Voting Rights Act Nearly Dead?*, WEEK (Nov. 21, 2023), <https://theweek.com/politics/voting-rights-act-danger-2024-election> [https://perma.cc/XF58-DY2P] (“[T]here have been 182 successful cases brought under the VRA over the past four decades—and only 15 of those were brought by the Department of Justice” and thus, “Monday’s ruling is ‘quite a sea change in the way that everyone—Congress, the courts, plaintiffs, and even defendants—have thought’ about how the law would be enforced. . . .”).

⁷⁴ Camilla M. Tribble, Comment, *Awakening a Slumbering Giant: Georgia’s Judicial Selection System After White and Weaver*, 56 MERCER L. REV. 1035, 1036 (2005).

⁷⁵ *Id.* Calls for a binding selection committee outside of the political process were made half a century ago, and legislation was proposed at that time, but such mandated constraints on the Georgia governor’s powers eventually died on the vine. See, e.g., Robert H. Hall, *The Facts About Georgia Courts and Judges Today*, 2 GA. STATE BAR J. 395 (1966) (arguing that judges should be selected according to merit, outside of a political system, to serve a longer term which allows for proof of merit, and then subjected only to running in an uncontested retention election); Carr G. Dodson, *Judicial Recommendations and the Legislature*, 6 GA. STATE BAR J. 391 (1970) (discussing failed legislative efforts).

⁷⁶ Ga. Exec. Order (Dec. 3, 1971) (unpublished executive document). The author’s Reference Librarian, Mary Wilson, Esq., visited the State of Georgia Archives on April 3, 2024, to view a copy of this Executive Order. Inexplicably, the jacket containing the copies of Governor Carter’s

committing to this process has been renewed by every Georgia governor to hold office since Mr. Carter.⁷⁷

Several subsequent Georgia governors after Mr. Carter put their own touches on the JNC.⁷⁸ For those who seek completeness at a more detailed level in the historical narrative of the JNC's development, the author recommends an article authored by his former law partner at Kilpatrick & Cody, A. Gus Cleveland.⁷⁹

The JNC's current process has been published on the JNC's official webpage.⁸⁰ The members of the JNC—whose majority the governor

Executive Orders did not contain this one, and the Archives cannot account for it. However, the document is not simply “gone with the wind.” It *did* exist at one time and has been in the past viewed by reliable people, including the author's former law partner at the Kilpatrick & Cody firm, the late A. Gus Cleveland, a former President of the State Bar of Georgia. See A. Gus Cleveland, *The Judicial Nominating and Appointment Process in Georgia: 1971-1990*, 27 GA. STATE BAR J. 54, 55 (1990) (“Following these early experiences in the fall of 1971, Governor Carter, at a luncheon meeting during the Midyear Meeting of the State Bar in December 1971, signed an Executive Order creating an Appellate Judicial Selection Commission;” and, “[i]n June 1973, when the size of the Executive Committee of the State Bar was again increased and after taking into account the unwieldiness of an eighteen-member Commission, Governor Carter and Jack Adams, who had become President of the State Bar, formulated a new Executive Order changing the name to the Judicial Nominating Commission and reducing the membership to ten . . .”). As a commentator has noted, “The JNC is not a constitutionally mandated body; rather, it is formed by executive order.” Tribble, *supra* note 74, at 1036 n.6 (noting that the then-current Executive Order stated that “the JNC acts ‘in aid to the discretion reposed in the Governor’ and ‘shall recommend’ qualified candidates” (quoting Ga. Exec. Order No. 06.11.03.01 (June 11, 2003) (available at https://sonnyperdue.georgia.gov/exorders/2003/jun/06_11_03_01.pdf [<https://perma.cc/L4ET-METB>])).

⁷⁷ Tribble, *supra* note 74, at 1036; see *Georgia Judicial Nominating Commission*, BALLOTPEDIA, https://ballotpedia.org/Georgia_Judicial_Nominating_Commission [<https://perma.cc/7LVL-9LG5>].

⁷⁸ See Tribble, *supra* note 74, at 1058–63.

⁷⁹ See Cleveland, *supra* note 76, at 54. For highlights of Mr. Cleveland's distinguished career, see Press Release, Univ of. Ga. Sch. Of L., UGA Law School to Name New Ethics Chair in Honor of Gus Cleveland (Jan. 19, 1999), https://digitalcommons.law.uga.edu/press_releases/359/ [<https://perma.cc/G4WC-VND8>].

⁸⁰ As of November 2023, we find under the heading “Process” on the Georgia JNC's webpage the following:

The Georgia Judicial Nominating Commission (“JNC”) will make recommendations to the Governor of Georgia in accordance with the following general guidelines:

1. Upon receipt of notice of a vacancy from the Office of the Governor, the Co-Chairs will:
 - a. notify the JNC of the vacancy;
 - b. send an email through the State Bar of Georgia's facilities to each member of the bar in applicable judicial circuit;
 - c. send a notice to each organization that has requested in writing to receive notices of vacancy, including attorney, business, media, and other organizations;
 - d. advise the President of the State Bar of Georgia, the Chief Justice and Presiding Justice of the Georgia Supreme Court, and the Chief Judge, Georgia Court of Appeals;
 - e. set a timetable for:
 - i. the deadline for expressions of interest;
 - ii. the dissemination of applications for interested applicants;
 - iii. the deadline for receipt of completed applications and executed consent forms;

hand-picks themselves⁸¹—state that they observe certain “[p]rotocols,” which are published on the Georgia JNC website

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- iv. the deadline for receipt of materials and submissions from interested organizations; and
 - v. a tentative meeting date for the JNC to discuss the vacancy.
2. Upon receipt of an expression of interest, the Co-Chairs will:
 - a. compile a list of interested applicants;
 - b. send each applicant an acknowledgement with the application to be completed;
 - c. secure from each applicant to be considered the requisite consent forms for the applicable background checks.
 3. Following the deadline for the receipt of completed applications and executed consent forms, the Co-Chairs will prepare a packet for member consideration which includes:
 - a. the applications; and
 - b. materials and submissions received for consideration at the meeting.The completed and submitted applications and other materials and submissions received by the JNC in connection with a vacancy will be available to the public upon written request.
 4. For vacancies where the number of applicants exceeds twenty-five (25), the Co-Chairs may appoint a subcommittee chaired by one of the Co-Chairs to conduct a preliminary review of the applicants.
 5. The JNC will meet at the time and place designated by the Co-Chairs. Members may participate by phone or in person. Candidates will be interviewed at the meeting.
 6. Following all interviews, the JNC shall meet in executive session to discuss the candidates and make recommendations.
 7. The Co-Chairs will then submit to the Governor a list of candidates that reflect the most qualified for the position.
 8. The Governor may interview such applicants on the list as he deems appropriate, resubmit the vacancy for further consideration, or take other action to fill the vacancy as he deems appropriate.
 9. Any or all of these guidelines may be changed, modified, or not applied if special circumstances warrant in the opinion of the Co-Chairs.

Process, supra note 72.

⁸¹ See *Georgia Judicial Nominating Commission*, supra note 77. This article explains that there are currently twenty-three courts whose judicial selection process includes a qualification commission (which is called the “assisted appointment” approach). See *id.* Ten of those states, including Georgia, use a “governor-controlled majority” model. *Id.* One state, Kansas, uses a commission whose majority is appointed by the state bar. See *id.* Twelve courts use a “hybrid” model, employing varying rules to determine the origin and composition of the nominating commission. See *id.* It is, of course, true that Georgia continues to hold what it describes as “nonpartisan” elections for the superior courts, the Court of Appeals, and the Georgia Supreme Court. See *id.* However, the meaningfulness of judicial elections has been greatly reduced by the practice of appellate judges in Georgia leaving their court through resignation tendered to the governor so that the governor then may appoint their replacement. Georgia law provides that when an appellate court judge resigns within the six months before an already scheduled election for their seat, the governor may appoint someone to the seat and the election is therefore postponed to the next cycle. See *infra* note 124 and accompanying text. As a result, few elections for appellate judgeships have recently fielded anyone other than a judge who is an incumbent and received his or her start by a gubernatorial appointment to a vacancy, and then a period of two years to get rooted before facing another judicial election. See Stephan J. Ware, *Judicial Selection that Fails the Separation of Powers*, 72 CATH. U. L. REV. 299, 320–21 (2023). As Professor Stephen J. Ware has argued, “the urgency of” this kind of threat to meaningful elections for appellate judgeships “is highest in states—Minnesota, Georgia, and Oregon—in which the supreme court acquires most of its new members through interim appointment, and in which an interim appointment nearly always leads to a safe multi-term position on the supreme court.” *Id.* at 302, 320, 322, 323–24. Professor Ware further observes

itself.⁸² Suffice it to say that one published commentator's assessment of the ameliorative effects of the JNC still holds true now that the situation is less than sanguine after a half-century of existence:

[T]he threat of politicized judicial elections still looms large. One solution to this problem would be to reinvigorate the JNC. Currently, the JNC is created by executive order, so it has no authority apart from the governor from whence it sprang. Georgia governors are not required to pick from the slate of candidates that the JNC proffers. Individual JNC members do not serve fixed terms; instead, they serve at the governor's pleasure. The JNC need not be a bipartisan or nonpartisan body.⁸³

that “[a]ll seven members of the Minnesota Supreme Court initially joined the court by interim appointment, as did all seven members of the Oregon Supreme Court, and eight of the nine members of the Georgia Supreme Court.” *Id.* at 322–23 (footnotes omitted). Professor Ware spotlights the distorting effect on the meaningfulness of elections such practices have: “No Georgia Supreme Court justice has ever lost re-election.” *Id.* at 324 & n.92.

⁸² Under “Protocols,” as of November 2023, the JNC’s website lists the following:

All Members of the Georgia Judicial Nominating Commission (“JNC”) shall act in accordance with the following protocols.

1. The JNC does not select or pick judges; this is a power reserved exclusively to the Governor.
2. No Member may receive anything of value from any applicant (a person who has an application for consideration for appointment to a vacant judgeship) while their application is pending.
3. No Member shall receive anything of value in exchange for their support or vote for an applicant.
4. No Member shall communicate any information received during any part of the process that has been deemed “confidential” by the Co-Chairs.
5. No Member of the Commission other than the Co-Chairs is authorized to speak for or comment on the work of the JNC.
6. No Member of the JNC shall have the legal authority, whether by agency or otherwise, to bind the JNC or any member of state government to anything.
7. Each Member is responsible for complete and total compliance with all applicable laws, rules, regulations, and Codes of Professional Conduct.

Protocols, JUD. NOMINATING COMM’N, <https://jnc.georgia.gov/about-us/protocols> [<https://perma.cc/4SRN-3T92>].

⁸³ See Tribble, *supra* note 74, at 1076. See generally Press Release, Off. of the Governor, Gov. Kemp Names 35 to Judicial Nominating Commission (Oct. 27, 2021), <https://gov.georgia.gov/press-releases/2021-10-27/gov-kemp-names-35-judicial-nominating-commission> [<https://perma.cc/KK7V-UA4A>] (showing Governor Kemp’s appointment of thirty-five members to the JNC in 2021). Professor Stephen J. Ware has observed of states with purely advisory nominating commissions like Georgia’s: “These states excessively concentrate interim selection power in the governor; the highest court of a state is simply too important to leave even interim appointments to the unconstrained discretion of one person.” Ware, *supra* note 81, at 320.

But a more significant, new set of challenges has emerged in the last few years, which serve to remove voter choice even further from the practical operations of Georgia Supreme Court selection. These begin with the Appellate Jurisdiction Reform Act of 2016,⁸⁴ and culminate in the Supreme Court of Georgia's 2020 decision in *Barrow v. Raffensperger*.⁸⁵ Both developments are discussed in the next subsection.

B. The Appellate Jurisdiction Reform Act of 2016 and the Georgia Supreme Court's Decision in Barrow v. Raffensperger

1. The Appellate Jurisdiction Reform Act of 2016

The Appellate Jurisdiction Reform Act of 2016 (AJRA)⁸⁶ made the most dramatic change to the Supreme Court of Georgia since the 1983 Georgia Constitution.⁸⁷ This change is, in turn, having a significant impact on the selection of Georgia Supreme Court justices—even though the basic 1896 model, as tweaked by reframing the elections as “non-partisan” in 1983, remains the same.⁸⁸

⁸⁴ 2016 Ga. Laws 883.

⁸⁵ *Barrow v. Raffensperger*, 842 S.E.2d 884 (Ga. 2020).

⁸⁶ 2016 Ga. Laws 883, 884 (not codified by the General Assembly, providing that: “This Act shall be known and may be cited as the ‘Appellate Jurisdiction Reform Act of 2016’”). This legislation is reviewed in detail by Bryan Janflone and Michael F. Williford, *HB 927—Supreme Court, Appellate Court Efficiencies*, 33 GA. STATE U. L. REV. 205 (2016). In a peculiarity that is even more odd for “the Empire State of the South,” the Georgia Legislature maintains no legislative history on proposed enacted laws. See *Introduction to Legal Research: Statutory Law*, GA. STATE UNIV. COLL. OF L. LIBR., <https://libguides.law.gsu.edu/c.php?g=253374&p=1689649> [https://perma.cc/Z2T5-ZB3V]. Accordingly, the *Georgia State University Law Review* (since 1985) and Atlanta's *John Marshall Law Journal* (since 2008) have shouldered the task of preserving as much legislative history as they can by providing legislative summaries of current bills before the legislature, researched, written, and published by law-student members of those respective publications. See *About John Marshall Law Journal*, ATLANTA'S J. MARSHALL L. SCH., <https://www.johnmarshall.edu/lawreview/> [https://perma.cc/AGGN-7A94]; *Bill Tracking & Legislative History*, GA. STATE UNIV. COLL. OF L. LIBR., <https://libguides.law.gsu.edu/c.php?g=253377&p=1689696> [https://perma.cc/QWD8-VMKN]. The author has served as Faculty Advisor to the *John Marshall Law Journal* since 2015. See *Law Journal Spotlight: Faculty Advisor*, LINKEDIN, https://www.linkedin.com/feed/update/urn:li:activity:7021487155734601728?utm_source=share&utm_medium=member_desktop [https://perma.cc/CK36-8QQ2].

⁸⁷ See CHRISTOPHER J. MCFADDEN, CHARLES R. SHEPPARD, CHARLES M. CORK III, DAVID A. WEBSTER & KELLY J. WEATHERS, *GEORGIA APPELLATE PRACTICE WITH FORMS* § 1:5 (2023-2024 ed.).

⁸⁸ Like many things one finds in Georgia law, the adoption of the “nonpartisan” judicial election seems to be a case of Georgia following the Joneses—as Professor Herbert Kritzer observed, “there is little evidence that partisan advantage was a motivating factor in the change to nonpartisan judicial elections” in Georgia's 1983 Constitution; “[r]ather[,] it appears to be a part of a broad effort to modernize a complex and overly decentralized system during the period when there was a national movement toward ‘court modernization.’” KRITZER, *supra* note 65,

There certainly were grounds for making the adjustments accomplished in the AJRA. The Act's "primary sponsor, [Georgia] Representative Christian Coomer (R-14th), introduced HB 927, referred to as the 'Appellate Jurisdiction Reform Act of 2016.'"⁸⁹ In explaining the rationale for the legislation, "Representative Coomer cited the business community's desire for efficient appellate courts that can promptly establish stable precedent as the main incentive behind proposing the Act."⁹⁰ Indeed, the Supreme Court and Court of Appeals had felt the pinch of a state constitutional command, known to Georgia lawyers and judges as the "two-term rule."⁹¹ That rule mandates that Georgia's "Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term."⁹² With case volume rising like flood waters in both the Georgia Supreme Court and the Court of Appeals,⁹³ Georgia Governor Nathan Deal and the legislature pushed through reform bills, including one that became the AJRA.⁹⁴ Two significant sets of statutory amendments were enacted as part of the AJRA.

First, the AJRA changed the appellate subject matter jurisdiction of both courts.⁹⁵ The AJRA relieved the Supreme Court of Georgia of its exclusive appellate jurisdiction over trial court orders and judgments in, inter alia, divorce cases, wills cases, and extraordinary remedies cases,⁹⁶ which previously consumed a quarter of the

at 127. For Professor Kritzer's discussion of the ebbs and flows of the 1983 constitutional revision to the judicial selection article, see *id.* at 133–38. Of course, making elections nonpartisan has created practical difficulties for candidates who must walk a careful line, see, e.g., DAVIS, SEARS, *supra* note 71, at 71–75, and constitutional difficulties in the state's efforts to regulate judicial campaign speech, see, e.g., David Schultz, *Judicial Campaign Speech*, FREE SPEECH CTR. (July 30, 2023), <https://firstamendment.mtsu.edu/article/judicial-campaign-speech/#> [<https://perma.cc/L3CP-VDPX>]; Tribble, *supra* note 74, at 1038–53 (discussing First Amendment issues with the regulation of judicial speech). In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), substantial portions of Georgia's then-extant restriction of judicial campaign speech were struck down as violating the First Amendment. See *id.* at 1325.

⁸⁹ Janflone & Williford, *supra* note 86, at 207.

⁹⁰ *Id.*

⁹¹ *Id.*; see GA. CONST. art. VI, § 9, para. 2.

⁹² GA. CONST. art. VI, § 9, para. 2.

⁹³ See, e.g., Michael B. Terry, *Historical Antecedents of Challenges Facing the Georgia Appellate Courts*, 30 GA. STATE U. L. REV. 965, 971 (2014); Kyle G.A. Wallace, Andrew J. Tuck & Max Marks, *Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals*, 30 GA. STATE U. L. REV. 925, 928 (2014).

⁹⁴ See Janflone & Williford, *supra* note 86, at 207–10.

⁹⁵ *Id.* at 212–13.

⁹⁶ See GA. CONST. art. VI, § 6, paras. 2–3. Concomitantly, the AJRA expanded the matters over which the Georgia Court of Appeals now has appellate jurisdiction. See GA. CODE ANN. § 15-3-3.1 (providing for original appellate jurisdiction in all Georgia cases not exclusively granted to the Supreme Court). This newly added section under the AJRA includes:

Supreme Court's annual docket.⁹⁷ Jurisdictional realignment of that kind had been recommended by various bar groups and blue-ribbon panels for some years prior.⁹⁸

Second, the other statutory amendment—and the one of most concern to this Article—enlarged the Georgia Supreme Court (after the Georgia Legislature in 2015 had enlarged the Georgia Court of Appeals substantially, to fifteen).⁹⁹ The Supreme Court was enlarged from seven to nine justices.¹⁰⁰ Bill sponsors offered a benign—even banal—explanation for the Georgia Supreme Court expansion, which had *not* been called for by the Study Committee that Governor Deal had empaneled to develop the contours of reform legislation.¹⁰¹ Then-Representative Christian Coomer, for example, was among lawmakers cited for the following, less-than-compelling, rationale for the Supreme Court's two-seat expansion:

Lawmakers' primary motivation for the addition of the Justices was the desire to spread the workload amongst nine Justices instead of seven. Presumably, the legislature believes the additional Justices will allow the Supreme Court to focus on the cases that have the greatest impact.

. . . .

[T]he argument that Georgia's expansion was driven by politics “does not carry a lot of water.” Coomer believes the bill passed because most Georgians want to make sure their state is “a place where companies want to do business.” “[I]t is important for us to be able to give [businesses] clear guidance in the judiciary—let me say this another way. It is important for the judiciary to give clear guidance to practicing lawyers as well as business community participants.”¹⁰²

(1) Cases involving title to land; (2) All equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; (3) All cases involving wills; (4) All cases involving extraordinary remedies, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; (5) All divorce and alimony cases; and (6) All other cases not reserved to the Supreme Court or conferred on other courts

Id.

⁹⁷ Janflone & Williford, *supra* note 86, at 213.

⁹⁸ See, e.g., Richard Creswell, *Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 11–14 (2001).

⁹⁹ See Janflone & Williford, *supra* note 86, at 207; GA. CODE ANN. § 15-3-1(a).

¹⁰⁰ Janflone & Williford, *supra* note 86, at 210; see GA. CODE ANN. § 15-2-1.1.

¹⁰¹ See Janflone & Williford, *supra* note 86, at 213–14.

¹⁰² *Id.* at 213–15 (footnotes omitted).

But the increase is significant for another reason—and is intertwined with the expansion of the Court of Appeals. And that reason is stark: creation of a Republican-chosen and Republican-beholden judicial dynasty in Georgia’s appellate courts.¹⁰³ This is a strategy that several other state’s governors and legislators have adopted and implemented.¹⁰⁴ Quoting an Arizona legislator, two commentators on Georgia’s Supreme Court expansion have observed that word salad and ratiocination are really window dressing around realpolitik: “there’s no separating policy from politics when you’re talking about the highest court in the state’; suggesting that the primary motivation for expanding supreme courts is partisan politics.”¹⁰⁵

One of the ironies of the AJRA and its predecessor bill is that sponsoring Representative Christian Coomer was soon thereafter appointed to the newly expanded Georgia Court of Appeals by Governor Deal.¹⁰⁶ A Republican loyalist who had served in the Georgia House of Representatives from 2011 through 2018, he appeared to be just the kind of court-expansion judicial product that Governor Deal sought.¹⁰⁷ Indeed, it was with this appointment, and

¹⁰³ See, e.g., Kristina Torres, *House Backs Expansion of Georgia’s Supreme Court*, AJC NEWS (Feb. 18, 2016), <https://www.ajc.com/news/state--regional-govt--politics/house-backs-expansion-georgia-supreme-court/zafZbJu4s1vnME6UwwnoxH/> [<https://perma.cc/3MRR-MSWZ>]. Janflone and Williford elaborate:

Why are nine Justices better than seven? It is unclear how two additional Justices will speed the resolution of the issues facing the Supreme Court. Opponents fear Governor Deal will have tremendous long-term influence on the make-up of the Supreme Court because he will appoint two new Justices in the summer of 2016. Governor Deal already appointed Justice Keith Blackwell in 2012, and will replace two other current Justices—Chief Justice Hugh Thompson and Presiding Justice Harris Hines—who plan to retire before Deal’s tenure is up in 2018. Potentially, Governor Deal will have the opportunity to appoint a majority of the Justices on Georgia’s highest court before he leaves office.

Janflone & Williford, *supra* note 86, at 214 (footnotes omitted).

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* (quoting Alan Greenblatt, *Does Size Matter? The Latest Battle over State Supreme Courts*, GOVERNING (May 19, 2016, 11:20 AM), <https://www.governing.com/archive/gov-georgia-arizona-supreme-court-expansion.html> [<https://perma.cc/RAN6-F2GE>] (remarks of Ariz. Rep. Mesnard)); see also Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1137–38 (2020).

¹⁰⁶ *Christian Coomer*, BALLOTPEdia, https://ballotpedia.org/Christian_Coomer [<https://perma.cc/UVM4-HMFT>].

¹⁰⁷ See Bill Rankin & Greg Bluestein, *In Filling Another Supreme Court Vacancy, Gov. Deal Achieves Milestone*, AJC NEWS (Sept. 14, 2018), <https://www.ajc.com/news/crime-law/filling-another-supreme-court-vacancy-gov-deal-achieves-milestone/Ng8oO2pLIEBspplV5FW1H/> [<https://perma.cc/Q2MR-7KWR>]; Kathryn Hayes Tucker, *Nomination Panel Names 40 Interviewees for Court of Appeals Spots*, DAILY REP. (Oct. 11, 2017), <https://galawsuitreform.com/nomination-panel-names-40-interviewees-for-court-of-appeals-spots/> [<https://perma.cc/AZ8M-VXG6>]; Jonathan Ringel, *Questions for the Bench: Judge Christian Coomer of the Georgia Court of Appeals*, DAILY REP. (May 6, 2019), <https://www.law.com/dailyreportonline/2020/01/23/questions-for-the-bench-judge-gary->

a concurrent elevation of another Court of Appeals judge to the Georgia Supreme Court, that Governor “Deal, a former district attorney and juvenile court judge, will have made an indelible imprint on the state’s legal system by the time he leaves office at the end of [2018],” noting that “Deal’s transformation of the state’s top two appellate courts has also been profound. He has now appointed five of the Supreme Court’s nine justices and appointed nine of the Court of Appeals’ [fifteen] judges.”¹⁰⁸ As seasoned political reporters for Atlanta’s venerable *Journal-Constitution* observed at the time, Governor Deal

“[has] really had a chance to remake the courts and he’s taken full advantage of it,” said Leah Ward Sears, a former chief justice who retired from the Supreme Court in 2009. “The people he’s appointing are quite conservative and, by and large, they’re much younger, too.”

Deal’s mark on the court is partly a matter of longevity and partly shrewd political maneuvering. Two-term governors often get an opportunity for multiple appointments, but they seldom get the chance to expand the court’s size.

That’s what Deal guaranteed for himself with legislation that passed the General Assembly in 2016. The bill, the chief sponsor of which happened to be Coomer, increased the number of Supreme Court justices from seven to nine and the number of Court of Appeals judges from [twelve] to [fifteen]. And it allowed Deal to fill those five new vacancies at the beginning of 2017.

Far more often than not, the governor has appointed young, conservative jurists who are members of The Federalist Society, which plays an influential role in putting conservative judges on the bench. And Deal has often elevated Court of Appeals judges to the state Supreme Court bench, giving him yet another vacancy to fill on the lower court.¹⁰⁹

jackson-of-atlanta-municipal-court/ [https://perma.cc/H3KE-3KFC]; Press Release, WBHF Community Radio, Gov. Nathan Deal Announced the Appointment of Rep. Christian A. Coomer to Court of Appeals of Georgia (Sept. 14, 2018), <https://wbhfradio.org/gov-nathan-deal-announced-the-appointment-of-rep-christian-a-coomer-to-court-of-appeals-of-georgia/> [https://perma.cc/7BBY-3Z6V].

¹⁰⁸ Rankin & Bluestein, *supra* note 107.

¹⁰⁹ *Id.*

Such schemes have been called out for what they are: the basest of partisan politics, dressed in the raiment of a supposed public-mindedness.¹¹⁰ But as a young scholar who has studied the path of high-court expansion in North Carolina, Georgia, and Arizona has persuasively argued, “it is clear that any benefit from a court-packing plan is outweighed by the resulting financial detriment, further-diminished caseload, destruction of public confidence in the courts, and erosion of judicial power.”¹¹¹

There is a coda to Representative Coomer’s appointment to the Georgia Court of Appeals that provides a further layer of irony, bringing to mind the old adage Robert Burns captured as “[t]he best-laid schemes o’ Mice an’ Men.”¹¹² In 2020, Georgia’s judicial watchdog, the Judicial Qualifications Council (JCQ), filed sixty pages of charges against Judge Coomer, for violations of the Code of Judicial Conduct as well as the Georgia Rules of Professional Conduct.¹¹³ One of the more astonishing allegations was that:

Later, Coomer drafted a will for Filhart and designated himself and his heirs—his wife and children—as beneficiaries, the filing contends. This gave Coomer “the authority to decide the division of Filhart’s estate to Coomer’s own benefit and to the detriment of others,” the JQC filing alleges. Coomer then drafted a new will for Filhart that made Coomer’s wife the executor, protecting his and his family’s positions as beneficiaries, the filing states.¹¹⁴

Georgia Rule of Professional Conduct 1.8, captioned “Conflict of Interest: Prohibited Transactions,” flatly states that “[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or

¹¹⁰ See *id.*; *supra* notes 103–05 and accompanying text.

¹¹¹ Elizabeth L. Robinson, Comment, *Revival of Roosevelt: Analyzing Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State “Court-Packing” Plans*, 96 N.C. L. REV. 1126, 1130, 1131 (2018).

¹¹² Robert Burns, *To a Mouse*, POETRY FOUND. (Nov. 1785), <https://www.poetryfoundation.org/poems/43816/to-a-mouse-56d222ab36e33> [<https://perma.cc/HMZ4-X39F>].

¹¹³ Bill Rankin, *Ethics Charges Filed Against Appeals Court Judge Christian Coomer*, AJC NEWS (Dec. 26, 2020), <https://www.ajc.com/news/atlanta-news/ethics-charges-filed-against-appeals-court-judge-christian-coomer/VMYI6GH6VVHGDNGSNUXKRX6OU#> [<https://perma.cc/6MAT-BFRC>].

¹¹⁴ *Id.*

spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.”¹¹⁵

In the face of the JCQ’s charges, Judge Coomer stepped back from hearing cases,¹¹⁶ and soon, as he lay in limbo (suspended *with pay*¹¹⁷ for nearly three years), his name and likeness were removed from the Georgia Court of Appeals website.¹¹⁸ After extensive proceedings, the JQC held against him,¹¹⁹ and the Supreme Court, after a remand to the JQC for further fact-finding,¹²⁰ confirmed in a lengthy opinion the JQC’s findings and conclusions and made its own, independent decision to remove him from the bench.¹²¹ The opening of the Georgia Supreme Court’s opinion echoes with the grandiose solemnity of the voiceover that for years resounded at the beginning of every episode of the long-running television drama, *Law and Order*:

In our system of separated powers, each branch of state government secures compliance with its decisions in different ways. Alexander Hamilton famously put it this way in Federalist No. 78: “The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments.”

That our judgment is our only power shapes the kind of conduct we must insist upon from Georgia’s judges. The judiciary’s judgment will be obeyed only so long as the public respects it, and that respect will not long survive judges who act in a manner that undermines public confidence in their

¹¹⁵ GA. RULES OF PRO. CONDUCT r. 1.8(c).

¹¹⁶ Rankin, *supra* note 113.

¹¹⁷ David Thomas, *Georgia Supreme Court Removes Appeals Judge over Ethics Violations*, REUTERS (Aug. 16, 2023), <https://www.reuters.com/legal/legalindustry/georgia-supreme-court-removes-appeals-judge-over-ethics-violations-2023-08-16/> [<https://perma.cc/H72W-NLQP>].

¹¹⁸ See *Current Judges*, CT. OF APPEALS OF THE STATE OF GA., <https://www.gaappeals.us/biographies/> [<https://perma.cc/46R8-6W8A>].

¹¹⁹ *In re Coomer*, 885 S.E.2d 738, 742 (Ga. 2023) (per curiam).

¹²⁰ *Id.*

¹²¹ See *In re Coomer*, 892 S.E.2d 3, 8 (Ga. 2023) (per curiam).

judgment and integrity. In this case, Court of Appeals Judge Christian Coomer is charged with patterns of behavior regarding his use of campaign funds and his dealings with a legal client that allegedly undermined public confidence. The Hearing Panel of the Judicial Qualifications Commission (“JQC”) found that he indeed committed those acts, that he did so in bad faith, that those acts violated the Georgia Code of Judicial Conduct, and that the violations warranted his removal.¹²²

Thus, the architect of the court-packing (or, if one prefers, “court expansion”) plans that earned him a seat on the Georgia Court of Appeals was “[h]oist with his own petard.”¹²³

2. Litigation over Secretary of State Brad Raffensperger’s Decision to Cancel a Judicial Election in the Wake of Justice Keith Blackwell’s Prospectively Effective Resignation Followed by Governor Kemp’s Anticipatorily Filling the Seat by Gubernatorial Appointment

Recent developments have further diminished the democracy supposedly promoted by judicial elections. Georgia law provides that when an appellate court judge resigns within the six months before

¹²² *Id.* at 7 (footnote omitted). The last lines of the Supreme Court’s opinion are also noteworthy:

We conclude that removal is the appropriate sanction. Accordingly, it is ordered that Judge Christian Coomer of the Court of Appeals of Georgia be removed from office, effective upon disposition of any motion for reconsideration filed pursuant to this Court’s Rule 27, or upon the expiration of the time for filing such a motion without any such motion having been filed. As a result of this order, Judge Coomer “shall not be eligible to be elected or appointed to any judicial office in this state until seven years have elapsed” from the date of this order. OCGA § 15-1-13(a).

Removed from office.

Id. at 21. One of the more egregious violations alleged and found, centered on the time of his gubernatorial appointment to the Court of Appeals:

Coomer, a lawyer who was then a member of the Georgia House of Representatives, applied for and was appointed to the Court of Appeals in 2018. Before stepping down from the legislature and being sworn in as a judge, Coomer took his family to Hawaii and paid for the trip with campaign funds, the Supreme Court said.

“Although Judge Coomer attempted to identify a legislative purpose for the trip, ultimately the trip was entirely leisure,” Wednesday’s opinion said.

Thomas, *supra* note 117.

¹²³ See WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 4 (Folger Shakespeare Library) <https://www.folger.edu/explore/shakespeares-works/hamlet/read/3/4/> [<https://perma.cc/C9KF-EXQX>]. For his part, Coomer, not so eloquently as Shakespeare, commented that “he was disappointed in the court’s ruling but that *I acknowledge that my own errors in judgment resulted in the Supreme Court’s decision.*” Thomas, *supra* note 117 (emphasis added).

an already scheduled election for their seat, the governor may appoint someone to the seat and the election is therefore postponed to the next cycle.¹²⁴ Litigation involving just such a situation resulted in lawsuits by two non-incumbent Supreme Court candidates running against a gubernatorial appointment created by an anticipatory resignation.¹²⁵ That litigation has made dynasty an even greater likelihood.¹²⁶

Barrow v. Raffensperger arose from the decision of Justice Keith Blackwell (one of the Georgia Supreme Court's finest young justices¹²⁷) to inform Georgia Governor Brian Kemp, on February 28, 2020, that he resigned from his seat—effective November 18, 2020.¹²⁸

¹²⁴ See Daniel Nicheanian, “Dystopian” Loophole for Georgia Judicial Elections Gives Brian Kemp the Last Laugh, BOLTS (Mar. 21, 2022), <https://boltsmag.org/dystopian-loophole-for-judicial-elections-gives-brian-kemp-the-last-laugh/> [<https://perma.cc/2G9A-2S7G>].

¹²⁵ See Ashley Mallon, *The Case of the Vanishing Supreme Court Contest: Barrow v. Raffensperger Eliminates the Power of the People to Elect Their Appellate, Superior, and State Court Judges*, 72 MERCER L. REV. 957, 958–59 (2021).

¹²⁶ See *id.* at 959. There was an earlier dust-up over a similar issue that created major headaches for the Georgia Supreme Court and then-Governor George Busbee. Justice Jesse G. Bowles performed what only can be termed a *Hamlet routine* as he vacillated over whether he would run for the Supreme Court to which Governor Busbee had appointed him; and then, whether he would serve once had been re-elected without opposition! KRITZER, *supra* note 65, at 138–39. Bowles finally resigned—but “[d]espite his apparent resignation, Bowles took the oath of office for the new term on December 15, 1980, . . . began his new term on January 1, 1981,” then “[f]our days later he resigned again!” *Id.* at 139. Governor Busbee made an appointment (Justice Hardy Gregory), but residents of two counties sued the State to force it to hold a special election, which they claimed Georgia law required. See *Duncan v. Poythress*, 515 F. Supp. 327, 330–31 (N.D. Ga. 1981). A federal district court agreed, and ordered that election, and enjoined Justice Gregory from positioning himself as “the incumbent.” *Id.* at 344. The Circuit affirmed. *Duncan v. Poythress*, 657 F.2d 691, 693 (5th Cir. 1981). Certiorari was sought and granted. *Poythress v. Duncan*, 455 U.S. 937, 937 (1982). In the meantime, Justice Gregory won the election, and the U.S. Supreme Court dismissed the petition as “improvidently granted.” *Poythress v. Duncan*, 459 U.S. 1012, 1012 (1982). But Justice Gregory had been listed on the ballot as the incumbent—in contravention of Judge Richard Freeman’s order—and when the original opponents challenged the results of the 1982 special election, Judge Freeman ordered the special election to be re-run. KRITZER, *supra* note 65, at 140. The election was duly run again on May 3, 1983, and Justice Gregory, who this time was not listed as the “incumbent,” won again. *Id.*

¹²⁷ See Joanna B. Apolinsky & Jeffrey A. Van Detta, *The Antebellum Irony of Georgia’s Disguised Lex Fori Doctrine: O Where Have You Gone, Brainerd Currie?*, 50 CUMB. L. REV. 407, 431–32 (2020). In 2017, the author’s home institution awarded Justice Blackwell an LL.D. degree, noting his judicial excellence. See *Atlanta’s John Marshall Law School Welcomes Georgia Supreme Court Justice as 2017 Commencement Speaker*, ATLANTA’S J. MARSHALL L. SCH. (May 19, 2017), <https://www.johnmarshall.edu/atlantas-john-marshall-law-school-welcomes-georgia-supreme-court-justice-2017-commencement-speaker/> [<https://perma.cc/D3AC-UXUA>] (quoting Dean Malcolm L. Morris, who described Justice Blackwell as having had “an illustrious career”).

¹²⁸ See *Justice Keith Blackwell to Resign in November*, SUP. CT. GA. (Feb. 28, 2020), <https://www.gasupreme.us/justice-blackwell-resign/> [<https://perma.cc/8TWF-67UC>]. Justice Blackwell, then aged forty-four, cited financial concerns:

Citing family obligations, Justice Blackwell said in a letter to the governor that he had decided to return to private law practice. “Our oldest daughter will leave for college in

Two candidates—attorneys Elizabeth Beskin and John Barrow—prepared to file the necessary paperwork to contest for Justice Blackwell’s seat, which had he not resigned, he would have been required to run and defend in a May 2020 election.¹²⁹ On March 1, 2020, Governor Kemp “notified the Secretary of State that he intended to fill Justice Blackwell’s office . . . by appointment.”¹³⁰ Secretary of State Raffensperger decided that, in light of the Governor’s notice, he was going to exercise an appointment power, the Secretary’s Office would accordingly “cancel candidate qualifying for the May 19 election for Justice Blackwell’s office and [Raffensperger] directed his staff to publicize that decision and not to accept qualifying documents and fees for the election for that

only a couple of years, and her sisters will follow not long behind,” he wrote, adding that, “I have decided that it is best for my family that I return to the private practice of law.”

Id. The day after his resignation became effective, Alston & Bird announced that Justice Blackwell had joined the firm. *See Supreme Court of Georgia Justice Keith Blackwell to Rejoin Alston & Bird*, ALSTON & BIRD (Nov. 19, 2020), <https://www.alston.com/en/insights/news/2020/11/supreme-court-of-georgia-justice-keith-blackwell> [<https://perma.cc/6298-BDWC>]. In the twenty-first century, the Georgia Supreme Court has lost two additional judicial stars, Chief Justice Leah Ward Sears and Chief Justice Harold D. Melton, to the more lucrative private practice of law. *See, e.g., Chief Justice Sears to Join Schiff Hardin*, ATLANTA BUS. CHRON., <https://www.bizjournals.com/atlanta/stories/2009/05/11/daily55.html> [<https://perma.cc/848R-QN68>] (May 13, 2009, 10:40 AM); *Chief Justice Melton to Leave Supreme Court*, SUP. CT. GA (Feb. 21, 2021), <https://www.gasupreme.us/chief-justice-melton-announcement/> [<https://perma.cc/FA8W-67LD>]. Justice Melton’s letter to the Governor echoed the financial considerations cited by Justice Blackwell:

“July 31 will mark my [thirtie]th year working in state government, [sixteen] years with the Court,” Chief Justice Melton said. “This fall, all of our three children will be attending college at the same time. Now is the best time for me to explore opportunities for the next season of life that will allow me to best serve our legal community and my extended family. I do not now know what my next move will be. With this announcement, I can begin the search process in earnest.”

See Chief Justice Melton to Leave Supreme Court, supra. Former Chief Justice Melton joined the large Atlanta-based law firm now known as Troutman Pepper Hamilton Sanders LLP. *See Georgia Chief Justice Harold D. Melton to Join Troutman Pepper’s National Litigation Practice Group in Atlanta*, TROUTMAN PEPPER (June 29, 2021), <https://www.troutman.com/insights/georgia-chief-justice-harold-d-melton-to-join-troutman-peppers-national-litigation-practice-group-in-atlanta.html> [<https://perma.cc/PTW5-8SW5>].

¹²⁹ *Barrow v. Raffensperger*, 842 S.E.2d 884, 887 (Ga. 2020). For further background on Attorney Beskin, who served as a Republican in the Georgia Legislature, see generally *Beth Beskin*, BALLOTPEdia, https://ballotpedia.org/Beth_Beskin [<https://perma.cc/9K9H-WLA5>]. Originally, in 2019, she announced an intention to run for the seat Justice Robert Benham would be vacating when his retirement became effective on March 1, 2020. *See Bill Rankin, A Third Candidate Announces Bid for Georgia Supreme Court Seat*, AJC NEWS (Sept. 12, 2019), <https://www.ajc.com/news/local/third-candidate-announces-bid-for-seat-georgia-supreme-court/mbaDlCxGpA3JHzfTmOEGzK/> [<https://perma.cc/EXB5-R79L>]. Attorney Barrow was a former Democratic Congressman from the Athens, Georgia, area. *See Russ Bynum, Candidate Suing Georgia for Canceled Election Joins New Race*, AP NEWS, <https://apnews.com/article/591043e9dcda6e0a02952ec916ac86cf> [<https://perma.cc/U7JZ-6F5S>] (Mar. 6, 2020, 6:00 PM).

¹³⁰ *Barrow*, 842 S.E.2d at 888.

office.”¹³¹ Attorneys Barrow and Beskin “each then attempted to qualify for election to Justice Blackwell's office, but the Secretary's staff refused to accept their qualifying documents and fees.”¹³²

Judicial watchdog responses to these maneuvers were both swift and condemnatory. One group, for example, declared:

You might think these provisions would entitle Benham's and Blackwell's replacements to serve only through the end of 2020, spending a few uneventful months keeping the seats warm for their duly elected successors. That “unless otherwise provided” caveat is an important one, though, because the state constitution also specifies that appointees to elected judicial positions automatically get extra time in office, serving through the year of the next general election that is more than six months out from their appointment.

Put differently: If Brian Kemp makes you a Supreme Court justice with fewer than six months to go until an election for Supreme Court justice, that election gets bumped for two full years. Sure enough, on March 1, Secretary of State Brad Raffensperger cancelled the contests for both seats on the grounds that Kemp would fill these vacancies himself.

The policy rationale for this loophole sounds sensible enough: It prevents rookie justices from having to learn the ropes of their new job while simultaneously running a hastily assembled campaign to keep it. But maneuvers like Blackwell's and Benham's are less about easing bureaucratic transitions than they *are about transforming seats on the court into prizes for the governor to dole out as he sees fit. When resignations conveniently arrive this close to an election, Kemp gets to dispense entirely with the burden of holding one.*¹³³

¹³¹ *Id.*

¹³² *Id.*

¹³³ Jay Willis, *Brian Kemp's Sham Democracy in Georgia*, APPEAL (May 13, 2020), <https://theappeal.org/politicalreport/brian-kemp-georgia-supreme-court-district-attorney-elections/> [<https://perma.cc/S5EZ-3N5Q>] (emphasis added). Willis further elaborated:

Benham's departure is a textbook example of this informal spoils system at work, but Kemp's bid to replace Blackwell is a more aggressive assertion of executive power. Since Blackwell is sticking around until November [means that] appointing his successor amounts to “filling” a position that is not actually vacant, while in the meantime cancelling the already-scheduled, constitutionally prescribed method for selecting his replacement. *Id.* However, Justice Nahmias's ratiocinations were devoted to rejecting this common-sense interpretation of the events and their legal significance, permitting Governor Kemp's position to sweep the field. *See Barrow*, 842 S.E.2d at 896.

For their part, Beskin and Barrow turned to the courts for relief.¹³⁴ Georgia has not merged their common-law writs into a modern statutory scheme with the elegant beauty of article 78 of the New York Civil Practice Law and Rules.¹³⁵ Thus, Beskin and Barrow had to employ Georgia's arcane process for seeking a writ of mandamus, which is fraught with many procedural curiosities and thorny issues.¹³⁶ The Fulton County Superior Court denied relief.¹³⁷ The Georgia Supreme Court receives appeals directly from the superior courts in mandamus cases.¹³⁸ That was the next stop for Candidates Beskin and Barrow.

The appeal to the Supreme Court encountered a significant problem, however. Much like the recusals from the U.S. Supreme Court in 1945 that left the seminal antitrust case *United States v.*

¹³⁴ See *Barrow*, 842 S.E.2d at 887.

¹³⁵ See DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 557, at 1066 (6th ed. 2018). Incorporated into the New York Civil Practice Law & Rules (C.P.L.R.) in 1937, the article 78 proceeding combines and supplants the common law writs of certiorari to review, mandamus, and prohibition. *Id.*; see also *id.* §§ 558–61 (describing the mandamus, prohibition, and certiorari functions of article 78). The author learned such vital characteristics of civil practice in New York from having taken two semesters of C.P.L.R. with Professor Siegel in 1986-1987. See generally George F. Carpinello, *In Memoriam: Mentor to the Profession: David D. Siegel*, 78 ALB. L. REV. 305, 305 (2014) (“David, unfortunately, was a member of a diminishing species: an academic who wrote for and about the profession . . . [who] probably [has been] cited more than anyone else by New York’s courts.”); George Carpinello, *A Tribute to David D. Siegel*, 72 ALB. L. REV. 439, 439 (2009).

¹³⁶ See generally GA. CODE ANN. §§ 9-6-20 to 9-6-28. Mandamus lives in chapter 6, “Extraordinary Writs,” of the Official Code of Georgia Annotated Title 9 (Georgia’s Civil Practice Code) along with the writs of prohibition and quo warranto. See *2022 Georgia Code, Title 9—Civil Practice, Chapter 6—Extraordinary Writs*, JUSTIA, <https://law.justia.com/codes/georgia/2022/title-9/chapter-6/> [https://perma.cc/2MUB-2VPH]. The Georgia Legislature has recently created a more modern process to repeal and replace Georgia’s complex notice of appeal and certiorari review statutes (former GA. CODE ANN. §§ 5-3-1 to 5-3-21 & §§ 5-4-1 to 5-4-21) with a unified “Petition for Review” procedure for appealing cases “from a lower judicatory to a superior or state court,” codified at GA. CODE ANN. §§ 5-3-1 to 5-3-21. See Marcia Ernst, *New Georgia Procedure for Appealing Decisions of Lower Judicatories to State or Superior Court Takes Effect July 1, 2023*, SMITH, GAMBRELL & RUSSELL, LLP, <https://www.sgrlaw.com/georgia-petition-for-review/> [https://perma.cc/Q2Q2-EWSC]. “The new ‘Petition for Review’ procedure is a single, modern, uniform, logical, and relatively simplified process for superior or state court review of lower judicial and quasi-judicial decisions” and is designed “to eliminate antiquated processes (like a writ of certiorari) and dovetail with the Civil Practice Act” by abolishing the “old process of appealing a decision of a city court, zoning board, local planning commission, or local licensing board, for example, [which] was impossibly complicated” by “many procedural traps for the unwary.” *Id.*

¹³⁷ *Barrow*, 842 S.E.2d at 887.

¹³⁸ 7 GEORGIA PROCEDURE: SPECIAL REMEDIES AND PROCEEDINGS § 6:25 (2015); GA. CODE ANN. § 9-6-28(b). The code, confusingly worded and without cross-reference, in the classic Georgia fashion, states, “[m]andamus cases shall be heard on appeal under the same laws and rules as apply to injunction cases.” GA. CODE ANN. § 9-6-28(b); see also GA. CODE ANN. § 5-6-34(a)(7) (discussing appeals from injunctions).

*Alcoa*¹³⁹ to be decided—after special Act of Congress¹⁴⁰—by Learned Hand and his Second Circuit panel sitting in lieu of the U.S. Supreme Court,¹⁴¹ there were numerous recusals among the Georgia Supreme Court justices from hearing the consolidated Beskin-Barrow appeal.¹⁴² An eight-judge court was cobbled together from the justices who declined, despite Barrow's motion, to recuse themselves—Chief Justice Melton, Presiding Justice Nahmias, and Justice Warren—and five superior court judges selected from across the state “by the Clerk of this Court at random from a pre-existing list and . . . designated in the place of the nonparticipating Justices.”¹⁴³

In a lengthy opinion from a six-judge majority, Presiding Justice David Nahmias wound his way through layers of issues; but the final outcome was to be determined by “whether Justice Blackwell's office will *actually* be vacated before the end of his existing term, and that indeed is the question on which these cases turn.”¹⁴⁴ On the one hand, Justice Nahmias wrote, “if Justice Blackwell's office will *inevitably* be vacated on or before November 18, then the Secretary's decision to cancel the May 19 election for the next term of Justice Blackwell's office is not subject to reversal by mandamus.”¹⁴⁵

On the other hand, however, if Justice Blackwell's resignation, notwithstanding its acceptance by the Governor, could be lawfully withdrawn before Justice Blackwell actually vacates his office, then no matter how likely it may be that the resignation becomes effective on November 18, there would be no certainty that his office would be vacant before December 31—that is, there would be a chance that he *might* complete

¹³⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

¹⁴⁰ *See* Act of June 9, 1944, ch. 239, 58 Stat. 272 (later codified at 28 U.S.C. § 2109).

¹⁴¹ *See* Lewis F. Powell, Jr., *Forward* to GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, at x (1st ed. 1994); Marc Winerman & William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 299–300 & n.22 (2013).

¹⁴² Order of the Georgia Supreme Court in Case No. S20M1012, S20M1020 (2020), <https://www.courthousenews.com/wp-content/uploads/2020/03/barrow-raffensperger.pdf> [<https://perma.cc/7ZVC-DCUV>]. Barrow moved for recusal of all justices of the Supreme Court. *Id.* Justices Blackwell, Boggs, Peterson, Bethel, and Ellington each decided on their own to recuse themselves. *Id.* The five judges so designated to sit on the Supreme Court to decide the case were Scott L. Ballard (Superior Court, Fayette County, Georgia), Brenda Holbert Trammell (Chief Judge, Superior Court, Baldwin County, Georgia), Richard M. Cowart (Judge, Lowndes County, Georgia), Sarah F. Wall (Chief Judge, Superior Court, Oconee Judicial Circuit), and Timothy R. Walmsley (Superior Court, Eastern Judicial Circuit). *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Barrow v. Raffensperger*, 842 S.E.2d 884, 901 (Ga. 2020).

¹⁴⁵ *Id.*

his existing term—and the Secretary would be required to conduct a nonpartisan election this year to fill the next standard term in the office beginning on January 1, 2021.¹⁴⁶

In Justice Nahmias' view, “these cases boil down to whether, under Georgia law, a Justice's ‘prospective’ resignation, tendered unequivocally in writing but effective only as of a future date, may be withdrawn after the Governor has formally and unequivocally accepted it as effective on that same date.”¹⁴⁷ Here is where the majority went for the jugular: “This Court has not directly addressed this question before, but for the several reasons that follow, we conclude that such a resignation cannot be lawfully revoked, even if both the Justice and the Governor consent to its purported withdrawal before its effective date.”¹⁴⁸ Justice Namhias brought this seemingly ineluctable line of reasoning to its crescendo in an assertion that the Court was actually *limiting* gubernatorial power, rather than expanding it by affirming the superior court's denial of mandamus relief—and confirming Governor Kemp's authority to appoint successors to justices who resign with future effective dates rather than submit the choice of their successor to Georgia voters:

By tendering his prospective resignation *before* the qualifying period for the election (and having it accepted by the Governor), Justice Blackwell put the Secretary of State, potential candidates, voters, and the public on notice that his office will be vacated at a time that will make the election legally meaningless; by so doing, he also precluded criticism that he was basing the timing of his resignation on who won or lost the election. The beneficial consequences of the approach taken by Justice Blackwell would be unavailable under a doctrine that allowed withdrawal of accepted resignations. Instead, an accepted prospective resignation effective after the election date would produce uncertainty about whether the election would have any legal effect and accusations that the resignation was announced to deter some or all candidates from qualifying for the election.

Judicially creating a withdrawal-by-mutual-consent doctrine would also shift more power over resignations to the

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Governor, who would effectively be able to decide whether an official who has second thoughts about resigning is allowed to remain in office. Our opinions cannot give Governors more authority over resignations than is constitutionally and statutorily prescribed.¹⁴⁹

Chief Justice Melton—always the diplomatic conciliator whose winged ways with words shall be sorely missed¹⁵⁰—concurred with the granitic Nahmias opinion, but offered a metaphor (almost a bedtime story) to soothe the ruffled feathers of those whose righteous cholera was summoned by the Governor's strategic mechanisms that the Court had just blessed:

In more illustrative language, one might think of Justice Blackwell's term as his carrying the torch handed to him on the day he took office at this Court. When Justice Blackwell vacates his office on November 18, 2020, he will not be handing that torch to a successor Justice, either elected or appointed. Instead, Justice Blackwell will be handing that torch to the Governor, at which time it will be immediately extinguished. No one, even if elected to do so at a prior time, could carry Justice Blackwell's torch after he vacates office, because that torch is neither burning nor extant. Instead, by appointment, the Governor must light a wholly new torch and hand it to a new Justice. This is simply the manner in which the law works when we apply the relevant constitutional provisions ratified by the people of Georgia to the facts of this case.¹⁵¹

The doughty dissenting duo of superior court judges was having none of it, however. Judge Brenda Holbert Trammell,¹⁵² joined by

¹⁴⁹ *Id.* at 905.

¹⁵⁰ See, e.g., Harry J. Winograd, *Georgia's Chief Justice Harold Melton's Transition—Grace in a Pandemic*, LINKEDIN (June 11, 2021), <https://www.linkedin.com/pulse/georgias-chief-justice-harold-meltons-transition-grace-winograd/> [<https://perma.cc/92RC-CZ7M>]; *Retiring Georgia Supreme Court Chief Justice Harold Melton Honored with Senate Resolution*, ALBANY HERALD (Mar. 3, 2021) https://www.albanyherald.com/news/retiring-georgia-supreme-court-chief-justice-harold-melton-honored-with-senate-resolution/article_43755dbe-7c4e-11eb-8e04-5b15579f43bc.html [<https://perma.cc/25AV-7X6E>].

¹⁵¹ *Barrow*, 842 S.E.2d at 908 (Melton, C.J., concurring).

¹⁵² To gain a better sense of this Judge, called from the trial bench to sit as a Georgia Supreme Court justice on a case of intuitional import, see generally Susan Jacobs, *Judge Brenda Trammell—Litigator, Mother & More*, MONTICELLO NEWS (Apr. 30, 2015)

Judge Scott L. Ballard,¹⁵³ offered an extensive, point-by-point response and critique of Justice Nahmias’s majority opinion.¹⁵⁴ In an early portion of her lengthy dissent, Judge Trammel observes that the majority’s approach seems to confuse the tail with the dog that is supposed to be wagging it:

We must reconcile two constitutional provisions. One guarantees the rights of the voters to determine the next Justice of the Supreme Court of Georgia. The other grants to the Governor the right to fill vacancies in such office by appointment. In most circumstances, the determination is fairly obvious. In this one, however, there is a direct conflict between the constitutional provisions requiring election and those providing for appointment. The majority gives the greater weight to the provisions allowing appointment. Because I feel that this denies the people the right to elect their Justice as provided by the Constitution, I cannot agree with the majority position.¹⁵⁵

In her valedictory paragraph, Judge Trammell recontextualized the dispute from both personal and *vox populi* perspectives:

I am a judge that was initially appointed by Governor Deal (in a very wise and discerning move, I might add). I am not against gubernatorial appointments. However, in this instance, when the resignation will not result in a vacancy in the office until (originally) almost six months after the election, I cannot in good conscience agree that the election should be cancelled and the will of the people thrust aside as “fruitless and nugatory.” I respectfully dissent.¹⁵⁶

<https://themoniceonnews.com/judge-brenda-trammellitigator-mother-more-p11720-115.htm>
[<https://perma.cc/6L4Y-GFQE>].

¹⁵³ To gain a better sense of this Judge, called from the trial bench to sit as a Georgia Supreme Court justice on a case of intuitional import, see generally *Ballard Law Office—Our History*, <https://www.ballardlaw.us/our-history/> [<https://perma.cc/SWH9-A7B7>]; *An Inmate, The Judge Who Sentenced Her and a Life Changed*, CITIZEN (Apr. 15, 2020) <https://thecitizen.com/2020/04/15/an-inmate-the-judge-who-sentenced-her-and-a-life-changed/> [<https://perma.cc/REQ5-ESHQ>] (providing an example of Judge Ballard’s insightful and intuitive approach to judging).

¹⁵⁴ See *Barrow*, 842 S.E.2d at 908–15 (Trammell, J., dissenting); *An Inmate, The Judge Who Sentenced Her and a Life Changed*, *supra* note 153.

¹⁵⁵ See *Barrow*, 842 S.E.2d at 908 (Trammell, J., dissenting).

¹⁵⁶ See *id.* at 915.

There has also been less-polite criticism of the Court's handling of the case from commentators,¹⁵⁷ as well as Candidate Barrow and his attorneys.¹⁵⁸ But that changes naught. We are left, in the memorable words Cecil B. DeMille placed in the mouth of Yul Brynner as Pharaoh Rameses in *The Ten Commandments*, with the bottom line: "So let it be written; so let it be done!"¹⁵⁹

IV. FROM DEMOCRACY TO DYNASTY

The expansion of both the Georgia Court of Appeals (from nine to fifteen judges) and the Georgia Supreme Court (from seven to nine justices) gave Governor Nathan Deal, both a lawyer and a Republican, the opportunity to appoint judges of a strict

¹⁵⁷ See Mallon, *supra* note 125, at 974.

¹⁵⁸ Lonnie T. Brown, Jr., *Criticizing Judges: A Lawyer's Professional Responsibility*, 56 GA. L. REV. 161, 167–68 (2021). As then-Professor (now Dean) Brown notes,

The lawyers for the lead appellant John Barrow responded to the recusal decision by sharply criticizing the non-recusing justices in the media. Barrow, also a lawyer and one of the would-be candidates for the court seat at issue, was even more condemnatory in rebuking the justices, especially Presiding Justice David Nahmias. In addition to questioning the appropriateness of Nahmias's refusal to recuse, Barrow also took the opportunity to denounce Nahmias generally for his alleged domineering style on the bench and suggested that the Presiding Justice was using his authority improperly to obtain a desired result in Barrow's appeal.

Id. (footnotes omitted). The author has also been critical of another decision written by Justice Nahmias: that in *Coon v. Medical Center, Inc.*, 797 S.E.2d 828 (Ga. 2017). See Apolinsky & Van Detta, *supra* note 127, at 408. Dean Brown notes that "[i]n rejecting [ABA Model Rules of Professional Conduct] Rule 8.2(a) and its overly-restrictive application to lawyers, both Georgia and the District of Columbia have appropriately accorded primacy to lawyers' free-speech rights in the interest of enhancing judicial accountability, thus helping to foster public confidence in the judiciary." Brown, *supra*, at 219. Justice Nahmias retired from the Court in 2022, see *Chief Justice Nahmias to Leave Supreme Court*, SUP. CT. OF GA. (Feb. 11, 2022), <https://www.gasupreme.us/02-11-2022-chief-justice-nahmias-to-leave-supreme-court/> [<https://perma.cc/TL47-AJGE>], and joined the Atlanta Office of the Jones Day law firm in January 2023, see *Former Georgia Supreme Court Chief Justice David Nahmias Will Join Jones Day as a Partner in Atlanta*, JONES DAY (Jan. 2023), <https://www.jonesday.com/en/news/2023/01/former-georgia-supreme-court-chief-justice-david-nahmias-will-join-jones-day-as-a-partner-in-atlanta> [<https://perma.cc/V746-9UWF>].

¹⁵⁹ THE TEN COMMANDMENTS (Paramount Pictures 1956); see also Laurance Jerrold, *So Let Be Written, So Let It Be Done*, 143 AM. J. ORTHODONTICS & DENTOFACIAL ORTHOPEDICS 745, 745 (2013). In June 2020, Beth Beskin lost an election to Justice Bethel, who had been appointed by Governor Nathan Deal in 2018. *Georgia Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Georgia_Supreme_Court_elections_2020 [<https://perma.cc/VW3U-ZM2P>]. After his defeat in the mandamus litigation with Mr. Raffensperger, Attorney Barrow did not further pursue a Georgia Supreme Court candidacy in the 2022 election. See *John Barrow (Georgia)*, BALLOTPEDIA, [https://ballotpedia.org/John_Barrow_\(Georgia\)](https://ballotpedia.org/John_Barrow_(Georgia)) [<https://perma.cc/Q3YY-BRDS>]. Ultimately, Governor Kemp appointed Fulton County Superior Court Judge Shawn LaGrua to the opening created by Justice Blackwell's retirement. Jill Nolan, *Kemp Names Appointee for Controversial Supreme Court Vacancy*, GA. RECORDER (Dec. 1, 2020, 5:56 PM), <https://georgiarecorder.com/briefs/kemp-names-supreme-court-appointee-for-controversial-vacancy/> [<https://perma.cc/BT84-DD6E>].

constructionist, textualist modality.¹⁶⁰ And the Georgia Court of Appeals has been the primary incubator for Georgia’s Supreme Court justices,¹⁶¹ just as the D.C. Circuit has so often been for the U.S. Supreme Court.¹⁶² This has monumentally historic consequences for the future of Georgia’s appellate courts and the meaning of “judicial elections” for those courts in Georgia.

First, the huge advantage that appointed appellate judges have received in Georgia when they finally have to stand for a statewide, general election, is documented.¹⁶³ The incumbents have almost never lost. In the last forty years, no incumbent appellate judge, appointed by the governor to fill an unexpired term, has lost a subsequent judicial election.¹⁶⁴ As a recent commentator observed, “Georgia has judicial elections, but in practice most judges are initially appointed by the governor.”¹⁶⁵

Second, the Georgia Supreme Court’s 2020 decision in a consolidated case,¹⁶⁶ challenging the continued service of Republican-oriented justices for months after they announced their resignations that allows the governor simultaneously to declare the seats “fill by appointment,” allows the dominant party—now and likely for some time to come, the Republican party—truly to have its cake and eat it too.¹⁶⁷ An incumbent justice can announce resignation

¹⁶⁰ See Bill Rankin, *A New Era for Georgia’s Highest Court*, AJC NEWS (Jan. 9, 2017), <https://www.ajc.com/news/local/new-era-for-georgia-highest-court/U8aXCg22yOsshBPrGJtfCO/> [https://perma.cc/D4CU-LEW4]; Nathan Deal, BALLOTPEDIA, https://ballotpedia.org/Nathan_Deal [https://perma.cc/3552-M2BR]; *Georgia’s Appellate Court Expansion*, MCGAHREN L. (Oct. 9, 2015), <https://mcgahrenlaw.com/georgias-appellate-court-expansion/> [https://perma.cc/X22B-4XJU].

¹⁶¹ Using data derived from information found through further research from *List of Justices of the Supreme Court of Georgia (U.S. State)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List_of_justices_of_the_Supreme_Court_of_Georgia_\(U.S._state\)](https://en.wikipedia.org/wiki/List_of_justices_of_the_Supreme_Court_of_Georgia_(U.S._state)) [https://perma.cc/D2E7-7UDF], the author has found that of twenty-five Supreme Court justices whose service began in or after 1981, eleven of them came from the Georgia Court of Appeals. More recently, in the period 2012 through the present, nine out of the eleven justices who began their service during this period came from the Georgia Court of Appeals. See *id.*

¹⁶² See Adam Feldman, *Empirical SCOTUS: The Singular Relationship Between the D.C. Circuit and the Supreme Court*, SCOTUSBLOG (Oct. 3, 2019, 10:44 AM), <https://www.scotusblog.com/2019/10/empirical-scotus-the-singular-relationship-between-the-d-c-circuit-and-the-supreme-court/> [https://perma.cc/7ZF6-T5NS] (“More current and recent Supreme Court justices previously served on the D.C. Circuit than on any other court.”).

¹⁶³ See, e.g., Tribble, *supra* note 74, at 1036, 1048, 1054, 1066.

¹⁶⁴ See Willis, *supra* note 133.

¹⁶⁵ Aaron Mendelson, *How Republicans Flipped America’s State Supreme Courts*, CTR. FOR PUB. INTEGRITY (July 24, 2023), <https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts/> [https://perma.cc/V7VC-CLBD].

¹⁶⁶ See *Barrow v. Raffensperger*, 842 S.E.2d 884 (Ga. 2020).

¹⁶⁷ See *id.* at 887–88.

to take effect at a future date,¹⁶⁸ and coordinate that date with: (1) the governor to allow them to find an ideologically suitable appointee to take the departing justice's place, and (2) the secretary of state to avoid declaring the vacancy one to be filled by voters in the next general election.¹⁶⁹

Third, the governor of Georgia is virtually certain to be a Republican for as far as we can reasonably foresee into the future.¹⁷⁰ The changes in politics, both statewide and nationally, since the terms of the last Georgia governors to appoint moderate and even progressive appellate judges (Governors Zell Miller and Roy Barnes, 1991-2003), ensure that even well-supported Democratic candidates, most recently Stacey Abrams,¹⁷¹ will be unlikely to prevail in a statewide election.¹⁷² In that case, there will not likely be, in the foreseeable future, progressive governors, such as Zell Miller, to appoint progressive judges, like former Justice Leah Ward Sears,¹⁷³ to the Georgia Supreme Court, where they can then take the incumbent advantage into re-election.

¹⁶⁸ When an opponent recently called for a Georgia Supreme Court candidate to make a pledge that he would not resign before the end of his term, thereby creating a vacancy for a Republican governor to fill the appointment, the candidate was dismissive of such a promise, "as 'an absurd stunt.'" See R. Robin McDonald, *Bethel Challenger Calls on Justice to Pledge He Won't Resign*, DAILY REP. (May 15, 2020, 8:12 PM), <https://www.law.com/dailyreportonline/2020/05/15/bethel-challenger-calls-on-justice-to-pledge-he-wont-resign/> [https://perma.cc/ECZ7-LL4H].

¹⁶⁹ See discussion *supra* Section III.A.2; Mallon, *supra* note 125, at 958–59.

¹⁷⁰ See *Party Control of Georgia State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Georgia_state_government [https://perma.cc/DA9Q-X28C].

¹⁷¹ Democrat Abrams lost to Republican Brian Kemp by 55,000 votes in 2018, but a larger margin of nearly 298,000 votes in 2022. See *November 8, 2022: General/Special Election*, GA. SEC'Y OF STATE https://results.enr.clarityelections.com/GA/115465/web.307039/#/summary?category=C_1&subcategory=C_1_1 [https://perma.cc/A52B-2HBV] (Nov. 21, 2022, 3:05 PM); *November 6, 2018: General Election*, GA. SEC'Y OF STATE, <https://results.enr.clarityelections.com/GA/91639/Web02-state.221451/#/> [https://perma.cc/L9R6-LDDY] (Nov. 17, 2018, 4:27 PM).

¹⁷² See M.V. Hood III & Seth McKee, *Partisan Schism in America's Newest Swing State*, 29 PARTY POL. 853, 855 (2023); Vanessa Williams, Mike DeBonis & Erica Werner, *Georgia Democrat Stacey Abrams Will Not Run for Senate in 2020*, WASH. POST (Apr. 19, 2020, 2:23 PM), <https://www.washingtonpost.com/politics/2019/04/30/georgia-democrat-stacey-abrams-will-not-run-senate/> [https://perma.cc/6KAX-PEHQ]; Charles S. Bullock III, Susan A. MacManus, Jeremy D. Mayer & Mark J. Rozell, *Stacey Abrams's Bid to Become America's First Black Woman Governor Comes Up Short*, in AFRICAN-AMERICAN STATEWIDE CANDIDATES IN THE NEW SOUTH 29, 67 (2022); Sharon D. Wright Austin, *Contemporary Black Populism and the Development of Multiracial Electoral Coalitions: The 2018 Stacey Abrams and Andrew Gillum Gubernatorial Campaigns*, 136 POL. SCI. Q. 417, 438 (2021); cf. Kristine Stilwell, Book Review, 60 GA. LIBR. Q. 32, 32 (2023) (reviewing GREG BLUESTEIN, *FLIPPED: HOW GEORGIA TURNED PURPLE AND BROKE THE MONOPOLY ON REPUBLICAN POWER* (2022)).

¹⁷³ See Herman Graham III, *The Progressive Streak of Chief Justice Leah Ward Sears: Individual Rights and Judicial Elections in Georgia, 1992-2005*, 20 J.S. LEGAL HIST. 101, 102 (2012).

Effectively, therefore, Georgia law and politics have combined in the third decade of the twenty-first century to assure that selection of Georgia's Supreme Court justices by "election," as Georgia has effectively redefined that term, simply serves only to create a strict-constructionist, textualist dynasty of very conservative justices on the Supreme Court of Georgia.¹⁷⁴ While the *ABA Journal* celebrated on a hopeful note in *The Changing Faces of Southern Courts* in 1993,¹⁷⁵ the wheel has made almost a full retrograde turn—and become frozen there. Of each of our most recent pair of Republican Governors, one might observe—as Lyman Hall¹⁷⁶ and the other delegates proclaimed to King George in the document written during a hot summer in Philadelphia—that “[h]e has made Judges dependent on his Will alone, for the tenure of their offices.”¹⁷⁷

V. A CODA

When this Article was in final stages of drafting, the Georgia Supreme Court (as constituted by Governors Deal and Kemp) gave evidence that it was to be no mere lapdog of the governor, at least when it comes to separation of powers. After the Georgia Legislature and Governor enacted (what the author saw *ab initio* as) a most ill-advised and ill-starred bill,¹⁷⁸ to allow a newly created

¹⁷⁴ See, e.g., Mendelson, *supra* note 164.

¹⁷⁵ See Mark Curriden, *The Changing Faces of Southern Courts*, 79 A.B.A. J. 68, 69 (1993). The article notes that “nowhere has [change] been more dramatic or swift than in Georgia . . . The list of decisions by the Georgia Supreme Court that fly in the face of recent conservative federal court rulings is growing by the month.” *Id.* at 70, 72; see also DAVIS, SEARS, *supra* note 71, at 79.

¹⁷⁶ Of Dr. Lyman Hall, a Northeasterner (like the author) who came to Georgia from his native Connecticut in his 30s, it has been aptly written:

Though Lyman Hall dabbled in a number of vocations [e.g., minister, physician, and eventually, planter], he was as focused as they came with regard to fighting for America's freedom. And as that fight wore on, he helped lead the most fence-straddling of the colonies to sign on for separation from Britain. Of course, this was after he took matters into his own hands and carried them all the way to Philadelphia—without Georgia's blessing.

DENISE KIERNAN & JOSEPH D'AGNESE, *Lyman Hall: The Signer Who Dragged Georgia into the Union, in SIGNING THEIR LIVES AWAY: THE FAME AND MISFORTUNE OF THE MEN WHO SIGNED THE DECLARATION OF INDEPENDENCE* 220, 220–21 (2009); see also Stan Deaton, *Lyman Hall: 1724–790*, NEW GA. ENCYC. <https://www.georgiaencyclopedia.org/articles/government-politics/lyman-hall-1724-790/> [<https://perma.cc/P652-R5EC>] (Feb. 21, 2018).

¹⁷⁷ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); Cherri Gregg, *How Philadelphians Handled Heatwaves in 1776*, CBS NEWS (June 20, 2012), <https://www.cbsnews.com/philadelphia/news/how-philadelphians-handled-heatwaves-in-1776/> [<https://perma.cc/QQN2-QHY5>].

¹⁷⁸ See Sydney Horwitz, *Georgia Senate Press Office, Governor Brian Kemp Signs Legislation to Establish Prosecuting Attorneys Qualifications Commission* (May 8, 2023), <https://senatepress.net/governor-brian-kemp-signs-legislation-to-establish-prosecuting->

administrative body in the state to discipline, or even remove, district attorneys in Georgia based (in the author's view) on the drift of political winds,¹⁷⁹ the Court was asked to *bless* the rules and procedures that the inaugural body (the euphemistically appellation "Prosecuting Attorneys Qualifications Commission," or "PAQC"¹⁸⁰) had adopted for itself.¹⁸¹ That was all that was holding this body back from having official existence and going after Athens-Clarke and Oconee Counties District Attorney Deborah Gonzalez¹⁸² and Fulton County District Attorney Fani Willis¹⁸³ for what more than a few

attorneys-qualifications-commission.html [https://perma.cc/23Z8-TMN3]; see also Max Abramson, *The Unconstitutional Consequences of a Prosecutorial Oversight Commission*, GA. RECORDER (Apr. 24, 2023), https://georgiarecorder.com/2023/04/24/the-unconstitutional-consequences-of-a-prosecutorial-oversight-commission/ [https://perma.cc/F5MF-YH6Z]; Jeff Amy, *Georgia Prosecutors Are Suing to Strike Down a New State Law that Undermines Their Authority*, AP NEWS, https://apnews.com/article/georgia-prosecutors-lawsuit-commission-0f9593225ac0a5caf4de8d457907ae71 [https://perma.cc/EZL3-TAUZ] (Aug. 2, 2023, 1:32 PM). See generally 2023 Ga. Laws 349, § 2 (effective May 5, 2023) (providing the language and context of the bill being described).

¹⁷⁹ See GA. CODE ANN. § 15-18-32 (2023); Abramson, *supra* note 178.

¹⁸⁰ Press Release, Lieutenant Governor of Georgia, Lt. Governor Jones Announces Appointments to Prosecuting Attorneys Qualifications Commission (Aug. 4, 2023), https://ltgov.georgia.gov/press-releases/2023-08-04/lt-governor-jones-announces-appointments-prosecuting-attorneys [https://perma.cc/XP93-KTM5].

¹⁸¹ 2023 Ga. Laws 349, § 2.

¹⁸² See Associated Press, *Georgia Enacts Law Letting Panel Punish, Oust Prosecutors*, U.S. NEWS (May 5, 2023, 6:50 PM), https://www.usnews.com/news/best-states/georgia/articles/2023-05-05/georgia-enacts-law-letting-panel-punish-oust-prosecutors [https://perma.cc/G82S-TSAT]. This article discusses how the law is tantamount to a bill of attainder against Athens-Clarke and Oconee Counties District Attorney Gonzalez. See *id.*

"I strongly oppose an excessive and unnecessary commission as district attorneys are already held accountable under existing laws and through the current democratic process of holding election," said Deborah Gonzalez, Democratic district attorney for Athens-Clarke and Oconee counties.

Gonzalez, under fire in Kemp's hometown of Athens, was cited by Republicans as one of the law's top targets. She has declined to prosecute marijuana crimes, some prosecutors have left her office and judges have criticized her for missing court deadlines.

Crucially, the Georgia law mandates that a prosecutor must consider every case for which probable cause exists and can't exclude categories of cases from prosecution.

Id.

¹⁸³ See *id.* *U.S. News* also noted that:

Fulton County District Attorney Fani Willis has also decried the measure, calling it a racist attack after voters elected 14 nonwhite DAs in the state. Some have viewed the law as Republican retribution against Willis, who is considering criminal charges against former President Donald Trump over interference in Georgia's 2020 election.

Id. That indictment was issued later in August 2023, heightening Republican calls to unleash the PAQC on District Attorney Willis. Amy Sherman, *Ask PolitiFact: Can Georgia Republicans Oust Fulton County DA Fani Willis?*, POLITIFACT (Aug. 31, 2023), https://www.politifact.com/article/2023/aug/31/ask-politifact-can-georgia-republicans-oust-fulton/ [https://perma.cc/Q4NA-BX68]. Republican leaders in the Georgia Senate started the process. Greg Bluestein, *Top Senate Republicans Seek to Reprimand Fani Willis over Trump Charges*, AJC NEWS (Oct. 9, 2023), https://www.ajc.com/politics/top-senate-republicans-seek-to-reprimand-willis-over-trump-charges/2HB45YLJUNCFLODJXRHQ4USPN4/ [https://perma.cc/BRQ6-AJQN].

Georgia lawyers¹⁸⁴ saw as separate sins against Republican sensibilities within the state.¹⁸⁵ The PAQC had transmitted to the Georgia Supreme Court draft standards of conduct and rules for the Commission's governance, pursuant to the PAQC law that provides that "such standards and rules shall be effective only upon review and adoption by the Supreme Court."¹⁸⁶ The Court, in a Memorandum Order issued on November 22, 2023, declared that "[a]fter consideration, we have grave doubts that adopting the standards and rules would be within our constitutional power," and therefore, flatly declined to take action on the PAQC's proposed standards and rules.¹⁸⁷

November 22, 2023, was a very good day for the Supreme Court of Georgia. Whether it portends a streak of independence under Chief Justice Boggs to rival that of the old Fifth Circuit under Chief Judge Elbert Tuttle as chronicled in *Unlikely Heroes*,¹⁸⁸ remains to be seen and may simply be wishful thinking. But, at least, there is a glimmer

¹⁸⁴ See, e.g., *Georgia District Attorneys File New Lawsuit Against the State to Challenge Reactivated Oversight Commission*, OFF. OF THE DEKALB CNTY. DIST. ATT'Y (Apr. 16, 2024), https://www.dekalbda.org/news_detail_T6_R288.php [<https://perma.cc/GY7L-R9WZ>].

¹⁸⁵ See, e.g., Abigail C. Sisson & Erica L. Welsh, *SB 92—Establishing a Prosecuting Attorneys Qualifications Commission*, 40 GA. STATE U. L. REV. 55, 76 (2023) ("Opponents have voiced additional concerns, expressing that the Act will essentially control and punish prosecutors who Republicans disagree with."); Associated Press, *supra* note 182; Sherman, *supra* note 183.

¹⁸⁶ 2023 Ga. Laws 349, § 2.

¹⁸⁷ Order, Sup. Ct of Ga., Matter No. S24U0190, In re: Prosecuting Attorneys Qualifications Commission Rules and Code Of Conduct (Nov. 22, 2023), <https://statecourtreport.org/sites/default/files/2023-12/In%20re%20Prosecuting%20Attorneys%20Qualifications%20Commission%20Rules%20-%20Georgia%20Supreme%20Court%20-%202011.22.2023.pdf> [<https://perma.cc/JAT7-HPHP>].

As part of its detailed and extensive elaboration of abstaining from the matter, the Court observed:

The Georgia Constitution vests "[t]he judicial power" in this Court. Ga. Const. of 1983 Art. VI § I ¶ I. The Constitution also decrees that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others" except as provided by the Constitution itself. Ga. Const. of 1983 Art. I § II ¶ III. So any action this Court takes must either be (1) within the judicial power or (2) otherwise specifically authorized by the Constitution.

.....

If this were a case that came to us through the ordinary litigation process, we would likely have to answer at least some of the difficult constitutional questions outlined above. But this is not a case; rather, it is a situation in which we must determine whether to exercise our administrative authority that is incident to the judicial power. In making that determination, just as in deciding cases and in all other official tasks, we remain mindful of the oath that we all took to do all things "agreeably to the laws and Constitution of this state and the Constitution of the United States." [GA. CODE ANN.] § 15-6-6.

Id. (footnote omitted).

¹⁸⁸ BASS, *supra* note 68.

of hope that there may be more to this judicial dynasty than one might have expected.

Meanwhile, John Barrow once again stepped forward to challenge the status quo in (s)elections for the Supreme Court of Georgia. In the November 2024 general election, Mr. Barrow challenged Justice Andrew Pinson, the Court's most recently appointed member, for the seat.¹⁸⁹ As a veteran political commentator observed about the match-up, "[t]ired of waiting for an open seat on the Georgia Supreme Court, former U.S. Rep. John Barrow is embarking upon what's been a fool's errand for 179 years: He wants to unseat a sitting [J]ustice in an election."¹⁹⁰ The commentator likened Mr. Barrow to "a lion looking for the most vulnerable wildebeest at the watering hole" for challenging "the youngest and most junior of the four justices up for reelection this year."¹⁹¹ Being a realist, however, the commentator wryly added, "[v]ulnerable' might not be the proper word. No incumbent justice has lost an election since the Supreme Court was founded in 1845, the year Marthasville was renamed Atlanta."¹⁹²

The commentator has proven prescient. Mr. Barrow lost the May 21, 2024 election to sitting Justice Pinson by ten percentage points.¹⁹³

*"Plus ça change, plus c'est la même chose."*¹⁹⁴

¹⁸⁹ See *John Barrow (Georgia)*, *supra* note 158.

¹⁹⁰ Bill Torpy, *Georgia Supreme Court Club Works to Keep Its Seats In-House*, AJC News (Mar. 6, 2024), <https://www.ajc.com/opinion/columnists/opinion-georgia-supreme-court-club-works-to-keep-its-seats-in-house/BLYGSMINKFF3ZGRN7Z7PI2APDQ/> [<https://perma.cc/J4B9-M7BH>].

¹⁹¹ *Id.*

¹⁹² Mr. Torpy further confirms one of this Article's primary points about (s)election of Georgia Supreme Court justices: "Even though it's an elective seat, [J]ustices are almost always appointed. Pinson was appointed to his seat just three days after his predecessor, David Nahmias, abruptly retired in 2022." *Id.* Mr. Barrow, as Mr. Torpy reports, "says he [had] planned to run again in 2022 against Justice Nahmias 'but then he followed the playbook' and retired before his stint was over, allowing the governor to make a pick." *Id.*

¹⁹³ Rick Rojas, *Georgia Supreme Court Justice Fends Off Challenger Who Made Abortion Rights a Focus*, N.Y. TIMES (May 21, 2024), <https://www.nytimes.com/2024/05/21/us/politics/georgia-supreme-court-andrew-pinson.html> [<https://perma.cc/MA4E-KK4U>]; *Georgia Supreme Court Elections, 2024*, BALLOTPEdia, https://ballotpedia.org/Georgia_Supreme_Court_elections_2024 [<https://perma.cc/236E-ECL2>].

¹⁹⁴ *Alphonse Karr*, in JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 514, 514 & n.3 (Emily Morison Beck ed., 15th & 125th anniversary ed. 1980). It is usually translated, "The more things change, the more they remain the same." *Id.* This was a favorite line oft-quoted by the author's late mentor and law-firm partner, Duane C. Aldrich, Esq., a well-respected member of the Georgia Bar and a nationally prominent labor lawyer, see *Aldrich, Duane C.*, N.Y. TIMES (Dec. 30, 1997), <https://www.nytimes.com/1997/12/30/classified/paid-notice-deaths-aldrich-duane-c.html> [<https://perma.cc/24KX-ZDFR>].