The Impeachment of Supreme Court Justice Samuel Chase: New Perspectives from Thomas Jefferson's Presidential Newspaper

MEL LARACEY

Battles with the federal judiciary were a major story during Thomas Jefferson's first presidential term. They included the Republicans' 1802 repeal of the 1801 Judiciary Act that Federalists had rammed through at the end of President Adams's administration; the Supreme Court's decision in *Marbury v Madison*; and, most vividly, the impeachment of Supreme Court Justice Samuel Chase.[1]

Despite the immense amount of scholarship on the subject, there is still disagreement among scholars regarding the specific attitudes and strategies of Jefferson and his Republican allies toward the judiciary during his first term in office. Some scholars paint Jefferson's approach as an ultimately half-hearted one, while others see a much stronger assault. For their conclusions, all scholars have to rely on inferences, as Jefferson left no clear indication of his thinking on several of the issues.

Thus, for example, Jefferson is said to have backed off on the impeachment effort against Chase because of his dissatisfaction with Republican Congressman John Randolph, who was leading the effort in the House. Similarly, Randolph's faltering efforts in the Senate trial have been attributed to his opposition to the efforts of other Republicans to settle the Yazoo land controversy in Georgia.[2] After initially writing to Congressman Joseph Nicholson in 1804 to urge him to begin the effort to remove Chase,[3] Jefferson himself apparently left no record of his true views on the matter as it unfolded. Consequently, scholarly interpretations have essentially been based on inference from sources such as letters and diaries of other parties involved.

This article examines another source from which inferences can be drawn: the treatment of the Chase impeachment in

Jefferson's presidential newspaper, the *National Intelligencer*. The newspaper, established through Jefferson's efforts in the nation's new capital in late 1800, was published three times a week and circulated postage-free to other newspaper editors around the country. The role played by the newspaper is a classic example of what political newspapers did in the early American republic. Eschewing the modern conception of a newspaper as one that carries "all the news that's fit to print," these newspapers focused on politically related events and issues, "reporting" and commenting on them from a highly partisan point of view. The papers and their editors "were purposeful actors in the political process, linking parties, voters, and the government together, and pursuing specific political goals."[4] The papers were powerful political agents, helping to "shape public opinion on a massive scale." They were the political lifeblood of the country, the "political system's central institution."[5]

The *Intelligencer* was widely regarded as reflecting the views of Jefferson and thus to be reporting the "official" Republican line. Jefferson himself arranged for the establishment of the paper in the new nation's capital in late 1800, inducing Samuel Harrison Smith to move there to become the editor. Many of the anonymous commentaries in the paper were written by high administration officials, including Jefferson himself.[6] And, even those written by editor Smith would almost surely have reflected the attitudes of his benefactor, without whose continued approval he would not remain employed.

Smith was of course in close professional contact with Jefferson in connection with the *Intelligencer*. He and his wife, Margaret Bayard Smith (who wrote a much-cited account of life in the new capital city), were also in frequent social contact with Jefferson at dinners in the presidential mansion and on many other occasions.[7] The *National Intelligencer* therefore would be expected to be an excellent source of information on the issues that Jefferson and his allies thought were important and on how they chose to deal with them.

The case study of the impeachment of Supreme Court Justice Samuel Chase that is presented here confirms this expectation. Examining how the *Intelligencer* "reported" the controversy presents new insights into the thinking and strategies of Jefferson and his allies as the process unfolded. It also reveals that the effort to remove Chase produced a vicious public backlash from Chase that is shocking by modern standards of judicial behavior. As will be seen, Chase publicly accused the President and his Republican allies in Congress not only of acting out of base

NATIONAL INTELLIGENCER,
AND
WASHINGTON ADVERTISER.

WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE.

MONDAY, FEBRUARY

LETTER FROM WILLIAM HENRY HARRISON,

National Intelligencer.

Congress of the United States.

House of Representatives.

Wednesday, Feb. 16, 1803.

Jefferson established the *National Intelligencer* in the nation's new capital in 1800 to shape public opinion and deliver the Republican party line. It was published three times a week and circulated postage-free to other newspaper editors around the country.

partisan and political motives but also of attempting to undermine the integrity and independence of the judicial branch of the U.S. government. From the perspective of how it was portrayed in Thomas Jefferson's presidential newspaper, therefore, the Chase battle represents one of the greatest public fights of one government branch against the other two in the history of the nation.

The basic story of the Republican effort to remove Chase from the U.S. Supreme Court is well known. In the estimation of one historian, Samuel Chase was hated by Republicans "more than any other man in America" with the possible exception of Alexander Hamilton.[8] Chase had demonstrated open bias against Republicans on trial for sedition and tax protest during the Adams administration and had imposed heavy penalties on them following their convictions, including in one case a death sentence. In the presidential election of 1800, he even openly campaigned for John Adams, thus forcing the Supreme Court to delay the opening of its term for lack of a quorum.[9] Then, when the election ended in a deadlock between Jefferson and his running mate, Aaron Burr, Chase tried hard to maintain the stalemate in the House of Representatives long enough to engineer an outcome in which virtually anyone but Jefferson—including Burr, John Adams, and John Marshall—could assume the presidency.[10]

Jefferson's election and the Republicans' growing strength at the Congressional and state levels seemed to inflame Chase even more, as evidenced by this statement to a friend in early 1803:

> There is but one Event (which will probably never happen) in which I will interfere with politics. I mean the establishment of a *new* Government. I believe nothing can save the *present* one from dissolution. Some Events, such as a War with France, may delay it for a few years. The Seeds are sown, they ripen daily. Men without *Sense* and without *property* are to be our *Rulers*, there can be no Union between the Heads of the two Parties. Confidence is destroyed; if attempted they will be branded as *Deserters*, and lose all Influence. Things must take their natural Course, from *bad* to *worse.*[11]

Finally, when word reached Jefferson later in 1803 that Chase had given an outrageously anti-Republican charge to a grand jury in Baltimore, the President essentially ordered Republicans in Congress to begin impeachment proceedings against the Justice.[12]

The Republican case against Chase in the *Intelligencer* was initially laid out in a broadside published in its May 20, 1803, issue. The commentary, entitled "JUDGE CHASE'S CHARGE," provided what it said was a "fair summary" of the charge Chase had made to the Baltimore grand jury on May 2. The commentary said the *Intelligencer* had delayed publishing the summary in the hope that "the whole Charge would appear" in the press. It said the summary was "taken by a person present" and "In some emphatic sentences the words are nearly such as he used; though, for the most part, greater regard has been paid to the ideas than the language."[13]

Chase's charge amounted to a high-Federalist critique of the core elements of Republicanism. As reported in the *Intelligencer*, Chase had ridiculed the idea that "all men had equal rights derived from nature," asserted that a monarchy could protect personal liberty as well as a republic, said that the "great bulwark of an independent judiciary has been broken down by the legislature of the United States," and criticized strongly a proposal in the Maryland legislature to expand the suffrage to all white males even if they owned no property. If measures like these were allowed to stand,

Chase had said, "Instead of being ruled by a regular and respectable government, we shall be governed by an ignorant mobocracy."

Chase's comments were quickly reported in a Baltimore newspaper. All prior accounts of this story have stated that Jefferson learned of the comments from that report. It now appears, however, that Jefferson would have heard about them from the editor of his presidential newspaper, Samuel H. Smith. That is because, on March 16, 1804, Smith published an affidavit in the *Intelligencer* explaining how he had come to record from personal recollection, and then publish in the May 20, 1803 *Intelligencer*, Chase's charge to the Baltimore grand jury. Smith said he had attended the hearing because he had been called as a witness before the grand jury. He wrote that he had found Chase's charge to the jury so extraordinary that "it impressed me with the opinion that it ought to be made public." He said he had written down his account of it that evening, after unsuccessfully trying to obtain the original from Chase and the grand jury members. Smith added that, when he made his request to the grand jury, he had been told "that the grand jury (although they agreed in political sentiment with Mr. Chase) thought the charge a very imprudent one, and would not, probably, assent to be instrumental in making it public."

On May 13, 1803, Jefferson wrote to a Republican Congressman, Joseph Nicholson, about Chase's charge, hinting pointedly, "Ought the seditious and official attack on the principles of our Constitution and of a State to go unpublished?"[14] Then, although it would take well over a year for the House to vote articles of impeachment against Chase, the attacks on Chase in the *Intelligencer* began just one week later. The paper's May 20 commentary labeled Chase's charge "the most extraordinary that the violence of federalism has yet produced." Chase had clearly violated his judicial oath to administer justice fairly and "agreeably to the constitution and laws of the United States." Of his criticism of the expansion of suffrage in Maryland, the commentary said the change was on the contrary a salutary move because it would make the state "more republican than it previously was." And of Chase's claim that liberty can exist under any form of government, it said, "This remark is very absurd. But it merits attention, not so much for its absurdity, as for its evidence of a rooted attachment to monarchy."

The Chase matter was next mentioned in the newspaper on August 5, 1803, when the paper, without commentary, reprinted the part of Chase's charge to the Baltimore grand jury that had been published in the Baltimore *Anti-Democrat* on June 25. The excerpt from the charge was prefaced by a statement from Chase himself, explaining that he had "with great reluctance" provided a copy of his charge because it had been "misunderstood by some editors, and shamefully misrepresented by others." Chase added that he believed a judge can "neither explain nor justify his judicial opinions," and "must therefore remain silent, although he is misunderstood or misrepresented."

On August 10, in its first item under the regular column "Washington City," the *Intelligencer* carried an attack against Chase. The attack was prefaced with the quotation from the Declaration of Independence that all men are created equal. The commentary then noted that, notwithstanding the Declaration's legendary pedigree, "it has become of late too common to doubt and deny" the sentiments expressed in the Declaration. Instead, it said, there were now many men who "affect to despise republican government, ridicule the idea of equal rights as visionary, abhor democracy, and leave no occasion unimproved of recommending the energies and splendors of monarchies and aristocracies." The commentary then quoted extensively from Chase's charge to the Baltimore jury, in which he had, as noted above, derided the idea of equal rights in society. Yet, the

commentary pointed out, Chase had been one of the men who had signed the Declaration of Independence! Of course, the commentary acknowledged, men can change their minds in the honest pursuit of truth. However, in an apparent reference to Chase's recent statement that as a judge he was obligated to remain silent even when his opinions were questioned, the commentary asserted that Chase, and all those other old revolutionaries who "now think with him," were hypocritically invoking non-partisanship to make themselves look better:

> Their *honest and disinterested* motives will elevate them above the reproach of being swayed by party spirit, by the love of power, the thirst of lucre, or any of those ignoble passions that in other times have covered with the mantle of infamy the proudest names.

This attack had closed with the promise to demonstrate later the "novelty and weakness" of Chase's claim that there can be "no rights of man in a state of nature." The next issue, on August 12, did just that in an essay entitled "Natural Rights." The essay quoted provisions from eight state constitutions in which "the possession of natural and unalienable rights is solemnly asserted." The commentary said that, in comparison to those statements and the sentiments expressed by so many great statesmen during the Revolution, Chase's grand jury comments could only be described as "ill-timed, misapplied, undignified, and untrue." For good measure, the commentary quoted from Locke and other English political philosophers on the subject of natural rights.

The commentary then concluded with a vivid explanation of why Chase's charge to the grand jury was so offensive to Republicans:

> So much would not have been said on this point, but for the insidious tendency of the opinion that man, having no natural rights, derives all the rights he possesses from government. It is far, very far, from being a mere abstract question. Once establish the dogma of Judge Chase, and governments become omnipotent. Man looks to them for all he possesses. Neither the laws of God nor the ordinances of nature are entitled to his respect. The despot, who lives on the misery of his subjects, becomes the object of exclusive homage. However governments may abuse powers given to them for the advancement of the public good, however they may oppress those they were formed to protect, the oppressed has no tribunal to appeal to, no established principles, engraven on the hearts of all men, to invoke, around which the affections of a nation may rally; and a sacred regard for which may unite them in their defense. If there be a doctrine, which may emphatically be denominated that of tyrants, it is this doctrine.

The assertion in the last sentence of this quotation that Chase's views represent the doctrine of "tyrants" indicates clearly that the original motivation for Republicans seeking his removal from the Supreme Court was one of sheer political philosophy. Chase had revealed publicly that he adhered to a philosophy that contradicted the core principle of Republicanism as expressed in the Declaration of Independence. If Chase no longer adhered to this principle, then in Republican eyes he was, as a member of the Supreme Court, a major doctrinal threat to the Republican vision of democracy in America.

In January 1804, the House proceedings against Chase began. After days of debate, the House formed a committee to consider impeaching Chase. The Committee

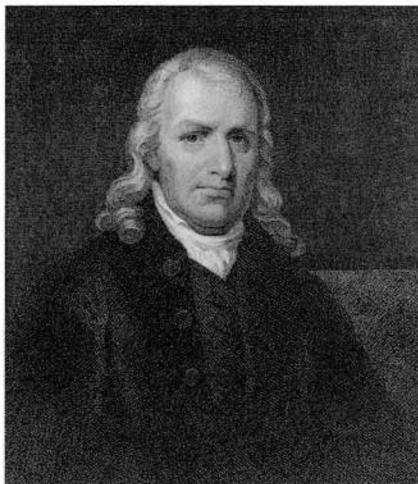
recommended impeachment, and after more debate the committee report was approved by a 73-32 vote of the whole House. The *Intelligencer* noted the formation of the Committee in its January 11 issue, and in several later issues that month published accounts of the debate the House had held regarding the formation of the Committee. On March 9, 1804, the paper filled its first two pages with documents that had been included with the House impeachment committee's report. These included several affidavits by the defense lawyers for John Fries, a Pennsylvania tax rebel over whose trial for treason in 1800 Chase had presided in a manner that Republicans had regarded as seriously biased, and answers to interrogatories by others involved in the trial. In several following issues (March 12, 14, 16), the paper published more documents, filling more than a page of each issue with them.

The March 14 issue also presented two happy news events for Republicans: the conviction of Judge Pickering on his impeachment charges by the Senate and the vote by the full House to begin impeachment proceedings against Samuel Chase. Under the headline "Judge Chase Impeached" (somewhat inaccurate because the House had not yet approved any specific charges), the paper presented a summary of the floor debate on the motion to proceed with Chase's impeachment. On March 26, the *Intelligencer* printed the remarks of Representative Elliot in the House floor debate on impeaching Chase. Elliot argued that, on the whole, Chase's actions, including his conduct of the sedition trial in 1800 of James Callender, the fiery Republican newspaper editor, warranted impeachment.

On that same day, John Randolph introduced in the House seven articles of impeachment against Chase. He did it just one day before the end of the House session, which of course meant the House would adjourn without acting on them. The March 28 issue of the *Intelligencer* then published the proposed articles. They were full of highly charged language. One accused Chase of "manifest injustice, partiality, and intemperance" in the trial of John Fries. Several complained bitterly about Chase's blatant bias in presiding over Callender's trial.[15] Another condemned his "intemperate and inflammatory political harangue" to the Baltimore grand jury as an attempt to incite the "odium" of the "good people of Maryland against the government of the United States." Chase's charge was further described as "highly indecent, extra judicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan."

In his classic study of Chase's impeachment, Richard E. Ellis says that, until his Senate impeachment trial, Chase remained "publicly silent" in the face of the proceedings against him.[16] This is simply wrong. Rather than remaining silent, Chase fought back strongly—and he did it in the most public way possible. Toward the end of the session of Congress in March, he wrote a "Memorial" to the House of Representatives protesting the fairness of the proceedings against him. Then, when there had been no opportunity to deliver his protest to the House in the closing days of the session, Chase sent it and an accompanying letter to editors of newspapers around the country, including the *National Intelligencer,* asking them to publish both!

Why did Chase do this? As he explained in his "Memorial," he felt he had been the victim of an extremely unfair process. He complained the House had approved no specific charges against him before it had adjourned. Instead, the House had only received a committee report, buttressed with statements and depositions of fourteen witnesses called by the committee, recommending his impeachment for undefined "high crimes and misdemeanors," and then, practically at the last minute, Randolph's proposed articles of impeachment. All of this,



THE TRIAL OF SAMUEL CHASE,

ONE OF THE ASSOCIATE JUSTICES

OF

THE SUPREME COURT OF THE UNITED STATES,

ON A CHARGE EXHIBITED BY

THE SENATE OF THE UNITED STATES,

FOR HIGH CRIMES AND MISDEMEANORS.

IN SENATE OF THE UNITED STATES,

FRIDAY, NOVEMBER 30, 1804.

The Senate took into consideration the motion made yesterday, that a committee be appointed to prepare and report rules of proceedings, to be observed in cases of impeachment, and agreed thereto; and

Ordered, That Messrs. Giles, Baldwin, Breckinridge, Stone, and Smith, of Vermont, be the committee.

FRIDAY, DECEMBER 7, 1804.

The committee last mentioned made report.

Ordered, That it lie for consideration.

FRIDAY, DECEMBER 4, 1804.

HIGH COURT OF IMPEACHMENTS—*The United States* vs. *Samuel Chase.*

On motion,

Resolved, That the Senate will, at one o'clock on this day, be ready to receive articles of impeachment against Samuel Chase, one of the associate justices of the supreme court of the United States, to be presented by the managers appointed by the House of Representatives.

Ordered, That the Secretary notify the House of Representatives accordingly.

On motion,

Resolved, That, when the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against Samuel Chase, the President of the Senate shall direct the Sergeant-at-arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against Samuel Chase, one of the associate justices of the suprême court of the United States." After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives."

Agreeably to the above resolutions, the managers on the part of the House of Representatives, to wit: Messrs. John Randolph, Rodney, Nicholson, Early, Boyle, Nelson, and G. W. Campbell, were admitted: and Mr. Randolph, the chairman, announced

When word reached Jefferson that Justice Samuel Chase (above) had given an outrageously anti-Republican charge to a grand jury in Baltimore in 1803, the President essentially ordered Republicans in Congress to begin impeachment proceedings against him (pictured is the Congressional record). Chase fought back by publishing his remarks in the *National Intelligencer.*

Chase noted, had been published in the *National Intelligencer,* thus giving it "an official character and sanction" because the newspaper was widely "understood to be the official organ of the government." Once published in that newspaper, all of the evidence and charges against him would be "spread throughout the United States, and will even extend to foreign countries." This, he said, meant that for months he would have no opportunity to defend his reputation because Congress would not meet again until November, 1804. Unrebutted, the material would "become a very powerful engine in the hands of calumniators and party zealots." Chase even expressed his suspicion that the release of all the material before the House had voted on impeachment articles, and the proposal of the articles just one day before the House session would end, had been done for just this purpose. That is certainly plausible. As one historian has observed, in the interim "the Republican press could exploit the depositions and articles to Chase's disadvantage, but he was denied means of replying officially to them.[17]

Asking newspaper editors around the country to publish his Memorial to the House of Representatives was therefore Chase's way of defending himself in the public eye. As he put it, "I deem it proper now to make it public, as an appeal to my country, to the world, and to posterity." Chase was essentially conducting a public relations campaign and carrying it out in the only way possible at the time—through the nation's newspapers. By modern standards, in which federal judges, especially Supreme Court Justices, behave circumspectly even in the face of criticism, what Chase did is extraordinary. And, of course, never since has a Supreme Court Justice acted in such a public and aggressive manner against a President and his Congressional majority.

The *National Intelligencer* granted Chase's request and published his Memorial and accompanying letter, first published in the *Washington Federalist,* in its April 4, 1804 edition. Smith, the editor of the *Intelligencer*, explained in an introductory note that he felt obliged to publish this material. As Chase had asked the editors of "all the newspapers in the United States" to publish his cover letter and Memorial to the House, for the *Intelligencer* to have refused to publish them "would be denounced as partial or pusillanimous."

Chase's Memorial to the House of Representatives was a stunningly direct attack on Thomas Jefferson. Chase charged that the impeachment process had been driven by partisan and personal motives traceable to the President himself. He made the charges via insinuation, saying he "trembled for the honor of his country, and for the success of republican government in this her last and fairest experiment," that a time might "ever arrive"

> . . . when a majority of Congress, inflamed by party spirit, and seeking the destruction of its opponent, shall desire to criminate a judge, in order to heap odium on the party with which he is connected; when a President, at the head of this majority, and guiding its passions, shall desire, from motives of private resentment, the ruin of any judge; when the schemes of the dominant party or of its leaders, may require the removal of all firm upright and independent judges, and substitution of others more complying or more timid.

As further proof of the partisan nature of the proceedings against him, Chase noted that most of the complaints against him were for judicial actions he had taken years ago. Only now, he said, when Republicans were confident of majorities in both Houses, had those complaints been revived to provide the basis for his impeachment and removal.

In its same April 4 issue, the *Intelligencer* followed Chase's letters with its critique of them. The critique pulled no punches, saying that Chase's letter to the House of Representatives was a "mass of misrepresentation . . . never, perhaps, equaled by a high official character." The "long and inflammatory remarks" could not all be dealt with individually without trying the "patience of the reader," so they were dismissed generally as "inapposite, untrue, or illogical." However, the commentary did respond to some of Chase's points specifically. As to his claim that the impeachment effort was blatantly partisan, the commentary argued that, of the fourteen witnesses called by the committee whose partisan affiliations were known, "is it not a little extraordinary that *seven* are *federal,* and *seven republican*." It then condemned as "envenomed" the "insinuation that attempts insidiously to instill into the public mind charges against the executive and legislative departments of our government, which it dares not openly avow."

Saying it was "honored by Judge Chase with being denominated the official organ of the government," the *Intelligencer* defended its publication of the House report, witness testimony, and the proposed articles of impeachment on classic Republican democratic theory. Publication was necessary so that "the people" could judge for themselves what Congress should do regarding Chase: "The representatives of the people are responsible to their constituents. If they err, the people ought not to be left in the dark. If they act right, the people, whose interests they guard, ought not to be ignorant of their motives of action."

Surprisingly, Chase's public defense of himself, and the *Intelligencer*'s partisan-tinged reply, has often been overlooked by scholars. As noted previously, Richard E. Ellis wrongly says that Chase remained "publicly silent" after the House adjourned in early 1804 without voting on the proposed articles of impeachment against him. Similarly, in his extensive examination of the political and doctrinal aspects of Chase's impeachment in *Constitutional Construction*, Keith Whittington makes no mention of Chase's public defense of himself.[18]

Bruce Ackerman did note that Chase had written and circulated a defense of himself but did not analyze its contents.[19] In his brief discussion of Chase's action, he noted only that all of the publicity would have helped dramatize the partisan nature of the struggle as Americans began voting for the next Congress.[20] That was surely true, but it shortchanges the seriousness and ferocity of Chase's charges. As framed by Chase, his impeachment represented an *institutional* struggle with the Supreme Court on one side and the President and his compliant, Republican-dominated Congress on the other. This meant, according to Chase, that the struggle was a clear threat to the integrity and independence of the judicial branch. In contrast to this high-minded, constitutionally based charge, Chase also painted Jefferson

Representative John Randolph of Roanoke, Virginia, led the impeachment effort against Chase when he was tried before the Senate in 1805. Some historians have argued that Randolph backed off because Jefferson asked him to, but coverage of the Chase trial in the *National Intelligencer* was relentless.

as nothing more than a vicious partisan schemer. Jefferson was acting "from motives of private resentment," Chase said, and "guiding" the "passions" of a Congress that was "inflamed by party spirit and seeking the destruction of its opponents."

Many scholars, including Ellis and Robert McCloskey, have concluded that Jefferson eventually became disinterested in the effort to impeach and remove Chase.[21] This would not have seemed evident to readers of the *Intelligencer*. For example, on April 5, just a few days after publishing and critiquing Chase's defense of himself, the *Intelligencer* published the Senate's report to the House stating that it was ready to proceed with the impeachment trial of John Pickering. The report included the text of a petition from the Judge's son that he be allowed to show that Pickering had been insane for two years, thus obviating the need for an impeachment proceeding, and a summary of the Senate's consideration and rejection of the petition and its vote to proceed with the trial of Pickering. A brief note explained the significance of the sudden attention to the matter: the newspaper was going to "commence a detailed statement" of Pickering's trial "to present an antidote to the flagrant misrepresentation which is circulating in the Eastern quarter of the union" about it. The paper then began carrying descriptions of the Senate proceedings in every one of its issues for several weeks.

Then, as soon as Congress began working again on the impeachment of Chase, the *Intelligencer* began covering it. On December 7, 1804, the paper used its entire first page to carry an account of the debate in the House of Representatives on the articles of impeachment against Chase. The account illustrates the deeply political nature of the impeachment proceedings. The three articles it reported on that day involved Chase's conduct of the trial of James Callender on a charge of sedition for having published a book, **The Prospect before Us**, that had attacked then President John Adams. One of the articles said Chase had committed an impeachable offense by refusing to allow John Taylor of Caroline to testify in the trial as to the truth of Callender's basic claims in the book that Adams had expressed "aristocratical opinions" as well as "sentiments inimical to a republican form of government," and had demonstrated that he was "faithful and serviceable in the British interest" by having cast deciding votes in the Senate on measures that would have imposed trade sanctions on Britain. The *Intelligencer* published the summary of the House debate on the other articles against Chase in its December 10 issue.

Coverage continued in the December 12 issue with a note that the Senate had scheduled Chase's trial to begin on January 2, 1805. The front page of the next issue, on December 14, published the procedural rules that the special Senate committee had approved for the trial. On January 4, 1805, the paper printed the account of the Senate proceedings two days earlier, when the Senate had granted Chase's request for extra time to prepare his defense. On January 7, it printed the speech he had delivered to the Senate on January 2, in which he had made some general remarks on the charges and had explained his request for more time to respond to the charges. On January 9, it printed additional Senate rules on its impeachment trial procedures. On January 11, it printed the affidavit Chase had filed in the Senate supporting his request for more time to prepare for the trial.

Chase's trial began on February 4, and the newspaper began reporting the proceedings two days later, noting that the reading of Chase's response to the charges had taken two and a half hours. Somewhat ironically, it followed this report with a note that the Supreme Court had opened its session the previous day. The next issue of the paper then carried an account of the debate in the House that had produced its stinging reply to

Chase's answer to the articles of impeachment. Among other things, the House reply asserted that Chase had "endeavored to cover the crimes and misdemeanors laid to his charge, by evasive insinuations, and misrepresentations of facts, and that the said answer does give a gloss and coloring utterly false and untrue to the various criminal matters contained in the said articles." The House urged the Senate to bring Chase to a "speedy and exemplary punishment."

The February 11 issue then filled its first two pages with the partial text of Chase's reply to the charges against him, noting that the trial had begun two days earlier, and that it would soon "lay before the public in this paper a detailed statement of the proceedings in this important trial as soon as it can be given with accuracy." The next two issues were devoted similarly to publishing the rest of Chase's reply.

The reply Chase filed with the Senate was markedly different from his newspaper screed ten months earlier. He had in the meantime put together a team of first-rate trial lawyers, and it showed.

The first seven of the eight articles of impeachment had accused Chase of various legal missteps—all allegedly betraying an anti-Republican or anti-defendant bias—while presiding over the Fries and Callender trials and a grand jury in 1800. As to each of those articles, Chase's response was firm and legalistic, citing precedent or common judicial practice to defend everything he had done. He added that, even if he might have made some honest errors in those cases, none of them rose to the level of an impeachable offense. Finally, he argued that to make vague, debatable criticisms of his judicial conduct a basis for impeachment would introduce arbitrariness, and thus the seeds of "despotism," into the impeachment process.

Only in his response to the eighth article, which had charged him with making an "intemperate and inflammatory political harangue" to the grand jury in Baltimore in 1803, did Chase take a more confrontational approach. Even then, though, he avoided any personal attacks on either Jefferson or those in the House of Representatives who had voted for his impeachment.

He first denied that anything he had said to the grand jury had been intemperate, inflammatory or indecent. He declared he still believed everything he had said in the charge, and that all he had done in expressing those opinions was to follow the long-established practice in the United States of judges presenting to grand juries "such political opinions as they thought correct and useful." He then argued that, even if a judge expressed "incorrect" political opinions, that could hardly be a basis for impeachment and removal. If that were the case, said Chase, "error in political opinion . . . might be a crime," and "a party in power might, under this pretext, destroy any judge, who might happen in a charge to a grand jury, to say something capable of being construed by them, into a political opinion adverse to their own system." Such conduct, he said, "would be utterly subversive of the fundamental principles on which free government rests."

This was as far as Chase went. Rather than impugning anyone's motives, or saying anything negative about their character, Chase stuck to the merits of the case. Framing the Article Eight charge as one that threatened political liberty in America was a powerful way to appeal to the moderate Republicans whose support Chase needed (and would get) in the trial.[22] And all astute Republicans would have realized that, as the number of Republican judges grew, making partisan behavior in judges an impeachable offense could be turned against their side too.[23]

A few issues later, on February 25, the paper reported that Chase's lawyers had each made long closing arguments. It also reported Chase's last brief remarks to the Senate. He said he was too ill to remain at the Senate

proceedings any longer, and regretted having to depart before hearing the Senate's verdict. He thanked the Senate for "its patience and indulgence in the long and tedious examination of the witnesses."

The March 1 paper reported the close of the trial proceedings that day and said the Senate would be voting on the articles later in the day. The report characterized the proceedings as a "full, patient, and deliberate hearing" of the charges against Chase, conducted with "impartiality, . . . dignified deportment, . . . order and decorum." It said the proceeding reflected "high honor on the Senate of the United States and the individual who presides over their deliberations," Vice President Aaron Burr.

There was a strong irony in the appearance of the next issue of the *Intelligencer*. It was published on March 4, 1805, which of course was the date of Jefferson's inauguration to a second term. So which "news" item received more space in the newspaper that day—the decision in the Chase impeachment case, or Jefferson's inauguration? Remarkably, it was the former.

The Chase story was headlined, all in capitals and in unusually large font, "JUDGEMENT PRONOUNCED ON THE IMPEACHMENT AGAINST SAMUEL CHASE." Meanwhile, in pitifully stark contrast, there was only this mention of Jefferson's inauguration: "*This day,* at 12 o'clock, the PRESIDENT takes the oath of office, when it is expected he will deliver an INAUGURAL SPEECH." On the glorious day of Jefferson's second inauguration, his own presidential newspaper devoted its entire first page and more than half of its second page to the speech that John Randolph had given at the opening of Chase's impeachment trial in the Senate. And on page three, centered on the page, the paper presented a full account of the final verdict, with a chart showing how each Senator had voted on each article of impeachment. (That detailed information may well have come from Jefferson himself, who had been keeping a running tally of the voting.[24])

It is hard not to ascribe some meaning to this hugely disproportionate coverage of the two events in Jefferson's newspaper. Why did the newspaper not once again, as it had for Jefferson's first inaugural address, publish the text of his second one on the day it was given?[25] It surely seems that an editorial decision was made that the Chase verdict was so important that it had to be published as soon as possible, at the expense of pushing coverage of Jefferson's inauguration to the next issue. Or could the editor just not bear to put both the news of Chase's acquittal into the same issue with coverage of Jefferson's splendid triumph? In any event, the paper's treatment of the news of Chase's acquittal certainly conveys the appearance that Republicans, rather than having lost interest in the trial or thought it inconsequential, still thought the trial had been hugely significant.

The next issue, March 6, did print, on its entire first page, Jefferson's inaugural speech. It also published a brief commentary on the speech, and reported that, following the speech, Jefferson had been "waited upon by a large assemblage of members of the legislature, citizens, and strangers of distinction;—and a procession was formed at the Navy Yard, composed of the several mechanics engaged, which marched to military music, displaying, with considerable taste, the various insignia of their professions." Even in this issue, however, the specter of Chase appeared in the form of an advertisement headlined in large print "TRIAL OF JUDGE CHASE" that reported that the editor of the *Intelligencer* was planning to "publish in a volume the proceedings on this interesting trial at full length, with as little delay as circumstances will admit." The ad solicited orders for the work and requested the editors of other newspapers to "confer a favor by inserting this advertisement a few times."

The next issue that mentioned either Jefferson or Chase, that of March 13, 1805,

	I	II	III	IV	V	VI	VII	VIII	
Adams	–	–	–	–	–	–	–	–	0
Anderson	+	+	+	+	–	–	–	+	5
Baldwin	+	–	+	–	–	–	–	+	3
Bayard	–	–	–	–	–	–	–	–	0
Bradley	–	–	–	–	–	–	–	–	0
Breckenridge	+	+	+	+	–	+	+	+	7
Brown	+	–	+	+	–	–	–	+	4
Cocke	+	+	+	+	–	+	+	+	7
Condit	+	+	+	+	–	–	–	+	5
Dayton	–	–	–	–	–	–	–	–	0
Ellery	+	+	+	+	–	–	–	+	5
Franklin	+	–	+	+	–	–	+	+	5
Gaillard	–	–	–	–	–	–	–	–	0
Giles	–	+	+	+	–	–	–	+	4
Hillhouse	–	–	–	–	–	–	–	–	0
Howland	+	+	+	+	–	+	+	+	7
Jackson	–	–	+	+	–	–	+	+	4
Logan	+	–	+	+	–	–	–	+	4
Maclay	+	+	+	+	–	+	+	+	7
Mitchell	–	–	–	–	–	–	–	–	0
Moore	+	+	+	+	–	–	–	+	5
Olcott	–	–	–	–	–	–	–	–	0
Pickering	–	–	–	–	–	–	–	–	0
Plumer	–	–	–	–	–	–	–	–	0
Smith. M.	–	–	+	+	–	–	+	+	4
Smith. N.Y.	–	–	–	–	–	–	–	–	0
Smith. O.	–	–	–	–	–	–	–	–	0
Smith. V.	–	–	–	–	–	–	–	–	0
Stone	+	–	–	+	–	–	+	+	4
Sumpter	+	+	+	+	–	–	+	+	6
Tracy	–	–	–	–	–	–	–	–	0
White	–	–	–	–	.	–	–	–	0
Worthington	+	–	+	+	–	–	–	+	4
Wright	+	–	+	+	–	–	+	+	5
+	16.	10	18	18	0	4.	10	19.	
–	18	24	16	16	34	30	24	15	

Breckenridge, Cocke, Howland, Maclay — 7
Sumpter — 6
Anderson, Condit, Ellery, Franklin, Moore, Wright — 5.
Brown, Giles, Jackson, Logan, Smith M., Stone, Worthington — 4.
Baldwin — 3
Bradley, Gaillard, Mitchell, Smith N.Y., Smith O., Smith V., Adams, Bayard, Dayton, Hillhouse, Olcott, Pickering, Plumer, Tracy, White — 0

Chase was acquitted, thanks to the effective efforts of his lawyers—notably Luther Martin (above)—and to some Republican Senators, believing that his impeachment was motivated more by party politics than by any real offense on Chase's part. Above is the vote tally for each of the eight articles Chase was impeached under, published on March 1, 1805.

once again devoted more space to Chase. Regarding Jefferson, the paper reported tersely that Jefferson's "re-election" had been "celebrated with much distinction at New York, Philadelphia, Richmond, and Petersburg" but that it had no space to give any "detail of these festivities." It did have space, however, to print both the resolution of

the Senate commending Vice President Burr for his "impartiality, dignity, and ability" in presiding over Chase's trial and Burr's response in which he expressed his appreciation to the Senate for "this flattering mark of their esteem." It also reported that, in a Sunday session, the House had registered its disagreement with the Senate over special legislation that would pay witnesses who had been summoned to testify in the Chase trial.

On March 18, the *Intelligencer* then began publishing, *in almost every issue for the next five months* (until August 23, 1805), parts of the transcript of the proceedings in Chase's trial. The March 18 issue, for example, carried the testimony of the two Republican attorneys who had sought to represent John Fries in his trial for treason. Both attorneys had testified that Chase had conducted the trial in an extremely biased manner. The April 3 and 5 issues of the paper were notable because they carried the account of Chief Justice John Marshall's testimony in the impeachment trial. Marshall had been present at the Callender trial as an observer. Called as a witness for Chase, he had unexpectedly provided testimony critical of some of Chase's conduct in the trial.[26] In August, the paper concluded its coverage of the trial by publishing the closing arguments of Chase's lawyers.

This in-depth, months-long coverage of Chase's impeachment in the *National Intelligencer* again contradicts the notion that Jefferson and his Republican allies had lost interest in the proceedings. If that were so, it seems inconceivable that Jefferson's newspaper would for so long have continued publishing so much of the proceedings, virtually verbatim. Rather, all the space devoted to the trial seems to be an obvious sign that Republicans thought the trial so important that they wanted a full account of it spread across the country. In this way, they could have been sure that all the allegations against Chase would be known nationally and in great detail. Readers would have seen for themselves what Chase was accused of and why, in the eyes of Republicans, he had deserved to be removed from office. Anyone reading or hearing of the proceedings as recounted in the *Intelligencer* would thus have received an extensive education in what Republicans did and did not expect from a federal judge, especially one sitting on the nation's highest court.

As Jeremy Bailey has shown, Jefferson had a long-held view that the executive branch should be involved in the impeachment process. Bailey writes that the energy of the executive in sometimes seeking impeachment and removal of judges or executive branch officials could, in Jefferson's eyes, make impeachment more likely "by pricking the attention of the people, who too rarely rise up against tyrants, and by emboldening legislators." A corollary of this executive participation was that it would strengthen the impeachment process "by improving the public's ability to understand the kind of questions that would be brought up by impeachments."[27] In light of Bailey's points, the reason for the extraordinary attention paid to Chase's impeachment and trial in Jefferson's presidential newspaper becomes even more obvious. Jefferson would have wanted the *Intelligencer* to carry out the task he envisioned for executive participation in the impeachment process: "improving" the ability of the American people to understand the basis for impeachment of officials, thus enabling them to judge for themselves whether their representatives had acted properly or not when engaged in the process.

Recall that, as noted previously, this is precisely how the editor of the *Intelligencer* had responded to Chase's complaint that the preliminary House impeachment materials should not have been published in the newspaper. Disagreeing with Chase, Samuel Harrison Smith said: "The representatives of the people are responsible to their constituents. If they err, the people ought not to be left in the dark. If they act right, the people, whose

interests they guard, ought not to be ignorant of their motives of action."

Smith's explanation, of course, also suggests a popular or "political" basis for the impeachment and removal of officials that fits with Jeffersonian popular democratic theory. Under this standard, impeachment is justified whenever any official, but particularly a judge, is somehow seriously harming the nation but has not committed any criminal offense. This broad standard contrasts with the "legal" basis standard, which holds that only criminal conduct can justify the process.[28] In a speech in the House during the impeachment effort, Republican William Branch Giles justified the functional, "political" view of impeachment bluntly: "You hold dangerous opinions, and if you suffer to carry them into effect you will work the destruction of the nation. We want your offices for the purpose of giving them to men who will fill them better."[29]

Building on statements like these, Stephen Engel asserts that Republican hostility to the Marshall Court, and by implication to politically "out-of-step" Justices such as Chase, was based not so much on hostility to the idea of judicial review but rather on the expectation that judges should hold views that were consistent with the American people's as a whole. If they did, then even the judicial branch would reflect the concept of "popular sovereignty." He also then concludes that, unexpectedly for both sides, out of the Chase trial emerged a bipartisan consensus that judges should behave in a politically neutral manner. Engel quotes one of the House impeachment managers as saying Chase's impeachment had been intended to "teach a lesson of future instruction to judges, that when intoxicated by the spirit of party, they may recollect the scale of power may one day turn, and preserve the scales of justice equal."[30]

Chase's impeachment also had more particular effects. Chase himself, suitably castigated in the public eye by the Jeffersonians, would have realized the danger in crossing them again. This public flogging could well have deterred him and other Federalist judges from ever again expressing anti-Republican sentiments in public.[31] Indeed, the Chase impeachment proceedings appear to have chastened even John Marshall. On the eve of the Senate trial, he wrote Chase to recommend abandoning judicial review in favor of "appellate jurisdiction in the legislature."[32] Then, when called to testify in the trial, he had appeared frightened, tentative, and accommodating to the prosecution.[33]

Conclusion

This research provides a better appreciation of the attitudes and strategies of Thomas Jefferson and his Republican allies regarding the impeachment of Samuel Chase. In many ways, the findings can lead to different scholarly assessments. Most significantly, they show that, rather than saying nothing publicly during the House impeachment proceedings against him, Chase went on a major public relations offensive.[34] In a letter he sent to newspaper editors around the country, he attacked not only the House Republicans but Jefferson himself. He accused the President of acting out of partisan and personal animosity, and argued that his impeachment was an obvious assault against the constitutional independence and integrity of the federal judiciary. The bluntness of Chase's attack on Jefferson is stunning, and stands as the most explicit public confrontation ever between a Supreme Court Justice and a President.

The extraordinary attention paid by Jefferson's presidential newspaper to Chase's impeachment also undermines major scholarly opinions on Jefferson's attitude toward the impeachment effort. Some scholars have concluded that Jefferson was uninvolved in the effort as it unfolded, and soon lost interest in it.[35] Others have asserted that Jefferson

backed off on the effort because he no longer viewed the Supreme Court as a serious threat due to the "cautious and conservative approach" the Court had taken since *Marbury*.[36] On the contrary, all the attention paid to Chase's impeachment in Jefferson's presidential newspaper leads to the opposite inference that the President and his Republican allies indeed cared deeply about the matter. That would have of course been apparent to the entire Washington political community at the time. And, while the Court as a whole might have become non-threatening, Samuel Chase's anti-democratic and anti-Jefferson public statements (and the similarly held Federalist sentiments of the other Supreme Court Justices, especially John Marshall) evidently were still considered a serious threat to Jeffersonian Republicanism and to the President himself. Nothing else explains the constant attention devoted to the matter in the newspaper for months. Indeed, as several scholars have noted, it was the article condemning Chase's political speech to the Baltimore grand jury that got the most votes in his impeachment trial.[37]

The inference that Jefferson actually wished for Chase's conviction then suggests different interpretations of some other aspects of the impeachment effort. From the assumption that Jefferson opposed the prosecution of Chase, it has been inferred that John Randolph must have acted on his own in initiating the impeachment proceedings, to embarrass and pressure Jefferson and his allies. Similarly, Jefferson is said to have then begun courting Aaron Burr, who as Vice President would preside over Chase's Senate trial, to get Burr to assist with the *acquittal* of Chase.[38] On the other hand, if one assumes, as the coverage in the *National Intelligencer* would seem to indicate, that Jefferson instead was actually trying to accomplish Chase's conviction and removal, his use of Randolph makes much more political sense. Randolph may have been, as he has been described, a political "wild card," but in this case Jefferson could well have found that crazy aggressiveness useful. Similarly, Jefferson's courting of Burr could have been with the design of *encouraging* Burr to do all he could to facilitate Chase's *conviction*. In this regard, it is noteworthy that, when Chase first appeared before the Senate on January 2, 1805, to request a postponement of the proceedings, Burr used the occasion to "badger and embarrass the Judge."[39]

Burr himself, early in Jefferson's presidency, had advised another politician that the *National Intelligencer* was a reliable guide to Jefferson's thinking. The newspaper's editor, he said:

> . . . has the countenance and support of the administration. His explanations of the Measures of Government and of the Motives which produce them are, I believe, the result of information and advice from high Authority.[40]

As this article shows, following Burr's advice can produce surprising results. By using the "explanations" in the *National Intelligencer* as a guide, it is possible to gain new insights into the attitudes and strategies of Jefferson and his allies as they navigated the turbulent constitutional waters of the new republic, fighting with Federalist enemies along the way.

ENDNOTES

[1] For an excellent overview of the Chase impeachment and discussion of the role it played in the evolution of the impeachment process in the American political system, *see* William H. Rehnquist, **Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson** (New York: William Morrow and Company, 1992). See also Melvin I. Urofsky, "Thomas Jefferson and John Marshall: What Kind of Constitution Shall We Have?" *Journal of Supreme Court History*, 31:3 (November 2006), 221-234; Peter Charles Hoffer and N.E.H. Hull, **Impeachment in America, 1635-1805** (New Haven: Yale University Press, 1984).

[2] Richard E. Ellis, **The Jeffersonian Crisis: Courts and Politics in the Young Republic**. (New York: W.W. Norton, 1971), chapter VI.

[3] Ellis, **The Jeffersonian Crisis**, 80.
[4] Jeffrey L. Pasley, **"The Tyranny of Printers" Newspaper Politics in the Early American Republic** (Charlottesville: University of Virginia Press, 2002), 3.
[5] Joanne B. Freeman, **Affairs of Honor: National Politics in the New Republic** (New Haven: Yale University Press, 2001), 147.
[6] Mel Laracey, **Presidents and the People: The Partisan Story of Going Public** (College Station: Texas A&M University Press, 2002), 59-62.
[7] Margaret Bayard Smith, **The First Forty Years of Washington Society Portrayed by the Family Letters of Mrs. Samuel Harrison** Smith (New York: Scribner, 1906).
[8] Donald O. Dewey, **Marshall versus Jefferson: The Political Background of *Marbury v. Madison*** (New York: Knopf: 1970), 94.
[9] Bruce Ackerman, **The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy** (Cambridge: Harvard University Press, 2005), 209-210; Ross E. Davies, "The Other Supreme Court," *Journal of Supreme Court History* 31:3, 221-234, at 26; Keith Whittington, **Constitutional Construction: Divided Powers and Constitutional Meaning** (Cambridge: Harvard University Press, 1999), 20-23, 43.
[10] Jane Shaffer Elsmere, **Justice Samuel Chase** (Muncie: Janevar Publishing Company, 1980), 134-135.
[11] Chase to John F. Mercer, March 6, 1803. Quoted in Elsmere, **Justice Samuel** Chase, 157-158. *See also* a similar quotation from a communication of the same date by Chase to G. Morris in Stephen M. Engel, "Before the Countermajoritarian Difficulty, Regime Unity, Loyal Opposition, and Hostilities toward Judicial Authority in Early America," *Studies in American Political Development* 23:2 (October 2009), 189-217, at 199 n. 84.
[12] Ellis, **The Jeffersonian Crisis**, 77-80; Shaffer, **Justice Samuel Chase**, 166-167.
[13] The summary does fairly well reflect the description found in the proceedings of the U.S. Senate, Annals, 8:2, 675-676.
[14] Quoted in Ellis, **The Jeffersonian Crisis**, 80.
[15] For a detailed, perceptive analysis of the charges against Callender, *see* Rehnquist, **Grand Inquests**, 74-89.
[16] Ellis, **The Jeffersonian Crisis**, 82.
[17] Elsmere, **Justice Samuel Chase**, 179.
[18] Keith Whittington, **Constitutional Construction: Divided Powers and Constitutional Meaning** (Cambridge: Harvard University Press, 1999).
[19] Ackerman, **The Failure of the Founding Fathers**, 202-203. *See also* James Haw, Francis F. Beirne, Rosamond Beirne, and R. Samuel Jett, **Stormy Patriot: The Life of Samuel Chase** (Baltimore: Maryland Historical Society, 1980).
[20] Ackerman, **The Failure of the Founding Fathers**, 202-203. Elsmere adds that Chase's public response was well received in Federalist circles and may even have deterred some Republican newspaper editors from further attacks against Chase until the House acted on the impeachment articles. **Justice Samuel Chase**, 200.
[21] *See, e.g.*, Robert McCloskey, **The American Supreme Court** (Chicago: University of Chicago Press, 1960).
[22] In addition to its publication in these issues of the *Intelligencer*, Chase's answer can also be found in the 1805 publication by Smith of the entire impeachment trial proceedings: **The Trial of Samuel Chase... Before the Senate of the United States, Taken in Shorthand by Samuel H. Smith and Thomas Lloyd**, 2 vols. (Washington, D.C., 1805). *See also* 8:2, 101-150, **Annals of Congress** (Washington, D.C., Gales and Seaton, 1834). On the crucial role played by moderate Republican Senators in Chase's acquittal, *see* Ellis, **The Jeffersonian Crisis**, 80-81 and 102-107.
[23] *See* Hoffer and Hull, **Impeachment in America**, 244.
[24] Ackerman, **The Failure of the Founding Fathers**, 214.
[25] Laracey, **Presidents and the People**, 59.
[26] Berger, **Impeachment: The Constitutional Problems**, 235-237.
[27] Jeremy Bailey, "Constitutionalism, Conflict, and Consent: Jefferson on the Impeachment Power," *The Review of Politics*, 70:4 (September 2008), 572-594, at 591-592.
[28] Jeffrey K. Tulis, "Impeachment in the Constitutional Order," in Joseph M. Bessette and Jeffrey K. Tulis, eds., **The Constitutional Presidency** (Baltimore: Johns Hopkins University Press, 2009), 229-246; Bailey, "Constitutionalism, Conflict, and Consent," 573-576. *See* Berger, **Impeachment: The Constitutional Problems**; Michael J. Gerhardt, **The Federal Impeachment Process: A Constitutional and Historical Analysis**, 2nd ed. (Chicago: University of Chicago Press, 2000).
[29] Quoted in Jeremy Bailey, "Constitutionalism, Conflict, and Consent: Jefferson on the Impeachment Power," *The Review of Politics* 70:4 (September 2008), 572-594, at 577. This is a specific example of the more general idea that non-judicial actors can shape constitutional understandings through their actions. *See* Larry D. Kramer, **The People Themselves: Popular Constitutionalism and Judicial Review** (Cambridge: Oxford University Press, 2005).
[30] Engel, "Before the Countermajoritarian Difficulty," at 198-202. *See also* his fuller treatment in **American Politicians Confront the Storm: Opposition Politics and Changing Responses to Judicial Power** (New York: Cambridge University Press, 2011). For earlier articulations of this idea, *see* Albert J. Beveridge, **The Life of John Marshall** (Boston: Houghton, Mifflin and

Company, 1916-19), III, 159; Richard B. Lillich, "The Chase Impeachment," *American Journal of Legal History* 4:1 (1960) 49-72, at 54-57. *See also* Rehnquist, **Grand Inquests**, 108-125; Whittington, **Constitutional Constructions**, 57-65.

[31] *See, e.g.*, Ackerman, **The Failure of the Founding Fathers**, 228; Whittington, **Constitutional Constructions**, 24-25, 48-49, 66-67.

[32] Dewey, *Marshall v. Jefferson*, 152-153; Ackerman, **The Failure of the Founding Fathers**, 220.

[33] Ellis, **The Jeffersonian Crisis**, 99.

[34] *See, e.g.*, Ellis, *supra* n. 15.

[35] Ellis, **The Jeffersonian Crisis**, 104. Ellis later elaborated on this opinion, asserting that "Actually, between Jefferson's letter to Nicholson in May 1803 and Chase's trial in March 1805 there is no evidence, aside from Federalist hyperbole, to indicate that the administration either was enthusiastic about, or even supported, the movement to impeach Chase." Ellis, "The Impeachment of Samuel Chase," in M. Belknap, ed., **American Political Trials** (Westport, CT: Greenwood Press, 1981), 57-78 at 65. *See also* Forest McDonald, **The Presidency of Thomas** Jefferson (Lawrence: University Press of Kansas, 1986), 92-93.

[36] McCloskey, **The American Supreme Court;** *see also* Dean Alfange, "Marbury v. Madison and Original Understanding of Judicial Review," 1993 *Supreme Court Review* 329-446; Ackerman, **The Failure of the Founding Fathers**, ch. 10.

[37] *See, e.g.*, Whittington, **Constitutional Construction,** 41; Ackerman, **The Failure of the Founding Fathers**, 213; Engel, **Before the Countermajoritarian Difficulty**, 202

[38] *See* Ellis, **The Jeffersonian Crisis**, 81-95.

[39] Ellis, **The Jeffersonian Crisis**, 86, 92-93; *see also* Ackerman, **The Failure of the Founding Fathers**, 212-213.

[40] Quoted in Laracey, **Presidents and the People**, 59-60.

"The Unjust Judge": Roger B. Taney, the Slave Power, and the Meaning of Emancipation

TIMOTHY S. HUEBNER

On October 12, 1864, Chief Justice Roger Brooke Taney died in his rented home in Washington, D.C. The death of the eighty-seven-year-old Maryland native, after he had served for twenty-eight years as Chief Justice of the nation's highest court, prompted little grief or mourning on the part of the people of the Northern states. While some Northern Democratic newspapers offered words of condolence and respect, Taney's Republican opponents, who were much more numerous, were quick to portray his death as a cause for celebration. As soon as word came to Massachusetts Senator Charles Sumner, he dashed off a letter to President Abraham Lincoln in which he noted, "Providence has given us a victory in the death of Chief Justice Taney. It is a victory for liberty and the Constitution." In the days following, a Philadelphia newspaper noted, "The nation can feel little regret at his removal from an office which, in his hands, has been so promiscuously used." Five months later, in a thorough article on the Chief Justice's legacy, the *Atlantic Monthly* concluded that Taney was "essentially a partisan judge" and around the same time, in early 1865, an anonymous sixty-eight-page pamphlet was published, **The Unjust Judge**, that made the same point.[1]

As the nation was concluding a long and bloody civil war, Taney's death in 1864 symbolized a constitutional revolution. The author of the Supreme Court's infamous proslavery decision in *Dred Scott v. Sandford* (1857), Taney embodied the so-called "Slave Power," the concentrated political interest that had dominated Southern politics for a decade and led the Confederate states to attempt to secede. To most Northerners, who had increasingly come to accept emancipation as a Union war aim, the Chief Justice's death represented the passing of the antebellum pro-slavery Constitution, the coming defeat of the Confederacy, and the possibility of the creation of a new post-war constitutional order. As northern

Republicans—particularly those of a radical bent—vilified Taney and what he represented, they looked forward not only to ending slavery but also to establishing new rights for African Americans. In doing so, white Republicans responded to the ongoing cause of Northern African-American activists, who, before and during the war, had criticized Taney for advocating the rights of slaveholders in *Dred Scott* and had instead sought to advance the rights of enslaved and newly freed African Americans. Taney's post-war image as one of the great villains of American history thus took shape in the midst of a revolutionary transformation in the American understanding of rights.[2]

Taney's poor reputation at the time of his passing stood in stark contrast to his own reputation just ten years before, during the mid-1850s. Although he had been a controversial nominee to the Court in 1836, viewed as someone likely to carry out the political agenda of his mentor and nominator, President Andrew Jackson, Taney soon earned a reputation as a moderate, fair, and "non-doctrinaire" Chief Justice.[3] Under his leadership, between the late 1830s and mid-1850s the Court issued a series of landmark decisions in the areas of contracts, admiralty law, and commerce. His opinion in *Charles River Bridge v. Warren Bridge* (1837) rejected the notion that a state-issued corporate charter contained an implied monopoly, thus spurring technological progress and economic development throughout the country. His decision in *Genesee Chief v. Fitzhugh* (1851) established that all public navigable waters came within the admiralty and maritime jurisdiction of the federal courts, thus expanding the reach of the federal courts at a time when steamboat traffic surged. His Court's decisions on the Commerce Clause reflected a pragmatic approach, embodied in the decision in *Cooley v. Board of Wardens* (1852) that areas requiring national uniformity would be the exclusive domain of Congress, while other matters of commercial regulations would be the purview of the states. In each of these opinions, Taney displayed a keen understanding of the larger circumstances surrounding the legal issues, as well as a skillful ability to craft decisions to resolve social and political tensions.[4]

Taney's deft judicial leadership paid political dividends. One of the most vociferous opponents of Taney's nomination to the high court, Senator Henry Clay of Kentucky, eventually offered a public apology for having expressed such sentiments and called Taney "a worthy successor of Chief Justice Marshall." Other notable senators, including Daniel Webster of Massachusetts, William Seward of New York, George Badger of North Carolina, and Salmon P. Chase of Ohio, similarly praised the Chief Justice. George Van Santvoord's **Sketches of the Lives and Judicial Services of the Chief Justices**, published in 1854, described Taney in glowing terms. The Chief Justice possessed "a reputation beyond reproach or the breath of calumny, a purity of life that no man can assail, a frank, independent, manly uprightness of conduct which knows no guile . . . , " Van Santvoord wrote. Taney had "sustained himself with ability and honor, as head of the federal judiciary."[5] As the historian R. Kent Newmyer puts it, "Had the Taney Court rested on its laurels in 1856, it would have surely gone down as one of the most popular and effective courts in our history."[6]

In 1857, Taney's reputation changed dramatically because of his decision in one case, of course, *Dred Scott v. Sandford.* In that case, the enslaved Missourian Dred Scott sued for his freedom after have been taken by his master to free territory and having lived there for two years, before being brought back to Missouri. The Court ruled against Scott, holding that he was still a slave.[7] Taney's opinion in *Dred Scott* contained two significant points of law. First, Taney held that African Americans, whether slave or free, had not been included in the political

THE UNJUST JUDGE

A MEMORIAL

OF

ROGER BROOKE TANEY,

LATE

CHIEF JUSTICE OF THE UNITED STATES.

"For with what judgment ye judge, ye shall be judged; and with what measure ye mete, it shall be measured to you again."—MATT. VII. 1, 2.

NEW YORK:
BAKER & GODWIN, PRINTERS,
PRINTING-HOUSE SQUARE, OPP. CITY HALL.
1865.

Shortly after Taney's death in October 1864, an anonymous sixty-eight-page pamphlet was published, *The Unjust Judge*, which accused Taney of abusing his judicial power. The author also argued that Taney had viewed slavery as incompatible with the Declaration of Independence in his youth, and had changed his position in the *Dred Scott* case.

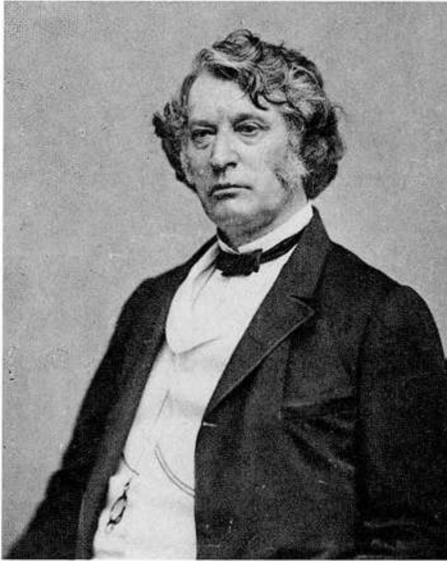
community at the time of the founding; therefore, he reasoned, neither they nor their descendants were citizens of a state within the meaning of the Constitution. This ruling in and of itself at the time was not the most controversial part of the decision. As one scholar has noted, many state courts in the South and the North had already held the same thing—that African Americans were neither citizens of their respective states, nor citizens of the United States.[8] But Taney seemed to go further than just denying blacks' citizenship—he denied that they possessed any rights at all. In reviewing the history of the writing of the Declaration of Independence and the Constitution, Taney held that the founders had not acknowledged or included African Americans in the people of the United States. Taney reasoned that the fact that so many of the founders held slaves proved that they had no intention of applying the "all men are created equal" language of the Declaration to African Americans—it was too glaring a contradiction. In making this point, Taney wrote these memorable words:

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence. . . . They had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

The second point of law decided by Taney in the case—and more significant within the context of the political debate of the time—was that Congress had no power to prohibit slavery in federal territories. Taney put it this way: "The right of property in a slave is distinctly and expressly affirmed in the Constitution." For this reason, Taney believed, Congress had no power to interfere with this right by banning slavery in federal territories. This was, at the time, the most controversial part of the opinion.[9]

The big question of the 1850s was whether slavery would be allowed to spread into new territories, and Taney's answer to that question was a resounding "yes." Slaveholders had a right to take slaves into new territory, Taney argued, and Congress could not interfere with those rights. In other words, the more pressing "rights" issue at the time was not whether African Americans—slave or free—possessed the rights of citizenship under the U.S. Constitution. Rather, "rights," in the context of the heated debates of the 1850s, meant the rights of slaveholders. Those were the rights that South Carolinian John C. Calhoun had championed and behind which Southern fire-eaters such as William Yancey of Alabama were beginning to rally in the late 1850s.[10] And those were the rights that Taney protected.

Strikingly absent from the mainstream national debate over slavery, in fact, was a discussion of the rights of black people. Most white abolitionists seemed perfectly content to debate the constitutionality and morality of slavery in an abstract way, and most Republicans seemed focused on preventing the spread of slavery to new territories. But few abolitionists or Republicans championed racial equality under the Constitution or the law. Abraham Lincoln, for example, stayed away from this issue as much as he could in his debates with Stephen Douglas in 1858. Lincoln made clear that he "never ha[d] complained especially of the *Dred Scott* decision because it held that a negro could not be a citizen" and focused only on the basic right—which he believed lay in the Declaration of Independence—that one person could not be owned by another person. In their



Upon learning of Taney's death, Massachusetts Senator Charles Sumner (above) dashed off a letter to President Abraham Lincoln in which he noted, "Providence has given us a victory in the death of Chief Justice Taney. It is a victory for liberty and the Constitution."

criticisms of the *Dred Scott* decision, in other words, Northern white Republicans focused relentlessly on the "slavery" part of the decision rather than the black citizenship or "rights" aspect of the decision.[11]

African Americans, however, had a different reading of the *Dred Scott* case. Rather than focusing on the question of slaveholders' rights, they zeroed in on the issue of black rights—their rights. Taney's bold claim that blacks "had no rights that the white man was bound to respect" became somewhat of a rallying point for the growing group of northern black activists who sought not only to end slavery but also to advance the aspirations of black people throughout the United States. In September 1858, a little more than a year after the issuing of Taney's opinion, at the Suffrage Convention of the Colored Citizens of New York, African-American leaders made clear exactly what they thought of Taney's opinion. Playing off the Chief Justice's language, they held that "The Dred Scott decision is a foul and infamous lie—which neither black men nor white men are bound to respect." The assembled delegates expressed particular outrage at Taney's interpretation of the Declaration of Independence—the idea that blacks had not been included in the political community at the founding and that, therefore, the government of the United States was a white man's government. The delegates announced, "We, therefore, call upon all who subscribe to the theory of human rights set forth in the Declaration of American Independence, to trample, in self-defense, the dicta of Judge Taney beneath their feet, as of no binding authority."[12]

The emphasis that African Americans placed on the citizenship part of the decision rather than the slavery part stands out, because it cut against the political grain during the late 1850s. The other striking element of the African-American critique of the decision was the way in which they personalized their criticism, training their aim specifically on Chief Justice Taney. Taney was one of seven Justices in the majority in the *Dred Scott* case—and each Justice wrote an opinion—but it was Taney's opinion, with its infamous words, "they have no rights," that most insulted African Americans. It may well have been the most offensive phrase—and the one that had the most galvanizing effect on a segment of the population—in the history of the U.S. Supreme Court.

The events of 1861 and 1862 contributed even further to this close identification of Chief Justice Taney with the Court's *Dred Scott* decision. After Lincoln was elected President in 1860, white Southerners feared that the right to hold slaves in territories would not be protected under the incoming President, and they seceded from the Union and the Civil War began. The Deep South states seceded first, during the winter of 1860-1861, followed by the states of the Upper South in the spring of 1861. The Northern war effort began in April 1861 as an attempt

simply to restore the Union, to put down the Southern rebellion. But by 1862 Union policy changed. Largely because of pressure exerted by African Americans, but also because of the Republican belief that liberating slaves helped the Union cause, emancipation started to become the official policy of the Union government in Washington. In a span of several months, Congress enacted several anti-slavery measures. These included legislation forbidding slavery in the territories (in defiance of the *Dred Scott* decision), ending slavery in Washington D.C., and making possible the emancipation of slaves owned by Confederates. The Lincoln Administration also took action against slavery and, in a limited way, in support of the rights of free blacks. In September 1862, Lincoln issued the Preliminary Emancipation Proclamation, promising freedom to all who were held as slaves in areas still in rebellion 100 days hence. In November, Attorney General Edward Bates issued an official opinion holding that free black sailors were citizens of the United States. In doing so, the administration again defied *Dred Scott*, arguing that the decision applied only to Scott's specific plea and possessed "no authority as a judicial decision." On January 1, 1863, Lincoln issued the final Emancipation Proclamation, which declared all slaves in non-Union-occupied areas of the Confederacy "forever free." With the Emancipation Proclamation black military service in the Union army finally came. Each and every one of these policies instituted by Lincoln and the Republicans in Congress constituted a gradual, methodical assault on the *Dred Scott* decision, particularly on the slavery part of the decision. By 1863, the South's "peculiar institution" was slowly losing its grip on the Southern states in the midst of war.[13]

In the meantime, Taney—still on the Court—and the *Dred Scott* decision—still on the books—lurked in the background. By this time, the Chief Justice held a unique position as the only Southerner on the Court who had been part of the *Dred Scott* majority who openly sympathized with the Confederacy. Five of the seven Justices in the majority had been Southerners. Justice Peter V. Daniel of Virginia died in 1860, before the war began. Because of his devotion to his home state and the secessionist course that it pursued, John A. Campbell of Alabama, another of the *Dred Scott* majority, resigned his seat on the High Court in early 1861 and returned home to the South. He ended up serving as the Assistant Secretary of War for the Confederacy. Justice John Catron of Tennessee, although a pro-slavery Justice, became famous during the war for his unwavering support for the Union. In 1861, upon attempting to hold federal circuit court in his home state, Catron encountered a group of Confederates outside of Nashville who informed him that, if he entered the city to hold court, his safety would not be guaranteed. Catron left. But when Federal forces occupied Nashville in early 1862, Justice Catron returned as somewhat of a conquering hero to Unionists in the city, and he did indeed hold U.S. circuit sessions in the city in summer of 1862. Justice James M. Wayne of Georgia, another pro-slavery Justice and, like Catron, part of the majority in *Dred Scott*, earned the scorn of his fellow Georgians for his faithful devotion to the Union.[14]

With Daniel dead, Campbell resigned, and Catron and Wayne thoroughly devoted to the Union, that left Taney: old, bitter, and increasingly partisan and angry. From his position as Chief Justice, Taney did all he could to thwart the Lincoln Administration in its prosecution of the war.

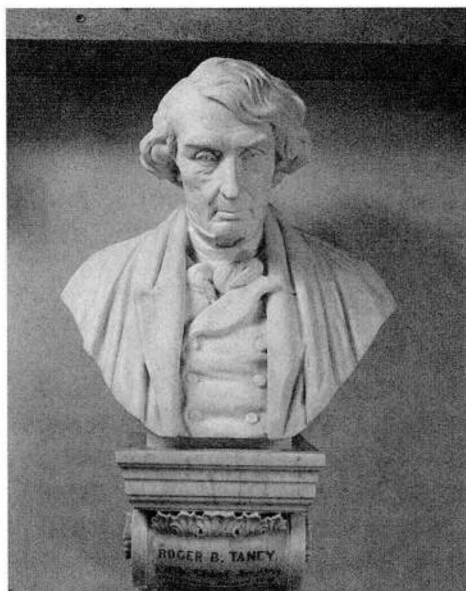
The Chief Justice ruled against Lincoln's suspension of the writ of habeas corpus while on circuit, voted against the constitutionality of Lincoln's blockade of Southern ports, and drafted a hypothetical opinion challenging the constitutionality of the federal draft law should it come before the Court (which it did not).[15] Of course, Taney seethed over Lincoln's Emancipation Proclamation, which

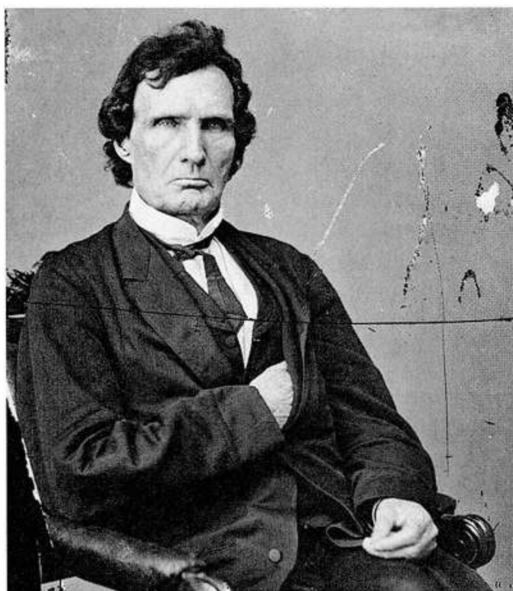
stood in stark contrast to his own *Dred Scott* decision. The Chief Justice was so opposed to Lincoln's policies—and so sure that the administration hated him for it—that he remarked aloud after his decision in the habeas corpus case, *Ex parte Merryman*, that "it was likely he should be imprisoned in Fort McHenry before night." The Lincoln Administration took no such action, but Taney's comment captured the level of distrust between the Chief Justice and the President.[16]

Throughout 1863 and 1864, as the Union army made greater inroads in the Confederacy, Taney's *Dred Scott* opinion—and Taney himself—seemed more and more the relics of a bygone era and came more and more under criticism. Although there were only six years between the issuing of the *Dred Scott* decision and the announcement of the Emancipation Proclamation, America had undergone a radical transformation. Congress, Lincoln, and the Union military were enacting and implementing policies making freedom possible, while African Americans were taking matters into their own hands by walking off Southern plantations and toward Federal military lines. Many of those who moved out of slavery—the men anyway—were moving into the Union army. Eventually, some 200,000 black men ended up serving as Union soldiers or sailors.[17] For blacks during the Civil War, military service offered a way to overcome the stamp of inferiority inherent in Taney's opinion—as a way to assert that they were men and a way to claim equal rights and an equal share of the American heritage. John Rock, a free black man from New Jersey who had become a leading lawyer and activist, insisted that the war presented just such an opportunity. In a speech delivered in January 1862 in Boston, Rock offered support for black enlistment through a mocking paraphrase of Taney: "Seventy-five thousand freemen capable of bearing arms, and three-quarters of a million of slaves wild with the enthusiasm caused by the dawn of the glorious opportunity of being able to strike a genuine blow for freedom will be a power that 'white men will be bound to respect.'"[18]

With the nation swept up in revolutionary change, Taney spent his last few years holed up in his rented home on Indiana Avenue in Washington D.C. Sick, mostly homebound in the care of his daughters and servants, and disgusted by the policies of President Lincoln and official Washington, Taney practically ceased to carry out his duties and spent much of his time in bed reading newspapers and smoking cigars.[19] Although he held the title of Chief Justice of the Supreme Court, his sympathies clearly lay with the Confederate government in Richmond. His son-in-law, Major Richard T. Allison, husband of his daughter Maria, served in the Confederate Army. Pictures of both of them hung on the wall in his house.[20] With Taney confined to his home, the Chief Justice's ill health and impressive longevity became a subject of some conversation and speculation in Washington. In 1863, Republican Senator Benjamin Wade of Ohio quipped, "I prayed with earnestness for the life of Taney to be prolonged through Buchanan's Administration, and by God I'm a little afraid I have overdone it!"[21] But Taney's time did eventually come. Hours before his death, Taney was presented with an opportunity to take an oath of allegiance to the United States government, an oath proposed by President Lincoln and provided for in Maryland's new state constitution. The Chief Justice stubbornly refused.[22]

Roger Taney died in the evening of October 12, and the very next day voters in Taney's home state of Maryland approved an amendment to the state constitution abolishing slavery. It was a fitting event to occur the day after the death of the pro-slavery Chief Justice. A few days later, a group of family members, friends, dignitaries, and onlookers gathered at Taney's residence on Indiana Avenue to pay their last respects.





Senator Lyman Trumbull of Illinois introduced a bill in 1865 providing for the placement of a marble bust of Taney in the Supreme Court chamber (left), where busts of previous Chief Justices were already displayed. Several Senators objected. Later that year, Congressman Thaddeus Stevens of Pennsylvania (right) referred to Taney's Dred Scott opinion in a speech on Reconstruction. Stevens argued that the notion that America was a white man's government was "As atrocious as the infamous sentiment that damned the late chief justice to everlasting fame, and I fear to everlasting fire."

After considering the appropriate way to respond, President Lincoln and three cabinet members—Secretary of State William Seward, Attorney General Edward Bates, and Postmaster General William Dennison—attended this informal visitation. Afterward, a train took Taney's body and a small group of mourners (including Attorney General Bates) to Frederick, Maryland, where the funeral service took place at St. John's Catholic Church, which sixty years earlier Taney had helped to build.[23] Taney's death prompted immediate negative responses from more than just Charles Sumner. On October 14, Secretary of the Navy Gideon Welles, who refused to attend the visitation, revealed to his diary that "during most of his judicial life [Taney] was upright and just," but that the "course pursued in the Dred Scott case and all the attending circumstances forfeited respect for him as a man or a judge." That same day, the *New York Times*, foreshadowing the assessments that were to come, identified Taney with the Confederate cause, arguing that the South's "Montgomery Constitution . . . does not contain a syllable in the interest of Slavery which is not found precisely in this Dred Scott Decision of Chief Justice Taney."[24]

During the next three months, in late 1864 and early 1865, Lincoln won re-election as President, Union forces under the command of Gen. William T. Sherman in Georgia continued their march to the sea and eventually northward into South Carolina, and Congress debated and passed a Thirteenth Amendment to the Constitution, ending slavery and in effect overturning the slavery portion of the *Dred Scott* decision. Meanwhile, the public debate over Taney's legacy—and the meaning of emancipation—began in earnest. By this time, the emphasis that African Americans had always placed on the "they have no rights" aspect of the opinion became an important part of the national discussion. As the Thirteenth Amendment

moved swiftly toward ratification by the states that year, the question of black citizenship and black rights moved to the forefront. Now that African Americans were free, what rights would they have?

In the midst of this debate, Taney and *Dred Scott*—now more closely connected than ever—became a symbol of the old pro-slavery order, the pre-Civil War Slave Power. On February 23, 1865, when Senator Lyman Trumbull of Illinois introduced a bill providing for the placement of a marble bust of Taney in the Supreme Court chamber, where busts of the previous Chief Justices were already displayed, Senator Charles Sumner of Massachusetts rose in opposition. "I object to that; that now an emancipated country should make a bust to the author of the Dred Scott decision." Senator Sumner continued: "The name of Taney is to be hooted down the page of history. Judgment is beginning now; and an emancipated country will fasten upon him the stigma which he deserves." Others joined Sumner in their criticism. Senator Benjamin Wade remarked that his constituents "would pay $2,000 to hang this man in effigy rather than $1,000 for a bust to commemorate his merits."[25] Later that year, in a famous speech on the floor of the House in which he laid out his views on the question of Reconstruction, Republican Congressman Thaddeus Stevens of Pennsylvania took an even stronger position against Taney. Referring to Taney's *Dred Scott* decision, Stevens argued that the notion that America was a white man's government only was "As atrocious as the infamous sentiment that damned the late chief justice to everlasting fame, and I fear to everlasting fire."[26]

In a lengthy article on Taney's legacy published that year in the *Atlantic Monthly*, the author, the Boston lawyer Charles M. Ellis, blamed Taney for the rise of the slave power and the secessionist movement. Labelling the Chief Justice "a judicial Calhoun," Ellis made clear that none of Taney's other work on the Court would matter in comparison to his infamous attempt to advance the rights of Southern slaveholders. "The secession war, and the triumph of liberty, will be the theme of the world; and he of all who precipitated them, will be most likely, after the traitor leaders, to be held in infamous remembrance; for he did more than any other individual . . . to extend the slave power."[27] Ellis went on to discuss Taney's motives in *Dred Scott*, and he here denounced the Chief Justice in similarly stark language. Noting that "the worst of motives is the disposition to serve the cause of evil," Ellis argued that Taney knew exactly what he was doing—that his decision attempted to snuff out all hope of rights and liberties for the nation's free and enslaved African Americans. Ellis portrayed the deceased Chief Justice as ignoring all of the precepts of the Christian religion, the Declaration of Independence, and the Constitution. "He slandered the memory of the founders of the government and the framers of the Declaration," Ellis wrote. "He was ready to cover the most glory page of the history of his country with infamy, and insulted the intelligence and virtue of the civilized world." Finally, going through a long list of English judges with reputations for unfairness and infamy—including Lord Chief Justice George Jeffreys of England, the infamous persecutor of Protestants during the late seventeenth century—Ellis concluded that Taney was the worst of all.[28]

The low point in Taney's reputation came with the 1865 publication of an anonymous sixty-eight-page pamphlet, **The Unjust Judge, A Memorial of Roger Brooke Taney**. Like the *Atlantic* article, the pamphlet accused Taney of the worst abuses of judicial power and asserted that the *Dred Scott* opinion alone would shape Taney's reputation. Much of the pamphlet argued that the Framers had been antislavery in their outlook and that the Constitution embodied the spirit of the Declaration of Independence, particularly its assertion that

all men were created equal. The author of **The Unjust Judge** took particular satisfaction in showing how, early in his career, Taney viewed slavery as incompatible with the Declaration, a position that he later rejected in the *Dred Scott* case. As a young lawyer in Frederick County, Maryland, Taney had indeed defended Jacob Gruber, an antislavery Methodist minister accused of disturbing the peace and inciting rebellion, and in the process Taney had cited the Declaration of Independence in support of Gruber's antislavery views. In his argument on behalf of Gruber in 1819, Taney had gone so far as to describe slavery as "a blot on our national character."[29] The author of the **Unjust Judge** made much of this apparent change of heart—describing Chief Justice Taney as failing to live up to his early ideals as well as those of the nation's founders. "At forty, Mr. Taney had responded to the call of the Revolution, 'insisted on the principles contained in that venerated instrument,' the Declaration . . . ," the author of **The Unjust Judge** wrote. "At eighty, clothed with the power and prerogative of the most potential place in the nation, on an occasion when he might have promoted, essentially, a consummation for which the whole earth was panting, he proved false to himself, false to the hope and charities he had once cherished, false to the liberal principles he had eulogized, and to a free Constitution he had sworn to support."[30] In its analysis of the *Dred Scott* case, the pamphlet drew upon the dissents in the case in an attempt to demonstrate that African Americans, contrary to Taney's assertion, had been included in the political community at the time of the founding.

But more than offering a legal critique of Taney's reasoning in the *Dred Scott* opinion, **The Unjust Judge** waged a rhetorical assault on the character of the nation's fifth Chief Justice. The author excoriated Taney as a "malevolent old man" engaged in "the most nefarious of purposes," a man as untrue to the principles of the Christian religion as he was to the ideals of the Constitution. In his perversion of the law and misuse of judicial power, Taney was said to equal the infamous Judge Jeffreys "in his worst moods, in his worst days." Moreover, the author of **The Unjust Judge** contended, "In the character and dimension of his crime against humanity," Taney exceeded Jeffreys: "As a jurist, or, more strictly speaking, as judge, in which character he will be most remembered, he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment among men."[31] The evolution in the response from Republicans was clear: Taney went from being "hooted down the page of history" to being condemned to hell for the decision, to being worse than the worst judge in the history of the English-speaking world, to being—next to Pontius Pilate—the worst to ever occupy the seat of judgment among men. The rush of Union victory and the triumph of emancipation made Taney appear, by comparison, to be on the wrong side of history, an abuser of power, and a force for evil.

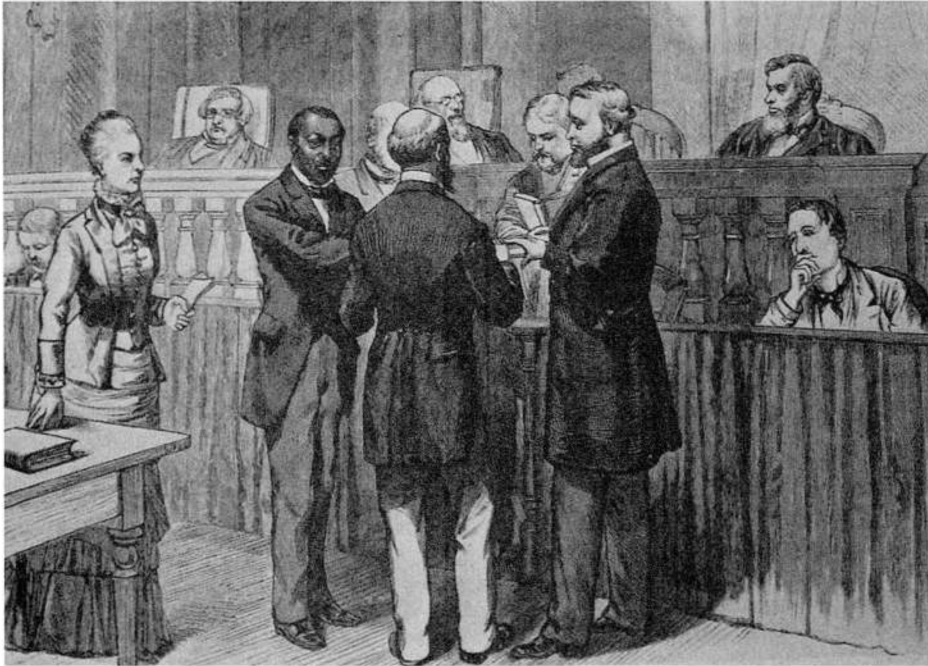
What does this interpretation of Taney's death mean? What does it say about Chief Justice Taney and about America at the end of 1864 and early 1865? First, it reveals that by the time of his death, Taney had come to embody the Slave Power—the entrenched proslavery interests that the Union was attempting to defeat. The "they have no rights" language of *Dred Scott*, the Union's adoption of a policy of emancipation, and Taney's attempts to thwart the Lincoln Administration turned Taney into a highly visible public enemy. By 1864, it was clear that Taney stood for the rights of slaveholders—for "no rights" for black people—and he stood opposed to Lincoln's efforts to prosecute the war. "Nobody doubts that Taney died with his heart beating for the Rebellion," one Northern newspaper wrote the day after his death. "He scarcely took pains to conceal his feelings."[32] In the North, there may have been no greater symbol of the South and all that it stood for than Chief Justice Taney.

Second, it tells us that these really were revolutionary times. It is striking that in a nation that had so valued its institutions—its founders, its Constitution, and its court system for decades—one of its most distinguished and longest-serving Justices might experience so rapid a fall in the minds of the Northern public. In 1864 and 1865, most Northerners really did see themselves as bringing about a profound, revolutionary break with their past—a past symbolized by the aging, pro-slavery Taney. It is not easy for twenty-first century Americans—who know that it would take a Civil Rights Movement to bring about further change—to understand the swift and revolutionary pace of events during the Civil War. It is often our tendency to read history backward rather than forward to say, from our perspective, that the war did not really change much. But a close examination of what contemporaries said at the time of Taney's death reveals the rapid downfall of the Chief Justice's reputation and speaks to the depth of the revolutionary events and aspirations of the day. The system of slavery—a 250-year-old institution in North America that represented nearly three billion dollars in wealth—went down to defeat on the battlefields of the Civil War, and along with it its most prominent judicial defender. These were indeed revolutionary times.

Third and finally, the story of Taney's rapidly declining reputation reveals something about black agency and activism, about the extent to which African Americans shaped the times. Of course, the fact of war was the driving force in bringing about emancipation, but it was African Americans themselves who were fleeing to federal military lines. It was African Americans who always focused on the "rights" portion of the *Dred Scott* decision, who always drew their inspiration from the "all men are created equal" language of the Declaration of Independence, and who always pushed the debate forward—to emancipation, to be sure—but also beyond, to the rights of black people in the republic. The arguments of white Radical Republicans like Sumner, Wade, Ellis, and Stevens owed a great deal to black activists' decades-long attempt to push the Declaration of Independence to the forefront of American political discourse. Thus, in this way African Americans helped bring about a fundamental shift in American notions of rights—from the rights that Taney had discussed in *Dred Scott*—the rights of slaveholders—to the rights of enslaved persons. Taney had relied on the Fifth Amendment of the Constitution to emphasize the rights of property, but African Americans looked to the Declaration of Independence to champion the rights of all human beings.

The passing of Taney, the revolutionary nature of the times, and the role of African Americans in bringing about that revolution was probably most evident in a truly historic event on February 1, 1865, less than four months after Taney's death, a month before Lincoln's second inauguration, and two and a half months before General Robert E. Lee's surrender at Appomattox. On that day, John S. Rock of Massachusetts became the first African American to gain admission to the bar of the United States Supreme Court, when he was admitted to practice by the new Chief Justice, Salmon P. Chase. The *New Orleans Tribune*, a black newspaper, took note. With pride, the newspaper reported that Rock would be practicing where previously, "The infamous Taney sat enthroned, decreeing that a colored man has no rights that the white man is bound to respect."[33] It was indeed a new era.

Author's Note: The author wishes to thank Jennifer Lowe and the Supreme Court Historical Society for the invitation to participate in the Leon Silverman Lecture Series, and he acknowledges the helpful suggestions of James B. O'Hara and Melvin I. Urofsky.



In 1865 John S. Rock of Massachusetts became the first African American to gain admission to the Supreme Court bar, when Belva Lockwood (left) moved his admission. The *New Orleans Tribune*, a black newspaper, reported that Rock would be practicing before a Bench where previously, "The infamous Taney sat enthroned, decreeing that a colored man has no rights that the white man is bound to respect."

ENDNOTES

[1] Charles Sumner to Abraham Lincoln, October 12, 1864. Letter. From Library of Congress. Abraham Lincoln Papers. http://memory.loc.gov/ammem/alhtml/malhome.html (accessed March 11, 2015); *Philadelphia North American*, as quoted in Charles Warren, **The Supreme Court in United States History** (Boston, 1932), v. 2, 391; "Roger Brooke Taney," *Atlantic Monthly*, 15 (Feb. 1865), 153; **The Unjust Judge: A Memorial of Roger Brooke Taney, Late Chief Justice of the United States** (New York, 1865). Warren provides a sampling of newspaper opinion about Taney, both positive and negative, but it is reasonable to surmise that the majority of Northerners held negative views of the Chief Justice. Lincoln's resounding re-election victory in 1864, just weeks after Taney's death, was a strong indicator of popular support for the Republicans and the perceptions of Taney described in this essay. Nationwide Lincoln carried 55% of the popular vote and twenty-two of twenty-five states. (The Confederate states did not participate in the election.) In fifteen of the twenty-two states he won, Lincoln garnered more than 55% of the vote.

[2] On Taney's reputation, *see* Paul Finkelman, "Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney," *Journal of Supreme Court History* (1994), 83-102; Marvin Winitsky, "Roger B. Taney: An Historiographical Inquiry," *Maryland Historical Magazine*, 69 (1974), 1-26; Timothy S. Huebner, **The Taney Court: Justices, Rulings, and Legacy**, (Santa Barbara, Calif., 2003), 175-185.

[3] Carl B. Swisher, **Roger B. Taney** (New York, 1936), 306-346; R. Kent Newmyer, **The Supreme Court under Marshall and Taney**, 2d. ed. (Wheeling, Ill., 2006), 116.

[4] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837); *Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851); *New York v. Miln*, 36 U.S. 102 (1837); *License Cases*, 46 U.S. 504 (1847), *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1852). For discussion of Taney's contributions in these areas, *see* Huebner, **Taney Court**, 115-128, 142-155; Newmyer, **Supreme Court under Marshall and Taney**, 89-117; Carl B. Swisher, **The Taney Period, 1836-1864** (New York, 1974), 71-98, 357-456.

[5] George Van Santvoord, **Sketches of the Lives and Judicial Services of the Chief Justices of the Supreme Court of the United States** (New York, 1854), 533; James F. Simon, **Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers** (New York, 2006), 99. *The Monthly Law Reporter*, which included a review of Van Santvoord's book, concurred with this laudatory assessment. *See* "The

Chief Justices of the United States," *The Monthly Law Reporter* (November, 1854), 370-372.

[6] Newmyer, **Supreme Court under Marshall and Taney**, 118.

[7] *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The literature on *Dred Scott* is vast, but *see*, most importantly, Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (New York, 1978); Walter Ehrlich, **They Have No Rights: Dred Scott's Struggle for Freedom** (Westport, Conn., 1979); Earl M. Maltz, **Dred Scott and the Politics of Slavery** (Lawrence, Kan., 2007); Paul Finkelman, **Dred Scott v. Sandford: A Brief History with Documents** (Boston, 1997); Lea VanderVelde, **Mrs. Dred Scott: A Life on Slavery's Frontier** (New York, 2009); and Austin Allen, **Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857** (Athens, Ga., 2006).

[8] Mark A. Graber, **Dred Scott and the Problem of Constitutional Evil** (Cambridge, 2006), 28-30.

[9] 60 U.S. 393, 407, 451.

[10] *See* Eric H. Walther, **The Fire-eaters** (Baton Rouge, 1992).

[11] Eugene H. Berwanger, **The Frontier against Slavery: Western Anti-Negro Prejudice and the Slavery Controversy** (Urbana, Ill., 2002); Eric Foner, **Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War** (New York, 1995); Roy P. Basler, **The Collected Works of Abraham Lincoln**, v. 3 (New Brunswick, N.J., 1953), 299-300. *See also* Lincoln, "First Inaugural Address—Final Text," March 4, 1861, in Basler, ed., **Collected Works**, v. 4, 269-270, where Lincoln portrays the existence of slavery in the South and the enforcement of the fugitive slave law as settled questions while describing the issue of the spread of slavery into the territories as the only issue dividing the country.

[12] "Suffrage Convention of the Colored Citizens of New York, Troy, September 14, 1858," as published in Philip S. Foner and George E. Walker, eds., **Proceedings of the Black State Conventions, 1840-1865** (Philadelphia, 1979), v. 1, 99-100.

[13] Edward Bates, **Opinion of Attorney General Bates on** Citizenship (Washington, D.C., 1862), 26. On these policies, *see* James Oakes, **Freedom National: The Destruction of Slavery in the United States, 1861-1865** (New York, 2013); Allen Guelzo, **Lincoln's Emancipation Proclamation: The End of Slavery in America** (New York, 2004).

[14] Timothy S. Huebner, **The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890** (Athens, Ga., 1999), 66-67 (on Catron); Robert Saunders, **John Archibald Campbell, Southern Moderate, 1811-1889** (Tuscaloosa, Ala., 1997), 136-185; Alexander A. Lawrence, **James Moore Wayne, Southern Unionist** (Chapel Hill, N.C., 1943).

[15] *Ex parte Merryman*, 17 Fed. Cas. 144 (1861); *Prize Cases*, 67 U.S. 635 (1863). On the contentious relationship between Taney and Lincoln in *Merryman*, and in general, *see* Simon, **Lincoln and Chief Justice Taney**, and Timothy S. Huebner, "Lincoln versus Taney: Liberty, Power, and the Clash of the Constitutional Titans," *Albany Government Law Review*, 3 (2010), 615-643; Arthur T. Downey, "The Conflict between the Chief Justice and the Chief Executive: *Ex parte Merryman*," *Journal of Supreme Court History*, v. 31 (2006), 262-278; Brian McGinty, **The Body of John Merrryman: Abraham Lincoln and the Suspension of Habeas Corpus** (2011); Jonathan W. White, **Abraham Lincoln and Treason in the Civil War: The Trials of John Merrymanb** (2011); James Dueholm, "Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis," *Journal of the Abraham Lincoln Association*, 29 (2008), 47-65.

[16] Samuel Tyler, ed., *Memoir of Roger Brooke Taney* (Baltimore, 1872), 427. The idea that Lincoln sought to arrest Taney has long been a matter of speculation among Lincoln scholars. The only evidence of such a plan is found in an unpublished manuscript by Lincoln's friend and associate Ward Hill Lamon, who served as U.S. Marshal for the District of Columbia. Lamon contended that Lincoln authorized him to "use his discretion" about whether to carry out such an arrest. One of the leading scholars of Lincoln and the Supreme Court concludes, "Lamon's story was never confirmed by Lincoln's principal biographers, and it stretches credulity to believe that Lincoln would approve such a grand provocation or, if he did, that he would let a minor official like Lamon decide whether or not to carry it out." Brian McGinty, **Lincoln and the Court** (Cambridge, Mass, 2008), 76-77. *See also*, Phillip W. Magness, "Between Evidence, Rumor, and Popular Perception: Marshal Lamon and the 'Plot' to Arrest Chief Justice Taney," unpublished paper.

[17] On the gradual, haphazard, and local nature of emancipation in the wartime South, *see* Edward L. Ayers and Scott Nesbit, "Seeing Emancipation: Scale and Freedom in the American South," *Journal of the Civil War Era*, 1 (2011), 3-24. Recent studies of emancipation and the black military experience include Steven V. Ash, **Firebrand of Liberty: The Story of Two Black Regiments that Changed the Course of the Civil War** (New York, 2008); David S. Cecelski, **The Fire of Freedom: Abraham Galloway and the Slaves' Civil War** (Chapel Hill, N.C., 2012); William A. Dobak, **Freedom by the Sword: The U.S. Colored Troops, 1862-1867** (Washington, D.C., 2011); Joseph T. Glatthaar, **Forged in Battle: The Civil War Alliance of Black Soldiers and White Officers** (Baton Rouge, La., 1990); and David Williams, **I Freed Myself: African**

American Self-Emancipation in the Civil War Era (New York, 2014).

[18] John S. Rock, "What if the Slaves are Emancipated?" as published in Philip S. Foner and Robert James Branham, eds., **Lift Every Voice: African American Oratory, 1787-1900** (Tuscaloosa, Ala., 1998), 367.

[19] The 1860 Census listed nine people living in the Taney household. In addition to Taney, this included three of his six daughters: Elizabeth Stevenson, Sophia Taylor, and Ellen Taney. Sophia, who was widowed, had a young son, Roger, who also lived in the house. In addition, the Census lists four free black servants: Madison Franklin, Martha Hill, Sallie Tilman, and Mary Britton. It is not clear whether his household remained this large by 1864, as Taney's main biographers mention only his "semi-invalid" daughter Ellen living with him by that point, in addition to his servants. *1860 Census*, Washington Ward 4, Washington, District of Columbia; Roll M653_103, 191; Image 191; Family History Library Film 803103 (www.ancestry.com) Taney had liberated most of his slaves decades before, and the 1862 D.C emancipation statute prevented him from holding any slaves at the time of his death. On Taney and slavery, *see* Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," *Journal of American History*, 97 (June 2010), 39-62.

[20] Simon, **Lincoln and Chief Justice Taney**, 220-221; Carl B. Swisher, **Roger B. Taney** (New York, 1936), 576.

[21] Tyler Dennett, ed., **Lincoln and the Civil War in the Diaries of John Hay** (New York, 1939), 53.

[22] Simon, **Lincoln and Chief Justice Taney**, 265-266.

[23] Simon, **Lincoln and Chief Justice Taney**, 265-266; Swisher, **Roger B. Taney**, 577-579.

[24] Diary of Gideon Welles, Secretary of the Navy under Lincoln and Johnson (Boston, 1911), v. 2, 177; "The Death of Roger B. Taney," *New York Times*, October 14, 1864.

[25] *Cong. Globe*, 38th Cong., 2nd Sess., 1012, 1016 (1865). Despite the intense debate, Congress eventually allocated the money for a Taney bust in the Supreme Court chamber in 1873, after the death of Taney's successor, Chief Justice Salmon P. Chase. More than 150 years after the debate over the bust, Taney's legacy is still a source of contention. In Frederick, Maryland, Taney's hometown, the city is attempting to decide the fate of a bronze statue of Taney that sits outside city hall. Chief Justice Charles Evans Hughes came to Frederick to dedicate the statue in 1931. In the aftermath of the tragic shootings of African Americans in Charleston, S.C. and the national debate over Confederate symbols that has ensued, the future of the statue in Frederick remains uncertain.

[26] *Cong. Globe*, 39th Cong., 1st Sess.,75 (1865).

[27] "Roger Brooke Taney," 159.

[28] "Roger Brooke Taney," 160-161.

[29] David Martin, ed., Trial of the Rev. Jacob Gruber, Minister in the Methodist Episcopal Church, at the March Term, 1819, in the Frederick County Court, for a Misdemeanor (Fredericktown, Md., 1819), 43. On this episode and its subsequent interpretation, *see* Huebner, "Roger B. Taney and the Slavery Issue."

[30] **Unjust Judge**, 47. Walker Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney** (Boston, 1965), 477-492, argues that Charles Sumner was the likely author of **The Unjust Judge**. David Donald disagrees. *See* Donald, **Charles Sumner and the Rights of Man** (New York, 1970), 193. Meanwhile, Samuel J. May Anti-Slavery Collection, part of the Division of Rare and Manuscript Collections at the Cornell University Library, lists Andrew Dickson White, the first president of Cornell, as the author of the **Unjust Judge**. For a more general treatment of the pamphlet and Taney's reputation, *see* Huebner, **Taney Court**, 177-178.

[31] **Unjust Judge**, 65.

[32] *Philadelphia Press*, October 14, 1864, as quoted in Warren, **Supreme Court**, v. 2, 390.

[33] "From Boston," *New Orleans Tribune*, February 15, 1865, 1.

The *Dred Scott* Case in Context

LEA VANDERVELDE

Today the *Dred Scott v. Sandford*[1] case is infamous. It is universally condemned for protecting slavery and for its racism by jurists, lawyers, historians, and the American public. The case is often mentioned in lectures about the Court's history. In American law and American culture, *Dred Scott* is the archetypal case that symbolizes injustice. It is the most discredited case ever decided by this Court and the one widely invoked in making comparisons with other failures of justice. Scholars count the many ways that the decision went wrong.[2]

As you will recall, the case contained three rulings, thereby blocking Dred Scott's claim to be recognized as a free man. There was a pair of holdings about the legitimacy of congressional power to prohibit slavery in the federal territories and a third very clear holding: that, as a black person, Dred Scott was precluded from utilizing the federal courts to assert his freedom, regardless of the validity of his claim. To be heard in federal court, under diversity jurisdiction, a plaintiff had to be a citizen of some state, or some foreign sovereign, such that diversity of citizenship existed between the parties, justifying federal jurisdiction. The Court, in a 7-to-2 decision, declared that, as a black man, Dred Scott was not a citizen of Missouri or indeed any state.

Recall that the decision stressed Dred Scott's African ancestry. Parenthetically, had his African ancestry given him citizenship in some foreign state, he would have satisfied diversity jurisdiction as well.[3] But the Court ruled that Dred Scott was a man without citizenship anywhere. To be without citizenship was bad enough, but without citizenship there could be no diversity of citizenship to give the federal court jurisdiction to hear the case.

Dred Scott based his substantive claim on a fairly common rule of the time, freedom-by-residence. This rule maintained that, if a slave lived for a time on free soil, where the bonds of slavery were banned, that residence freed the slave and changed the person's status unalterably, such that, if the slave again entered a jurisdiction where slavery was legal, the irreparably broken bonds would not reattach.[4] Once free, forever free.

Freedom-by-residence had widespread acceptance, particularly in Missouri, for fully

three decades until the Missouri Supreme Court reversed itself in Dred Scott's very case, a case that also involved his wife.[5] In 1852, after the Missouri Supreme Court declared that it would no longer follow the rule of freedom-by-residence, Scott had only one avenue left open to him, to sue in federal court in St. Louis. The case was tried and the jury rendered a verdict against the slave petitioner.[6]

On appeal, the United States Supreme Court issued the three rulings that locked Dred Scott out on every possible basis; even if he had had some valid claim to freedom, he had no standing to get into federal court to raise such a claim. And, although he had lived in places purportedly free by congressional designation, neither congressional designation was constitutional. Congress had no power to outlaw slavery in the territories.[7]

One might think the case has only antiquarian interest today, but then we would lose the lessons that it teaches and perhaps be unaware of its significance in contributing to the world we now inhabit. The Thirteenth Amendment is 150 years old this year, 2015. The *Dred Scott* case was a catalyst in that constitutional reformation. The *Dred Scott* decision not only catapulted Lincoln's rise to prominence in his "House Divided" speech, but it also served as a springboard to the Reconstruction Amendments. The Thirteenth and Fourteenth Amendments were legally necessary not only to validate the Emancipation Proclamation but also to repudiate the harm that had been wreaked by the expansive decision in *Dred Scott*. The Amendments were also necessary to fix the flaws in our Constitution that that decision had so dramatically revealed.

The purpose of this essay is to set the case in context in order to understand more clearly some of its lessons and its significance. I will not address how the case led to the Civil War, except to note that it not only further polarized the two sides but also rendered congressional action futile. The decision implied that any future congressional moves toward emancipation would likely be unconstitutional. The Court had just signaled that Congress had no such power to declare slavery banned under the Constitution. I will not address divisions among members of the Court, although there were many. And Chief Justice Taney's views on slavery will not be addressed except to note that he was not completely unfamiliar with freedom suits. Marylanders will know that Roger Taney's law partner was Francis Scott Key, and Francis Scott Key took several freedom suits on behalf of slaves.[8] This essay sets the case in context in order to learn some of its meaning.

Each of us has some image of the contest in the *Dred Scott* case. At base we know that it involves a slave suing his master, who lost. Yet, even for very close readers of the 241-page opinion, the dimensions of the dispute are unclear.

That a slave claiming freedom would lose does *not* seem surprising. That a slave would be able to sue at all *does*. After all, what could slaves do anyway? They had no agency. They were born, died, had children, and worked for another's gain. But far more often, they were persons who were acted upon. They were bought, sold, transported, sent, bequeathed, and inherited. But they themselves did not buy, sell, contract, send, or inherit. And slaves certainly did not sue.

Slaves inhabited their master's agendas during enslavement. The subject and subjective quality of their lives was overtaken by their existence as objects. And as objects, they belonged to someone else with a subjective life. As slaves, they were often unnoticed and usually described in the passive voice as having the characteristics of objects. But in this momentous, game-changing case, an enslaved man filed a lawsuit.

One cannot overstate how rare this species of case was in the U.S. Supreme Court. The Court decided other slavery cases,

but those cases took place between free persons, suing over the heads of the slaves.[9] The fate of slaves in those cases was derived without their participation. *Dred Scott* is the only case to reach the Supreme Court that pits a slave directly against his master. The case that comes closest is *The Amistad*, yet that case was brought in admiralty and it concerned a ship and its cargo. Even there the enslaved people were not parties in the law suit. The issue of their freedom was derivative of other legal questions.[10]

Fire without Light--Incongruous and Incomprehensible

Despite the case's explosive rulings, the circumstances that brought the case to the Supreme Court seem incomprehensible. The circumstances that pit this slave against his master seem unlikely. That a Missouri slave would sue a New York master for freedom is baffling, to say the least. Ironically, paying close attention to the stipulated facts does not bring the image into focus; it does not bring us closer to understanding the case; it renders the image less clear.

Even more perplexing is the question of how the case ever happened at all. Among the famous and famously notorious cases, the circumstances of *Dred Scott v. Sandford* are the *least well* understood. This case was famous from its very announcement[11] and has continued to be infamous ever since. Yet, until now, few knew precisely the contours of that injustice or how the litigants came to be in the case.

The facts were stipulated on appeal. Reading them leaves an unsettling sense that there was either something missing or inaccurate in the transcription. Several Justices repeat the long fact statement verbatim in the texts of their several opinions. This rhetorical choice to repeat verbatim, rather than simply paraphrase the salient points, suggests that perhaps even the Justices found the facts somewhat incongruous, so they carefully repeated the stipulations in order to be accurate.

By the time that the case reached the U.S. Supreme Court, it had been screened and studio-worked by the advocates to the point that the facts had become flattened representations of the realities of the dispute. It is no wonder *Dred Scott* is hard to fathom, as the surrounding circumstances were bleached out. The actual parties' motives were so blunted in the course of the trial and appeals process as to present starkly highlighted competing claims instead of the many extenuating circumstances in which the controversy was embedded. This happens to a certain extent in every appeal. The trial and appeals process often abstracts cases in this way. Attempting to identify the litigants' circumstances and motives brings some of the humanity back into the case and helps us understand its true dynamics.

Further obscuring its dynamics, the actual circumstances of *Dred Scott v. Sandford* were overwritten by the very powerful narrative of the fiction writer Harriet Beecher Stowe. **Uncle Tom's Cabin**, published around the time of the decision, focused national attention upon the horrors of plantation slavery.[12] This phenomenally popular book etched into public consciousness the dynamics and practices of plantation slavery. Dred Scott was not a plantation slave, however. He was not involved in agricultural production. He lived as a domestic servant in remote outposts and in the city of St. Louis. Yet these material distinctions of his existence are not noted in the case, and the images of plantation slavery were so dominant that they affect our ability to understand the nature of his enslavement and this case.

The point to be made is different from the Rashomon effect, that each viewer reads facts and circumstances from an individually situated perspective.[13] To a certain extent that is true in almost every collective experience. A more singular claim can be made about *this*

case, that the stipulated statement of fact is so opaque and seems so incongruous as to make little sense from any perspective. If the Justices themselves could not extract the salient facts and condense them in a more coherent statement, then the resulting picture is necessarily incoherent.

Relying on the stipulated facts alone, it is difficult to see why the parties kept fighting for eleven years. The chain of events that brought Dred Scott and John F. A. Sanford into such enduring conflict simply does *not* ring true. It does not seem authentic. Why and how did this litigation even come about? How did it stay on the rails as long as it did rather than meeting some other sort of ending? There is no way to see the actual dynamics behind the conflict.

From reading the stipulated facts, the dispute only makes sense at the level that it is stripped down to a primitive, almost prosaic dynamic, such as, that slaves will always seek freedom from their masters. And masters, in turn, will always wish to control the labors of slaves who generate personal wealth for them. At that level, the case becomes so overdrawn as to make it only about exploitation, pure and simple.

There is a parade of questions as to why? And these questions lead to further questions.

First, why did this enslaved man ever return to a slave state once he had lived in free lands? Was he drugged and kidnapped like Solomon Northup?[14] Was he strong-armed, shackled, and removed from free territory by force? Was he tricked into leaving, or was he a fool?

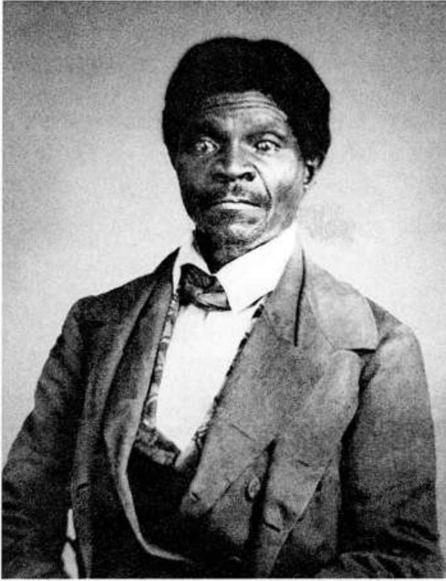
The answer is none of the above. There were extenuating circumstances not apparent from reading the case that explain why Dred Scott returned to a slave state. Winter was coming to Minnesota. At the time he left, the troops with whom he could have found employment were being withdrawn from the region. But in advance of their removal, the troops were ordered to engage in a scorched-earth policy, by stripping the roofs off and burning all the remaining cabins. This was done in order to prevent people from remaining and to evict squatters from all the surrounding land.[15] Scott returned to St. Louis, as any reasonable person would have, because he could not survive the winter and because there was no place on the upper Mississippi to fall back to.[16] All steamboats lead to St. Louis, the steamboat terminal located in the slave state of Missouri.

Second, why would a slave owner even attempt to hold fast to an aged slave who suffered from illness and had reached the end of his productive life? And how could a slave owner ever hold on to a slave intent on resisting from the distance of a thousand miles away? The logistics are baffling and the motives seemingly incomprehensible. Further, if Dred's value was so reduced by his diminished capacity, why didn't the case just settle?

Could it be, as generations of *Dred Scott* scholars speculated, that the litigants were ideologically driven by their strong political views on the subject of slavery?[17] Or, on the other hand, was this a grudge suit between parties whose personal relationships had degenerated to such an extent that neither would settle?

The answer to these questions is none of the above. Neither of the parties was ideologically driven. And the men who were the named parties did not know each other well enough to make the lawsuit personal.

John F. A. Sanford was a businessman who was very financially successful. He was a New York–based Washington lobbyist, extremely effective in obtaining lucrative government contracts and government franchises that benefitted his family-owned company. He was CEO of one of the nation's largest and most globally integrated companies of the time, the American Fur Company.[18] John Jacob Astor had made a fortune in that company before him, and Sanford was accumulating a very sizeable fortune as well.[19] But, with the exception of lobbying Congress to benefit his investments in the



Dred Scott **is the only case to reach the Supreme Court brought by a slave against his master.**

Indian trade and later the Illinois Central Railroad, he appears to have had little interest and no participation in the politics of his day.[20]

Neither plaintiff nor defendant was supported by ideological factions until the day that an appeal was filed in the U.S. Supreme Court, at which point the case first drew national attention. Some have supposed that the case was set up to raise the issues before the Court, but there is no evidence to support such a view. The case became politicized eight years after its filing. For the first eight years of litigation, Dred Scott basically acted on his own.

Nor could this case have been based upon personal grudge. It is highly unlikely that the two named parties ever met, because, quite simply, they were almost never in the same place at the same time. While Sanford was in St. Louis, Dred Scott was serving masters in military outposts far away. And, by the time Dred Scott returned to St. Louis, Sanford resided almost exclusively in New York City.

Eliminating political ideology or personal grudge as the factors sustaining this litigation for eleven years, one must also consider its economics, but that factor is no more telling. Paradoxically, each time one drills down into the details and particular circumstances of these two men, one finds further questions about the incongruity of it all.

Economic theory would predict that the case would have settled. Dred Scott did attempt to buy his freedom before filing suit, but his offers were refused.[21] And yet he was not a particularly valuable slave. Young, strong, healthy, and skilled slave men were valued highly at the time, yet he had none of those attributes. Aging male slaves like him, without strength or specialized skills—he had only ever served as a valet—were seen by masters as more of a financial liability than an asset. These persons were just an extra mouth to feed, an extra body to clothe, someone not worth their keep. Dred Scott also suffered from tuberculosis, and he almost died the winter before the Supreme Court's decision. The longer the lawsuit lasted, the weaker he became, and he died within eighteen months of the decision.[22]

Moreover, with his master living as far away as New York, and his living within sight of free soil—just across the river from the free state of Illinois—why didn't he simply make his move by attempting escape rather than going to court? At the time that he chose to sue, there is a likelihood that he might have been caught.[23] Was an elderly slave even worth going after?

Third, what did Dred Scott expect his case could achieve? Wasn't a slave's lawsuit brought against his master doomed to fail? Even if Dred Scott didn't know the law, certainly members of the bar would. So what attorney would take such a case? And yet, he did get a lawyer; in fact, he had several. How did this impoverished slave client get even one lawyer to represent him?

Three Contexts

To find the answers to this parade of mysteries, the case must be examined in three

broader contexts, in which it is embedded: national geography, local law, and personal relationships.

The first is the context of geography on the national scale. Recent research shows that slaves played a larger role in the nation's expansion and westward migration during the period of the Antebellum Frontier than we may have thought. And for slaves, geography was destiny.

The second context is local law. Certain unique aspects of the Missouri statute authorizing freedom suits were not invoked once this case was filed in federal court, but they affected this case by creating expectations in the local community that slaves could sue for freedom and could win. And the third context is to focus on other people involved in the case, persons who changed the incentives and probably exercised influence over whether the case settled.

Geography as Destiny

First, consider the case in the geography of the nation. There was a steady stream of slave petitioners who satisfied the criteria for freedom by having lived on free soil before arriving at the St. Louis courts in a slave state. Persons moving west stopped along the long journey sometimes to rest and spend time on free soil. The great majority of those persons suing for freedom in St. Louis based their claim, just as the Scotts did, on the rule of freedom-by-residence.

The Ohio River was the main corridor of traffic, with ports at Louisville and Cincinnati- and at St. Louis, a short stretch up the Mississippi River. St. Louis was the main steamboat terminus. One had to move slaves west along the Ohio River corridor because it was much easier to travel by water than overland. With the nation free north of the Ohio River, and slave south of the river in the early decades of the nineteenth century, western travelers routinely traversed the line and often remained a while on the free northern shore before reaching their destination. Since travel often took weeks or months, travelers moving west stopped often, seeking work and putting their slaves to work in order to earn some money before moving on. Some slaves moved west with military officers, statesmen, lawyers, and pioneers. Anyone with sufficient wealth to afford a slave found it desirable to have one as an extra pair of hands.[24] With a surplus of slaves in Virginia, persons who inherited slaves found it better to move them west, where labor was in high demand. For slaves, geography was destiny.

Some slaves were sold immediately upon reaching St. Louis, gateway to the West. But many of the slaves who eventually sued for their freedom continued to serve the same masters with whom they had moved west for weeks and months after reaching the port. These slaves usually stayed with their masters until some incident altered the security in their lives: their master died or fell upon hard times and thus they were about to be sold, or they sued when they felt their children were threatened. Some slaves were foreclosed upon by their master's creditors. Then they filed for freedom in the St. Louis courts.

Thus, as the transportation hub, St. Louis was a natural catchment for slaves who had experienced a mixed pattern of residence in free and slave territories, and St. Louis was something else: it was the center of western legal activity. In that vast, sparsely settled area where judges could only be found when they rode circuit, one could always find a justice of the peace in St. Louis. These courts, sited at connecting transport hubs, functioned as emergency rooms for persons in transport with legal difficulties. St. Louis was thus the exact place for this litigation to arise.

Local Law and the Odds of Success

So, consider the odds. Imagine a black servant suing his or her white master before a

jury and judge, all white men, many of whom were slaveholders themselves. Was suing for freedom a lost cause? Was it a foregone conclusion that the slave would lose in court in a slave state? What were the odds of success?

Surprisingly, at the time that the Scotts filed suit, the odds were very good. Slaves petitioning for freedom in St. Louis actually won more than 100 contested cases.[25] Why? Because of a second important feature: the unique Missouri statute enacted during Missouri territorial days, and then reenacted after statehood, specifically *enabled* slaves to sue for their freedom.[26]

Some historical treatments of the Scotts' lawsuit make it appear that the plaintiff was raising a novel claim. Not only was the Scotts' loss not a foregone conclusion, but given this precedent and the number of prior successful freedom suits, the Scotts should have won the case easily, under Missouri law in the Missouri courts.

With this Missouri statute as the basis for their action, more than 300 slaves had sued before in similar circumstances in St. Louis alone. And, even more remarkably, those who persevered through the obstacles inherent in such a lawsuit usually won their freedom. By the numbers, there were roughly 300 cases filed in St. Louis, involving 239 litigants. (There are slightly more lawsuits than litigants because some filed suit more than once.) For this research, 170 signatures of freedom litigants were assembled from case files discovered in the storerooms of the St. Louis Courthouse.[27] What this mosaic of signatures represents is quite moving. These marks were made by persons who were forbidden from learning to read or write by Missouri law. For most, if not all of these individuals, it was the first time that they had ever held a pen, at least as a utensil with which to write rather than to hand a pen to a master. They signed as instructed in the only way they could, by making an "X." Yet they were not acting under their masters' orders. These X's challenged their masters' authority. These signatures indicated their agency and claims to independence. These signatures signify the authentic actions of enslaved individuals who are speaking their claims of freedom in the court. The affidavit signed with an X told the slave's story.[28]

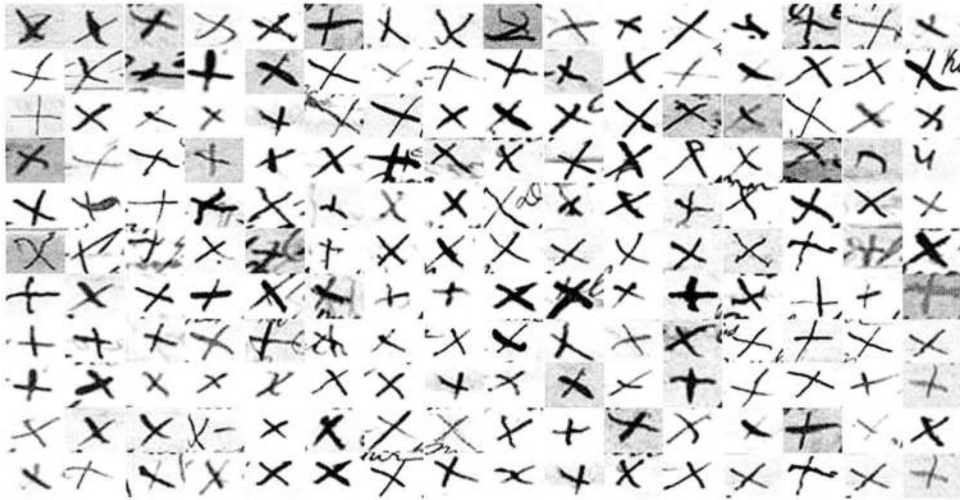
Again, it is surprising that many of the people who wrote these X,s eventually became free. The St. Louis Court recognized the rule of freedom by residence. More than 100 times the St. Louis Circuit Court responded to their petitions by declaring the precious words, that the plaintiff was forever free from his or her putative master, and all claiming under him.[29]

Most of these freedom suits were family affairs, whether the litigants sued jointly, in tandem, or in succession. A total of 160 persons, of the 239 litigants, were clustered in thirty-eight identifiable families or housemate groups. In terms of gender, women were more apt to sue than men, and most of the women who sued were mothers, like Harriet, Dred Scott's wife.

What Was a Freedom Suit? How Did the Slave Acquire a Lawyer and Get to Court?

Under the procedure set out by the Missouri statute, a slave began a lawsuit by orally presenting his or her claim to a court official—the clerk of court, a justice of the peace, a judge, or a lawyer. The clerk wrote the story down and the slave then signed with the X customary for illiterate persons.[30]

One remarkable feature of the Missouri statute was that such affidavits, if approved, allowed slaves to be declared paupers. The judge who reviewed the affidavit would then appoint a lawyer for the slave petitioner.[31] Slave freedom suits in Missouri were unique in this regard because no other segment of the impoverished public was given a lawyer by simply asserting a claim, filing an affidavit,



Above are 170 signatures of illiterate litigants suing for their freedom in St. Louis. The author collected them from documents in the storeroom of the courthouse. Under Missouri law, most won their freedom.

and asking the judge to assign one. In most states, *in forma pauperis* suits simply waived the court fees, but in this particular Missouri statute, the impoverished slave suing for freedom was actually assigned an attorney.[32]

This meant that the slave did not need to find his own legal representation. If the slave claimed circumstances sufficient to bring a cognizable claim, the judge would find an attorney for the slave. Some slaves did approach lawyers who, in turn, assisted them in filing the necessary affidavit. Other slaves seem to have gone to an official on their own. It should be noted that, within the city of St. Louis, slaves had considerable freedom of movement because such liberty was necessary in order for them to accomplish their master's chores: fetching water, doing laundry, and running errands. Thus, it was not difficult for a slave to find and approach a justice of the peace in the city. If no lawyer already stood with the slave, the judge could assign almost any lawyer, someone who just happened to be present in court that day, or, at other times, some lawyer to whom these freedom cases were assigned more routinely.

The statute neither provided compensation for the attorneys, nor did it require, like the Virginia statute, that the representation had to be done free, pro bono.[33] Lawyers could not expect compensation from their enslaved clients. But that did not prevent some from attempting to extract compensation from their clients in one way or another. Slaves were sometimes hired out to their lawyers. Dred Scott was. And, given that the other option was to be auctioned to work for a stranger or sit out the delay in jail, working for one's lawyer may not have been such a bad option.

There appears to be very little evidence of cause lawyering among the lawyers representing slaves. Missouri freedom suits were not brought or advanced by abolitionist societies as they were in several states of the Northeast.[34] Advocating abolition in Missouri was a crime after 1837. Even before such advocacy was actually outlawed, abolitionism was extremely unpopular. It should be remembered that, in 1836, Elijah Lovejoy's printing press was burned in Missouri, after which he moved across the river to Alton, Illinois, where his press was burned again and he was killed.[35]

Among the lawyers who represented slaves in these suits, there is no direct evidence of antislavery sentiment at all—either in the local newspapers or their private

papers. Most continued to own slaves and to will them to their heirs rather than free them upon their deaths. For example, Attorney Edward Bates, representing Lucy Delaney, proudly stated in court, "I am a slaveholder myself."[36] Instead, the lawyers who represented slaves most often seemed to be trial lawyers—just that—men who supported themselves by arguing cases on a number of issues and who were sometimes assigned by the judge before whom they practiced to represent a slave petitioner.

So if these lawsuits are to be considered early civil rights cases, and indeed, they probably should be, it is very interesting that they proceeded without the help or direction of a civil rights bar. There is no evidence of a civil rights bar in St. Louis.[37] These suits were brought by the litigants themselves and advanced with the pro bono lawyer assignments of the local judge.

How did a statute with these relatively unique features ever come about in the slave state of Missouri in the first place? It is because Missouri took very seriously its role as part of the national compromise on slavery. Designated as the slave state to balance the entry of the state of Maine as the free state, Missouri saw itself as preserving the balance upon entering the United States. The Missouri statute sorted things out; it separated those entitled to freedom from others who were not. The statute recognized the jurisdictional division between free and slave territories. And Missouri saw that, as keeper of the balance, the state was respecting the covenant upon which it had entered the union.[38]

Rule of Law

The interesting second- and third-order legal questions have to do with how the specific rule of law that recognized slaves' claims to freedom held up in the face of the contrary social norms and pressures of the slave state of Missouri.

Conventionally, one of the law's most important purposes is to protect the weak from the strong.[39] The notion of the rule of law is that it is expected to hold that line. The rule of law is in greatest tension, however, when it is not supported by surrounding norms and supplemental legal structures.[40]

In St. Louis, the emancipatory rule ran at odds not only with the prevalent social norm that slavery was both legal and desirable, but also with the legal presumption favoring slavery over freedom for black persons. These conflicting forces tested the strength of the rule of law in protecting vulnerable populations. Hence, it is all the more remarkable that the statute lasted as long as it did, for thirty years, and functioned as effectively as it did in delivering grants of freedom more than 100 times to those slaves who had resided on free soil.[41]

Yet in no legal system can existing precedent that runs squarely against social

Harriet Robinson was married to Dred Scott on free soil, in a ceremony performed by her own master, who then relinquished all responsibility for her and left the territory. Eight years and two children later, Harriet filed suit in her own name, the same day as Dred, with the same lawyer. Her case was subordinated into Dred's—a strategic mistake because it was actually stronger than her husband's.

norms hold without experiencing larger background pressures mounting about its core. And, when the rule cannot hold, it can be broken abruptly in a single case, like Dred Scott's case. And, when this case collapsed, it silenced a great many other tenuous protections for vulnerable populations. The *Dred Scott* decision reverberated not only in St. Louis and Missouri, but in other parts of the nation as well. Any rights held or enjoyed by black persons were more fragile after the *Dred Scott* decision than they had been before the decision.

Hidden Parties

There is still a third context that it is necessary to explore. In nineteenth-century American legal history, there are many hidden persons with interests at stake in a law suit, individuals not recognized as parties to the case. Nineteenth-century legal records usually focus exclusively on free white men of means. Persons of diminished circumstances, like slaves, paupers, and married women were systematically overlooked, either consciously excluded or unconsciously neglected.

In fact, many of the recent advances in American legal history have come by way of looking for those individuals, seeking out their possible influence in legal processes like court cases and thus including them in the pattern of the American social fabric.[42] These persons were not simply ciphers in the American legal landscape; they were not furniture, even if they were chattel. They were human actors with their own individual agendas, ideas, and interests. Like subatomic particles in physics, not directly observed, they are often first noticed by the effect that they exert on the dynamics of events. They are often only noticed when, as in this case, events seem to occur in otherwise unexplainable ways.

In this case, there were hidden persons interested in the outcomes on both sides. On the plaintiffs' side, there was Mrs. Dred Scott (Harriet) and the Scotts' daughters, Eliza and Lizzie. Their existence changes the dynamic terrain and the incentive structure of the case. It reconstitutes the tug of interests behind this famous lawsuit in important ways. Acknowledging their relevance to the lawsuit and recognizing that they had interests, perhaps independent of, or perhaps supplemental to Dred Scott's interests makes the case look very different.

Harriet Robinson was married to Dred on free soil, in a ceremony performed by her own master, at the very point that he relinquished all interests in her and left the territory. Simultaneously, it should be noted, Harriet's master abandoned his concomitant obligation to provide for her.[43] Eight years and two children later, Harriet Scott filed suit in her own name, the same day as did her husband, Dred, with the same lawyer.[44]

Yet, as the lawyers and judges advanced the two cases, Harriet Scott's lawsuit was repeatedly overlooked, both unconsciously and on a conscious level. Quite tellingly, the clerk failed even to enter a judgment in Harriet Scott's case the first time that both cases went to trial. He failed to record her name at all in the court's official daybook until that error was noticed and cleaned up six months later at the end of that term of court. After that oversight, the cases were consolidated. The lawyers for both parties consciously stipulated her case into his, agreeing that the result in her case would be determined by the ultimate outcome of his.[45] And then she was paid no further attention.

This turned out to be a strategic mistake because the case that the plaintiffs' lawyers chose to advance was the weaker of the two. Harriet Scott's case was stronger, and she should have been the lead plaintiff. Not only could she argue freedom-by-residence, Harriet's master admitted relinquishing her when he married her to Dred Scott and promptly left free territory. That gave her an additional claim that she had been manumitted by her

master on free soil, or at least that she had been intentionally abandoned there, extinguishing her owner's claim on her and consequently anyone's ownership of her. She would have won on that basis alone in the Missouri courts. Yet Harriet Robinson was married to Dred Scott, a man whose claim was based solely on freedom-by-residence. And thus, her case was subordinated to his in the consolidation. Though strategically this consolidation was an error, the lawyers had reason to expect freedom-by-residence to hold up, as it had held for thirty years. But when it crumbled and brought down Dred Scott, it brought down Harriet's claim as well. Her other basis for claiming freedom had been jettisoned for convenience.

The lawyer's choice was in some ways predictable. This practice of subordinating the wife to the husband drew structure and support from the legal rule of coverture, which legally covered the wife in marriage, similarly abrogating her interests to his. In fact, it would have been surprising if the lawyers had chosen the wife instead of the husband as the lead plaintiff.[46]

As a legal rule, coverture hid a remarkable array of complex realities and interesting dynamics with explanatory power by nullifying the wife's legal presence in cases in which she may have had a substantial interest and practical influence.[47] Recovering these facts is difficult for legal historians because the very recording practices were imbued with the notion of coverture. Until the 1850 census, only husbands were identified by name as heads of household. Married women, children, and servants were counted, but they were not named.[48]

Yet, Harriet Scott's position as a mother rendered her more legally relevant to the family's stability than she was in her position as wife of Dred. In this paired and parallel litigation, the rule of matrilineality had considerable significance for their children. That rule, by which the status of the child was determined by the status of the mother, meant that the children's fates would follow their mother's eventual designation in the lawsuit's outcome.[49] The status of the Scott daughters hinged on the determination of the status of Harriet, their mother.

The status of their father was legally irrelevant to their claim to freedom. Dred's victory or loss was only relevant to the status of the three other members of his family because of the lawyers' joint stipulation to treat them as such. Husband and wife were one, and husband was the one. The children followed the mother, but the wife was subordinated to the husband. So recognizing Harriet Scott and the children provides some of the extenuating circumstances for explaining the case's otherwise incomprehensible incentive structure and the litigants' tenacity.

Recognizing the family's influence in the case explains why Dred Scott sued rather than ran. If Dred Scott had chosen to run away, it would mean separating from the family that by his actions, he had demonstrated he wished to remain with. After all, he had had earlier opportunities to escape. He had spent nearly eighteen months assigned to an officer in Louisiana and Texas in advance of the Mexican-American War, before returning to his family, traveling alone by steamboat to reach them in St. Louis. The family sued within weeks of being reunited.[50]

Suing for freedom had two advantages. First, it permitted Dred Scott to remain in the company of his family. Second, delivering freedom to his family could put them beyond the clutches of any owner with the authority and prerogative to separate them. Delivering freedom papers would also protect the girls against any kidnapper who illegally tried to strong-arm them and take them away. Yet, in terms of legal results, Dred Scott as their father could not deliver them from these evils, even if he had won. Only a victory by their mother, Harriet, could do that. Her successful lawsuit would provide the girls their freedom papers.

It appears that the plaintiffs hoped to achieve by the litigation, not merely Dred's freedom from chattel slavery but to give their children a future in freedom and preserve their liberty to remain together as a family.

Adding Dred Scott's wife, Harriet and the girls reconfigured the defendant's incentives as well. No longer does the reader see Dred Scott, weak and aged, as the only property asset at stake. The much more valuable human assets in the economic equation were the young healthy girls growing into womanhood, and their mother. By connecting Dred Scott to the children through control of Harriet, the value of the human property at issue increased considerably. One can speculate that when the Widow Emerson, claiming to have inherited Dred Scott, refused to sell him his freedom, she was looking past him to see the value that his daughters would bring to her own daughter when she came of age. In the custom of the time, slave children were often considered legacies to masters' children.[51]

With Harriet, Eliza, and Lizzie Scott making a difference to the petitioner's desire to pursue the case, consider the hidden persons on the defendant's side, who, in this case, are the family network of the defendant. Among all the defendant masters in these some 300 lawsuits, one family of slaveholders was the most active—the St. Louis Chouteau family. Patriarchs from this close-knit family owned numerous slaves, more than were owned by anyone else in the city, and in the freedom suits, as slaveholders the Chouteaus were repeat players.[52] They had repeatedly lost their slaves in St. Louis lawsuits for thirty years under the freedom-by-residence rule.

This prolonged Chouteau family interest is important to recognize, because John F. A. Sanford was the wealthy family's loyal son-in-law. John F. A. Sanford was a defendant whom Dred Scott could hardly have known. Yet Sanford had fallen into the role as executor of an estate of which Dred Scott was a part.[53] Years later in a *New York Times* interview, Mrs. Emerson-Chaffee was asked why the case didn't settle. She agreed that the case would have settled if it were not for the Chouteaus. They wanted the rule changed and pressed Sanford to pursue the case as far as it could it go.[54] If Dred Scott would not give up because the freedom of his entire family was on the line, Sanford did not give up, even though he seemed to care little about the lawsuit, because his in-laws wanted a win.

Bad Luck and Trouble

So how did this all come to bear on the Scott family?

The precedent was well established. The Scotts had witnesses and a lawyer, they met the elements of the case, and they should have won in state court under Missouri state law as more than 100 litigants had before them.

Suing for freedom was difficult, make no mistake about it. These enslaved persons exposed themselves to considerable risks in suing their masters. They had to declare publicly that their masters were acting in violation of law in denying them their freedom. Some were kidnapped and hustled aboard steamboats after they had filed suit; the Chouteaus had been caught attempting this.[55] Anticipating trouble, the judges routinely admonished the defendants not to remove the slave or retaliate against him because of the suit. Yet some did.

So, by filing suit, enslaved litigants risked it all. They could not expect to be granted freedom immediately. It would require a lengthy lawsuit, although rarely as lengthy as the Scotts', and if they lost they could expect some sort of retribution for bringing trouble to their masters. Going to trial produced intense anxiety in slave litigants.[56]

The Scotts went to trial three times. They lost the first case in a mistrial. They won the second trial in a jury verdict, only to have it reversed on appeal when the Missouri Supreme Court changed the rules concerning

freedom-by-residence. So they went to trial a third time in federal court.[57]

Although the statute entitled them to an attorney, the Scotts were passed off between seven successive lawyers in the course of the litigation.[58] None of their lawyers stayed with the case for more than a year or two.

In the Missouri courts, the Scotts had very bad luck indeed because no one could have foreseen that the Missouri Supreme Court would change the legal rules on them. In 1852, the Missouri Supreme Court reversed the rule of freedom-by-residence.[59] In essence, the Missouri Supreme Court changed the rules on the Scott family after their cases had already been in litigation for six years, after a previous trip to the state high court and after they had even won a jury verdict and been declared free, pending appeal. This reversal of legal rule was applied retroactively to the Scotts' cases. The Missouri Supreme Court had been a relatively stable, three-judge bench for years, but then the system for selecting judges was revised to an electoral system. The judges elected under the new system seemed less committed to the thirty-year-precedent that the court had followed since statehood.

The Scotts experienced the years of litigation by a combination of time spent in jail and time spent working for temporary masters after they were auctioned by the sheriff on the courthouse steps. Ironically, the Scotts experienced even more constriction of their personal liberties while suing for freedom than they had experienced before. And Dred Scott almost died from tuberculosis one cold winter after the appeal had been docketed at the United States Supreme Court.

Further, during the eleven-year lawsuit, they were subjected to the trials of Job. Devastations of almost biblical proportions occurred in St. Louis during the decade that the Scotts' fate was in limbo. These affected all city residents, but whereas others could leave town to avoid the devastation, the Scotts were under court order to remain within the city limits. So they were continually exposed to dangers. A massive cholera outbreak swept the city, producing the city's worst epidemic ever.[60] Like the plagues of Europe, people had to be conscripted simply to bury the dead. No one could be found to empanel a jury because no one would respond to the call. The courts went on indefinite suspension that year.[61]

If that weren't bad enough, a massive fire that burned several dozen steamboats at the docks spread to the warehouses along the shore and then spread further to destroy all of the buildings in a sixteen-block area that comprised the heart of the city. The conflagration destroyed the homes, shops, and business buildings, causing more people to flee the city. Persons remaining, still under the cholera threat, were further conscripted to clear the charred remains of what once had been the city's main buildings.[62]

During the months and years of continuances, delays, lawyer substitutions, fires, and epidemics, Missouri had changed around the Scotts. Or rather the nation had changed around Missouri. With national turmoil over the Fugitive Slave law,[63] a civil war in Kansas,[64] and new militancy on both sides, Missouri, the compromise state, which had regarded itself as part of the national balance, became swept up in the national debate over slavery.

For years, Missouri had regarded this turmoil with some detachment, as occurring at a distance. There were no abolitionists in Missouri. Missouri did not see itself as embroiled in this conflict. News reached Missouri slowly by steamboat. But with advances in a new technology, the telegraph, alarming messages of immediacy that had previously taken days to reach Missouri now pummeled the city with news that militant pro- and antislavery sides were lining up.[65]

And when the case went national, the Scott family was caught up as just specks of dust in a larger storm. Eliza and Lizzie were never named parties. So at that point, their

parents sent them into hiding for their own protection.[66]

Concluding the Case

In March 1857, in a 7-to-2 decision, the United States Supreme Court ruled against Dred Scott. From the context of Missouri laws, you can see that Chief Justice Taney was simply wrong when stating those incendiary words that black persons never had rights that white men were obligated by law to respect.[67] In Missouri, black persons had been entitled to their freedom-by-residence. Furthermore, black persons had the right to an attorney to redeem that entitlement. And that rule of law held for three decades. That small degree of protection alone had been a remarkable thing. In the face of resistance from white slaveholders, the St. Louis courts had sustained the rule of law to protect a vulnerable and otherwise friendless population. Chief Justice Taney's statement regarding black persons' rights became the one sentence most often identified with the case. The statement was, of course, hyperbole. But it was dangerous hyperbole. Thereafter no black persons could use the federal courts. Did they have any legal rights at all? The Chief Justice of the United States Supreme Court, Roger Taney, said not.

Easy to accept into popular belief, the sentence enshrined a concept of racial inequality that was not present in racial terms in the Constitution's language, despite its passages about slaves and slavery that were pivotal to Taney's argument. The sentence invited greater legal disability to be imposed on black persons through law. And several state legislatures acted accordingly.

There was pushback almost immediately. Senator Henry Wilson of Massachusetts, who would become one of the strongest Republican advocates of the Reconstruction reforms, publicly tested the resolve of the administration to follow this ruling the day after the decision. Senator Wilson attempted to procure a passport from the State Department for a black Massachusetts doctor who wished to travel abroad. Senator Wilson told the press that he wished to see whether the federal government would issue one to a black man now that the Supreme Court had ruled that African-Americans were not citizens. The State Department refused, citing the *Dred Scott* decision.[68]

John F. A. Sanford probably never knew that he had won. By the time of the decision, Sanford had gone mad and was confined to a mental institution.[69] The St. Louis Chouteau family sent Mrs. Emerson in Massachusetts some money related to the litigation. Most likely, it was the wages earned by the Scotts and impounded by the sheriff, during the eleven years of the case.[70]

It came as an embarrassment to Mrs. Emerson's new husband, Congressman Clifford C. Chaffee, a Republican from Massachusetts, to learn that, by coverture, he was actually the owner of the nation's most famous slave. He owned the Scotts because he had married Dr. Emerson's widow. Dred and Harriet Scott were hastily transferred by quitclaim deed to someone in Missouri.[71] By law, only a Missouri resident could free a Missouri slave. Thus, the Scotts were finally granted their freedom, not by operation of law—state, federal, or constitutional—but by fortuity: the public embarrassment of a congressman from Massachusetts.

Though Dred Scott lived less than two years after the case ended, the family remained together. Harriet Scott and her daughters survived the Civil War. Lizzie married and had children of her own. Eliza remained single, living and working with her mother, doing laundry to support themselves.

Finale

It was not simply Chief Justice Taney, writing for the Court, who bears

responsibility for the outcome of the case, although the decision that he wrote worsened the result. The U.S. Constitution failed to provide redress for this most basic human right, and it left citizenship and access to the federal courts up to the states. Our Constitution of 1789, with all of its brilliance, could not protect them.

The U.S. Supreme Court's most discredited opinion was not overturned by the Court that had handed it down; it was overturned by constitutional amendment. Constitutional amendment is only politically possible as the result of social movements. A case can sharpen the sides, and this case did. The decision became a rallying point for both sides.

Understanding the Scotts' lawsuit is also useful in seeing the arc of the Reconstruction Amendments. There are many points to be worked through in future writing, but here only a few stars in that constellation can be noted.

First, the Scotts' lawsuit catalyzed the process of constitutional amendment. It became a rallying point in the Lincoln-Douglas debates, in the halls of Congress, and in conversations throughout the nation.[72] President Lincoln's Emancipation Proclamation, as an executive order taken in time of war, was a start to ending slavery, but it applied only to states in rebellion. And was it legal?[73] Amending the Constitution was necessary not only to abolish slavery and sustain the emancipation by proclamation but also to erase the lingering cloud of the *Dred Scott* decision.

Second, the text of the opinion not only highlighted the Constitution's deficiencies, but it also provided texts and structures from which those remarkable amendments were crafted. The language for the Thirteenth Amendment, "that neither slavery nor involuntary servitude shall exit," was taken directly from the Northwest Territorial Ordinance that Chief Justice Taney had declared invalid. Moreover, if there was any remaining doubt whether Congress had power to supplement the amendment—another *Dred Scott* ruling—Section two of the Thirteenth Amendment explicitly granted Congress the authority to do so.[74] Section one of the Fourteenth Amendment granted citizenship to all persons born on American soil, as both Dred and Harriet Scott were.[75]

Granting citizenship did much more than ensure the ability to use the federal courts. And once the momentum began, there was more—equal protection and due process applied to the states, the right to vote, and a panoply of civil rights—that came in the Reconstruction-era legislation.[76]

Bringing back the details of this case allows us to see the humanity of the persons behind the famous suit and its significance as a constitutional moment.[77] With this new research, we now know that Dred Scott was not a lone man, nor was he a puppet of political interests. He must be seen as a member of a family who sought freedom for its children. His family must be seen as part of a community of litigants, mostly organized by families, who turned to the courts to seek freedom for themselves and their children. We should remember what the Scotts stood for because then we can see them, not as victims, but as heroes who lost. Knowing their story connects us to them. It allows us to recognize that they sought an objective that is universal and transcendently human.

The Scotts were denied access to the federal courts, but being recognized as citizens was never the satisfaction that they were seeking. They were seeking the much more fundamental human right to protect the stability of their family and provide a future in freedom for their children. These are rights that all persons seek from their government and from their courts.

There are many persons of diminished circumstances in the nation's legal history, but few stand out as prominently as the Scott family does. They sought protection from much more powerful, private propertied

interests that could exploit them, separate them so they could no longer enjoy each other's company, protection, and support, assign them to labor for others without their consent, and threaten what all parents fear: that their children might be abused and taken from them.

Formally, slavery has been abolished, but the interests of the Scotts are universal and enduring. The rule of law is still most at risk in protecting vulnerable populations, which is exactly where it is most needed. Taken together, the constitutional amendments created a minimal sphere of protection for the least well-off, the most vulnerable, and the most friendless. There is room in the remarkable Reconstruction Amendments to harbor this family from the storm.

ENDNOTES

[1] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[2] Jack M. Balkin and Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49 (2007); Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 Pepp. L. Rev. 13 (2011). Even those scholars like Austin Allen, who maintains that the decision fit into the jurisprudence of the era, believe that the result in the case is to be condemned. Austin Allen, Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857 (2006). Scholar Mark Graber identifies the decision as reviled, but argues that it may have been a necessary evil to keep the nation together in the face of increasing North and South tensions. Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (2008).

[3] As of the time of the *Dred Scott* decision, there was no U.S. Code, which was first codified as such in 1873. However, Article III, Section II, had been interpreted by case law to have the above-stated meaning for federal jurisdiction, as is referenced in *Dred Scott v. Sandford*, 60 U.S. 393, 426. At the time of the lawsuit, citizens of foreign countries could satisfy the jurisdictional requirements needed to get access to sue in the federal courts.

[4] The Missouri Supreme Court adopted the rule in *Winny v. Whitesides*, 1 Mo. 334 (1824). The court wrote: "We are clearly of opinion that if, by a residence in Illinois, the plaintiff in error lost her right to the property in the defendant, that right was not revived by a removal of the parties to Missouri." *Id.* at 336.

[5] The Missouri Supreme Court case *Scott v. Emerson*, 15 Mo. 576 (1852), reversed the ruling in the leading case, *Winny v. Whitesides*, 1 Mo. 334 (1824).

[6] Lea VanderVelde, Mrs. Dred Scott: A Life on Slavery's Frontier, 302-303 (Oxford University Press, 2009.)

[7] Some consider these additional rulings dicta, maintaining that the ruling on diversity of citizenship ended the matter. *See*, e.g., Laurence H. Tribe, American Constitutional Law 549 (Foundation Press, 2d ed. 1988); Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford University Press, 1978), at 439 (noting other contemporaneous claims of "obiter"). I thank my colleagues Todd Pettys and Herb Hovenkamp for this point. Yet, even if they were dicta, these additional rulings declaring the Congressional action unconstitutional were very extensive and constituted most of Chief Justice Taney's opinion.

[8] Francis Scott Key's involvement in freedom cases can be seen from the original court documents included at the website, "Oh Say Can You See: Early Washington DC Law & Family Project" found at http://earlywashingtondc.org/interest.html#family. The project developed by William G. Thomas III, University of Nebraska–Lincoln, Jennifer Guiliano, Indiana University, and Trevor Muñoz, Maryland Institute for Technology in the Humanities, provides digital records of freedom suits in the early days of the District of Columbia.

[9] *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (detailing how the state of Pennsylvania sued the man who kidnapped a former slave living in Pennsylvania, as opposed to the slave bringing suit on her own behalf).

[10] *The Amistad*, also known as *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841).

[11] Newspapers throughout the nation had been anticipating the decision in the case for months before it was issued. The decision was front page news in most newspapers and some newspapers published the lengthy opinion in its entirety. *See* Alix Oswald, *The Reaction to the Dred Scott Decision*, 4 Chapman University Historical Review (2012).

[12] Uncle Tom's Cabin was first published in 1852. Harriet Beecher Stowe, Uncle Tom's Cabin; or, Life Among the Lowly (Boston: John P. Jewitt, 1852). Thereafter Uncle Tom's Cabin became one of the most popular books of the entire century.

[13] The Rashomon effect usually refers to contradicting perspectives of different viewers and participants in the same incident. Valerie Alia, Media Ethics and Social Change. (Edinburgh; New York: Edinburgh University Press; Routledge U.S., 2004), 229.

[14] David Wilson. Twelve Years a Slave, (Auburn, NY: Orton and Mulligan; London: Samson Low, Son &

Company, 1853). Solomon Northup's book provided the basis for the Academy Award–winning movie, *Twelve Years a Slave*.

[15] Lea VanderVelde, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (Oxford University Press, 2009).

[16] In the 1830s, the upper Mississippi River had few towns and even fewer people who would accommodate a former slave seeking work. Galena, Illinois, was perhaps the only town of any size that far north of St. Louis. Yet, even in Galena, it is not clear that freedom for former slaves was guaranteed. *See* Lea VanderVelde, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT, (Oxford University Press, 2014) at 133-37.

[17] Every generation has had its *Dred Scott* scholar and each scholar has pondered the litigants' motives. Several suggested that political operatives or politically motivated lawyers were behind bringing the case in the first place. On this point, Professor Fehrenbacher disputed the claims of the scholars who preceded him. *See* Fehrenbacher, THE DRED SCOTT CASE; Vincent C. Hopkins, DRED SCOTT'S CASE (1951, reprint, New York: Atheneum, 1957). Frank H. Hodder, "Some Phases of the DRED SCOTT CASE," *Mississippi Valley Historical Review* 16 (1929) at 3–22.

[18] VanderVelde, MRS. DRED SCOTT, at 295-98. Sanford's usefulness to the Company is detailed in his letters and other American Fur Trade Company letters that are collected in a magnificent calendar created by Grace Nute. Grace Lee Nute, PAPERS OF THE AMERICAN FUR COMPANY: CALENDAR OF THE AMERICAN FUR COMPANY'S PAPERS (Washington: U.S. G.P.O., 1945).

[19] Congress passed "An Act to Incorporate the American Fur Company" on April 6, 1808. Shortly after, on April 13, 1808, President Jefferson gave written approval of Astor's plan to formulate the company. The American Fur Company became incorporated, with 99.9% of the corporation's stock held by Astor who ran the company. John Upton Terrell, FURS BY ASTOR, (1963) at 143-45.

[20] None of his letters makes note of any of the political matters of the day. *See* Entries for John F. A. Sanford in the Grace Nute Papers and the Chouteau papers of the Missouri History Museum collection.

[21] VanderVelde, MRS. DRED SCOTT, at 227-28, citing Dred's own account, which was corroborated by Mrs. Emerson.

[22] *Id.* at 324 describing Dred Scott's death.

[23] The decision to sue occurred before the Fugitive Slave Act was enacted. The Act, enacted in 1850, extended the long arm of the law to require free states to assist in returning runaway slaves to their masters.

[24] Lea VanderVelde, "Slaves in Free Territory" (unpublished ms. on file with author).

[25] Lea VanderVelde, REDEMPTION SONGS.

[26] The earliest statute of this kind in force in the area that became Missouri was enacted by the Louisiana Territorial Legislature on June 27, 1807. Laws of the Territory of Louisiana, Chapter 35 Freedom: An Act to enable persons held in slavery, to sue for their freedom.

[27] My part in discovering these cases is described in the preface to VanderVelde, REDEMPTION SONGS.

[28] I tell twelve of these stories in my book, REDEMPTION SONGS.

[29] The exact words of the judge's declaration of freedom were contained in the statute and transcribed in the court's record book.

"§ 13. If the plaintiff's right to freedom is established, judgment of liberation shall be given in his favor against the defendant, and all persons claiming under him by title derived after the commencement of the suit." Section 13, of Missouri Statute, FREEDOM: An act to enable persons held in slavery to sue for their freedom, enacted January 27, 1835.

[30] The procedure is more extensively explained in VanderVelde, REDEMPTION SONGS, at 8-9.

[31] Missouri Revised Statutes, Ch. 167, Art. II, 1845. "An Act to Enable Persons Held in Slavery, to Sue for Their Freedom" (June 27, 1807), *Laws of a Public and General Nature of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri up to the Year 1824*, Vol. I. Jefferson City, Mo: W. Lusk & Son, 1842, 96–97. Also, Freedom: An Act to Enable Persons Held in Slavery to Sue for Their Freedom. January 27, 1835.

[32] For a more complete analysis of how the Missouri Statute worked, see VanderVelde, REDEMPTION SONGS, at 8-9.

[33] An Act to Amend an Act Entitled, "An Act to Reduce into One, the Several Acts concerning Slaves, Free Negroes, and Mulattos, and for Other Purposes." Virginia Acts, Ch. 189, Dec. 25, 1795. The Revised Code of the Laws of Virginia, "An Act providing for the Re-publication of the Laws of this Commonwealth," passed March 12, 1819.

[34] Martha S. Jones, *Time, Space, and Jurisdiction in Atlantic World Slavery: The Volunbrun Household in Gradual Emancipation New York*, 29 Law & Hist. Rev. 1031 (2011).

[35] On a Sunday in July of 1836, Elijah Lovejoy's printing press arrived at the Alton wharf. That night, "some men, reportedly from across the river in Missouri, had knocked the press to pieces and thrown it into the river." Though he denied it at a meeting called shortly after the night that the printing press was destroyed, Lovejoy was regarded as an abolitionist "because he believed slavery to be wrong and said so." Though, while in Alton, Lovejoy perhaps intended to write primarily about religious matters, he also published his views that slavery was "an awful evil and sin." Lovejoy had a second printing press by September of 1836, but this press was also destroyed by the following August, when a

group "broke into the Observer office" and "broke the large printing press into pieces and tossed it into the river." Lovejoy's third printing press was destroyed on the night of September 21, 1837, when men broke into the warehouse where the printing press was stored and "rolled the press (still in its crate) to the river bank, broke it into pieces, and threw it into the Mississippi." Paul Simon, FREEDOM'S CHAMPION: ELIJAH LOVEJOY, (1994) 63-66, 85-91.

[36] Lucy Delaney, *From the Darkness Cometh the Light or Struggles for Freedom*, in SIX WOMEN'S SLAVE NARRATIVES (1891, reprint, New York: Oxford University Press, 1988). Edward Bates was later President Lincoln's Attorney General. Lucy's narrative is compared to and contrasted with the allegations in the existing court documents in VanderVelde, REDEMPTION SONGS, CH. 11. The comparison is an interesting demonstration of how the court documents compare to the memory and oral history of members of slave families.

[37] VanderVelde, REDEMPTION SONGS, at 201. For a short period of time, there was a critical mass of three lawyers repeatedly taking freedom suits and pursuing them zealously—Gustavus Bird, Francis B. Murdoch, and Ferdinand Risque. Altogether, the group amassed some significant victories in court and on appeal, but one would be hard pressed to describe them as coordinating their work as a civil rights bar.

[38] William E. Foley, THE GENESIS OF MISSOURI: FROM WILDERNESS OUTPOST TO STATEHOOD (University of Missouri Press, 1989); Robert Pierce Forbes, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA (University of North Carolina Press, 2009).

[39] This has been the recognized function of the common law since Blackstone. "[C]ourts of justice are instituted in every civilized society, in order to protect the weak from insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited . . ." BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book 3, Chapter 1.

[40] This argument is developed in VanderVelde, REDEMPTION SONGS, at 20-21.

[41] *Id.* at 263, n. 47.

[42] Annette Gordon-Reed, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (University of Virginia Press, 1998); Laurel Thatcher Ulrich, A MIDWIFE'S TALE: THE LIFE OF MARTHA BALLARD, BASED ON HER DIARY, 1785-1812 (Vintage Books, 1991); Laurel Thatcher Ulrich, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750 (Vintage, 1991). This genre of historical writing is sometimes described as complementary feminist history, because it completes the historical canon that has so often focused only upon free white males. *See*, for an example of how complementary feminist history changes our understanding of legal change, Lea VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Mens' Consciences and Women's Fidelity*, 101 YALE L. J. 775 (1992).

[43] VanderVelde, MRS. DRED SCOTT, at 115-26.

[44] Two suits were filed on Monday, April 6, 1846. One by "Dred Scott" and the other by "Harriet, a woman of color." VanderVelde, MRS. DRED SCOTT, at 235. It is interesting to note that Harriet Scott is not referred to by a last name in the initial petition, and in much of the court's subsequent records.

[45] VanderVelde, MRS. DRED SCOTT, at 277.

[46] *See generally* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 Yale L. J. (1997).

[47] For discussions of coverture, *see* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, Feminist Studies 5 (1979); Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 Law Libr. J. 459 (2002).

[48] This is one feature of the records that makes it very difficult to find information about women and to research the lives of individual women. The United States Census for 1830 included only the names of heads of households. Household members were lumped together in groupings of males and female residences; the 1840 census was not much better. It was not until 1850 that the U.S. Census provided the actual names of residents living in households still ascribed as under the head of the most senior male living there.

[49] The concept of the rule of matrilineality meant that the status of a child was determined by the mother's status. The Latin name for this rule was "Partus sequitur ventrem." VanderVelde, REDEMPTION SONGS, at 212, n. 16.

[50] VanderVelde, MRS. DRED SCOTT, at 233-35.

[51] VanderVelde, REDEMPTION SONGS, at 151-52, and Lucy Delaney, "From the Darkness Cometh the Light or Struggles for Freedom."

[52] VanderVelde, REDEMPTION SONGS, at 200-201.

[53] When Dr. Emerson died, the widow's father, Alexander Sanford, assumed the role of executor until his death. With Alexander Sanford's death, his son, John F. A. Sanford, took up the role of executor for both his father's estate and his brother-in-law's estate. VanderVelde, MRS. DRED SCOTT, at 295.

[54] Mrs. Emerson, Dred's owner was later interviewed in the *New York Times*. VanderVelde, MRS. DRED SCOTT, at 431 n. 44, quoting "Famous Dred Scott Case," *New York Times*, December 22, 1895.

[55] VanderVelde, REDEMPTION SONGS, at 256, n.8.

[56] Lucy Delaney, "From the Darkness Cometh the Light or Struggles for Freedom, and VanderVelde, REDEMPTION SONGS, at 155-57.

[57] VanderVelde, MRS. DRED SCOTT, at 288-92.
[58] *Id.* at 233-307.
[59] *Scott v. Emerson*, 15 Mo. 576 (1852)
[60] VanderVelde, MRS. DRED SCOTT, at 267-73.
[61] *Id.* at 268.
[62] *Id.* at 269-70.
[63] The Fugitive Slave Act of 1850 allowed individuals who owned slaves, or their authorized agents, to "pursue and reclaim" fugitive slaves who had "escape[d] into another State or Territory of the United States." The Fugitive Slave Act of 1850, 9 STAT. 462, 463 § 6. This Act also threatened criminal sanctions to individuals who attempted to: rescue the fugitive, help the fugitive escape, harbor the fugitive, or "knowingly and willingly obstruct, hinder, or prevent such [owner]. . . from arresting such a fugitive. The Fugitive Slave Act of 1850, 9 STAT. 462, 464 § 4.

This federal statute was bitterly resented in free states. When slave owners attempted to seek rendition of their slaves who had escaped to free territory, people of cities like Boston and Milwaukee did everything in their power to prevent the return of the runaway. In Boston the community rallied around Anthony Burns. Fetridge, BOSTON SLAVE RIOT, AND THE TRIAL OF ANTHONY BURNS (2015), republishing 1854 original.

In Wisconsin, the people of Milwaukee managed to forcibly release Joshua Glover from jail and assist in his escape to Canada. In subsequent litigation, the Wisconsin Supreme Court declared the federal Fugitive Slave Law unconstitutional. *Ableman v. Booth*, 11 Wis. 501 (1859). The United States Supreme Court reversed the decision and issued a writ of mandamus to the Wisconsin Supreme Court. *Ableman v. Booth*, 62 U.S. 506 (1859). H. Robert Baker, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (Ohio University Press, 2007); Walter T. McDonald and Ruby West Jackson, FINDING FREEDOM: THE UNTOLD STORY OF JOSHUA GLOVER, RUNAWAY SLAVE (2007).
[64] Jonathan Earle and Diane Mutti Burke, BLEEDING KANSAS, BLEEDING MISSOURI: THE LONG CIVIL WAR ON THE BORDER (University of Kansas Press, 2013); Graber, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).
[65] Edward Bates Diary quoted in VanderVelde, MRS. DRED SCOTT, at 414, note 24.
[66] *Id.* at 299 & 321.
[67] *Dred Scott v. Sandford*, 60 U.S. at 407 ("[T]hey [black persons] had no rights which the white man was bound to respect").
[68] VanderVelde, MRS. DRED SCOTT, at 322.
[69] *Id.* at 323.
[70] *Id.* at 321-22.
[71] *Id.*
[72] Lincoln-Douglas debate at Alton Illinois, October 15, 1858.
[73] Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional: Do We/Should We Care What the Answer Is?*, 2001 U. Ill. L. Rev. 1135 (2001); Henry L. Chambers, Jr., *Lincoln, The Emancipation Proclamation, and Executive Power*, 73 Md. L. Rev. 100 (2013). President Lincoln himself is said to have been concerned about whether the Emancipation Proclamation was legal. Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. Ct. REV. 349.
[74] Section 2 of the Thirteenth Amendment provides: "Congress shall have power to enforce this article by appropriate legislation."
[75] Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
[76] Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992). Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y. U. L. Rev. 863 (1986). Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213 (1991).
[77] Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998).

Oliver Wendell Holmes, Jr., and the American Civil War

CATHARINE PIERCE WELLS

Oliver Wendell Holmes, Jr. spent three terrible years fighting in the Civil War. By any standard his experience was horrific. He was wounded three times, suffered a nearly fatal bout of dysentery, and endured the deaths of many of his closest friends. Without doubt, it was the most affecting period of his life. Unfortunately, however, the accounts of Holmes' wartime experience have been notably superficial. Part of the problem has been the fact that, until recently, the chief source of information about these years was Holmes' own diary and letters. The difficulty with these as a source has been twofold. First there is his basic reticence. It is rare that he speaks about himself, rarer still that he dwells on his feelings. Second, there is the fact that Holmes himself heavily edited his diaries and letters. If more revealing letters ever existed, they were tossed in the fire long ago.

This situation has been somewhat improved by the accumulating historical scholarship about the Civil War. In particular, there was the publication in 2005 of a detailed history of Holmes' regiment, the Massachusetts Twentieth.[1] This, together with related historical documents, enables us to put Holmes letters into a factual context. In addition, the letters of some of his contemporaries are now more readily available and these permit us to see Holmes through the eyes of his comrades. Filling in the details of his daily life as a soldier generates a clearer picture of the experience and the changes that took place in Holmes' character and illuminates the role the war played in forming it.

Signing Up

When the Civil War started, Holmes was finishing his final year at Harvard College. There were many Abolitionists in Boston, but there were also many Copperheads. The commercial life of the city was tightly bound up with Southern cotton and, as a result, most of the wealthier citizens tolerated slavery. Holmes' own family was split—his mother was against slavery; his father did not oppose it.

Holmes himself was an ardent Abolitionist. His mother was surely a factor, but there was also the strong influence of "Pen" Hallowell, his closest friend at Harvard. Most of the young men at Harvard lived on Beacon Hill or were the sons of Holmes' family friends, but Norwood Penrose Hallowell was an exception. He came from Philadelphia and a well-known family of fighting Quakers. The Hallowells were fervently against slavery and had volunteered their home as a stop on the Underground Railroad. This choice subjected them to dangers that were unknown in the comfortable drawing rooms of Beacon Hill. Even the children bore their share of the risk. Consider, for example, the following anecdote that Hallowell described in his memoirs:

> Hid away in the barn of our country residence was another fugitive, a tall, lithe, muscular man, black as anthracite, Daniel Dangerfield by name, now forgotten no doubt, but then enjoying for a brief period a national reputation. The police force of Philadelphia was watching for that man. The detectives looked mysterious as they went about on their false scents and failed to see our Daniel as he passed . . . comfortably seated in my mother's carriage, the curtains drawn, my brother Edward on the box quite ready to use his five-shooter, and a younger brother (Hallowell) in the less heroic part of driver.[2]

To an idealistic young man such as Holmes, Hallowell's willingness to defy armed authority for a noble cause must have seemed exotic and heroic. Soon they were close friends, with Hallowell exerting considerable influence. It was Hallowell who was responsible for Holmes' growing commitment to Abolitionism; it was Hallowell's older brother, Edward, who enlisted him in guarding Abolitionist preacher Wendell Phillips from the hostility of a tough Boston crowd; and ultimately it would be Hallowell who would be his companion during much of the Civil War.

Holmes was nineteen when the war began. When the Rebels fired on Fort Sumter, he was ready to enlist. For him, the requirements of duty were clear. He believed in the Union and, increasingly, in abolition. Furthermore, he was committed to a code of chivalry, drawn no doubt from his childhood love of Sir Walter Scott, whose description of the Black Knight summed it up nicely: he would have "no craven fears, no cold-blooded delays, no yielding up a gallant enterprise."[3] Holmes' own strength and courage was as yet untried, but this was the requisite attitude, and the resulting desire to enlist was sure, steady, and accepted no frustration.

Without waiting for graduation, Holmes and Hallowell joined the Fourth Massachusetts Battalion. They were stationed at Fort Independence on Castle Island, a spare but comfortable camp that was less than ten miles from his home in Boston. For two young men, bored with college life, their duty could hardly be classified as a hardship. Nevertheless, there was one serious problem with the assignment. It became increasingly clear that the Fourth would never see any action—it was destined to stay in Massachusetts, performing only ceremonial duties. Since the two young men did not see this as their calling, they soon resigned and began the search for a new unit that had greater prospects of joining the fight.

It was through his father's influence that Holmes obtained a commission in the Massachusetts Twentieth—the unit that would ultimately be called "The Harvard Regiment." The nickname is somewhat deceptive. It was acquired by virtue of the fact that so many of its best known officers had gone to Harvard. Yet the regiment itself was composed of people from every economic class and from all over the state. This diversity was unusual as recruitment efforts were generally local. Individual towns began

the process by forming companies of volunteers; they would then join with other towns to form county-wide regiments. On paper, the Governor had the authority to appoint officers, but in actual practice he was strongly guided by local appraisals of leadership and by the candidates' contribution to the recruitment efforts. The result was that each unit had a high degree of initial cohesion—soldiers went to war with long-standing friends and acquaintances. This meant that each man was doubly accountable—poor conduct resounded not only in your military unit but also in civilian life—and a lost friend was doubly mourned—as a comrade and as a companion of one's youth.

Even though the Twentieth was an exception to this pattern, it had many of the same characteristics. There was, to be sure, no geographic unity. Several of the companies came from Boston, others came from Cape Cod, western Massachusetts, or other areas of the state that were too small or too isolated to field their own regiments. Nevertheless, like other Massachusetts regiments, there was a strong sense of interpersonal connection as most of the soldiers—enlisted men and officers alike—were serving with many people that they had known all their lives.

The real exceptionalism of the Twentieth came from the way its officers were chosen. Governor Andrews was a populist and an Abolitionist, and, prior to the war, he had not been popular with the wealthy men who lived on Beacon Hill. With war looming, however, he was particularly anxious to ensure their commitment to the cause and could find no better way to accomplish this than to enlist their sons in the struggle. He therefore chose William Lee as the commanding officer. Colonel Lee had all the right connections. As a successful business man and a Harvard graduate, he was well known and widely respected, and he had easy access to Boston's elite.

Dr. Holmes went to see Colonel Lee bearing a note from Henry Lee, the Governor's trusted aide and the doctor's cousin, recommending Wendell for a commission. This visit was enough to settle the matter. Despite Wendell's youth and gaunt appearance, the decision to give him a commission was really not a difficult one. His father was an influential leader in Massachusetts – just the sort of man that Governor Andrews wanted to bring on board. Wendell himself was smart, capable, and physically strong. In addition, he was an early volunteer who had some training. Thus, in July 1861, Holmes became a First Lieutenant and was initially assigned to Company G, under the command of an Irish man named Henry Sweeny.[4] Hallowell also received a commission. Lacking Beacon Hill connections, he wrote to Governor Andrews directly, and Hallowell's natural leadership abilities, his training at Fort Independence, and his family's Abolitionist credentials were sufficient to convince the Governor to appoint him as well.

Formation of the Massachusetts Twentieth

Once the officers were chosen, it was necessary to recruit enlisted personnel. The regiment set up an office at Camp Massasoit in order to take maximum advantage of walk-ins, but the real work had to be done by the officers. Fortunately, several of the companies were headed by leaders with close ties to Boston's German and Irish communities, which were filled with immigrants who had fled harsh conditions in their own countries and as a result were extremely patriotic and strongly opposed to slavery. Thus, the German and Irish officers were able to bring hundreds of young men into the regiment. For example, Captain Sweeny, Holmes' superior officer, was able to recruit sixty volunteers from among his community of Irish immigrants.[5]

The Harvard officers, however, were less successful in obtaining recruits—there was no rush to sign up from Beacon Hill. Nevertheless, a few of them did produce

results. Captain William Bartlett, for example, who had spent much of his Harvard years in pool halls and bar rooms, was able to capitalize on these connections and recruit twenty-five men. Lieutenant George Macy, a Boston businessman and cousin to R.H. Macy, the merchandising giant, sailed off to his original home in Nantucket and returned with twenty-four men. Subsequent trips yielded sixty more. Both Holmes and Hallowell did their share. Hallowell, with his charm and passionate Abolitionism, recruited ten men. Holmes returned to his old summer home in Pittsfield, Massachusetts, and recruited eleven.[6] Finally, on July 18th, the regiment was inducted into federal service.[7]

The beginning of its service was not auspicious. Upon inspection, Colonel Lee found "the personal material . . . very deficient in stamina and capability."[8] He complained that "the recruiting officers had used such desperately bad judgment" that only one-third of the recruits met the expected average. Training soon began in earnest. The soldiers were up at 6:30 in the morning and in bed by 10:00 at night. In addition to roll calls and the other routines of camp life, each day included four and one-half hours of drill, a dress parade, and one hour of regular instruction for both officers and enlisted men.[9] For the newlyminted officers, discipline was not easy. Initially many of the men were defiant of authority. One man from Nantucket challenged Holmes by saying, "Why shouldn't a man go where he pleased when a day's work was done and spend his own money without asking leave of any God-damned officer?"[10] Answers to such questions had to be summarily given. For example, a neighborhood saloonkeeper whose hospitality had caused a fair amount of drunkenness challenged a group of officers who came to his establishment and poured his whiskey into the street. In responding, Major Paul Revere—grandson of the famous Revolutionary rider—did not mince words. He produced his pistol, laid it on the bar, and said: "This is my authority."[11]

By the end of the summer, all the necessary adjustments had been made and the Twentieth was ready to report for duty. Despite Colonel Lee's initial skepticism, it was not a bad fighting force. The soldiers were physically healthy and adequately trained, although the unit was short-handed and would remain so throughout the war. The unusual way in which it had been formed meant that there would be an aspect of class conflict in many of its internal relations. There was always a division between the upper-class Harvard officers and the working-class Irish and German immigrants. This was apparent even before the regiment had reported for duty. On the way to Washington, the unit stopped in New York, where a citizen's group had sponsored a dinner to celebrate their readiness. Governor John A. Andrew, visiting New York, was the featured speaker. According to one newspaper account, he gave a speech of "great power" and put the "house in a complete tempest" when he promised that even if New York was occupied by Confederate troops, "Massachusetts would entrench herself behind the hills of Berkshire, and make the Switzerland of New England the rampart of freedom."[12] However, the Beacon Hill contingent did not hear his speech, as they had preferred to arrange their own dinner at an elegant New York restaurant.

Sadly, class differences were intensified by a division over the issue of slavery: many of the Beacon Hill officers supported it while the German and Irish soldiers were unequivocally opposed. As the regiment moved southward and encountered growing numbers of fugitive slaves, the disagreement became more intense and led to disputes about what to do with them—whether to employ them or return them to their owners.[13] As a result, the administration of the so-called "Harvard Regiment" became a source of continuing trouble that would run back-and-forth between the Massachusetts State House and the Federal military command.[14]

Balls Bluff

On September 7, 1861, the Twentieth arrived in Washington and received its orders.[15] The unit was to be at Edwards Ferry on the north bank of the Potomac River, just opposite the small city of Leesburg, Virginia. On the other side of the river stood the Confederate Army, and the Union Army was there to hold the enemy in check. For the next two months, both armies stayed in place, maintaining their readiness to fight.

It was not until late October that the Twentieth had its first experience of actual combat and, as was typical at this stage of the war, its efforts were defeated by confusion and error in the Union leadership. The problems began with an ambiguous order from General George B. McClellan. He had written General Charles P. Stone that Union forces had occupied Dranesvilles, a small town on the Virginia side of the Potomac. McClellan's hope was that this move would force the Confederates to abandon Leesburg, and he ordered Stone "to keep a good lookout upon Leesburg." He also suggested that Stone might make a "slight demonstration" that would encourage a Confederate withdrawal.[16] Though McClellan later said that this language was not meant to authorize an attack on the enemy,[17] General Stone not only ordered his pickets to increase their firing, but, in accordance with his more aggressive reading of the order, put together a small force to cross the river at Balls Bluff—an area marked by an incline that rises one hundred feet above the river. In the event of trouble, the Twentieth was to serve as reinforcement. They waited on Harrison's Island, a small island that bisected the river and would serve as a staging area for any attack.

When the exploratory force returned, they reported that there was a small Confederate encampment. This news was duly passed on to General Stone, who ordered them to cross the river once again and destroy the enemy camp. Once this was done, they were to return unless they found a tenable position on the Virginia side where they could wait for reinforcements from the Union forces at Dranesville.

This was a dangerous assignment. With the Confederates close by, Colonels Richard Lee and Charles Devens had no way of knowing exactly what the situation would be when their troops returned to the top of the bluff. In addition, the invading force would be particularly vulnerable as the men climbed up the steep hill. Once there, retreat would be difficult, given the narrowness of the path that descended to the river and the scarcity of boats. There was also the fact—unfortunately unknown to Lee and Devens—that the Union forces had already abandoned Dranesville and consequently there would no possibility of reinforcement from the Virginia side of the river.

Nevertheless, the Union regiments crossed the river and climbed the bluff without incident. There was no sign of an enemy camp and this fact was passed on to headquarters. Throughout the day, there were increasing indications of Rebel activity. In the morning there were small engagements as Union forces encountered enemy pickets. By the afternoon, three Confederate regiments had marched south from Leesburg to confront them. Chaos followed. The Southern forces occupied the higher, sheltered portion of the field and were able to press their advantage. As the Union forces lost ground, they were forced to face the difficulty of their position. To save himself, each man had to scramble down the narrow path and gain a seat in one of the two small boats crossing the river. Since there were not enough boats, some soldiers attempted to swim; but, even for the physically able, the swollen river was extremely treacherous. Many were shot during the escape, and the end result was disaster. From the Twentieth, there were 40 killed, 36 wounded, and over 100 captured by enemy forces.[18]

Given their inexperience, the men of the Twentieth acquitted themselves with honor.

Norwood Penrose "Pen" Hallowell (above) befriended Oliver Wendell Holmes, Jr., at Harvard College, from which they both graduated in 1861. His fervent abolitionism, derived from his Quaker faith, led him to volunteer for service in the Civil War and inspired Holmes to do the same. Hallowell would volunteer to command the all-black 55th Massachusetts in 1863.

They stayed calm, coolly and efficiently firing their weapons. Hallowell—now Captain Hallowell—was especially resourceful; he was able to find a flank position where he and his men could fire cleanly into the midst of the enemy force.[19] Holmes himself displayed real courage. With bullets in the air, he stood at the front of his troops and urged them on. Soon he was hit by a spent bullet that forced him to the ground. He crawled towards the rear where Colonel Lee suggested that he seek treatment. But Holmes examined his wound, found it was superficial, and decided he could soldier on. By his own account, he rushed forward to the front of his unit and, waving his sword, asked "if none would follow me."[20] Thus Holmes was hit for a second time—this time by a live bullet that

pierced his chest and came perilously close to his heart. Amidst considerable doubt as to his survival, he was transported back to Harrison Island and then to the mainland. He wavered in an out of consciousness. At one point, he was so certain of his own death that he considered swallowing the lethal dose of laudanum that he carried in his pocket. Sensibly, however, he postponed it, deciding that there was no point so long as there was so little pain.[21] Within a few days, he rebounded. Ten days later, he was well enough to be transported to Philadelphia, where he stayed with Hallowell's family. In another ten days, he was on his way to Boston.

Holmes' homecoming was worthy of a gallant knight. In Boston, wounded soldiers were still a novelty and, of those who returned, Holmes was by far the most notable. Thus, many people came to pay their respects. In the first three weeks, there were, by his mother's count, 133 visits in all.[22] His callers were not just friends and family but important men as well. For example, the Abolitionist, Senator Charles Sumner, came to see him twice. There was also a visit from the English author Anthony Trollop, who happened to be travelling in America.[23] Harvard was well represented, too—both its president, Cornelius Felton, and its best known professor, Louis Agassiz, made their way to Holmes' door. And, of course, there were the young women who brought gifts of flowers and food.[24]

Holmes no doubt took it all in, enjoying his time in the center of attention. He assumed a sophisticated air, describing army life as an "organized bore."[25] But we can only imagine how disorienting the whole experience must have been. In the course of three weeks, he had gone from a young man who had never experienced serious discomfort to one who had been tested by the reality of war. He had watched friends die and had his own very proximate brush with death. Nevertheless, in almost no time, he was back in the safety of Beacon Hill, basking in the hometown adoration that his heroics had generated.

When he was alone, there must have been time to think and there was plenty to think about. The first and foremost thing was that he approved of his own conduct. Whatever his doubts may have been about his ability to stand fast in the face of danger, they could now be put aside. While he had begun the battle "all keyed up,"[26] his instincts had done him credit—he had not shrunk from his duty. Yet, despite his own sense of success, one disturbing reality must have slowly become apparent. The slaughter at Balls Bluff was meaningless—it had no important objective and it had accomplished nothing. The newspapers were full of it—sketching a narrative where mistake after mistake led young and inexperienced troops to needless slaughter. The public was angry and ultimately that anger forced the government to form a commission to investigate. For one who had been there, this controversy must have struck a discordant note. For him, the battle had been deeply meaningful; to outsiders, he could now see that it was a comedy —or rather a tragedy—of errors. In this new narrative, he was less of a heroic leader and more of a victim, and it must have occurred to him that heroic actions lose some of their luster when they prove to be so entirely pointless.

Holmes had begun his wartime service aspiring to the gallantry of Ivanhoe, but, like many of his comrades, he found this ideal ill-suited to the Civil War experience. Ivanhoe fought alone. He chose his battles wisely, always representing good against evil. But Holmes was part of a big war machine—a complex piece of work that, in the beginning at least, malfunctioned more often than it succeeded.

Ball's Bluff had been Holmes' first chance to show his gallantry, his first chance to honor his ideal. But his ideal, once fulfilled, could not carry him forward. He needed a more subtle context in which to frame his concept of heroism. One element of this context was the code of the professional

soldier. A few years earlier, Tennyson had written a well-known poem describing an incident in the Crimean war. Like Balls Bluff, the incident was caused by an ambiguous order and subsequent miscommunication and, again like Balls Bluff, many were killed and wounded. In the poem, Tennyson described the reaction of soldiers who had been ordered to charge—defenseless—into a valley that was surrounded by enemy artillery:

> Was there a man dismay'd?
> Not tho' the soldier knew
> Someone had blunder'd:
> Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do and die:
> Into the valley of Death
> Rode the six hundred.[27]

So it was at Balls Bluff. Holmes had nearly lost his life for no reason. Such a sacrifice would not have advanced the cause. It would only be a regrettable mistake. From this, Holmes learned an important lesson: war required more than swagger. When he approached the field of battle, he could not assume that he would be striking a blow for cause and country. Even pointless orders required obedience and, from this point on, he knew that his fate was not in his own hands. It would ultimately be settled as a small and unintended consequence of a larger plan of battle. Therefore, his will and his judgment had to be suspended in favor of the assigned task, whether that task was foolish or wise.

If Holmes' actions were to be decreed by others, his determination had to spring from the deepest recesses of his soul. For this, he needed encouragement, and perhaps he turned to Emerson who had been his primary source of inspiration throughout his college years. Emerson had described his own vision of heroism:

> Let him hear in season, that he is born into a state of war, and . . . that he should not go dancing in the weeds of peace, but . . . let him take his reputation and life in his hand, and, with perfect urbanity dare the gibbet and the mob by the absolute. . . . rectitude of his behavior. . . . To this military attitude of the soul we give the name of Heroism. Its rudest form is contempt for safety and ease.[28]

For Emerson, war required certain attitudes—urbanity, rectitude, and contempt for safety and ease. But it also required more. In "Self-Reliance," he had argued that each person must trust his (or her) inner voice. Applied to heroism, this meant that:

> There is somewhat not philosophical in heroism; there is somewhat not holy in it; . . . Heroism feels and never reasons, and therefore is always right; . . . [The hero] finds [in himself] a quality that is negligent of expense, of health, of life, of danger, of hatred, of reproach, and knows that his will is higher and more excellent than all actual and all possible antagonists.[29]

What a tall order this must have been for Holmes! In his heart, he was a philosopher with a love of reflection and deeply considered ideals. Circumstances, however, required him to be heedless, to act without thinking, and to disregard the instincts of a careful man. It is no wonder that he sought an outward token to support his inward conviction. Before he left, he wrote to Emerson, asking for an autograph. Emerson complied and, throughout the rest of the war, Holmes carried the autograph in his pocket next to his breast.

Holmes returned to the army in March 1862, in time to participate in the Peninsula Campaign.

The Peninsula Campaign

There are only 100 miles separating Washington, D. C. and Richmond, Virginia. In April 1862, General McClellan might have simply moved forward towards the Southern capital. At that point, there were approximately 50,000 Confederate soldiers standing in the way, a not insurmountable force given the superior numbers that McClellan commanded. The somewhat unlikely alternative was to approach the city from the southeast by sailing to Hampton, Virginia, and marching northwards up the Peninsula formed by the James and York Rivers. While the peninsula route meant encountering fewer enemy troops, it was also longer and logistically challenging. For reasons known only to military historians, McClellan chose the peninsula.

Given the logistics, McClellan's first order of business had to be the fortifications at Yorktown. So long as the Confederates controlled them, necessary supplies and reinforcements could not be transported on the York River. Rather than assault Yorktown, McClellan, ever cautious, opted for a siege. The resulting month's delay gave the Confederates ample time to adjust their forces to the new Union strategy. They drew their troops closer to Richmond and, by the time McClellan was ready for the assault, the Confederate capital was well defended, and the Union forces never attacked. They spent one month close to Richmond, and then, after two small and somewhat inconclusive battles, McClellan ordered a retreat.

Inevitably, this pointless trip up and down the peninsula was the cause of much suffering and the Massachusetts Twentieth was in the thick of it. They spent two months advancing through mud and enemy fire north towards Richmond, a month camped outside of Richmond preparing fortifications, and then five painful days guarding the rear of the Union Army as it retreated down the peninsula. In all this time—much of it in the midst of combat—Holmes was not wounded, but, like many of his comrades, he suffered severe blows to morale and spirit.

For the soldiers, the Peninsula Campaign was a time of extreme privation and danger. The Twentieth began the march towards Yorktown with inadequate shelter; their tents would not arrive for several weeks. This was important because it rained almost continuously. Ultimately, the damp, combined with little food and little rest, made most of the soldiers ill. But ill or not, they had to persevere and this required intense determination—what Holmes called pluck:

> It's a campaign now and no mistake no tents, no trunks no nothing it has rained like the devil last night all day and tonight . . . Marching will have to be slow for the roads have constantly to be made or amended for artillery . . . The men and officers are wet enough you may believe but there is real pluck shown now as these are real hardships to contend with.[30]

By its very nature, pluck required an almost delusional optimism. On April 23, Holmes reassured his family that "my cold seems to have finally departed" and "I have been very well." But this was not quite true: "the two rainy days before and while on picket my bowels played the Devil with me owing to cold and wet and want of sleep." The "want of sleep" was particularly miserable:

> I forgot to say that as our camp is only about a half a mile from the pickets in the beeline we are called under arms about every third night by some infernal regiment or other getting excited and banging away for about five minutes we stand about an hour in the mud and then are dismissed.[31]

That Holmes would describe himself as "very well" in the face of all this bespeaks the

level of denial that was necessary to support the needed "pluck."

The long campaign up the Peninsula culminated in the battle of Fair Oaks. For the Twentieth, even getting to the battle proved a struggle. Holmes wrote: "(We) marched for miles I should think the last part through a stream above our knees and then double-click through mud a foot deep onto the field of battle."[32]

As they neared the fighting, they saw many wounded soldiers who encouraged them on: "Give it to them, Massachusetts boys, you are just in time." But, as is typical of war, the messages were mixed, as deserters warned them that no one could stand what was in front of them and that they would be "cut to pieces" if they moved forward.[33] Finally at 6:00 PM, they emerged from the woods and joined the battle.[34] Henry Ropes, one of the Harvard officers, described it this way:

> The noise was terrific, the balls whistled by us and the Shells exploded over us and by our side, the whole scene [was] dark with smoke and lit by the streams of fire from our battery and from our Infantry in line on each side.[35]

And then there was the human suffering:

> Dead covered the field. The sight of the wounded was even more distressing. Some walking, some limping, some carried on stretchers and blankets, many with shattered limbs exposed and dripping with blood.[36]

All in all, it was a horrifying and frightening sight.

As at Balls Bluff, Holmes' courage did not fail. Nor was he willing to tolerate cowardice in his men. Later, he explained the mechanics of courage to his family:

> But really as much or rather more is due to the file closers than anything else, I told 'em to shoot any man who ran and they lustily buffeted every hesitating brother. I gave one (who was cowering) a smart rap over the backsides with the edge of my sword—and stood with my revolver and swore I'd shoot the first who ran or fired against orders.[37]

Finally, hours of fighting brought success. Holmes wrote: "Here we blazed away . . . till we were ordered to cease firing and remained masters of the field."[38]

There is nothing like victory to test men's souls. First, there was the fleeing enemy. Like the rebel forces at Balls Bluff, the Twentieth now had the opportunity to shoot the enemy in the back fleeing from the battlefield. Hallowell, the "fighting Quaker," found this distasteful, believing that men fleeing from the fight should be considered *hors de combat*. He therefore ordered his men to stop firing. This was not a popular order, but it held.

Once the enemy had left, the Twentieth set up camp on the field of battle. The smell was terrible and the sights were worse. Holmes wrote his father:

> As you go through the woods you stumble constantly, and after dark . . . perhaps tread on the swollen bodies already fly blown and decaying, of men shot in the head back or bowels—Many of the wounds are terrible to look at—especially those fr. fragments of shell.[39]

There was no food to speak of and, distasteful as it was, many of the men were reduced to ransacking the dead bodies for something to eat.

The enemy wounded presented a different kind of problem. Their cries and yells resounded throughout the camp. Remarkably, after a long day of marching and fighting, a number of the Union soldiers felt compelled

to assist. They fetched water, gave up their blankets, and spoke with the wounded Rebels, writing down names and addresses so that they could inform Southern families about their sons' final hours. Dr. Revere, brother of Colonel Revere and the company's doctor, even administered precious opiates to ease their final suffering. Perhaps, as one writer suggested, the men were just trying to prove a point; they were "determined to show" that they were not just "superior soldiers" but also men of "superior sensibilities."[40] However, long after the point is lost, the compassion remains as one more peculiar aspect of a war among brothers.

After the battle of Fair Oaks, the Union Army began preparing for a siege of Richmond. At one point, the Twentieth was sent three miles back from the front lines so the unit could get some much-needed rest. Nearly everyone in the unit was sick. Beside the ever-present dysentery, there was an assortment of other ailments. On June 13, Holmes wrote: "Shall I confess a frightful fact? Many of the officers including your beloved son have discovered themselves to have been attacked by body lice."[41]

And on the 19th, he mentioned a different ailment: "The homesickness which I mentioned in my last they say is one of the first symptoms of scurvy."[42]

Ailments or not, the war continued. At the end of June, there were two events that marked the complete reversal of fortune for the Union Army. The first was the wounding of General Joseph Johnston, the Confederate Commander, and his replacement by the more aggressive Robert E. Lee. The second was that a skillful use of deception by the Confederates had convinced General McClellan that the rebel army was three times its actual size. These, together with two fierce battles fought outside Richmond, were enough to persuade McClellan that the assault on Richmond would be far too risky. As a result, he made a highly controversial decision to retreat.

The Twentieth received the news on the morning of the 28th. The first order of business was to move a number of railroad cars that had been left at Fair Oaks and were loaded with ammunition. With no locomotives available, the orders were to push the heavy cars three miles east to Savage Station so they would not fall into enemy hands. This meant that the Twentieth could not begin its retreat until the next morning when the unit was among the last Union soldiers to leave Fair Oaks. As the men began their march, they could see the celebration of the rebel forces as they entered the Union fortifications.[43] This must have been a demoralizing sight; one can imagine their feelings as they voluntarily—and seemingly without reason—yielded the ground they had so recently fought for and won.

Also demoralizing was the sight of the wounded trying to follow the Army. "It was a pitiful sight," one soldier wrote, "to see the wounded men who had been in the field hospital at Savage Station try to follow the army. Some with one leg some with arms gone others with Head tied up trying to escape from being taken prisoner which to many of them meant death.[44]

The Twentieth's placement at the end of the retreating army meant that the men were part of the rear guard. Like all retreats, the march was confusing, disorderly, and filled with conflict. At one point Hallowell's company was ordered out to harass the advancing enemy. Out in the field, Hallowell could hear troop movements behind him and gradually realized that the rest of the Union Army was pulling out. He awaited orders but none came. The question then became whether he and his soldiers were expected to follow the retreat or whether they were supposed to stay behind and die fighting. Without orders, Hallowell could only assume the latter. Thus, deep in the forest, fearful and alone with his men, he settled in to do his duty. Much later that night and to his great relief, orders finally came permitting him to abandon his post.

The way back to the main force was not easy. The night was dark and damp; the roads were more than muddy. Paul Revere managed the line and tried to boost the men's spirits by offering encouragement, but not everyone was interested in building morale. Holmes later complained about Tremlett—another Harvard officer—who spread the word that "we must surrender or be cut to pieces within 36 hours."[45]

Finally at dawn, the men rested for a few hours before continuing their march. Soon they were pinned down by a Confederate artillery attack. They lay down in the mud and waited. They were tired and thirsty from their march, but the only water available came from the muddy pools beside the road. The artillery fire had set the surrounding forest ablaze. Since the trees were damp from the spring rains, there was little danger of the fire leaping to their position near the road, but nevertheless the smoke was terrible and the men were left choking and struggling to breathe. It was several hours before they could resume their march and no sooner had they done this than they received orders to join the battle at Glendale.[46]

Glendale was the last battle on the Peninsula and, once again, the Twentieth took many casualties. Holmes lost his cousin, Jimmy Lowell—an event he would remember years later in a famous speech delivered on Memorial Day, 1884:

> I see another youthful lieutenant as I saw him in the Seven Days, when I looked down the line at Glendale. The officers were at the head of their companies. The advance was beginning. We caught each other's eye and saluted. When next I looked, he was gone.[47]

After the battle, Holmes and his regiment returned to the safety of Harrison's Landing. As they entered the camp, the unit struck one observer as being particularly hard hit; he described them as looking "used up,"[48] and, in fact, they were. The Peninsula Campaign had resulted in fourteen killed, seventy-two wounded, and eight missing or captured from the unit.[49] Hallowell and Holmes were both safe although not without considerable wear and tear. Holmes, in particular, was nearing the end of his endurance. We can hear the fatigue in his July 4th attempt to reassure his mother: "I only want to say I am well after immense anxiety and hard fighting."[50] But it was more than fatigue. The Peninsula had taught him that the line between life and death is very thin.

He had also learned a lesson about his own strength. Consider, for example, the extremes of discomfort that he experienced. He had been a healthy boy from a comfortable home. Further, he had been at that age when a young man imagines that he is not only immortal but downright indestructible. Conditions on the Peninsula had driven him almost to the breaking point. If he still thought of Emerson and his description of the hero, it must have seemed strangely out of reach. Emerson had written that a hero could maintain his "contempt for safety and ease" because [he] had a "self-trust which slights the restraints of prudence, in plenitude of [his] energy and power to repair the harms [he] may suffer."[51]

For Holmes, at this stage in the war, the belief in his own "energy and power" must have been less of a conviction and more of a desperate hope. Furthermore, the reality of human suffering could no longer be ignored. While he tells his family that he is increasingly indifferent to the carnage all around him,[52] his indifference did not extend to the cries of the wounded[53] or to the loss of people he knew. For example, as the Memorial Day speech makes clear, he was still suffering the loss of Jimmy Lowell twenty years after his death.

During August 1862, a much weakened regiment moved from Harrison's Landing to Alexandria, Virginia. It had started the war with 787 men and thirty-nine officers; it was

now down to 200 men and eight officers. This meant there had to be new recruits, and Governor Andrew obliged by sending 344 men.[54] Despite the fact that these recruits were untrained and in many cases unarmed, the unit was fighting again by the end of the month, this time in a rearguard action to protect General John Pope's army as it retreated from Manassas.

This action was followed by a brief period of inactivity during which Holmes was able to obtain a twelve-hour pass. He spent the time in Washington buying clothing and supplies. Good food and a good night's sleep in a quiet and comfortable bed were restorative. Though he wrote his mother that he was experiencing "spasmodic pain" in the bowels, he nevertheless insisted that he was "pretty well" and then even corrected the phrase with emphasis to "*very* well."[55] Holmes was beginning to heal, but the time of renewal would not last. On the 13th of September, they left for Antietam.

Antietam

We remember Antietam as the bloodiest day in American history. The battle can be divided into three distinct stages. The first stage took place in the morning when three successive waves of Union soldiers attacked the Confederate line to the north. At the center of this fight, there was a cornfield that lay between two patches of woods. The second stage began in the early afternoon when the

Both Hallowell and Holmes suffered significant wounds in the bloody battle of Antietam (pictured above) with the Twentieth Regiment of Massachusetts Volunteers. Hallowell's left arm was shattered by a bullet but later saved by a surgeon. Having just recovered from taking a bullet in the chest at the battle of Bulls Bluff, Holmes was shot in the neck at Antietam, but managed to recover again.

Union Army mounted a charge against the Confederate troops at the center of the field. This resulted in a fight over the notorious Sunken Road. The third and final stage began in the late afternoon when General Ambrose Burnside consolidated his forces and attacked the southern part of the Confederate line. The center of the third fight was a small bridge that crossed Antietam Creek.

The Twentieth fought in the morning as part of the third wave. Henry Ropes recounted the ensuing action in a letter to his father. He began by describing the march across the cornfield:

> Our division was formed in three lines, the first line Gorman's brigade, the second ours, the third Burns. The principal musketry firing was done of course by the first line. We were under heavy fire, however, and suffered from artillery while advancing. We drove the enemy before us with tremendous loss on both sides. The slaughter was horrible, especially close to the Hagerstown Turnpike where the enemy made a stand by the fences.[56]

Once across the Turnpike, they entered the woods where there was a momentary halt in artillery fire. As they emerged from the woods, however, they found themselves in an extremely precarious position. Ropes continued:

> We finally advanced down the slope, beyond which the enemy held a cornfield and farmhouse with barns and outbuildings, all on an opposite slope. (This was the Poffenberger farm.) The enemy had Cannon planted on the top and constantly swept us down with grape and Shrapnell shell. Our line was advanced close to the first, exposing us to an equal fire, while we could not fire at all because of our first line. The third line was finally advanced close to the second, all this time we stood up and were shot down without being able to reply.[57]

The problem here was that General Edwin Vose Sumner had ordered the lines formed too close together, and, as the army fought its way across the cornfield, it had turned leftward. This meant that the left-hand side had become even more tightly packed so that only the soldiers at the extreme left of the formation could fire their weapons. To make things worse, the Division was without leadership. General John Sedgwick and General Napoleon J.T. Dana had both been wounded.

In time, the Division's bad position became worse. They found themselves surrounded on three sides. The enemy was in front of them fighting Colonel Willis Gorman's brigade, but there were also rebel soldiers attacking both from the side and from the rear. Ropes described their predicament:

> The enemy in the meantime came round on our left and rear, and poured in a terrible crossfire. Sumner came up in time to save the Division and ordered us to march off by the right flank. We did so, but the left regiments gave way in confusion, the enemy poured in upon our rear and now the slaughter was worse than anything I have ever seen before.[58]

Indeed, the situation was dire, but the Twentieth had earned its reputation for grace under fire. Ropes' pride in their conduct is apparent:

> Sumner walked his horse quietly along waving his hand and keeping all steady near him. Although the regiments in rear of us were rushing by us and through our ranks in the greatest confusion, we kept our company perfectly steady, did not take a single step faster than the

> regular marching order and brought off every man except those killed and wounded who of course were left.[59]

Hallowell and Holmes were among the wounded who had been left on the field. Hallowell was hit in the left arm. Dressed inconspicuously in a private's shirt, he was able to sneak through enemy lines to a house that was located in Union territory. Holmes had been shot in the back of the neck and was lying down, drifting in and out of consciousness. He might have been left for dead but for the diligence of a man named William LeDuc, who insisted that Holmes receive attention. They gave him brandy and he revived enough to be able to stand, and with help he too made it to safety. As he entered the house, he saw Hallowell and lay down next to him.

Their relative safety would not last for long. The advancing enemy army had finally overtaken Nicodemus House—the house where Hallowell and Holmes and countless other wounded had sought shelter. While the rebels were busy in the yard, one of them performed a quiet act of empathy. As Hallowell later told it:

> The first Confederate to make his appearance put his head through the window and said: "Yankees?"
> "Yes."
> "Wounded?"
> "Yes"
> "Would you like some water?" A wounded man always wants some water. He off with his canteen, threw it into the room, and then resumed his place in the skirmish line and his work of shooting retreating Yankees. In about fifteen minutes that good hearted fellow came back to the window all out of breath, saying: "Hurry up there! Hand me my canteen! I am on the double-quick myself now." Some one twirled the canteen to him, and away he went.[60]

After the federal forces reoccupied Nicodemus House, the wounded were evacuated to the temporary hospital in Keedysville. Hallowell was fortunate to have his arm saved by a surgical procedure called "exsection,"[61] and, as it turned out, Holmes' wound was not serious. The bullet had gone straight through his neck without doing lasting injury to his airway or spinal column. Once again, he had been lucky.

Holmes' behavior after his injury suggests that he might have felt relieved to be wounded. The next day, he wrote a short note to his parents, reassuring them:

> Usual luck—ball entered at the rear passing straight through the central seam of coat & waistcoat collar coming out toward the front on the left hand side—yet it don't seem to have smashed my spine or I suppose I should be dead or paralyzed or something—It's more than 24 hours & I have remained pretty cocky, only of course feverish at times & some sharp burning pain in the left shoulder.[62]

Apparently, he felt well enough the next day to make his way to Hagerstown, where he could board a train to Philadelphia. Instead, once in Hagerstown, he delayed. "I pulled up in good quarters at Hagerstown . . . and not feeling quite inclined to undertake the journey homeward immediately alone—I decided to remain here a few days."

The delay might have been worrisome to his mother but for the fact that it was perfectly clear that Holmes was having a wonderful time. The letter itself had been dictated to a young woman with whom he was clearly enjoying a flirtation. Furthermore, it opened in a joking mood:

> Tho unheard from I am not yet dead but on the contrary doing all that an unprincipled son could do to shock the prejudices of parents & of

> doctors—smoking pipes partaking of the flesh pots of Egypt swelling around as if nothing had happened to me.

Finally, it ended with the promise that "I will be with you shortly for another jollification in Boston."[63]

The lightheartedness of this letter forms a sharp contrast with the rest of Holmes' Civil War correspondence. Because he was wounded, he was exempt from all duties and responsibilities. Since his return in March, there had been considerable suffering, and, through it all, he had to obey orders, be a good leader, and generally live up to his own code of heroism. Now, wounded, he was free—free to stop in a comfortable home, free to flirt with a pretty girl, and free to hold his parents at arm's length. With respect to the latter, he was explicit: "I neither wish to meet any affectionate parent half way nor any shiny demonstrations when I reach the desired haven."[64] Unfortunately, however, his father could not easily be brushed away. He was already en route with a pencil and paper in hand. Dr. Holmes' story, **My Search after the Captain**, became a classic of Civil War literature, and young Holmes was saved from embarrassment only by the fact that, like so much of what Dr. Holmes wrote, the story was chiefly about himself.

This time, Holmes spent a mere seven weeks at home before he returned for duty. Not surprisingly, he displayed a distinct "nervousness" that was duly noted by his father.[65] Antietam marked a turning point in his attitude toward the war. He had learned an important lesson, one difficult for a man of his age and background to internalize. Over the previous nine months, experience had been a strict and ruthless teacher. He now understood that there were limitations on his own strength, power, and spirit. He might aspire to glory in all its forms. With the greatest self-discipline, he might force himself to complete whatever task was to hand. But there was, in the final analysis, a line beyond which he could not go. And what was true for him was also true for the cause he had embraced. He now understood that the Confederate Army was determined to resist occupation; he believed that the Union Army could win a battle but not the war, and, after his seven weeks at home, he was also doubtful that the civilian world of the North was fully committed to victory. These growing realizations must have been hard to swallow, but swallow them he did. From this point forward, his skepticism about the war is apparent in his letters and diary.

His first letter home after his recuperation is a good example of the new attitude. Admitting that he was "blue," he told his parents that he had had difficulty obtaining directions to his unit and that the army "seems to hold that you are a nuisance for not having stayed at home as indeed but for honor I should suspect I was a fool."[66]

No doubt, this is a reasonable sentiment, but for Holmes it represents an entirely new tone of voice, one increasingly both self-deprecating and critical of military command.

Fredericksburg

After the costly standoff at Antietam, General McClellan was finally relieved of his command. He was replaced by General Burnside, who decided upon a direct route to the Confederate capital. This meant that Fredericksburg, which lay halfway between Washington and Richmond, became the immediate target. Fredericksburg was a small city protected on the north and east by the Rappahanock River. General Burnside planned to cross the river by the use of pontoon bridges that were being sent from Washington. Unfortunately, the bridges were not delivered on time and, by the time they did arrive, the Confederate Army had moved in and fortified the town.

Nevertheless, on December 11, the Union Army attempted to take Fredericksburg. Amidst enemy fire, the engineers began

While some have suggested that the war turned Holmes into a detached and cynical spirit, the author argues that Holmes (pictured here in uniform) was remarkable in his ability to go on with his life after the war with a renewed sense of purpose. What was it in his character that enabled him to withstand war without losing himself?

assembling the bridges. As they neared the opposite shore, the firing became so intense they could not continue. The Twentieth was assigned to guard them, but the engineers were still unable to make any progress against the well-hidden snipers. The work soon came to a halt. Burnside faced a dilemma. His army could not cross the river without bridges and the bridges could not be built so long as no one was fighting the enemy on the other side. To solve this problem, the Michigan Seventh volunteered to cross the river in pontoon boats. General Burnside thought the mission suicidal but, lacking other alternatives, he permitted it and it succeeded. Next across the river was the Massachusetts Twentieth, and to them fell the duty of clearing the main street. This meant running a gauntlet with enemy fire from all sides. Shots came from everywhere—windows, doors, roofs, basements, and alleys. The Union soldiers were an easy target while the Confederates shot from

cover. The only way to prevail was for the front to keep moving forward, depending on soldiers from the rear to replace those who were shot. And this is what the Twentieth did. Holmes' friend from home, Henry Abbott, became the hero of the day. He stood at the front of his soldiers as they were mowed down by enemy fire. When his first platoon was shot to pieces, he calmly ordered the second one forward and led "them into a storm with the same indifferent air that he has when drilling a Battalion."[67]

For the Twentieth, this was a dreadful day, but it was one that Holmes spent on the sidelines. In a letter to his mother, he recounted his feelings as he watched his regiment go into battle:

> Yesterday morning the grand advance begins—I see for the first time the Regiment going to battle while I remain behind—a feeling worse than the anxiety of danger, I assure you—Weak as I was I couldn't restrain my tears—I went into the Hospital . . . listless and miserable.[68]

Holmes had a serious case of dysentery. Without antibiotics, dysentery was a lethal threat. Left untreated, it would cause the bowels to run with blood, mucus and half-digested food, leading to dehydration, starvation, and death. During the Civil War it killed 60,000 soldiers. Holmes was not only sick; his life probably hung in the balance. But staying in the hospital was not an easy thing:

> We couldn't see the men but we saw the battle—a terrible sight when your Regiment is in it but you are safe—Oh what self reproaches have I gone through for what I could not help and the doctor, no easy hand, declared necessary—And in it again the Regiment has been—Scarcely anyone now left unhurt . . . —The brigade went at an earthwork and got it with cannister.[69]

When it was all over, he described it as "one of the most anxious and forlornest weeks of my military career."[70]

Fredericksburg also led Holmes to articulate some of his new attitudes about the war to his father. He now became openly sarcastic about the unjustifiable optimism in the Boston papers:

> I always read now the D. Advertiser . . . —and I was glad to see that cheerful sheet didn't regard the late attempt (Fredericksburg) in the light of a reverse—It *was* an infamous butchery in a ridiculous attempt—in wh. I've no doubt our loss doubled or tripled that of the Rebs.

Further, while reaffirming his belief in the "rightness of our cause," he expressed his doubts about ultimate victory:

> It is my disbelief in our success by arms in wh. I differ from you . . . —I think in that matter I have better chances of judging than you—and I believe I represent the conviction of the army.

He then countered the argument—presumably one made in a letter from his father, that the Southern devotion to slavery was matched by a Northern commitment to "civilization and progress" and that the North would prevail because "progress" is stronger than slavery. Holmes' response suggests that he was rethinking the role of war in ending slavery.

> If civ'n & progress are the better things why they will conquer in the long run, we may be sure, and will stand a better chance in their proper province—peace—than in war, the brother of slavery—brother—it is slavery's parent, child and sustainer at once.[71]

At this point, Holmes was part of an army that had become thoroughly demoralized.

The battle at Fredericksburg and the subsequent retreat brought the Union Army to its lowest point. Desertions were becoming more common and discipline was lax. Abbott may not have been exaggerating when he wrote, "The state of the army is terrible. Since the intense suffering caused by this advance, things are much worse & almost ready for mutiny."[72]

Morale in the Twentieth was once against threatened by class conflict. One long-standing issue became more intense during the winter of 1862-63. The Twentieth had lost so many commissioned officers that it was necessary to appoint replacements. Not surprisingly, Governor Andrew preferred to promote from within the ranks, but to the snobbish Harvard officers, this meant sharing their duties with men from immigrant families who had neither breeding nor education. The Harvard officers didn't like it, but they were powerless to stop it.

There was also the question of what to do about a commanding officer. Up until Antietam, Colonel Lee had provided real leadership. In fact, the most fractious time for the unit occurred during his absence after Balls Bluff. Then, it was only his return from the Confederate prison that brought some measure of peace to the warring factions. After Antietam, however, Colonel Lee had a breakdown. He had disappeared from the battle and been found days later drunk in a stable.[73] Suffering from alcoholism, he was never able to resume command. His formal resignation came soon after the battle at Fredericksburg.[74]

Replacing Lee was a difficult issue. The Beacon Hill contingent wanted one of their own. Lt. Col. Francis Palfrey was next in line, but he had little support in the unit as he was not widely regarded as competent, nor was Governor Andrew inclined in his direction. The next in seniority after Palfrey was Capt. Ferdinand Dreher, a German-American officer, who was also not popular among his fellow officers, partly because he was not from Harvard and partly because his German accent was so thick he had a hard time making himself understood. Third in seniority was Capt. Macy, the preference of his fellow officers but not the Governor's choice. Rumors swirled around the camp. Some thought that Dreher would be named—he was, after all, the Governor's favorite. Others thought it might be—God forbid!—an outsider. Such rumors infuriated the Harvard officers and caused them to complain bitterly about civilian interference.

Ultimately, however, the Governor simply made the appointment in accordance with seniority. First he appointed Palfrey, but Palfrey was so disabled he resigned. Then he appointed Dreher, who barely lived long enough to receive the appointment. Finally, Macy was appointed acting Colonel with every expectation of being appointed to permanent command. Logical as this outcome seemed to the men of the Twentieth, it was not to be. Paul Revere had not yet been officially removed from the rolls of the Regiment, and he outranked Macy. He also wished to assume the command, and Governor Andrews, who was still not well disposed towards Macy, was more than willing to have that happen. Technically, since Macy was already occupying the Colonel's slot, he had to be mustered out of the unit so that Revere could assume his place. The Harvard officers were so outraged at Revere's interference that they refused to speak to him when he arrived. Nor were they assuaged when Revere intervened so that Macy could remain in the unit at the rank of Lieutenant Colonel. Macy himself behaved with grace, but the rest of the officers nursed their grudge.

Despite the low morale, the officers stood by the unit. Holmes was offered a staff position with General Sedgwick. Traveling with the General would have been somewhat more comfortable than living on the line. Nevertheless, he turned it down, preferring to stay in a unit that, despite its conflicts, commanded both his affection and respect.

Henry Abbott and John Ropes were also offered staff positions. They too turned them down. Pen Hallowell, however, did leave the unit, but he did not transfer to a more comfortable job at headquarters. Instead, he volunteered for one of the most difficult jobs in the Army. Together with Colonel Robert Shaw, he would form the command of the Massachusetts 54th, the first Black regiment in the Union Army. Hallowell asked Holmes to join him, but for reasons nowhere recorded, Holmes declined.[75]

The fiasco at Fredericksburg and the general malaise in the Army brought action from Washington. General Burnside was relieved in favor of General Joseph Hooker. Hooker sought to improve morale by rewarding units that had fought well. Naturally, this benefitted the Twentieth. As a reward, they were given additional furloughs. They were also moved into comfortable winter quarters in Falmouth, where Holmes served as Provost Marshall. As the spring wore on, wholesome food and adequate rest began to have their effect. As their situation improved and the leadership issue stabilized, the officers began to think less of unit politics and more of the coming offensive.

General Hooker had devised a complicated plan for taking Fredericksburg. He divided his army into three sections: the first would cross the Rappahanock well north of the city; the second would cross to the south; and the third smaller unit, which included the Twentieth, would remain near Fredericksburg. The point of the strategy was to leave Lee guessing about where the main attack would come.

On May 2, the pontoon bridges were once again moved into place and the Twentieth crossed into Fredericksburg. This time they did not attempt passage down the main street but instead moved to the north and approached the western fortifications from the open plain. This avoided the snipers in town but exposed them to the Confederate artillery. In a letter to his mother, Holmes gave a vivid description of the scene that followed.

> Pleasant to see a d'd gun brought up to an earthwork deliberately brought to bear on you—to notice that your Co. is exactly in range—1st discharge puff—second puff (as the shell burst) and my knapsack supporter is knocked to pieces . . . 2nd discharge man in front of me hit—3d whang the iron enters through garter and shoe into my heel.[76]

And whang! Holmes would be going home once again. He arrived back in Boston in the middle of May. This time the wound was not life-threatening but it would take longer to heal and required a course of rehabilitation so that he could walk properly. His father described him as being "in excellent spirits . . . (and) not at all nervous, as when he was last wounded."[77] Obviously, his life on Beacon Hill was more comfortable than life in the Army. On the other hand, the revolving contrast between home and battle must have been somewhat disorienting. The war looked one way viewed from the comfort of Beacon Hill, and looked quite different from the battlefield. As the war went on, these two perspectives must have seemed more and more at odds. For example, there were all those mutilated corpses. "As you go through the woods," he wrote from the battlefield, "you stumble constantly, . . . perhaps tread on the swollen bodies already fly blown and decaying."[78] Compare this with the tenderness and delicacy of the letter sent by John Ropes to Holmes asking him to be a pallbearer at his brother Henry's funeral:

> The body arrived this morning. It is, I am afraid to say, not in a state to be seen. It would not do to open the coffin. All that can be seen through the glass-plate is the breast, which is bare, and in which there is a fearful wound in the region of the

> heart, which must have caused instant death. I think I can discern a fragment of shell embedded in the breast. It is a sad and shocking sight—nothing of the face can be seen but the chin, round which is a handkerchief.[79]

Home and war are two different worlds, and it is painful to hold both in one's heart. Back at war, Holmes himself described the problem:

> The duties & thoughts of the field are of such a nature that one cannot at the same time keep home, parents and such thoughts as they suggest in his mind at the same time as a reality—Can hardly indeed remember their existence.[80]

Leaving the War

Holmes returned to the war at the end of January 1864. Then, after six more months of active service, he would be on his way home for good.

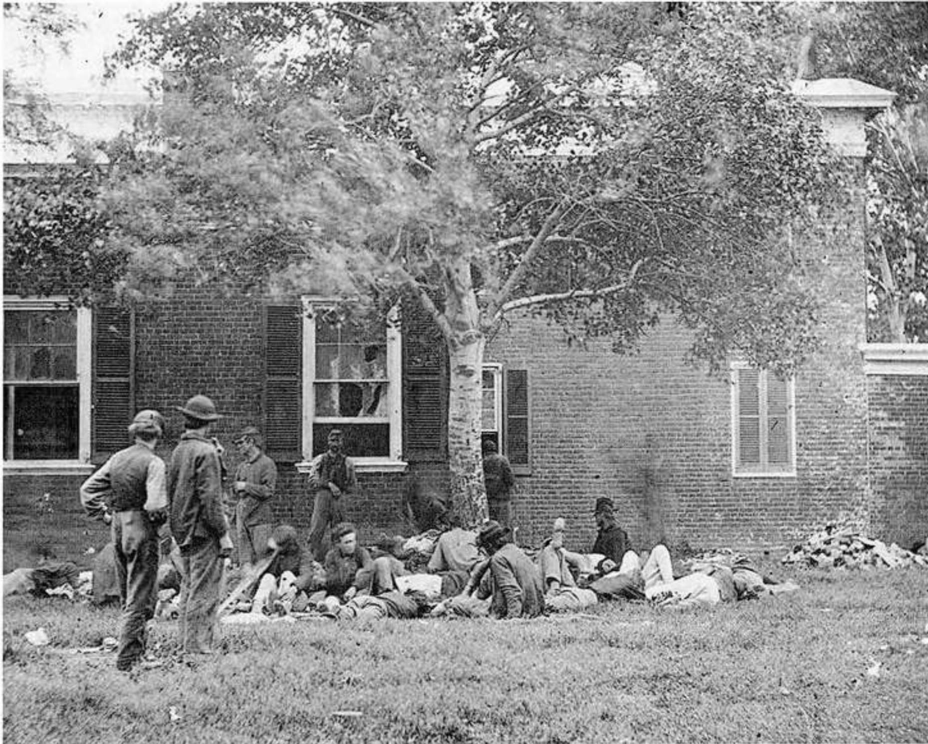
Separation from the Army was a long process—a complex one that involved several sets of changes. The first affected Holmes' self-image as a soldier. We have seen that Holmes began the war with a somewhat romantic image of himself as a gallant knight and that this image was not to last through the events at Balls Bluff. He developed a new narrative that tied him to the war—one that drew on the duties of a professional soldier, the loyalty to one's unit and the Emersonian ideal of heroism. Essential to the Emersonian ideal was a steadfast confidence in one's own ability to withstand discomfort and injury, but it was this confidence that Holmes had lost on the Peninsula.

The second set of changes had to do with his perception of the war. Holmes believed in the Union cause. Up until the end, he would characterize it as the "Christian crusade of the century."[81] Over time, however, he came to believe that the North was incapable of subjugating and occupying the South. With no victory in sight, the war seemed like an endless sinkhole that chewed up men's lives. He was there because it was his duty to be there and because his dearest friends were there. And so he weathered the dysentery at Fredericksburg I and the terrible sight of his men doing battle without him. And he suffered the wound at Fredericksburg II and the welcome trip home that came with it. He would be in Boston for six months, but six months was not nearly long enough to regain his composure. Later, much later, he confessed his secret hope that he might lose his foot entirely so that he would not have to return at all.[82]

His last remaining tie to the Army was also his strongest—the loyalty that he felt to his regiment. When he returned, however, the sad and simple truth was that he could not return to his regiment. The Civil War had its share of red tape. Colonel Revere had been killed at Gettysburg and Lt. Col. Macy had been wounded. Holmes was next in line for the position of Lt. Colonel. He suggested that he waive it in favor of his friend, Abbott, who was at that point commanding the unit. Abbott, however, gracefully declined and Holmes accepted the promotion. This created an anomaly in the chain of command. Abbot was a Major but, if Holmes returned as a Lt. Colonel, he would have to serve under Abbott—essentially taking orders from one of lower rank. The obvious solution—that Holmes accept a temporary demotion—was not available as the Twentieth already had its full allotment of Captains.[83] There was no solution except for Holmes to leave the unit and accept a staff position at Sixth Corps Headquarters.

Holmes may have contemplated that his absence from the unit would be temporary. As late as mid-April 1864, he wrote to Charles Eliot Norton of his plan to return to the Twentieth as Lieutenant Colonel under a

Holmes greatly admired the courage of his friend Henry Abbott (left), with whom he served for two and a half years until Abbott was killed in the Battle of the Wilderness (soldiers recovering from that battle are pictured). Unlike Holmes, Abbott was a Copperhead.



recovered Colonel Macy: "In all probability from what I hear of the filling up of the Regt. I shall soon be mustered in for a new term of service as Lt. Col. Of the 20th."[84] Note that the "new term of service" was contingent on the circumstance that the Regiment was "filling up." This refers to the fact that the Regiment would go out of existence on its three-year anniversary unless two things happened: it had to persuade half of its remaining volunteers to reenlist for a new term and had to recruit enough men to bring the unit up to fighting strength (844 men).[85] Given that the Twentieth had been decimated by its years of service, these were two difficult requirements, but remarkably the Regiment passed both these tests. The result, however, was a unit that barely resembled the one that Holmes had left.[86]

Despite the fact that Holmes intended to rejoin the Twentieth, it is clear that his commitment was somewhat problematic. Holmes had written Norton to thank him for sending his article about King Louis IX and his crusade to the Holy Land. The crusade came at a time when the fervor that had attached to the First Crusade had diminished, and the review described the devices that the King used to keep his followers attached their mission. Obviously, such a story would be particularly meaningful to Holmes at this point in the war:

> the story seems to come up most opportunely now when we need all the examples of chivalry to help us bind our rebellious desires to steadfastness in the Christian Crusade of the 19th century. If one didn't believe that this war was such a crusade . . . it would be hard indeed to keep the hand to the sword; and one who is rather compelled unwillingly to the work by abstract conviction than borne along on the flood of some passionate enthusiasm, must feel his ardor rekindled by stories like this . . . No it will not do to leave Palestine yet.[87]

Nevertheless, one month later his mind was made up—he was not going to re-enlist; he was going to "leave Palestine" after all. One might well wonder what happened in the intervening month to produce such a dramatic change. There were a number of factors, all caused by events on the battlefield.

Grant was now in charge of the Union forces, and with him came a new strategy for ending the war. Union plans were no longer centered on occupying Richmond. Instead, Grant recognized that the destruction of Lee's Army would mean an end to the Confederacy. And so he began a long war of attrition. It began on May 5 with the battle of The Wilderness. For two days, there was intense fighting in difficult terrain. Toward the end of the second day, the Confederate Army outflanked the Union Army on the right side, inflicting much damage and taking a thousand prisoners from Sixth Corps. That night, Grant disengaged his forces from the fighting and resumed his march southward towards Spotsylvania Courthouse. This began the series of flanking maneuvers in which battle followed battle with little time between. It was somewhere between The Wilderness and Spotsylvania that Holmes made his decision to leave.

In this period, several events occurred that might have affected his decision. The first was that his friend Henry Abbott was killed in the Wilderness. Abbott was Holmes' last remaining tie to the Twentieth. Holmes' affection for him was obvious when he described him twenty years later:

> There is one who on this day is always present on my mind. He entered the army at nineteen, a second lieutenant. . . . I saw him in camp, on the march, in action. I crossed debatable land with him when we were rejoining the Army together. I observed him in every

> kind of duty, and never in all the time I knew him did I see him fail to choose that alternative of conduct which was most disagreeable to himself. He was indeed a Puritan in all his virtues, without the Puritan austerity; for, when duty was at an end, he who had been the master and leader became the chosen companion in every pleasure that a man might honestly enjoy.[88]

In some ways, the two men were an odd pairing. Abbott was a Copperhead[89] and one of the more elitist officers in the unit, usually one of the first to complain about officers who were not also "gentlemen." Hallowell and Holmes, on the other hand, often bridged the divide between the anti-abolition "gentlemen officers" and the pro-abolition "non-gentlemen" members of the Regiment. Furthermore, they came from opposite sides of Boston's elite. Henry's father, Judge Abbott, was a practical man well connected in the business community; Holmes' father was a man of letters.

The depth of this difference and the affection that bridged it can be seen in a letter that Abbott wrote to his father concerning Holmes:

> I am glad you are going to take Holmes under your wing. His father, of course, one can't help despising. But Oliver Junior . . . is infinitely more manly than the little conceited Doctor. I am very confident, that he is worthy of your friendship, because a man here in the hardships and dangers of the field can easily detect what is base in a man's character, and it is particularly trying to Holmes who is a student rather than a man of action. But since I have seen him intimately, he has always been most cool, cheerful, and self-sacrificing. . . . He is considered in the army a remarkably brave and well instructed officer, who has stuck to his work, though wounded often enough to discourage any but an honorable gentleman.[90]

Thus, it is obvious that the two men held one another in high esteem, and certainly the two and a half years of shared service had made them close. One might even say that their fates seem strangely intertwined. Notably, it was Abbott who took Holmes' place when Holmes was sick with dysentery during Fredericksburg I. Had it not been for the illness, it would have been Holmes rather than Abbott who led his company down the streets of the city, and perhaps Holmes would have done it less heroically. And again it was Abbott who led Holmes' company at Gettysburg when Holmes was recovering in Boston. The fact that Henry had died in the Wilderness would have cut the last strong emotional bond that Holmes had with his regiment.

In addition, Holmes was seeing a new kind of fighting. There were battles that dragged on for days and days. Troops were digging in, building barricades and trenches. It was also true that Holmes was seeing, for the first time, the awesome extent of the fighting. At headquarters, he was learning more about the scope of the fighting; and as he rode around attending to his duties, he was seeing more of the destruction.

All of this was clearly taking its toll. Holmes' diary from the period shows relatively constant fighting from May 5 on with tremendous losses: "In the corner of woods . . . the dead of both sides lay piled in the trenches 5 or 6 deep—wounded often writhing under superincumbent dead. . . . The losses of our Corps in these nine days are ten thousand five hundred & forty seven!"[91]

On May 16, he finally found a quiet time to write to his parents. It is no surprise that he was not "in the mood for writing details." Instead he summed up the situation:

> Enough that these nearly two weeks have contained all of fatigue and

> horror that war can furnish—The advantage has been on our side but nothing decisive has occurred & the enemy is in front of us strongly intrenched . . . nearly every Regimental off—I knew or cared for is dead or wounded.

And then he told them he had had enough: "I have made up my mind to stay on the staff if possible till the end of the campaign and then if I am alive, I shall resign."[92]

The reasons for his resignation have led to some confusion. The Twentieth reached the end of its three-year term on July 16, 1864. On August 1, the soldiers who had not reenlisted were mustered out at a ceremony on Boston Common. Some thought that this meant the termination of the Twentieth and bemoaned the fact that its demise meant the loss of so many good soldiers. For example, Charles Page, a *New York Tribune* reporter, wrote:

> Regiments are continually going home on the expiration of their terms of service. Among the last which have gone are the Eighteenth and Twentieth Massachusetts, historical regiments. Would that I could catalogue the names of the heroes, Bay-State born and nurtured and taught, who have fallen from these.
>
> Practically, the most important consideration is that so many trained and valuable officers are thus lost to the service. Of the Twentieth, Oliver Wendell Holmes, Jr. . . . served more than two years steadily and chivalrously as a line officer, . . . and he goes out of service because his regiment does, not because he would taste the sweets of home.[93]

We have seen, however, that this dispatch is not entirely accurate. The Twentieth did not go out of service; it would continue on.[94] Furthermore, Holmes could have reenlisted; and the reason—at least the reason he gave publicly—for not doing so was that he could no longer "endure the labors and hardships of the line."[95]

Privately, however, the reason given to his parents speaks more to his altered conception of duty than of his disability. The fullest explanation is this one from a letter of June 17.

> I can do a disagreeable thing or face a great danger coolly enough when I *know* it is a duty—but a doubt demoralizes me as it does any nervous man—and now I believe the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body *earned* the right . . . to decide for myself how I can best do my duty to myself to the country and, if you choose, to God.[96]

This explanation, however, hides more than it discloses. It is obvious that his father, growing more and more ardent in his support of the war, had disapproved of Holmes' plan to leave the army before the war was over. Thus, in this passage and in others, Holmes emphasized his right to decide for himself the extent of his duty. There is therefore no recital of the reasons why his duty had ceased. We do know, however, that he had talked it over with several people. For example, he mentioned a discussion with Hayward, the "mentor of the Regt," and told his friend Anna Pomeroy that the medical director had advised him that he was "not keeping up by the strength of my constitution now but by the stimulus of this constant pressure to which we have been subjected."[97]

In any case, I think it is not difficult to understand how Holmes approached the issue. In the summer of 1864, the war was not winding down but rather had shifted into high gear with no real end in sight. Holmes would have been justified in feeling that another

enlistment would have meant the end of his life. The odds in favor of being killed must have seemed extremely high. And, if he were not killed, he was certainly mindful of the risk of receiving a crippling wound or worse. As he wrote to his parents, "Many a man has gone crazy since the campaign begun from the terrible pressure on body and mind."[98]

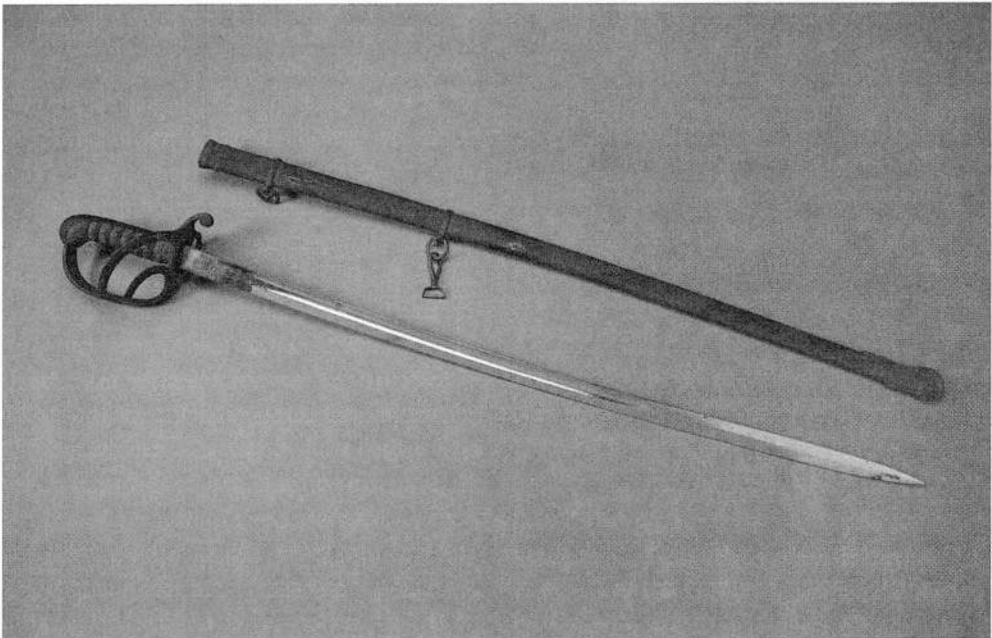
But these considerations simply spoke to the sacrifice involved in reenlisting, and sacrifice was what duty was all about. He must have thought hard about the nature of his duty and about what it required from him. Did the same duty that required him to enlist also require him to reenlist?

In tracing his experiences in the war, we can see three distinct circumstances that changed in the three years of his service. First, there is the question of his physical capabilities. Holmes had not held anything back—he required himself to push to the limits of his endurance. Years of this had taken their toll. While his wounds may have healed, the day-in-and-day-out punishment of his body had not. There were few men who had suffered what he had suffered and were still able to perform their duties.

Second, there was the fact that the Army had changed. It was not just that there was no longer room for him in the Twentieth; it was that the days of infantry charges were over. It was not heroism that would win the day, but a daily grind of mechanized killing. As Nathan Hayward, Holmes' "mentor," had put it in a letter home:

> A general order from General Grant, to Meade, to Hancock, to Gibbon, to the brigade commanders, to regimental commanders—nothing to arouse enthusiasm—not the presence of generals to encourage and inspire their men with the example of their own determination—but as I say this cold blooded official order.[99]

It was this transformation that made the old-time officers nostalgic for McClellan. Holmes might well have agreed and felt that war was no longer the kind of thing where individual effort and valor made a difference.



Many factors went into Holmes' decision not to reenlist in the summer of 1864, including the physical and psychological toll the war had taken on his mind and body. Pictured above is his sword.

Third, and perhaps most importantly, his views about war and its relationship to abolition had changed. Holmes was certainly not a pacifist. In fact, throughout his life, he praised the military spirit that men bring to war. On the other hand, we have seen that he had arrived at the important insight that war is "the brother of slavery—brother—it is slavery's parent, child and sustainer at once."[100] One could say that Holmes was mistaken in this judgment. Within a year, the war would be over and there would be no slavery in the South. Yet, as the next hundred years would demonstrate, the war against slavery did not end in 1865. Plantation slavery would be replaced by systems of peonage,[101] white supremacy, and lynching trees. The face of slavery had been changed but it had not been eliminated.

War and Character

When Holmes returned to his family in Boston, he found that little had changed. He was able to pick up where he left off, enrolling in law school in the fall of 1865. Indisputably, however, Holmes himself had changed. Those closest to him saw it as positive. Fanny Dixwell, soon to be his wife, declared that, without the war, Holmes would have been a coxcomb.[102] Others, more distant, saw the change as negative. Beginning with the publication of Holmes' war diaries in 1946, scholars argued that his wartime experience diminished his idealism and led him away from conventional religion and morality. This experience was also, some suggested, responsible for many of Holmes' least appealing characteristics: his detachment, his cynicism, and the single-mindedness of his ambition.[103] Soon, each of his biographers attempted armchair psychology. For example, in a 1965 article, Saul Touster offered Holmes' war experiences as the "the psychological sources of Holmes' life style."[104] To the modern ear, his use of the term "life style" might suggest some form of extreme deviance but, in fact, all he really meant was:

> . . . the deadening of sympathetic feelings, the Olympian aloofness, the spectator view, books to calm the nerves, the sentiment of honour, the belief in heroic action, the disbelief in causes—all these, by which he can somehow gain distance from the world, can be seen in him by the end of the war. . . .[105]

This is not a flattering picture of Holmes, but it is nonetheless balanced and fair.[106] More recent accounts are less so.

For example, in a 1995 biography, G. Edward White described Holmes' war experience in a way that is unambiguously condemnatory. For White, Holmes is not a hero injured by things beyond his control. Rather, he is a coward whose lack of character is amplified by his wartime trauma. For example, White draws a sharp contrast between Holmes and his friend, Henry Abbott:

> The one, Abbott, the very personification of soldierly duty and honor. The other, Holmes, a soldier who after being shot in the heel had hoped his foot might be amputated so that he could avoid returning to war, who had chosen to leave service before Union victory was certain, who had admitted to his parents that he could no longer endure the blows and hardships of being a line officer, [and] who had reproached himself for missing the battle that produced Abbott's legendary bravery.[107]

Thus, what earlier writers had seen as "survivor's guilt"[108] becomes, for White, "real" guilt caused by real failures of spirit. Holmes had not just lost his idealism, White suggests; he had become an amoral egoist, who thought only of himself.[109]

Even more extreme is a 2002 study by Albert Alschuler. Noting that a negative

interpretation of Holmes' war experience "now seems conventional,"[110] he restates many of the negative assessments without analysis or criticism. For example, he portrays Holmes as a man obsessed with "war, power, and struggle[.]"[111] He also notes in Holmes "[an] attraction to morbidity[.]" [112] But for Alschuler, Holmes is not just a coward; he is almost a psychopath. "Imagine," he says:

> that your Uncle Bob is a postal clerk whose career has never been interrupted by military service, and imagine that Bob begins one day to voice the thoughts once voiced by Oliver Wendell Holmes. For example, at the dinner table one evening, Bob announces, "[W]hen men differ in taste as to the kind of world they want the only thing to do is to go to work killing." The next day, Bob praises suicide as a more "uneconomic" form of expression than charity to the poor. You and other family members are likely to consider whether Bob needs help.[113]

This analogy seems farfetched. Holmes is not sitting at the dinner table philosophizing about mass murder and suicide. He makes these statements in a context in which his hearers understood that he was making a larger point, one driven home by a provocative exaggeration. Even more notable is the fact Alschuler chose to compare Holmes to Uncle Bob who has spent his days delivering mail rather than fighting a war. Fighting a war x2014;especially a civil war—is an important life experience and one that colors our estimation of those who do it. Note, for example, Saul Touster's treatment of this issue:

> Holmes was, it seems to me, a profoundly injured spirit, and his greatness as a human being can be justly viewed only in the light of this fact. . . . He had been there and come back! We are all in awe of such spirits.[114]

One way to understand the difference in the views of Touster and Alschuler is to remember that the Vietnam War intervened. That war taught us many things. It taught us that the traumas of war make reentry into civilian life very difficult. It filled our streets and shelters with men who had been devastated by combat, who have forced us to see that the psychological wounds of battle are often worse than the physical ones. For Alschuler, this means that returning soldiers deserve sympathy, but not respect.[115] As a result, he wonders "how and why a man brutalized by war became the great oracle of American law."[116] In asking this question, Alschuler is not wondering how Holmes rose to the challenge. Rather, his question assumes that Holmes was so badly damaged by his Civil War experience that he was an inappropriate candidate for high office and public esteem.[117]

It seems to me this is the wrong question. Holmes' experience in the war *was* devastating. After the war, Holmes *was* skeptical about conventional morality and conventional religion. He was also distrustful of simplistic idealism and he was certainly ambitious. But none of these characteristics is pathological. In short, they do not require a patronizing explanation. Many of Holmes' Boston contemporaries shared these qualities. Many of these qualities were part of Holmes' character well before his Civil War experience.

It is a painful truth that the hardships of war do not run off a young man's back like so many drops of water, but what is striking about Holmes is not that he was badly damaged, for he was not. What is striking is that the war did so little to nullify his spirit. Within a year of his return, he had enrolled in Harvard Law School and begun work on his career. After law school, he visited Europe. In London, he led an active social life, his wit and striking personality making him a

popular guest at fashionable dinners and weekends.[118] In Paris, he had no contacts, but he actively explored the city and its European culture. In Switzerland, he even did some serious climbing in the Alps.[119]

Nor did he seem troubled when he came home. A depressed man might have lapsed into a desultory practice of law, but he did not. He remained energetic and engaged. While legal practice did not excite him, he spent his free time studying legal history and building relationships with others who were committed to intellectual pursuits. He spent long evenings with William James discussing philosophy.[120] He went on vacation with Henry James, and flirted with the women who accompanied them.[121] He edited a law review, and discussed legal theory with his friends. He reached out to Boston lawyer George Shattuck as a mentor and friend.[122] Furthermore, as time went on he patiently worked his way through mountains of case law (in order to provide the annotations for a new edition of Kent's **Commentaries**)[123] and read most of the existing literature on legal theory. He married Fanny Dixwell, a woman with whom he had much in common, and they formed a life-long bond of engagement and comfort.[124]

Furthermore, his life continued to be successful and reasonably content. He wrote articles for the *American Law Review*,[125] and, by the time he was forty, he had completed **The Common Law**.[126] At this point, he stood poised for appointment to the Harvard Law School faculty and soon thereafter to the state's highest court.[127] At no time did he show symptoms of severe psychological distress. Indeed, this is a remarkable story of achievement for one who at a young age suffered the worst experiences that war could provide.

Looking at these facts, it seems simply inaccurate to dismiss Holmes as one of those promising young men who go off to war and return to a life of loneliness and misdirection. Perhaps Holmes was lucky. But it is also possible that his background and character were well suited to withstand the pressures of war and that the war, far from disabling him, gave him qualities that fueled his success. If this is so, then it is an important story and the crucial questions would be: What was it in his character that enabled him to withstand the crisis without losing himself? How was he able to leave adversity behind and approach the rest of his life with a renewed spirit and a wholesome appetite for hard work and new adventures? Answering these questions requires that we reassess Holmes and his legacy. We should not accept the common—almost cartoonish—representation of Holmes as a detached and cynical spirit. Instead, we must recognize the depth of character that sustained him and provided him with the courage and inspiration to persevere in the face of catastrophic difficulties.

Author's Note: I am grateful to Dean Vince Rougeau and to the Boston College Law School for supporting this research through the Carney Scholars Program.

ENDNOTES

[1] Richard F. Miller, Harvard's Civil War: A History of the Twentieth Massachusetts Volunteer Infantry (2005).

[2] Norwood P. Hallowell, Selected Letters and Papers of N.P. Hallowell 25 (1963).

[3] Sir Walter Scott, Ivanhoe, 248 (University Press Edition). at 248

[4] Miller, *supra* n. 1 at 27.

[5] *Id.* at 32-33

[6] *Id.*

[7] *Id.* at 35.

[8] *Id.*

[9] *Id.* at 38-39.

[10] *Id.* at 36-37.

[11] *Id.* at 38.

[12] Unidentified newspaper clipping in Scrapbook at Harvard Law School in The John G. Palfrey (1875-1945) collection, 1715-1938. Family and Personal Material, Civil War: Civil War Scrapbook created by OWH, 1861-1865. http://nrs.harvard.edu/urn-3:HLS.Libr:1815413?n=18

[13] Given that the North and South were at war, the notion of Northern soldiers returning slaves to their Southern

"owners" seems strange. Nevertheless, that is exactly what Colonel Palfrey (a non-Abolitionist Harvard officer) did during the period that Colonel Lee (an Abolitionist) was a prisoner of war. This was a difficult time for Hallowell who, with Holmes recuperating in Boston and the other Abolitionist Harvard officers in Southern prisons, remained the only Harvard officer who favored abolition. Never one to sit silently by, Hallowell challenged Macy: "By what authority do you make New England soldiers do such work?" "In pursuance of my orders from Gen. Stone," Macy replied. . . . Hallowell looked at the Nantucketer and said "slowly and sadly" that "I didn't think that any New England Gentleman would do such dirty work." MILLER, supra note 2, at 97.

[14] *See, e.g. Id.* at 84-104.

[15] Mark De Wolfe Howe, ed., OLIVER W. HOLMES, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL Holmes, JR.. 4 (1947)

[16] *Id.* at 55.

[17] LIVA BAKER, THE JUSTICE FROM BEACON HILL 114 (1991).

[18] Miller, *supra* note 1, at 81-82.

[19] *Id.* at 71.

[20] *Id.* at 13.

[21] *Id.* at 13-18.

[22] BAKER, *supra* note 17 at 121.

[23] 1 Mark DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 111 (1957).

[24] Baker, *supra* note 17, at 121.

[25] *Id.*

[26] Holmes, *supra* note 15, at 21.

[27] ALFRED LORD TENNYSON, "The Charge of the Light Brigade," in SELECTED POETRY 118 (Norman Page ed., 1995).

[28] Ralph Waldo Emerson, "Heroism," in 5 The HARVARD CLASSICS 125, 127-28 (Charles W. Eliot, ed. 1909).

[29] *Id.* at 128.

[30] HOLMES, *supra* note 21, at 38-39.

[31] *Id.* at 46.

[32] *Id.* at 48.

[33] MILLER, *supra* note 1, at 128 (quoting the Civil War Letters of Henry Ropes).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 129.

[37] HOLMES, *supra* note 15, at 51.

[38] Miller, *supra* note 1, at 131.

[39] Holmes, *supra* note 15, at 51.

[40] MILLER, *supra* note 1, at 132.

[41] Holmes, *supra* note 15 at 53.

[42] *Id.* at 55.

[43] Miller, *supra* note 1, at 139.

[44] *Id.* at 145.

[45] Holmes, *supra* note 15 at 60.

[46] Miller, *supra* note 1, at 147.

[47] Oliver W. Holmes, Jr., Memorial Day Address at Keene, New Hampshire (May 30, 1884), in THE ESSENTIAL HOLMES 80, 86 (Richard Posner ed., 1992).

[48] MILLER, supra note 1, at 152.

[49] *Id.* at 151.

[50] HOLMES, *supra* note 15, at 57.

[51] Ralph Waldo Emerson, "Heroism," in 5 THE HARVARD CLASSICS 125, 127-28 (Charles W. Eliot, ed. 1909).

[52] HOLMES, *supra* note 16 at 78

[53] It is interesting that his friend William James uses this phrase to refer to the kind of insistent moral claims that cannot be ignored. WILLIAM JAMES, *The Moral Philosopher and the Moral Life* in THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 210 (1956). After the war, Holmes and James spent many hours discussing philosophy and one wonders whether this short hand description dates from these discussions.

[54] MILLER, *supra* note 1, at 154.

[55] Holmes, *supra* note 15 at 61-62.

[56] Henry Ropes, 1 Civil War Letters of Henry Ropes 265 (1859), http://ia600404.us.archive.org/3/items/civilwarletterso01rope/civilwarletterso01rope.pdf.

[57] *Id.* A different writer adds color to the scene: "The men leaned quietly on their muskets and the officers chatted and smoked their cigars and pipes." MILLER, *supra* note 2, at 174.

[58] *Id.*

[59] *Id.*

[60] Hallowell, supra note 2, at 17.

[61] Miller, *supra* note 1, at 179. Exection involves cutting away the damaged bone and placing two healthy cross-sections back together. As a result of the operation, one of Pen's arms became an inch shorter than the other.

[62] Holmes, *supra* note 15, at 64.

[63] *Id.* at 67-8

[64] *Id.*

[65] Baker, *supra* note 17, at 144 (quoting Dr. Holmes who, describing Holmes during subsequent recuperation from his third wound, wrote that "he was not at all nervous, as when he was last wounded").

[66] Miller, *supra* note 1, at 75; *see also id.* at 79 (where he describes Fredericksburg as an "infamous butchery in a ridiculous attempt").

[67] *Id.* at 201.

[68] Holmes, *supra* note 15, at 74.

[69] *Id.* at 76.

[70] *Id.* at 77.

[71] *Id.* at 80.

[72] Miller, *supra* note 1, at 217.

[73] *Id.* at 182

[74] *Id.* at 218

[75] Baker, *supra* note 17, at 141.

[76] Holmes, *supra* note 15, at 92.

[77] Baker, *supra* note 17, at 144

[78] Holmes, *supra* note 15, at 51.

[79] Letter from John Ropes, at Harvard Law School, The John G. Palfrey (1875-1945) collection of Oliver Wendell Holmes Jr. Papers, 1715-1938. Family and Personal Material, Civil War: Civil War Scrapbook created by OWH, 1861-1865. http://nrs.harvard.edu/urn-3:HLS.Libr:18154137n=18
[80] Holmes, *supra* note 15, at 123.
[81] *Id.* at p.122, note 1.
[82] G. Edward White, Oliver Wendell Holmes, Jr. (2006).
[83] Baker, supra note 17, at 145.
[84] Holmes, *supra* note 15, at 122, n.1.
[85] Miller, *supra* note 1, at 315.
[86] After the slaughter at Gettysburg, all who remained of Holmes' friends in the officer corps were Macy and Abbott. Furthermore, thanks in part to the growing practice of foreign recruiting, German was replacing English as the most spoken language in the Regiment.
[87] Holmes, In Our Youths Our Hearts Were Touched With Fire, Memorial Day Speech delivered May 30, 1884, at Keene, N.H., before John Sedgwick Post No. 4, Grand Army of the Republic.
[88] *Id.*
[89] Generally, the term "Copperhead" was applied to those who were so opposed to the war that they encouraged various forms of resistance. Obviously the soldiers in the Twentieth who were called "Copperheads" were not so extreme in their views.
[90] Howe, *supra* note 24, at 158, n.1.
[91] Holmes, *supra* note 15, at 117.
[92] *Id.* at 112.
[93] Charles L. Page, Letters Of A War Correspondent 176-7 (1899).
[94] There is much ambiguity about the continuing life of the regiment. The Twentieth had been riddled once again by losses and was ultimately absorbed into another unit. Furthermore, even as the unit continued on, there was no place left for him on the line. After Abbott's death and Macy's wound, a man named Magnitzky had taken command. Magnitzky was a German-speaking soldier who began the war as a non-commissioned soldier in Holmes' company. Holmes thought well of Magnitzky—he would later hire him as an office manager in his law practice—but he was not about to serve under him. Nor would he attempt to upset the command structure as Revere did after Fredericksburg. Even a staff position was not available. General Sedgwick had been killed in the recent fighting and the command structure was being consolidated as the Federal Armies were gathering in one place. His alternative at that point would have been to join a new unit.
[95] Holmes, *supra* note 15, at.143 (citing this as a reason to give Governor Andrew and adding, "Nothing further need be told abroad"). *See also* Letter to Agnes Pomeroy, "I find myself too weak from previous campaigns to do the duties of an officer of the line properly. *Id.* at 143, n.2.
[96] *Id.* at 143.
[97] *Id.* at 149.
[98] *Id.* at 150.
[99] Miller, *supra* note 1, at 399.
[100] Holmes, *supra* note 17 at 80.
[101] Douglas Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008).
[102] Baker, *supra* note 17, at 105, Felix Frankfurter papers Library of Congress.
[103] *See, e.g.*, Edmund Wilson, Patriotic Gore: Studies In The Literature Of The American Civil War (Oxford U. Press 1962)
[104] Saul Touster, *In Search of Holmes from Within*, 18 Vand. L. Rev. 437 (1965).
[105] *Id.*
[106] The same cannot be said of an article by Yosal Rogat, which describes nothing that is positive about Holmes' character. Rogat's assessment was that the war had left Holmes with certain moral weaknesses that made him unappealing both as a judge and as a human being. *See* Yosal Rogate, The Judge As Spectator, 31 U. Chi. L. Rev. 213, 253-6 (1964).
[107] G. Edward White, Oliver Wendell Holmes, Jr. 79 (2006).
[108] *See e.g.* Touster, *supra* note 104, at 472.
[109] White, *supra* note 107, at 70. ("His concept of duty had thus progressed from the idea of fidelity to a cause to that of loyalty to a regiment and finally to that of loyalty to oneself.").
[110] Albert Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes 50 (2000). The conventional view to which he refers is not White's harsh judgment but the milder one by Robert Gordon: "The war experience may have laid the foundations of Holmes's aloof detachment, his disengagement from causes and distrust of enthusiasms, and the bleakly skeptical foundations of his general outlook, according to which law and rights were only the systems imposed by force by whatever social groups emerged as dominant in the struggle for existence." Robert W. Gordon, *Introduction: Holmes's Shadow*, in The Legacy Of Oliver Wendell Holmes, Jr. (Stanford University Press, 1992).
[111] *Id.* at 49.
[112] *Id.*
[113] *Id.* at 50. The quotes from Holmes are obviously taken out of context. Neither statement was casually made at a dinner table. The first, for example, comes from a letter in which he was explaining why he found Jane Austen dull. *See* Wilson, *supra* n. 103, at 761.
[114] Touster, *supra* note 104, at 471.
[115] In fact, Alschuler's sympathy seems a little ambivalent: "If Bob were a war hero, however, your response

might be somewhat different. The crusty talk of soldiers is part of their charm. This talk may be a way of reminding an audience of an old soldier's history without quite boasting." Alschuler, *supra* note 110, at 50.

[116] *Id.* at 181.

[117] That this is the nature of his question is evident in the answers he gives. According to Alschuler, Holmes has an undeservedly good reputation because of: (1) "his height (six foot three), his eyes, his bearing, and his mustache;" *id.* at 181, (2) "the lack of plausible liberal heroes on the bench of the U.S. Supreme Court;" *id.*, and (3) "the public relations efforts on Holmes's behalf . . . by Felix Frankfurter and other young admirers of Holmes." *Id.* at 182.

[118] Baker, *supra* note 17, at 179.

[119] He went climbing with Leslie Stephen and the climbs were difficult enough to earn him membership in the London Alpine Club. *Id.* at 185-6.

[120] *Id* at 193. *See also*, RALPH BARTON PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES (1996).

[121] *Id.* at 199. *See also*, SHELDON M. NOVICK, HENRY JAMES, THE YOUNG MASTER (2007) for a fuller account of this relationship.

[122] In a memorial to Shattuck, Holmes wrote: "Young men in college or at the beginning of their professional life are very apt to encounter some able man a few years older than themselves who is so near to their questions and difficulties and yet so much in advance that he counts for a good deal in the shaping of their views or even of their lives. Mr. Shattuck played that part for me." OLIVER WENDELL HOLMES, MEMOIR OF GEORGE OTIS SHATTUCK 10 (1900). He also said: "From the time when I was a student in his office until he died, he was my dear and intimate friend." *Id.* at 22.

[123] JAMES B. KENT, COMMENTARIES ON AMERICAN LAW (Oliver Wendell Holmes ed., 12th ed. 1873).

[124] For a description of the relationship between Holmes and Dixwell, *see* Baker, *supra* note 17, at 218-230.

[125] His major writings during this period include: Codes and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870); Oliver Wendell Holmes, *The Arrangement of the Law—Privity*, 7 Am L. Rev. 46 (1872-3); Misunderstandings of the Civil Law, 6 Am L. Rev. 37 (1871); *Theory of Torts*, 7 Am L. Rev. 652, (1872-3); *Gas Stokers Strike*, 7 Am. L. Rev. 582 (1872-3); *Primitive Notions in Modern Law I*, 10 Am L. Rev. 422 (1875); *Primitive Notions in Modern Law II*, 11 Am. L. Rev. 641 (1877); *Possession*, 12 Am. L. Rev. 688 (1877); *Common Carrier and the Common Law, 13* Am. L. Rev. 609 (1879); and *Trespass and Negligence*, 14 Am. L. Rev. 1 (1880).

[126] OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

[127] He was appointed to the Harvard Law faculty in January 1882 and to the Massachusetts Supreme Judicial Court in December 1882.

Justice Holmes and the Civil War

Editor's Note: The following is a transcription of a panel discussion that took place at the Supreme Court on May 8, 2014, as part of the Supreme Court Historical Society's Leon Silverman Lecture Series. Scott Harris, the Clerk of Court, introduced the panel and Professor Brad Snyder acted as moderator. Historians James M. McPherson and G. Edward White were the distinguished panelists.

Remarks by Professor James M. McPherson about the Civil War:

Everyone who knows something about Oliver Wendell Holmes, Jr., is familiar with the famous passage from his Memorial Day address in Keene, New Hampshire, in 1884. "Through our great good fortune," said Holmes on that occasion, "in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing... We have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us."

The fire that touched Holmes' heart was of course his service in the Civil War two decades before he delivered this speech. At the age of twenty, in 1861, Holmes had been commissioned a first lieutenant in the Twentieth Massachusetts volunteer infantry. He rose to captain in this regiment, one of the best in the Army of the Potomac and one that suffered the fourth-highest number of combat deaths in the entire army. Holmes twice came close to being numbered among those dead, from serious wounds he received at the battle of Balls Bluff in October 1861 and at Antietam in September 1862. His third wound, a piece of shrapnel in his heel at the Battle of Chancellorsville in May 1863, appeared less serious at first but required the longest period of convalescence before he could return to his regiment—to the Sixth Corps in March 1864. By then he had transferred to staff duty with General Horatio Wright, a safer post than as a line officer in an infantry regiment but one that proved more exhausting and dangerous than he had anticipated. On one occasion he was almost captured.

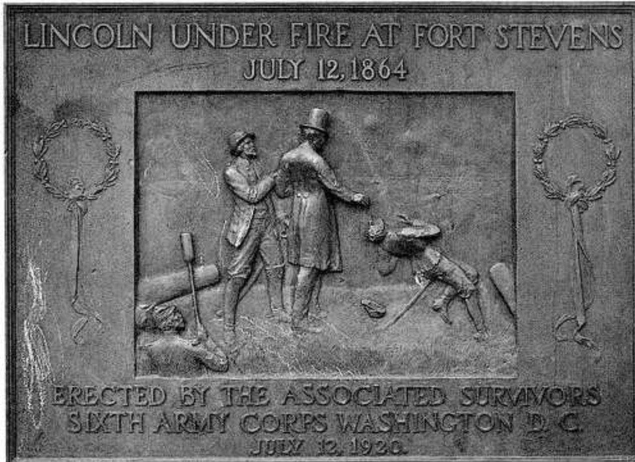
At the end of his three years enlistment, Holmes mustered out in July 1864 and enrolled at Harvard Law School. Holmes' youth was, therefore, certainly "touched with fire." And his experience in the war did indeed teach him that life was a profound and passionate thing that could come to an end at any moment.

As it happened, however, he lived another seventy-two years after the third of his Civil War wounds. During those seventy-two years, he alluded to his war experiences on several occasions in conversations with friends, but rarely in public. In fact, his Memorial Day address in 1884 was his first public reference to the war since shortly after he had had been mustered out twenty years earlier. Thousands of books appeared about the Civil War during Holmes' lifetime, but he read almost none of them. He did not join any of the veterans' organizations like the Grand Army of the Republic or the Loyal Legion of the United States or the Twentieth Massachusetts Veterans Organization. He did not attend any of the many reunions of soldiers who wore the blue that took place during the postwar decades. He showed little passion or activism toward the issues of nationalism and freedom that had motivated his enlistment in 1861 and for which he had periled his life for three years.

During his time as a student at Harvard College from 1857 to 1861, Holmes had been an abolitionist. He was a distant cousin of Wendell Phillips, one of the most militant of Boston abolitionists. Holmes' best friend in college was Norwood Penrose Hallowell, a fervent abolitionist from a Philadelphia Quaker family. Holmes and Hallowell formed part of Wendell Phillips' bodyguard during the abolitionist riots in the winter of 1860-1861. They enlisted together in the Twentieth Massachusetts after graduating from Harvard, when Hallowell's antislavery convictions trumped his Quaker pacifism. In February 1863, Hallowell accepted a commission as lieutenant colonel in the new Fifty-Fourth Massachusetts infantry, the first black regiment officially organized in the north. He tried to persuade Holmes to take a commission as a major in this regiment, where together they could help advance the cause of abolition and equal rights. Holmes was not interested. Hallowell went on to fight in the Fifty-Fourth, to command another black regiment, to work on behalf of black rights for the rest of his life, and to help found the NAACP forty-five years after the end of the Civil War.

While Holmes showed little if any interest in this cause, Holmes and Hallowell drifted apart over the years. And Holmes' circle of close friends during those years included few Civil War veterans. If Holmes' heart was touched with fire in the early 1860s, the fire appeared to have flickered and gone out in later years. Or maybe not. Perhaps the flame of a commitment to a cause with a capital "C" had been transmuted into a commitment of a cluster of values described by such words as duty, honor, and professionalism. Holmes hinted at such a transmutation at his next public reference to the Civil War eleven years after his Memorial Day address when he spoke of the soldier's faith at a ceremony at Harvard to award him an honorary degree in 1895. "I do not know what is true." He said on that occasion, "I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use."

Now the point is not whether Holmes was right about the soldier's lack of understanding. I think that most Civil War soldiers did understand the cause for which they fought and had some understanding of



Holmes and Abraham Lincoln were both at Fort Stevens when Jubal Early's Confederate troops approached Washington D.C. in July 1864. Was Holmes the soldier who warned "Get down you damn fool" when the President was peering over the parapet and the bullets were flying?

strategy and tactics. The point is that Holmes now admired the soldier's faith not in an ideological cause, but in duty and honor. By 1863, midway through his Civil War service, Holmes' closest friend in the army—his true model, if you will—was no longer Penn Hallowell but Henry Abbott, who was actually a year younger than Holmes. Abbott's ideological convictions were 180 degrees contrary to those of Hallowell and initially to those of Holmes himself. Abbott was a Democrat, almost a Copperhead, who was contemptuous of abolitionists, blacks, Republicans, and Abraham Lincoln. Yet Holmes struck up a friendship with Abbott that turned into admiration for Abbott's extraordinary courage and cool professionalism under fire. Abbott was a superb soldier, the best one in an outstanding regiment, whose death commanding the regiment at the age of twenty-two in the Battle of the Wilderness, profoundly affected Holmes.

According to Louis Menand, and I think he is right, the example of Abbott convinced Holmes that nobility of character consists in doing one's job with indifference to ends, and to rate the professionalism and discipline of the soldier higher than the merits of any particular cause. Or to return to Holmes' own words, "the highest value is that which leads a soldier to throw away his life in obedience to blindly accepted duty." It is beyond my competence to evaluate Holmes' judicial philosophy or to trace any kind of direct relationship between his Civil War experience and his decisions as a justice on the Massachusetts Supreme Court and then on the United States Supreme Court. But I think I can see a connection between the evolution of his mindset as a soldier from idealism to pragmatism—a connection between that and the famous first sentence in his book, **The Common Law**, "The life of the law has not been logic, it has been experience."

Many of his decisions and dissents on the Supreme Court, as I understand it, reflected this pragmatism, reflected a willingness to allow state legislatures or Congress to experiment with legislation that might, or might not, accomplish its purpose but should not be declared unconstitutional just because it may have violated some principle or precedent. As a Justice he could not conveniently be characterized as a liberal or a conservative. He did not really believe in the efficacy of many reform efforts by Progressives, but he did believe in allowing them to make the effort. He was skeptical of some

aspects of the New Deal but convinced of the necessity to do something.

When President Franklin D. Roosevelt spoke with Holmes four days after his inauguration in 1933, Roosevelt asked Holmes if he had any advice for dealing with the crisis facing the country. "You were in a war, Mr. President," Holmes is quoted as replying. "I was in a war too. And in a war there is only one rule. Form your battalions and fight."

Remarks by Professor G. Edward White about Holmes:

I think Jim McPherson has done an excellent summary of Holmes' Civil War experiences and I am not going to repeat that. I do want, however, to suggest that the cumulative experience of the war for Holmes left him with considerable ambivalence. First of all, he mustered out when his initial term of enlistment expired, and he did that after considerable soul searching. As late as a month before he made the decision, he had written a letter to Charles Eliot Norton talking about how he had been inspired by an account that Norton had given of the Crusaders, and he likened the participation in the war to a crusade on behalf of the whole civilized world, and then ended the letter by saying he planned to re-up—"It will not do to leave Palestine yet." But at the time he wrote the letter he was to face the last of a series of harrowing experiences—the Chancellorville and Wilderness campaigns—where, as he put it one time in a reminiscence, "The bodies of men lay six feet deep in corpses" as he rode his horse on a walk, as he put, it "through the blue line."

And finally he comes to the realization that he just can't go back because, among other things, if he does go back he is not going to be able to go back as an aide, a position that kept him largely out of the line of fire, but back into his infantry unit. And as he says to his mother, "I am waiving promotion and I am not going to reenlist. The sufficient reason is that I can no longer endure the horrors of the line." And he said, "I know I can face a thing coolly when it's my duty, but war demoralizes me as it would any nervous man." So he left. And he left with a fair amount of guilt. His comrades and friends like Abbott had died. He had survived and he had left before the war ended.

So I think one of the reasons that Holmes doesn't participate in any of the veterans' ceremonies—indeed any of the occasions making a formal remembrance of the war—is that feeling of ambivalence. And I also think that that's the source of a kind of romanticization that he lends to his reminiscences of the war, where he remembers that this was a crusade, where he remembers this splendid carelessness that the soldier has in throwing his life away for a cause that he doesn't necessarily understand. At the same time there is a good deal of private pride that Holmes takes in having been in the war.

After the first decade of Holmes' tenure on the Supreme Court, he realizes that he can do the work in comparatively short time, and yet it is a collegial body and he has to wait for his colleagues to catch up with him. The Court's Conference was held on Saturdays during Holmes' tenure (1902-1931). The assignments for opinions would be dealt out after the Conference on Saturday. Holmes would take his assignment home and produce his opinion, approximately by Tuesday. He would then ask the Chief Justice if he could do another one. He would volunteer to write opinions that other Justices were struggling with. Chief Justices had to rein him in because of these tendencies. So not being able to do the full amount of work that he would have desired, he turned to writing, to correspondence.

And in the correspondence with some of his intimate friends, he noted the anniversaries of his war wounds or particular battles. When he died and the contents of his house

were surveyed, two items turned up. One of them was in a bedside table, and it was a little tiny case containing two bullets, and there was a little memorandum next to the bullets, crammed in, saying, "these are bullets taken from me in the Civil War." In the closet in his bedroom were two uniforms and on two of them were pinned "these are the uniforms I wore in the Civil War and this is my blood."

So Holmes had a kind of secret pride in participating in the war. But there was also an awkward memory, which explains why Holmes tends to emphasize, in his accounts of the Civil War, the soldierly ethos that Professor McPherson has alluded to. This is why he admires Abbott. And his admiration for Abbott is another side of his self-loathing. He recognizes that in the war—to paraphrase one of his letters: "one of the things that I learned in the war is that just because I am more educated than other people and possibly more intelligent than some people, I wasn't necessarily a better soldier and was possibly a deficient soldier."

I think it is hazardous to draw much about his judicial career from those experiences. I think they were very important experiences in his life. By life, I mean his whole life—for much of his career on the Court, he had a full extrajudicial life, which included correspondence and flirtations with women, a romance with Clare Castleton, and affectionate relationships with his law clerks. But I am loathe to suggest that there was much connection of a direct kind between his jurisprudence and his Civil War experience.

One has to bear in mind that, when Holmes left the Army of the Potomac in July 1864, he was twenty-three years old. In the next eighteen years he would go to law school, be accepted to the Massachusetts bar, begin with a law firm, become an editor of and contributor to the *American Law Review*, edit the twelfth edition of James Kent's **Commentaries**, write a series of articles in the *American Law Review* between the early 1870s and 1880 on a variety of subjects, write the lectures that he delivered that would become **The Common Law**, and be appointed to the Harvard Law faculty. He stayed there for one year, leaving so suddenly that his colleagues on the faculty, including James Bradley Thayer, who had raised money for a chair for Holmes to take when he joined the faculty, were thunderstruck and outraged. He consulted none of them when he accepted the position on the Supreme Judicial Court of Massachusetts. And it took over fifteen years before Harvard granted Holmes any official recognition, even though by that time he had gone on to become an associate judge and then chief judge on the Supreme Judicial Court of Massachusetts. So there is a lot going on in those eighteen years between the time he leaves the army and the first time he steps on to the bench. It's all law. It's a sampling of every professional role that the legal profession presents. And an immersion in those notes that was very intense. On one occasion Holmes was dining with Henry and William James's family and he brought with him to the dinner table one of those green bags, that is, a bag containing a manuscript that students used at the time.

And he had in the bag the manuscript of his edition of Kent's **Commentaries**, the twelfth edition, which was to come out in 1871, and William James's mother says "Do you bring that bag with you to the table all the time?" And he says, "Oh yes, yes I do." And she then describes him as a powerful machine carved to narrow out a self-beneficial groove through life. His friends and colleagues note his intensity. So this is not a trivial pursuit that he is engaging in: the law is very important for him; he struggles with understanding why it appeals to him. He finally concludes that it is worthy of an intelligent man, and so he throws himself into it. And so I think what Prof. McPherson has described as his pragmatism is hard for me to trace to his Civil War experience. And with respect to his

abolitionism, there is a considerable transformation of his attitude while he is in service, and it's away from abolitionism.

He says, later on in his life, that his heroes in the war were more on the Confederate side. He admired their courage, he admired their soldierly abilities. When he turns down Penrose Hallowell's offer to join a regiment that would be composed of African-American soldiers, he tells this to his friend, Henry Abbott, and Abbott writes him a letter saying "I am glad you didn't worship at the shrine of the great nigger." Holmes' record on civil rights issues as a Supreme Court Justice is not exemplary. He is probably in an era in which the Court's support for civil rights was grudging at best. Holmes is even more grudging than many of his colleagues. So, if there was an initial enthusiasm for abolitionism it dissipated in the war. I think the greatest impact of the war on Holmes' work as a judge and a scholar comes in this double transformation that he made from the idea of the war being a crusade to admiration for the ethos of the soldier's faith.

And then it takes yet another turn. When Holmes begins to do scholarship and be a judge, he begins to liken intellectual enterprise to something like a solitary hazardous journey. He begins to wrap himself in a cult, which is later called "jobbism," the idea that you just do your job as best you can and leave it at that. There is a remarkable passage in an address that Holmes makes on the fiftieth anniversary of the Harvard class of 1861 in 1911 in which he says to an audience—something like seventy percent of that class fought in the war—and he says, "I learned in the regiment and the class to hammer out as solid and compact a piece of work as one could, to try to make it first rate and to leave it unadvertised." Now that's a good encapsulation of Holmes' attitude to his academic work. But did he learn it in the class and the regiment? I think not. Or put it another way, I think only in translation.

Panel Discussion

Professor Brad Snyder:

What I am really interested in is that Holmes as a Justice was considered a philosopher king. People have had a field day with his different philosophies. During the war he made a transition from abolitionism to something else, and I think there is a disagreement about what that something else is. Professor McPherson said it was pragmatism. Louis Menand would say it would be skepticism of all ideas. And then Professor White was resisting the idea toward the end that it was "jobbism," that that was constructed later on and that that is not really what the war taught him at all. In his book Professor White says it was an "an unadvertised professional craftsmanship" is what the war taught him? Are these competing narratives about Holmes' philosophy, are they mutually exclusive, are they consistent, are they contradictory? Which narrative do you buy most about Holmes' thinking?

Professor James M. McPherson:

I see no inconsistency between the idea of Holmes as a pragmatist and his jobbishness. What he admired most was a kind of professionalism of doing the job right, of getting things right, not exactly a perfectionism, but whatever works, and that seems to me the essence of pragmatism. One of his close friends during much of his life was William James, who was the architect of the philosophy of pragmatism. I think this admiration of Abbott, the professionalism, the courage, the devotion to duty, and to honor, really replaced the idea of devotion to a cause. Because of Holmes' Civil War experience that evolves into pragmatism. But I don't see this pragmatism as being at all inconsistent with what Professor White described either.

Professor G. Edward White:

I think we are talking about two related but different things. I entirely agree that the cult of jobbism is a translation of the ethos of soldiering. I think that Holmes gets it from

that—he doesn't explicitly acknowledge the connection—but he feels as if he is trying to do his job the best he could in the same manner that Henry Abbott was trying to do his job the best way he could.

But scholars have attempted to describe Holmes as a pragmatist. First, I think they have to reckon with a letter that Holmes wrote to William James when James published a book on pragmatism. William James and Holmes had been close in the 1860s. Those were the days when they were both participants in the Metaphysical Club. James went abroad to study medicine, and he and Holmes organized the club and they had a lot of correspondence about philosophy. Holmes was very interested in philosophy—in fact, that interest leads to one of the concerns he has about whether he will ever catch on to law school: will law school be that interesting? But once Holmes goes to law school and finally gets immersed in things, he begins to separate himself from the Jameses and indeed from his college friends generally. He and William James don't have much contact after that. When Holmes writes James that later letter about pragmatism, his comment is not favorable. Pragmatism he says, may be "an empty humbug." He is asking whether pragmatism does anything as a philosophy. I don't think one can make Holmes into Brandeis, who was all for experimentation at the state level, at least if it suited his particular agenda. One could probably say that Brandeis might have embraced pragmatism.

But there is not a single line that I have found in Holmes's papers or his writings that identifies him explicitly with the pragmatic approach, and I don't think it's consistent with his temperament. I don't think Holmes is a Mr. Fix-it Guy. I don't think Holmes is a facilitator and an accommodator. I think he is largely aloof, detached, independent. He certainly wasn't much of a "player" on the Supreme Court. He was very affectionately disposed toward his fellow Justices but there is very little sense that he was acting like Justice Brennan, or someone who is really enjoying the politics of the institution and trying to persuade people to take positions that Holmes would endorse. Holmes goes his own way. I realize that I am perhaps in the minority among Holmes scholars, but I resist the pragmatic label.

Professor Brad Snyder:

There has been a recent book called **Harvard's Civil War**, about the Twentieth Massachusetts regiment, by a historian named Richard F. Miller. What he shows in that book about the Twentieth Massachusetts regiment was that it was divided along ideological lines and along class lines. You had most of the officers being Harvard gentlemen and then you had German troops, Nantucket whalers, and some Irish in the unit. And there was the other division besides class between the abolitionists, of which Holmes was in the beginning but not by the end, and the non-abolitionists led by Henry Abbott.

Did that change Holmes' ideas about class and difference? Because here is someone who befriended a lot of people whom Boston Brahmins wouldn't befriend—Jews—he accepted people of all different religions and nationalities. Did that have any influence on his acceptance of different types of people?

Professor James M. McPherson:

I think his experience in that regiment democratized his social attitudes in many ways. He came to admire courage and all of these different groups, the whaling people from Nantucket, the German-Americans from Boston, the Irish, demonstrated courage because this was a tough regiment. At the same time I think the Harvard caste of the officers—the Brahmin caste to some degree, not all of them were Harvard men but many of them came from the upper middle class of Bostonians—forged a relationship of respect and deference. The officers respected the men and the men

respected the officers, partly because the officers demonstrated their courage and their skill of leadership and I think that's what forged the regiment into such an outstanding one. Even though one would not originally see this as a promising mix, but it turned out to work very well and I think that probably had something to do with Holmes' sense of professionalism as being one of the highest values.

Professor G. Edward White:

There is no question that when Holmes enlists he thinks his enlistment is a "class" contribution, a kind of noblesse oblige on the part of he and his Porcellian colleagues at Harvard to go out and fight for this particular cause. That is why the term "chivalry" comes up, a nineteenth-century version of the Knights of the Round Table in Holmes' consciousness. I agree that his experience in the regiment is democratic. It sticks in my craw to use the term "democratizing" in connection with Holmes, it is really hard to think of Holmes as a democrat. He is, after all, the author of a letter that says "I loathe the thick fingered clowns that are the people." But he recognized that there were people in this regiment from different backgrounds than his, less "distinguished" backgrounds, that are better soldiers. They are dealing better with the stresses of war than he is. So I think that's important.

With respect to Holmes' tolerance, it is often cited that he had close friendships with people who were Jewish, or who were Chinese. I have a couple things to say about that. First, he clearly has a love/hate relationship with his own social class in Boston. When he goes on the Supreme Judicial Court of Massachusetts he writes some opinions that are not regarded from the point of view of some of the solid citizens of Boston, as "appropriate." They are a little too intellectual. There is a quote from Senator George Frisbee Hoar of Massachusetts, who opposed Holmes' Supreme Court nomination, when Henry Cabot Lodge and Theodore Roosevelt decided to appoint Holmes to the Court. Lodge and Roosevelt knew Hoar was going to oppose Holmes, so they just went ahead and nominated him and consulted Hoar later. They knew once Holmes was nominated that Hoar couldn't oppose Holmes because he was the chief judge of the the Supreme Judicial Court of Massachusetts—how is the senior senator from Massachusetts going to say "no" to that? But Hoar nonetheless wrote a letter that said, in effect, "I think there are a lot of solid old timbers in the Massachusetts bar and I wonder whether carving a judge out of ornamental ivory would be better." And then there is the famous colloquy between Edward Atkinson, the capitalist turned philanthropist, after Holmes' speech "The Soldier's Faith" was published. Holmes ran into Atkinson in Boston, and Atkinson said, "I read your speech, I don't like it. It's bad morals and bad politics."

In short, as Holmes suggested in a letter he wrote to Frederick Pollock after being nominated to the Court, that some solid citizens of Boston thought he was not reliable, that he was too intellectual, too ornamental. Holmes resented that. With the exception of John Chipman Gray, he didn't have intimate adult friends drawn from the Brahmin group. His intimate friends, after he went on the Supreme Judicial Court of Massachusetts, fell into two categories. One group was women, whom he just enjoyed—maybe there had been some flirtations earlier in their lives, but now they are just friends: John Chipman Gray's wife, Nina, Baroness Moncheur, and several others. The other category is people with whom he has engagement and intellectual affinity. Holmes doesn't mainly care who you are, socially, if you show evidence that you have paid attention to issues that Holmes is interested in. Whether you are John C. H. Wu or whether you are Louis Einstein or whether you are Felix Frankfurter, or whether you are Harold Laski, or whether you are Sir Frederick Pollock (from a very different

background), Holmes is happy to talk to you about anything that interests him.

But that is a very different kind of intimacy. That is a very structured intimacy. It's the intimacy of the correspondence relationship. There is a story about Laski, who is many years younger than Holmes. Laski and Felix Frankfurter are age contemporaries; both are forty years younger than Holmes. Holmes has taken to Laski, and Laski sends him books. Over Holmes' life, he receives more letters from Laski than any other one correspondent. Finally, five or six years into the correspondence, Laski proposes that they call each other by their first names. They have been writing "My Dear Holmes," "My Dear Laski." Laski sends Holmes a letter and signs it "Harold." Holmes writes back "My Dear Laski." That's all I have to say.

Professor Brad Snyder:

We would be remiss if we didn't talk about Fort Stevens in the Civil War. Was Holmes at Fort Stevens with President Lincoln when Jubal Early's Confederate troops were approaching Washington D.C.? Is his quote about telling Lincoln to "Get down you damn fool" apocryphal?

Professor James M. McPherson:

Here is what we know for sure. President Lincoln was there on July 11; he was peering over the parapet while the bullets were flying and some soldier told him to "Get down." He may have said it, "Get down, you fool," or he may have said, "Get down you damn fool." But we know that somebody did, because Lincoln told John Hay about it that evening, that some soldier had gruffly told him to get down, and Hay recorded it in his diary. We don't know whether Holmes was there on the 11th; we do know that Holmes was there on the 12th. The next day Lincoln was there. And, on this occasion, General Wright told Lincoln to get down. I would like to believe that it was Holmes who told Lincoln on the 11th to get down. But we don't know that for sure. I suspect it was somebody else but I wish it was Holmes.

Professor G. Edward White:

I have reason to doubt that it was Holmes for two reasons. Holmes talked to his close friends about particular experiences that he had in the Civil War. He talked to his law clerks about them; his law clerks remembered several conversations. When he would remember the days of wounds, he would sometimes make other allusions to things. And he did write a letter that demonstrates that he was at Fort Stevens when Lincoln was there. And he actually mentions the fact that Lincoln was there. But he says nothing about any incident involving someone telling Lincoln to get down. That is a little curious. Holmes was very far from being someone who wanted to embellish his participation in things. I think that if he had on that occasion said, "Get down you fool" to Lincoln, he would have simply said that he said that, although he wouldn't have advertised it prominently. But he would have mentioned it to an intimate at some point in his life, and he never did.

The source of the story was Harold Laski, who was a notorious embellisher. And there is no other source for the story. So I am inclined to put this one in the same category as the story that when Daniel Webster made his argument in the Dartmouth College case, there were tears in John Marshall's eyes. It's a good story and somebody tells it at some point in the history of writing up these incidents and it's too good for people not to repeat. That isn't to say it happened.

Professor Brad Snyder:

I wanted to talk about Holmes' views about Lincoln. Not only was Holmes, after his wartime experience, ambivalent about the war, but he was also ambivalent about Lincoln. When people asked him about Lincoln later on, he didn't really put Lincoln even in the great man category. I was curious as to why you thought that?

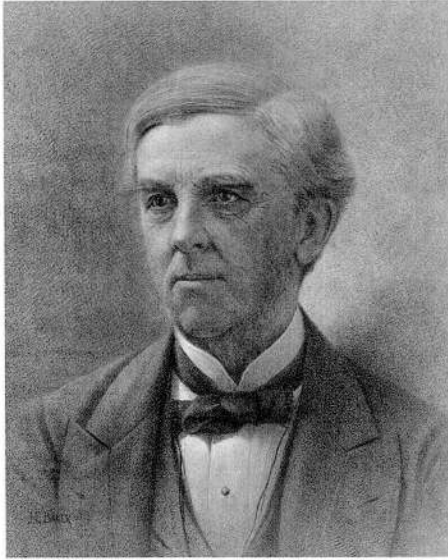
Holmes often told his law clerks stories about his experiences in battle. He is pictured here in his home office with his last law clerk, James H. Rowe.

Professor James M. McPherson:

I don't really know the answer to that question, I have been curious about it too. I find it a little bit puzzling. I think he did vote for Lincoln in 1864; there is no doubt about that. He didn't in 1860 because he couldn't yet vote in 1860. But you are quite right that he never really expressed the kind of reverence for Lincoln and admiration for Lincoln and profound respect for Lincoln's leadership and what Lincoln stood for that one might have thought and that his father Holmes, Sr., did. And it may have to do with the kind of skepticism with which he emerged from the war about so much of everything. But it still does puzzle me and I don't have a good answer to that question.

Professor G. Edward White:

Holmes comes out of the war with a very strong sense of what a mess the campaigns were. The experience of the Army of the Potomac would have confirmed that. For long periods in Holmes' service, he is wading through swamps trying to get from the Virginia northern neck area to Richmond in two different abortive efforts to invade Richmond. He sees people randomly shot; he gets randomly shot. He sees people run to their deaths because someone gives them a wrong order. He never has any sense of what the general plan of the war is. And so he may have associated Lincoln with the strategists of the war and thought that it was a cock-up. And he partly blamed Lincoln for that. And then of course he came out of the war no longer an abolitionist. He had a much more ambivalent attitude toward the Confederates and the returning Confederates. So he had no particular reason to lionize Lincoln, and lionization wasn't Holmes' style. He wrote a lot of affectionate tributes to people on their deaths,



Holmes had an ambivalent relationship with his father, a successful author and man of letters. He tried to distance himself from Oliver Wendell Holmes, Sr., (above) by choosing to enter the legal profession.

and said some nice things about them. But fulsome praise was not his métier. I can image his having an attitude toward Lincoln of increasing detachment.

Professor Brad Snyder:

One thing we haven't discussed today is that Holmes was the son of a very famous father at the time. His father capitalized on his son's words at Antietam by writing a very famous *Atlantic Monthly* story, "My Hunt After the Captain." I know you can make too much of the story and his Oedipal struggle to escape his father's shadow and I don't mean to be that reductivist, but do you think that this created an estrangement between Holmes and his father or at least put a distance between them? Did the fact that his father was an ardent abolitionist both before and after the war and Holmes was not an abolitionist by the end of the war cause a strain in their relationship?

Professor James M. McPherson:

It could well be. Ted referred earlier to Holmes' love-hate relationship with his Brahmin class in Boston. I think love and hate may be too strong to describe his relationship with his father. I think he probably did have this ambivalent relationship with his father. On the one hand it was a close relationship, but on the other hand clearly an ambitious young man is going to try to escape from the shadow of a very prominent man, especially as he is moving into a very different profession.

Professor G. Edward White:

First of all, the generation of Holmes' father was not abolitionist, and Holmes' father was not an abolitionist by the time the war broke out. And so in some ways Holmes' Brahmin contemporaries were making a statement by enlisting. I think Holmes resented the "My Captain" article. Imagine the circumstances. He has suffered his second wound, he is returning home to convalesce. His father then comes down to meet him, and then writes an article in which the thrust is "I, Oliver Wendell Holmes, Sr., who am a household word at the time, am writing about my son. So just don't forget that, even though he is a returning Civil War veteran, that he is my son." I think that Holmes did not appreciate that. Going into the law was a way of distancing himself from his father.

From the Urban Legend Department: McReynolds, Brandeis, and the Myth of the 1924 Group Photograph

FRANZ JANTZEN

James Clark McReynolds (Associate Justice, 1914–1941) might be the single most personally unpopular Supreme Court Justice in history. Anecdotes about his difficult and offensive personality are regularly repeated in most contemporary references to him of any depth, and a number of these refer to insults he directed at his Jewish Brethren. But was he so anti-Semitic that there is no group photograph for 1924 because he refused to sit next to Justice Louis D. Brandeis, as the seating arrangement dictated? Although this story is frequently cited as evidence of just how obnoxious he could be, it is not true.

The Mechanics of the Group Photograph

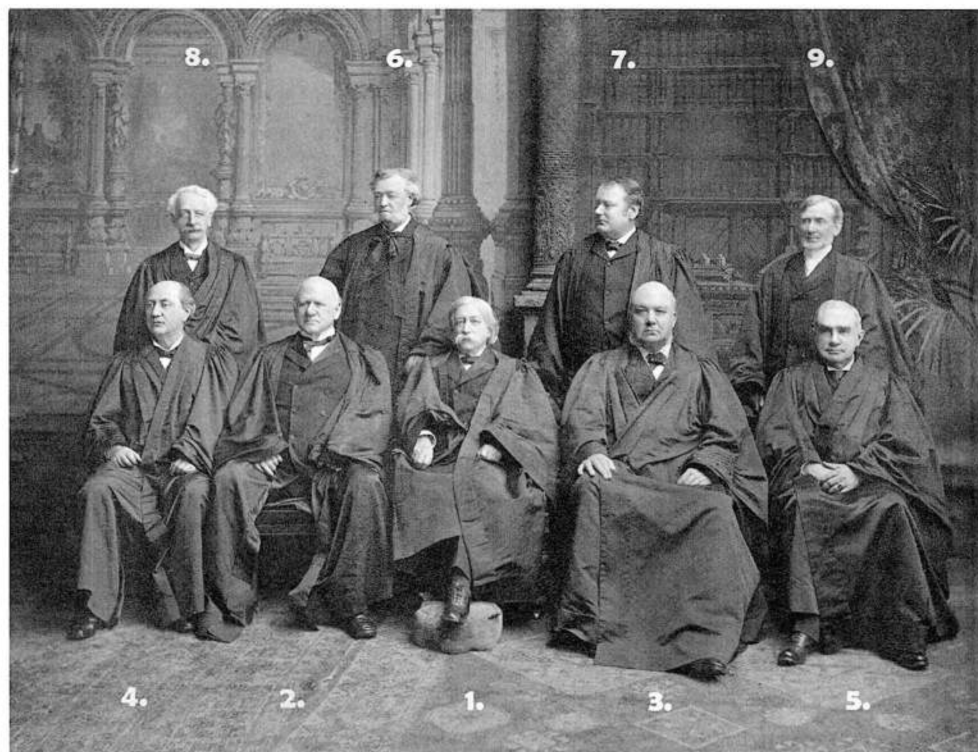
In order to debunk this myth, it is first necessary to review some of the traditions regarding group photographs taken of the Justices of the Supreme Court of the United States.

There is perhaps no visual cue that immediately says "Supreme Court" better than the Justices' group photograph. For the past fifty years, its details have been unwaveringly consistent: five seated and four standing Justices in black robes surrounded by red draperies and carpeting, but, as with all traditions, the particulars have evolved over time. The first sitting Court to gather *en masse* for such a photograph was the Chase Court, who posed for photographer Alexander Gardner in March 1867.[1] The remainder of the nineteenth century was a period of much experimentation during which group photographs were taken intermittently, but by the turn of the twentieth century some of the elements that are familiar today, such as their frequency and arrangement, had been resolved.

While it is often assumed that the Justices pose for a new group photograph every year, it is in fact not an annual event. From the start the Justices have, at first by happenstance and then by tradition, generally gathered together for this purpose only once between changes on the Bench,[2] and the photographs from that sitting are then considered the official photographs for however many years those particular Justices sit together as a group.[3]

Since 1899, the Court has posed for these group photographs in an arrangement that places each Justice in a specific position based on seniority,[4] so nothing is left to chance when it comes to who sits or stands next to whom. This arrangement has five seated Justices in front and four standing behind, with the Chief Justice seated in the middle and the other Justices staggered outward by seniority, first on the Chief Justice's right and then on the Chief Justice's left. This pattern then continues back and forth, front to back, so that the newest member of the Court is always standing in the back row and on the far right of the photograph.

Thus, without any further analysis the story of the 1924 group photograph is wrong on two technicalities. Group photographs had been taken shortly after Justice Edward T. Sanford joined the Court in February 1923, and they would not be taken again until after the next new member of the Court, Harlan Fiske Stone, arrived in March 1925; no new group photograph was taken in 1924 because there simply



The members of the Fuller Court gathered for this photograph at the C. M. Bell Studio before oral arguments on Monday, May 22, 1899. The Court's current seating arrangement was formally adopted at this morning's sitting and has been used continuously since then; it places the Chief Justice (1) in the center with the other Justices staggered outward from most senior to most junior (9). Seated from left are Justices David Brewer and John Marshall Harlan, Chief Justice Melville W. Fuller, Justice Horace Gray, and Justice Henry Billings Brown. Standing from left are Justices Rufus Peckham, George Shiras, Jr., Edward Douglass White, and the junior Justice, Joseph McKenna.

were no new Justices. And, even if a new member *had* joined the Court in 1924, McReynolds and Brandeis would have been separated in the photograph *because* of the seating arrangement. McReynolds immediately preceded Brandeis in seniority (they joined the Court in 1914 and 1916 respectively), so they would either have remained in the same positions as they were in the 1923 photograph, with McReynolds seated at one end and Brandeis standing toward the other, or they would have been seated at opposite ends of the front row, where they can be found in the 1925 photograph.[5]

Alpheus T. Mason and the 1924 Group Photograph That Wasn't Taken

Where, then, did this story come from? It first appeared in a 1965 biography **William Howard Taft: Chief Justice**, by Alpheus T. Mason,[6] who is best known for four books on Brandeis and a biography of Harlan Fiske Stone. In a chapter titled "At The Helm," Mason briefly describes the personalities of each of the Justices on the Court at the time of Taft's arrival. He describes McReynolds as being one of the more difficult:

> McReynolds even refused to sit next to Brandeis for the Court photograph. "The difficulty is with me and me alone," McReynolds wrote the Chief Justice in 1924. " . . . I have absolutely refused to go through the bore of picture-taking again until there is a change in the Court and maybe not then." The Chief Justice had to capitulate; no photograph was taken in 1924.[7]

Mason cites an exchange of two specific letters between Justice McReynolds and Chief Justice Taft as his source.[8] He supports his allegation that McReynolds refused to sit next to Brandeis with selected quotes from the first of the two letters, which is from McReynolds to Taft, but it is necessary to read the complete text in order to determine the true nature of his refusal:

> [March 27 or 28, 1924]
>
> Dear Chief Justice,
>
> Won't you try to dispose of Clinedinst by telling them that the difficulty is with me & me alone, that I have absolutely refused to go through the bore of picture-taking again until there is a change in the court & maybe not then. Just [turn?] them on me as the guilty party. They are impertinent I think.
>
> I don't want to be unreasonably obstinate ~~or of course not [use?] considerate of you~~ or to show lack of consideration for you. But isn't there an old saying—"The hogs eye is sot."[9] But do please tell Clinedinst to go now where they are bound to go by & by unless they reform.
>
> Faithfully yours,
>
> J.C. McReynolds[10]

To which Chief Justice Taft replied:

> March 28, 1924
>
> My dear Justice McReynolds:
>
> I regret that you have reached the conclusion that you have, but in view of your decision, I have notified the other members of the Court that the photograph will not be taken.
>
> Sincerely yours,
>
> [WHT][11]

What Really Happened to the 1924 Group Photograph

As the full text of McReynolds' letter makes clear, it has nothing to do with Brandeis, but with "Clinedinst." His reference is to the Clinedinst Studio, a Washington photography studio that was on all of the Justices' minds in late March 1924. Specifically, they were deciding whether or not to go to the Clinedinst Studio and sit for a group photograph, even though there had not been a change on the Court since the last one had been taken.

At this point, to better understand McReynolds' objections, we must enter the internal politics between Chief Justice Taft and the Washington portrait photographers who would clamor for the chance to take a group photograph of the Court each time a new Justice arrived. During the 1920s, the three studios that regularly vied for this honor were Harris & Ewing, Underwood & Underwood, and Clinedinst. During this period the Court decided who got to take this photograph on a case-by-case basis, and typically one or two studios were chosen, often due in part to their persistence.

Thus, when Justice Sanford joined the Court in February 1923, the studios renewed their letter-writing campaigns to Chief Justice Taft, and he then brought the question of who would take the next group photograph to the Conference. The Justices settled on two studios—Harris & Ewing, which was becoming their mainstay, and Underwood & Underwood—and visited both studios on the morning of Tuesday, April 10, 1923 before Court convened at noon. Both photographs appeared in newspapers the next day.

The Clinedinst Studio, which had photographed the Justices since the 1890s, was not pleased at having been excluded and thus lobbied Taft over the next several months for the opportunity to take its own group photograph of the 1923 Taft Court. Taft finally agreed to try to appease them, and in March 1924 he attempted to rally the Justices for a third sitting.[12] However, Justice McReynolds' refusal to participate sealed its fate, and the subject ended with Taft's reply.

Thus, McReynolds' reasons for refusing to sit for the photograph were not just that it would have been boring but unnecessary: there had not been a "change in the Court"—a new Justice—since the Justices had last sat for a group photograph, at two different studios, eleven months earlier. Enough time had gone by that, to put it succinctly, "the hog's eye is sot," [13] and Clinedinst was also being impertinent by hounding Taft with repeated requests. (All the Justices would have been aware, too, that it would have been unprecedented for the same group of sitting Justices to pose for a third photographer).

Although McReynolds' objection clearly had nothing to do with Brandeis or the seating arrangement, Mason inexplicably found otherwise. By summarizing and quoting as he did, he inferred that the letter was proof of anti-Semitism. The legitimacy of this error was cemented by Mason's reputation as a scholar and historian, and the damage was done.

From Footnote to Folklore

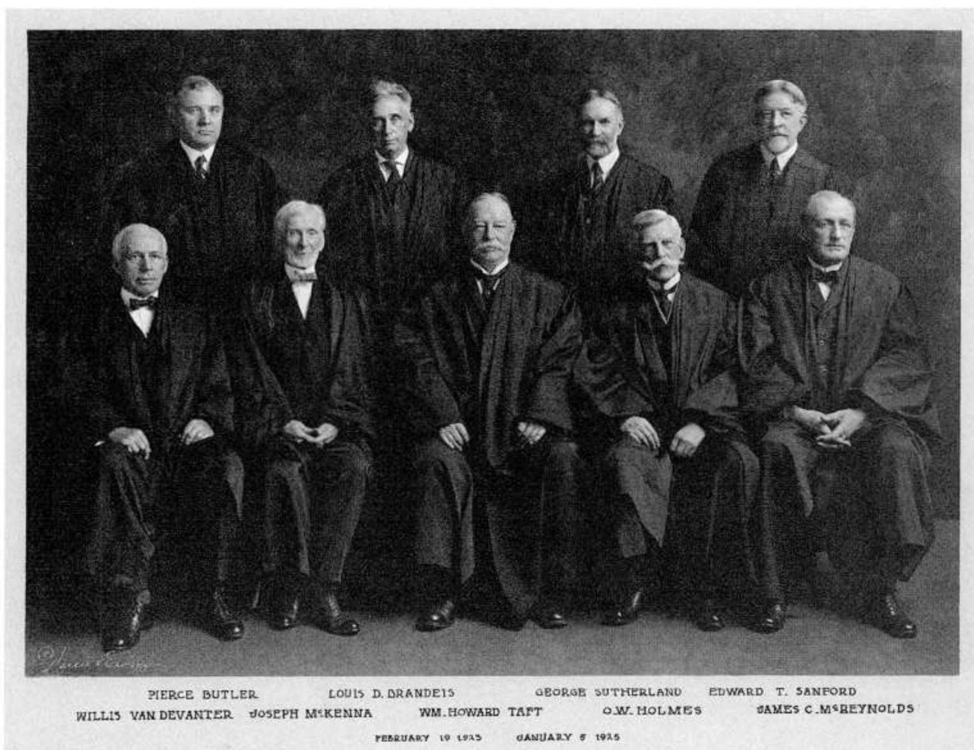
Because Mason's story is a mere four sentences long and appears in a biography of Taft but has nothing to do with Taft, his jurisprudence, or the work of the Court, it would likely have been an error that would be overlooked by history. However, shortly after the book's publication it was prominently repeated in a full-page review in *The New York Times Book Review*[14] by Alan Westin, a professor of public law and government at Columbia University, and this may have helped give it a crucial nudge toward its current popularity.

In his review, Westin went out of his way to repeat Mason's entire paragraph about

McReynolds, whom he characterized as "the insufferably rude Neanderthal." In Westin's hands, the story became: "McReynolds refused to sit for the Court's annual photograph in 1924 because seniority arrangements would have placed him beside Brandeis." Westin not only did not recognize the flaws in Mason's version, but he added two of his own. First, he assumed the picture was taken every year and rephrased it to become "the Court's annual photograph," thereby reinforcing a common misconception. Second, he added that the reason McReynolds refused to sit next to Brandeis was that "seniority arrangements" had placed them next to each other. Both mistakes distorted the story even further.

With numerous retellings over the years,[15] the "group photograph" has almost universally become the official, or the annual, group photograph. This seemingly innocuous change suggests an even more serious indictment of McReynolds and that he might somehow even be ignoring a duty mandated by his office if he were to break with tradition by refusing to sit next to a Jew.

McReynolds had, of course, threatened to break with tradition when he refused to sit for another group photograph "until there is a change in the court & maybe not then." However, that appears to be nothing more than an actual example of McReynolds' difficult personality. Although he might have complained, he showed up for all ten sittings during his tenure when the new group photograph was to be taken[16] and he never threatened to disrupt the traditional seating arrangement. At nine of these ten sittings there was at least one Jewish Justice on the



A group photograph of the Taft Court, taken by one of two different studios before Court on the morning of April 10, 1923. Eleven months later, the Clinedinst Studio wanted to be the third to photograph this Court, but McReynolds refused to participate, saying "the hog's eye is sot." (Note that Justice McKenna, the junior Justice in 1898, has now become the senior Justice. This makes him the first Justice to spend his entire tenure posing according to this arrangement, as well as the first Associate Justice to occupy every position in this progression from junior to senior).

Court—first Brandeis, then Benjamin Cardozo and Felix Frankfurter—and although the seating arrangement never called for him to sit beside a Jewish Justice, at three of these sessions either Cardozo or Frankfurter stood directly behind him.

Group photographs aside, there are other occasions when tradition dictates that the Justices arrange themselves differently, though still by seniority, such as when they are around the table in Conference, attending a funeral, or at a Joint Session of Congress. Regarding Joint Sessions, the Supreme Court has traditionally been invited to, and attended, these events since at least the mid-nineteenth century, and the seating arrangement for them is as unambiguous as it is for group photographs. The Supreme Court is placed in the front row, and the Chief Justice, if attending, is seated on the aisle with the Associate Justices seated sequentially down the same row by seniority. Since Justice Brandeis followed McReynolds in seniority, according to this arrangement the two would sit next to each other if they both attended the same Joint Session.

One Joint Session that both McReynolds and Brandeis attended was a speech by President Calvin Coolidge on Tuesday, February 22, 1927, to honor the 195th anniversary of President George Washington's birth. While it is difficult to determine exactly how many Joint Sessions these two Justices attended together—there were at least four[17]—we know they attended this particular one because they can be seen, seated next to each other, in a photograph taken during the ceremonies.[18]

James E. Bond concludes his biography of McReynolds by observing that history has

The Supreme Court listens to President Calvin Coolidge address a Joint Session of Congress marking the 195th anniversary of President George Washington's birth, on February 22, 1927. Seated in the front row, from left to right, are Chief Justice William Howard Taft and Justices Oliver Wendell Holmes, Jr., James C. McReynolds, Louis D. Brandeis, George Sutherland, and Pierce Butler.

treated him harshly. "He was an easy man to dislike, and the biographies and histories of the period have been written largely by or about men who disliked McReynolds. Typically they contain the always-colorful stories of his rude, cantankerous, intolerant behavior. Collectively, they have shaped the caricature of him that survives."[19]

McReynolds' colleagues and associates[20] have left behind first-hand observations confirming that he could indeed be rude, cantankerous, intolerant and prejudiced, and from these shortcomings he should not be excused. For example, not long after becoming Chief Justice, Taft privately summed him up as a selfish, vindictive grouch who was fuller of prejudice than any man he had known.[21] But we can only truly take the measure of the man by using those things that he actually said and did, and the memories and impressions of those who knew him, not by using myth or innuendo.

With this in mind, it is troubling to note that the story of the 1924 photo session is often bundled with a handful of other horrors about him—sometimes repeated in the same sequence, often prefaced by "reportedly" or "it is said," and typically lacking primary source citations if they are cited but usually not cited at all—which are repeated so often that their ubiquity gives them the appearance of uncontested truth. Yet one of these stories is false, and as a miscast stone it has not only distorted history but troubled the waters. In the narrowest sense it begs the question, if this one is false, then how many other stories about him might be false or distorted as well?[22]

ENDNOTES

[1] "The Supreme Court Photographed." (*The Daily National Intelligencer*, March 16, 1867, p. 3), among others. Gardner took two photographs at this session, a "formal" and an "informal" pose. In the former, the Justices are wearing their robes and have included the Clerk of the Court, D. W. Middleton. In the latter, the Clerk is not present and they are posed without their robes. For both photographs the Justices posed in the staggered seniority arrangement they used when seated on the Bench.

[2] The Supreme Court Curator's Office records indicate the Court has commemorated its membership by sitting together for a group photograph exactly fifty times in its history. On forty-four of these occasions, they have done so on a single day, and on the remaining six occasions when they posed a second time, the circumstances were unique to each case. The most recent example is the Rehnquist Court, who posed in 1994 after the arrival of Justice Stephen Breyer and then again in 2003, at the suggestion of Curator Catherine E. Fitts, after an unprecedented nine years without a change in membership or a new group photograph. No sitting Court has ever posed a third time.

[3] An "official group photograph" from the early years generally refers to any of several photographs that had been taken during sittings with photographers who had been selected or approved by the Justices. Today it refers to a single photograph, voted on by the Justices, from a sitting with their chosen photographer, currently Court Photographer Steve Petteway. It is not clear when the Justices began voting for their preferred pose, but the process goes at least as far back as the Taft Court.

[4] The first time the Justices are known to have used this seating arrangement was for a photograph of the 1888 Waite Court. After experimenting with several different poses during the early 1890s, the Court adopted the current seating arrangement in 1899, and it has been used consistently ever since.

[5] There is a single window of opportunity when this arrangement dictates they would have been next to each other in a group photograph. That brief moment occurred between the retirements of Justices William R. Day and Mahlon Pitney, from November 13 to December 31, 1922. During this period they were numbers six and seven in seniority and thus would have stood next to each other in the middle of the back row. However, because the Court was incomplete at the time, a group photograph was neither contemplated nor taken.

[6] Alpheus T. Mason was a professor of law and jurisprudence at Princeton from 1925–1968, and the author of twenty-two books, including his biographies of Brandeis, Stone, and Taft. He is highly regarded as a judicial biographer and historian. His Taft biography emerged from a much larger and comprehensive, though unfinished, study of the Chief Justiceship.

[7] Mason, Alpheus Thomas. **William Howard Taft: Chief Justice** (Simon & Schuster, 1964), p. 216–17. Mason begins the paragraph with:

> For McReynolds the Court's *bête noire* was fellow Democrat Justice Brandeis. In 1922 Taft proposed that members of the Court

> accompany him to Philadelphia on a ceremonial occasion. "As you know," McReynolds responded, "I am not always to be found when there is a Hebrew abroad [sic—McReynolds wrote "aboard"]. Therefore my 'inability' to attend must not surprise you."

While this may well be an oblique reference to Brandeis, McReynolds did not mention him by name in his letter and also sent mixed signals to Taft by showing support for the trip ("I vote with you concerning the Philadelphia trip . . . "), which was to rededicate the Supreme Court Chamber at Independence Hall. In the end, neither McReynolds nor Brandeis went. Justice McReynolds to Chief Justice Taft, February 1922, Papers of William Howard Taft, Manuscripts Division, Library of Congress, reel 239.

[8] No reference to this story was found prior to Mason, and most contemporary references appear to repeat his version, since the wording often hews closely and with only slight variation. His two cited sources are in the Papers of William Howard Taft in the Manuscripts Division at Library of Congress, available to researchers since the summer of 1941.

[9] The Kentucky expression "The hog's eye is sot" roughly translates to, "it's all over" ("The Hog's Eye Is Sot," *St. Louis Republic*, Nov. 6, 1904) and "nothing conceivable will change" ("Roosevelt Favored by Kentucky Voters," *New York Times*, Oct. 19, 1932). It was first popularized by Urey Woodson, a Kentucky member of the Democratic National Committee, who used it to express his confidence in Democrat Alton B. Parker's chances for victory against Theodore Roosevelt in the 1904 presidential election. It has also been interpreted as meaning "we're going to stand pat" ("District Bill Is Deadlocked," *The Washington Herald*, May 4, 1920).

[10] Justice McReynolds to Chief Justice Taft, c. March 1924 (either March 27 or 28); Papers of William Howard Taft, Manuscripts Division, Library of Congress, reel 263. Many thanks to Associate Curator Matthew Hofstedt, Exhibitions Coordinator Lauren Van Dyke, and Professor Barry Cushman at the University of Notre Dame Law School for their help interpreting several nearly indecipherable words in this handwritten letter.

[11] Chief Justice Taft to Justice McReynolds, March 28, 1924; Papers of William Howard Taft, reel 263.

[12] Taft's letter to each Justice is so wonderful it is worth quoting in full: "Clinedinst is still anxious that he be not excluded by an iron monopoly from the privilege of having our admiring fellow-citizens look upon the beautiful forms and faces of the members of the highest tribunal of the land. He has been patient and long suffering. Will you not consent, therefore, to come to his studio at the corner of H and 14th Streets, at 11 o'clock on Saturday next, March 29th, and in this way share the burden of oppressed humanity which the writer has had to bear for now these many months?" Chief Justice Taft to Joseph McKenna, March 27, 1924, Papers of William Howard Taft, reel 263.

[13] *See* note no. 9.

[14] Westin, Alan. "Judging The Judge," *New York Times Book Review*, Sunday, May 9, 1965. Professor Mason kept a scrapbook containing about two dozen book reviews, including this one, of his Taft biography. None of the other reviews in his scrapbook repeated the McReynolds/Brandeis anecdote. Box 20 of The Papers of Alpheus Thomas Mason, Seeley G. Mudd Manuscript Library, Princeton University.

[15] One need go no farther than a simple Google search for "McReynolds Brandeis photo 1924" to demonstrate not only that this story has been repeated dozens of times over, but also how nearly universal it has become to add "official" before the word "photograph"—a mistake that cannot be attributed to Mason—or "annual," which can in part be attributed to Westin's book review. Most versions indicate that McReynolds' reason was because of seating arrangement seniority.

[16] These ten occasions, as documented in the Court's collection, begin with the 1914 White Court, when McReynolds was the junior Associate Justice, and end with the 1940 Hughes Court, when he was the senior Associate Justice. (Thomas Waggaman, Marshal of the Court from 1938–1952 and the Court's first unofficial historian, recorded in an internal inventory that one additional group photograph took place while McReynolds was on the Court, of the 1938 Hughes Court after the arrival of Stanley F. Reed. But if it was taken, he secured no copies for the Court, which would have been exceedingly unlike him, and no known copies have surfaced. Thus, at the time of this writing it remains a bit of a mystery.)

[17] It is often difficult to determine which Justices attended which Joint Session because descriptions of these events tend to be unclear. Many simply note that the event was "attended by the Supreme Court" or "the Court attended as a body," even if the entire Court was not present. Thus, unless newspaper descriptions are precise, one must turn to letters, diaries, and photographic evidence. Presidential inaugurations aside, the three other Joint Sessions Justices McReynolds and Brandeis both attended were President Wilson's Annual Messages on December 4, 1917, and December 2, 1918, and a memorial service for President Calvin Coolidge on February 6, 1933.

[18] It should be noted that Curator Catherine E. Fitts, not the author, realized a photograph of the two of them might have been taken at a Joint Session.

[19] Bond, James E. **I Dissent: The Legacy of Justice James Clark McReynolds** (George Mason University Press, 1992), p. 135.

[20] A particularly detailed first-hand account of Justice McReynolds was written by John Knox, who served as his law clerk for October Term 1936. See Dennis Hutchison and David Garrow, eds., **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (The University of Chicago Press, 2002).

[21] William Howard Taft to daughter Helen Manning, June 11, 1923. Papers of William Howard Taft.

[22] For example, another story is that Justice McReynolds refused to attend Justice Frankfurter's swearing-in ceremonies after exclaiming "My God, another Jew on the Court!" However, the *Supreme Court Journal* for October Term 1938 (p. 131) confirms that he was, in fact, present for Frankfurter's swearing-in.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

An admirable, although hardly unique, characteristic of public life in the United States is the tradition of commemorations and observances marking anniversaries of important events. Such occasions help not only to comprehend the passage time of time but also to celebrate triumphs, honor sacrifices, and facilitate education and the building of a strong picture of the past. In short, such occasions go far toward instilling a collective national memory of a particular event, era, or circumstance.

Recent months have witnessed two such sets of commemorations that have highlighted events of seismic proportions that were themselves separated by about a half century: the sesquicentennial of the end of the Civil War in the United States in April 1865[1] and the centennial of the outbreak in August 1914 of what quickly became The Great War (or, as it would be known a generation later, World War I) in Europe. Events that combined into war among the American states had begun with the shelling of Fort Sumter in Charleston Harbor in April 1861. Entry by the United States into the European conflict was formalized by a declaration of war, ironically approved by Congress during Holy Week in April 1917.[2]

In retrospect, both the American Civil War and World War I at their onsets were marked by deep irony. First, many contemporary observers expected the conflicts, once they were underway, to be short-lived, a view that perhaps made sense in the American context in that neither warring side was initially fully equipped and organized for a struggle that, as events unfolded, would be so intense and widespread and last four years, yet made no sense in the European context where military preparedness, technology, and tactics of the combatant nations fused with such horrific force that a brief and decisive termination would truly have been remarkable, if not a fortuity. Instead, that twentieth-century conflict, like the earlier one on American soil, was unexpectedly costly in lives and material assets and equally prolonged (and unlike it, global).

Second, both the American Civil War and World War I wrought results and secondary effects of a variety and of a magnitude barely imagined by most observers and participants in either 1861 or 1914. Indeed, both conflicts

offer broad examples of the near certainty of unexpected consequences. Among other effects, World War I effectively remade the political map of Europe and (with defeat and collapse of the Ottoman Empire) the Middle East; entombed several royal dynasties; introduced the United States to its first encounter with the modern phenomenon of total war; thrust American military and diplomatic power onto the world scene to an unprecedented degree; and, through the birth of the Soviet Union, afforded international communism a potent national base for the first time.

For its share, the victory by the North in the American Civil War effectively lent permanence to the "United" part of the nation's name, so that, perhaps for the first time, the continued existence of the Union of states was no longer in doubt given that, even in the best of times after 1789 and prior to 1865, there had always been at least an undercurrent of disunion. It was comprehension of this new reality that allowed Chief Justice Salmon P. Chase four years after Appomattox to declare that "[t]he Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."[3] His assertion was not merely rhetoric, in that the Confederate surrender provided a definitive military answer to questions about the legitimacy of secession and the supremacy of the national government. A long-running debate in American federalism thus was settled, if not entirely silenced.

Yet, in terms of lasting consequences, the Civil War engendered fundamental changes in the American political system chiefly in the form of the Thirteenth, Fourteenth, and Fifteenth Amendments that were ratified between December 1865 and March 1870 and remain the constitutional legacy of the Republic's greatest domestic crisis. The first of these ended slavery and was for that reason probably the least surprising of the three, even if its human consequences were vast. In granting freedom to one class, it imposed a huge and unprecedented economic penalty on another.[4] The last of the trio of amendments attempted to remove race as a criterion for voting, even as it left the definition of the franchise and the administration of elections otherwise undisturbed in hands of the states.[5]

More than either of the other two amendments, the Fourteenth signaled an entirely new relationship between national and state governments, leading some people even to view the Fourteenth as a kind of "Second Constitution." Indeed, in contrast to the single objectives of the other Reconstruction amendments, the Fourteenth was actually several amendments rolled into one. The first sentence of section one specifically addressed citizenship: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Those twenty-eight words constitutionally consigned to the trash heap the Supreme Court's announcement in the *Dred Scott* case that the framers of the Constitution never intended African Americans to be included within the meaning of the word "citizens" and so could "claim none of the rights and privileges which that instrument provide[d] for and secure[d] to citizens of the United States."[6] The much longer second sentence of the same section in turn proclaimed new, broad, but undefined restrictions on state power: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." That first clause merely borrowed language from Article IV of the Constitution. The second clause drew verbatim from the due process limitation on the national government in the Fifth Amendment. The words of the third clause were new to the Constitution and seemed to tweak the guaranties of the first and

second clauses. Taken together, the three clauses evidenced strong rights-friendly and anti-discriminatory purposes. Indeed, the fulsome second sentence of section one has long been responsible for making the amendment routinely the most litigation-prone provision of the Constitution as measured by the number of cases on the Supreme Court's docket. Moreover and more immediately, both parts of section one erased any lingering doubts about the constitutionality of the Civil Rights Act of 1866. This comprehensive statute, designed to augment the Thirteenth's abolition of slavery, had declared all persons born in the United States to be national citizens. Thus, by constitutionalizing as well as codifying both these guaranties and a new relationship between national and state governments, Congress greatly reduced the chance that lawmakers of a later day might undo its work.

Section three of the Fourteenth Amendment politically disabled former Confederate leaders, section four foreclosed any attempt by nation or state to assume the Confederate debt or to pay compensation to ex-slave owners, and section five empowered Congress to enforce the terms of the amendment. Yet it was only in section four that an oblique and curious reference to voting rights appeared. In addition to eliminating the infamous Three-Fifth's Compromise (that counted three-fifths of the slave population for purposes of determining representation in the House of Representatives and therefore votes in the electoral college), section four dictated that a state's representation in Congress would be reduced in proportion to the number of "male inhabitants" twenty-one years of age and older who were denied the right to vote. Although that penalty has never been exacted from a state, the amendment directly anticipated, and indirectly allowed, racially based disfranchisement, just as it indirectly sanctioned the continued denial of the vote to women. The origins of the Fifteenth Amendment[7] thus curiously rested in the Fourteenth as a result of the complex political realities at the time when Republicans, anticipating a Democratic resurgence, perceived the future of their party to be at stake.

The consequences of these Reconstruction-era amendments in the years since their ratification have been so vast that, without them, life in the United States in many respects would probably not be easily recognizable today. That statement is especially true in the context of the Supreme Court's various applications of the Fourteenth Amendment. These remain a dominant and running theme across recent books about the Court, as the revealingly entitled **On Democracy's Doorstep** by J. Douglas Smith amply demonstrates.[8]

Democracy's Doorstep

Smith, who is also author of a book on race relations in Virginia, is executive director of the Los Angeles Service, an academy that attempts to teach high school students about the political, social, and environmental infrastructure of the host city. While **Doorstep** might well be appropriate for high school students to read, Smith's book seems actually aimed not so much at his students but at a much wider audience that should include political and legal neophytes alongside specialists and generalists alike. The volume's subtitle handily captures its contents: "The Inside Story of How the Supreme Court Brought 'One Person, One Vote' to the United States." An alternate phrasing might just as accurately have read "A Revolution, American style," in that the book provides a description of a modern-day democracy still in the process of *becoming*. However the title might be understood, the result of Smith's labors is certainly the most readable and perhaps the most thoroughly researched and documented study on the subject to appear in half a century.[9] The

title suggests the observation of Professor Woodrow Wilson not long after publication of the future president's classic book about Congress.[10] "Democratic institutions are never done," he wrote. "[T]hey are like living tissue—always a-making."[11]

Smith's account of historic litigation over legislative districting mainly in the early 1960s deals fundamentally with the allocation of political power and addresses a challenge that has long been central to any polity that aspires to representative government: how to operationalize democratic theory. The Declaration of Independence spoke of "Governments . . . deriving their just powers from the consent of the governed." Since 1776 that consent has emanated from the ballot box as the people confer consent on or withdraw consent from those who rule over them and act in their name. But how was that act of power granting or withdrawing to be filtered, structured, or channeled? The answer to that question could follow only from the particular system of representation that was established.

Thus, at the outset of American national government, the Articles of Confederation, as it was drafted in 1777, paid no heed to population variances among the states but rather allocated political power on the basis of one state, one vote, meaning that states such as Delaware, Georgia, and Rhode Island possessed fully as much voting strength in the Congress as did the far more populous states of Virginia, New York, and Pennsylvania, even as the state legislatures that selected a state's delegation to the Articles Congress could, at the individual state's discretion, vary the size of its delegation from a minimum of two to a maximum of seven. In contrast, the framers of the Constitution in Article I set up an initial apportionment of the sixty-five seats in the House of Representatives that took presumed population totals and differences into account in advance of the first national census. Moreover, members of the House were elected by the people. Apportionment of the Senate, however, adhered more to the Articles in two respects, as each state's two Senators were to be chosen by the individual state legislatures. Furthermore, in almost all instances,[12] members in both chambers would vote individually rather than by state.

Apportionment of the Senate today is the same as when the Constitution was ratified, whereas apportionment of the House is a function of the changing populations among the fifty states, with each state having a minimum of one representative. With the membership of the House fixed by statute at 435 since 1913,[13] the balance of the remaining 385 seats is distributed among the states following each decennial census. Yet, with a historic preference for single-member districts at the congressional level, how were district lines to be drawn? The responsibility for that task has remained with each state, through its legislature.[14] As far back as 1842, Congress required each state with more than one representative to construct districts "composed of contiguous territory," and statutes in 1901 and 1911 mandated "compact" congressional districts (to rein in rampant gerrymandering), but the Apportionment Act of 1929 left out any requirements for compact, contiguous, or equally populated districts. As the years went by, populations of House districts across the nation grew increasingly imbalanced.

On Democracy's Doorstep opens literally in the aftermath of the story Smith relates —on July 5, 1968, in the East Conference Room in the Supreme Court Building, where retiring Chief Justice Earl Warren met with dozens of reporters.[15] Understandably, he was asked to identify his major contribution. The question was potentially difficult because between 1953 and 1969 the Warren Court, with revolutionary effects, had erected landmark decisions across the landscape of American constitutional law. Yet, his apparently surprising answer was categorical: the

redistricting cases. Why? For Warren the right to vote freely and equitably for the candidates of one's choice was the essence of democracy. Untrammeled exercise of this right was essential to the preservation of all others and so was the bedrock of our political system.

Because the story that Smith tells so effectively began well before the living memory of most readers today, its richness and significance can best be appreciated by a review of some central events. Of these, among the more important was the litigation in *Colegrove v. Green*,[16] initiated on Fourteenth Amendment grounds by Northwestern University political scientist Kenneth Colegrove and other Illinois voters against state officials over sharply skewed *congressional* districts in Illinois, where, according to the 1940 census, the fifth district counted a population of 112,116, while the seventh district had nearly nine times as many: 914,053. Yet plaintiffs' plea that the Supreme Court right what they perceived to be a constitutional wrong was unavailing. "We are of opinion," wrote Justice Felix Frankfurter for himself and Justices Stanley Reed and Harold Burton,[17] that:

> . . . the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination. . . . Courts ought not to enter this political thicket.[18]

This is the original cartoon that led to the coining of the term "gerrymander." The district that was created by the Massachusetts legislature favored the incumbent Democrat-Republican party candidate Governor Elbridge Gerry over a Federalist challenge in 1812.

Rebuffing the invitation to intrude, Frankfurter had implicitly discounted the thrust of a leading question Chief Justice John Marshall had posed long before in a different context. Observing that "in some cases then, the Constitution must be looked into by the judges," Marshall queried, "if they can open it at all, what part of it are they forbidden to read or to obey?"[19] Instead, Frankfurter instructed voters seeking relief from numerically imbalanced congressional districts to turn to the state legislature or to Congress, not to the Court.

An opportunity for the Court to rethink its reluctance in *Colegrove* to engage political boundaries followed some fourteen years later in *Gomillion v. Lightfoot*[20] after an Alabama law had redrawn the city limits of Tuskegee from a simple square into a twenty-eight-sided figure. The result was to remove from the city all but a handful of black voters while leaving white voters unaffected. Justice Frankfurter, in spite of his position in *Colegrove* about political questions, declared that the Fifteenth Amendment guarantee against racial discrimination in voting justified judicial action to invalidate this racial gerrymander. Left unanswered was whether the Fourteenth Amendment's equal protection clause might offer a judicial remedy for nonracial discrimination, based on urban versus suburban or rural residence.

An affirmative answer came in *Baker v. Carr*,[21] a case involving numerically unequal *state* legislative districts in Tennessee for which the Court had noted probable jurisdiction just seven days after *Gomillion* came down. Tennessee had last redistricted in 1901, and intervening population shifts by 1960 produced a situation in which thirty-seven percent of the population lived in twenty of the thirty-three senatorial districts and forty percent of the population lived in sixty-three of the ninety-nine house districts. Finding no obstacle in the political question doctrine, Justice Brennan announced for the majority that such imbalanced legislative districts presented a valid question under the Equal Protection Clause and that henceforth federal courts would be empowered to provide a remedy. In making this belated entrance into the political thicket, however, *Baker* neglected to lay down guidelines by which a valid districting plan could be distinguished from an invalid plan. That standard appeared to arrive the following year in *Gray v. Sanders*,[22] where the Court invalidated the Georgia county-unit system of primary elections for statewide offices that greatly disfavored urban counties. A candidate could handily win the popular vote but lose the election. Said Justice Douglas in enunciating the principle of voter equality:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.[23]

Wesberry v. Sanders in 1964 then extended the same principle to congressional districts, with the Court holding that the Constitution had the "plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." Justice Black's opinion insisted that, "As nearly as practicable, "one man's vote in a congressional election is to be worth as much as another's."[24] The three-round contest, set in motion by *Baker v. Carr*, concluded almost exactly four months later in *Reynolds v. Sims*.[25] By applying the now familiar rule of one-person-

one-vote, the Justices challenged the legitimacy of at least forty state legislatures by mandating numerically equal districts for *both* legislative chambers.[26] Thus, within the span of about two years—from *Baker v. Carr* through *Reynolds v. Sims*—the Court had commanded a reshaping of the American political system.

As Smith relates these breath-taking developments with their rich detail, **On Democracy's Doorstep** makes at least three additional contributions to our understanding of the Court. First, the volume is a clear reminder that decisions from the Court are the products not only of very public paths of litigation that eventually place complex and often sensitive and divisive issues on the judicial doormat but also of a decision-making process within the Court that is usually hidden from public view. In particular, Smith shows how *Baker v. Carr* came close to being a different decision. When that case came down on March 26, 1962, Brennan's majority opinion asserting jurisdiction spoke for six members of the Court. Concurring opinions by Justices Douglas and Tom Clark indicated that they would have reached the merits of the case if the allegations of inequality in the suit could be sustained. Justice Potter Stewart also concurred, noting that the merits of the case were not before the Court for review. Justices Frankfurter and John Marshall Harlan dissented, and Justice Charles Whittaker did not take part. Yet, when the case was initially argued during the 1960 Term, the vote in conference vote was four-to-four, with Clark and Whittaker joining Frankfurter and Harlan.

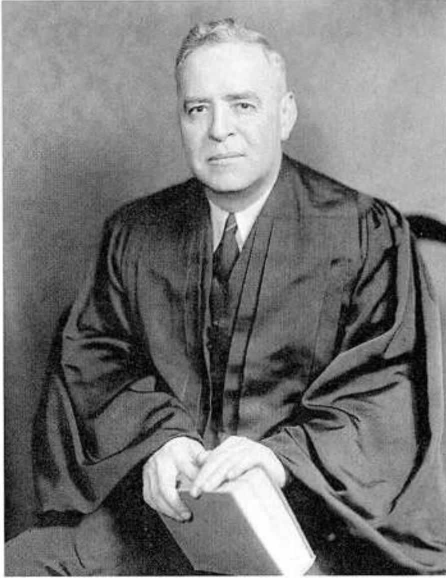
Stewart, it seemed, was undecided on the issue of jurisdiction, that is, whether legislative districting was justiciable. And it was largely at his urging that the case was carried over for reargument in the 1961 Term. By then Stewart had come around to the view that the Court could take jurisdiction, thus providing a five-to-four vote in favor of the Tennessee appellants on that important point. Yet, Stewart hesitated to lay down precise standards. For their part, Chief Justice Earl Warren and Justices Black, Douglas, and Brennan wanted to do more than simply to acknowledge jurisdiction. Going to the merits, they would hold that the Fourteenth Amendment required Tennessee at least to provide approximately fair distribution or weight in votes. This seemed to be less exacting than the equality rule the Court later imposed in 1964. To keep Stewart's vote, however, Brennan (to whom Warren had assigned the opinion) would have to stick to jurisdiction and leave standards alone. After Frankfurter circulated his dissent in February, Clark quickly indicated agreement with it. Frankfurter then suggested to Clark that he write separately on the appellants' failure to exhaust other remedies. Frankfurter presumably wanted to make sure that Clark's vote held tight by arranging for the Texan to convince himself that disgruntled Tennessee voters had other channels for relief. But the plan backfired: Clark discovered there really were no practical non-judicial remedies that Tennesseans could pursue and he accordingly notified Frankfurter that he would not be joining his dissent. This meant that Stewart's vote was no longer necessary for Brennan's majority. Thus, the opinion Brennan announced in the courtroom on March 26 was basically the opinion he had written before Clark switched his vote. Had Clark sided with Brennan initially, or shortly after reargument in October 1961, it seems probable that the opinion would have addressed the matter of standards as well as jurisdiction. And the standard might well have been a more flexible one of approximately fair weight applied to only one house of a state legislature. Had the case worked out this way in 1962, it is at least questionable that the same Justices would then have adopted the less flexible rule of numerical equality that they imposed in 1964 on both houses of a bicameral state legislature.[27]

It is near this point of the story that **Doorstep** makes its second contribution to an understanding of the Court through what is revealed about the connection of the Tennessee case to the retirement of Charles Evans Whittaker, the fourth of President Dwight Eisenhower's five High Court appointees, who reached the Supreme Bench in 1957 after service on the U.S. District Court for the Western District of Missouri and the U.S. Court of Appeals for the Eighth Circuit. According to Smith, by the time Clark had switched his vote, Whittaker had entered Walter Reed Hospital, where he remained under observation for seventeen days. Ever since his confirmation he "had struggled with the demands of the job. He lacked the sort of coherent judicial philosophy that guided someone like Frankfurter, and instead approached each case on its merits. As a former clerk remarked, the Justice put himself in the position of casting the 'critical vote too often' and 'agonized' over each decision. No case proved more difficult for him than *Baker v. Carr*". . . [and he] fell into a deep depression."[28] Having apparently said nothing to colleagues (or the President) about his condition, in early February 1962 Whittaker retreated to a lodge in rural Wisconsin that was owned by the *Kansas City Star* but did and said little for days. Returning to the Court in late February, he attended the Conference on Friday, March 2. On Tuesday, March 6, he admitted himself to Walter Reed, and, according to his son, who was an Air Force captain and a recent medical school graduate, was contemplating suicide. Chief Justice Warren visited the Justice on March 15 and was "unnerved" by his appearance, the apparent result of anti-depressant drugs that had been administered. Warren then prevailed upon hospital officials to convene a board that declared Whittaker to be permanently disabled. The Chief Justice then notified President John Kennedy of Whittaker's intention to retire from active service as of April 1. "By signing a letter of disability on behalf of Whittaker, Warren enabled his troubled colleague to retire with full benefits."[29] Whittaker left Walter Reed on Friday, March 23, prior to any public announcement of his departure from the Court, and three days before *Baker v. Carr* came down. At a news conference three days after that decision, President Kennedy announced the Justice's retirement.

Smith notes that, on April 4, "an embittered Felix Frankfurter" wrote to former law clerk (and by then professor at Yale Law School) Alexander Bickel, "Am I right in assuming that your headnote for *Baker v. Carr* would be, '*Held*, a little judicial pregnancy is permissible.' Your stomach too would have turned." On the following day, Frankfurter suffered a massive stroke, and, although he did not officially retire until August, he never returned to active duty at the Court. "*Baker v. Carr* had claimed—at least to a certain extent—its second victim."[30]

The third substantial contribution that **Doorstep** makes to an understanding of the Court is its emphasis on the fact that the Justices occupy a position that is not only at the pinnacle of the national *legal* system but is very much enmeshed in a *political* system as well. This truth becomes apparent through Smith's account of the widespread, well-organized, and apparently well-funded attempts—sparked by the redistricting decisions—to enact Court-curbing measures. The Court, after all, had engaged in a restructuring of political power in the United States with clear winners and losers, and the latter did not react amiably to the diminished status that had been judicially imposed upon them. This was a situation Justice Frankfurter had anticipated in his dissent in the Tennessee case that Justice Harlan joined[31]:

> We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have



John Ferren's biography of Wiley Rutledge not only demonstrates how Rutledge functioned within the Court with respect to his colleagues, but also in relation to his clerks. It also illuminates his use of briefs and oral argument and his approach to opinion writing responsibilities.

> courts pass on a statewide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. . . . In any event, there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear sure to be disappointing to the hope.[32]

As events unfolded in 1965 and 1966, anti-Court amendments in the Senate fell only seven votes short of the two-thirds required by the Constitution. Moreover, twenty-eight states of the constitutionally mandated thirty-four petitioned Congress to convene a constitutional convention under Article IV's alternate (and yet-to-be-implemented) amendment procedure to turn back what the Court had decreed. This campaign withered after 1966, however, because of speedy implementation of *Wesberry* and *Reynolds*. Indeed, Smith reports that, by 1966, forty-six of the fifty states had generally complied with the rulings.[33] Because approval by thirty-eight states would have been needed for ratification of any corrective amendment, the Court-curbing drive soon ran out of steam. Understandably, state legislators and members of the U.S. House of Representatives elected under the new rules were now as advantaged as their predecessors had been disadvantaged by the 1964 rulings and so were hardly any more inclined to vote themselves out of power.

In his account of the back-and-forth discussions within the Court that ultimately produced Brennan's opinion in *Baker v. Carr*, Smith notes that Brennan "leaned on Wiley Rutledge's decisive opinion in *Colegrove* to conclude that apportionment disputes did, in fact, fall within the purview of the federal courts."[34] In *Colegrove*, it is fair to say that Rutledge somewhat equivocally concluded that the issue might properly be litigated but for other reasons chose merely to concur in the result.[35] This outcome left Frankfurter's plurality opinion as the apparently authoritative Court position in the Illinois case. That reality later led Brennan to insist in a memorandum to Chief Justice Warren and Justices Black and Douglas that Rutledge's jurisdictional reasoning was needed "if we are effectively and finally to dispel the fog of another day produced by Felix's opinion in *Colegrove*."[36]

Wiley Rutledge Biography

Justice Wiley Blount Rutledge[37] is the subject of **Salt of the Earth, Conscience of**

the Court, by John M. Ferren.[38] While publication of a judicial biography is always a welcome and noteworthy event, it is most unusual for the author to be a jurist himself—in this case senior judge on the District of Columbia Court of Appeals—where he has sat since his appointment in 1977 by President Jimmy Carter. His meticulously researched and carefully written volume seems to be the first monograph on Justice Rutledge since Fowler Harper's in 1965.[39] (Ferren's book also contains a model and uncommonly thorough index,[40] a refreshing feature usually noticed only in its absence.[41])

The two-part main title of the book captures Judge Ferren's estimate of his subject. The phrase "salt of the earth" has been part of the English language at least since the appearance of the King James translation of the Bible in 1611[42] and has come to refer in contemporary parlance to a caring person or persons of great honesty and kindness. As such the reader suspects Ferren would accept Harper's earlier estimate of the man: "Every case that came before him was . . . a deep emotional experience. It was not abstract justice that he sought. He was not interested in a form of words. It was not justice in the air but in this very case, between man and man—between man and the state."[43]

Even though, among Justices on the modern Court, Rutledge's six-year tenure (1943–1949) has been among the briefest)—he died at the age of fifty-five from a stroke—**Salt of the Earth** is a useful addition to the judicial literature for several reasons.[44] First, while Rutledge's path to the High Court was hardly unique, it still remains unusual. Before President Franklin D. Roosevelt named him to a new seat on the U.S. Court of Appeals for the District of Columbia Circuit in 1939, this Kentucky-born son of a Baptist minister had not only taught at but had been dean at two law schools: Washington University in St. Louis and the University of Iowa.[45] That those years as a professional educator meant much to Rutledge is evident in part of a letter he sent Thomas Reed Powell at Harvard Law School[46] upon his confirmation as a Justice in 1943:

> I'm essentially a dean. Mind you, I say dean, not professor, or scholar or jurist or judge. . . . I didn't know how much I liked it. Drudgery and detail, no time for research or writing or study—but every day some kid had a problem, and once in a while you could help. For purely personal satisfaction, I'd head back to Iowa Law School tomorrow—if there were [a vacancy] and they'd have me. It's something like once a dean always a dean.[47]

Second, Rutledge is an instructive subject because an examination of his life, especially as a maturing professional, opens a window onto a now-distant past—the New Deal era—that for many is no more than an unfamiliar swirl of individuals and political events that in so many ways helped to transform the United States and to set in motion forces that influence public life even today. Except perhaps for the Democratic collapse wrought by Lincoln's election in 1860 and then the Civil War, never has one major American party's domination been so rapidly eclipsed as when Democrats displaced Republicans in the 1930s. Yet, the two major political parties as they defined themselves going into the presidential election of 1932 bear only a faint resemblance to the Democratic and Republican parties of today. Moreover, it was hardly clear from the Presidential campaign of 1932 itself that a Democratic victory would mark a sharp break with the policies of the past and effect major changes. As one opinion journal observed, the Republican party's "weaker twin . . . differs from the G.O.P. only in that its desire to become the party of privilege has never been satisfied."[48]

Yet, Roosevelt's triumph in 1932 and again in 1936 led to significant changes,

including even the language of political discourse. To see this, one needs only to reflect on at least three different shapes that modern liberalism assumed during Rutledge's years in public life. As typified by the core of what progressives had long promoted and what legislatively came to be called the New Deal, *economic liberalism* stressed workplace reforms, rights of labor, and social and economic policies designed to reduce economic inequality. Economic liberalism, however, in turn had necessitated *constitutional liberalism*. This view insisted on a passive role for the judiciary so that judges would defer to legislators who enacted the policies designed to implement economic liberalism. Thus, constitutional liberalism was typified by the advocates of judicial restraint who, before the Constitutional Revolution of 1937, had opposed judicial interference with the handiwork of economic liberalism. Finally, in tension with constitutional liberalism was *programmatic liberalism*, which focused heavily on achieving progressive policy outcomes, through the judiciary if necessary. Accordingly, this view called for judicial expansion of non-property civil liberties and civil rights in situations when they had been restricted by legislative majorities. To one degree or another, Rutledge not only intellectually encountered, but at various times advocated, each manifestation of liberalism.

Third, Rutledge merits a full-length biography not only because he was Roosevelt's eighth and last appointee[49] but because the circumstances of his nomination offer one more confirmation of Justice Sandra Day O'Connor's observation that being picked for the Supreme Court "is probably a classic example of being the right person in the right spot at the right time. Stated simply, you must be lucky."[50]

At a distance now of more than seven decades from Rutledge's nomination in 1943 as the eighty-fourth Justice, it may be difficult to appreciate the rapid changes in the membership of the Court that had occurred within such a relatively short period of time. After all, Roosevelt was into his second term before Justice Willis Van Devanter's retirement occasioned the opportunity for the President to make his first selection for the Court. Then, between Black's appointment for Van Devanter's seat in 1937 and the choice of Rutledge to fill the position vacated by Justice James Byrnes in 1943, there were the nominations of Stanley Reed for departing Justice George Sutherland, Frankfurter for Justice Benjamin Cardozo, Douglas for Justice Louis Brandeis, Frank Murphy for Justice Pierce Butler, Byrnes for Justice James McReynolds, Justice Harlan Fiske Stone for Chief Justice Hughes, and Robert H. Jackson for Justice Stone.

In this whirlwind of personnel changes, Ferren instructively devotes considerable space not only to Rutledge's nomination,[51] but also to the nominations of Justices Frankfurter and Douglas. Indeed there is so much material on selection politics that anyone conducting research on the making of the "Roosevelt Court" should now consider Ferren's volume a necessary resource. Specifically for Rutledge, the reader sees the importance of advocates and evaluators or referees. In the first category was the St. Louis newspaper editorial writer Irving Brant,[52] whom Roosevelt read regularly and respected highly and who promoted Rutledge for both the Court of Appeals and the Supreme Court. Indeed, Ferren considers Brant's influence decisive in Rutledge's nomination to the High Court. In the second category were individuals like Hebert Wechsler, who, at the direction of Attorney General Francis Biddle, prepared a detailed assessment of Rutledge's work on the Court of Appeals. Had that report been less enthusiastic, it might well have turned the President's attention to others on the short list that included former Supreme Court nominee Judge John Parker of the Fourth Circuit Court of Appeals[53] and Roger Traynor of the California Supreme Court. Wechsler's

memorandum, from which Ferren quotes extensively, indicated that an exceedingly thorough appraisal had been done. Rutledge's opinions, it explained, reflected "a soundness of judgment, a searching mind, a properly progressive approach to legal issues, some mastery of phrase and style—especially after the first year—and a dominating effort to answer all the problems in terms that will satisfy the litigant and the lawyer that their points have not been ignored." That last tendency, however, yielded opinions that were "frequently too long," but even that negative added to what Wechsler found to be the candidate's "most striking trait": "his warm sense of what real people are like throughout this broad land." Then followed what Ferren found to be an especially important point: "Civil liberty problems and review of administrative agencies, especially in the labor field, have been the major issues. His work leaves no room for doubt that these values are safe in his hands. More than this, however, I think it shows independence of mind within that framework. There is none of the easy factionalism to which so many liberals succumb." Citing eight opinions in particular on which these conclusions rested, Wechsler ended with probably the most critical consideration of all: Rutledge's "stand in favor of the Court Plan."[54] For Roosevelt, lack of loyalty on that issue would presumably have been a nomination-killer, as it apparently was for Judge Learned Hand, on whose behalf Justice Frankfurter had heavily lobbied the President.[55] "[T]his time Felix overplayed his hand," Justice Douglas later reported the President's having said.[56]

Fourth, Rutledge is a rich subject for a biography because his time on the Supreme Court fell at a significant era in judicial history, spanning parts of both the Stone and Vinson Courts. Connecting with the past, his tenure from 1943 until 1949 fell within about a decade of the "revolution" of 1937, at which point the Court abandoned its previous role as gatekeeper for various types of social and economic regulation and re-focused its attention instead on non-property issues in civil liberties and civil rights.[57] Connecting to the future, Rutledge's service also fell within little more than a decade of some of the landmark rulings of the Warren Court. In the latter respect, Ferren's analysis of the Court's work and especially Rutledge's role in it suggests two observations: First, some of the issues in cases decided during Rutledge's six-year service would be revisited, often with very different outcomes, by the Warren Court; second, Rutledge was part of a nucleus that, in conjunction with Justices Frank Murphy, Black, and Douglas, and with an occasional vote from either Robert Jackson or Felix Frankfurter, could deliver at least a small majority in decisions that anticipated some of what the Warren Court later accomplished. And, even when that nucleus fell short of the necessary five votes, its members could still publish dissents. One thinks in particular of the insightful and perceptive crystal-ball reading in the dissent that Rutledge filed in *Everson v. Board of Education of Ewing Township*,[58] the Court's first Establishment Clause case in the modern era involving policies of state or local governments: "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made," observed Rutledge. "One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."[59] Or, viewed in reverse sequence, had someone other than Rutledge occupied his seat during those years, the Warren Court might well have lacked the thrust and perhaps even inspiration that it did receive from the time during which Rutledge served.

Finally, this study of Rutledge as Justice is useful because Ferren demonstrates how Rutledge functioned within the Court with respect not merely to his colleagues, but also to his clerks,[60] as well as his use of briefs and oral argument and his approach to opinion writing responsibilities.

Oral Arguments and Coalition Formation

Oral argument, of course, was part of the Court's decision-making process in nearly every case in which Rutledge participated. This step along a case's route to decision remains today the most visible part of the Supreme Court's work. Indeed, thanks to the convenient Internet access to both transcripts and audio recordings, oral argument is more public today than it has ever been. This part of the Court's work is now the subject of **Oral Arguments and Coalition Formation on the U.S. Supreme Court**, a tightly written, thought-provoking, and carefully structured study by political scientists Ryan C. Black of Michigan State University, Timothy R. Johnson of the University of Minnesota, and Justin Wedeking of the University of Kentucky.[61]

Speaking at a Ninth Circuit judicial conference, Chief Justice John G. Roberts observed, "As a justice, I know how important oral argument is. As an advocate, I wasn't sure of this."[62] The authors insist in their conclusion that their volume removes whatever doubts may have existed about the accuracy of the Chief Justice's claim.[63] Yet, what is noteworthy about their book is not that they make a strong empirical case for the importance of oral arguments, but what they find to be the essence of that importance.

For the casual observer in the Courtroom on an argument day, the proceedings may seem mainly to be a pair of presentations by counsel to the Justices or at most a series of exchanges between counsel and the Justices over the course (usually) of an hour. For Black, Johnson, and Wedeking, however, oral argument is much more than that—it is a conversation that the Justices have not so much with the attorneys but among themselves. Indeed, oral argument is actually the first step in a coalition-building process. It is during oral argument, they report, that individual Justices probe and learn what and how their colleagues think about a case and hence what kind of opinion they may be likely to join or eschew. In other words, the attorney addressing the Bench at a particular moment becomes merely the intermediary through which this conversation takes place.

Moreover, even though a case may have been accepted for review weeks or even months before it is argued, the authors remind the reader that, under the internal norms that prevail, the Justices, by their own admission, do not often discuss a case among themselves prior to oral argument, once review has been granted or probable jurisdiction noted. (However, one supposes that some discussion might have taken place at the particular conference when certiorari was granted.) In other words, just as oral argument is the *only* opportunity the Justices have to engage counsel directly about a case, it is also typically their *first* opportunity to discuss a case with each other.

This reconnaissance or exploratory function of oral argument is thus in addition to other ends that oral argument has long been supposed to serve. For example, the occasion provides opportunity to glean factual information about a case that does not appear in the written briefs or to call for explanation or elaboration of a point that otherwise might remain unclear. Particularly when the national government is party to a case, oral argument is a forum to learn how Congress or some part of the executive branch might respond to a particular situation. Finally, oral argument permits a Justice to probe the intricacies and implications of an argument. Response from counsel may lead a Justice to become more certain about the correctness of a position or move a Justice to rethink a tentative conclusion.

The authors' research was both ambitious and extensive: analysis of oral arguments from the 1998 through the 2007 Terms and analysis of the complete oral argument notes from the papers of Justice Lewis F. Powell, Jr. (1972–1987) and Justice Harry A.

Blackmun (1970-1994). As an aid to the reader, the authors have helpfully provided notes that connect specific exchanges to audio files at the website of the University of Michigan Press.[64] Moreover, several of the figures showing the handwritten oral argument notes of Blackmun and Powell are also posted at the same link. This is in addition to the book's photographic reproduction of some memoranda between Justice Powell and Justice Byron White over the contents of an opinion.

The findings, the authors insist, should "put to rest any doubt that the coalition-formation process begins during oral arguments." They report that "Blackmun's oral argument notes clearly show that he was predicting likely final coalitions as he sat in open court." Moreover, they found "that the more Blackmun notes comments from a specific colleague, the more likely he is to predict that colleague's vote. Blackmun is no amateur sidewalk fortune-teller. When he ventures a prediction, he is correct about seventy-six percent of the time, a figure that increases to eighty percent when he notes two or more references."[65] They consider such data "solid evidence that learning at oral argument pays off in terms of helping justices build a road map of the likely path a case will take." In other words, the actual "crafting of the majority opinion has its roots as far back in the process as the oral arguments."[66] In a wider perspective, it is an intriguing question whether their findings would characterize the behavior of other Justices in the same time period under review or to Justices in other eras or even to appellate tribunals other than the Supreme Court, but it lies well beyond the objectives of this book and could not be answered without much additional research.

Overall, the book's descriptive conclusion has an important prescriptive application in the ongoing discussion about the value of oral argument as a step in the Court's decision-making process. Plainly, oral argument, particularly the preparation for it, represents an enormous commitment of time on the part not only of counsel but of the Justices and their clerks too. For that reason, some have advocated less argument time or even its elimination entirely. The authors believe that such a change would be drastic and a mistake, a strong blow to the Court's process of crafting law." Removal of argument would do away "with one of the important venues in which the justices converse with each other about the case, determine their concerns about particular issues, and begin learning how eventual coalitions might form." Moreover "we would expect the opinion-writing process would be less efficient and more time consuming as would-be opinion authors (at least initially) would have substantially less information about their colleagues' positions." The result might be fewer opinions signed by at least five Justices. Perhaps most important, such action would "eliminate the only public portion of the Court's decision-making process and remove the only bit of transparency in the nation's highest court of last resort."[67] Indeed, one suspects that elimination of oral argument would necessitate introduction of some kind of less formal (and not public) substitute forum within the Court for similar exchanges among the Justices. The authors conclude with the reminder that "no other mechanisms in government take so little time (one hour per case) yet provide such a remarkable payoff to the American system of government."[68]

The Men Who Made the Constitution

Foundational to each book surveyed here is the Constitution, without which there would understandably be no Supreme Court. Those who drafted that document are the focus of **The Men Who Made the Constitution**, a useful reference work by John R. Vile, who teaches political science at Middle Tennessee State University.[69] Among other contributions, Vile has written a two-volume set in encyclopedia format on the actual

drafting of the Constitution[70] and has edited a pair of two-volume sets on prominent American lawyers and judges.[71] Thus, he is hardly a newcomer to the field. In this instance, **The Men Who Made the Constitution** is noteworthy for both its organization and content, both of which are partly determined by the fact that, of the seventy-four delegates chosen by the legislatures of twelve states[72] to attend the Convention that convened in Philadelphia in May 1787, only fifty-five eventually took their seats. Accordingly, this book contains a substantive biographical essay of varying length about each of those fifty-five that provides insight into the role that the particular delegate played at the Convention, and, where possible, includes information about the individual's views on the substantive matters, such as the structure of a national judiciary, with which the delegates had to deal. Preceding these essays is a lengthy introductory chapter that succinctly reviews the Revolution, the Articles of Confederation, and the major proposals considered and events that took place once business of the Convention commenced in Philadelphia.

Of the delegates, ten had been members of the Congress under the Articles, eight had signed the Declaration of Independence, and the signatures of six appeared on the Articles of Confederation. Significantly, the fifty-five included five future Justices of the Supreme Court: John Blair (Virginia), Oliver Ellsworth (Connecticut), William Paterson (New Jersey), John Rutledge (South Carolina), and James Wilson (Pennsylvania). On balance, therefore, the Convention was only partly a reassembling of the generation that had set the Revolution in motion. Rather, the delegates, steeped in political theory as many of them were, came from a pool of individuals who were fast gaining a wealth of real-world experience in the political life of the young nation, or, as Vile depicts their work, they were "an example of 'practical virtue in action.'"[73] At the Convention, quality thus seems clearly to have compensated for numbers, as probably no other gathering in the land since 1787 has matched the Convention for its embedded statecraft talent and intellect. As the books surveyed here suggest, the resulting political system has been the legatee.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

BLACK, RYAN C. **Oral Arguments and Coalition Formation on the U. S. Supreme Court: A Deliberate Dialogue**. (Ann Arbor: The University of Michigan Press, 2012). Pp. x, 141. ISBN: 978-0-472-1186-5, cloth.

FERREN, JOHN M. **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge**. (Chapel Hill: The University of North Carolina Press, 2004). Pp. xii, 577. ISBN: 978-1-4696-1549-0, paper.

SMITH, J. DOUGLAS. **On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought "One Person, One Vote" to the United States**. (New York: Hill and Wang, 2014). Pp. 370. ISBN: 978-0-8090-7423-5, cloth.

VILE, JOHN R. **The Men Who Made the Constitution: Lives of the Delegates to the Constitutional Convention**. (Lanham, MD: The Scarecrow Press, 2013). Pp. xxxvi, 446. ISBN: 978-0-8108-8865-4, cloth.

ENDNOTES

[1] The dates in 1865 of April 9 (when Robert E. Lee surrendered his army to Ulysses S. Grant at Appomattox Court House in Virginia), and April 26 (when Joseph E. Johnston surrendered his army to William T. Sherman near Durham Station in North Carolina) are commonly cited as marking the formal end of hostilities, although resistance by pockets of Confederate units, particularly in the West, persisted in some places for weeks afterward. One writer has characterized the terms of surrender dictated by Grant and Sherman as reflecting "victorious restraint." Amanda Foreman, "Mercy in Victory Is as

Ancient as War." *Wall Street Journal*, April 4, 2015, p. C-12. Her assessment may be correct, given alternatives. Still, there was never any policy forthcoming to benefit devastated areas similar to the Marshall Plan that followed World War II.

[2] Hostilities in World War I ceased with the Armistice of November 11, 1918.

[3] *Texas v. White*, 74 U.S. (7 Wallace) 700, 725. (1869).

[4] No compensation was paid to the slave-owners, most of whom lived in the states of the late Confederacy and now faced financial ruin. "The legal authority of the United States was thus used for an annihilation of individual property rights without parallel (outside of modern communism) in the history of the Western world." R. R. Palmer, **History of the Modern World** (1960), 543.

[5] The promise of the Fifteenth Amendment, however, remained unfulfilled and truly did not become a reality for any substantial period of time until after passage and implementation of the Voting Rights Act almost a century later in 1965.

[6] *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404 (1857).

[7] "The right . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[8] J. Douglas Smith, **On Democracy's Doorstep** (2014), hereafter cited as Smith.

[9] See Royce Hanon, **The Political Thicket** (1966).

[10] Woodrow Wilson, **Congressional Government** (1885).

[11] Woodrow Wilson, **An Old Master and Other Essays** (1893), 116.

[12] The exception is that, in instances where no candidate for President receives a majority of the electoral vote and selection of the President devolves upon the House, each state's delegation casts a single vote. In the corresponding situation where no candidate for Vice President receives a majority of the electoral vote, the selection is made by the Senate, where members vote individually.

[13] http://www.house.gov/content/learn (last accessed on April 28, 2015).

[14] In *Arizona State Legislature v. Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), a closely divided Supreme Court held that a state may allow a body other than its legislature to do the redistricting for congressional seats.

[15] As matters unfolded, Chief Justice Warren remained on the Court for another term after President Lyndon Johnson's failed nomination of Justice Abe Fortas to replace him. "[S]ince they wouldn't confirm Abe," said Warren, "they will have me." Henry J. Abraham, **Justices and Presidents** (3d ed., 1992) 13.

[16] 328 U. S. 549 (1946).

[17] *Colegrove v. Green* was decided by seven Justices. Justice Frankfurter wrote the opinion that announced the judgment of the Court. Justice Rutledge concurred in the result. Justices Black and Douglas and Murphy joined Justice Black's dissent. Justice Jackson did not participate. He was chief U.S. prosecutor at the Nuremberg Trials in 1945–1946. Chief Justice Stone died on April 22, 1946, after the case had been argued on March 7 and 8, but before the case came down on June 10.

[18] 328 U.S. at 552, 556.

[19] *Marbury v. Madison*, 5 U. S. (1 Cranch) 137. 178 (1803).

[20] 364 U.S. 439 (1960).

[21] 369 U.S. 186 (1962).

[22] 372 U.S. 368 (1963).

[23] *Id.*, 379, 381 (1963).

[24] 376 U.S. 1, 8 (1964).

[25] 377 U.S. 533 (1964).

[26] Of the fifty states in 1964, forty-nine had bicameral legislatures while Nebraska had a unicameral legislature. This pattern remains in place. Because the Constitution mandated a Senate that was not apportioned on the basis of population, Alabama and other states had argued that one house of a two-house state legislature could, for that reason, be apportioned on the basis of something short of population equality. However, the Court through Chief Justice Warren's opinion for the majority rejected the persuasiveness of what had been called the "federal analogy," *Id.*, 571.

[27] *See* Smith 81-89.

[28] *Id.*, 89.

[29] According to Smith, had Warren convinced Whittaker merely to resign, he would have forfeited a lifetime annual pension of $17,500. *Id.*, 90. Whittaker died in 1973.

[30] *Id.*, 92.

[31] Justice Harlan also penned a powerful dissent in *Reynolds v. Sims* that surely would have pleased Justice Frankfurter.

[32] 369 U.S. at 269-270 (emphasis in the original).

[33] Smith, 270.

[34] *Id.*, 88.

[35] A combination of circumstances dissuaded Rutledge from joining the dissent. "As a matter of legislative attention, whether by Congress or the General Assembly, the case made by the complaint is strong. But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily, or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections. The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. To force them to share in an election at large might bring greater equality of voting right. It would also deprive them and all other Illinois citizens of representation by

districts which the prevailing policy of Congress commands. . . . There is not, and could not be, except abstractly, a right of absolute equality in voting. At best, there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution. The right here is not absolute. And the cure sought may be worse than the disease." 328 U.S. at 566.

[36] Smith, 88.

[37] Ferren reports that he found no traceable family connection between Wiley Rutledge and South Carolina's John Rutledge, who was both an Associate Justice (1790-1791) and a recess appointee as Chief Justice (1795) but whose nomination to the latter position was rejected by the Senate in the 1790s. John M. Ferren, **Salt of the Earth, Conscience of the Court** (2004), hereafter cited as Ferren, 13.

[38] Published by University of North Carolina Press in 2004, and an excerpt was published in this *Journal* in 2004.

[39] Fowler V. Harper, **Justice Rutledge and the Bright Constellation** (1965).

[40] Ferren, 549-577.

[41] Lacking, however, is a chronology, which should be a standard feature in any biography.

[42] *See* Matthew 5:13.

[43] Harper, **Justice Rutledge and the Bright Constellation**, p. 336.

[44] To fill Rutledge's seat, President Harry Truman appointed former Indiana Senator Sherman Minton of the Court of Appeals for the Seventh Circuit.

[45] On the current Supreme Court, Justice Elena Kagan is a former dean at Harvard Law School. Several other Justices have held professorships or other teaching positions: Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, and Antonin Scalia. Earlier, Justice Frankfurter was a professor at Harvard Law School at the time of his appointment in 1939, and Douglas had taught at the law schools at both Columbia and Yale universities before his appointment from the Securities and Exchange Commission, also in 1939.

[46] Powell had forwarded to Rutledge the memorandum he had sent Frankfurter in 1938 after meeting Rutledge at a conference in Chicago and finding him to be Supreme Court material.

[47] Ferren, 219.

[48] "A Party for the People," *The Nation*, Jan. 28, 1931, p. 88.

[49] This count does not include Roosevelt's appointment of Justice Stone as Chief Justice to replace retiring Chief Justice Hughes.

[50] Abraham, **Justices and Presidents**, 7.

[51] Ferren, 207-221.

[52] Among other works, Irving Brant authored a six-volume biography of James Madison that Bobbs-Merrill published between 1941 and 1961.

[53] President Hoover had nominated Parker to the Supreme Court in 1930 after Justice Edward Sanford died. The Senate's rejection of Parker was the first such unsuccessful nomination to the Supreme Court since that of Wheeler Peckham in 1894. Hoover then nominated Owen J. Roberts for Sanford's seat.

[54] *Id.*, 215.

[55] Had Roosevelt not believed that Judge Hand, who was highly critical of many of the Court's rulings against the administration, had opposed him on this matter, a nomination of Hand in 1943 would have been somewhat awkward in that Hand was already seventy-one—a year beyond the cutoff retirement age lodged in the failed 1937 Supreme Court "reorganization" (Court-packing) proposal. *See* Gerald Gunther, **Learned Hand** (1994), 392.

[56] Ferren, 217.

[57] In particular, *see United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

[58] 330 U.S. 1 (1947). In this case, five Justices, through an opinion by Justice Black, upheld a New Jersey policy that reimbursed parents for the cost of transporting their children to school, including situations even where the school being attended was a parochial school. Justices Frankfurter, Jackson, and Burton joined Rutledge's dissent.

[59] *Id.*, 63.

[60] Future Justice John Paul Stevens clerked for Rutledge during the 1948 Term, Ferren, 230.

[61] Ryan C. Black, Timothy R. Johnson, and Justin Wedeking, **Oral Arguments and Coalition Formation on the U.S. Supreme Court** (2012), hereafter cited as Black, Johnson, and Wedeking.

[62] *Id.*, 117.

[63] As an advocate in the U.S. Solicitor General's office and in private practice, John G. Roberts' skills were legendary. *See* his "Oral Advocacy and the Re-emergence of a Supreme Court Bar," 30 *Journal of Supreme Court History* 68 (2005).

[64] www.press.umich.edu/titleDetailDesc.do?id=4599894 (last accessed on May 17, 2015).

[65] Black, Johnson, and Wedeking, 112-113.

[66] *Id.*, 113.

[67] *Id.*, 114.

[68] *Id.*, 115.

[69] John R. Vile, **The Men Who Made the Constitution** (2013), hereafter cited as Vile.

[70] The Constitutional Convention of 1787 (2005), 2 vols.

[71] **Great American Judges** (2003), 2 vols.; **Great American Lawyers** (2001), 2 vols.

[72] Rhode Island selected no delegates.

[73] Vile, xx.

Illustrations

The images in these pages are either from the Library of Congress or in the public domain, except as noted below:

Page 237, Engraving by J.B. Forrest after John Wesley Jarvis, Collection of the Supreme Court of the United States
Page 239, Portrait by John Wesley Jarvis, National Portrait Gallery
Page 243 (bottom), The Thomas Jefferson Papers Series 1, General Correspondence. Library of Congress
Page 243 (top), Etching by Albert Rosenthal, Library of Congress
Page 253, Brady-Handy Photograph Collection, Library of Congress
Page 256, Roger B. Taney bust by Augustus Saint-Gaudens, courtesy of the U.S. Senate
Page 270, graphic by Photomosaic: Zoë Woodworth, courtesy of Lea Vandervelde
Page 287, courtesy of the Massachusetts Historical Society
Page 298, National Archives
Pages 303 (top) and 307, Historical & Special Collections, Harvard Law School Library
Page 316, Photograph by National Photo Company, Library of Congress
Page 323, Harris & Ewing photographers, Library of Congress
Page 326, Photograph by C. M. Bell Studio, Collection of the Supreme Court of the United States
Page 329, Photograph by Harris & Ewing, Collection of the Supreme Court of the United States
Page 330, Photograph by National Photo Company, Library of Congress
Page 338, Cartoon by Elkanah Tisdale (1771-1835), Library of Congress
Page 342, Photograph by Harris & Ewing, Collection of the Supreme Court of the United States

Cover: Roger B. Taney. Library of Congress.

Introduction

Melvin I. Urofsky

There is no need to explain the contents of this issue, since the titles are self-evident. With three exceptions, all of these pieces come from last year's Leon Silverman Lecture Series dealing with the Court and the Civil War. In addition to the dialogue between esteemed historians James McPherson and G. Edward White about the impact of the Civil War on Holmes, we are delighted to publish Professor Catharine Pierce Wells's narrative account of Holmes' Civil War experiences in which she provides a nice counterpoint to the McPherson-White discussion. Please note also that one of the contributors is our own associate editor, Timothy S. Huebner, whose day job is Sternberg Professor of History and department Chair at Rhodes College in Memphis.

A word is in order about Leon Silverman himself, who died at age ninety-three this past February.

Leon's career as a lawyer and public servant are well known, and, as Chief Justice John G. Roberts, Jr., noted, "Leon's sense of service to the judiciary did not stop at the courthouse door." In particular, Leon played a crucial role in making the Supreme Court Historical Society the respected and influential institution it is today.

On a more personal note, Leon bears the responsibility for my becoming editor of this journal. It is now some twenty years since I met with Leon, who handed me copies of what were then the Society's Yearbooks, and asked me what I thought of them. Having no idea of what he had in mind, and pretty sure that I would never see him again, I told him I thought that it was a mistake to just reprint articles that appeared elsewhere, and that the publication would never gain any respect until it carried original articles. He said, "Can this be done?" and I fell right into the trap and said, "Sure. All you need is the right editor who can go out into the scholarly community and use his or her connections to get good pieces." Leon then smiled, shook my hand, and said the job was mine. It has been a great source of satisfaction to me that, over the years, as the Yearbook became the *Journal* and expanded to a thrice-yearly publication

schedule, that whenever I saw Leon, he told me that he liked the results.

Of the articles in this issue that are not part of the Lecture series, the first is by Mel Laracey, associate professor of history at the University of Texas at San Antonio, and deals with a perennially popular topic: Thomas Jefferson's war against the judiciary.

The others are by Franz Jantzen and Grier Stephenson. Grier's Judicial Bookshelf has been a staple of the *Journal* since before I took over, and it remains a lively and acute assessment of recent books on the Court. I remain grateful that Grier continues to do this.

As any scholar who has ever worked with the Supreme Court's archives who needs pictures for a book, Franz is not only an invaluable resource, he is the person to go to for assistance with graphic materials. On a personal level, I owe him a great deal for all the help he gave me when I was getting pictures for my Brandeis book, and he was working out of one of the trailers during the building's renovation.

There have always been stories about why there is no Court picture for the 1924 Term, and the tale most often told—and believed—is that Justice James C. McReynolds was so anti-Semitic that he refused to sit with Louis D. Brandeis. If one thought about this a bit, it makes no sense since the two men are in other pictures during the twenty-three Terms they served together. Franz decided to look into it, and his detective work should lay the more common tale to rest, although it appears that nothing will stifle the fact that McReynolds was a highly prejudiced person.

As always, a lot of good and interesting material. Enjoy.

Contributors

Timothy S. Huebner is the Irma O. Sternberg Professor of History and Chair of the Department of History at Rhodes College. He also serves as Associate Editor of the *Journal of Supreme Court History*. His new book, **Liberty and Union: The Civil War Era and American Constitutionalism**, is forthcoming in 2016 from University Press of Kansas.

Franz Jantzen is the Collections Manager for Graphic Arts at the Supreme Court of the United States.

Mel Laracey is an Associate Professor of Political Science at The University of Texas at San Antonio.

James M. McPherson is the George Henry Davis 1886 Professor of American History, Emeritus at Princeton University.

Brad Snyder is Associate Professor of Law at University of Wisconsin School of Law.

Donald Grier Stephenson, Jr. is the Charles A. Dana Professor of Government at Franklin & Marshall College.

Lea VanderVelde is Josephine Witte Professor of Law at University of Iowa College of Law.

Catharine Pierce Wells is a Professor of Law and Law School Fund Research Scholar at Boston College Law School.

G. Edward White is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law.