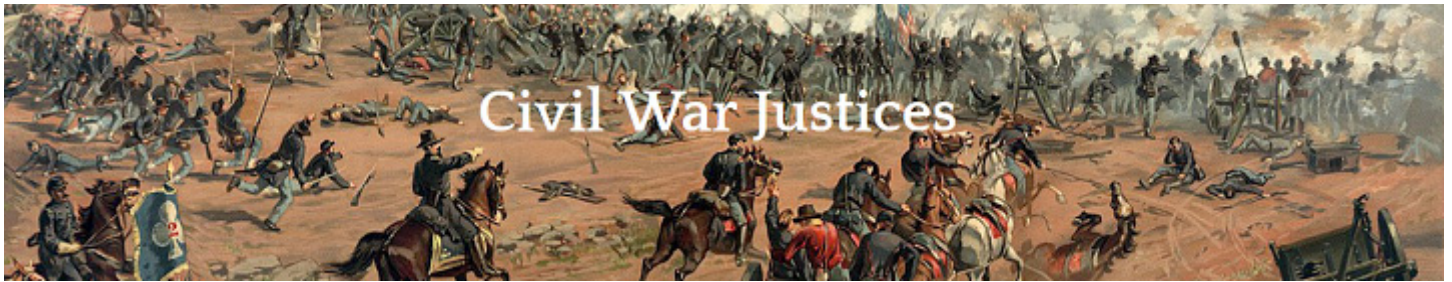




# *Society Update*

The Official Publication of the Michigan Supreme Court Historical Society

Winter 2018



## **The Civil War and Law**

by Trenton Koch, 2017 Coleman intern

**F**ew events in American history had a greater effect on the course of the country than the American Civil War. Over the course of four years Americans North and South threw themselves headlong into a brutal and personal struggle over the future of the country. The importance of the conflict can be seen perhaps most basically in the huge numbers involved. North and South, more than three million men joined or were conscripted into the army, including five future and one former Michigan Supreme Court Justice. Those three million comprised a full ten percent of the U.S. population at the time. Of those, around 620,000 died, both from combat and from other causes such as disease or starvation. This number, not much less than the number of Americans killed in all other American wars combined, illustrates how shocking the war was. It is not surprising that the war affected all aspects of American life.

Most obviously, the war brought about the end of slavery in the United States, and freed four million African Americans from bondage. The war also further galvanized the industrial economy of the North, setting the United States on the path to becoming the greatest industrial power on Earth. At the same time, the Homestead Act and Pacific Railroad Act were passed, opening the West for settlement and connecting America from coast to coast. American politics was also deeply affected. Abraham Lincoln's Republican Party became deeply reviled in the South (save by the newly-freed slaves), giving the Democrats reliable control there until the 1960s. Republican domination of the more highly populated North, meanwhile, led to

Republican victory in nine of the next eleven Presidential elections. Just as it affected American society, economics, and politics, the Civil War also had far ranging consequences on American Law.

If the Civil War proved nothing else, it showed that the American federal government was supreme over the states in the American Union, and denied the right of secession once and for all. Prior to the Civil War, the relationship between state and federal power was hazy. Assuming that the states would get along, the founding fathers had placed few mechanisms for resolving inter-state conflicts in the Constitution. Thus, between ratification and the Civil War, the states and the federal government engaged in push and pull conflicts over the nature of federal power and the American Union. Over the course of this period, nearly every state, at some point, asserted its authority to resist or nullify federal law.<sup>1</sup> The most prominent example of these battles was the Nullification Crisis of 1832, when South Carolina refused to enforce a federal tariff within its borders, only backing down in the face of President Andrew Jackson's threat to send in federal troops. Nearly all of these conflicts were over slavery, the dominant sectional issue of the age. Northern states often refused to recognize fugitive slave laws, while Southern states resisted any federal efforts to interfere with the peculiar institution where it existed.

As these battles grew more intense, the idea of a state's right of secession became more popular. Those who supported secession saw the United States as a collection of sovereign entities, each of whom had

the right to withdraw from the compact if they felt the national government had abused its powers. This viewpoint, pushed by South Carolina Senator John C. Calhoun, was at odds with a view espoused by Northerners like Daniel Webster and Abraham Lincoln which saw the country as a “perpetual union” that could only be broken with the consent of the other members. As the Southern states seceded in the wake of Lincoln’s election, this viewpoint came to dominate the federal government in opposition to that secession, along with ideas of a strong central government and national supremacy. (188) Over the course of the war, necessity coupled with Lincoln’s willingness to ignore court challenges to his actions to create a new supreme federal government with greatly expanded powers. After Lincoln ignored Chief Justice Taney’s declaration that his suspension of habeas corpus was unconstitutional, Congress passed the Habeas Corpus Act of 1863, which confirmed Lincoln’s powers. Subsequent challenges to Lincoln’s power were few, and the courts often found in the government’s favor.<sup>2</sup> The result of all of this was a new order where the federal government was totally dominant over the states. The doctrine of state’s rights was fundamentally changed, as well. Whereas many states had formerly claimed that their laws could supersede federal law, they now claimed that some issues should rather be devolved to the states, most prominently the issue of race relations.

The Civil War also, at least partly, led to a movement of systemization that sought to turn the ad hoc system of the antebellum era into a more ordered, refined, and non-political legal doctrine. Judges sought to reckon with contradictions that arose from the slave system, such as Southern judges needing to square property law over slaves with the fact that slaves could still express will and agency. Judges and legal theorists sought to remove politics from law. To do that, they sought to exchange a reliance on precedent books with more systemic and, in their minds, scientific doctrines that removed outdated concepts and reorganized the law along rational grounds. The chaos of the Civil War helped to spur a desire to see the state as a neutral actor, devoid of religious, class, or interest ties, and as a way to mediate social chaos in the future.<sup>3</sup> They also emphasized a sharp distinction between public and private law, that is, criminal and regulatory law versus the law of contract, tort, etc. This separation was designed to keep private law insulated from political interference.

Another obvious effect of the Civil War on American law was the post-war expansion of civil rights, primarily accomplished through the 13th, 14th, and 15th Amendments. The 13th Amendment had ended slavery, but it also contained an enforcement provision, unprecedented in the Constitution, that gave the federal government powers to protect the newly freed. The 14th Amendment guaranteed the newly freed civil rights and equality before the law, and again gave the federal government enforcement powers, while the 15th sought to prevent voting discrimination. These Amendments, along with the Civil Rights Acts, sought to apply the Bill of Rights to the states and protect the newly freed slaves from their former masters.<sup>4</sup> (226-227) While there was some success in this regard during the decade following the Civil War, forces soon converged to bring that effort to an end.

All too often, the Supreme Court in the years after the war refused to appreciate how circumstances had been changed by the war. Though the court had recognized Congress’ right to make Reconstruction policy, the court also sought to limit Congress as it attempted to protect freedmen. Instead of seeing the new amendments as fundamentally reordering the federalism of the country, the courts interpreted congressional action through antebellum legal thought. Decisions such as in the *Slaughterhouse Cases* interpreted the new amendments in narrow terms and undermined Congress’ ability to protect southern blacks. As white resistance to black civil rights continued in the South and apathy set in among northern whites, the federal government turned the problems of race relations over to state governments.<sup>5</sup> When the Supreme Court supported the “separate but equal” doctrine in *Plessy v. Ferguson* in 1896, the Jim Crow segregation system of the South received constitutional backing, formally recognizing the institutional disenfranchisement of southern blacks. By refusing to recognize how the Civil War had changed the nature of American government and thus narrowly interpreting the Reconstruction Amendments, the Supreme Court helped to establish the monstrous system of Jim Crow in the South.

In Michigan, however, the story of post-war legal theory, especially in relation to civil rights, took a different course. As opposed to the U.S. Supreme Court, the Michigan Supreme Court did somewhat appreciate the changed nature of the national character, at least as it pertained to relations between races. Prior to the war, Michigan was still a frontier state, in character if

not entirely in reality. In 1860, the court found in *Pond v. People* that a man could use deadly force to protect his life or property when under attack, further enforcing the idea that a man's home is his castle. Michiganders were also skeptical of governmental power, overturning their original state constitution in 1850 in favor of one that limited legislative authority and made all judicial positions elective.<sup>6</sup> The people, then, had much faith in popular institutions, but still viewed governmental power with suspicion.

Being part of the old Northwest Territory, slavery was never practiced on a large scale in Michigan, and the final handful of slaves in the territory were freed in 1835. In regards to race relations, then, Michigan was already ahead of large portions of the country, but blacks and whites were by no means equal. In 1846, the Michigan legislature refused a petition from black citizens asking for the right to vote, and the 1850 Constitution limited the franchise to white men. Segregation in schools was also allowed, and a unanimous ruling by the state Supreme Court in 1858 upheld the right of a steamboat operator to restrict access based on race.<sup>7</sup> Anti-slavery was very popular in the state, as can be seen by the popularity of the Republican Party after its formation, but deep legal divisions still separated whites from blacks.

After the war, however, the state began to shift to be more in line with the new reality. In 1867, the Michigan legislature passed an act outlawing school segregation, setting the stage for the *Workman* case. With the schools now legally desegregated, Joseph Workman sued after his son was denied entrance to the Tenth Ward school in Detroit on account of his race, and his case was heard in 1869. The Detroit School Board argued that admitting black students would disrupt the classroom, but the Supreme Court found in favor of Workman, arguing that the legislature intended to fully desegregate Detroit schools. That same year, the Michigan Legislature ratified the 15th Amendment and the Michigan Constitution was amended to give black men the right to vote.<sup>8</sup> The *Workman* case, along with these other legislative and popular acts, showed a shifting thinking on civil rights, as recognition of the political and civil rights of blacks became more accepted.

Another landmark civil rights case from the Michigan Supreme Court took place 25 years after the war. In 1890, when four of the five Justices were Civil War veterans, the court ruled in *Ferguson v. Gies* that

segregation by race in public places was illegal. After William Ferguson was denied service in the white section of the Gies European Hotel restaurant, and was subsequently expelled, he took his case to court. Justice Allen B. Morse's opinion makes clear the changes the Civil War wrought. Morse held that there was an "absolute, unconditional equality of white and colored men before the law." Morse decried the reasoning of U.S. Supreme Court Chief Justice Taney in the Dred Scott case as "fallacious and contrary to the principles of law", and recognized that the 15th Amendment had "placed the colored citizen upon an equal footing in all respects to the white citizen." Further, Morse held that some cases decided in the antebellum era "cannot now serve as a precedent," recognizing how deeply the Civil War had altered things.<sup>9</sup> (speech and blackpast.org) In 1896, *Plessy v. Ferguson* would allow segregation in the states, but the matter had already been decided, in the opposite manner, in Michigan.

After the Civil War, the supremacy of the U.S. federal government was no longer in doubt. Court cases, legislative acts, and the three Reconstruction Amendments had extended federal supremacy and gave the central government the power to protect civil rights within the states. Nevertheless, apathy in the North, resistance in the South, and a reticence on the part of the judiciary to recognize the changed nature of things, curtailed the lasting extension of civil rights to black Americans. Unlike the national judiciary, however, the Michigan judiciary recognized how the War had shifted the status of black Americans, taking a broad view of the amendments and applying their principles in the cases they heard. While by no means perfect, Michigan was still a leader in progress toward equality at the time, having taken to heart the lessons of the Civil War.

1: Hall, Kermit L., William M. Wiecek, and Paul Finkelman. 1996. *American Legal History: Cases and Materials*. New York: Oxford University Press. 187-188

2: Hall, Wiecek, and Finkelman. *American Legal History: Cases and Materials*. 223

3: Horwitz, Morton J. 1992. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press. 10-20.

4: Hall, Wiecek, and Finkelman. *American Legal History: Cases and Materials*. 226-228

5: Hall, Wiecek, and Finkelman. *American Legal History: Cases and Materials*. 227-231.

6: Chardavoyne, David, and Paul Moreno. 2015. *Michigan Supreme Court Historical Reference Guide*. East Lansing: Michigan State University Press. 153.

7: Chardavoyne and Moreno. *Michigan Supreme Court Historical Reference Guide*. 159-160.

8: Chardavoyne and Moreno. *Michigan Supreme Court Historical Reference Guide*. 160-162.

9: Nolan, Larry. *Ferguson v. Gies: A Supreme Decision*. Speech given April 20, 2017. See also <http://www.blackpast.org/primary/william-w-ferguson-vs-edward-g-gies>



# Frank Murphy: One-of-a-Kind

by Julie M. Dale, Third Circuit Historical Society

In today's terms, Frank Murphy had a short life of just 59 years. In anyone's terms, his career was jam-packed, extensive, and instrumental in the advancement of civil rights. As Detroiters and Michiganders we should all be proud to call him one of our own.

Frank Murphy was born in 1890 in Harbor Beach, Michigan and died at Henry Ford Hospital of a coronary thrombosis in 1949. He was a devout Catholic and a confirmed bachelor.

He attained his law degree at the University of Michigan in 1914. He served in the U.S. Army during World War I, after which he returned to Michigan. He became an assistant U.S. attorney for the Eastern District of Michigan and served from 1919 to 1922. In 1923, he became the youngest judge ever to be elected to the Recorder's Court where he served until 1930. He then served as Mayor of Detroit until 1933. President Franklin D. Roosevelt then appointed Murphy to the position of Governor-General of the Philippine Islands and after which he became High Commissioner of the Philippines until 1936. He returned to Michigan and ran successfully, winning by a narrow margin, for Governor against the Republican incumbent.

One of the notable events of his career as Governor was the "sit-down" strike at General Motors. Workers at several Flint plants sought to organize on

behalf of the United Auto Workers. Governor Murphy, in an attempt to avoid bloodshed, called out the National Guard to maintain order, but refused to use the

Guard or the state police to eject the strikers forcibly. Instead, he personally intervened and served as mediator between GM and the UAW. The strike was eventually settled, with GM recognizing the UAW as representative of GM workers.

Because Republicans remained the majority in Michigan, Murphy was defeated in his second bid for Governor. President Roosevelt then appointed Murphy as the Attorney General of the United States and he served for just one year, a year in which he established the Civil Liberties Unit of the Criminal Division. After this one year, a vacancy occurred on the U.S. Supreme Court by the death of Justice Pierce Butler. Roosevelt, on January 4, 1940, appointed Murphy as Associate Justice of the Supreme Court to fill the vacancy. He served on the Supreme Court until his death in 1949. During his tenure, he wrote 199 opinions for the majority and 68 for the dissent.

Justice Frank Murphy was known as a civil rights advocate from beginning to end. At the University of Michigan he refused to join a fraternity that denied Jews membership in the fraternity. During his career as Judge of the Recorder's Court, he was well known for presiding over the two murder trials of Dr. Ossian Sweet, an African-American charged with the murder of a white man. Dr. Sweet had moved his family to a white



**Judge Frank Murphy**  
*April 13, 1890–July 19, 1949*

The portrait of Frank Murphy was unveiled on Thursday, January 18, 2018, by the Third Circuit Historical Society. The portrait hangs in the courtroom of Judge Timothy Kenny, Chief Judge Pro Tem and Presiding Judge of the Criminal Division.

# and One of Our Own

“The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”

”

neighborhood in Detroit. After a victim was shot when a mob of whites assembled outside the Sweet home, Sweet was charged with the murder. Clarence Darrow led the defense of Dr. Sweet who, after the first trial ended in a hung jury, was acquitted after his second trial. Judge Murphy's fairness to the prosecution and to the defense is honored by the plaque hanging in this building, the Frank Murphy Hall of Justice, on the first floor.

Another example of Frank Murphy's activism was on January 30, 1944, the one year anniversary of the Allied liberation of Auschwitz death camp, when Justice Murphy formed the National Committee Against Nazi Persecution and Extermination of the Jews, which was created to combat Nazi propaganda "breeding the germs of hatred against Jews." The eleven committee members included U.S. Vice President Henry Wallace, the 1940 Republican presidential candidate Wendell Willkie, and Henry St. George Tucker, Presiding Bishop of the Protestant Episcopal Church.

Some notable cases in which Justice Murphy participated and voiced his opposition to discrimination and support for civil rights include:

- *Falbo v United States*, 320 US 549, 561; 64 S Ct 346, 352; 88 L Ed 305 (1944). In the last lines of his dissent Justice Murphy wrote: "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case."
- *Korematsu v United States*, 323 US 214; 65 S Ct 193, 202; 89 L Ed 194 (1944). In his dissent Justice Murphy harshly criticized the majority ruling. The majority upheld the constitutionality of the

government's internment of Japanese-Americans during World War II. Justice Murphy called the ruling the "legalization of racism." He also stated: "Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Id* at 233.

- *West Virginia State Board of Education v Barnette*, 319 US 624, 644; 63 S Ct 1178, 1188; 87 L Ed 1628 (1943). Justice Murphy concurred and voted with the majority to end compulsory flag saluting in schools.
- *Thornhill v Alabama*, 310 US 88, 91; 60 S Ct 736, 738; 84 L Ed 1093 (1940). Justice Murphy delivered the opinion of the Court, which protected picketing by labor unions.

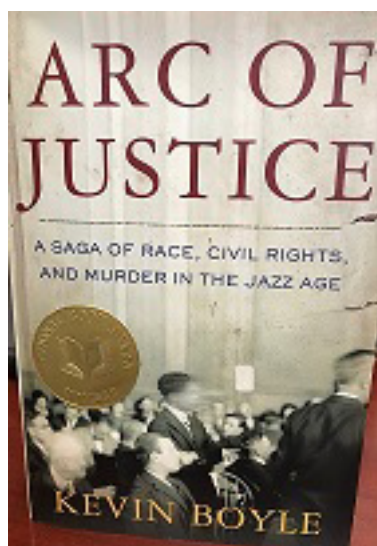


## About the Author

Julie M. Dale has been with the Third Circuit Court since 2009, working in the Office of the General Counsel. One of the primary functions of the Office of General Counsel is to conduct research and to draft memoranda and proposed opinions. She served as a law clerk to Hon. Bill Callahan from 2001-2003.

## How the Third Circuit Aquired the Murphy Portrait

The portrait of Judge Frank Murphy was commissioned by the City of Detroit when he was mayor. It was painted by an artist well-known at the time, J. Raeburn Middleton, who had been commissioned by the Crown at one point. When Judge Murphy was sent to the Philippines by President Roosevelt the city did not pay for the portrait and so it stayed with the artist. Eventually, the artist's granddaughter inherited it. She first tried to donate it to the State for its Hall of Governors; however, it was kept in storage, not displayed. The granddaughter asked to have it returned and later, found Third Circuit Chief Judge Robert J. Colombo, Jr. who happily accepted the portrait. The portrait was hung on January 18, 2018, in the Criminal Division courthouse, which is named the Frank Murphy Hall of Justice.



Interested in reading more about Judge Frank Murphy? Kevin Boyle's National Book Award-winning book *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* is a careful study of the Ossian Sweet murder trial over which then-Judge Frank Murphy presided. It was published in 2004.

### Sources for Article:

"Justice Frank Murphy and American Labor Law, Mich L Rev 100, no 7 (2002): 1900-26.

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### Timeline of Frank Murphy's Life

- 1890 born in Harbor Beach, Michigan on April 13
- 1914 graduated from the University of Michigan Law School
- 1919 became US attorney for the Eastern District of Michigan on August 9
- 1923 elected to the Detroit Recorder's Court
- 1925 and 1926 presided over the Sweet trials
- 1930 elected Mayor of Detroit
- 1933 appointed Governor-General of the Philippines by FDR
- 1936 defeated incumbent Frank Fitzgerald to become the state's 35th Governor
- 1938 defeated by Frank Fitzgerald in the gubernatorial race
- 1939 appointed US Attorney General
- 1940 appointed to the US Supreme Court
- 1944 wrote the *Korematsu* dissent
- 1949 died on July 19



## Judge Cohn to be Honored at Michigan History Conference



Judge Avern Cohn, Society President Charles Rutherford, and State Bar Past President Lawrence Nolan with the Douglass Cup, donated by the Judge to the Society last spring.

Judge Avern L. Cohn will be honored with the Historical Society of Michigan's *History Hero* award on Saturday, March 24, 2018. The presentation of the award will take place during the luncheon of the Historical Society of Michigan's conference where Judge Cohn will be the keynote speaker.

Judge Cohn will share interesting stories with well-known columnist and commentator Jack Lessenberry, including memories from the Judge's personal life along with famous, not-so-famous, and infamous tales from his many years on the bench.

Judge Cohn was appointed to the U.S. District Court for the Eastern District of Michigan on May 17, 1979, and confirmed on September 25, 1979. He has been on senior status since October 9, 1999.

Judge Cohn has served on the Board of Directors of the Michigan Supreme Court Historical Society since 2003.

The Historical Society of Michigan's "Michigan In Perspective: The Local History Conference" will be held March 23-24, 2018, at the Wyndham Garden in Sterling Heights, Michigan. Visit [hsmichigan.org](http://hsmichigan.org) to register online.

## MISSING



The portrait of William Asa Fletcher, first Chief Justice of the Michigan Supreme Court (1836–1842) is lost and we are seeking to find it.

At the portrait dedication of Randolph Manning, presented on April 3, 1889, Big Four Justice James V. Campbell noted: "Not far from the time when the State of Michigan was organized, a portrait of William A. Fletcher, who was first Chief Justice of the State Supreme Court, was painted by Prof. Alvah Bradish, and owned by a resident of Detroit. By some casualty or oversight it has for many years been out of general knowledge."

The image above is from *Life and Times of Stevens Thomson Mason, The Boy Governor of Michigan*, by Lawton T. Hemans (1920), courtesy of the Bentley Historical Library.

Have you seen this portrait or know where it might be? If so, call the Society at (517) 373-7589.

## Law Clerk Directory:

Did you clerk for one of the Michigan Supreme Court justices? Or do you know someone who did? If so, please send us an email at [lawclerk@micourthistory.org](mailto:lawclerk@micourthistory.org) with the name of the Justice and the dates of service. We are compiling a law clerk directory.

## Society Board of Directors



Front row (L-R): Judge Alfred M. Butzbaugh, President Emeritus Wallace D. Riley, Treasurer John P. Jacobs, Secretary Lawrence P. Nolan, President Charles R. Rutherford, Judge Denise Langford Morris, Professor John W. Reed, Judge Fred L. Borchard, Judge Avern L. Cohn. Back row (L-R): Mary Massaron, Stephen K. Valentine, Jr., Jill M. Wheaton, Richard D. Reed, Janet K. Welch, John G. Fedynsky, Justice James L. Ryan, Vice President Carl W. Herstein, Justice Mary Beth Kelly, Gregory J. DeMars, Susan Fairchild, Peter Ellsworth, and Julie Fershtman. Not pictured: Bruce A. Courtade, Matthew Herstein, Frank Kelley.

### 2018 Society Member Contribution Form

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## Spotlight on Solicitors: Part Four

A feature of the Advocates Guild, written by Andrea Muroto Bilabaye

The Solicitor General is the top appellate attorney in the state. In recognition of those who have held this prestigious post, the Advocates Guild is running our Spotlight on Solicitors series throughout 2017 and the beginning of 2018. Our first installment of this series ran in the Winter 2017 newsletter, featuring a short history of the office and biographies of the first two men to hold this position: Edmund E. Shepherd (1941–1957) and Samuel J. Torina (1957–1961). The second installment in the Summer newsletter covered the next three Solicitors General: Joseph B. Bilitzke (1961–1962), Eugene Krasicky (1962), and Robert A. Derengoski (1963–1982). Part three featured Louis J. Caruso (1982–1990), Gay Secor Hardy (1990–1992), and Thomas L. Casey (1992–2008). Our final installment covers the three most recent officeholders: B. Eric Restuccia (2008–2011), John J. Bursch (2011–2013), and Aaron D. Lindstrom (2013–present). Restuccia served under Attorney General Mike Cox, while Bursch and Lindstrom both served under current Attorney General Bill Schuette.

### **B. Eric Restuccia (2008–2011)**

An alumnus of the University of Michigan Law School, Restuccia, Michigan's ninth Solicitor General, graduated with his J.D. in 1993. Following graduation, he clerked for Michigan Supreme Court Justice Dorothy Comstock Riley before accepting a position as an assistant prosecutor for Wayne County. In 2003, he joined the Michigan Attorney General's Office and was appointed Solicitor General five years later.

Before he became Solicitor General, Restuccia had the opportunity to argue in front of the U.S. Supreme Court for the first time in *Halbert v. Michigan*, 545 U.S. 605 (2005). The day after he was sentenced, Halbert moved to withdraw his no contest plea. The trial court judge informed him that he would have to file an application for leave to appeal in the Michigan Court of Appeals, and Halbert requested that counsel be appointed to him, since he was indigent. The trial court declined to do so, and he appealed this decision, claiming violations of the Due Process and

the Equal Protection Clauses. Restuccia argued that Halbert was not entitled to appointed appellate counsel because this was a discretionary appeal as opposed to an appeal by right. The U.S. Supreme Court, however, found that the right to intermediate review is virtually meaningless without the assistance of counsel to guide the defendant through the complex process. It therefore held that indigent defendants who were convicted through pleas had the right to have appellate counsel appointed for them.

*Berghuis v. Smith*, 559 U.S. 314 (2010) addressed the issue of jury selection policies that resulted in juries with underrepresented racial minorities. After the defendant, an African-American, was convicted of second-degree murder by an all-white jury, he alleged on appeal that the county's juror selection policies denied him of his Sixth Amendment right to an impartial jury from an adequate cross section of the community. Restuccia defended the county's policy of excusing jurors who claimed hardship based on a lack of adequate available child care or reliable transportation. The Court agreed with Restuccia, holding that there was no direct evidence that the policies in question resulted in African-Americans being underrepresented on juries in the county.

Restuccia's last case before the U.S. Supreme Court was *Berghuis v. Thompkins*, 560 U.S. 370 (2010), which dealt with the issue of invoking one's Fifth Amendment right to silence. In this case, the defendant was arrested for first-degree murder. During the police interrogation that followed, he remained silent for the first two hours and forty-five minutes of the three-hour interrogation before he confessed. On appeal, he alleged that the officer's continued questioning of him despite his lengthy silence was a violation of his right to remain silent. Restuccia successfully argued that the defendant's silence alone did not constitute the required unambiguous invocation of his *Miranda* rights. The U.S. Supreme Court further added that police are not required to secure an unambiguous waiver by the defendant before continuing with the interrogation.

A few years after relinquishing the post of Solicitor General, Restuccia agreed to serve as the Deputy

Solicitor General under Aaron Lindstrom, a position which he currently holds. He has also won several legal awards, including a best brief award from the National Association of Attorneys General for his work in the U.S. Supreme Court. In addition, he has recently joined the executive committee of the Society's Advocates Guild.<sup>1</sup>

### **John J. Bursch (2011–2013)**

A native of Grand Ledge, John J. Bursch received his J.D. from the University of Minnesota Law School in 1997. Upon graduation, he clerked for Judge James B. Loken of the U.S. Court of Appeals for the Eighth Circuit. He then entered private practice with the Grand Rapids law firm Warner Norcross & Judd, where he founded and chaired the firm's Appellate Practice Group and the Public Affairs Litigation Group. Bursch credits Attorney General Bill Schuette, a former colleague, with encouraging him to apply to be Michigan's tenth Solicitor General.

The rights of Native Americans have been an important and controversial issue throughout our nation's history. Bursch addressed this issue before the U.S. Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). This case involved a casino that was built outside of Indian lands. Michigan sued the tribe for closure of the casino, but the tribe claimed sovereign immunity. Bursch argued that Congress abrogated this immunity in the Indian Gaming Regulatory Act;<sup>2</sup> as such, the state should be allowed to sue the tribe for violation of state gaming laws and various provisions of the Tribal-State compact. The U.S. Supreme Court, however, held that the IGRA only abrogates sovereign immunity when the disputed activities take place on Indian land. Since the casino in this case was located outside of Indian land, sovereign immunity prevented Michigan from suing, even though the administrative aspects of the casino were handled from within the reservation.

In the November 2006 election, Michigan voters approved an amendment to the state constitution prohibiting "all sex- and race-based preferences in public education, public employment, and public contracting." In response, citizens formed the Coalition to Defend Affirmative Action and sued the state (*Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary*, 134 S. Ct. 1623 (2014)),

alleging that the proposition violates the Equal Protection Clause. Bursch argued on behalf of the state to uphold the voters' initiative. The U.S. Supreme Court was careful to note that this case was not about the constitutionality of race-based admissions policies in general but only about the rights of voters to pass a constitutional amendment on the issue. The Court held that there was no authority, either from the constitution or precedent, that would allow the Court to take the decision to prohibit affirmative action policies away from the voters. Therefore, the Court found in favor of Bursch's position.

Though it was after his time as Solicitor General, Bursch argued a portion of the landmark case *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Bursch argued the first of two issues in the historic case, which addressed the question of whether a state's ban on same-sex marriages violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. Though Bursch argued that allowing same-sex marriages would weaken the institution of marriage as a whole and result in fewer heterosexual marriages, the Court found that the right to marry is a fundamental liberty under the Fourteenth Amendment and that there is no justifiable reason to treat same-sex couples any differently from opposite-sex couples.

During his tenure as Solicitor General, Bursch argued eight times before the U.S. Supreme Court (and one more time since then) and twelve times before the Michigan Supreme Court. After stepping down as Solicitor General, Bursch returned to private practice at Warner Norcross & Judd. In August 2016, he launched Bursch Law, a Michigan-based boutique law firm. He has earned an array of awards throughout his career thus far, including three Distinguished Brief Awards for briefs filed with the Michigan Supreme Court and back-to-back Supreme Court Best Briefs Awards from the National Association of Attorney Generals for his work with the U.S. Supreme Court. Bursch also sat on the committee that reviewed U.S. Supreme Court Justice Elena Kagan's writings prior to her senate confirmation. Recently, he joined the executive committee of the Society's Advocates Guild.

### **Aaron D. Lindstrom (2013–present)**

Michigan's eleventh and current Solicitor General is Aaron D. Lindstrom. Originally from Jackson, Michigan, Lindstrom earned a computer science degree

from the U.S. Military Academy at West Point and served five years in the Army before graduating from the University of Chicago Law School in 2004. Upon graduation, Lindstrom clerked for Judge Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit. He then worked in the appellate and constitutional law practice group of Gibson, Dunn & Crutcher's Washington, D.C., office, and in the appellate practice group of Warner Norcross & Judd. He became Assistant Solicitor General in 2012, and he was appointed Solicitor General in 2013.

Lindstrom first got a chance to argue in front of the U.S. Supreme Court in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015). This case involved the "three strikes" provision of the Prison Litigation Reform Act,<sup>3</sup> which prohibits a prisoner from appearing in forma pauperis in federal court if they have previously filed three claims that were dismissed as frivolous, malicious, or for failing to state a claim upon which relief can be granted. In this case, the defendant had one claim dismissed as frivolous and two claims dismissed for failure to state a claim; however, he was in the process of appealing one of those dismissals when he filed another in forma pauperis petition, which was dismissed by the trial court as being over the limit under PLRA. The defendant argued that the dismissal currently being appealed should not have been counted against him. The U.S. Supreme Court, however, sided with Lindstrom, finding that the PLRA requires only dismissals on the statutory grounds enumerated, and it does not take into account any pending appeals.

Implementing environmental protection measures that are effective yet affordable has been a constant struggle. Lindstrom had a chance to argue exactly this issue in *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699 (2015). In this case, the Environmental Protection Agency imposed regulations on electric utility steam generating units based on a study that showed power-plant emissions posed a public health threat. Lindstrom argued against these regulations. He contended that though the Clean Air Act<sup>4</sup> gives the EPA the authority to impose such regulations, it is only allowed to impose regulations that are appropriate and necessary. And in determining whether a regulation was appropriate and necessary, Lindstrom argued, the agency must consider the cost to the affected power plants. The U.S. Supreme Court agreed that cost was a relevant factor that must be considered

by the EPA when imposing regulations, and it ruled in favor of Lindstrom.

Lindstrom had a chance to argue a criminal law case before the Michigan Supreme Court in *People v. Lockridge*, 498 Mich. 358 (2015). The defendant in this case challenged the constitutionality of the Michigan sentencing guidelines<sup>5</sup> after he was convicted of involuntary manslaughter. He argued that the mandatory minimum sentencing scheme in Michigan interfered with his Sixth Amendment right to a jury trial, since it permitted the judge—rather than the jury—to engage in fact-finding. Despite Lindstrom's contrary position, the Michigan Supreme Court agreed, finding that the sentencing scheme required the judge to engage in fact-finding beyond those facts to which the defendant admitted or those that the jury found. The judge was then required to increase the mandatory minimum under the then-current sentencing guidelines, which the Court found unacceptable.

Lindstrom's tenure as Solicitor General is ongoing, and he is currently entering his fifth year as Michigan's Solicitor General.

### **Author Info**

Originally from Houghton Lake, Michigan, Andrea Muroto Bilabaye is a third-year law student at Western Michigan University Cooley Law School. She currently works as a law clerk at Speaker Law Firm, an appellate firm specializing in family law.

### **Endnotes**

<sup>1</sup> It should be noted that Restuccia and Bursch (discussed in the following section) both joined the executive committee of the Advocates Guild long after this project was conceived.

<sup>2</sup> 25 U.S.C. § 2701 et seq.

<sup>3</sup> 28 U.S.C. § 1915(g).

<sup>4</sup> 42 U.S.C. § 7412.

<sup>5</sup> MCL 769.34





MICHIGAN SUPREME COURT  
HISTORICAL SOCIETY

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