



THE SECOND “KANSAS” JUSTICE

CHARLES EVANS WHITTAKER

Stephen R. McAllister

INTRODUCTION

SEVERAL YEARS AGO I wrote an article for the *Green Bag* about David Josiah Brewer, the first “Kansas” Justice to sit on the Supreme Court of the United States.¹ In that article, I effectively suggested he might be the *only* Kansas Justice, commenting that Justice Charles Evans Whittaker, who was born and grew up in Kansas but obtained his legal education and engaged in his lengthy professional career in Kansas City, Missouri, merely “*could* be labeled ‘The Other Kansas Justice.’”² Whittaker served on the U.S. Supreme Court only briefly – from 1957 to 1962 – and probably qualifies as one of the least-studied members of the Court. This article explores Justice Whittaker’s Kansas roots. Now having visited the sites of those roots personally and dug into his family history in Kansas, I think it only fair to declare that Whittaker most certainly is the second “Kansas” Justice, as well as the first native-Kansan Justice.

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¹ Stephen R. McAllister, *The Kansas Justice, David Josiah Brewer*, 19 Green Bag 2d 37 (Autumn 2015) (emphasis added).

² *Id.* at 38 n.1.



Justices of the Supreme Court of the United States on May 20, 1957, a few weeks after Charles Whittaker joined the Court. Left to right, front row: William O. Douglas, Hugo Black, Chief Justice Earl Warren, Felix Frankfurter, and Harold Burton. Back row, left to right: Robert Jackson, Tom Clark, John M. Harlan, and Charles Whittaker.

Charles Whittaker was born on the Whittaker family farmstead south of Troy, Kansas, in Doniphan County on February 22, 1901. The farm at that time had been in his family's hands since 1853 or 1854.³ Unlike David Brewer, who came to Kansas as an adult (in the State's earliest days), Whittaker had decades of family roots in Kansas. To this day, Whittakers live in Doniphan County. Many of them are buried there. I visited two graveyards in the county and located several Whittakers, including the Justice's grandfather and grandmother. They rest on a hilltop in the beautiful

³ See Richard Lawrence Miller, *Whittaker: Struggles of a Supreme Court Justice* 1 (Greenwood Press 2002) (hereinafter "Struggles") (claiming family lore holds that John Whittaker purchased the land from Indians in 1853, which would have been illegal); Craig Alan Smith, *Failing Justice: Charles Evans Whittaker on the Supreme Court* 5-6 (McFarland 2005) (hereinafter "Failing") (opining that family lore puts the purchase in 1853 but "[m]ore likely it was 1854 after the territory had been legally opened to settlement").

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Doniphan Cemetery, established in 1869, just a few miles south of the family farm.

Whittaker departed the Troy, Kansas area for good about 1920, at the age of 19, to pursue his dream of becoming a lawyer.⁴ He did not go far. Even though he had never finished high school, he persuaded the Kansas City Law School (a part-time night school then, now known as the University of Missouri-Kansas City School of Law) to admit him provisionally on the condition that he also take classes at a high school in Kansas City to obtain his diploma.⁵ Whittaker also worked in the office of one of the largest Kansas City law firms at the time, Watson, Gage, and Ess, located one block from the law school. The firm hired him after graduation and he spent his entire private practice career there before becoming a U.S. District Judge, a judge on the U.S. Circuit Court of Appeals for the Eighth Circuit, and a justice on the U.S. Supreme Court.⁶

I focus on Whittaker’s time in Kansas to support my contention that he can and should be considered both a “Kansas” Justice and a “Missouri” Justice. After all, Kansas proudly claims Dwight D. Eisenhower – his presidential library and museum are in Abilene, Kansas,⁷ and one of the two Kansas statues in the U.S. Capitol is Eisenhower⁸ – yet General/President Eisenhower was born in Texas, unlike Whittaker. Another link between the two is that Eisenhower nominated Whittaker to each of the three federal judicial positions the latter held.

I also will write a little about Whittaker’s time in law school, most notably his path crossing Harry Truman’s (when both were law students), and offer a few comments about Whittaker’s later career. But my focus is his Kansas roots.

⁴ *Failing* at 8; *Struggles* at 2.

⁵ *Failing* at 9.

⁶ *Id.*

⁷ See www.eisenhowerlibrary.gov.

⁸ See www.aoc.gov/explore-capitol-campus/art/dwightdeisenhower.

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Above: The Doniphan County Courthouse in Troy, Kansas. Below: Interior of the courthouse, with a portrait of Charles Evans Whittaker hanging on the wall at far left.



THE KANSAS YEARS 1901-1920

Doniphan County, Kansas, is in the far northeast corner of Kansas, bounded on two sides by the Kansas and Missouri Rivers, and just across the Missouri River from the relatively large town of St. Joseph, Missouri, starting point of the Pony Express. The county seat is Troy, a modest town with a wonderful square and a beautiful turn-of-the-century courthouse in the middle of that square.⁹

Whittaker did not grow up in any town in Doniphan County. He was a farm kid, the third generation of Whittakers on his family's property. His grandfather, John Whittaker, bought a half-section¹⁰ of land about six miles south of Troy in either 1853 (when it would have been illegal because Kansas was not then a territory open to settlement) or 1854 (when it would have been legal). I have been unable to verify the date of his purchase. But I have located the land and reviewed the available abstracts that go along with it. The abstracts reveal some interesting information about the Whittakers and the childhood home of the Justice.

In 1863, Whittaker's grandfather and grandmother deeded one acre of land in the far northeast corner of the property to school authorities to build a country school, one of dozens of country schools scattered across

⁹ The Troy town square could itself be the subject of an article. The Doniphan County courthouse, dedicated July 4, 1906, is majestic and on the Register of Historic places. It has only one courtroom, reminiscent of *To Kill A Mockingbird*, with lots of dark wood-work. A picture of Justice Whittaker hangs in the hallway outside the courtroom. The courthouse is surrounded by interesting monuments, including one commemorating Abraham Lincoln's visit to and speech in Troy in December 1859, a Pony Express marker (Troy was on an alternate Pony Express route coming from St. Joseph, Missouri), a miniature Statue of Liberty (a memorial to veterans), and an imposing native sculpture that towers 27 feet above the sidewalk leading to the main entrance of the courthouse. The sculptor was Peter Toth, who during the 1970s and 1980s strived to place one of his native sculptures in every state, which he accomplished. The “Kansas” sculpture ended up in Troy. *See Trail of the Whispering Giants*, Wikipedia, en.wikipedia.org/wiki/The_Trail_of_the_Whispering_Giants (includes a chart of locations and pictures).

¹⁰ A “section” of land, in the Midwest at least, is a one-mile-square piece of property that contains 640 acres. Whittaker's grandfather bought about 320 acres, which measured one mile in length on the north and south borders, and one-half mile along the west and east borders.

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Doniphan County. The school, which was built in 1870 and opened in 1871, became known as Brush Creek School (named for the creek that runs nearby). The country schools typically operated from January to June each year because farm work was a priority in the summer and fall. And the teachers (almost always single women) changed with some frequency, often because they got married and had higher obligations, according to the mores of that era.

The original Brush Creek School, which Whittaker attended for many years, stood until 1920, when it burned down.¹¹ Thus, nothing remains of the school where he studied except possibly for one artifact – the school bell. A school bell taken from the subsequent and last version of the school (before it was torn down and not rebuilt in the early 1950s) is mounted today at the farm of a Doniphan County resident whose family now owns the original Whittaker farmstead. I have been unable to verify whether this bell hung at the school when Whittaker attended (1906 to circa 1915), but it may have, given the bell likely would have been located outside the school itself and thus may have survived the fire that destroyed the building.¹² In any event, it is a wonderful symbol of rural America's past.

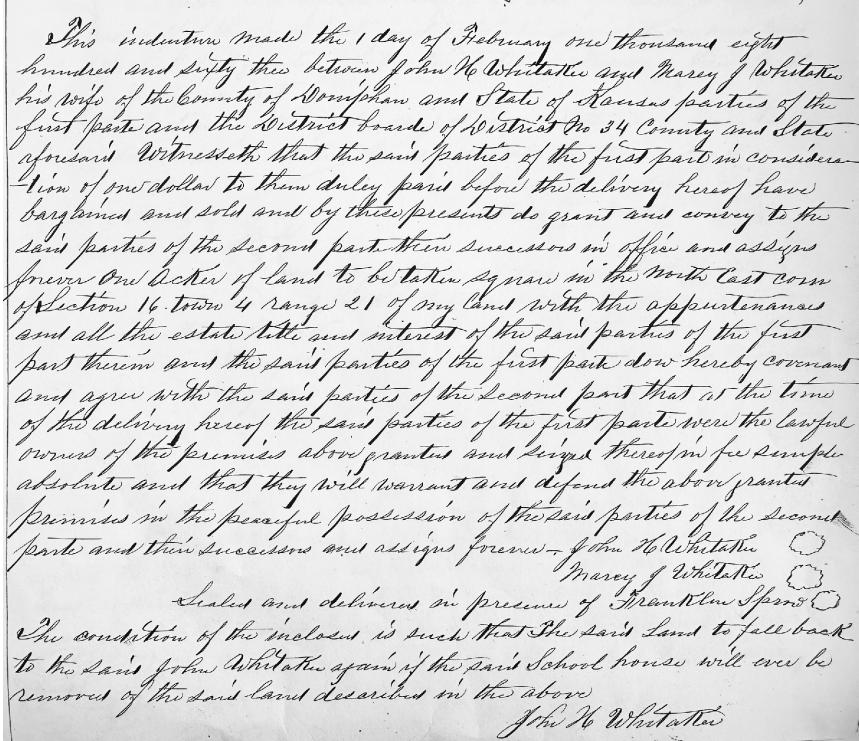
If you visit the site of Brush Creek School today, near 150th and Moon Light Roads in Doniphan County, what you will see is a small, elevated area in the corner of a sloping cornfield. Nothing remains of the school or its foundation, at least nothing that is visible.

But there are some records, including a 1906 annual report (dated July 26, 1906) on Brush Creek School. That report indicates how many students resided in the district (52), how many attended that year (36), how many days of instruction were provided (120), the teacher's salary (\$240), and other information. Notably, the report provides a census of the student

¹¹ The Kansas Chief, January 15, 1920 ("School house burns").

¹² Charles Singleton Bell (no kidding) founded the bell company which made the Brush Creek School bell. Located in Hillsboro, Ohio, the company started in 1875, but the name on the bells changed over time. The bell I saw is marked "The C.S. Bell Co.," which was the identification used on these bells starting in 1894 and going well into the 20th century. Bell's bells were not dated, and they are steel rather than bronze, so it is impossible to know the exact date a given bell was made. See History of C.S. Bell and Hillsboro, Ohio, towerbells.org. But it is possible the bell I saw hung at Brush Creek School when Whittaker attended.

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Whittaker Land Transfer for Brush Creek School. Transcription by Stephen R McAllister (with misspellings in original preserved): "This indenture made the 1 day of February one thousand eight hundred and sixty three between John H Whitaker and Marey J Whitaker his wife of the County of Doniphan and State of Kansas parties of the first part and the District board of District No 34 County and State aforesaid Witneseth that the said parties of the first part in consideration of one dollar to them duly paid before the delivery hereof have bargained and sold and by their presents do grant and convey to the said parties of the second part their successors in office and assign forever one Acker of land to be taken square in the north east corner of Section 16 town 4 range 21 of my land with the appurtenances and all the estate title and interest of the said parties of the first part therein and the said parties of the first part do hereby covenant and agree with the said parties of the second part that at the time of the delivery hereof the said parties of the first part were the lawful owners of the premises above granted and seized thereof in fee simple absolute and that they will warrant and defend the above granted premises in the peaceful possession of the said parties of the second part and their successors and assigns forever — John H Whitaker Marey J Whitaker

"Sealed and delivered in presence of Franklin Sprow. The condition of the inclosed is such that the said land to fall back to the said John Whitaker again if the said School house will ever be removed of the said land described in the above. John H Whitaker"

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Above: The Brush Creek School bell (perhaps). Below: A 1906 Brush Creek School annual report, listing Charles Whittaker and his brother Sam.

8	Roy Gutzman	16	Oct 1896	9	—	—	John Gutzman
9	Wester	12	Sept 1898	7	—	—	Reese Grab
10	Leo	18	Oct 1891	3	—	—	hers. John Peeter
11	Lee Grable	10	Oct 1889	16	Wathena	—	Great Kesselhut
12	Oscar Teuk	11	Aug 1899	13	—	—	—
13	Aug Teuk	2	Nov 1889	17	—	—	—
14	Robert Kesselhut	20	Sept 1887	18	—	—	—
15	John	2-6	Nov 1891	4	—	—	—
16	Adolph	6	June 1891	5	—	—	—
17	George Bahr	2	March 1891	17	—	—	—
18	Richard	8	Jan. 1891	15	—	—	—
19	Orvel Dennis	12	Nov. 1887	18	Troy	—	—
20	Sam. Whittaker	24	Jan. 1899	7	—	—	W. S. Dennis
21	Chas.	22	Feb 1901	5	—	—	C. E. Whittaker
22	Allie Ulrich	9	Jan 1886	20	—	—	Mary Ulrich
23	Will	10	July 1868	12	—	—	W. H. Lawson
24	Hubert Dawson	22	Sept 1884	19	—	—	—
25	Senat	16	Sept. 1890	16	—	—	—
26							
27							

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body, including an entry for “Chas.” Whittaker, born “22 Feb. 1901” and then “6” years old. His older brother Sam also is listed, and their address is given as simply “Troy.”

What would Whittaker’s life have been like as a child and young man growing up on a farm and attending a country school on his parents’ property? It would have been extremely limited geographically, and likely a lot of hard work. Farming with mules and horses at that time was back-breaking labor. When I visited the property in late 2023, I saw remnants of an old rock wall on the property. No one knows now when that wall was built. But if it were during Whittaker’s childhood one could be sure he was part of such very labor-intensive work. Having worked with limestone fenceposts on farms in north central Kansas growing up, as well as hauling rocks out of a field on a flatbed trailer I loaded by hand, I can say with confidence that building a rock wall by hand would have been (as it still is) tedious and laborious.

The country schools were not really K-12 institutions, at least not strong ones for those of high school age. Eventually, likely about age 14, Whittaker rode a pony six miles each way into Troy, to attend the high school there. He worked on the farm and ran trap lines for fur-bearing critters to make some money.¹³ He had completed less than two years of high school when his mother died on his birthday in 1917.¹⁴ Her sudden and early death may have been the genesis of a lifelong struggle with depression. Whittaker reportedly was so distraught at her death that he simply quit going to school.

But a sensational murder trial in St. Joseph, Missouri, apparently stoked his dream of becoming a lawyer. After working for almost three years after his mother’s death and saving several hundred dollars, Whittaker left the farmstead and the Troy area for good in 1920. That summer he moved to

¹³ Whittaker would later recall trapping skunks, for which he received about \$3.00 a pelt, but which sometimes got him sent home from school to change clothes. *Failing* at 8; *Struggles* at 1.

¹⁴ This is the date his biographers report for his mother’s death, and it supports the notion that Whittaker became depressed at age 16 and dropped out of high school. Curiously, however, the gravestone for Whittaker’s mother and father (set circa 1952, when his father died) indicates his mother died on February 26, 1919, almost two years later. Perhaps this is just a mistake, explained by his father dying 33 years later and the gravestone being created at that time, when memories had faded.

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Kansas City, Missouri, to finish high school, attend the Kansas City Law School at night, and work for Watson, Gage, and Ess as an office assistant.¹⁵

I have visited the Whittaker farmstead, now a cornfield. The family home (there were two, one built to replace the original after Whittaker moved away) no longer stands. The primary indications there once was a home- stead there are an old pump that still stands (in the cornfield) above the Whittakers' water well, and taller corn stubble nearby in one part of the field where the houses once stood. The current farmers do not disc that area of stubble after harvest because of the remaining house foundation which is near the surface of the field. The land itself is beautiful, with rolling hills and many trees. One can easily imagine a lush green spring, an impressive palette of colors in the fall, and tranquil snow-covered fields in winter. All beautiful Kansas. The farm was small by modern standards but large enough to sustain three generations of the Whittaker family.

There is no historic marker or anything else to officially mark Whittaker's birthplace,¹⁶ his childhood home, or the Brush Creek School he attended. If you drive around the property or through the area today you will see many cornfields and lots of trees scattered over rolling hills, all while more likely than not driving on a traditional Kansas gravel road (sometimes quite dusty!).

Whittaker's formative years were spent in Kansas. He himself attributed much of his success to his mother,¹⁷ with whom he lived only on the family farm in Kansas. His work ethic was extraordinary, demonstrated by what he took on and accomplished, starting at the age of 19, in Kansas City. Plus, there was his subsequent success as a private attorney, not to mention that he sat on *every* level of the federal judiciary, an accomplishment very few have ever matched. Justices Sonia Sotomayor and Ketanji Brown Jackson are the only current Justices to have been both a U.S. District judge and a U.S. Court of Appeals judge before becoming a U.S. Supreme

¹⁵ *Failing* at 9; *Struggles* at 2.

¹⁶ He was born Charles "Edgar" Whittaker but in adulthood adopted and began using the middle name of "Evans" instead, though never officially changing his name. One story is that he may have admired Charles Evans Hughes and changed his own middle name to sound more like a lawyer. *Failing* at 7, 15.

¹⁷ *Struggles* at 1.

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Above: Water well pump (foreground) and higher stubble where the Whittaker house was located (background). Below: Remnants of old rock wall on the Whittaker farmstead.



Court justice. Between Whittaker's tenure and theirs, I do not believe any other Justice can make that claim. Interestingly, Whittaker's fellow Kansas Justice, David J. Brewer, sat on the Kansas Supreme Court and the U.S. Court of Appeals for the Eighth Circuit before becoming a U.S. Supreme Court Justice (and his successor was Charles Evans Hughes, whom Whittaker admired). Perhaps "Kansas" Justices must do more to prove themselves before being nominated.

LAW SCHOOL AND BEYOND

Whittaker worked incredibly hard during his law school years (1920-1924), attending both high school and law school for two years, and all the while working in a law firm. That is a Kansas farm work ethic.

Whittaker also overlapped in law school with a student in the class behind him named Harry Truman. Truman had fought in World War I and been elected a "judge" for Jackson County in 1922.¹⁸ But the title "judge" and the fact that he worked at the county courthouse are misleading. At that time, there were three "judges" for Jackson County, and they were not law judges at all, but the equivalent of county commissioners.¹⁹ Truman decided he wanted an actual law degree and at almost age 40 enrolled in the Kansas City Law School in September 1923.²⁰ Perhaps fortunately for the country, Truman lasted less than two years before dropping out and continuing his political career.²¹

There are at least two notable facts about the relationship between Truman and Whittaker. First, while the two were acquainted with each other as law students,²² the evidence suggests they were neither friends nor friendly. There are reports of Whittaker trying to make sure Truman did not become a member of the legal fraternity of which Whittaker was a member at the law school.²³

¹⁸ David McCullough, *Truman*, at 166 (Simon & Schuster 1992) (hereinafter "*Truman*").

¹⁹ *Id.* at 159.

²⁰ *Id.* at 168.

²¹ *Id.* at 171.

²² *Struggles* at 4 (Whittaker speaking of Truman: "He was a year behind me"; "I've known him for many years").

²³ *Failing* at 15 ("During their senior year together, Whittaker and Gunn conspired to keep a freshman student named Harry S Truman from joining their fraternity.").

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Second, they had a common later acquaintance but quite different opinions of him, which likely was the result of political and philosophical differences. Truman was a Democrat and closely aligned with the Irish-Catholic Pendergast political machine in Kansas City. Whittaker was a Republican. They both came to know Roy Roberts,²⁴ an editor and publisher at the *Kansas City Star*, and a reliable supporter of Republicans.

For Truman, Roberts was often an adversary. In contrast, the *Star* was a client of Whittaker’s law firm and Roberts became one of the most outspoken and influential supporters of Whittaker for judicial positions.²⁵ Roberts may, in fact, have been Whittaker’s most important patron and supporter. Truman, on the other hand, is reported to have “loathed” Roberts.²⁶ Thus, although Whittaker and Truman knew each other for years, they were of different political parties, and had very different promoters and allies.

Finally, a consideration perhaps relevant to whether Whittaker should be claimed as a “Kansas” Justice is his final resting place. Unlike his parents and grandparents, Whittaker is buried in Kansas City, Missouri, not Kansas.²⁷ That said, in his later years (at least post-Supreme Court tenure at some

²⁴ Roberts is a fascinating figure in his own right, a cigar-smoking, self-proclaimed Republican “kingmaker” who pushed the nomination of Alf Landon for President in 1936. He appears to have taken on Whittaker as a cause in the 1950s. As a close friend and confidant of President Eisenhower, Roberts had considerable influence in Eisenhower appointments involving Missouri and, in this one instance, the Supreme Court.

²⁵ The law firm defended the *Star* in a major antitrust lawsuit while Roberts “sought to place Charles Whittaker on the district court bench in Kansas City.” *Failing* at 30. Whittaker in fact solicited Roberts’s support when he sought appointment to the district court. *Id.* at 50-52. Roberts later went to bat for Whittaker when an Eighth Circuit position opened, *id.* at 77-78, and again when Whittaker was a candidate for nomination to the Supreme Court. *Id.* at 86 (“Whittaker’s appointment to the Supreme Court seemed predestined because of two factors: Eisenhower’s insistence on a set of restrictive criteria for the selection of federal judges and the incessant urgings of Eisenhower’s close friend and confidant, Roy Roberts.”).

²⁶ *Truman* at 309 (describing Roberts as “the fat, hard-drinking, opinionated editor of *The Kansas City Star*, who was a Republican and a man Truman loathed”).

²⁷ He is buried in the Forest Hill Cemetery in central Kansas City, close to other Kansas City notables such as Negro Leagues baseball star and Baseball Hall of Fame inductee Buck O’Neil, and designer Kate Spade.

point), he resided again in Kansas. A 1971 probate document relating to his family lists him as Charles Evans Whittaker of “Mission, Kansas.” Mission is part of the greater Kansas City area, but on the Kansas side of the line.

CONCLUSION

Others have written about Whittaker’s legal career, including his tenure as a Supreme Court Justice. Some have been critical of the latter, including the fact that he retired after only five years and resigned altogether a few years after that, giving up a lifetime judicial pension. I make only one observation in that regard: The evidence that Whittaker long suffered from depression, anxiety, and perhaps other mental-health challenges is pretty convincing. The world in which he lived was not very understanding of or sympathetic to such conditions or the people who suffered from them. Nor were the treatment options available today on the table then. Maybe Whittaker would have been better equipped to succeed as a Justice today with modern support and treatment. I do not know. But I am inclined to give him the benefit of the doubt.

At the memorial for Whittaker at the Supreme Court following his death, Chief Justice Warren Burger described him as a “self-made lawyer who became one of the foremost advocates of his bar,” and as follows:

Those who sat with him could understand readily why he achieved great success at the bar. He was a perfectionist, with a passion for the facts of the case And he was never content after he became a judge, until he had mastered the facts of the case He drove himself unsparingly in his dedication to achieve that mastery.

Those who sat with him agree that he had few peers in terms of profound and conscientious application to his daily work. Indeed, he carried this to a point that was a source of concern to his friends and to his family, as the work of the Court mounted after he came here.²⁸

²⁸ 420 U.S. vii, xv-xvi (1975).

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Whittaker was, in significant part, a Kansan. The people of Troy and the surrounding area know his story and are proud of him, as they should be, as all Kansas should be. Like Eisenhower who appointed him, Whittaker very much grew up “in Kansas” with Kansas influences in all the best ways.

Kansas can and should claim Justice Whittaker as one of its own.

