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To Fight the Battle, First You Need Warriors: Edward Garrison Draper, Everett Waring, and the Quest for Maryland's First Black Lawyer

John G. Browning

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TO FIGHT THE BATTLE, FIRST YOU NEED WARRIORS: EDWARD GARRISON DRAPER, EVERETT WARING, AND THE QUEST FOR MARYLAND'S FIRST BLACK LAWYER

By: John G. Browning*

I. INTRODUCTION

As she reflected upon her historic confirmation as the first Black woman on the nation's highest court, Justice Ketanji Brown Jackson acknowledged that she stood "on the shoulders" of many "true pathbreakers."[1] Undoubtedly, Justice Jackson had in mind earlier Black U.S. Supreme Court advocates turned members of the federal judiciary such as Constance Baker Motley (the first Black female federal judge) and Thurgood Marshall (the first Black U.S. Supreme Court justice).[2] Yet, she could easily have been referring as well to the earlier generations of Black lawyers whose trailblazing efforts paved the way for lawyers like Motley, Marshall, and Charles Hamilton Houston.[3] While the history of the first Black lawyers in America is a chronicle of broken barriers and adversities overcome, the history of Black lawyers in Maryland—the state that produced Thurgood

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* John G. Browning is a former Justice on Texas' Fifth Court of Appeals, and he now serves as the Distinguished Jurist in Residence and Professor of Law at Faulkner University's Thomas Goode Jones School of Law. He is a graduate of Rutgers University and the University of Texas School of Law, is an elected member of the American Law Institute, and has received Texas' highest awards for legal writing, contributions to legal ethics, and continuing legal education. A Trustee of the Texas Supreme Court Historical Society, he serves as editor-in-chief of the Society's award-winning journal. Justice Browning gratefully acknowledges the assistance of the Dartmouth College Library, as well as the research assistance of Jacob Linn, Brice Litus, and Erin Carrington Smith of the University of Baltimore School of Law. He dedicates this article to the memories of Edward Garrison Draper, Everett J. Waring, and all those wrongfully denied the chance to become lawyers because of the color of their skin.

[1] *Ketanji Brown Jackson's Remarks at the White House After her Supreme Court Confirmation*, CNN, https://www.cnn.com/2022/04/08/politics/ketanji-brown-jackson-confirmation-speech/index.html (last updated Apr. 8, 2022, 5:00 PM).

[2] *See infra* Parts II-V.

[3] *See infra* Parts II-IV. *See generally The Case That Changed America: Brown v. Board of Education: Meet the Legal Team*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/meet-legal-minds-behind-brown-v-board-education/ (last visited Sept. 28, 2022, 10:14 AM) (describing the legal accomplishments of Motley, Marshall, and Houston).

Marshall and Charles Hamilton Houston—is particularly poignant.[4] As this article will discuss, the effort to integrate Maryland's bar took place decades after the Civil War—well past the point that other Southern states had admitted Black lawyers into the legal profession.[5] Maryland's restrictions led to historic injustices, including the denial of a well-qualified Ivy League graduate, Edward Garrison Draper.[6] But the same discriminatory laws galvanized a civil rights movement in Baltimore, one that predated the National Association for the Advancement of Colored People ("NAACP") and launched the career of the first Black person admitted to the Maryland State Bar Association, Everett J. Waring.[7]

In sharing the story of the campaign to break the race barrier of the Maryland bar, this article aims to correct the egregious historical neglect of this subject. The history of lawyers generally has been too long regarded as "a white man's history,"[8] while Black lawyers' "names and contributions remained unknown."[9] The Reconstruction Era itself was long neglected by generations of historians who regarded it as an illegitimate period "presided over by unscrupulous 'carpetbaggers' from the North, unprincipled Southern white 'scalawags,' and ignorant freedmen."[10] Despite being a largely unknown and overlooked chapter in American legal history, the quest to open the doors of the Maryland bar to Black Americans is a chapter with significant consequences for the civil rights movement and one that yields lessons that resonate with today's racial justice movement. At a time when the struggle for diversity, equity, and inclusiveness in the legal profession continues—the percentage of Black attorneys actually regressed between 2011 and 2021—it remains more important than ever to appreciate the significance of Black voices in the profession and what it took for those voices to be heard.[11] Thurgood Marshall, himself denied entry to the University of Maryland School of Law, recognized that later civil rights victories would not be achieved without first dismantling racial barriers to legal education and the

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[4] *See infra* Parts II-V.
[5] *See infra* Part III.
[6] *See infra* Part II.
[7] *See infra* Part IV; Catherine E. Pugh, *Milestones in Black Education,* BALT. SUN (Feb. 4, 1992), https://www.baltimoresun.com/news/bs-xpm-1992-02-04-1992035057-story.html.
[8] Maxwell Bloomfield, *John Mercer Langston and the Training of Black Lawyers, in* W.J. LEONARD, BLACK LAWYERS 79 (1977).
[9] J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1994 19 (U. Pa. Press 1993).
[10] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xix (1988).
[11] Hassan Kanu, *'Exclusionary and Classist': Why the Legal Profession is Getting Whiter,* REUTERS, https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/ (Aug. 10, 2021, 5:49 PM).

profession.[12] Cases like *University of Maryland v. Murray* (1935), along with U.S. Supreme Court cases like *Missouri ex rel. Gaines v. Canada* (1938), *Sipuel v. Board of Regents of the University of Oklahoma* (1948), and *Sweatt v. Painter* (1950) made later civil rights milestones like *Brown v. Board of Education* (1954) possible.[13] The lessons learned from the decades-long effort to integrate the Maryland bar were clear: to fight the battle for racial justice, you first need warriors.

II. EDWARD GARRISON DRAPER SEEKS TO DEFY THE ODDS

Maryland did not admit a Black lawyer to practice until Everett J. Waring in 1885 and did not repeal its discriminatory statute banning Blacks from bar admission until 1888—some 20 years after the ratification of the Fourteenth Amendment.[14] The state's law restricting anyone but white males from becoming lawyers dated back to 1832.[15] It provided that applicants must "have been a student of law in any part of the United States for at least two years previous to said application."[16] The few historians to comment on this restriction dismissed its race-based exclusion as "merely codified practice," since the notion of a Black lawyer must have been far-fetched in 1832.[17] Indeed, a Black man would not be admitted to the bar of any state until 1844, when the Maine Bar admitted Macon Bolling Allen.[18] Allen moved to Massachusetts the following year becoming the first Black lawyer in that state in 1845.[19] Only a handful of Black lawyers would follow in his footsteps by the outbreak of the Civil War: Robert Morris, admitted in Massachusetts in 1847; George Vashon, admitted in New York in 1848; John Mercer Langston, admitted in Ohio in 1854; Aaron Alpeoria Bradley, admitted in Massachusetts in 1856; Edward Garrison Walker, admitted in Massachusetts in May 1861; and John Swett Rock, admitted in Massachusetts in September 1861.[20]

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[12] *Id.*

[13] *Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/brown-v-board/timeline.html (June 7, 2021).

[14] Act of Apr. 7, 1876, ch. 264 § 3, 1786 Md. Laws (repealed 1888); *see 1831-1884: Abolition and Emancipation*, BALT. HERITAGE, https://baltimoreheritage.github.io/civil-rights-heritage/1831-1884/ (last visited Sept. 28, 2022, 11:47 AM).

[15] Act of Mar. 10, 1832, ch. 268 § 2, 1831 Md. Laws.

[16] *Id.*

[17] *See generally* SMITH, *supra* note 9, at 33-34.

[18] *See id.* at 2.

[19] *Id.* at 94.

[20] *Id.* at 34, 96, 100, 129.

However, such a dismissive approach, overlooks what was going on in the South, and in Maryland particularly, at the time that statute was passed. Nat Turner's unsuccessful slave rebellion of August 1831 in Southampton, Virginia had sent shockwaves throughout the South, motivating Southern legislatures to pass even more restrictive laws against the education, movement, and assembly of slaves.[21] Beyond laws that further subordinated the enslaved population, states like Virginia and Maryland began to ponder what to do about something they perceived to be an even bigger threat in the event of future uprisings—the free Black population.[22] Calls for the removal of free people of color and forced colonization of Liberia gained momentum.[23] As one historian noted, in Virginia:

> [t]he question as to what should be done with the blacks turned out to be the most important matter brought before the legislature. Three-fourths of the session was devoted to the discussion of such questions as the removal of free Negroes, and the colonization of such slaves as masters could be induced to give up.[24]

A bill for the removal of Virginia's free Black population to Liberia was considered, tabled, and indefinitely postponed in the Senate by a vote of 18 to 14.[25]

Maryland, on the other hand, went further.[26] At its 1831-32 legislative session, Maryland passed a law allowing a board of managers to use state funds appropriated for the purpose of removing free Black Maryland residents to Liberia in conjunction with the state-created Maryland Colonization Society.[27] And like other Southern states, Maryland passed a wide range of other laws impacting free Black people within its borders in an effort to make emigration seem like a more palatable alternative to living and working in the state.[28] For example, few Black persons could succeed as retail

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[21] John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. AFR. AM. HIST. 208, 219-220 (1920).
[22] *Id.*
[23] *Id.* at 231.
[24] *Id.*
[25] *Id.* at 229-30.
[26] *Id.* at 219-20.
[27] Act of Mar. 12, 1832, ch. 281, 1831 Md. Laws.
[28] For example, the 1831–1832 Maryland legislature required free Blacks to carry certificates attesting to their non-enslaved status, restricted meetings of free Black people; required special licenses for free Black people to own weapons; and required free Black persons desiring to leave the state for more than 30 days to first obtain a court-issued permit. *See* Act of Mar. 14, 1832, ch. 323, §§ 1, 2, 6, 7, 1831 Md. Laws. Free Black people,

shopkeepers due to one such law, which prohibited the sale "by any free Negro or mulatto" of:

> any bacon, pork, beef, mutton, corn, wheat, tobacco, rye, or oats unless such free negro or mulatto shall, at the time of such sale, produce a certificate from a justice of the peace, or three respected persons residing in the neighborhood of said negro, of the county of which such negro resides, that he or they have reason to believe and does believe, that such free negro or mulatto came honestly and bona fide into possession of any such article so offered for sale . . . ."[29]

Ostensibly, the law was to address the concern that freedmen trafficked in stolen goods, yet it had a chilling effect on the free enterprise and wealth-building of free Black people.[30] One who was not deterred, however, was a successful Baltimore tobacconist and cigar-maker named Garrison Draper. Garrison and his wife, Charlotte Gilburg Draper, lived in Antebellum Baltimore, and like roughly half of Maryland's Black population, they were free.[31] They had one child, Edward Garrison Draper, born in Baltimore on January 1, 1834.

The elder Draper had some education.[32] According to the census of 1860, of the 84,000 free Black people in Maryland, 21,699 could not read or write.[33] He had an inquiring mind and co-founded an organization—the Society of Enquiry—to learn more about the proposed colonization of Liberia.[34] Because of his interest, Draper was invited to be a correspondent for the *Maryland Colonization Journal*, the publication of the state-funded Maryland Colonization Society.[35] Most free Black people opposed the notion

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in theory, had the right to own property and to sue or be sued—rights which in reality were limited by the absence of Black lawyers and by a state law prohibiting Black people from testifying against whites. *See* Act of June 8, 1717, ch. 13, § 2, 1717 Md. Laws.

[29] Act of Mar. 14, 1832, ch. 323, 28 at § 9, 1831 Md. Laws.

[30] *See* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 979 (1985) (citing James M. Wright, *The Free Negro in Maryland, 1634-1860*, 261-75 (1917)) (In the Baltimore City Directory for 1840, for example, there are only 10 Black retailers listed. By 1850's directory, that number had only increased to 18).

[31] *See* Bogen, *supra* note 30, at 977.

[32] *Id.* at 979.

[33] JEFFREY R. BRACKETT, THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY 198 n.2 (1889).

[34] Bogen, *supra* note 30, at 979.

[35] *Id.*

of Liberia colonization, evincing a healthy skepticism of white motivation for supporting it.[36]

Prior to 1832, Maryland had supported the work of the American Colonization Society, founded as a private organization that helped establish the "colony" of Liberia.[37] But with the passage of its 1832 law enshrining Liberian colonization as an official state policy, Maryland ceased its financial support of the national organization.[38] Instead, it focused on its own group, the Maryland Colonization Society, and the establishment of a specific area dubbed "Maryland in Liberia."[39] While not officially a state agency, the Maryland Colonization Society was heavily funded by the state.[40] Ultimately, more than a thousand free or formerly enslaved Black residents of Maryland went on to establish what was once known as "the independent Republic of Maryland" in Liberia, known today as Liberia's Maryland County.[41]

Garrison Draper remained interested in the concept of Black Americans finding the freedoms they had been denied in the United States through emigration to Liberia, but he did not buy into the enticement of a tropical paradise that was often used to generate interest in the colonization effort.[42] In his letters on the subject, Draper was realistic about the real reason Liberia represented an attractive option: it created an opportunity to secure the rights and liberties that Black Americans were denied in their own country.[43] Unlike the European immigrants who came voluntarily to America "not only for the pecuniary advantage of agriculture or commerce, but also to transmit the blessings of civil and religious liberty to their posterity," Draper wrote: Black people were brought to this country "without consulting their

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[36] *Id.*

[37] *Id.* at 977 n.100.

[38] *See* Act of Mar. 12, 1832, ch. 281, § 1, 1831 Md. Laws (codified at MD. CODE art. 66, §§ 44-46 (1860) (repealed 1865)); *see also* Act of Mar. 14, 1832, ch. 314, § 1, 1831 Md. Laws (codified at MD. CODE art. 66, §§44-46 (1860) (repealed 1865)).

[39] Bogen, *supra* note 30, at 977 n.100.

[40] *Id.*

[41] *See generally* John H. B. Latrobe, President of the Md. Hist. Soc'y., Maryland in Liberia—A History of the Colony Planted by the Maryland State Colonization Society Under the Auspices of the State of Maryland, U.S., at Cape Palmas on the South-West Coast of Africa, 1833–1853 (a paper read before the Maryland Historical Society) (Mar. 9, 1885) (transcript available in the Columbia University Library); *accord*, Christina Tkacik, *'The Real Story of Liberia Is a Story of Survival': Remembering the Role of Black and White Marylanders in the Creation of Africa's First Republic*, BALT. SUN (July 1, 2021, 5:00 AM), https://www.baltimoresun.com/features/retro-baltimore/bs-fe-retro-maryland-countyliberia-colonization-20210701-qm56afogzjhxbjx32lvx6fx4bq-story.html.

[42] Bogen, *supra* note 30, at 979.

[43] *Id.* at 980.

own wishes."[44] As such, Garrison Draper prepared young Edward for a possible life in Liberia.[45]

Yet, the majority of the free Black population in Baltimore did not share Garrison Draper's cautious hope for colonization in Liberia.[46] Pointing to the language in one of the Maryland Colonization Society's own resolutions from their 1841 convention, the group bluntly acknowledged that "the idea that the colored people will ever obtain social and political equality in this state is wild and mischievous; and by creating among them hopes that can never be realized, is at war with their happiness and improvement."[47] In 1838, the Society's traveling agent, John H. Kennard, summarized for his board of managers the opposition to colonization that he heard from members of the Black community:

> They are taught to believe, and do believe, that this is their country, their home. A Country and home now wickedly withholden from them but which they will presently possess, own and control. Those who Emigrate to Liberia, are held up to the world, as the vilest and veriest traitors to their race, and especially so, toward their brethren in bonds.[48]

But perhaps no one captured the sentiments of the Black community quite as succinctly as Black minister and educator, William S. Watkins, who in 1831 wrote in William Lloyd Garrison's abolitionist newspaper, *The Liberator*, that Black Baltimoreans would "rather die in Maryland, under the pressure of unrighteous and cruel laws" than to be "drive[n], like cattle" to Liberia.[49]

In preparation for a (hopefully) promising future in Liberia, Draper sought out the best possible education for his son.[50] Public education for Black children in Baltimore was limited at best.[51] So young Edward was sent

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[44] Draper, Colonization and Missions, *in* 2 MD. COLONIZATION J. 288 (1844).
[45] Bogen, *supra* note 30, at 980.
[46] *Id.* at 979.
[47] Maryland Colonization Society Resolutions (June 4, 1841), *in* 1 MD. COLONIZATION J. 15 (1841).
[48] Md. State Colonization Soc'y, *Maryland State Colonization Society Overview*, MD. STATE ARCHIVES, http://slavery.msa.maryland.gov/html/casestudies/mscs_overview.pdf (last visited Nov. 1, 2022) http://slavery.msa.maryland .gov/html/casestudies/mscscountycs.html (quoting John H. Kennard, Reports to the Board Manager (Dec. 9th, 1838), *in* MD. COLONIZATION SOC'Y PAPERS 54-55 (1787-1902)).
[49] 2 THE BLACK ABOLITIONIST PAPERS: CANADA, 1830–1865, at 234 (C. Peter Ripley, et al. eds., 1986) (quoting A Colored Baltimorean, Letter to the Editor, THE LIBERATOR (Boston), June 4, 1831).
[50] Bogen, *supra* note 30, at 980.
[51] *See generally* Bettye J. Gardner, *Antebellum Black Education in Baltimore*, 71 MD. HIST. MAG. 360, 360–63 (Fall 1976).

off to the public school for Black children in Philadelphia.[52] Edward evidently received a fine preparatory education because he was able to pass Dartmouth College's entrance examination in 1851, which then encompassed Greek, Latin, English grammar, mathematics, and geography.[53] Draper was not Dartmouth's first Black student; that distinction belongs to Edward Mitchell, who enrolled in 1824 and graduated in 1828.[54] However, at least one historian has claimed Draper may very well have been the first Black man from Maryland to graduate from college.[55] In any event, by the time he graduated from Dartmouth in 1855, Draper had maintained "a very respectable standing, socially, and in his class."[56]

Draper next set his sights on becoming a lawyer, with his ultimate goal of being Liberia's first college-educated, trained attorney.[57] Before the Civil War, there were only a handful of law schools and none were in Maryland.[58] Most lawyers received their training by "reading the law" under the tutelage of an older practitioner or judge.[59] College degrees were not common; as late as 1883, less than half of the students at the fledgling University of Maryland School of Law had bachelor's degrees.[60] Until the State passed its bar admission statute in 1832, no formal standards existed for becoming a lawyer in Maryland.[61] With that statute, Maryland, for the first time, spelled out that an applicant must be a free, white male citizen of Maryland over twenty-one years of age who had been "a student of the law in any part of the United States, for at least two years previous to said application."[62] Applicants could make their petition in open court, at any of

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[52] James Hall, *A Lawyer for Liberia*, *in* 9 MD. COLONIZATION J. 88 (1857). Philadelphia had established separate public schools for Black children as early as 1822. John C. Van Horne, The Education of African Americans in Benjamin Franklin's Philadelphia, *in* "THE GOOD EDUCATION OF YOUTH": WORLDS OF LEARNING IN THE AGE OF FRANKLIN 94 (John H. Pollack ed., 2009).

[53] Bogen, *supra* note, 30, at 980 (citing *Dartmouth College Catalog, 1851–1852*, at xxii).

[54] *See* Forrester Lee, *Finding Community: The Life of Edward Mitchell 1828*, DARTMOUTH LIBR., https://www.dartmouth.edu/library/rauner/exhibits/finding-community.html (last updated May 17, 2022) (acknowledging the assistance of Jay Satterfield, Head of Dartmouth's Rauner Special Collections Library, for assistance with documenting Edward Garrison Draper's career at the school).

[55] A. BRISCOE KOGER, THE MARYLAND NEGRO 17 (1955).

[56] Hall, *supra* note 52.

[57] Bogen, *supra* note 30, at 981.

[58] *Id.* at 981-82.

[59] Jennifer Uhlarik, *Becoming a Lawyer in the Old West*, HEROES, HEROINES & HIST. (Feb. 25, 2015, 1:00 AM), https://www.history.com/2015/02/becoming-lawyer-in-old-west.html.

[60] ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 177–87 (1953); *see also The Law School of the University of Maryland Catalog, 1884*, at 5–6 (1884).

[61] David S. Bogen, *The First Integration of the University of Maryland School of Law*, 84 MD. HIST. MAG. 39 (1989).

[62] Act of Mar. 10, 1832, ch. 268, 1831 Md. Laws.

the county courts, "courts of equity or courts of appeals. . . ."[63] The statute called for the courts "to examine the applicant upon the same day during the regular session [of the court], touching his qualifications for admission . . . and they shall also require and receive evidence of his probity and general character . . . . "[64] Upon a satisfactory examination, the newly admitted attorney was entitled to practice in all courts of the state.[65] Judicial examination of aspiring attorneys was the norm in Maryland until 1876, when a statute was enacted authorizing each court to appoint a board of at least three attorneys to examine the applicant in the presence of the court.[66]

Deciding to embark upon a course of legal education must have been daunting for Draper, and he apparently made this decision only "[a]fter much consultation with friends."[67] As a well-read free Black man, Draper surely knew of the few Black lawyers then practicing in the United States at the time: men like: Macon Allen, Robert Morris, George Vachon, and John Mercer Langston.[68] Besides the uncertainty of the career path itself and its prospects, Draper was aware that Maryland's race restriction would discourage lawyers from offering him the apprenticeship that he sought—not to mention the judicial approval he would need to be an admitted attorney.[69] Support for Draper's risky endeavor would come from the Maryland Colonization Society.[70] As the Society's journal would later indicate, hopes were high that a promising young Black lawyer like Draper could fulfill an important role in Liberia:

> On the sailing of almost every expedition we have had occasion to chronicle the departure of missionaries, teachers, or a physician, but not until the present time that of a lawyer. The souls and bodies of the emigrants have been well cared for; now, it is no doubt supposed, they require assistance in guarding their money, civil rights, [etc]. Most professional emissaries have been educated at public expense, either by

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[63] *Id.* at § 1.
[64] *Id.* at § 2.
[65] *Id.* at § 3.
[66] Act of Apr. 7, 1876, ch. 264, 1876 Md. Laws; *see also* William Adkins II, *What Doth the Board Require of Thee?*, 28 MD. L. REV. 103 (1968) (providing a historical overview of Maryland bar admission requirements).
[67] Hall, *supra* note 52.
[68] *See* EDWARD BYRON REUTER, THE MULATTO IN THE UNITED STATES: INCLUDING A STUDY OF THE ROLE OF MIXED-BLOOD RACES THROUGHOUT THE WORLD 232-34 (1918).
[69] *See* Hall, *supra* note 52.
[70] *See id.*

> Missionary or the Colonization Societies, but the first lawyer goes out independent of any associated aid.[71]

The first source of tangible support came in the form of the attorney under whom Draper would "read the law"—retired Baltimore attorney Charles Gilman.[72] Gilman, a member of the Maryland Colonization Society's Board of Managers, agreed to instruct Draper in the law and provide him with access to his office.[73] Gilman, born in New Hampshire on December 14, 1793, was admitted to the New Hampshire bar in 1826.[74] He moved to Baltimore in 1833 and had a successful career there until the spring of 1849, when he apparently went off to California—swept up like so many others with "gold rush fever."[75] Gilman's stay in California lasted about five years, after which he returned to spend his remaining years in Baltimore before his death on September 9, 1861.[76] Gilman's return to Maryland in 1854 may have been prompted by health concerns, as at least one source maintains that "before his return to Maryland he suffered a stroke."[77]

Gilman's mentoring of Edward Garrison Draper was not the only support the aspiring lawyer received, directly or indirectly, from the Maryland Colonization Society.[78] When Draper was not tucked away in Gilman's office, Draper spent much of his time reading in the office of Dr. James Hall, general agent of the Society and editor of the *Maryland Colonization Journal.*[79] Hall would later describe Draper as a man "of an amiable disposition, very modest and retiring, [and] a good student. . . . ."[80]

But reading law books and tutelage by retired lawyers would only take Draper so far. The color of his skin made it impossible for Draper to acquire firsthand practical knowledge of the day-to-day realities of Baltimore law practice and the rules and quirks of the bench and bar.[81] Fortunately, Draper was able to spend the final months studying in the Boston office of prominent attorney, Charles W. Storey.[82] The Harvard-educated Storey was

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *A Lesser-Known New Hampshire Masonic Leader: Charles Gilman*, 3 Q. NEWSL. ANNIVERSARY LODGE RSCH. NO. 175, (Anniversary Lodge of Research No. 175, Milford N.H.), 2002, at 7-8 [hereinafter Gilman].
[75] *Id.*
[76] *Id.*
[77] *Charles Gilman*, THE GRAND LODGE OF A.F. & A.M. OF MD., https://mdmasons.org/past-gm/charles-gilman-2/ (last visited Oct. 20, 2022).
[78] Gilman, *supra* note 74, at 7-8.
[79] *See, e.g.*, Bogen, *supra* note 30, at 982.
[80] James Hall, *Death of J. W. Lugenbeel, M. D.*, 9 MD. COLONIZATION J., at 79.
[81] Gilman, *supra* note 74, at 8.
[82] *Id.*

well-positioned to provide opportunities for Draper to see lawyers in action, since he served as clerk of the Superior Criminal Court and the register of insolvency for Suffolk County.[83] Storey himself had studied law in the offices of George T. Curtis, who had been part of the legal team representing Dred Scott, and Benjamin R. Curtis, a dissenting U.S. Supreme Court Justice in the *Dred Scott* decision.[84] Given Storey's connection with both Curtises, the *Dred Scott* decision was likely a subject of conversation between Storey and young Draper.[85] Storey was sympathetic to the abolitionist cause; his wife Elizabeth Moorfield was a prominent abolitionist.[86] Their son, Moorfield Storey, served as private secretary to noted abolitionist Senator, Charles Sumner.[87] The younger Storey would go on to have a distinguished career, serving not only as president of the American Bar Association but also as a co-founder and president of the NAACP.[88]

On October 29, 1857, armed with legal education, months of practical observation in Boston courts and Charles Gilman's sponsorship, Draper presented himself for examination before Baltimore Superior Court Judge Zacheus Collins Lee.[89] Judge Lee, a first cousin to Robert E. Lee, had served as the U.S. District Attorney for Baltimore from 1848 to 1855, after which he was appointed to the bench—a position he would hold until his death in 1859.[90] Judge Lee was a slave owner, and while the number of slaves he owned is unknown, he posted newspaper advertisements offering rewards for the capture and return of at least two of his slaves, Martha and Samuel, who had run away.[91]

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[83] WILLIAM T. DAVIS, PROFESSIONAL AND INDUSTRIAL HISTORY OF SUFFOLK COUNTY, MASSACHUSETTS 413 (Boston Hist. Co., Vol. 1, 1894).
[84] *Biographies of the Robes*, SUP. CT. HIST. THE FIRST HUNDRED YEARS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/antebellum/robes_curtis.html.
[85] *Id.*
[86] Geoffrey D. Austrian, *Moorfield Story*, HARV. MAG. (July-Aug. 2018), https://www.harvardmagazine.com/2018/07/moorfield-storey.
[87] *Id.*
[88] Austrian, *supra* note 86.
[89] Bogen, *supra* note 30, at 984; Smith, *supra* note 9, at 142.
[90] *Stratford Hall and the Lees Connected with Its History*, LEE FAMILY DIGIT. ARCHIVES, https://leefamilyarchive.org/reference/books/alexander/06.html (last visited May 17, 2022).
[91] *See* DAILY NAT'L INTELLIGENCER (Aug. 8, 1842) https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18420812dni1.pdf; BALT. SUN (Aug. 1842), https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18420810bs1.pdf; DAILY NAT'L INTELLIGENCER (July 27, 1836), https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18360727dni1.pdf.

Judge Lee knew that however impressive Draper might be as a candidate, he was not a "free white citizen" and so would not be admitted.[92] However, Draper persuaded the judge of his intent to emigrate to Liberia and his desire to practice law there.[93] So, Judge Lee issued Draper a certificate that stated as follows:

> STATE OF MARYLAND
> City of Baltimore
> October 29, 1857
>
> Upon the application of Charles Gilman, Esq. of the Baltimore Bar, I have examined Edward G. Draper, a young man of color, who has been reading law under the direction of Mr. Gilman, with the view of pursuing its practice in Liberia, Africa. And I have found him most intelligent and well informed in his answers to the questions propounded by me, and qualified in all respects to be admitted to the Bar in Maryland, *if he was a free white citizen of this State*. Mr. Gilman, in whom I have the highest confidence, has also testified to his good moral character.
> This Certificate is therefore furnished to him by me, and with a view to promote his establishment and success in Liberia at the Bar there.
>
> Z. Collins Lee
>
> Judge of the Superior Court, Baltimore, Maryland[94]

Armed with this certificate, the newly married Draper and his wife, Jane Rebecca Jordan, set sail from Baltimore to Liberia six days later aboard the *M.C Stevens*.[95] Also on the voyage was G.W. Hall (son of Dr. Hall), who wrote of his prospects to the corresponding secretary, describing the young Dartmouth graduate as:

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[92] *See generally LANGSTON, John Mercer*, HIST., ART & ARCHIVES, https://history.house.gov/People/Detail/16682, (last visited Oct. 20, 2022) (noting that in some states that restricted admission to the legal profession to white male citizens, a sympathetic judge or examining committee could sometimes find justification for a Black candidate of mixed ancestry. In the case of John Mercer Langston in Ohio—who had defiantly refused to "pass" in order to attend a law school—he was found to be not only qualified but "close enough to white.").

[93] *See* Z. Collins Lee, Certificate Attesting that Edward G. Draper is Fit to Practice Law (Oct. 29, 1857), *in* 9 MD. COLONIZATION J. 89 (1857).

[94] *Id* (emphasis added).

[95] James Hall, *Voyages of the Ship M. C. Stevens*, *in* 9 MD. COLONIZATION J. 81 (1857).

> fully qualified, color excepted, to practice at the Baltimore bar. His success is almost certain, as there is not another lawyer in Liberia who was bred to the profession; a second one might be equally successful, and thus, this business would gradually pass out of the hands of quacks, who now hold it without depending upon their practice for support.[96]

This optimism was echoed by the Maryland Colonization Society. His arrival was heralded in its article *A Lawyer for Liberia*, noting:

> We consider the settlement of Mr. Draper in the Republic as an event of no little importance. It seemed necessary that there should be one regularly educated lawyer in a community of several thousand people, in a Republic of freedmen. True, there are many very intelligent, well-informed men now in the practice of law in Liberia, but they have not been educated to the profession, and we believe no one makes that his exclusive business. We doubt not but they will welcome Mr. Draper as one of their fraternity.[97]

But the promise was unfulfilled.[98] Within a year after his arrival in Monrovia, Liberia, Edward Garrison Draper died on December 18, 1858, in Cape Palmas—only two weeks before his 25th birthday.[99] The cause was pulmonary consumption, better known as tuberculosis.[100]

Nothing is known of Draper's all too brief legal career in Liberia.[101] What we do know is that, but for the color of his skin, this Ivy League graduate met all the requirements for admission to the Maryland bar—a fact acknowledged by the Baltimore judge who examined him.[102] Edward Garrison Draper deserves to be added to the small but growing number of members of diverse communities who have been granted posthumous bar admission by state supreme courts in the 21st century, as a way of righting the wrong of being rejected by the bar on racial grounds during the 19th and early

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[96] Letter from G.H. Hall to R.R. Gurley (Dec. 16, 1857), *in* 34 THE AFR. REPOSITORY 94 (1858).
[97] *Id.* at 27.
[98] *See Edward Garrison Draper*, DARTMOUTH LIBR., https://www.dartmouth.edu/library/rauner/blackgreens/e_draper.html (last visited Oct. 6, 2022).
[99] *Id.*
[100] *See id.*
[101] *See generally* Bogen, *supra* note 30, at 985 (revealing that Draper fell fatally ill after arriving in Liberia and died within a year).
[102] Letter from G.H. Hall to R.R. Gurley, *supra* note 96, at 94.

20th centuries.[103] These include the Washington Supreme Court's admission of Japanese American Takuji Yamashita in 2001; the Pennsylvania Supreme Court's admission of Black American George Vachon in 2010; the California Supreme Court's admission of Chinese American Hong Yen Chang in 2015 and Japanese American Sei Fujii in 2017; the New York Supreme Court's admission of Black American William Herbert Johnson in 2019, and the Supreme Court of Texas' admission of Black American J.H. Williams in 2020.[104] Draper was denied the distinction of becoming Maryland's first Black lawyer months after the U.S. Supreme Court, in one of its most infamous decisions, denied Black Americans much more: their basic rights of citizenship.[105] But it is never too late to address the injustices of the past.

III. THE FIGHT GOES ON: *IN RE TAYLOR* AND CHARLES WILSON

In the aftermath of the Civil War, the educational and economic opportunities that had long been denied to the Black population suddenly brought the legal profession within reach.[106] Across the former Confederate states, the legal profession's racial barrier was breached, spurred on in part by the creation of a law department at fledgling Howard University.[107] Howard's earliest graduates would forge new paths as the first Black lawyers in multiple states.[108] Arkansas admitted its first Black lawyer in 1866; Tennessee and South Carolina followed suit in 1868; Mississippi added its first in 1869, while Alabama, Louisiana, and Virginia welcomed their first Black lawyers in 1871.[109] Texas did not have a Black lawyer admitted until 1873, while Georgia did not see a Black lawyer admitted until 1878.[110] Yet,

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[103] *See generally* John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. AFR. AM. L. & POL'Y 1 (2021) (examining the posthumous bar admission of various lawyers who were denied admission on the basis of race).

[104] *See id.*

[105] *See* Scott v. Sanford, 60 U.S. 393 (1857).

[106] *Emancipation and Reconstruction*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/african/emancipation-and-reconstruction/ (last visited Oct. 17, 2022).

[107] *Our History*, HOWARD UNIV. SCH. OF L., http://law.howard.edu/content/our-history#:~:text=Howard%20University%20School%20of%20Law%20started%20as%20Howard%20University%20Law,of%20Professor%20John%20Mercer%20Langston (last visited Oct. 6, 2022).

[108] *See* John G. Browning, *"Pioneers of an Interesting and Exciting Destiny": The Lives and Legacies of Howard's First Law Graduates*, 66 HOWARD L.J. (forthcoming 2023).

[109] *Id.*

[110] John G. Browning, *A Texas Law Graduate's Quest to Uncover the Story of the State's First Black Attorney*, THE ALCALDE (Mar. 1, 2021, 1:13 PM)

in the face of these breakthroughs elsewhere, Maryland's bar remained lily-white.[111]

Despite the ratification of the Fourteenth Amendment, debate continued to swirl over the meaning and extent of its provisions, including both the Equal Protection Clause and the Privileges and Immunities Clause.[112] Even before the U.S. Supreme Court would weigh in during *The Slaughterhouse Cases*, discussions surrounding other civil rights legislation featured heated consideration of the Privileges and Immunities Clause that occasionally veered into the subject of Black membership in the legal profession.[113] For example, prominent constitutional lawyer and Wisconsin senator, Matthew Carpenter, during a debate over Senator Charles Sumner's civil rights bill in 1872 on just what rights were protected as "privileges and immunities" of citizenship, addressed the issue of Blacks in the legal profession.[114] Arguing that the Privileges and Immunities Clause struck down racial barriers like Maryland's discriminatory statute, he proclaimed, "[t]hat great amendment opened the bar to colored men."[115] Later, relying on the Privileges and Immunities Clause in *Bradwell v. Illinois*, Carpenter maintained that the protections afforded by the Fourteenth Amendment were equally applicable to both gender and racial discrimination: "Why may a colored citizen be admitted to the Bar? Because he is a citizen, and that is one of the avocations open to every citizen, and no State can abridge his right to pursue it. Certainly, no other reason can be given."[116] Later, he expanded upon this notion:

> The 14th Amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employment of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications

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https://alcalde.texasexes.org/2021/03/a-texas-law-graduates-quest-to-uncover-the-story-of-the-states-first-black-attorney/.

[111] Stephanie Cornish, *Maryland's First Black Lawyers,* AFRO NEWS (Mar. 26, 2015), https://afro.com/marylands-first-black-lawyers/.

[112] *See infra* text accompanying notes 114-17.

[113] *See infra* text accompanying notes 114-17.

[114] CONG. GLOBE, 42nd Cong., 2d Sess. 524, at 762 (1872).

[115] *Id.* In 1872, Carpenter would argue before the Supreme Court on behalf of the Crescent City Livestock Corporation in *The Slaughterhouse Cases* and on behalf of Myra Bradwell's bid to become a lawyer in *Bradwell v. Illinois*. *See Slaughter-House Cases*, 83 U.S. 36, (1872); *see* Bradwell v. State, 83 U.S. 130, (1873).

[116] John A. Lupton, *Myra Bradwell and the Profession of Law: Case Documents*, 36 J. SUP. CT. HIST. 236 (2011) (reproducing in full Argument for Plaintiff in Error, Bradwell v. State, 83 U.S. 130 (1873)).

> that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation . . . .[117]

Unfortunately, the Supreme Court's restrictive view of the Fourteenth Amendment's protections in *The Slaughterhouse Cases* influenced state courts around the country, and Maryland was no exception.[118] For example, in *Cully v. Baltimore & Ohio Railroad Co.*, Baltimore federal judge, William Fell Giles, ruled against Black plaintiffs suing a Maryland railroad for forcing them into separate and lesser accommodations, holding that the privilege of local travel on the railroad was one of state citizenship rather than a privilege of U.S. citizens.[119] In 1877, this narrow view—centered on the Privileges and Immunities Clause rather than the Equal Protection Clause—would doom another legal attempt to integrate the Maryland bar.[120]

Interestingly enough, even before the Maryland bar formally admitted Black lawyers, at least one practiced within the confines of federal courts in Maryland.[121] James Harris Wolff attended Harvard Law School after reading the law under the tutelage of former Massachusetts Congressman Daniel Wheelright Gooch. On June 26, 1875, he was admitted to the Suffolk County bar and to practice before the Supreme Judicial Council of Massachusetts.[122] That same year, Wolff moved to Maryland and was the first Black lawyer admitted to practice before the United States Circuit Court of Maryland.[123] Federal Court practice, however, provided more limited opportunities than state court practice.[124] In 1876, Wolff and Charles S. Taylor, another Black lawyer originally from Massachusetts, decided to challenge Maryland's racially discriminatory statute.[125] Wolff soon dropped out of the case and returned to Massachusetts, where he was eventually appointed to the state Adjutant General's office as a clerk by Governor John Davis Long.[126]

Taylor, however, pressed forward with the suit. His qualifications were impeccable: he was already licensed in Massachusetts, and, in June

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[117] *Bradwell,* 83 U.S. at 137.

[118] *See* Cully v. Balt. & Ohio R.R. Co., 6 F. Cas. 946, 947 (D. Md. 1876) (No. 3,466).

[119] *Id.*

[120] DENNIS PATRICK HALPIN, A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865–1920 54-55 (Univ. Pa. Press, 2019) (clarifying that although the Maryland Court of Appeals decided *In re Taylor* in 1877, the actions leading to it began in 1876).

[121] *Id.* at 55.

[122] SMITH, *supra* note 9, at 103.

[123] WALTER J. LEONARD, BLACK LAWYERS 293 (1977).

[124] *See generally* SMITH, *supra* note 9, at 103-04 (discussing how Massachusetts admitted Wolff to the bar, as did the U.S. Circuit Court of Maryland, but Maryland's State Bar did not allow Wolff to practice in the state, so he moved back to Massachusetts).

[125] HALPIN, *supra* note 120, at 54.

[126] SMITH, *supra* note 9, at 104.

1877, Taylor was sworn into practice before the U.S. Circuit and District courts in Maryland.[127] Sponsoring Taylor's admission was district attorney Archibald Stirling.[128] Taylor's test case for state court admission was grounded in the Fourteenth Amendment's Privileges and Immunities Clause: admission to the bar, he argued, was a privilege of state citizenship under Article IV of the Fourteenth Amendment, belonging to "that class of privileges that a State legislature [could not] abridge on account of race or color."[129] Unfortunately, his argument did not rely on the Equal Protection Clause, and the Supreme Court (in decisions like *Bradwell*, and *The Slaughterhouse Cases*) had already rejected any Privileges and Immunities basis.[130]

The Maryland Court of Appeals denied Taylor's petition.[131] It dismissed the applicability of Article IV of the Fourteenth Amendment because Taylor was now a resident of Maryland.[132] Citing *The Slaughterhouse Cases*, the court held that privileges of state citizenship "are not embraced" by the Privileges and Immunities Clause.[133] Citing *Bradwell*, the court observed that bar admission was a privilege of state, not national, citizenship.[134] To the Maryland Court of Appeals, therefore, such Supreme Court precedent made it abundantly clear that "the 14th Amendment has no application."[135] The court did not even discuss the application of the Equal Protection Clause, comfortable in its assumption that *The Slaughterhouse Cases* had effectively done away with any basis for challenging discrimination in laws that did not involve property, the right to travel, or personal security.[136] Having been barred from practicing in Maryland state courts because the court upheld the statute's racial exclusion, Taylor soon left Maryland and returned to Massachusetts.[137]

Any further challenge to Maryland's racially discriminatory bar admission statute would lay dormant until 1884.[138] That year, another Black attorney from Massachusetts, Richard E. King, came to Maryland and tried a

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[127] HALPIN, *supra* note 120, at 55.
[128] *Id.*
[129] *In re* Taylor, 48 Md. 28, 29 (1877).
[130] *Id.* at 31-32; *Bradwell*, 83 U.S. at 139; *Slaughter-House Cases*, 83 U.S. at 80.
[131] *Taylor*, 48 Md. at 34.
[132] *Id.* at 31; *see Bradwell*, 83 U.S. at 138.
[133] *Taylor*, 48 Md. at 32 (quoting *Slaughter-House Cases*, 83 U.S. at 75).
[134] *Taylor*, 48 Md. at 32-33 (citing *Bradwell*, 83 U.S. at 130).
[135] *Taylor*, 48 Md. at 33.
[136] *Id.* at 32 (citing *Slaughter-House Cases*, 83 U.S. at 115). It certainly did not help dissuade the court that the Maryland legislature had reaffirmed its racial restriction on bar admission in 1872 and again in 1876. HALPIN, *supra* note 120, at 54.
[137] HALPIN, *supra* note 120, at 55.
[138] *Id.*

different approach, taking the fight to the legislature instead of the courts.[139] King lobbied the Maryland House of Delegates to overturn the exclusionary law but was unsuccessful.[140] Writing in the *New York Globe*, future Black Maryland lawyer, William Ashbie Hawkins, seethed at the legislative inaction: "The bill allowing colored lawyers to practice in the courts of the State was left, as was expected, on the files. So far as the law is concerned, the Colored people of this State are practically little better off than they were in antebellum days."[141]

King also petitioned the U.S. Senate to intervene, to no avail.[142] However, while his campaign was unsuccessful, he garnered considerable media attention and support, raising public awareness of the racially exclusionary law.[143] Mainstream newspapers like the *Baltimore Sun* called for the law to be changed, saying, "[t]he law has no right to keep a colored man from earning his bread in any honest way he may see fit, provided that he shows himself able to meet the requirements imposed on all other classes of citizens."[144]

Even more significant than the media coverage, the attention shined on this issue helped galvanize the nascent Mutual United Brotherhood of Liberty, a group of Black pastors and community activists led by Reverend Harvey Johnson, pastor of the Union Baptist Church.[145] With legislative efforts stalling (a bill to permit Black lawyers in state courts passed the Maryland Senate but failed in the General Assembly), Johnson and the Brotherhood of Liberty decided to bring a test case on bar admission.[146] They were buoyed by two recent developments.[147] First, in 1882, Black support had been critical in changing judicial selection in Baltimore; instead of appointed judges, the Baltimore Supreme Bench featured judges elected with the key support of Black voters.[148] Second, in 1885, Johnson and the Brotherhood— represented by white attorneys Alexander Hobbs and Archibald Stirling, Jr.—won a crucial civil rights victory in a public accommodations discrimination case, the *Steamer Sue* lawsuit.[149] Black female church members, who had been forced to move to second-class seating, sued the steamship owners, and U.S. District Judge Morris ruled that

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[139] *Id.*
[140] *Id.*
[141] *Id.* (quoting William Ashbie Hawkins, *Baltimore Topics*, N.Y. GLOBE, Apr. 5, 1884).
[142] HALPIN, *supra* note 120, at 55.
[143] *Id.*
[144] Editorial, *Colored Men as Lawyers*, BALT. SUN, Feb. 7, 1884, at 2.
[145] *See, e.g.*, HALPIN, *supra* note 120, at 42 fig. 3.
[146] HALPIN, *supra* note 120, at 54-55.
[147] *See infra* text accompanying notes 148-49.
[148] *Id.*
[149] The Sue, 22 F. 843 (D. Md. 1885).

although the steamship owners could provide separate accommodations, they had to be equal.[150] In addition, he awarded damages of $100 to each plaintiff for the conduct of the ship's officers.[151]

Finding a suitable plaintiff for the test case on bar admission, however, would prove challenging.[152] The *Taylor* decision, combined with the restrictive statute itself, had already discouraged Black candidates from pursuing this career path, while simultaneously dissuading Black lawyers in other states from coming to Maryland.[153] Reverend Johnson and attorney Hobbs finally found their plaintiff: Charles S. Wilson, a Massachusetts-trained attorney who was teaching high school in Baltimore County.[154] With some persuasion, Wilson applied for admission to the Supreme Bench of Baltimore City.[155] At the same time, more and more white community leaders were coming out against racial restrictions on bar admission, including Baltimore Mayor Ferdinand Latrobe and Baltimore Supreme Bench Judge Charles Phelps, who called the statute "a relic of barbarism."[156]

At the initial hearing on Wilson's case, while Judges Brown and Fisher seemed sympathetic to the unfairness of the statute's racial exclusion, they nevertheless felt compelled to uphold the statute due to the *Taylor* precedent.[157] Arguing that subsequent Supreme Court cases had effectively overruled *Taylor*, Hobbs was able to appeal the ruling to Baltimore's Supreme Bench.[158] On appeal, Hobbs emphasized how Maryland's statute violated the Fourteenth Amendment's Equal Protection Clause, abandoning the earlier Privileges and Immunities-focused arguments.[159] He pointed to post-*Taylor* U.S. Supreme Court precedents that emphasized equal protection grounds, including *Strauder v. West Virginia*[160] and *The Civil Rights Cases*.[161]

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[150] *Id.* at 843-44.
[151] *Id.* at 848.
[152] *See supra* pp. 1-2.
[153] *See* Act of Mar. 10, 1833, ch. 268, § 2, 1831 Md. Laws; *In re Taylor*, 48 Md. at 28.
[154] HALPIN, *supra* note 120, at 54.
[155] *Id.*
[156] *Colored Lawyers: Views of Members of the Bar as to the Admission of Colored Men*, BAL. SUN, Feb. 10, 1885, at 1, col. 2.
[157] *Admitted to the Bar*, BALT. SUN, Mar. 20, 1885, at 1, col. 4.
[158] *Id.*
[159] *Id.*
[160] Strauder v. West Virginia, 100 U.S. 303 (1880).
[161] *See* The Civil Rights Cases, 109 U.S. 3, 23–24 (1888); *see also Can Colored Men Be Lawyers? Argument on the Application of Charles S. Wilson for Admission to the Bar*, BALT. SUN, Feb. 16, 1885, at
2, col. 2. (mentioning a newspaper article contemporaneous to the aforementioned cases summarizing the petitioner's argument).

On March 19, 1885, the Supreme Bench of Baltimore—in a unanimous decision—held that Maryland's statutory racial exclusion for the legal profession constituted a denial of the Fourteenth Amendment's equal protection guarantee.[162] The court reasoned that, if Black people could not be discriminated against in jury selection (the central holding in *Strauder*), they certainly could not be discriminated against in the opportunity to become lawyers and judges.[163] The court noted that securing "all chances of participation in other branches of the administration of the law" was "quite as essential to their security."[164] As the court pointed out,

> [t]o debar any class of citizens from its membership is not only to prevent their engaging in a lawful calling, but, in the language of the Supreme Court, tends to degrade and stigmatize the whole class by depriving them of a privilage [sic] which all other citizens possess and of the equal protection of the law.[165]

While it was an important victory, Wilson's case was not a complete one.[166] For one thing, its application was limited to Baltimore, rather than the State.[167] For another, Charles Wilson did not go on to become admitted.[168] A victory had been achieved in favor of the abstract right to practice law, albeit not in a statewide sense. The struggle to show that Black people were not only as worthy of the right to practice law as any white candidate but also were equally capable of succeeding as practitioners was ongoing.[169] To fight this ongoing battle for civil rights in Maryland and beyond, Reverend Johnson and the Brotherhood of Liberty needed warriors. They found one in a newly minted graduate of Howard University School of Law named Everett J. Waring.[170]

IV. RISING TO THE CHALLENGE: EVERETT WARING AND THE INTEGRATION OF THE MARYLAND BAR

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[162] *Admitted to the Bar*, *supra* note 157, at 1, col. 4.
[163] *Id.*; *see also Strauder*, 100 U.S. at 310.
[164] *Admitted to the Bar*, *supra* note 157, at 1.
[165] *Id.*
[166] *See infra* text accompanying notes 168-71.
[167] *See supra* note 162 and accompanying text.
[168] HALPIN, *supra* note 57, at 57. (Sources disagree on how this happened. One leading scholar maintains that Wilson simply did not apply to the bar.); AZZIE BRISCOE KOGER, THE NEGRO LAWYER IN MARYLAND 7 (1948) (Others have said that the court ultimately found Wilson not qualified to practice law.).
[169] *See infra* Part IV.
[170] *See id.*

Everett J. Waring was born in Springfield, Ohio on May 22, 1859, to James and Melinda Waring.[171] James, an educator, worked as the principal of the Black schools of both Springfield and Columbus.[172] James was biracial and Melinda was white, and contemporary accounts described their son Everett as "very light-colored."[173] Everett was one of five children and attended Columbus High School, where he graduated in 1877.[174] After graduation, Everett began work as a teacher as well.[175] James Waring died on May 15, 1878, and that year, Everett assumed his father's position as principal.[176] Changes to the school system in 1882 left young Waring without a job.[177] He briefly edited a newspaper in Columbus, but then received an appointment from U.S. Senator John Sherman to serve in the Department of the Interior as an examiner of pensions.[178] The patronage job provided him with a steady income while he attended Howard University School of Law, and Waring graduated in 1885.[179]

Like many early Howard graduates, Waring became a trailblazer.[180] How the young lawyer and the crusading Reverend Harvey Johnson first crossed paths remains a mystery, but Johnson clearly had an eye out for a lawyer who could pick up where the successful Wilson case left off.[181] As one account has it, "Johnson rushed to Howard University to convince Waring to come to Baltimore and make history."[182] Several months after graduating from Howard University School of Law, Waring moved to Baltimore.[183] On October 10, 1885, Waring "presented himself to the Supreme Bench of Baltimore City and was admitted to the bar, becoming the first Negro lawyer admitted to practice in the courts in Maryland" on the

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[171] *Everett J. Waring: 1859–1914*, MD. STATE ARCHIVES, https://msa.maryland.gov/ msa /stagser/s1259/121/6050/html/17455000.html (last visited Oct. 20, 2022).
[172] *Id.*
[173] *Id.*; *Franklin County at the Beginning of the Twentieth Century*, HIST. PUBL'G CO., (1901). https://books.google.com/books?id=OAM2AQAAMAAJ&pg=PA366#v=onepage&q=Clarence&f=false.
[174] *Everett J. Waring: Education, Law and Business Careers*, MD. STATE ARCHIVES, https: //msa.maryland.gov/msa/stagser/s1259/121/6050/html/17452000.html (last visited Oct. 20, 2022).
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*; HISTORICAL PUBLISHING PARTY, FRANKLIN COUNTY AT THE BEGINNING OF THE TWENTIETH CENTURY 366 (Hist. Pub. Co. 1901).
[179] *Id.*; *see* Browning *supra* note 108 (describing the early days of Howard University School of Law).
[180] Waring, *supra* note 174.
[181] *Id.*
[182] *Id.*
[183] *Id.*

motion of Assistant State's Attorney Edgar H. Gans, a progressive white lawyer sympathetic to racial equality issues.[184] Not surprisingly, the Black press nationwide hailed the moment.[185] In one New York paper, a Black lawyer from the District of Columbia named William E. Matthews was quoted as saying "I'm glad to see the subject [of bar admission] treated on its merits and not as a social or political question."[186]

Waring soon had a colleague: Joseph Seldon Davis, an 1885 Howard Law graduate.[187] A native Virginian, Davis had graduated from the Hampton Institute in the late 1870s.[188] Like Waring, he had initially worked as a teacher before moving to Washington, D.C. and finding a government job.[189] Davis worked at the General Land Office while attending law school at Howard, and like Waring, he brought a sense of military-like obligation to his work in advancing civil rights, stating "[m]any a brave soldier gave his life for universal liberty, and we will be derelict of duty if we fail to labor unitedly in carrying out the principles of justice and liberty for which so many noble lives have been sacrificed."[190] On March 1, 1886, Davis was admitted to practice law before the Supreme Bench of Baltimore.[191] Together, Waring and Davis became co-counsel for the Brotherhood of Liberty.[192]

The Brotherhood wasted no time in putting Waring and Davis to work advancing a civil rights agenda by mounting legal challenges to Maryland's discriminatory laws.[193] The first of these was the state's Bastardy Act, a law which established the rights of white women, but not black women, to seek financial support in cases of abandonment by the fathers of their children.[194] As originally written in 1781, the law had applied to all women; later, in 1785, legislators narrowed its scope to apply to free women, regardless of race.[195]

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[184] SMITH, *supra* note 9, at 144 (quoting Ashbie Hawkins Orator, *Bar Association Holds Its Banquet*, BALT. AFRO-AM., Sep. 29, 1922, at 12); Bogen, *supra* note 30, at 1041.
[185] *See generally The Colored Lawyer*, N.Y. FREEMAN, Mar. 14, 1885, at 2, col. 4 (discussing the reactions of the colored legal community to the admission of colored men to practice in Maryland).
[186] *Id.*
[187] Plebian, *Progress of the Emancipated Race*, 84 PHRENOLOGICAL J. AND SCI. HEALTH 83, 85 (1887); *1884-85: Catalogue of the Officers and Students of Howard University*, at 8 (1884).
[188] *Id.*
[189] *Id.*
[190] *Id.* at 85-86.
[191] David S. Bogen, *Forgotten Era: Black Lawyers' Struggles for Recognition in the Maryland Legal Profession Began Nearly 130 Years Ago*, 19 MD. B. J. 10, 10 (1986).
[192] *Id.*
[193] Thomas B. Corey, *Maryland's Legal Pioneers*, 28 MD. B. J. 22, 26 (1995).
[194] *Id.*
[195] Henry J. McGuinn, *Equal Protection of the Law and Fair Trial in Maryland*, 24 J. NEGRO HIST. 143, 146 (1939).

But in 1860, lawmakers added a racial restriction, inserting the word "white."[196]

Waring sought to challenge the Bastardy Act on behalf of a young Black woman named Lucinda Moxley, who sought the prosecution of her child's father, James Smith.[197] It is quite possible that this case was not as adversarial as it seemed on paper; the state was represented by the same Edgard Gans who had sponsored Waring's admission, and the father, Smith, was represented by Edwin R. Davis, a lawyer who had tried to change the law in Maryland's House of Delegates.[198] The case also had popular support, with the *Baltimore Sun* reporting that many citizens both Black and white "think that the bastardy law, which discriminates against colored women, is a barbarism, and ought to be done away with."[199]

Davis entered a responsive pleading on Smith's behalf, arguing that, because the law did not apply to Black women, Moxley lacked standing to bring the suit.[200] The lower court accepted this demurrer, setting the stage for Baltimore's Supreme Bench to determine the Act's constitutionality.[201] In presenting his argument, Waring became the first Black lawyer to appear before the Supreme Bench.[202] On the day of the hearing, the courtroom was crowded with lawyers and laypeople alike, all eager to witness the historic first argument by a Black lawyer in a Maryland courtroom.[203] According to one account, the "youthful advocate did not disappoint those who had pinned their faith in him."[204] Waring argued that the Act stigmatized Black women by denying them the same protections that white women enjoyed.[205] "[T]he Bill of Rights guarantees colored women the common law," he said, before continuing, "[t]hey are on the same footing with white women at common law. Why not under statute?"[206]

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[196] *Id.* at 146–47.
[197] HALPIN, *supra* note 120, at 72.
[198] *Id.*
[199] *Id.* (quoting *The Color-Line Test: A United Effort to be Made to Abolish an Objectionable Law,* BALT. SUN, Apr. 30, 1886, at 6).
[200] HALPIN, *supra* note 120, at 72.
[201] *Id.*
[202] *Id.*
[203] SMITH, *supra* note 9, at 144.
[204] Elaine K. Freeman, Harvey Johnson, and Everett Waring: A Study of Leadership in the Baltimore Negro Community, 1880-1900 29 (Sept. 1968) (M.A. thesis, George Washington University) (on file with the George Washington University library system) (quoting Warner McGuinn, A Brotherhood of Liberty 18-20 (1907) (unpublished manuscript)).
[205] HALPIN, *supra* note 120, at 73.
[206] *Id.*; *Maryland's Unjust Law: Lawyers Waring's Plea in a Bastardy Case*, N.Y. FREEMAN, June 12, 1886, at 2.

However, Waring and his client did not prevail.[207] The Baltimore Supreme Bench upheld the lower court's decision, ruling that the Bastardy Act did not violate the Fourteenth Amendment because it did not protect an individual.[208] Viewed technically, the statute protected the state from having to support the out-of-wedlock child by levying a fine against the father—thus safeguarding state revenue rather than benefiting a mother or her child.[209] The outcome was disappointing, especially since its racial restriction not only excluded Black women entirely, but also had the effect of protecting white men from the legal consequences of fathering children as the result of interracial relationships.[210] Interestingly, just a few months later, in a case involving a white couple, one of the justices who decided against Ms. Moxley accepted the white father's argument that the law violated the Fourteenth Amendment's equal protection guarantee.[211] Judge Edward Duffy apparently had a change of heart, writing that the law "denied the colored woman the right to have the father of her illegitimate child compelled by process of law to support the child, a right accorded by law to the white woman, and was therefore in that respect also unconstitutional."[212] The following year, the Maryland Court of Appeals heard *Plunkard v. State*, yet another challenge to the Bastardy Act involving a white couple, in which counsel for the defendant father adopted Waring's Fourteenth Amendment equal protection argument.[213]

In a 5–1 decision, the Court of Appeals of Maryland held that the Bastardy Act did not violate the Fourteenth Amendment, stating that "[t]he procreation of illegitimate children cannot be said to be a privilege or immunity of citizens of the United States, nor does the statute give any privilege or confer any benefit upon the mothers of such children."[214] The lone dissenting justice, Frederick Stone, made it clear that he felt the racially divisive wording of the Act should not pass constitutional muster, saying "[i]f the [F]ourteenth [A]mendment to the [C]onstitution of the United States means anything it means that there shall not be in any State one law applying to the white race and another and different one applying to the black."[215]

The defeat had a silver lining for Waring and the Brotherhood of Liberty.[216] As one scholar has noted, his historic appearance had tremendous

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[207] *See* HALPIN, *supra* note 120, at 73.
[208] *Id.*; *see A Bastardy Law Sustained*, BALT. SUN, July 3, 1886, at 4.
[209] HALPIN, *supra* note 120, at 72.
[210] *Id.* at 73.
[211] *Id.* at 73-74.
[212] *Id.* at 74.
[213] *Id.*; Plunkard v. State, 67 Md. 364, 366, 10 A. 225, 225 (1887).
[214] HALPIN, *supra* note 120, at 74 (quoting *Plunkard*, 67 Md. at 370, 10 A. at 227).
[215] *See Plunkard*, 67 Md. at 372, 10 A. at 228 (Stone, J., dissenting).
[216] Freeman, *supra* note 204, at 30.

significance, since "to Baltimore's Negroes the mere presence of Waring as counsel made the event seem a major victory."[217] For the Brotherhood, the *Plunkard* decision helped galvanize statewide public support for, first, lobbying the legislature to amend the Act (two bills were introduced and rejected in spring 1888), and later funding an appeal to the Supreme Court.[218] A Black newspaper helped with a fundraising drive, and the Brotherhood issued a call for subscriptions to fund these legal costs.[219] Facing mounting public pressure, and staring at a potential showdown at the Supreme Court, Maryland's legislature gave in.[220] In May 1888, when Dean John Prentiss Poe submitted his codification of Maryland's laws (the same one in which he eliminated the racial restriction of the bar admission statute), he omitted the word "white" in the Bastardy Act.[221] The legislature adopted the revised code without comment.[222] That same year, Waring was admitted to practice before the Court of Appeals of Maryland on April 17, reflecting his, and other Black lawyers', right to practice statewide.[223]

Notwithstanding the unsuccessful court challenge by Waring, the Brotherhood of Liberty's efforts helped ultimately defeat the Bastardy Act.[224] However, Waring would be kept busy with other civil rights battles such as education reform.[225] Indeed, Baltimore was plagued by longstanding racial inequalities in education including lack of funding, inadequate facilities, and the city's refusal to hire Black educators.[226] In 1886, the Brotherhood's education committee succeeded in getting the city council to pass an ordinance to build two new primary schools and a new high school.[227] After the mayor vetoed the measure the following year, Waring wrote a newspaper editorial in February 1887 that "called upon the mechanics, professional men, businessmen, laborers, women, children, in fact, everyone, to join the army

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[217] *Id.*

[218] HALPIN, *supra* note 120, at 74-75.

[219] *Id.* at 75; *see Our Baltimore Budget*, N.Y. AGE, Apr. 7, 1888.

[220] HALPIN, *supra* note 120, at 75.

[221] David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 1043 (1985). As a number of scholars have pointed out, Poe's actions were likely the product of pragmatism rather than race sympathy. *Id.* at 1043 n.363. A segregationist, he later authored legislation to disenfranchise Black voters. *Id.* And as dean of the University of Maryland School of Law, he supervised the 1891 expulsion of Black students. *Id.* at 1043.

[222] *Id.*

[223] *Id.*; *see* 2 CONWAY W. SAMS & ELIHU S. RILEY, THE BENCH AND BAR OF MARYLAND, 1634 – 1901, at 431 (1901).

[224] HALPIN, *supra* note 120, at 75.

[225] *Id.* at 78.

[226] *See* Freeman, *supra* note 204, at 36.

[227] *Baltimore City Schools: The Question of Colored Teachers for Colored Children and Other*, BALT. SUN, Feb. 24, 1886, at 6.

and storm the fortress that denied us [equal employment and opportunities in the schools]."[228] The Brotherhood's education committee and its offshoot, the Maryland Educational Union, continued to press the issue with public gatherings and protests that called for Black voters to make their wishes known.[229] Finally, in May 1888, Baltimore's new mayor, Ferdinand Latrobe, signed an ordinance that made sweeping changes, including giving Black teachers the right to teach in Baltimore with equal pay to their white counterparts.[230]

In other cases, Waring fought the good fight but did not emerge victorious.[231] He defended a Black man named Ernest Forbes, who was accused of raping a white woman.[232] Despite the deathbed confession of a different Black man, Forbes was convicted and executed.[233] Waring also lost a suit against an insurance company that discriminated against Black customers by charging them higher premium rates; the insurance carrier maintained that the prices were justified by Black customers' higher mortality rates.[234]

Waring also represented Reverend Robert McGuinn, a Black pastor who had purchased a ticket in 1887 for travel to Virginia on the steamship *Mason Weems*.[235] McGuinn sat down at a table on board for dinner; upon seeing him there, white passengers refused to dine, prompting the captain to intervene.[236] The captain asked McGuinn to move; when he refused, the captain tried to move him.[237] A white passenger began to assault the clergyman, and fearing for his own safety, Rev. McGuinn left the vessel before it arrived at his destination.[238] Waring sued the captain and the ship's owners in federal court for racial discrimination, but Judge Morris dismissed the complaint.[239] While conceding that a common carrier must make a "bona fide effort" to provide equal accommodation to first-class passengers regardless of race, Morris nevertheless foreshadowed *Plessy v. Ferguson*.[240] He wrote:

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[228] *Baltimore Issue: The Struggle for Colored Teachers and a High School – Ministers and Newspapers*, N.Y. FREEMAN, Mar. 12, 1887, at 4.
[229] HALPIN, *supra* note 120, at 78.
[230] *Judge Brown's Apt Quotation: Local Briefs*, BALT. SUN, May 4, 1888, at 4.
[231] Freeman, *supra* note 204, at 77.
[232] *Id.* at 76.
[233] *Id.* at 77.
[234] *Id.*
[235] McGuinn v. Forbes, 37 F. 639, 639 (D. Md. 1889).
[236] *Id.* at 639-40.
[237] *Id.* at 640.
[238] *Id.*
[239] *Id.* at 641.
[240] *Id.*

> When public sentiment demands a separation of the passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs.[241]

In fighting these "race battles," Everett Waring had achieved milestones for himself and for the Black community.[242] He and the Brotherhood of Liberty succeeded in breaking Maryland's racial barrier to entering the legal profession, ending the racial and gender discrimination of the Bastardy Act, and achieving meaningful educational reforms.[243] Yet Waring and his clients also repeatedly experienced the racial inequalities of the criminal and civil justice systems.[244] Before too long, however, the young lawyer would be tested on the biggest stage of all: the Supreme Court of the United States.[245]

V. THE ROAD TO *JONES V. UNITED STATES*

Even as Waring absorbed the loss in Reverend McGuinn's suit over disparate treatment in public accommodations, events were occurring on a tropical island thousands of miles from Baltimore that would result in Waring becoming the first Black lawyer to argue before the U.S. Supreme Court.[246]

The story began decades earlier, and involved neither gold nor oil, but a far more mundane treasure, guano (dried bird droppings).[247] Rich in phosphates used for fertilizer during the 19th century, guano deposits on islands and rocks throughout the Caribbean and Pacific, became immensely valuable.[248] By the middle of the 19th century, most of the guano deposits in the United States were exhausted, and concerns mounted that American farmers were being gouged by foreign interests.[249] Guano was so important

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[241] *McGuinn*, 37 F. at 641.
[242] David S. Bogen, *The Forgotten Era*, 19 MD. BAR J. 10, 10 (1986).
[243] *Id.*
[244] *Id.*
[245] *Id.* at 11.
[246] *Id.* at 11-13.
[247] Millard Fillmore, U.S. President, Remarks Addressing Congress: First Annual Message, (Dec. 2, 1850) (transcript available at https://millercenter.org/the-presidency/presidential-speeches/december-2-1850-first-annual-message).
[248] *Id.*
[249] Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 782 (2005).

that in 1850, President Millard Fillmore proclaimed that it was "the duty of the Government" to secure it at "a reasonable price."[250] On August 18, 1856, Congress passed the Guano Islands Act, which provided:

> Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.[251]

In a November 18, 1857 letter to the U.S. Department of State, an American sea captain named Peter Duncan claimed Navassa Island for the United States under the Guano Act, and an official reply by the State Department, dated December 8, 1859, formally recognized Navassa as appertaining to the United States.[252] The uninhabited Caribbean Island was three square miles, located approximately 100 miles south of Guantanamo Bay, Cuba, and about 30 miles west of Haiti.[253] It had been first discovered by Columbus in 1493, who sailed past it and named it "Navaza."[254] No one ever landed on the island, and for good reason; the pear-shaped island lacked any sheltered harbor or safe landing spaces, had steep vertical limestone cliffs, and was surrounded by a submerged reef.[255] The island had snakes, no freshwater, and little vegetation—but, of course, it was a favorite spot for defecating birds.[256] Honeycombed with caves and crevices packed with phosphates, Navassa was estimated by Captain Duncan to have at least one million tons of phosphatic guano.[257]

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[250] Fillmore, *supra* note 247.
[251] 48 U.S.C. § 1411 (2018).
[252] Burnett, *supra* note 249, at 787-88. A fascinating and exhaustive treatment of the United States' foray into imperialism with the Guano Islands can be found in JIMMY SKAGGS, THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION (St. Martine's, 1994).
[253] Adam Clanton, *The Men Who Would Be Kings: Forgotten Challenges in U.S. Sovereignty*, 26 UCLA PAC. BASIN L.J. at 39 (2008).
[254] *Navassa Island Government 2016*, ALL COUNTRIES, (Feb. 16, 2016), https://allcountries.org/world_fact_book_2016/navassa_island/navassa_island_government.html.
[255] Nick Pietrowicz, *Navassa: America's Forgotten Caribbean Island*, THE INST. OF WORLD POL., (Feb. 10, 2021), https://www.iwp.edu/articles/2021/02/10/navassa-americas-forgotten-caribbean-island/.
[256] *Id.*
[257] Jones v. United States, 137 U.S. 202, 205 (1890).

Duncan's employer, Edward Cooper, applied for exclusive rights to Navassa under the Guano Island Act, but not without dispute.[258] Citing the 1697 Treaty of Ryswick, which divided up the island of Hispaniola between France and Spain, Haiti claimed ownership of the island by virtue of gaining independence from France.[259] In 1858, prompted by attacks by the Haitian military, the U.S. Navy intervened to secure America and Cooper's interests. On December 8, 1859, Cooper was officially granted exclusive possession of Navassa, and he then transferred his rights to the newly formed Navassa Phosphate Company.[260] With the Civil War looming, the company did not begin active mining operations until 1865.[261] Mining operations were difficult; two "harbors" were created by dynamiting cutouts into the side of the island, enabling supplies (including food, water, and building materials) to be brought ashore via block and tackle.[262] Labor, however, was the biggest issue.[263]

Working conditions on Navassa during its first two-plus decades have been described as "abysmal," "horrific," and "grotesque"; when an American sailor on the *U.S.S. Galena* visited the island in 1889, he could "hardly understand how human beings . . . [could] live in such a place and not go mad."[264] As if the backbreaking labor of digging into dried guano for long hours in the tropical heat was not bad enough, the overpowering stench of ammonia made work even worse.[265] Living quarters hewn out of native limestone were rudimentary and the company's supervisors, some of whom were former slave overseers, abused the laborers.[266] The workers' pay was docked if they were injured, wildly inflated prices were charged at "the company store," and workers deemed insubordinate were punished by being placed in "the stocks," a "barbarous instrument" in which a man was cuffed by his hands and feet.[267] Who would work under such conditions?

Cooper, based in Baltimore, initially contracted with the State of Maryland for convict labor that was mostly White.[268] But after the convicts rebelled against the treatment resulting in several shootings by overseers, the company began to recruit Black laborers, both the recently emancipated and

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[258] Clanton, *supra* note 253, at 39.
[259] *Id.* at 39 n.205.
[260] *Id.* at 39-40.
[261] *Id.* at 40.
[262] Pietrowicz, *supra* note 255.
[263] SKAGGS, *supra* note 252, at 172.
[264] John Cashman, *"Slaves Under Our Flag:" The Navassa Island Riot of 1889*, 24 MD. HISTORIAN 1, 1 (1993).
[265] Burnett, *supra* note 249, at 788.
[266] SKAGGS, *supra* note 252, at 172-73.
[267] *Id.* at 5–6.
[268] Burnett, *supra* note 249 at 788-89.

those who had always been free.[269] Black Baltimoreans were lured into signing labor contracts with the promise of working in a tropical paradise.[270] For most, however, there were limited alternative prospects.[271] Black people living in the Chesapeake Bay region, and indeed, most of the United States, between 1865 and 1889, faced widespread poverty and limited employment opportunities.[272] Mining employed more Black people than any other southern industry, according to one expert.[273] The typical labor contract with the Navassa Phosphate Company paid eight dollars ($8.00) per month (plus room, board, and transportation) and had a term of fifteen months.[274]

By 1889, there were 139 Black laborers on Navassa, and at least 11 White managers led by a superintendent, Dr. Charles Smith.[275] Under Dr. Smith's watch, working conditions had steadily deteriorated, and discipline had become more capricious.[276] On September 14, 1889, what had once been simmering boiled over.[277] After a White manager, Charles Roby, threatened one of the Black workers, another laborer struck Roby with a metal bar.[278] Chaos erupted on the island, and in the ensuing violence, five White managers were killed.[279] During a lull, Dr. Smith managed to send word to a British naval vessel offshore to call the U.S. Navy.[280] Ultimately, the British ship transported the surviving White managers and several Black workers to Kingston, Jamaica, and from there, the American consul arranged passage to Baltimore.[281]

On October 4, 1889, the *U.S.S. Galena* arrived at Navassa.[282] Its captain sent ashore a 5-man board of inquiry to investigate the uprising and interview witnesses, accompanied by a detachment of Marines to maintain order.[283] After a week of interviews, the sailors arrested six Black laborers believed to be the "ringleaders": James Johnson, Henry Jones, George S.

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[269] *Id.*
[270] *See Jones*, 137 U.S. at 224 (quoting the contract between Navassa Phosphate Company and their workers) ("Should they fail to obey the orders and instructions of said Navassa Phosphate Company, or its agents, or refuse at any time to labor, they shall forfeit all claim for wages and compensation which may be due them.").
[271] SKAGGS, *supra* note 252, at 173.
[272] *Id.*
[273] *Id.* at 174.
[274] *Id.*
[275] Cashman, *supra* note 264, at 3.
[276] SKAGGS, *supra* note 252, at 177-78.
[277] *See* Burnett, *supra* note 249, at 789.
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] SKAGGS, *supra* note 252, at 184.
[282] Burnett, *supra* note 249, at 789.
[283] SKAGGS, *supra* note 252, at 185.

Key, and Amos Lee, all of whom were suspected of murder, and Albert Jones and James Phillips, both of whom were suspected of mutiny and assault.[284] Three other workers were taken into protective custody as material witnesses while the remaining Black laborers were loaded into two commandeered freighters to be transported back to Baltimore.[285]

Baltimore's U.S. district attorney, Thomas G. Hayes, had gotten word of the riot and met the *Galena* off the coast of Virginia.[286] On board, Hayes "practically held court," and ultimately selected 18 of the laborers to present to the grand jury for indictment.[287] When the *Galena* docked at Baltimore on October 27, the prisoners were identified by Charles Roby, who survived the incident, and were turned over to the deputy U.S. Marshal.[288] When the two freighters arrived several days later, the process was repeated.[289] In a scene that evoked Baltimore's slaveholding past, the defendants were marched through the city streets in chains, dressed in rags; onlookers said "they had never beheld men in such a degraded condition before."[290] Seven of the laborers were charged with murder: George S. Key, Henry Jones, Caesar Fisher; Edward Smith, Stephen Peters, Charles H. Smith, and Charles H. Davis, while the remaining eleven were charged with aiding and abetting.[291] Faced with defense objections to trying all the defendants together, the judges decided to hold five separate trials, which were later consolidated into three main trials.[292]

Newspapers around the country ran lurid, racially charged stories.[293] The *Washington Post* titillated readers with "A Horrible Butchery," claiming the murdering Black laborers had uttered, "fiendish yells that a Comanche Indian would have envied."[294] The *New York Times* headline shouted, "Hunted Down by Negroes."[295] The *Galveston Daily News* described the defendants as "Black Butchers," while the *New Orleans Daily Picayune* branded them as "a murderous gang of mutineers."[296] Even the hometown

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[284] *Id.*
[285] *Id.*
[286] Burnett, *supra* note 249, at 789.
[287] *Id.*
[288] SKAGGS, *supra* note 252, at 185.
[289] *Id.*
[290] HALPIN, *supra* note 120, at 82.
[291] *Navassa Rioters Indicted*, WASH. POST, Nov. 11, 1889, at 7; *Indicted on Five Separate Charges*, BALT. SUN, Nov. 15, 1889, at 4.
[292] *Indicted on Five Separate Charges*, *supra* note 291, at 4.
[293] *See infra* notes 294-97 and accompanying text.
[294] *A Horrible Butchery*, WASH. POST, Oct. 2, 1889, at 1.
[295] *Hunted Down by Negroes*, N.Y. TIMES, Oct. 2, 1889, at 1.
[296] *The Black Butchers*, GALVESTON DAILY NEWS, Oct. 11, 1889, at 1; *The Navassa Riot*, NEW ORLEANS DAILY PICAYUNE, Oct. 19, 1889, at 2.

paper, *The Baltimore Sun*, joined in, calling the laborers as "fine a collection of scoundrels as could be gathered together in any jail in the country."[297]

The Brotherhood of Liberty, along with a Black fraternal organization based in Baltimore, the Order of Galilean Fishermen, quickly mobilized a defense team.[298] It consisted of Everett J. Waring, Joseph S. Davis, and four white attorneys—Archibald J. Stirling, his son J. Edward Stirling, Robert B. Graham, and James D. Cotter.[299] On November 3, 1889, Waring filed a writ of habeas corpus on behalf of Henry Jones, arguing that the United States did not have jurisdiction over Navassa Island.[300] Although the court rejected Waring's request, he was clearly laying the basis for an appeal to the Supreme Court, which had never previously ruled on that issue.[301]

Between November 19, 1889, and February 15, 1890, the trials were held in Baltimore's U.S. Circuit Court as the (then) court of general jurisdiction.[302] Two judges presided over the trials: Judge Thomas J. Morris, U.S. District Judge for the District of Maryland, and Justice Hugh Lennox Bond, a federal circuit judge fulfilling his "circuit-riding" duty for the Fourth Circuit.[303] Before an all-White jury, the prosecution called all but one of the surviving White managers as witnesses, along with all twenty-one of the Black laborers.[304] The prosecution's strategy was to highlight the brutality of the violence itself and claim that the violence was the result of a conspiracy rather than a spontaneous uprising, all while denying that the living and working conditions on Navassa were as horrible as described.[305] The defense, meanwhile, did not deny the violent events themselves, but argued that there was no conspiracy and that the white supervisors had instigated the violence by their mistreatment of the Black laborers and abusive working conditions.[306] In the end, even as the prosecution's witnesses bolstered their claims of conspiracy, witness after witness detailed the horrific conditions on the island.[307] The defense called 16 witnesses (all Black), eleven of whom were defendants.[308] Most testified to the living and working conditions that

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[297] *The Navassa Rioters*, BALT. SUN, Oct. 18, 1889, at 1.
[298] SKAGGS, *supra* note 252, at 186.
[299] HALPIN, *supra* note 120, at 84.
[300] *Id.*
[301] *See id.*
[302] SKAGGS, *supra* note 252, at 186.
[303] *Id.*
[304] *Id.*
[305] HALPIN, *supra* note 120, at 85.
[306] *Id.*
[307] SKAGGS, supra note 252, at 187.
[308] *Id.*

had led to the events of September 14 and the subsequent spontaneity of the riot, such as the heavy drinking by white managers.[309]

On December 2, 1889, the first verdict was reached by the jury.[310] Key was found guilty of murder, Moses Williams was acquitted, and the jury deadlocked on the remaining sixteen defendants.[311] Subsequent trials would not turn out as well for the defense.[312] The second trial began on December 13, and in it, Henry Jones was convicted of murder, while Caesar Fisher and seven others were found guilty of manslaughter.[313] Two defendants were found not guilty, and the jury deadlocked on the remaining seven.[314] The third trial, which began on February 10, 1890, resulted in Key, Smith, and Jones being found guilty of murder, while the remaining defendants were convicted of crimes ranging from manslaughter to participating in a riot.[315] There were two remaining trials for those charged with rioting; in the first, twenty-three of the twenty-five defendants were convicted.[316] In the second trial, three defendants pleaded guilty to manslaughter.[317]

The final tally by February 15, 1890, was three men convicted of murder; fourteen convicted of manslaughter; and twenty-three convicted of rioting.[318] One defendant, Moses Williams, was exonerated in every proceeding except for the last.[319] On February 20, 1890, the 40 defendants stood before both Judges Morris and Bond for sentencing.[320] The three convicted of murder—Henry Jones, George S. Key, and Edward Smith—were sentenced to hang on March 28 in Baltimore's city jail.[321] Of the fourteen convicted of manslaughter, eight were sentenced to ten years in prison at hard labor, while four received five-year sentences and two received two-year sentences.[322] The twenty-three convicted of rioting received terms ranging from six months to two years in Maryland's House of Correction.[323]

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[309] *Id.*
[310] HALPIN, *supra* note 120, at 85.
[311] *Id.*
[312] *Id.*
[313] SKAGGS, *supra* note 252, at 189.
[314] *Saturday's City News*, BALT. SUN, Dec. 23, 1889, at 4.
[315] SKAGGS, *supra* note 252, at 189; *Fate of Navassa Rioters*, BALT. SUN, Feb. 21, 1890, at 5.
[316] SKAGGS, *supra* note 252, at 190.
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] SKAGGS, *supra* note 252, at 190.
[323] *Id.*

The executions of Jones, Key, and Smith were stayed pending an appeal to the U.S. Supreme Court.[324] In the fall of 1890, a lawyer making history would attempt to make even more history with an innovative jurisdictional argument.[325]

VI. A BLACK ADVOCATE BEFORE THE COURT

It has been said that *Jones v. United States* "lays the basis for the legal foundation for the U.S. empire because it establishes the constitutionality of the fact that the United States can claim overseas territory and that it is consonant with the U.S. Constitution."[326] But, before considering the *Jones* case's significance from a purely legal standpoint, let us acknowledge another basis for its importance. While several other Black lawyers had followed in the footsteps of John Swett Rock and had been admitted to the Supreme Court bar between 1865 and 1890, a Black lawyer was not admitted to argue in front of the Supreme Court until 1880.[327] On the brief for appellants Jones, Smith, and Key were *two* Black lawyers—Everett J. Waring and Joseph S. Davis—along with three white attorneys, John Henry Keene, Jr., Archibald Stirling, and J. Edward Stirling.[328]

The historic nature of a Black lawyer arguing before the nation's highest court, especially in a case marked by the dehumanizing, slavery-like working conditions endured on Navassa by the appellants, was not lost on the Black press.[329] The *New York Age* commented, "On Wednesday of last week one of the most impressive and significant events in the jurisprudential history of the Republic transpired at Washington, and none the less so

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[324] *Id.*

[325] *See* Brief for Plaintiffs in Error, Jones v. United States, 137 U.S. 202 (1890) (No. 1143). The three defendants on appeal had become the "plaintiffs in error"; however, the Court in its opinion refers to them as the "defendants," and I have referred to them by name or as the appellants.

[326] Fresh Air, *The History of American Imperialism, from Bloody Conquest to Bird Poop*, NAT'L PUB. RADIO, at 08:48 (Feb. 18, 2019), https://www.npr.org/2019/02/18/694700303/the-history-of-americanimperialism-from-bloody-conquest-to-bird-poop (interviewing Daniel Immerwahr, author of HOW TO HIDE AN EMPIRE – A HISTORY OF THE GREATER UNITED STATES (2019)).

[327] Karanjot Gill, *Samuel R. Lowery (1830 or 1832-1900)*, BLACKPAST (Oct. 9, 2018), https://www.blackpast.org/african-american-history/lowery-samuel-r-1830-or-1832-1900/.

[328] *Jones*, 137 U.S. 202. While all three of the defendants convicted in the U.S. District Court for the District of Maryland had separate appeals in which they were represented by Waring, their cases were consolidated for oral argument. *See* Smith v. United States, 137 U.S. 224 (1890); *see* Key v. United States, 137 U.S. 224 (1890). Sadly, by the time the Court decided *Jones*, Joseph Davis had passed away. Smith, *supra* note 9 at 179.

[329] *See, e.g., An Historical Event*, N.Y. AGE, Nov. 15, 1890.

because the leading papers of the country allowed the event to pass without emphasizing it in any manner."[330] The paper went on to put the oral argument in perspective by referencing the dramatic turn since the 1857 *Dred Scott* decision that denied the citizenship of Black Americans, proclaiming "Mark the change. Thirty-four years after the rendering of this monstrous decision, three 'Negroes' appear before the same Court, full-fledged attorneys and counselors of law, residents of the erstwhile slave State of Maryland, and argue a question of Federal jurisdiction."[331]

Waring's argument, as much as his mere presence, was groundbreaking, too.[332] His fourteen-page brief did not contest the facts, instead focusing on the argument that his clients were not subject to prosecution because Navassa—having never been legally acquired—was not part of the United States and therefore was not subject to its jurisdiction.[333] Relying on both international and constitutional law doctrines, Waring argued that the "peculiar species of discovery" envisioned under the Guano Islands Act lacked the support of either international law or the U.S. Constitution.[334] Title, Waring stated, was acquired by "occupancy, discovery, conquest, or cession."[335] Waring summarily dismissed all but discovery as viable options (although, perhaps *too* summarily in the case of occupancy), and then proceeded to assert that title by right of discovery "means a title that is permanent, fixed, and indefeasible."[336] As Waring pointed out, the discovery contemplated by the Act could not possibly be permanent, since the Act's own provisions stated that all rights would terminate once the guano had been removed, under the law's abandonment provision.[337]

According to Waring, the question that remained was whether Congress had the power to legislate over territory that was acquired in a different manner, a form of "discovery" that only involved temporary possession and never conveyed title under either international or constitutional law.[338] Territory that had been taken only temporarily, Waring maintained, cannot constitute "part of the territorial domain of the United States."[339] While Waring acknowledged that the Constitution's Territory Clause "empowers Congress to make rules respecting territory belonging to the United States," he argued that the United States had not attempted to

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[330] *Id.* at 2.
[331] *Id.*
[332] *See infra* notes 334-47 and accompanying text.
[333] Brief for Plaintiffs, *supra* note 325.
[334] *Id.* at 3.
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.* at 4.
[339] *Id.*

acquire title to Navassa so the island "[did] not belong to the United States."[340]

Waring also took a shot at the Act's use of the vague word "appertain," questioning whether it actually meant anything at all.[341] In the brief, he asked, "It is respectfully inquired what is the significance or meaning of this desultory phrase 'appertain to'?"[342] Later, of course, in *The Insular Cases*, the Court itself would use the term to explain the status of the Philippines, Puerto Rico, and Guam in the wake of the Spanish-American War.[343] The Supreme Court would adopt the position that territories "appertaining" to the United States are territories "belonging to," but not "part of" the United States, rendering them part of the nation's "territorial domain" while not part of the United States proper. As Justice White would later describe it in *Downes v. Bidwell*:

> The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but was merely *appurtenant thereto as a possession*.[344]

Waring's argument had merit.[345] The U.S. government had never conducted an investigation into whether Haiti or any other nation had a superior claim to Navassa, and, while it had asserted an economic interest, it had never claimed Navassa to be "part of" the nation, despite Haiti laying claim to it.[346] In the face of government silence, even the press noted Haiti's declared interest.[347] However, the government's response to Waring's brief

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[340] *Id.*

[341] *Id.* at 5. As a State Department memorandum in 1932 would later admit, the term "appertaining" was "deft, since it carries no precise meaning and lends itself readily to circumstances and the wishes of those using it." OFF. OF THE LEGAL ADVISOR, U.S. DEP'T. OF STATE, THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ISLANDS ACT AND OF THE NORTHWEST HAWAIIAN ISLANDS, MIDWAY, AND WAKE 317 (Aug. 9, 1932).

[342] Brief for Plaintiffs, *supra* note 325, at 5.

[343] *See, e.g.,* Downes v. Bidwell, 182 U.S. 244, 307 (1901).

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

[345] *See infra* notes 346-50 and accompanying text.

[346] *See generally* Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2412-15 (2022) (discussing U.S. and Haitian ambivalence to Navassa's sovereignty).

[347] *See, e.g., Jurisdiction in Navassa,* N.Y. TIMES, Nov. 3, 1889 ("The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the

began with a dismissive aside that his argument was "not easy to understand."[348] The government ignored the defense's observations about the lack of permanent title conveyed by the Guano Islands Act and instead offered the suggestion that Navassa "being thus in the possession of this Government, it must be for the time being regarded as part of the national domain."[349] Without taking pains to define this amorphous "national domain," the government asserted that "Congress has the power to legislate co-extensive with the national domain; not only co-extensive with the national domain, but co-extensive with the national authority, according to the maritime and international law."[350]

The Court, in a unanimous opinion, rejected Waring's argument, holding that the Guano Islands Act was "constitutional and valid" and "that the Island of Navassa must be considered as appertaining to the United States."[351] The Court reasoned that the determination of sovereignty over a territory was a political question properly reserved for the executive and legislative branches—not the judicial branch.[352] The Court discussed the evidence of discovery, possession and occupation of Navassa—not to draw its own conclusion about sovereignty, but to demonstrate that the other two branches had come to their own conclusion, one which it was the Court's role to accept.[353] As the Justices concluded,

> [I]f the executive, in his correspondence with the government of Hayti [sic], has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.[354]

The Court's holding that the islands acquired under the Guano Islands Act were "in the possession of the United States" meant that the Navassa Phosphate Company's claim to Navassa was valid and thus the defendants

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Black Republic has jurisdiction over Navassa, and the action of the Counsel Waring is to determine the question of jurisdiction.").

[348] Brief for Defendant in Error at 5, Jones v. United States, 137 U.S. 202 (1890) (No. 1143).

[349] *Id.* at 6.

[350] *Id.* at 7.

[351] *Jones*, 137 U.S. at 224.

[352] *Id.* at 212.

[353] *Id.* at 217-21.

[354] *Id.* at 221.

were properly subject to prosecution in American courts.[355] But on a greater level, it would be a distinction central to the reasoning of the *Insular Cases* ten years later, and would have repercussions that resonate even today.[356] In the Court's most recent term, Justice Gorsuch issued a blistering concurrence in a case involving Social Security benefits for a resident of Puerto Rico.[357] Calling the *Insular Cases,* a "rotten foundation" of racial stereotypes when it came to affording constitutional rights and protections for territory residents, Justice Gorsuch called for this "shameful" precedent to be overruled.[358]

The Court's decision didn't actually settle the exact legal status of the various guano islands (Navassa had been the first one claimed, but more than 100 such islands were eventually claimed), nor did it determine the fate of Jones, Key, and Smith.[359] While their death sentences were affirmed, the tide of public opinion had turned.[360] Coverage of the case shined a spotlight on the abuses endured on Navassa by the Black laborers, and the defendants sought executive clemency.[361] Media coverage, even by newspapers that had initially condemned the violent uprising, supported the clemency campaign.[362] In an 1891 editorial, the *Washington Post* argued,

> The men employed by the Navassa Phosphate Company were subjected to brutal and inhuman treatment of "bosses" worse than the worst of the proverbial overseers of old slave times, and that there was great provocation for the outbreak and mutiny which culminated in the murder of five of the white men who had themselves precipitated the riot.[363]

The Brotherhood of Liberty mobilized a petition-writing campaign, with leading Baltimore citizens, clergymen, attorneys, the Baltimore

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[355] *Id.* at 216, 223-24.

[356] *See generally* De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York and Porto Rico Steamship Co., 182 U.S. 392 (1901). *See, e.g., infra* text accompanying notes 357-58.

[357] United States v. Vaello Madero, 142 S. Ct. 1539, 1552-57 (2022) (Gorsuch, J., concurring).

[358] *Id.* at 1554, 1557.

[359] *Jones*, 137 U.S. at 224 (holding that Navassa Island specifically appertained to the United States and that the United States District Court for the District of Maryland had jurisdiction to indict Jones, Key, and Smith.).

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

[361] *Id.*

[362] *See* Dan Fesperman, *A Man's Claim to Guano Knee-Deep in Bureaucracy: Island Fortune in Fertilizer Has Baltimore Connection*, BALT. SUN, July 19, 1998 (describing how the defendants were portrayed in the press by newspapers such as the Baltimore Sun and the New York Times).

[363] *A Good Case for Clemency, supra* note 360, at 4.

Federation of Labor, and even some of the original trial jurors supporting the clemency effort.[364] J.T. Ensor, the U.S. Attorney for the District of Maryland, even penned a letter, stating that "[e]xpediency and justice justify the exercise of executive clemency in these cases."[365] On April 1, 1891, the Brotherhood of Liberty representatives personally delivered the petition to President Benjamin Harrison, along with an appeal written by Waring and the defense team.[366] A month later, President Harrison commuted the defendants' death sentences to life in prison, saying that there were mitigating circumstances as a result of the inhumane working conditions in which "[t]heir employers were, in fact, their masters."[367] Such a state, the president wrote, "might make men reckless and desperate."[368] Negative publicity continued to plague the Navassa Phosphate Company, and it ceased mining operations in 1898 before going into receivership.[369]

VII. CONCLUSION

His historic defense ensured Everett J. Waring prominence in Baltimore's Black community.[370] The fact that a Black lawyer had argued before the U.S. Supreme Court brought him a steady stream of clients, both Black and white.[371] Financial success led to Waring becoming active in real estate, and at one point, he owned as many as forty properties.[372] He was also a president and co-founder of the Lexington Savings Bank, the first bank in Maryland started and run by Black Americans.[373] But on March 8, 1897, the Lexington Savings Bank went into receivership.[374] Waring was charged with embezzlement, and the man who was once one of Baltimore's leading citizens had to seek a change of venue to Howard County, believing he would not receive a fair trial in the city.[375] Although he was acquitted and although

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[364] *See* HALPIN, *supra* note 120, at 87.
[365] *The City Courts: The Navassa Island Murderers—Decision Reversed—Damage Suits*, BALT. SUN, Apr. 10, 1891, at 4.
[366] HALPIN, *supra* note 120, at 89.
[367] *Imprisonment for Life: The President Commutes the Sentences of the Navassa Rioters*, WASH. POST, May 19, 1891, at 7.
[368] *Id.*
[369] Brennen Jensen, *Poop Dreams: It's a Guano-Covered Rock in the Sea. So Why Do So Many People Want a Piece of Navassa Island?*, BALT. CITY PAPER, Feb. 21, 2001, at 4.
[370] *See Everett J. Waring: 1859–1914*, *supra* note 171, at 2 (describing Waring's reputation as a leader in Baltimore's Black community).
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*
[375] *Id.* at 3.

evidence showed Waring had tried to use his own personal funds to save the bank, Waring's fall from grace was complete.[376] He moved back to Ohio, where he died on September 2, 1914.[377]

Everett J. Waring remains, sadly, a "forgotten first" despite his historic achievement.[378] While his portrait hangs in Baltimore's Clarence Mitchell Courthouse, and while a minority bar association in Maryland bears his name, few even in the legal profession are aware of his significance.[379] In a former slave state that clung to a "whites-only" legal profession for more than 20 years after the Civil War, and with the support of Black community organizing that helped pave the way for groups like the NAACP, Waring broke through the color barrier and then immediately set to work challenging discriminatory laws.[380] And in only his fifth year as a lawyer, he found himself challenging U.S. sovereignty over a far-flung island in an effort to spare the lives of Black men who had endured slavery by another name.[381] As if being the first Black lawyer to argue before the U.S. Supreme Court wasn't intimidating enough, Waring had to make that argument before a Court that included five of the justices who would decide *Plessy v. Ferguson* six years later.[382]

While largely overlooked by scholars, Waring's historical significance is undeniable.[383] His admission ushered in the beginning of an era of distinguished Black civil rights lawyers in Maryland, ranging from William Ashbie Hawkins to Charles Hamilton Houston to Thurgood Marshall.[384] Virtually anywhere that Black lawyers practiced, they struggled to earn a living: after all, white clients generally didn't hire them, and most Black clients could not afford to pay substantial fees.[385] Recognizing this, early Black lawyers devoted significant time and energy to building up the Black community's economic infrastructure and mobilizing the political clout that would pave the way for future growth and opportunity.[386] In Maryland, this translated to getting Harry S. Cummings elected in 1890 as

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[376] *Everett J. Waring: 1859–1914*, *supra* note 171, at 2.
[377] *Everett J. Waring Obituary*, PHILA. INQUIRER, Sept. 4, 1914, at 7.
[378] Bogen, *supra* note 30, at 10, 13.
[379] *Clarence M. Mitchell Jr. Courthouse: Courtroom* 231, MD. STATE ARCHIVES, https://msa.maryland.gov/msa/speccol/sc5500/sc5590/html/waring.html (last visited Sept. 28, 2022); WARRING MITCHELL L. SOC'Y, http://www.waringmitchell.org/ (last visited Sept. 28, 2022).
[380] Bogen, *supra* note 30, at 10, 12.
[381] *Id.* at 11 (citing *Jones*, 137 U.S. at 224).
[382] Bogen, *supra* note 30, at 11; *see also Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 26, 2022).
[383] Bogen, *supra* note 30, at 10.
[384] *Id.* at 10-13.
[385] *Id.* at 11.
[386] *Id.* at 11-12.

the first Black person to serve on the Baltimore City Council.[387] Although he was defeated in his reelection bid in 1892, Cummings worked tirelessly for Black constituents and managed to integrate the Maryland Institute of Art and Design by appointing its first Black student.[388] In 1890, Cummings—along with Joseph Seldon Davis, future lawyer William Ashbie Hawkins, and other businessmen—founded the Economics Association, a support network for Black-owned businesses.[389]

However, the fight for Black representation in Maryland's legal profession was far from over.[390] With vocal cries for segregation reaching a fever pitch in 1890, the University of Maryland School of Law expelled its only two Black students, William Ashbie Hawkins and James L. Dozier.[391] Both finished their legal education at Howard.[392] The University of Maryland School of Law's doors would remain closed to Black students for nearly half a century, until Thurgood Marshall and Charles Hamilton Houston won Donald Murray's suit seeking admission to the school.[393]

Yet more Black lawyers continued to walk through the doors opened by Everett Waring and the Brotherhood of Liberty.[394] William Ashbie Hawkins, admitted in 1892, was present at the Niagara Conference that led to the founding of the NAACP, and he went on to become Maryland's leading civil rights lawyer for decades—challenging segregation in housing and transportation as well as attempts at disenfranchising Black voters.[395] By 1935, the end of the first half of the century of Black admission to the Maryland bar, there were 32 Black lawyers in Baltimore alone.[396] As one scholar noted, "[m]easured by the forces arrayed against them, the achievements of the black lawyers in Maryland in these first four decades were substantial," and black lawyers' "economic survival was itself a triumph."[397]

Acknowledgment for the pioneering Black lawyers in Maryland's history is long overdue.[398] One positive step toward restorative justice would

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[387] *Id.* at 11.
[388] *Id.*
[389] Bogen, *supra* note 30, at 11.
[390] *Id.* at 11-12.
[391] *Id.* at 11.
[392] *Id.*
[393] *Id.* (citing Pearson v. Murray, 169 Md. 478, 590-94 (1936)).
[394] *Id.* at 11-12.
[395] Bogen, *supra* note 30, at 11-13.
[396] *Id.* at 13.
[397] *Id.*
[398] *Id.* at 10, 13 (explaining that the struggle of black lawyers to establish themselves in Maryland is little known, and these early lawyers should not be forgotten).

be the posthumous bar admission of Edward Garrison Draper.[399] In the same year the United States Supreme Court proclaimed Black people "beings of an inferior order"[400] who could not be considered citizens, Draper displayed such a command of the law that a White judge found him "qualified in all respects" and worthy of bar admission but for the color of his skin.[401] Recognizing Draper—a living, breathing repudiation of the racist beliefs manifested in Chief Justice Taney's opinion in *Dred Scott v. Sandford*—with posthumous admission to the Maryland bar would be more than a symbolic gesture.[402] It would right a historic wrong and racial injustice, while simultaneously serving as homage to the Black legal trailblazers on whose shoulders we stand.[403]

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[399] *See* John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. AFR.-AM. L. & POL'Y 1, 34 (2021) (explaining that one purpose of posthumous bar admissions is to foster restorative justice by giving a person something that was wrongly withheld from them, or by removing a stain on one's reputation).

[400] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857); *see also* D. Dumont Smith, *Decisive Battles of Constitutional Law: VIII. Dred Scott vs. Sandford*, 9 A.B.A. 649, 650 (1923) (discussing Chief Justice Taney's opinion regarding Black people as an inferior people); *see also* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 977 (1985).

[401] Bogen, *supra* note 30, at 10.

[402] *See* Browning, *supra* note 399, at 3 (examining whether posthumous bar admissions are "merely symbolic coda," or if they are "meaningful steps toward racial healing").

[403] *Id.* at 3, 28, 34, 36 (explaining that posthumous bar admissions of legal trailblazers are useful tools in righting wrongs and racial injustices).