The Jurisprudence of the First Woman Judge, Florence Allen: Challenging the Myth of Women Judging Differently

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

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

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\(^2\) Id. at 53–54, 56; Florence Ellinwood Allen, The Supreme Court of Ohio & the
the first woman elected to a state Supreme Court, elected to the Ohio Supreme Court in 1922 and re-elected in 1928. She was the first woman appointed to a federal appellate court, nominated to the U.S. Court of Appeals for the Sixth Circuit in 1934 by President Franklin D. Roosevelt. She was the first woman to serve as chief judge of a federal appellate court, taking leadership of the Sixth Circuit in 1958. And, she was the first woman shortlisted for the U.S. Supreme Court, nominated for more than ten vacancies by four presidents from both parties.

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

4. Id. at v; Florence E. Allen Named Federal Judge: First Woman to Get Place on Circuit Bench, N.Y. TIMES, Mar. 7, 1934, at 9. The first woman jurist appointed to any federal court was Genevieve Cline, chair of the Ohio Republican Women, appointed to the United States Customs Court in New York City by President Calvin Coolidge in 1928. TUVE, supra note 1, at 88.
5. TUVE, supra note 1, at 189.
8. ALLEN, supra note 7, at 31.
supported by both Republican and Democratic women at the local and national level. Allen credited “the great woman movement” and the “sisterhood” for her success and judicial appointments: “the place didn’t come to me,” she said, “you gave it to me.” The bipartisan amalgamation of suffrage women and their organizational networks would continue to lobby for Allen, securing her nomination to the federal appellate court, and endlessly campaigning for her nomination to the U.S. Supreme Court.

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

10. Tuve, supra note 1, at 53–56.
14. Tuve, supra note 1, at 126.
15. See id. at 92, 116–17, 126.
16. Like many progressive women supporting the labor movement, Allen approved of protective legislation for women workers, which was thought to be threatened by equal rights for women because labor laws of minimum wage and maximum hours were legally premised on women’s difference and weakness. See Muller v. Oregon, 208 U.S. 412, 420 (1908); Tracey Jean Boisseau & Tracy A. Thomas, After Suffrage Comes Equal Rights? ERA as the Next Logical Step, 227, 234–37, in 100 YEARS OF THE NINETEENTH AMENDMENT (Holly J. McCammon & Lee Ann Banaszak, eds. 2018). Allen was also aligned with Maud Wood Park, Carrie Chapman Catt, and the League of Women Voters all of whom opposed Alice Paul and her ERA movement, due to Paul’s militantism during the suffrage movement. Boisseau & Thomas, supra, at 230; Tuve, supra note 1, at 30–35.
17. See Allen, supra note 7, at 56, 142.
18. See Clark, supra note 12, at 497.
was the global peace movement, though she spent most of her career focused on narrow questions of local law. These paradoxes reveal a moderate approach to judicial decision making, closely tied to facts and rules rather than politics or ideals.

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

A key question at the time of Allen’s judicial appointment, as now, is whether women judge differently than men. In Allen’s time, there was fear that a woman would be more moralistic, stemming from the prohibition and temperance movements, or more emotional or anti-intellectual in approach. Today, studies have sought to find a connection between gender and judicial outcome. Some studies have suggested that women jurists are more likely to support plaintiffs in sexual harassment, employment, and immigration cases, or vote more liberally in death penalty and obscenity cases. Yet other studies have found little evidence that women
judge differently from men. Judge Allen’s record, as this Article will show, supports the second conclusion: that women judge no differently than men. In fact, Allen worked hard to refute any claim that women judged differently. She worked repeatedly to refute claims of women’s judicial incompetency, and instead molded herself in the male norm to prove that women could “think like a man,” which to her meant crafting clear, objective, authoritative decisions unencumbered by emotion or her former pro-woman idealism.

This Article delves into the life and work of Judge Allen to provide insight to the contributions and jurisprudence of the first woman judge. For history questions what difference putting a woman on the bench might have made. Part I explores Allen’s early influences on her intellectual development grounded in her progressive and politically active family, and her close network of female professional friends. Part II discusses her pivotal work with the women’s suffrage movement, working with the national organizations in New York and leading the legal and political efforts in Ohio. This proactive commitment to gender justice, however, would not survive her ascension to the bench. Once on the court, few cases raised issues of women’s rights, and in those that did, Allen offered only neutral support. Instead, her initial entrée to the judicial profession on the common pleas court focused on judicial management, legal process, and being tough on crime, while supportive of defendant’s rights. Part III traces these cases, highlighting her notoriety as a judge against mafia and corrupt lawyers and judges. Part IV then analyzes Allen’s jurisprudence from her decade on the state supreme court, following the wide variety of cases before her and tracking her developing reputation as a moderate, but politically inconsistent judge. Part V explores Allen’s decisions from her twenty-five years on the federal court of appeals, reconciling her reputation as a Roosevelt
liberal with her moderate and bipartisan decisions. The final section of the Article then analyzes Allen’s judicial career, tracing her failed nominations to the U.S. Supreme Court and evaluating her limited legacy to the profession. Her once zealous advocacy of gender justice fizzled into simple polite encouragement of women in the legal profession. Overall, this story reveals the jurisprudence of the first woman judge, crafted carefully to reflect a moderate judge, fitting within the male-centric norms of the profession, and discarding any promise of women’s advocacy on the bench.

I. EARLY INFLUENCES: PROGRESSIVE FAMILY AND FEMALE FRIENDS

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

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

35. See TUVE, supra note 1, at 12, 65.
36. See Florence Allen, Diary, in Florence E. Allen Papers, 1932–1936, Box 4, Folder 1 (on file with the Western Reserve Historical Society Archives) [hereinafter Allen Papers]; TUVE, supra note 1, at 81.
37. See ALLEN, supra note 7, at 14; TUVE, supra note 1, at 8.
38. See ALLEN, supra note 7, at 44; TUVE, supra note 1, at 81, 134.
39. Organ, supra note 13, at 220; TUVE, supra note 1, at 134.
40. TUVE, supra note 1, at 162.
41. See Cook, supra note 6, at 21–22; TUVE, supra note 1, at 6–7.
42. See ALLEN, supra note 7, at 2, 9–10.
leaders of the women’s suffrage movement in New York City and Ohio pushed Allen towards a progressivism feeding her personal development as a professional, unmarried woman. These women, many lawyers, activists, and lesbians, modeled an alternative model of women’s role in society free from the domestic family. And it would be these women who would loyally support Allen throughout her life and career.

A. Family, Service, and Community

Florence Allen was born on March 23, 1884, in Salt Lake City, Utah, after her family relocated there from the Western Reserve of Northeastern Ohio. Florence was born three years after the move, the third of six children. Allen’s father, Clarence Emir Allen (“Emir”), had been a professor of Greek and Latin at Western Reserve College in Hudson, Ohio. He gained his five minutes of fame by being the first college baseball player in Ohio to throw a curve ball, helping Reserve beat Oberlin College 36 to 5 in 1877. Emir was diagnosed with terminal tuberculosis, and the family moved to Utah as a last ditch effort to save his life, on the advice and help of his friend, Liberty Holden, founder of the Cleveland Plain Dealer. The move worked, and Emir survived even after losing one lung, going on to study law and work as a mining manager. He was elected seven times to the territorial legislature, making contributions to the law of workplace maximum hours laws, occupational safety, and public schools. Upon Utah’s admission as a state, Emir was elected in 1895 as one of the first state representatives to the U.S. Congress. However, he served only one term, opposing, like other pro-silver

43. See Organ, supra note 13, at 218–27.
44. See id.
45. Id. at 219.
46. See TUVE, supra note 1, at 4.
47. ALLEN, supra note 7, at 2.
48. See Letter from J.P. Barden to Mrs. [Helen] Fitzmiller (May 14, 1936) (on file with the Western Reserve Academy Archives, Hudson, Ohio) (stating Allen learned the curve pitch while playing semi-professional baseball the summer before with the Keystones in Erie, Pennsylvania); Paul Packard, The Historic Spot Which Witnessed the First College Curve (c. 1938) (on file with the WRA Archives); Grad Pitches First “Curve” in College Ball, CLEVELAND PLAIN DEALER, c. 1970.
49. See ALLEN, supra note 7, at 2.
50. Id.
51. See Letter from Clarence Emir Allen to Hon. R.N. Baskin (Dec. 6, 111) (on file in Allen Papers, Box 1, Folder 1) (discussing public school legislation); H.F. No.1 in the Utah House of Representatives, introduced by Clarence Allen (Jan. 14, 1890) (on file in Allen Papers, Box 1, Folder 1) (establishing free public schools).
dissenters, the Republican Party’s endorsement of the gold standard and the 1896 Republican national convention nomination of Ohioan William McKinley for president, and he became entangled in the unsuccessful crusade to unseat Mormon Senator Reed Smoot.53

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

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

53. See id. at 214–15, 222.
54. See ALLEN, supra note 7, at 9–10.
56. IVERSEN, supra note 52, at 246.
57. Id. at 247 (citing Letter from Corinne Allen to Alice Stone Blackwell, n.d. (c.1930) (on file in National Association of Woman Suffrage Association Papers (NAWSA), Library of Congress)).
58. See id. at 247.
59. See TUVE, supra note 1, at 7.
60. See IVERSEN, supra note 52, at 176, 252.
61. See id. at 246–52 (citing Mrs. Clarence E. Allen, Have You Taught Your Child to be a Monogamist, CHILD WELFARE MAG. 10 (Feb. 1916) (on file in Allen Papers, Box 1, Folder 1) (establishing a “Sex Morality Code” of the National Congress of Mothers and Parent Teacher Association for the monogamous “ideal of normal family life,” which included opposition to sex education in the schools, and teaching children not to masturbate)).
62. IVERSEN, supra note 52.
Florence, at the age of twelve, moved back to the Cleveland area to live with her maternal grandparents while her father served in Washington, D.C. She attended her grandfather’s New Lyme School, and then the Women’s College of the Western Reserve University. In high school, she emerged as a leader among her peers, called “Cousin Jo” by classmates for her resemblance to Louisa May Alcott’s independent-minded character in the classic book, Little Women, who, like Jo, starred in school plays, often assuming the male lead. For her “‘swan song’ as the editor of the high school literary journal, she wrote an editorial condemning sororities as undemocratic— though she herself had been a member of one.”

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

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64. Id. at 99.
65. Id.
66. Organ, supra note 13, at 220.
67. See Iversen, supra note 52, at 221.
68. See Allen, supra note 7, at 21–22; Tuve, supra note 1, at 19–20.
70. Ross, supra note 69.
71. See Allen, supra note 7, at 21–22; Tuve, supra note 1, at 17.
72. Tuve, supra note 1, at 17; Florence Allen, Diary, Aug. 29, 1904 (on file in Allen Papers, Box 3, Folder 1).
B. Finding Feminist Friends

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

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

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

73. Organ, supra note 13, at 220.
74. See id.
75. See id. at 220–21.
76. See id. at 221–22.
77. See Tuve, supra note 1, at 21.
78. Id. at 18.
79. Id. at 21.
81. Tuve, supra note 1, at 21.
82. Id.
83. Id. at 22. The first woman lawyer in Cleveland, Mary Spargo, began practice in 1885 after serving an apprenticeship with the law firm, Morrow & Morrow. James Harrison Kennedy, A History of the City of Cleveland: Its Settlement, Rise and Progress 470 (1896). Spargo was admitted to practice by the Ohio Supreme Court, but had previously been refused an appointment as a notary public on the grounds that the constitution did not permit it. Id. A large portion of her clients were women, as she intended and expected, but also included male clients, and her work was not confined to “clerical or subordinate duties.” Id.
a male fortress, with lawyers concerned mostly with aspects of private property, business incorporation, crime, and legal affairs,” subjects “with which women supposedly . . . should not be concerned.” The long-prevailing assumption was that women were intellectually inferior to men and lacked a logical and rational mind. Early feminist leaders, like Elizabeth Cady Stanton and Sarah Grimké, challenged these gendered assumptions from the early 1800s, seeking to advance women’s position through equal access to higher education.

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

84. Tuve, supra note 1, at 22. Fifteen years later, in 1920, “when the proportion of women in the [legal] profession[] reached [its] peak, less than three per cent of the [the] profession was female.” Id.
86. See Elizabeth Cady Stanton, Address on Woman’s Rights (Sept. 1848), in Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony 94, 98 (Ann D. Gordon, ed. 1998); Sarah M. Grimké, Letters on the Equality of the Sexes and the Condition of Women (1837).
87. See Landever, supra note 19, at 25.
88. See Tuve, supra note 1, at 21–22.
89. Id. at 22.
90. Anderson, supra note 63, at 100.
91. Tuve, supra note 1, at 22 (internal quotations omitted).
93. Allen, supra note 7, at 49.
unhappy in Chicago, where money was short and friends were few. She did connect with Jane Addams and the Hull House Settlement, befriending and working a bit with the emerging social workers there.

Disillusioned in Chicago, in summer 1910, Allen transferred to New York University Law School. NYU was one of the largest law schools in the country, and had by then admitted eighty-two women among its total enrollment of 600. She first enrolled in the evening division, but soon transferred to the day division as she prioritized law school above work. Women students at NYU met regularly and listened to speeches designed to compensate for their supposedly deficient life skills, for example to learn general business knowledge like reading a broker’s statement. They were told “[t]hey must work the clock around day in and day out and be at the beck and call of business when it comes” rather than being detoured by “some side issue.” Women were also told they must compensate for the fact that the voice and physical appearance of the average women lawyer “does not produce the impression of authority and aggressiveness” which are key characteristics of a lawyer (defined as male).

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

94. See TUVE, supra note 1, at 22–23.
95. ALLEN, supra note 7, at 24.
96. See TUVE, supra note 1, at 23.
97. Id.
98. Id.
99. See id. at 24–25.
100. See id. at 25.
101. Id.
102. See TUVE, supra note 1, at 25.
103. See id.
104. See id. at 23.
105. Id.
106. Id.
a social work job that was based on women’s volunteerism. Allen found another job with the National College Women for Equal Suffrage that paid forty dollars per month, serving as an assistant secretary to suffrage leader Maud Wood Park, which brought Allen into the inner circle of the women’s suffrage movement and launched her work as a zealous suffrage advocate. She also gave paid lectures on current events to the New York Board of Education and private girls’ schools. Allen’s time in New York was transformational. She established lifelong friends and colleagues from progressive suffrage circles who would be pivotal in her future legal work and judicial campaigns.

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

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

107. See id. at 24.
108. See TUVE, supra note 1, at 26.
109. Id.
110. See Cook, supra note 55, at 319.
111. See Organ, supra note 92, at 64, 71.
112. Florence Ellinwood Allen, supra note 2.
113. Organ, supra note 92, at 7.
114. See id. at 150.
115. See TUVE, supra note 1, at 63, 80.
117. TUVE, supra note 1, at 80.
118. Id. at 131.
119. Organ, supra note 92, at 150.
120. Boston marriages were not unheard of among wealthy and privileged women of the late nineteenth and early twentieth century and gave women the opportunity to have close personal friendships based on equality and the freedom to pursue careers and political activism. See LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA 18–21 (1991).
as her close inner circle of lesbian friends have led some modern scholars to assume that Allen was gay.121 If true, Allen herself was not out about it.122 Nor is there any evidence in her biography or remaining public papers, although Allen and Mary culled those carefully before donation.123 In her diary, Allen notes only that she talked “lesbianism and marriage,” during one weekend in the country, and read and circulated the book *Marriage as a Trade*, which argued for women to reject marriage in favor of a professional career.124 However, any social acceptance of lesbianism that might have existed in the early century of New York City, quickly faded over the decades of Allen’s adulthood, increasing in social taboo and repression with the conservatism through the 1950s.125 Therefore, it is not surprising that Allen, even if gay, would not have so identified, as the first lesbian judge appointed to a federal court was in 1994, and the first openly gay judge in Ohio was not until 2007.126

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

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

124. *See id.* at 93, 148 (citing Florence Allen, Diary, June 4, 1920 & Nov. 20, 1923); *see also* Cicely Hamilton, *Marriage as a Trade*, at v–vii (1909).

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


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

128. *See id.* at 40.
woman out in such weather. Allen handled cases that came in the door, including legal aid referred work, and she served as lead attorney for the national and state women’s suffrage movement. Her first case was helping a woman divorce her abusive husband. She was appointed an assistant county prosecutor in Cleveland in 1919 by a Democratic administration, with the prosecutor allaying concerns about her gender by saying, “I consider that Miss Allen will do a man’s job in our office. I rate her as the equal of virtually any male attorney.” Allen became the first woman prosecutor in the country, and the first woman admitted to the Ohio Bar Association.

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

129. See id.
130. See Howard, supra note 9.
131. See TUVE, supra note 1, at 40.
132. Id. at 53.
135. See TUVE, supra note 1, at 49.
136. See id.
137. Id. (internal quotations omitted); see VALERIE JEAN CONNER, THE NATIONAL WAR LABOR BOARD: STABILITY, SOCIAL JUSTICE, AND THE VOLUNTARY STATE IN WORLD WAR I 150–51 (1983); Richard B. Gregg, The National War Labor Board, 33 HARV. L. REV. 39, 44–45 (1919). A general precept of the NWLB was that all women hired during the war were to receive equal pay for equal work. See Gregg, supra, at 43.
was granted based on her arguments that the “women did not have their day in court” as they were not permitted to be heard at the first meeting.\textsuperscript{139}

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

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

\section*{II. Advocating for Women’s Suffrage}

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

\begin{footnotes}
\footnote{139. \textit{Id.} at 305.}
\footnote{140. \textit{Id.}}
\footnote{141. \textit{See id.; Conner, supra note 137, at 153, 156.}}
\footnote{143. \textit{See Conner, supra note 137, at 156; Tuve, supra note 1, at 49.}}
\footnote{144. \textit{See Tuve, supra note 1, at 156.}}
\footnote{145. \textit{See id. at 35–36, 42–43.}}
\footnote{146. \textit{See id. at 42–43.}}
\footnote{147. \textit{See id. at 36.}}
\end{footnotes}
in Utah, where her mother was active in the suffrage movement and where women had gained the right to vote.148 The Utah territory granted women the right to vote in 1870, one year after Wyoming became the first state to grant women suffrage, in part to demonstrate that women were not oppressed under polygamy.149 Suffrage leaders Elizabeth Cady Stanton and Susan B. Anthony came to Utah in 1871 to speak with women and herald one of the first states to grant the voting privilege.150 The federal Edmunds-Tucker Anti-Polygamy Act of 1887, however, disenfranchised Utah women voters as a penalty for the territory’s continued polygamy.151 Women’s right to vote was restored in 1896 when Utah became a state after disavowing polygamy.152

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

148. See id. at 26.
150. See Gordon, supra note 149, at 97; Iversen, supra note 52, at 25.
151. See Gordon, supra note 149, at 166.
152. See id. at 201; Iversen, supra note 52, at 175.
154. See id.
155. See Lisa Tetrault, Winning the Vote, 40 Humanities Mag. No. 3 (Summer 2019).
156. See id.
158. See Tetrault, supra note 155.
amendment. Others like Lucy Stone and Carrie Chapman Catt, leader of the merged National American Woman’s Suffrage Association (NAWSA), focused on state campaigns, until 1916 Catt’s “Winning Plan” embraced a two-track approach of a federal amendment priority accompanied by selective state strategies. State campaigns over the decades achieved some scattered success by the early twentieth century when Allen joined the movement, with some states adopting school board suffrage, others municipal suffrage, and six Western states passing full suffrage.

Ohio was a leading battleground in the state strategy for women’s suffrage throughout this time. It had been one of the earliest states after Seneca Falls to organize at the grassroots level, with the Salem Convention on Woman’s Rights in 1850, and the Akron Woman’s Rights Convention in 1851. Ohio women had sought an amendment to the state constitution as part of the constitutional convention to guarantee women’s right to vote. Reorganizing again after the Civil War, Ohio women secured school board suffrage in 1894, which was upheld by the Ohio Supreme Court in 1896. A leader of the NAWSA national suffrage organization, Harriet Taylor Upton, lived in Youngstown where she moved the headquarters of the organization and helped focus the energy for suffrage in her home state.

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

159. See id.

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


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


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

166. See ALLEN & WELLES, supra note 163, at 38–39.
Wood Park, the leader of the National College Women’s Equal Suffrage League. Park believed that the women’s suffrage movement would move faster if younger college women organized in support. The twenty-seven-year-old Florence Allen worked with Park to schedule speakers and organize local chapters for college women.

In the summer of 1912, on break from law school, Allen came to Ohio to help Park campaign for an amendment to the Ohio Constitution granting women the right to vote. Park and Inez Milholland (later to become the iconic lady on the white horse in the New York suffrage parade, and whom Allen also knew from NYU), had set up a college suffrage chapter in Cleveland in 1910. A state constitutional convention in 1912 gave women another opportunity to press for the vote by amendment. The campaign became known as the “Amendment 23” campaign because women’s suffrage was Amendment 23 of 41 amendments presented to the legislature for special election schedule for September 3, 1912. The culmination of the campaign was Ohio’s first suffrage parade in Columbus of approximately 5,000 organized by the Ohio Woman’s Suffrage Association (OWSA) on August 27, 1912. OWSA made attempts to include Black suffragists by integrating the country delegations rather than have a segregated Black section, and by including two floats from Black suffragists. Allen canvassed the state in mostly rural areas, giving ninety-two speeches in eighty-eight counties. She traveled by trolley and buggy, giving speeches from literal soap boxes and automobile back seats. She learned to deal with hecklers, and honed her arguments, essentially adopting the classic arguments of Elizabeth Cady Stanton by arguing that women were unjustly taxed without representation, mirroring the key American demand for freedom.

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167. See TUVE, supra note 1, at 26.
168. See ALLEN, supra note 7, at 29.
169. See id. at 32; TUVE, supra note 1, at 26.
170. See TUVE, supra note 1, at 32–33.
171. See id. at 31.
172. See id.; see also Mikesell, supra note 165, at 12–14.
174. See Rausch, supra note 173, at 131, 134 n.73; ALLEN & WELLES, supra note 163, at 46.
175. See BOOTH, supra note 133, at 68–69.
176. ALLEN, supra note 7, at 32.
177. See TUVE, supra note 1, at 33.
178. See id. at 32–34, 38.
her well for the rest of her life as active supporters in judicial campaigns.\textsuperscript{179} The suffrage amendment, however, failed in the fall, with male voters rejecting it 335,000 to 295,000.\textsuperscript{180}

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

Allen returned to NYU, where she graduated second in her class in June 1913.\textsuperscript{181} During that senior year, she continued to work for women’s suffrage in her spare time, giving speeches at the NAWSA convention in Syracuse and to other groups at Swarthmore, Cornell, Mount Holyoke, Barnard, and the Cleveland City Club.\textsuperscript{182} Allen marched in the massive suffrage parade to Washington, D.C. held on March 3, 1913 and organized by Alice Paul and NAWSA, “the largest peaceful protest ever assembled on D.C. streets to that point.”\textsuperscript{183} The suffragists intended to call out President Woodrow Wilson on the eve of his second inauguration for his opposition to suffrage, and they effectively upstaged him.\textsuperscript{184} Lawyer Inez Milholland led the great parade down Pennsylvania Ave, “clad in a white cape astride a white horse, ... behind her stretched a long line with nine bands, four mounted brigades, three heralds, about twenty-four floats, and more than 5,000 marchers.”\textsuperscript{185} Women from countries that had enfranchised women came first in the procession; then the pioneers, then sections celebrating working women grouped by occupation

\textsuperscript{179.} See id. at 33.  
\textsuperscript{180.} See id. at 34.  
\textsuperscript{181.} Id. at 35.  
\textsuperscript{182.} Id. at 34.  
\textsuperscript{183.} Tetrault, supra note 155; Tina Cassidy, Mr. President, How Long Must We Wait? Alice Paul, Woodrow Wilson, and the Fight for the Right to Vote 45 (2019).  
\textsuperscript{184.} See Tuve, supra note 1, at 34–35; Tetrault, supra note 155; DuBois, supra note 149, at 188–94.  
and dressed for work; then the state delegations; Black women were segregated at the back, though Ida B. Wells-Barnett challenged this arrangement by moving up to her state contingent half way through the parade.\textsuperscript{186} Crowds, however, comprised mostly of men attending the inauguration, attacked the marchers and over one hundred women were sent to the hospital.\textsuperscript{187} NAWSA had planned to present the president with a petition, but organizers shied away from such a direct gesture at the last minute.\textsuperscript{188} Allen left the march and returned to New York where she tried, unsuccessfully, to persuade the board to change its mind about the petition.\textsuperscript{189} In the aftermath of this lost opportunity, the young suffragist Alice Paul demanded more militant political action following the English suffrage tactics of Emmeline Pankhurst like pickets, attacks, and hunger strikes.\textsuperscript{190} Paul formed the Congressional Union of NAWSA, which later spun off as the independent National Woman’s Party (NWP).\textsuperscript{191} Allen stayed loyal to NAWSA, rejecting the militant action which she and other conventional suffragists found to be an embarrassment and an impediment to effective advocacy and persuasion.\textsuperscript{192}
After graduation in 1913, Allen returned to Cleveland, drawn by her suffrage friends and connections there.\textsuperscript{193} Even as she struggled to find paying work, Allen served as the lead attorney for the state woman’s suffrage association until her election to the bench in 1920.\textsuperscript{194} In 1913, women had begun a second campaign to amend the state constitution for women’s suffrage, building on the new opportunity for voter initiatives and referendums adopted in the most recent constitutional convention.\textsuperscript{195} As World War I began in Europe, Allen took and passed the bar exam, and then traveled the state, circulating petitions to get the required number of signatures for a referendum.\textsuperscript{196} When 176 suffragists, two from each Ohio county, tried to present the successful petition at the capitol, the secretary of state refused to appear, even though he had met the liquor industry for their proposed amendment hours before.\textsuperscript{197} The president of the Ohio State University intervened to leave the petition with the secretary’s office assistant.\textsuperscript{198}

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

\textsuperscript{193.} See id. at 35–36.
\textsuperscript{194.} See id. at 36; see also Florence Ellinwood Allen, supra note 2.
\textsuperscript{195.} See ALLEN & WELLES, supra note 163, at 46; Rausch, supra note 173, at 187; Mikesell, supra note 165, at 45–54.
\textsuperscript{196.} See TUVE, supra note 1, at 36.
\textsuperscript{197.} See id. at 37.
\textsuperscript{198.} Id.
\textsuperscript{199.} See ALLEN & WELLES, supra note 163, at 46; TUVE, supra note 1, at 38.
\textsuperscript{200.} ALLEN & WELLES, supra note 163, at 46.
\textsuperscript{201.} TUVE, supra note 1, at 38.
\textsuperscript{202.} See id.
\textsuperscript{203.} See id. at 39.
Cleveland newspaper writers and most Protestant ministers were pro-suffrage, but strong anti-suffrage sentiment came from the industrialists who opposed protective labor legislation like minimum wage and maximum hour laws, and the liquor industry that feared women’s temperance and reformers’ vote for prohibition. Opponents were well funded, hosting picnics for working men with free beer, and plastering posters on trolleys and public spots. The women’s suffrage amendment was defeated, more soundly than in 1912.

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

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

204. See id.
205. See id. at 30, 37–39, 52.
206. See id. at 39.
207. See Tuve, supra note 1, at 37–39; Rausch, supra note 173, at 231.
208. See Tuve, supra note 1, at 41.
209. Allen & Welles, supra note 163, at 48–49.
210. See Allen, supra note 7, at 35; see also Scown v. Czarniecki, 106 N.E. 276, 277, 302 (Ill. 1914); State ex rel. Mills v. Board of Elec. Columbus, 6 Ohio Cir. Dec. 36, 38 (Ohio App. 1895), aff’d without decision, 47 N.E. 1114 (Ohio 1896).
211. Tuve, supra note 1, at 41.
212. Id.
213. Id. at 42, 46 n.54.
214. Allen, supra note 7, at 36; Allen & Welles, supra note 163, at 49.
support a federal suffrage amendment. In Montana, women were voting for the first time, and they would elect the first woman to Congress, Jeanette Rankin. While in Montana, Allen received a wire notifying her that the East Cleveland case would be heard by the Ohio Supreme Court in a few days. She recounted in her autobiography her rush to return to Ohio in time for the hearing. While there were other capable lawyers to handle the argument, Allen had been the lead attorney on the case since the drafting of the charter. She wanted to be the one to argue before the court. She caught the train in Great Falls, Montana, and reportedly gave explicit notice to the train company of her need for a timely arrival, citing potential losses of a thousand dollars from any delay, drawing on her law school training regarding establishing foreseeability for recovery of consequential damages. She wired two friends from Chicago Law School, Alice Greenacre and Greta Coleman, who met her at the connecting station in Chicago with a suitcase of law books, which Allen reviewed overnight to Columbus in preparation for the argument. The Ohio Supreme Court upheld the constitutional validity of municipal suffrage. The Court, however, delayed announcement of the decision until April, so women’s votes in East Cleveland were not counted in the next election, though the cities of Columbus and Lakewood subsequently adopted women’s suffrage charters.

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

215. See Tuve, supra note 1, at 42.
216. Id.
217. Id.
219. Id. at 36.
220. See id.
221. Id. at 36.
222. Id. at 36–37.
224. See Allen, supra note 7, at 37.
225. Tuve, supra note 1, at 43.
unsuccessful.227 Presidential suffrage would prove to be an effective strategy on the road to the Nineteenth Amendment, as North Dakota, Nebraska, Rhode Island, and Indiana passed presidential suffrage in 1917, working in tandem with Allen’s efforts in Ohio, and ultimately seventeen states would pass presidential suffrage.228 In Ohio, Allen and her colleagues talked with every state legislator, and Democratic Representative James A. Reynolds of Cuyahoga County introduced the bill.229 Allen “did much legal work in connection with this [bill],” and handled the hearing before the Ohio Senate.230 In early February 1917, presidential suffrage passed both houses of the Ohio legislature and was signed into law by the progressive Democratic governor, James A. Cox.231

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

227. See DuBois, supra note 149, at 184–85.
228. See App. One: The Electoral Thermometer: Woman Suffrage Won by State Constitutional Amendments and Legislative Acts Before the Proclamation of the Nineteenth Amendment, supra note 161, at 376–77 (including Texas (1918), Maine (1919), Missouri (1919), Iowa (1919), Wisconsin (1919), Tennessee (1919), Kentucky (1919)).
229. See ALLEN & WELLES, supra note 163, at 50–51.
230. ALLEN, supra note 7, at 37.
231. See ALLEN & WELLES, supra note 163, at 51 (noting passage in the House 72 to 50 and in the Senate 20 to 16).
232. See ALLEN, supra note 7, at 37.
233. Id. at 38; ALLEN & WELLES, supra note 163, at 51.
234. Tuke, supra note 1, at 43.
235. Id.
236. See id.
238. See Tuke, supra note 1, at 43.
However, presidential suffrage was passed again in Ohio on June 16, 1919, by large majorities, the same day Ohio became the fifth state to ratify the Nineteenth Amendment. However, presidential suffrage was passed again in Ohio on June 16, 1919, by large majorities, the same day Ohio became the fifth state to ratify the Nineteenth Amendment. Attempts by liquor interests for a state referendum on federal constitutional amendments, upheld by the Ohio Supreme Court, briefly threatened woman’s suffrage. The U.S. Supreme Court, however, held definitively that there could be no state public referendum on the ratification of a federal constitutional amendment by the legislature. With Tennessee’s ratification of the Susan B. Anthony Amendment on August 18, 1920, women’s right to vote was included in the federal Constitution, and state presidential suffrage became irrelevant.

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

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

239. Allen & Welles, supra note 163, at 52 (passing House 75 to 5 and Senate 27 to 3).
240. See id.
241. See Hawke v. Smith, 253 U.S. 221, 231 (1920); Allen & Welles, supra note 163, at 52.
242. See Allen & Welles, supra note 163, at 52.
243. See Tupe, supra note 1, at 49; Allen, supra note 7, at 39.
244. See Tupe, supra note 1, at 47–48; Rausch, supra note 173, at 264.
245. See Tupe, supra note 1, at 48; Allen, supra note 7, at 74.
246. See Allen, supra note 7, at 73–74.
247. See id. at 73–78; Tupe, supra note 1, at 67–72.
248. Allen & Welles, supra note 163, at 5.
249. Id.
and not the usual thing,” and that all had been changed by “universal suffrage with all of its ramifications.”

III. AN INDEPENDENT, TOUGH JUDGE ON THE TRIAL COURT

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

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

250. Id.
251. See ALLEN, supra note 7, at 40.
252. Id. at 39–40.
253. Id. at 41.
254. See TUVE, supra note 1, at 54.
255. See ALLEN, supra note 7, at 41; TUVE, supra note 1, at 55.
256. ALLEN, supra note 7, at 41.
257. See id.
259. ALLEN, supra note 7, at 49.
Despite this non-partisan stance, Florence Allen was clearly a Democrat. She said that she was a Democrat because she believed a political party should exist to "render[] service to the people."

Such service and humane progressive legislation, she argued, was achieved under Democratic President Woodrow Wilson in laws on child welfare and women in industry—for the first time in over forty years. For almost half a century, she chided, “one would have thought that only men, and adult men at that, peopled America.” Allen also cited Wilson’s plan of international peace and the pending League of Nations as a strong reason for her political affiliation. In addition, she noted the progressive Democratic mayor of Cleveland, Tom Johnson, as a reason for her support. The Democratic administration in Cleveland appointed Allen as a prosecutor, and a Democratic state representative introduced women’s presidential suffrage in Ohio, supporting Allen and her views.

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

passage of the Nineteenth Amendment and continuing their bipartisan efforts.\textsuperscript{272}

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

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

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

\begin{itemize}
\item \textsuperscript{272} Tuve, supra note 1, at 52.
\item \textsuperscript{273} Id. at 56–57.
\item \textsuperscript{274} See id. at 57; Wesley M. Oliver, The Prohibition Era and Policing: A Legacy of Misregulation 39 (2018); Eric Burns, 1920: The Year That Made the Decade Roar, 126–27, 200–02 (2015); see also Chris M. Smith, Syndicate Women: Gender and Networks in Chicago Organized Crime 86 (2019).
\item \textsuperscript{275} Tuve, supra note 1, at 57.
\item \textsuperscript{276} Allen, supra note 7, at 46.
\item \textsuperscript{277} Tuve, supra note 1, at 57 (internal quotations omitted).
\item \textsuperscript{278} Id.
\item \textsuperscript{279} See Allen, supra note 7, at 47–48, 50–51.
\end{itemize}
or victim during a criminal trial, an injustice she identified when the defendant made bail, but the complainant was imprisoned for their “protection.” Her solution was not to overturn the state statute or practice, but simply to expedite any case in which a witness was being held. In another example of addressing delay, Allen recommended continuing criminal trials over the summer, rather than breaking for the usual summer delay, during which both defendants and witnesses remained in jail. When the other eleven judges on the court refused, she traded assignments with a judge on the criminal court, rescheduled her vacation, and heard cases throughout the summer.

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

280. See id. at 46–47.
281. See id. at 47.
282. Id. at 52.
283. See id.
284. See id. at 51–52.
285. ALLEN, supra note 7, at 45.
286. Id.
287. Id. at 69.
288. See id. at 51–52.
289. See Gives Rules for Happy Marriage, Newspaper Clipping (Apr. 26, 1922) (on file in Allen Papers, Box 6, Folder 2).
290. See id.
291. See id. (internal quotations omitted).
provide for the wife to receive a regular allowance and be a “business partner” to the husband, and for the wife to be “sympathetic” and “never nag” her spouse.292

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

Allen’s most notorious case as a trial judge was the case of “The Black Hand.”301 Frank Motto, a gang leader who “terroriz[ed] men and women . . . of Italian birth” was convicted of murdering two business partners, then stealing the payroll funds they carried.302
Judge Allen and members of the jury were threatened during the trial, receiving a paper with the printed black outlines of a hand saying “The day Motto dies, you die.”\textsuperscript{303} The jury convicted Motto, and Allen imposed the death penalty as dictated by state law.\textsuperscript{304} She was the first woman judge in the country to impose the death penalty.\textsuperscript{305} Allen reported that she “did not enjoy this task.”\textsuperscript{306} Elsewhere, she said was against capital punishment, but believed it was her judicial duty to enforce the law.\textsuperscript{307} While the Motto case was being appealed up the state courts, Allen moved with her friend to a new apartment.\textsuperscript{308} When Allen traveled, her friend reported periodically hearing someone around the house at night.\textsuperscript{309} When the women later prepared to move out and emptied storage lockers in the basement, they found a number of black hands outlining the walls.\textsuperscript{310}

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

\begin{footnotes}
\item[303.] Id. at 56 (internal quotations omitted).
\item[304.] Id.
\item[305.] Id.
\item[306.] Id.
\item[307.] \textsc{Allen, supra} note 7, at 56.
\item[308.] See id. at 57.
\item[309.] See id.
\item[310.] Id.
\item[311.] Id. at 58.
\item[312.] See id.
\item[313.] \textsc{Allen, supra} note 7, at 58.
\item[314.] See id. at 59–60.
\item[315.] See id. at 61.
\item[316.] \textit{Judge Is To Testify Today: McGannon To Defend Self Against Charge Made by Chief Witness for State, Cin. Enquirer, Dec. 28, 1920,} at 1 [hereinafter \textit{Judge Is To Testify}].
\end{footnotes}
spouse. The state law of spousal incompetency allowed the spouse against whom the testimony is offered to prohibit that testimony in a criminal trial. Thus, it seems Judge McGannon did not want his wife’s statement in court. Judge Allen sentenced McGannon to jail, and standing from her podium, lectured him on the particular wrongfulness of a judge, dedicated to upholding truth and justice, lying in the courts of law.

Allen reported that she was reversed only three times. One of these cases was her decision holding attorney Tim Long in contempt of court. Long, a former prosecutor whom Allen had worked with, was defense counsel to a George Crawford who pled guilty to embezzling $15,000. Crawford had no prior record, and Allen initially sentenced him to parole, and his wife sold some jewelry to make partial restitution. Attorney Long then lied in court, saying there was no other money in hiding, and that he had not received a fee. In the contempt hearing before Judge Allen, it was established that Crawford had deposited $5000 into a bank account with a fictitious name, and given control of the account to Long as a legal fee. Allen sentenced Long to five days in jail for his contempt of lying to the court, and revoked Crawford’s parole. The Ohio courts reversed, finding that Judge Allen improperly imposed summary contempt. Allen had thought her contempt penalty appropriate because the conduct occurred in front of her in court, but she acknowledged in her autobiography that she came to see the importance of restraint in issuing contempt because the judge personally feels the injury and may not have the usual objective distance to render judgment.

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

317. See Wilson R. Huhn, Ohio’s “Sacred Seal of Secrecy”: The Rules of Spousal Incompetency and Marital Privilege in Criminal Cases, 20 AKRON L. REV. 433, 435 (1987); see also State v. Orth, 86 N.E. 476, 477–78 (Ohio 1908) (holding that spouses can testify on behalf of each other, but not against each other).
318. See Huhn, supra note 317, at 436.
319. See Judge Is To Testify, supra note 316, at 1.
320. See ALLEN, supra note 7, at 62.
321. Id. at 52.
322. See Long Given 5 Days in Contempt Case, CLEV. PLAIN DEALER, Nov. 3, 1921.
323. See ALLEN, supra note 7, at 53; see also Long Given 5 Days in Contempt Case, supra note 322.
324. See ALLEN, supra note 7, at 53.
325. See Long Given 5 Days in Contempt Case, supra note 322.
326. See id.
327. Id.
328. See ALLEN, supra note 7, at 54.
329. See id.
her “friendship and cooperation.” That would not, however, be the case for the higher courts on which she would serve.

IV. MODERATION ON THE OHIO SUPREME COURT

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

330. Id. at 52.
331. See id. at 79 (explaining the reaction of the other judges on Judge Allen’s first day).
333. The Court had shifted from majority Democrat in 1913 (five of seven justices) to the majority Republican by 1919, with only one Democrat by 1921, and would remain so until it began to shift back again after the Democratic sweep of 1932 and by 1934 had become majority Democrat (five of seven justices). See Justices by Term Since 1913, THE SUP. CT. OF OHIO, https://www.supremecourt.ohio.gov/SCO/formerjustices/terms.asp [https://perma.cc/XRT4-4892]; see also Justices of the Supreme Court of Ohio 1803 to Present, THE SUP. CT. OF OHIO, http://www.supremecourt.ohio.gov/SCO/formerjustices/default.asp [http://perma.cc/MZX3-2P9V].
334. Tuve, supra note 1, at 63, 65.
335. See Cleveland Woman Judge Elected to Supreme Bench, ST. LOUIS DISPATCH, Nov. 10, 1922, at 1 (“S[h]e had the support of the majority of the women.”). Mary Grossman was also elected to the Cleveland Municipal Court, scandalized by the McGannon case. Tuve, supra note 1, at 73 n.14.
336. See Allen, supra note 7, at 65.
337. See id. at 50.
338. See Tuve, supra note 1, at 65 (citing undated newspaper clipping in Allen Papers, Box 26, Folder 6).
The resulting press celebrating Allen’s successful election as the first woman in the country elected to a Supreme Court was a “veritable love feast,” applauding her historical feat, underscoring her qualifications, and labeling her a “women’s woman.”

However, at least one naysayer, the former mayor of Cincinnati, Edward Dempsey, protested her election, arguing that the results should not be certified because the Nineteenth Amendment gave women only the right to vote, not the right to hold public office. Once certified, Allen moved to Columbus, bought a big old house close to the courthouse, and her parents, sister Esther Gaw, now a single mom and Dean of Women Students at Ohio State University, brother Jack (before his death), and friend Susan moved in.

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

339. Id. at 66–67.
340. See id. at 66. Several states like Iowa and Oklahoma did still prohibit women from holding public office. Id. at 73 n.16.
341. See id. at 78–80.
342. ALLEN, supra note 7, at 79.
343. Id.
344. Id.
though Allen said they eventually became friends.\textsuperscript{345} Even eight years later her colleagues didn’t know what to make of her. When Allen cut her outdated long hair, worn in figure-eight top knot, into a very short style, one of her fellow judges told her she looked like a football player.\textsuperscript{346} Her haircut received media interest, with the newspaper commenting that although Judge Allen had long defied the trend of the “bobbed hair epidemic,” she returned from summer vacation having “cast aside the long chestnut-colored tresses.”\textsuperscript{347} The paper reported that her male colleagues were surprised, but refrained from comment, as “there was no statutory law on the subject of how a woman should wear her hair.”\textsuperscript{348}

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

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

\begin{itemize}
\item \textsuperscript{345} See id. Robinson was a Republican and a former county prosecutor and would become great-grandfather to President George W. Bush. See Daniel Nasaw, \textit{The Bush Family Tree: Five Generations of an American Dynasty}, WALL ST. J. (June 15, 2015), http://graphics.wsj.com/jeb-bush-family-tree [https://perma.cc/5J5K-797X].
\item \textsuperscript{346} See Florence Allen, Diary, Oct. 1, 1929.
\item \textsuperscript{347} \textit{Bobbed Locks Finally Win Judge Allen}, Dec. 22, 1929 (on file with author).
\item \textsuperscript{348} Id.
\item \textsuperscript{349} See \textit{Allen}, supra note 7, at 80.
\item \textsuperscript{350} Id.
\item \textsuperscript{351} See id. at 80–81; \textit{Tuve}, supra note 1, at 92.
\item \textsuperscript{352} See \textit{Allen}, supra note 7, at 80.
\item \textsuperscript{353} See id. at 82–85.
\item \textsuperscript{354} See, e.g., State \textit{ex rel.} Bowman v. Bd. of Comm’rs of Allen Cnty., 177 N.E. 271, 280 (Ohio 1931) (Allen, J., dissenting after hearing), appeal dismissed \textit{sub nom.} Allen Cnty. v. Ohio, 286 U.S. 526 (1932); \textit{City of Cuyahoga Falls v. Beck}, 143 N.E. 661, 667 (Ohio 1924) (holding for city because taxpayers delayed too long in challenging sewer system and
\end{itemize}
cases, Allen upheld Cleveland's new city manager plan against constitutional challenge. The plan by which a city manager was hired by a city council elected by proportional representation had been strongly advocated by Allen and women's organizations like the League of Women Voters as a way to address corruption in government and efficiency over politicking. Allen's opinion was one of the first judicial decisions in the United States to uphold that form of municipal power, and hailed as the first supreme court decision written by a woman. The plan, however, was repealed in 1931, strongly opposed by both political parties. In another important decision on power, Pritz v. Messer, Allen wrote the opinion upholding the constitutionality of the zoning power under the home-rule provision and within the police power to protect the public morals, health, and safety. The United States Supreme Court held similarly three years later in the seminal case, Village of Euclid v. Ambler Realty Co., but Allen had already recognized and articulated the validity of zoning laws as an exercise of police power.

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

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356. See Tuve, supra note 7, at 92–93.
357. See Allen, supra note 7, at 81–82.
358. See id. at 81; Tuve, supra note 1, at 92.
360. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 394–95 (1926); Pritz, 149 N.E. at 35.
for damages.\textsuperscript{362} These views mirrored that of her father, who had worked as a state legislator in Utah to pass a worker’s compensation statute.\textsuperscript{363} Allen’s decisions earned her the support of labor, which publicly endorsed her in her judicial re-election campaigning.\textsuperscript{364} But they also quickly cost her the support of labor in later nominations, when in a subsequent decision, she took the position against labor and voted to uphold a state building contract given to a non-union company.\textsuperscript{365} Allen’s moderate decision making aggravated labor supporters who expected universal sympathy for union workers.\textsuperscript{366}

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

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

\textsuperscript{362.} See Indus. Comm’n v. Polcen, 169 N.E. 305, 306 (Ohio 1929); Ohio Automatic Sprinkler Co. v. Fender, 141 N.E. 269, 277 (Ohio 1923) (reversing past cases by a vote of four to three).
\textsuperscript{363.} See Allen, supra note 7, at 80.
\textsuperscript{364.} See, e.g., id. at 85 (explaining a worker’s compensation case); see also Landever, supra note 19, at 31–32.
\textsuperscript{366.} See Tuve, supra note 1, at 109.
\textsuperscript{368.} See Snedaker, 145 N.E. at 17 (Allen, J., concurring).
\textsuperscript{369.} Allen, supra note 7, at 87.
\textsuperscript{370.} See id. at 76–77.
\textsuperscript{371.} For an overview of Judge Allen’s views on the international peace movement, see id. at 74–78; Tuve, supra note 1, at 67–72; Florence E. Allen, Peace Through Justice, 35 Women Lawyers J. 6, 6–8, 36 (1949) (discussing the tragedy of World War II and the best methods for achieving peace); Florence E. Allen, Address Before National Business and Professional Women (July 1946) (on file in Allen Papers, Box 15, Folder 3). For a background on outlawing war through treaties, see for example Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World xii (2017) (arguing that the Kellogg-Briand Treaty to outlaw war was a transformational movement in international relations).
But losing both of her brothers in World War I triggered a lifelong commitment to peace efforts, and she spoke often on the radio, to church congregations, and to women’s and peace conventions on the topic. Her sincere and inspirational oratory had a “ministerial aura” to it, infused with Biblical references and personal daily parables. Allen believed that she could do more for change from the Senate, where she could make laws, rather than simply interpret them, and where she could engage on a broad international level.

Allen initially received Democratic Party support, but when the past candidate, Atlee Pomerene, then the prosecutor of the Teapot Dome Scandal in Washington, stepped back in, the party dropped its support of Allen in favor of Pomerene. Allen had campaigned after work and during her lunch hour, gave speeches at dinners, toured the state in her Model T car named “Gypsy,” and studied court briefs until four in the morning, all while arriving each day at the court by seven. The unions strongly endorsed her. “Labor is supporting [Judge Allen],” they said, “because she is comparably the best and biggest man available for the job. In brains, character and experience, she towers head and shoulders above the field.” The Railway Labor Organization supported Allen because of her “progressive views and humane tendencies,” and because of her record on the bench showing her “eminently fair to the interests of all classes, including labor.” These endorsements and Allen’s hard work and determinism, however, were not enough. The voters were no longer engaged by peace efforts, as eight years after the war they sought isolationism and distance from the past loss, and caused some to label Allen a “red,” associating her with socialism and anti-patriotic action. Pomerene won the primary, but lost the general election.

In commenting that Ohio had lost the opportunity to be the first state to have a woman U.S. Senator, The Evening Star national newspaper noted that, while the hopes of women across the country had “gone a-glimmering,” Allen had no real chance to defeat the

372. See TUVE, supra note 1, at 70.
373. See ALLEN, supra note 7, at 73–74.
374. TUVE, supra note 1, at 71–72.
375. See id. at 75.
376. See id. at 75–76.
377. See id. at 75, 80–81.
378. See TUVE, supra note 1, at 77.
379. Id.
381. See TUVE, supra note 1, at 85; Florence Allen, Diary, Mar. 21, 1926.
382. See TUVE, supra note 1, at 78.
Republican candidate, though the “race would have been picturesque, . . . with the feminist element interjected.”

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

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

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

384. TUVE, supra note 1, at 86.
385. See id. at 87.
386. See Letter from D.B. Robertson, President, Brotherhood Locomotive Firemen & Enginemen to All Members of B.L.F.&E. Residing in the State of Ohio (Oct. 17, 1928) (on file in Allen Papers, Box 6, Folder 3).
387. See TUVE, supra note 1, at 87, 105.
388. See id. at 84–85.
389. Id. at 87.
390. Id.
391. Id.; see Bd. of Educ. of Sch. Dist. of Dayton v. State ex rel. Reese, 151 N.E. 39, 39 (Ohio 1926) (per curiam). In Reese, the Dayton School Board established separate classrooms for black children in mixed schools in 1912, a practice it had used in the nineteenth century, and then in 1918, assigned all black children at one school to a separate annex behind the main school building where white students attended. Id. Dayton ignored the Ohio Supreme Court’s court decree finding it illegal, and school segregation battles continued there for fifty years, culminating in a U.S. Supreme Court case on the appropriate scope of a desegregation remedy. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979), aff’g, Brinkman v. Gilligan, 583 F.2d 243, 249 (6th Cir. 1978).
392. See State ex rel. Weaver v. Board of Trustees of Ohio State University, 185 N.E. 196, 199 (Ohio 1933); Letter from Clayborne George, Legal Defense Committee of the Cleveland NAACP to Senator Robert Bulkley (Feb. 12, 1934) (on file in Allen Papers, Box 6, Folder 5) [hereinafter Letter from Clayborne George to Senator Robert Bulkley]; Letter from
of Trustees, a Black college student, Doris Weaver, sued Ohio State University for racial segregation in the housing component of her college clinical experience.\textsuperscript{393} Home economics majors like Weaver lived in a house with a student roommate.\textsuperscript{394} When no other student elected to live with Weaver, she was assigned to live with a white instructor in an adjacent house, rather than the main house.\textsuperscript{395} The Ohio Supreme Court’s decision was unanimous in holding that discrimination laws could not reach social, intimate relations such as a roommate.\textsuperscript{396} By 1933, the Court had three Democrats, including a Chief Justice.\textsuperscript{397} The decision had been per curiam, but the NAACP still excoriated Allen for her passive acceptance of the decision and her refusal to dissent.\textsuperscript{398} “We believe that by this opinion, an opinion reeking and pregnant with racial discrimination, Judge Allen and her associates disbarred themselves from any further judicial consideration.”\textsuperscript{399} Allen defended the decision on the facts in a response to the NAACP, and said she would “vote exactly the same,” and that the decision was color blind as the “[same decision] would have been rendered in the case of any white girl.”\textsuperscript{400} Decades later, Allen was still sensitive to the criticism of the case, and seemed to justify her decision by recounting in her autobiography the story of a Black friend from college, Mary Brown, who commented to Allen that she would not have brought such a lawsuit like Doris Weaver, but would have instead continued her studies to make the way easier for the next Black woman’s success.\textsuperscript{401}

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

\textsuperscript{393.} See Weaver, 185 N.E. at 197.
\textsuperscript{394.} See id.
\textsuperscript{395.} ALLEN, supra note 7, at 91.
\textsuperscript{396.} Weaver, 185 N.E. at 199.
\textsuperscript{398.} See Letter from Clayborne George to Senator Robert Bulkley, supra note 392.
\textsuperscript{399.} Id.
\textsuperscript{400.} See Letter from Florence E. Allen to Walter White, supra note 392.
\textsuperscript{401.} See ALLEN, supra note 7, at 92.
\textsuperscript{402.} TUVE, supra note 1, at 103.
Carrington Marshall. Marshall had been elected Chief Justice in 1920, and served until 1932 during most of Allen’s tenure. Marshall was a Republican, fifteen years Allen’s senior, who had thirty years of general office practice as a lawyer. Allen had angered Marshall by calling him out in an opinion she wrote in a case involving the mishandling of school funds. She challenged Marshall’s social and business ties to the case and endorsed the parties’ request for recusal. In the opinion, Allen, and the other justices, criticized Marshall for setting himself on a pedestal and assigning cases so that opinions reflected his own personal views.

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

403. Id. at 103, 108; see also Florence Allen, Diary, Dec. 10, 1932.
405. See Carrington Tanner Marshall, supra note 404.
406. See ALLEN, supra note 7, at 88–90 (citing State ex rel. Turner v. Marshall, 176 N.E. 454, 455 (Ohio 1931)).
408. See TUVE, supra note 1, at 99.
409. See id. at 103.
410. See id.
411. See id. at 104–05.
412. See id. at 105–06.
413. See id. at 103.
414. See TUVE, supra note 1, at 104.
415. See id. at 106.
candidacy put her on the national radar for another political appointment to federal court.416

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

V. A CONSERVATIVE LIBERAL ON THE FEDERAL APPELLATE COURT

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

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

416. See id.
417. Howard, supra note 9; Tuve, supra note 1, at 110.
418. See Tuve, supra note 1, at 110.
419. See M. Neil Reed, Tom Vanderloo & Stephanie Woebkenberg, A History of the United States Court of Appeals for the Sixth Circuit, Fed. Law., Aug 2016, at 34, 36. The Sixth Circuit had only three judgeships for decades, but increased to four in 1928, six by 1940, and currently sixteen. Id.
420. See Tuve, supra note 1, at 111; Reed et al., supra note 419, at 36.
421. See Tuve, supra note 1, at 107–08.
Harold Stephens, a lifelong friend from Utah. Former U.S. Supreme Court Justice John Clarke wrote in support: “As the daughter of my college classmate I have had an especial interest in Judge Florence Allen . . . . I think her opinions equal if not superior to any others coming from the Ohio Supreme Court in recent years. You know of course of her thorough education and judicial methods.”

Judge Will Stephenson, a colleague on the Ohio Supreme Court said, “There is no Court too big for Judge Allen.” Activism from the women’s division of the Democratic Party and support from First Lady Eleanor Roosevelt all converged to create the right political circumstances for the appointment of a woman.

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

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

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

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

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

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

430. Id.
431. TUVE, supra note 1, at 110 (internal quotations omitted).
432. See id.
433. Id.
434. Id. at 111 (internal quotations omitted).
435. See ALLEN, supra note 7, at 95.
436. Id.
437. See id. at 95, 97.
438. TUVE, supra note 1, at 116 (internal quotations omitted).
439. Id. (internal quotations omitted).
440. See ALLEN, supra note 7, at 96.
441. See id. at 95–96.
442. Id. at 97.
443. Id. at 97–98.
trains headed for Cincinnati, Allen refused to postpone.444 Sensitive to the expense during this latter part of the Depression, Allen continued the case despite how she looked, with her face bandaged and wrapped in adhesive tape.445 Her fortitude in carrying on, even with a bandaged face, won over Judge Hicks a bit, and they were able to work together on the court.446

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

444. See id. at 98.
445. See id.
446. See ALLEN, supra note 7, at 98.
447. See, e.g., Niepert v. Cleveland Illuminating Co., 241 F.2d 916, 916–17 (6th Cir. 1957) (negligence boat pier); Poliafico v. United States, 237 F.2d 97, 101–02 (6th Cir. 1956) (narcotics); Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 820 (6th Cir. 1950) (government contracts); Deupree v. Levinson, 186 F.2d 297, 299 (6th Cir. 1950) (admiralty).
449. Compare NLRB v. Hoppes Mfg. Co., 170 F.2d 962, 964 (6th Cir. 1948) (for labor upholding NLRB); NLRB v. Packard Motor Car Co., 157 F.2d 80, 86 (6th Cir. 1946) (for union holding foremen are employees eligible for bargaining unit); NLRB v. Salant & Salant, Inc., 183 F.2d 462, 465 (6th Cir. 1950) (for union upholding NLRB that company failed to bargain in good faith); Emulsified Asphalt Prods. Co. v. Mitchell, 222 F.2d 913, 914 (6th Cir. 1955) (for labor holding company must comply with FLSA), with NLRB v. Bill Daniels, Inc., 202 F.2d 579, 586 (6th Cir. 1953) (for management holding car agencies need not comply with FLSA); Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731, 742 (6th Cir. 1950) (for management holding no evidence employee fired for union activity); Ohio Power Co. v. NLRB, 176 F.2d 385, 386 (6th Cir. 1949) (for management holding supervisors are not eligible employees for bargaining unit); Midland Steel Prods. Co. v. NLRB, 113 F.2d 800, 805–06 (6th Cir. 1940) (for management reversing NLRB).
contempt of court and refusal to answer questions. And she heard “innumerable tax cases.”

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

452. Allen, supra note 7, at 101; see Wexler v. Comm'r of Internal Revenue, 241 F.2d 304, 304 (6th Cir. 1957) (taxing profits for horse race betting), cert. denied, 354 U.S. 938 (1957); Auto. Club of Mich. v. Comm'r of Internal Revenue, 230 F.2d 585, 586 (6th Cir. 1956) (taxing auto club income as commercial not recreational activity), aff'd, 353 U.S. 180 (1957); Rogers v. Comm'r of Internal Revenue, 111 F.2d 987, 988 (6th Cir. 1940) (tax penalties); McNerney v. Comm'r of Internal Revenue, 82 F.2d 665, 665–66 (6th Cir. 1936); Rudolph Wurlitzer Co. v. Comm'r of Internal Revenue, 81 F.2d 971, 972 (6th Cir. 1936), cert. denied, 298 U.S. 676 (1936); Miller v. Hocking Glass Co., 80 F.2d 436, 436 (6th Cir. 1935), cert. denied, 298 U.S. 659 (1936).
454. Allen, supra note 7, at 102.
456. Id.
457. Allen, supra note 7, at 102.
458. Id.
459. See id. at 102–03.
declined to hear most patent cases, leaving the appellate courts and decisions like Allen’s as the final word on patent law. Patent lawyers were “aghast” when Allen was first appointed to the federal court, but quickly did “an about face and were among her most conspicuous advocates” appreciating her expertise. Potter Stewart, future Supreme Court Justice who sat on the Sixth Circuit with Allen from 1954 to 1958, used Allen’s opinions as research and learned patent law from her.

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

462. TUVE, supra note 1, at 158.
463. See id. at 157.
466. See Walker, 17 F. Supp. at 309.
468. See id. It thus disagreed with its prior decision in Muller, upholding protective legislation of maximum working hours for women because they were different from men, as women were physically weak and small, effected by maternity and menstruation, and burdened by housework demands. Muller v. Oregon, 208 U.S. 412, 421–22 (1908).
New York law in Morehead. Allen used this dicta as her guide, distinguishing Ohio’s minimum wage standard from Adkins by its non-vague description of a “fair wage” for reasonable value, and thus, upheld the law. She adopted the moderate path of reconciliation, rather than engaging with the constitutional claims on the merits of gendered legislation. Four months later, a split Supreme Court explicitly overruled Adkins on the merits in its decision in West Coast Hotel v. Parrish by Chief Justice Hughes, finding it to be a departure from true principles of employment and thus upholding women’s minimum wage laws. One year later, Congress adopted the Fair Labor Standards Act, extending the minimum wage to all employees, shepherded by Roosevelt’s first female secretary of labor, Frances Perkins. Allen’s decision thus foreshadowed the trend in the law, and was consistent with her suffrage and labor background generally in favor of protective legislation for women and workers.

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

470. See id. at 618–21 (Hughes, C.J., dissenting); see also id. at 631 (Stone, J., dissenting) (stating he would not make the differences between the statutes the sole basis of decision).
472. See id.
473. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937).
476. See 22 U.S.C. § 2282 (repealed 1976). This law extended the pre-existing Section 2281, which required a three-judge court to enjoin a state law. Today, a three-judge court is required only for apportionment of congressional districts. 28 U.S.C. § 2284(a).
477. See TUVE, supra note 1, at 118.
478. 21 F. Supp. at 950.
479. See TUVE, supra note 1, at 119–21.
streamlined the evidence and controlled the parties and the case.\textsuperscript{480}
Her written decision wholeheartedly endorsed the power of the federal government to create the TVA and regulate the navigable waters.\textsuperscript{481} It was hailed as a victory for liberal governance and New Deal legislation at a time when the U.S. Supreme Court had been striking down much of President Roosevelt’s attempted economic legislation.\textsuperscript{482} The Supreme Court upheld the TVA legislation, and the case put Allen in the national spotlight.\textsuperscript{483} Decades later, however, the TVA project became a target for modern liberals who challenged the environmental consequences of the project for endangered species.\textsuperscript{484}

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

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

\begin{itemize}
\item \textsuperscript{480} See id. at 120.
\item \textsuperscript{482} See TUVE, supra note 1, at 122.
\item \textsuperscript{486} Id. at 1018–19.
\item \textsuperscript{487} Jim Chen, The Story of \emph{Wickard v. Filburn}: Agriculture, Aggregation and Commerce, in CONSTITUTIONAL LAW STORIES 69, 83 (Michael C. Dorf ed., 2d. ed. 2009).
\item \textsuperscript{488} See Filburn, 43 F. Supp. at 1020–23 (Allen, J., dissenting).
\item \textsuperscript{489} See 317 U.S. 111, 128–29 (1942).
\item \textsuperscript{490} Chen, supra note 487, at 92 (internal quotations omitted).
\end{itemize}
schools unconstitutional and in a subsequent decision ordered integration with “all deliberate speed.” In two cases, Judge Allen ruled against school districts failing to follow the remedial dictate of*Brown* to use all deliberate speed to end segregation in schools. Unlike some other courts and with some dissenting opinion, she also issued injunctions ordering the conduct to stop. In a related decision, Judge Allen authored one of the Sixth Circuit’s most notable cases: *Detroit Housing Commission v. Lewis.* In *Detroit Housing,* she held that racial segregation in Detroit’s public housing was unconstitutional, becoming the first case in the nation to so hold. Detroit had maintained separate all-white and all-black housing, and maintained separate eligibility lists resulting in vacancies in the white housing but wait lists for black housing. Unlike Allen’s past decision in *Weaver* that had earned her such criticism, this time Allen took action to remedy the housing segregation on the basis of race.

During her twenty-five years on the federal bench, Allen was known for her intellect, clear writing, and work ethic. She became Chief Judge of the Sixth Circuit during her final term in 1958. Allen continued her interest in international issues, giving numerous speeches and working on various transnational and global initiatives, including a tour of a women’s prison in Spain, a series of lectures in Mexico, and authoring the book, *The Treaty as an Instrumentality of Legislation* in 1952. This work increased her visibility beyond the bench, giving Allen a national personality as the first woman judge.

VI. SHORTLISTED

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

493. See *Clemmons,* 228 F.2d at 858; *Booker,* 240 F.2d at 694.
494. 226 F.2d 180, 181 (6th Cir. 1955).
495. *Id.* at 183.
496. *Id.* at 181 n.2.
497. *See id.* at 183.
498. See *TUVE,* supra note 1, at 153.
501. See *Cook,* supra note 6, at 22; *cf.* *TUVE,* supra note 1, at 194–95.
502. See *Cook,* supra note 6, at 19.
became the first woman formally considered for the highest court in the nation. She was considered for more than twelve vacancies by four Presidents: Democratic Presidents Franklin D. Roosevelt and Harry Truman, and Republican Presidents Dwight Eisenhower and Herbert Hoover. Allen coveted and pursued the nomination through self-candidacy and active supporters, but it remained out of reach. She was realistic though, telling her supporters:

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

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{503} Kenney, \textit{supra} note 121, at 211.
\item \textsuperscript{504} \textit{Jefferson \& Johnson}, \textit{supra} note 6, at 16–17. There is also evidence that Allen recommended for appointment by Republican President Calvin Coolidge as early as 1924. \textit{Id.} at 17.
\item \textsuperscript{505} Cook, \textit{supra} note 6, at 19.
\item \textsuperscript{506} See \textit{Tuve}, \textit{supra} note 1, at 122.
\item \textsuperscript{507} See \textit{id.} at 122–23.
\item \textsuperscript{508} \textit{Id.} at 123.
\item \textsuperscript{509} \textit{Id.} at 107.
\item \textsuperscript{510} See Cook, \textit{supra} note 6, at 28.
\item \textsuperscript{511} See \textit{Tuve}, \textit{supra} note 1, at 122, 125.
\item \textsuperscript{512} See Cook, \textit{supra} note 6, at 26–28.
\end{enumerate}
\end{footnotesize}
expertise in federal subject matter. The book was based on a series of lectures Allen gave at Bryn Mawr during a leave from the appellate court. Allen thought that speaking about the Constitution was not controversial, and thus could maintain her semblance of judicial impartiality. The book was geared to the average public citizen rather than legal scholars, and was an idealistic history lesson more appropriate for high school students. It offered little insights into her jurisprudence or ideals, and the publisher did little to promote it. Instead, the publisher pressed for her for an autobiography, something Allen was reluctant to do for many years.

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

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

513. See Tuve, supra note 1, at 145–46 (citing Florence E. Allen, This Constitution of Ours (1940)).
514. See id.
515. See id. at 145.
516. See id. at 149.
517. See id. at 148–49.
518. See id. at 150–51.
519. Cook, supra note 55, at 314.
520. Id. at 315.
521. See Tuve, supra note 1, at 163–64.
522. Id. at 164 (citing India Edwards, Pulling No Punches: Memoirs of a Woman in Politics 171 (1977)).
523. Id.
525. Id. at 172.
a “pronounced liberal” and party stalwart. Allen’s quiet progressivism, and sometimes moderation, as well as her public speeches on safe topics did not fit this standard. Allen described herself as a “liberal-conservative,” which Time magazine called “middle-of-the-roadish.” Her great liberal causes of women, suffrage, and peace were “passé” and old fashioned and did not appeal to the modern liberals or judicial concerns. Thus, there was no political advantage to be gained by nominating Allen.

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

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

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526. TUVE, supra note 1, at 126 (internal quotations omitted).
527. Id.
528. See id.
529. See id. at 169–70.
531. Clark, supra note 12, at 489, 494.
532. See TUVE, supra note 1, at 124–25.
534. See JEFFERSON & JOHNSON, supra note 6, at 38, 74.
535. See LINDA HIRSHMAN, SISTERS IN LAW, at xiv (2015).
justice. O’Connor was hailed as the perfect first woman on the Court because she was able to get along with the all-male institution without causing problems. She didn’t challenge the status quo, was moderate in decorum and ideology, conversationally put her male colleagues at ease, hosted luncheons, and organized aerobics in the Court basement. In contrast to the next woman appointed to the Supreme Court, Ruth Bader Ginsburg, O’Connor did not make waves or challenge legal and social norms, and thus seemed to ease the transition, at least for the men. The feisty Ginsburg arrived with her subversive ideology of gender equality, fierce determination for women’s rights, and demand for a better office on a separate floor apart from the other Justices.

CONCLUSION: THE GAVEL’S GLASS CEILING

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

However, Allen’s desired legacy for women in the law would be muted and delayed. As Justice Ruth Bader Ginsburg remarked, “[a]fter Allen’s retirement in 1959, the appellate bench would remain entirely male until 1968.” No other woman would be appointed as a federal appellate judge until thirty-four years after Allen, when Shirley Hufstedler was selected for the Ninth Circuit in 1968. No other woman was appointed to the Sixth Circuit for another forty-five years, until Cornelia Kennedy was appointed in 1979. A woman

536. Cook, supra note 55, at 323.
537. See Hirshman, supra note 535, at xv.
538. See id. at xv, 147.
539. See id. at xv.
541. See, e.g., Allen, supra note 11, at 4, 22.
542. See id. at 22.
545. See Douglas Martin, Cornelia G. Kennedy, A Pioneering Federal Judge, Dies at 90,
would not be appointed to the federal district court in Ohio until 1980, when Ann Aldrich (another six-foot-tall NYU Law graduate) was appointed to the Northern District in Cleveland. A big change on the federal courts came when President Jimmy Carter made gender and racial diversification of the federal courts a priority and created judicial merit task forces, resulting in the appointment of forty women to the federal courts. At the state level, it would be sixty years after Florence Allen until another woman served on the Ohio Supreme Court when Blanche Krupansky was temporarily appointed in 1981, and Alice Robie Resnick was elected in 1989.

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


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

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

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