The Gettysburg College Journal of the Civil War Era

THE GETTYSBURG COLLEGE JOURNAL OF THE CIVIL WAR ERA

Volume 12 Article 1

2023

Gettysburg College Journal of the Civil War Era 2023

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Keywords
Gettysburg College, civil war

GETTYSBURG COLLEGE

JOURNAL OF THE CIVIL WAR ERA

Volume 12 | Spring 2023

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If you or anyone you know has written an undergraduate essay in the past five years on the Civil War Era or its legacy, visit our website at http://cupola.gettysburg.edu/gcjwe/ to enter have your work considered for next year's volume of the journal. Please review the following requirements and categories for publication.

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1. Academic Essays: We are interested in original research making extensive use of primary and secondary sources. Possible topics include, but are not limited to: military history, social history, race, reconstruction, memory, reconciliation, politics, foreign affairs, the home front, etc. **6,000 words or less.**

2. Historical Nonfiction Essays: This category is for works of nonfiction surrounding the Civil War that are not necessarily academic in nature. Examples include essays in public history of the war, study of re-enactment culture, current issues in Civil War memory such as the sesquicentennial, etc. Creativity is encouraged in this category if it remains a nonfiction piece. **2,000 to 6,000 words.**

Anyone with an interest in the Civil War may submit their work, including graduate students and independent scholars, as long as the submission is undergraduate work written within the past five years. If your submission is selected, your work will be published online and in a print journal, which you will receive a copy of for your own enjoyment.

Letter from the Editors

It is our pleasure to present the twelfth volume of the Gettysburg College Journal of the Civil War Era. The challenges of student scholarship during the era of COVID make the successful publication of this edition a particularly gratifying one. Changes to the submission, review, and publication processes provided a challenge which our authors and editors met with impressive dedication and remarkable patience. It is a great honor to note that the Journal is healthier than ever before and has a bright future in the years to come.

This volume contains three academic essays which illuminate various aspects of the Civil War Era. The first, Riley Neubauer's "A Stolen Ship: Robert Smalls' Daring Escape to Freedom," is a highly entertaining work of military and race history which details the experiences of one of the Civil War's most fascinating figures. Imminently readable, the essay contextualizes Smalls' work within broader understandings of Black agency within the period.

The following essay, Ian L. Baumer's "Chaos in Congress: Masculinity and Violence in the Congressional Struggle Over Kansas," meanwhile uses effective primary source research to question manifestations of gender ideology in the period. Blending histories of politics, race, and gender, Baumer develops an intriguing interpretation of the social context of the American Civil War.

Finally, Matthew X. Wilson's "History and Implications of the Missouri Test-Oath Case," provides a stunning conclusion to this volume of the Journal. Citing prolifically from court cases, historical works, and legal analyses, Wilson has created a spectacular spotlight on an aspect of the Civil War period which rarely receives the attention merited by its importance.

In addition to our three published authors, we received a collection of high-quality, engaging works of history and analysis which were delightful to read. Selecting only a few out of this larger group was a challenging task and could not have been accomplished without the assistance of our diligent editors, who accepted multiple challenges with smiles and prompt emails. Our special thanks go out to James Duke, Lauren Letizia, Nicholas Ryan, and Stefany Kaminski. Though Lauren has completed her term as an undergraduate, we are confident that the Journal is in the hands of qualified editors who look forward to even more submissions next year. We would also like to thank Dr. Ian Isherwood for his support and advice, and Mary Elmquist for her assistance in updating the Journal's submission and review systems to provide better stability and more effective communication.

We hope this journal not only contributes to the growing body of scholarship on the Civil War Era, but also addresses the historiographical gaps within such scholarship. New interpretations which meaningfully evaluate the history of the period in nuanced, evidence-driven ways help drive our understanding and practice forward. We are proud of the efforts given by each author, and we look forward to seeing their continued historical work for years to come.

Sincerely,

Brandon R. Neely, '23
Emily R. Jumba, '24
Danielle S. Russell, '25

Editors-in-Chief
Gettysburg College Journal of the Civil War Era

Contents

A STOLEN SHIP: ROBERT SMALLS' DARING ESCAPE TO FREEDOM

Riley M. Neubauer | *College of William and Mary*

At 2:00 a.m. on the hazy morning of May 13, 1862, the U.S.S. *Planter* glided out of Charleston Harbor. A formerly enslaved man by the name of Robert Smalls was at the helm, bringing with him a crew of five other African American men and their families. Smalls was born into slavery in Beaufort, South Carolina, on April 15, 1839, and in 1861 he became a member of the *Planter*'s enslaved crew. On the night of May 12, 1862, the enslaved men slowly unloaded the ship, and the white crew led by Captain Charles J. Relyea opted to go drink in town rather than supervise the rest of the work. Smalls seized this opportunity. The plan: commandeer the ship and sail it to freedom. He and the crew made one quick stop to pick up their families at the North Atlantic Wharf before slipping out of the Harbor. They first had to pass five Confederate forts. Smalls hoisted the South Carolina and Confederate flags to give the illusion that the *Planter* was on a routine supply mission. After safely passing four other forts, the ship approached Fort Sumter at 4:15 a.m. Smalls pulled the whistle cord: two long blows and

one short one—the Confederate signal. They advanced with no trouble. Now, under the cover of darkness, they traded the flags for a white bed sheet. Smalls hoped to approach the Union ships blockading Charleston harbor without the *Planter* being attacked. When the ship came up along the Union *Onward*, Smalls said to Captain John Nichols, "I'm Robert Smalls. I brought you the *Planter*. I thought it might be of some use to Uncle Abe."[1]

Robert Smalls successfully delivered himself and his passengers to freedom. For decades, scholars have debated the question of "who freed the slaves;" my paper adheres most closely with historians Vincent Harding and David Williams, who argue that enslaved people were principally responsible for emancipating themselves. However, many scholars disagree with this assessment. In his 1995 article "Who Freed the Slaves?" famed Civil War historian James McPherson answered the question with Abraham Lincoln. McPherson claimed that without the Civil War, emancipation would not have occurred—and many scholars do agree with him—but he further argued that the Civil War

[1] *Slavery and the Making of America*, narrated by Morgan Freeman, PBS Thirteen, 2005, https://www.thirteen.org/wnet/slavery/about/p_transcript4.html.

was fundamentally triggered by Lincoln's election, and that since the Union Army that interacted with emancipated slaves was directed by Lincoln, Lincoln freed the slaves.[2] Ira Berlin criticized McPherson's "elitist history," and argued that "the question of who freed the slaves…resonate[s] loudly in contemporary controversies about the role of 'Great White Men' in our history books." Berlin proposed his theory of "long emancipation" roughly twenty years after his critique of McPherson was published. Berlin viewed emancipation as a near century-long movement, rather than one distinct moment, in which the persistent struggle and bravery of African Americans who strove for freedom ultimately led to emancipation.[3] Whereas Berlin did not use the term "self-emancipation," he essentially described the same process as Harding and Williams, who each defined emancipation as a result of the work of enslaved Black people. "While Lincoln continued to hesitate about the legal,

[2] James M. McPherson, "Who Freed the Slaves?," *Proceedings of the American Philosophical Society* 139, no. 1 (March 1995): 9, https://www.jstor.org/stable/986716.
[3] Ira Berlin, *The Long Emancipation: The Demise of American Slavery* (Cambridge, MA: Harvard University Press, 2015), 9. See also Ira Berlin responding to McPherson's "Who Freed the Slaves" Emancipation and its meaning in American Life published by Quaderni (1996): 27-34.

constitutional, moral, and military aspects of the matter, the relentless movement of the self-liberated fugitives into the Union lines…took their freedom into their own hands," Harding wrote.[4] The Emancipation Proclamation, then, was merely a legal document to confirm what enslaved people had been doing all along. Williams built on this idea, and presented newfound primary source evidence that enslaved people rushed towards freedom through both active and passive resistance.[5] The story of Robert Smalls validates Williams and Harding's arguments that enslaved people were not bystanders in the quest for emancipation as McPherson suggests; rather, the unique circumstances of the Civil War and the morning of May 13, 1862, allowed Smalls to enact his carefully-crafted plan to seize his own freedom.

Despite being favored by his enslaver and therefore shielded from the harsher aspects of enslavement, Small was purposefully exposed to the horrors of enslavement by his mother, Lydia, who hoped to caution him against resistance. However, her plan had the opposite effect. Enraged by the

[4] Vincent Harding, *There Is a River: The Black Struggle for Freedom in America* (Boston, MA: Houghton Mifflin Harcourt, 1981), 228-235.
[5] David Williams, *I Freed Myself: African American Self-Emancipation in the Civil War Era* (New York, NY: Cambridge University Press, 2014), 2.

atrocities he saw, Smalls vowed never to be complacent in the system of enslavement. He was openly rebellious and confrontational from a young age, and he continued to revolt until he could perform the single greatest act of rebellion: self-emancipation. While Smalls never knew the true identity of his father, Smalls suspected that he was the son of John McKee, his first enslaver. Likely due to this supposed familial connection, as well as his intelligence and kind disposition, Smalls worked within the McKee household. Lydia feared her son did not understand the horrors of enslavement because of his preferential treatment, so she took him to the local arsenal to watch a slave auction.[6] "I have had no trouble with my owner but I have seen a good deal in traveling around on the plantations," Smalls said in a post-Civil War interview. Enslaved people were whipped "for the simplest thing if it was not done to suit the owner's notion. They were whipped till the blood came and then washed down with salt and water," he continued.[7] While Smalls had "no trouble" with McKee, their relationship was

[6] Okon Edet Uya, *From Slavery to Public Service: Robert Smalls 1839-1915* (New York: Oxford University Press, 1971), 4.
[7] John W. Blassingam, ed., *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies* (Baton Rouge, LA: Louisiana State University Press, 1977), 380-381.

not representative of the usual power dynamic between masters and those they enslaved. So, it was only by "traveling around on the plantations" that Smalls witnessed the more common realities of enslavement. Seeing the unjust and violent treatment of other enslaved individuals, Smalls decided that he would rebel.

Over Robert Smalls' years of enslavement working as a ship hand, he earned the trust of the white officers, which allowed him to plan his escape. By 1857, Smalls convinced McKee to allow him to hire himself out at a rate of fifteen dollars an hour, even convincing McKee to permit Smalls to keep a small portion of his wages. Smalls began as a stevedore, worked his way up to foreman, and eventually went to work for John Simmons, a prominent shipowner, who taught him how to be a sailor. By 1861, Smalls possessed a thorough knowledge of the harbors and waterways of South Carolina and Georgia.[8] When the Civil War broke out, Smalls held a position as the most senior sailor that an enslaved man could be. On April 12, 1861, when the Confederate Army attacked the Union-held Fort Sumter, Smalls was employed by John Ferguson, the owner

[8] Uya, *From Slavery*, 6-7.

of the sidewheel steamer the *Planter*. Shortly after the Union surrendered the Fort, the Confederate Government seized control of many of the ships in Charleston Harbor and forced the enslaved crews to work for the Confederate war effort.[9] Smalls was infuriated by this forced service in support of the Confederacy. He was content to be employed by Ferguson because his work on the *Planter* was purely transactional; however, Smalls refused to labor in support of a system that perpetuated enslavement. While he had the option to purchase his own freedom with the funds he had already saved, he did not have enough money to purchase his family, so he stayed. Despite his decision to temporarily remain on the *Planter,* Smalls and the other enslaved men onboard met in secret to discuss potential escape plans. As an unnamed member of the group remembered after the war, they spoke about "plac[ing] themselves under the Stars and Stripes instead of the Stars and Bars."[10] Their self-emancipation was imminent—the men simply had to wait for the right time to seize their freedom.

While there are multiple triggers for the escape on the night of May 12, 1862, Smalls felt increasing pressure to

[9] Uya, *From Slavery*, 12.
[10] Uya, *From Slavery*, 14.

escape following his mother's newfound emancipation at the hands of the Union Army, his wife Hannah's desire to raise their children in a free state, and Major General David Hunter's emancipatory proclamation. In the early spring of 1862, the Union Army captured the plantation where Lydia Smalls was enslaved and freed her. After Smalls received the letters she sent that described the happiness she felt to work for the Union, he brooded over her freedom and his enslavement, even though they were physically separated only by a few miles.[11] It is surprising that both Smalls and his mother were literate, considering that many enslaved people never had the opportunity to learn to read or were banned from doing so by their enslavers. In 1864, Smalls addressed the General Conference of the African Methodist Episcopal Church and remembered his conversation with Hannah right before their escape. Smalls did not want his children to witness the cruelty Lydia forced him to see when he was their age, and Hannah agreed with him. "It is a risk dear, but you and I, and our little ones must be free," Smalls recalled Hannah telling him.[12] Smalls was greatly concerned

[11] Uya, *From Slavery*, 13.
[12] "Capt. Robert Smalls Addresses the General Conference of 1864, Daniel A. Payne, Presiding," *The A.M.E. Church Review* 70 (1955): 23.

by the issue of his family's freedom and this desire for freedom motivated the rest of the *Planter's* enslaved crew members to involve their families in the escape plan. It is clear from Hannah's comment, that she and Smalls understood the major risks that went along with their plan. Hannah proclaimed that if Smalls died in the attempt to gain their freedom, she would die with him: "I will go, for where you die, I will die." [13] Major General Hunter's May 9, 1862, General Order No.11 placed Florida, Georgia, and South Carolina under martial law and emancipated all enslaved people in those states. Only ten days later, Lincoln issued a new proclamation that voided General Hunter's proclamation. Lincoln claimed that General Hunter had no authority to emancipate enslaved people, and such a decision could only be made by the President or by Congress.[14] While it is not officially clear if Smalls knew of this proclamation, given his proximity to Confederate officers who would have been outraged at what they would view as General Hunter's

[13] Ibid.

[14] Letter by Abraham Lincoln, "Abraham Lincoln papers: Series 1. General Correspondence. 1833-1916: Abraham Lincoln, Monday, May 19, 1862 (Proclamation revoking General David Hunter's General Order No. 11 on military emancipation of slaves)," May 19, 1862, https://www.loc.gov/item/mal1604600/.

overreach and theft of their property, he likely would have overheard such conversations. Smalls' escape occurred before Lincoln revoked this order—so, Smalls believed he would be safe in the hands of the Union Navy, if he could reach it. The conditions of the Civil War allowed General Hunter to issue General Order No. 11, which follows McPherson's logic that Lincoln and the Union Army freed enslaved people. In reality, however, since Smalls' enslavers were supporters of the Confederate Army, they were not required to abide by General Hunter's orders, since he was neither their commander nor in their same army. For this proclamation to mean anything realistic to an enslaved person, they had to emancipate themselves and flee to the Union Army.

Smalls encountered five major obstacles to overcome as soon as the moment of escape dawned: stealing the *Planter* without the Confederate officers noticing, maintaining the support of the other enslaved crewmen because he could not run the ship alone, piloting the ship and passing for the white Captain Relyea, sailing undiscovered past four heavily armed Confederate forts, and finally, approaching the Union ship without being fired upon. There were many places Smalls could have failed, yet he

succeeded—why did everything go right for him? It appears that luck worked in Smalls' favor. The June 17, 1862, issue of the *New York Daily Tribune* printed a verbatim copy of the *Planter*'s logbook from the night of May 13th in an article called "Capture of a Rebel Steamer," but it provides little insight into the steps Smalls and his crew took to ensure a successful journey. The language is concise and direct: "we leave Charleston at ½ past 3 o'clock on Tuesday morning. We pass Fort Sumter at ¼ past 4 o'clock. We arrive at blockading squadron at Charleston Bar at ¼ to 6. We give three cheers for the Union flag once more."[15] In this basic account the only new piece of information is that the members of the ship gave "three cheers for the Union flag" once they arrived alongside the U.S.S. *Onward*. Historian and author Andrew Billingsley analyzed this segment in his book *Yearning to Breathe Free* and stated that the first mate John Smalls (of no relation to Robert) must have written the entry, as he omitted his name from the list of enslaved men

[15] "Capture of a Rebel Steamer," *New York Daily Tribune*, June 17, 1862, https://chroniclingamerica.loc.gov/lccn/sn83030213/1862-06-17/ed-1/seq-1/.

and women that preceded it.[16] In 1883, the United States Navy produced a report for the House of Representatives that described the reactions of white officers who interacted with Smalls shortly after his escape. This report also included a short preface to provide readers with background information about the escape. Ironically, this source provides more context than the *Planter*'s logbook. The report reads more like a historical novel than a review of the events. It begins at 2:00 a.m. on May 13, 1862, when Smalls donned Captain Relyea's wide-brimmed straw hat to better resemble the Captain. Smalls had practiced pacing on the deck of the ship with his arms folded exactly in the way that the Captain did so that, in the dim early morning light, the two were indistinguishable. At 3:25, the *Planter* continued "her perilous adventure," and Smalls blew the ship's whistle while it sailed past Fort Johnson. At 4:15, the ship passed Fort Sumter, and "the signal required to be given by all steamers passing out was blown as coolly as if General Ripley was on board going out on a tour of inspection."[17] General James Wolfe Ripley, a member of the Union Army

[16] Andrew Billingsley, *Yearning to Breathe Free: Robert Smalls of South Carolina and His Families* (Columbia, SC: University of South Carolina Press, 2007), 63.
[17] Robert Smalls, H.R. Rep. No. 47-1962, 2d Sess. (Feb. 19, 1883).

and the Chief of Ordinance for the U.S. Army Ordnance Department was solely responsible for modernizing the artillery's weaponry. The comparison drawn between Smalls and Ripley contextualized Smalls' greatness for all readers because, in that era, Ripley's name was synonymous with military prestige. Smalls' "perilous adventure," as the report labeled it, was successful because of the circumstances of the Civil War, the careful preparations Smalls made to closely imitate the Confederate crew, and a great deal of luck that just happened to be on the side of the *Planter's* crew.

Immediate reactions to the *Planter*'s achievements were mostly full of surprise. Regardless of modern historians' arguments about the frequency of self-emancipation, similar stories are nonexistent. In a letter to another Union officer, the *Onward*'s Captain Nichols described encountering the *Planter* and Robert Smalls. Captain Nichols reflected on the fact that enslaved people had performed this great deed, and informed his fellow officer that "I sent for the hero, Robert, and he soon came, a pleasant-looking darky, not black, neither light, extreme amount of wooly hair, neatly trimmed, fine teeth; a clean and nice linen check coat with a very fine linen shirt having perhaps been of the wardrobe of the Navy officer who

commanded the boat but fitting him very well."[18] With the inclusion of details about his physical appearance and clothing, Captain Nichols' description of Smalls is the only one in existence that illustrates how Smalls looked on the morning of his escape. Nichols praised Smalls, calling him a "hero," yet he used racist and dehumanizing language in the rest of his description, referring to Smalls as a "pleasant-looking darky" with "wooly hair" whose "fine" clothing could only have belonged to a white officer, as an enslaved person would rarely (if ever) own such items. Nichols' letter read as if he was trying to praise Smalls for his extraordinary bravery, but some of the language he used was pointed and racist. Other Union Officers, however, had clearer respect for Smalls' actions. Flag Officer S.F. Dupont's letter, written on May 14, 1862, was compiled into the U.S. Navy Report on the incident and offered Smalls genuine praise. "Robert, the intelligent slave and pilot of the boat," he began, "is superior to any who have come in our lines—intelligent as many have been. His information has been most interesting, and portions of it of the utmost importance."[19] Flag Officer Dupont called Smalls "intelligent" twice and asserted that

[18] Billingsley, *Yearning to Breathe Free*, 60.
[19] Robert Smalls, H.R. Rep. No. 47-1962, 2d Sess. (Feb. 19, 1883).

the information Smalls brought along with the *Planter* was of the "utmost importance" to the Union cause. Rather than rely solely on a description of Smalls' physical characteristics like Nichols, Dupont referred to Smalls' intelligence and value as a future Naval Officer, not just a newly emancipated person.

Just as scholars Harding and Williams suggest was possible for enslaved African Americans, the actions of Union generals and politicians further supported enslaved individuals' quest for freedom. Smalls' contemporaries and modern historians fail to note that Smalls did not pilot the *Planter* to freedom to be famous, or to be a Union Naval Captain. As he stated on November 1, 1895, while reflecting on his escape and the status of African Americans in the United States at the end of the nineteenth century, "My race needs no special defense, for the history of them in this country proves them to be the equal of any people anywhere. All they need is an equal chance in the battle of life."[20] And that is precisely what Smalls was trying to accomplish on May 13th: setting himself up for his own "equal chance in the battle of life."

[20] Uya, *From Slavery*, 1.

Bibliography

Berlin, Ira. *The Long Emancipation: The Demise of American Slavery*. Cambridge, MA: Harvard University Press, 2015.

Billingsley, Andrew. *Yearning to Breathe Free: Robert Smalls of South Carolina and His Families*. Columbia, SC: University of South Carolina Press, 2007.

Blassingam, John W., ed. *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies*. Baton Rouge, LA: Louisiana State University Press, 1977.

"Capt. Robert Smalls Addresses the General Conference of 1864, Daniel A. Payne, Presiding." *The A.M.E. Church Review* 70 (1955): 23.

Halfmann, Janet. *Seven Miles to Freedom: The Robert Smalls Story*. Illustrated by Duane Smith. New York City, NY: Lee & Low Books, 2008.

Harding, Vincent. *There Is a River: The Black Struggle for Freedom in America*. Boston, MA: Houghton Mifflin Harcourt, 1981.

Harper's Weekly (New York City, NY). "Robert Smalls, captain of the gun-boat 'Planter' The gun-boat 'Planter,' run out of Charleston, S.C., by Robert Smalls, May 1862." June 14, 1862. https://www.loc.gov/item/97512451/.

Henig, Gerald S. "Meet the Unstoppable Mr. Smalls." Navy Times. Last modified March 2007. https://www.navytimes.com/news/your-navy/2019/02/12/meet-the-unstoppable-mr-smalls/.

Lincoln, Abraham. Letter, "Abraham Lincoln papers: Series 1. General Correspondence. 1833-1916: Abraham Lincoln, Monday, May 19, 1862 (Proclamation revoking General David Hunter's General Order No. 11 on military emancipation of slaves)," May 19, 1862. https://www.loc.gov/item/mal1604600/.

Lineberry, Cate. *Be Free or Die: The Amazing Story of Robert Smalls' Escape from Slavery to Union Hero*. New York City, NY: Picador, 2017.

McPherson, James M. "Who Freed the Slaves?" *Proceedings of the American Philosophical Society* 139, no. 1 (March 1995): 1-10. https://www.jstor.org/stable/986716.

Miller, Edward A., Jr. *Gullah Statesman: Robert Smalls from Slavery to Congress, 1839-1915*. Columbia, SC: University of South Carolina, 1995.

New York Daily Tribune. "Capture of a Rebel Steamer." June 17, 1862. https://chroniclingamerica.loc.gov/lccn/sn83030213/1862-06-17/ed-1/seq-1/.

The Roanoke Daily Times (Roanoke, VA). "He Ran the Gauntlet: How a Confederate Boat Was Turned over to the Enemy." July 9, 1896. https://chroniclingamerica.loc.gov/lccn/sn95079481

/1896-07-09/ed-1/seq-6/#date1=1789&index=11&rows=20&words=Robert+Smalls&searchType=basic&sequence=0&state=&date2=1963&proxtext=%22robert+smalls%22&y=0&x=0&dateFilterType=yearRange&page=1.

Robert Smalls, H.R. Rep. No. 47-1962, 2d Sess. (Feb. 19, 1883).

Slavery and the Making of America. Narrated by Morgan Freeman. PBS Thirteen, 2005. https://www.thirteen.org/wnet/slavery/about/p_transcript4.html.

Uya, Okon Edet. *From Slavery to Public Service: Robert Smalls 1839-1915*. New York: Oxford University Press, 1971.

Williams, David. *I Freed Myself: African American Self-Emancipation in the Civil War Era*. New York, NY: Cambridge University Press, 2014.

CHAOS IN CONGRESS: MASCULINITY AND VIOLENCE IN THE CONGRESSIONAL STRUGGLE OVER KANSAS

Ian L. Baumer | *University of Virginia*

In 1838, Royal Navy officer Frederick Marryat visited the United States. He arrived in New York on 4 May and made his way to the country's exciting capital, Washington, D.C., where he sat in on the Congress of the young republic. Marryat had mixed thoughts on the legislature, but one event stood out to him. According to Marryat, this event "engrossed the minds of every individual" in Washington: a duel that resulted in the death of Representative Jonathan Cilley at the hands of his colleague William Graves. As a foreigner, Marryat remarked that the duel, as well as "what took place after it," was a "subject for grave reflection." Cilley's body was laid in state at his funeral. In Britain, a duelist would be "condemned and executed for murder," yet here in America was such a man receiving state honors! If Americans wanted to be a moral people, they would need to stop paying "those honours to

vice and immorality which are only due to honour and to virtue."[1]

The American people did not heed Marryat's advice, as they would continue to accept violence within their political system – particularly in Graves' and Cilley's institution: Congress. In *The Field of Blood*, a recent study on antebellum congressional violence, Joanne Freeman records over *seventy* violent incidents between members of Congress in the years between 1830 and 1860. In the 1850s, one topic generated these incidents more than any other: slavery. During his time in America, Marryat speculated that slavery would "produce a separation between the Northern and Southern states." The question of slavery constantly occupied congressional debate in the years after Marryat's visit. In the 1850s, a dispute over whether slavery would expand to the Kansas Territory spawned several violent incidents in Congress, swelling the boil of sectional tension that erupted into the Civil War in 1861.[2]

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[1] Frederick Marryat, *A Diary in America: With Remarks on its Institutions*, vol. 1 (Philadelphia, PA: Carey and Hart, 1839), accessed at Gale's Sabin Americana Database (hereafter SAD), 173.

[2] Joanne B. Freeman, *The Field of Blood: Violence in Congress and the Road to the Civil War* (New York, NY: Farrar, Straus and Giroux, 2018), 5; Marryat, *A Diary in America*, vol. 2, SAD, 118.

This essay examines three of those incidents: the near duel between John C. Breckinridge and Francis Cutting in 1854, Preston Brooks' caning of Charles Sumner in 1856, and the 1858 congressional brawl prompted by a fight between Laurence Keitt and Galusha Grow. To understand these men in the context of gender, this essay inspects how their conceptions of masculinity and opinions on slavery motivated these violent incidents. Before this essay does so, it establishes Amy S. Greenberg's dichotomy of martial and restrained masculinities as the lens by which it will analyze the masculine practices of the involved parties. This analysis argues that the behavior of the instigating actors of Kansas-related scuffles in the 1850s reveals that these incidents resulted from the practice of a specifically Southern iteration of martial manhood grounded in the service of slavery's interests.

I: Greenberg's Gender Groundwork: Masculinity vs. Restrained Masculinity

In her 2005 book *Manifest Manhood and the Antebellum American Empire,* Amy S. Greenberg identifies two prominent, opposing modes of 19th century American masculinity: restrained and martial. According to

Greenberg, restrained men "grounded their identities in their families, in the evangelical practice of their… faith, and their success in the business world." Restrained men also prized expertise and ability, measuring their fellow men's value through "their success as breadwinners." Because restrained men dedicated themselves to sedulous labor and religious faith, they often observed strict moral standards. Restrained men typically held the rule of law in high esteem, despised violence and blood sports, and disapproved of the overconsumption (or sometimes the mere consumption) of alcohol. Adherents of restrained masculinity could be found in all political parties, but the reform aspects of the Whigs, Know- Nothings, and Republicans held a "special appeal" to restrained men. To restrained men, the ability to be, as Greenberg puts it, "morally upright, reliable, and brave" separated the manly from the unmanly.[3]

Martial men, on the other hand, rebuffed the moral standards that guided restrained men. They had no problems with imbibing alcohol, often doing so in "excess with pride." Moreover, martial men did not highly regard expertise in the

[3] Amy S. Greenberg, Manifest Manhood and the Antebellum American Empire (New York, NY: Cambridge University Press, 2005), 11, 12, 152.

workplace like restrained men. This difference arose from the fact that martial men located manly value not in in the mastery of a skill or knowledge, but in the mastery of other people. As the central tenet of martial manhood, dominance guided the typical behaviors of its adherents. Consequently, martial men often depended on public displays of physical strength, aggression, and sometimes violence to back their claims to manhood. Although martial men could be found in every political party in the antebellum United States, the Democratic Party found more martial men among its ranks than any other party because its "aggressively expansionist discourse" resonated with the goal of asserting one's manhood through dominance.[4]

Slavery had been a controversial issue in American politics since the Constitutional Convention of 1787, but contention over the peculiar institution exponentially intensified in the 1850s. Fierce debate over the legal status of slavery in the territories acquired by the United States in its recent war with Mexico forced Congress to engineer a sectional compromise in 1850. However, this compromise contained seeds of discord. The compromise authorized

[4] Ibid., 12.

popular sovereignty over slavery in the New Mexico and Utah Territories, which paved the path for Senator Stephen A. Douglas (D-IL) to propose the Kansas-Nebraska Act in the Senate. By allowing the Kansas and Nebraska Territories to vote on the legal status of slavery, the act permitted slavery north of the 36° 30' latitude line, thereby repealing the Missouri Compromise. According to Elizabeth Varon, Douglas publicly demanded for the demise of the Missouri Compromise because it unconstitutionally "abrogated the rights of citizens to self-government." While some Northern Democrats and all Republicans and Free-Soilers viewed the death of the Missouri Compromise as anathema, most Southerners welcomed it. Among these Southerners were many slaveholding Democrats and martial men who had had no qualms about solving their problems violently, a fact which augmented the volatility of the incoming debate on Kansas.

Douglas did not realize it at the time, but introducing the Kansas-Nebraska Act to the Senate opened a pandora's

box of violence and rage that endured for the rest of the decade.[5]

II: Political Cannibalism and the Kansas-Nebraska Act: Breckenridge vs. Cutting

On 27 March 1854, the *Congressional Globe* recorded an intense argument between Francis B. Cutting (D-NY) and John C. Breckinridge (D-KY) while debating the House's Kansas-Nebraska bill. Breckinridge, a member of an eminent political family in the slave state of Kentucky, established himself in Congress as a member of the Southern Democrats by demanding federal protections for slavery. Cutting, who lived his entire life in New York City, identified as a Northern Democrat who entertained the prospect of granting protections to slavery, but not unreservedly so. In principle, Cutting supported the Kansas-Nebraska Act.

However, when he filed a motion to send the House bill to the Committee of the Whole House on 21 March 1854, he irked several Southern Democrats, including

[5] Elizabeth Varon, Disunion! The Coming of the American Civil War, 1789-1859, (Chapel Hill, NC: University of North Carolina Press, 2010), 252.

Breckinridge. Cutting claimed he proposed the motion in order to consider amendments that would more easily secure the bill's passage. He also stated that he wanted a "fair opportunity" for him and his Northern colleagues to articulate their views on the bill to their constituents, but Breckinridge interpreted the motion as an obstacle meant to delay the bill's passage.[6]

Two days after Cutting proposed the motion, Breckinridge delivered a scalding speech that directly condemned Cutting. Breckinridge prefaced his insult-laced remarks with a disclaimer, stating that he "had nothing to do with" Cutting's motives. He then proceeded to label Cutting's motion as a "movement to kill the bill" and a "stab aimed at [the bill] by a professed friend." Breckinridge followed up this diatribe with an angry line of inquiry:

> Does not the gentleman from New York [Mr. Cutting] know, that when the bill went to the Committee of the Whole…it went to its grave? In other words, by putting it at the foot of the Calendar, it can no more be reached at

[6] *Congressional Globe*, 33rd Congress, 1st Session, Debates, 27 March 1854, 760.

> this session, in the regular course of legislation, than you can take from something under a mountain that is piled upon it?[7]

With the Kansas-Nebraska bill allegedly buried by the vast number of items on the calendar of the Committee of the Whole, Breckinridge decried Cutting's motion as an "assault" on the bill. The images invoked by Breckinridge's rhetoric depicted his Northern co-partisan as an assassin of the bill, as Breckinridge argued that the motion "was the act of a man who throws his arm in apparently friendly embrace around another" and "at the same time covertly stabs him to the heart."[8]

Cutting delivered a spirited response four days later. He sardonically acknowledged Breckinridge's disclaimer. Breckinridge, a man who supposedly admired "candor and frankness," had actually "professed to say he meant to cast no imputation against [Cutting's] motives" while simultaneously employing imagery that portrayed Cutting "with a murderous stiletto in hand" ready to stab his allies in

[7] *Congressional Globe*, 33rd Congress, 1st Session, Appendix of Speeches, 23 March 1854, 439.
[8] Ibid., 439 & 441.

the back. Though Cutting felt insulted by Breckinridge's speech, he also felt surprised by Breckinridge's hostility to his motion, explaining that he "was amazed that a gentleman from a slaveholding State" had carped about "Northern men friendly to the principles of this bill, who merely desired a fair opportunity for discussion." Perhaps the most inflammatory section of Cutting's response implied that Breckinridge lied about the number of bills on the Committee of the Whole's calendar. The "scores and scores of bills" that Breckinridge said would bury the Kansas-Nebraska bill were really less than one score of bills and resolutions – in fact, only nineteen, according to Cutting. Breckinridge's characterization of nineteen bills and resolutions as "a mountain," Cutting scoffed, was a product of Breckinridge's "active imagination" which "created scores and scores of bills."[9]

Breckinridge offered a rejoinder immediately after Cutting concluded his remarks. Firstly, Breckinridge objected to the "flagrant manner" in which Cutting had "attempted to torture and twist [Breckinridge's] words out of their proper and legitimate meanings." Cutting's motives

[9] *Congressional Globe*, 33rd Congress, 1st Session, Debates, 27 March 1854, 761.

were irrelevant, Breckinridge reiterated. The effects of Cutting's motion mattered more than anything else, since he pleased "every political Abolitionist" in Congress by delaying the bill. Yet Breckinridge criticized Cutting for claiming that he had made the motion in order to debate amendments to the House bill, as Breckinridge pointed out that amendments had been made not to the House bill, but to the Senate bill. He then pushed back against Cutting's claims concerning the size of the Committee of the Whole's calendar. He stated that he had "no recollection of saying there were scores of bills" on the calendar and claimed that he could find no written record showing he had ever said such a thing. In essence, Breckinridge responded to Cutting's charge of dishonesty with one of his own.[10]

These accusations caused further exchanges of cross words between the two men on the floor. For instance, Cutting suggested Breckinridge was ungrateful because he had attacked a New York Democrat when New York Democrats had financially contributed to his 1850 House of Representatives campaign. Cutting likely found this lack of gratitude doubly infuriating because Breckinridge's

[10] Ibid., 762.

electoral victory was no easy feat. Breckinridge needed as much help as possible in order to win Kentucky's 8th congressional district, which had hitherto been dominated by the Whigs in the past seven elections. The animosity between Cutting and Breckinridge reached a climax when the former issued the following invective:

> How dare the gentleman [Mr. Breckinridge], then, upon this floor, in the presence of those who heard me, undertake to assert that I professed friendship for the measure, with a view to kill and assassinate it, by sending it to the bottom of the calendar? And then, when I remarked that the Committee of the Whole have taken under their control the House bill which can be taken up, discussed, amended, and reported to the house, he retreats, and escapes, and skulks behind the Senate bill?[11]

[11] Ibid., 764.

This remark enraged Breckinridge, who immediately demanded that Cutting withdraw it. Cutting not only refused to withdraw *any* of his statements, but refused to further address Breckinridge's remarks while on the floor, as he angrily declared that what Breckinridge had said in debate "belongs in a different arena."[12]

After the House adjourned for the day, Cutting opened negotiations to duel with Breckinridge, perhaps unknowingly. In an initial note to Breckinridge, Cutting demanded that Breckinridge retract the accusation that Cutting had spoken falsely during debate or otherwise "make the explanation due from one gentleman to another." The same day, Breckinridge sent a reply, refusing to retract his statements. Cutting then sent another note the following morning reiterating his demand. Breckinridge interpreted this note as a challenge to duel, and so he embraced "the alternative offered by [Cutting's] note" by tasking a friend with arranging the terms of his "meeting" with Cutting. However, since Breckinridge and Cutting each considered themselves to be the aggrieved party in their dispute, each man set his own terms for the duel. Breckinridge's second

[12] Ibid.

chose rifles at sixty paces at the Maryland home of Francis Preston Blair, an editor of the *Congressional Globe*. Cutting's second responded by selecting pistols at ten paces at a location to be determined later. This caused confusion between the two men's seconds, who met with each other and agreed to convince Cutting and Breckinridge to find a peaceful resolution. Thanks to the intervention of the seconds, Cutting and Breckinridge met and apologized to each other on 31 March, and Breckinridge retracted his remarks, thereby settling the dispute. Both men later cast their votes in favor of the bill, which passed 113-100 in the House and later became law.[13]

While the confrontation between Breckinridge and Cutting ended before it escalated into violence, the fact that it occurred over a bill that had important ramifications for the legal status of slavery in Kansas was no coincidence. Breckinridge's furious reaction to Cutting's motion was unquestionably out of proportion. Contrary to

[13] "The Cutting-Breckinridge Correspondence," as quoted in *Herald* (New York, NY), 8 April 1854, accessed at the Gale Nineteenth Century U.S. Newspapers Database (hereafter GNUS). A second was a participant in a duel tasked with ensuring that the two principal participants conducted their honorable combat under the terms to which they mutually agreed; *Congressional Globe*, 33rd Congress, 1st Session, 22 May 1854, 1254.

Breckinridge's claims, the calendar of the Committee of the Whole did not irrevocably bury the Kansas-Nebraska bill. In fact, the Committee later unearthed the Kansas-Nebraska bill by simply tabling all other items on the calendar which preceded it. The *National Democrat*, a newspaper published by the national organization of the Democratic Party, acknowledged the unjustified nature of Breckinridge's reaction by referring to the incident as "Mr. Breckinridge's assault on Mr. Cutting." The fact that Breckinridge's most furious moment during his tenure as a Representative arose over a motion that interfered with the growth of slavery demonstrates Breckinridge's vested interest in the peculiar institution.[14]

Breckinridge's grounding of his manhood in martial masculinity melded with this interest. James Klotter recounts Breckinridge's private and political lives in his family biography of the Breckinridges. Breckinridge's station in life offered him opportunities to control others. During the Mexican-American War, he served as a major in Kentucky's Third Volunteer Regiment of Foot, commanding hundreds of soldiers as his subordinates and executors of the

[14] *National Democrat* (Boston, MA), as quoted in *Daily Whig and Courier* (Bangor, ME), 7 April 1854, GNUS.

United States' endeavor to impose its political will on Mexico. More importantly, Breckinridge owned slaves and thus had an incentive to publicly promote domination and policies that enabled its practice within slavery. Accordingly, Breckinridge supported both the continuation of slavery in the 1850 Kentucky Constitution and the Supreme Court's majority decision in *Dred Scott v. Sandford*. Breckinridge's affinity for domination and his stake in the preservation of slavery together defined his character *qua* man and politician. This accounts for his invocation of abolitionism in his condemnation of Cutting and his desire to control the timeline of the Kansas-Nebraska bill both as a personal project and an instrument of slavery's interests. Meanwhile, Cutting's motion was inconsistent with said desire for control because it delayed the timeline set for the bill by the Southern Democrats. This prompted Breckinridge to react aggressively to Cutting's motion, thus making Breckinridge the instigator of their quarrel.[15]

However, Cutting's actions demonstrate that he was not one to roll over and take it when challenged. Cutting's

[15] James C. Klotter, *The Breckinridges of Kentucky: 1760-1981* (Lexington, KY: University Press of Kentucky, 1986), 103, 108, 113.

willingness to duel did not go unnoticed by Northern newspapers. *Frederick Douglass' Paper* wrote that in the face of Breckinridge's "highest pitch of indignation," Cutting "bore himself like a man." The *Boston Atlas* published a resolution passed by Tammany Hall – New York City's powerful Democratic political machine – praising Cutting for his "chivalric conduct" in his stand against Breckinridge. The *New York Mirror* touted Cutting as "the best shot we have in our pistol galleries" and cited Cutting's erstwhile willingness to duel New York physician Alexander Hosack "at any time or place, and with any weapon" as evidence of his manliness. These accounts depicted Cutting as a man amenable to public displays of physical bravado, which suggests that he was a martial man. The altercation between Breckinridge and Cutting thus pitted a martial Southerner against a martial Northerner. However, this altercation more importantly arose between two Democrats over the future of slavery in Kansas and other new territories. The nature of this dispute therefore reveals that the Democratic Party had begun to cannibalize itself over the future of slavery by the 1850s. Southern slaveholding Democrats, including Breckinridge, had grown distrustful of their Northern co-partisans' commitments and abilities to

not only preserve but to spread slavery. Breckinridge himself continued to lead this self-cannibalization of the Democratic Party. In 1860, Southern Democrats refused to accept Stephen Douglas as their presidential candidate, instead nominating Breckinridge and effectively destroying the Democratic Party's claim to being a national institution.[16]

III: Bleeding Kansas and Bad Blood: Brooks vs. Sumner

A little more than two years after the quarrel between Breckinridge and Cutting, a more infamous encounter occurred in Congress: on 22 May 1856, Representative Preston Brooks (D- SC) mercilessly beat Senator Charles Sumner (R-MA) with a cane in the Old Senate Chamber. Brooks struck Sumner with his cane about thirty times. He directed several blows to Sumner's head, which left him bleeding and concussed. What could have caused such a savage, pre- meditated assault of a Senator at his place of work? The simple answer: a dispute over slavery in Kansas. Before the caning, Sumner had been the most vocal opponent of pro-slavery interests in the Senate. Sumner had

[16] *Frederick Douglass' Paper* (Rochester, NY), 31 March 1854, GNUS; *Atlas* (Boston, MA), 10 April 1854, GNUS; *Mirror* (New York, NY), as quoted in *Daily Register* (Raleigh, NC), 5 April 1854, GNUS.

several heated exchanges with the slaveholder Andrew Butler (D-SC) over slavery throughout their shared time in the Senate. During debate over a petition to repeal the Fugitive Slave Act, Butler accused Sumner of refusing to obey the Constitution when Sumner evaded the question of whether Massachusetts would obey the Fugitive Slave Act. Sumner also took exception to Butler's assertion that the "independence of America" had been won by the "patriotism and good faith of slaveholding communities." Sumner responded to Butler by criticizing South Carolina itself as well as its senior Senator, asserting that "in his vaunt for slaveholding communities," Butler had "made a claim for Slavery so derogatory to Freedom and inconsistent with history" that Sumner could not leave it unaddressed. In Butler's final response, his anger flowed freely, as he rejected calls to adjourn in order to lambaste Sumner for the "elaborate and vindictive" assault on South Carolina and the Butler name. Thus began the bad blood between Sumner and Butler.[17]

[17] "Senator Butler's Reply to Sumner," in T. Lloyd Benson, *The Caning of Senator Sumner* (Belmont, CA: Thomson Wadsworth, 2004), 65 & 67; "Sumner's Reply to Assailants and Oath to Support the Constitution," in Benson, *The Caning*, 74; "Senator Butler's Final Response," in Benson, *The Caning*, 77.

Two years after the passage of the Kansas-Nebraska Act, a series of violent clashes between pro-slavery and anti-slavery settlers consumed Kansas, thrusting the young territory into a state of political disarray. Sumner believed the horrors of "Bleeding Kansas" to be the work of slaveholding interests, which he denounced in his "Crime Against Kansas" speech given on 18 and 19 May 1856. In this speech, Sumner denounced the violent infiltration of Kansas by pro- slavery settlers as a heinous crime, calling it the "rape of a virgin Territory." Sumner condemned several of his colleagues who had legislated in the interest of slavery, including Stephen Douglas and James M. Mason (D-VA). However, Sumner had likely not forgotten his past quarrel with Butler, and accordingly commenced a lengthy tirade against Butler laced with personal insults. Sumner compared Butler to the farcical chevalier Don Quixote and labelled slavery as his Dulcinea, alleging Butler had "made his vows" with slavery, a "harlot" that appeared "polluted in the sight of the world."[18]

Sumner then leveled his most bitter insult against Butler, using arguably un-senatorial language to do so:

[18] "The Crime Against Kansas," in Benson, *The Caning*, 98 & 99.

> If the slave States cannot enjoy what, in mockery of the great fathers of the Republic, [Mr. Butler] misnames equality under the Constitution – in other words, the full power in the national territories to compel fellow men to unpaid toil, to separate husband and wife, and to sell little children at the auction block – then, sir, the chivalric senator will conduct the state of South Carolina out of the union! Heroic knight! Exalted senator! A Second Moses come for a second exodus![19]

Butler was not present to hear this diatribe due to illness; however, Preston Brooks, a relative of Butler and a son of South Carolina, seethed with anger and sought retribution for the harm Sumner had caused to the honor of his relative and his state. Brooks thought the speech to be too ungentlemanly to allow Sumner the option to duel. Additionally, Congress had enacted an anti- dueling law in Washington, D.C. in 1839 in response to the Cilley-Graves

[19] Ibid.

duel. Because the city observed the law stringently, Brooks knew dueling would, to use his words, "subject [him] to legal penalties more severe than would be imposed for a simple assault and battery." He therefore planned to physically attack Sumner without formal warning.[20]

On 22 May, Brooks entered the Senate, waited for the women that were present in the galleries to leave, then approached Sumner. According to a letter Brooks penned to his brother, he told Sumner:

> Mr. Sumner, I have read your speech with care and as much impartiality as was possible and I feel it is my duty to tell you that you have libeled my State and slandered a relative who is aged and absent and I am come to punish you for it.[21]

Brooks then "gave [Sumner] about 30 first rate stripes with a gutta percha cane." Sumner's wherewithal to fight back was quite literally beaten out of him, as Brooks

[20] *Congressional Globe*, 34th Congress, 1st Session, Appendix of Speeches, 14 July 1856, 832.
[21] "Preston Brooks Describes the Incident to His Brother," in Benson, *The Caning*, 132.

reported that "for about the first five or six licks [Sumner] offered to make fight but I plied him so rapidly that he did not touch me." Sumner "bellowed like a calf" towards the end of the thrashing.[22]

Brooks' firsthand account omits several important details, however. Brooks did not acknowledge that Sumner was seated at his desk entrenched in paperwork, thus putting Sumner in what he characterized as an "entirely defenceless position." Brooks also failed to mention that he had an accomplice in the chamber: Laurence Massillon Keitt (D-SC), a personal friend of Brooks and fellow member of the House. James W. Simonton, a *New York Times* reporter, was present in the chamber before the caning. When Simonton and others rushed towards Brooks and Sumner to stop the scuffle, Keitt intercepted them and threatened any who wished to interfere, brandishing his own weapons and growling, according to Simonton, "let them alone, God damn you!" Lastly, Brooks did not mention that Sumner was unarmed during the incident – a fact which Sumner made

[22] Ibid.

clear in Senate testimony when he said, "I had no arms either about my person or in my desk."[23]

The conduct of Brooks and Sumner as men and politicians provides insight into the nature of their masculinities. Charles Sumner adhered strictly to the tenets of restrained masculinity. Not only was he unarmed during the caning, but he admitted to "never wearing arms in [his] life" because he had "always lived in a civilized community where wearing arms has not been considered necessary." Sumner's disinterest in weapons, the tools of imposing one's will upon others, indicates his rejection of the central tenet of martial manhood: domination. Sumner also applied anti-violence logic to nations. Speaking to a Boston crowd in 1845, Sumner harshly criticized military spending in times of peace as "irrational," "unchristian," and "vainly prodigal of expense." He then argued that "the true grandeur of humanity" instead is found "in moral elevation, sustained, enlightened, and decorated by the intellect of man." In the speech, Sumner also made appeals to Christianity, noting that he who "inspires a love for God and for man" is "the

[23] "Testimony of Charles Sumner," in Benson, *The Caning*, 137; "Testimony of *New York Times* Reporter James W. Simonton," in Benson, *The Caning*, 139.

man of honor in a Christian land." Sumner's appeal to faith, abhorrence of violence, and praise of lofty moral standards – all hallmarks of restrained masculinity – qualified Sumner as a restrained man.[24]

Preston Brooks was the diametric opposite of Sumner: a *bona fide* martial man. This fact is made clear by Brooks' violent past. While attending South Carolina College (today the University of South Carolina), Brooks participated in several violent encounters, one of which resulted in his expulsion from the school. In this particular incident, Brooks approached the town marshal of Columbia with two loaded pistols and threatened him because "he had heard from a Negro an exaggerated report that his brother had been carried by the town Marshall [*sic*] in an ignominious manner to the guard house," according to the report of the college's faculty that recommended Brooks' expulsion. Even after Brooks "found his brother no longer in confinement," he continued to menacingly brandish his weapons and threaten the town marshal. The faculty found this behavior so "against the laws of morality and the land,"

[24] "The True Grandeur of Nations," in Benson, *The Caning*, 14 & 15; "Testimony of Charles Sumner," in Benson, *The Caning*, 137.

that they unanimously voted to suspend Brooks and recommended his expulsion to the school's Board of Trustees, a recommendation which it accepted.[25]

This belligerent episode was not unique or exceptional among elite Southern students. As Lori Glover has found, Southern colleges and universities during the antebellum period frequently served as places for young Southern men to try "drinking, gambling… dueling and other forms of orchestrated violence" without parental supervision. The typical elite Southern student behaved this way to show he possessed a form of "self-mastery" in which he "was not controlled by anybody but himself," much to the vexation of school administrators and college town lawmen. This outward display of self-mastery played a crucial role in cultivating Southern martial manhood, as Glover notes that self-mastery "laid the foundations for [Southern elites'] dominance over wives, children, and, particularly slaves."[26]

[25] "Report of the South Carolina College Faculty on the Expulsion of Preston S. Brooks," in Benson, *The Caning*, 26.
[26] Lori Glover, "'Let Us Manufacture Men': Educating Elite Boys in the Early National South," in Craig Thompson Friend and Lori Glover, eds., *Southern Manhood: Perspectives on Masculinity in the Old South* (Athens, GA: University of Georgia Press, 2004), 29.

Despite never receiving his degree from South Carolina College, Preston Brooks' disorderly stint in Columbia prepared him for the oppressive practices of slaveholding, which he embraced without shame. Brooks publicly defended his right to dominate and discipline his slaves in the resignation speech he offered after attacking Sumner. During the course of the speech, Brooks questioned the authority of the House of Representatives to discipline him for "offenses committed outside of its presence." Brooks wondered if this authority extended to his home. If it did, Brooks continued:

> Why, sir, if I go to my home, and I find that one of my slaves had behaved badly in my absence, and I direct him to be flogged, I may be charged with – to use the language which is familiar here – "crime the blackest and most heinous"; and when I come back [to the House of Representatives] – and come back I will – may be punished myself for inflicting a chastisement which, by the common law and the constitutional laws of

> my country, I have the right to inflict upon my slave, who is my property.[27]

Brooks' history of violence and his unabashed proclamation of his constitutional right to abuse his slaves make clear that he defined his manhood in terms of his domineering, militant behavior and his interest in slavery, making him a squarely martial man.

The caning of Sumner added great tension to the already decaying sectional relations of the country. In particular, the bloody incident animated a truculent sentiment in the Northern Republican press. Two days after the caning, the *Pittsburgh Gazette* called for Northern politicians to enact vengeance against the South, as the paper declared that, "it can no longer be permitted that all the blows shall come from one side" and promised to elect new representatives "if our present representatives will not fight." The article threateningly finished, "these cut-throat Southrons will never learn to respect Northern men until some one of their number has a rapier thrust through his ribs, or feels a bullet in his thorax." Though it used less visceral

[27] "Resignation Speech of Preston Brooks, 14 July 1856," in Benson, *The Caning*, 152.

rhetoric than the *Gazette*, the *Boston Atlas* echoed similar sentiments a day after the caning. No longer could the North tolerate the closure of "the mouths of the representatives of the North… by the use of bowie-knives, bludgeons, and revolvers." "If violence must come," the *Atlas* continued, "we shall know how to defend ourselves." While Sumner represented restrained masculinity, his caning galvanized the martial men of the North to meet their Southern counterparts, pushing the country closer to mass sectional violence.[28]

IV: The Lecompton Constitution and Congressional Brawl of 1858: Team Grow vs. Team Keitt

The topic of Kansas led to yet another violent incident in Congress in 1858. In February of that year, Congress debated admitting the polarized territory into the Union. The doughfaced President James Buchanan (D-PA) and the Southern bloc of the Democratic Party aimed to admit Kansas into the Union governed by the pro-slavery Lecompton Constitution. Because this constitution was drafted by a territorial legislature whose election was tainted by electoral fraud and intimidation, a bloc of Northern

[28] *Gazette* (Pittsburgh, PA), 24 May 1856, GNUS; *Atlas* (Boston, MA), 23 May 1856, GNUS.

Democrats led by Stephen Douglas viewed the Lecompton Constitution as "a travesty of popular sovereignty." Consequently, when Congress voted on the admission of Kansas as a slave state, the Northern Democrats repudiated the president, instead siding with the Republicans in opposition to the measure. These two blocs combined possessed enough votes to eventually reject Kansas' statehood under the Lecompton Constitution.[29]

But this did not stop the Southern Democrats from trying. Before sunrise on 6 February, the House convened to debate a bill admitting Kansas as a slave state. The Southerners wanted to delay votes on the bill during this session because several members of their bloc were missing from the chamber. Because the evening before the debate was a Friday, many Southern congressmen had spent much of the night "boozing at bars," according to Joanne Freeman, making themselves indisposed for the early morning session. To delay votes on the bill, Southern Democrats introduced several motions to extend the debate and to adjourn the House. John Quitman (D-MS), a fire-eater and proponent of the Lecompton Constitution, offered one such motion. At

[29] Varon, *Disunion!* 306.

that time, Galusha Grow (R-PA), who had switched parties after the passage of the Kansas-Nebraska Act, happened to be consulting with fellow Pennsylvanian John Hickman (D), an opponent of the Lecompton Constitution. Grow objected to Quitman's motion from the Democratic side of the chamber.[30]

Laurence Keitt, a radical Fire-Eater and an accomplice of Brooks in the Sumner caning, reacted to Grow's objection by hostilely confronting him. The *Congressional Globe* did not record the ensuing exchange between Grow and Keitt, but observers of the event relayed its details to major newspapers. According to the *New York Times*, Keitt growled at Grow, "if you are going to object, return to your own side of the House." Grow responded by defiantly stating that he and all members of the chamber had the right to object from wherever they liked because the House was a "free hall." Keitt took exception to Grow's use of the phrase "free hall," as he interpreted 'free' as an oblique insult against slaveholding Southerners. He then asked Grow what he had meant by that response; Grow insisted that he "meant precisely" what he said. Keitt,

[30] *Congressional Globe*, 35th Congress, 1st Session, Debates, 5 February 1858: 601-603; Freeman, *Field of Blood*, 237.

incensed by Grow's boldness, shouted at Grow: "I'll show you, you damned Black Republican puppy!" He then grabbed Grow by the throat. Grow slapped away Keitt's hand before reaffirming that he would speak in the chamber wherever he desired, then added that he would let no slave driver "crack his whip over" him. This remark infuriated Keitt, who again shouted at Grow and tried to grab him by the throat. Grow reacted this time not with words, but with a punch to Keitt's face. The blow stunned Keitt, knocking him to the floor.[31]

The particulars of the madness that followed were not entirely clear to contemporary accounts, but these accounts did agree on certain details. After Grow struck Keitt, about a dozen Southern Democrats approached Keitt and Grow, among them Reuben Davis (D-MS) and William Barksdale (D-MS). A group of Republicans, including John "Bowie Knife" Potter (R- WI) and the brothers Elihu Washburne (R-IL) and Cadwallader Washburn (R-WI), interpreted this as a hostile movement, and reacted by rushing to the aid of Grow. The parties clashed in the well of

[31] *Times* (New York, NY), 6 February 1858, accessed at NYT Times Machine (hereafter NTM); *Times* (New York, NY), 8 February 1858, NTM.

the House in a disorienting factional melee. During the scuffle, Barksdale seized Grow. Potter, fearing for Grow's safety, struck Barksdale. Barksdale, surrounded on all sides, mistakenly thought that Elihu Washburne had delivered the blow. He let go of Grow and socked Washburne.[32]

All accounts agreed that a Republican then retaliated against Barksdale for attacking Washburne, but disagreed upon the identity of the Republican. The *Mississippian* – edited by Barksdale's brother – and the *New York Times* claimed that Cadwallader Washburn attacked Barksdale to save his brother; the *Lowell Daily Citizen* and the *Staunton Spectator* maintained that Potter assailed Barksdale. In any case, either Washburn or Potter grabbed Barksdale by the head in order to, in the words of the *New York Times*, pummel him "to greater satisfaction." Much to the surprise the Republican attacking Barksdale, his hair came off of his head: the balding Barksdale had been wearing a toupée. Disoriented by the affray around him, Barksdale proceeded to put his hairpiece on backwards. This odd event triggered spontaneous laughter throughout the chamber, which, combined with thunderous calls for order by House Speaker

[32] *Times* (New York, NY), 8 February 1858, NTM; Cadwallader Washburn preferred his last name to be spelled without a silent "e."

James Orr (D-SC), aided in ending the scuffle before any of its participants sustained serious injuries.[33]

The brawl cemented Galusha Grow's hard-nosed reputation. By the late 1850s, Grow was loathed by his Southern colleagues for his abrasive style of debate and his practice of harshly targeting pro-slavery members of the chamber. Grow's allies in the House viewed him as "a courageous, swashbuckling paladin" of anti-slavery forces, according to Robert D. Ilisevich. He "bullied and badmouthed" his pro-slavery colleagues, driving them to anger. During the Kansas- Nebraska debates, for instance, John Quitman and Grow nearly came to blows during a heated debate over the repeal of the Missouri Compromise. When Grow told Quitman that Southerners bore responsibility for augmenting sectional animosity and anti-slavery sentiment through their "injudicious and unjust legislation," Quitman angrily replied that the North had "robbed [the South] of California" in the Compromise of 1850. This sort of confrontational, public display of prowess defined Grow's *modus operandi* for the rest of his

[33] Ibid., NTM; *Mississippian* (Jackson, MS), 16 February 1858, GNUS; *Daily Citizen* (Lowell, MA), 9 February 1858, GNUS; *Spectator* (Staunton, VA), 17 February 1858, accessed at the Library of Virginia's Virginia Chronicle database.

antebellum political career, according to Ilisevich. Such carefully orchestrated truculence instantiated martial masculinity, whose adherents belligerently asserted themselves to flaunt their manhood. Grow's adherence to martial masculinity accounts for his defiant, assertive response to Keitt's initial comments and his willingness to thump Keitt.[34]

However, Keitt was the principal instigator of the conflict, a fact he acknowledged in an apology he offered to the House on 8 February. Like Breckinridge and Brooks, the instigators of their respective conflicts, Keitt fell squarely into the martial camp of masculinity. His arrival to the chamber while under the influence of alcohol before the brawl is the first indicator of this fact. Like many of his Southern colleagues the evening of the brawl, Keitt heavily imbibed. Keitt was, to use Stephen Berry's words, "half drunk and half asleep" at the time Grow made his objection. Such conduct could be expected from martial men, who often drank in excess. Keitt's views on manhood also clearly qualified him as a member of the martial camp. According

[34] Robert D. Ilisevich, *Galusha A. Grow: The People's Candidate* (Pittsburgh, PA: University of Pittsburgh Press, 1989), 65, 100, 110; *Congressional Globe*, 34th Congress, 1st Session, Debates, 19 January 1856, 262.

to Berry, Keitt believed most politicians to be ambling and unmanly. Keitt contended that a real man "did not dally or dicker," but instead pursued a higher purpose "decisively." This criterion of manhood demanded a man to prosecute his convictions without regard for the sensitivities of others: the same sort of domineering self-mastery practiced by Preston Brooks and other young Southern elites. Like Brooks, Keitt also attended South Carolina College, where he and his peers learned and accepted the merits of pro-slavery arguments. Keitt's firm commitments to martial masculinity and to slavery worked in tandem, as they generated controversy in the wake of Keitt's role in the Sumner caning and his militant rencontre with Grow, thereby pushing the two sections closer to the brink.[35]

V: Conceptual Symbiosis: The Mutualism of Slavery and Martial Masculinity

Breckinridge, Brooks, and Keitt were kindred spirits. All three men represented the Democratic Party and the interests of slaveholders in the House of Representatives. Breckinridge later did so in the Senate and Vice-Presidency.

[35] Stephen Berry, *All That Makes a Man* (New York, NY: Oxford University Press, 2003), 47 & 52.

Each of these three men hailed from a Southern state whose moral fabric and economic activity rested on slavery. During their time in public office, all three either employed violence, intimations thereof, or both against political opponents with whom they clashed over the issue of slavery. Each of these three men embraced martial masculine ideals. Their actions, attitudes, and the roles as aggressors in their respective clashes reflected a broader trend within Congress in the decade before the Civil War: violent disagreements between members of Congress over slavery in Kansas arose from Southern men acting on the dictates of a form of martial masculinity that rooted itself in the service of slavery's interests.

While a man's adherence to martial masculinity did not always entail his commitment to slavery, the tenets of martial masculinity synergized well with the logic of slavery. In particular, domination, the martial man's byword, found a home in slavery as an apparatus by which slaveholders could ensure the continued enslavement of their laborers. Bertram Wyatt- Brown has observed that enslaved people's unquestioning compliance with the demands of their masters was an essential component of the dominant-submissive relationship between the enslaver and the

enslaved. Slaveholders used violence to obtain this compliance and stop "the encroachments of slaves and free blacks into forbidden areas of autonomy." Slaveholders consequently enjoyed comfortable lifestyles and economic success that Wyatt-Brown maintains "rested upon the prestige, power, and wealth that accrued from the benefits of controlling others." Slaveholders thus had every incentive to be martial men. Because domination constituted the lifeblood of both slavery and martial masculinity, the peculiar institution and this domineering expression of manhood existed in a state of conceptual symbiosis. Domination's centrality to both slavery and martial masculinity created a mutualistic relationship wherein the practice of each benefitted the well-being of the other. A domineering slaveholder could more easily obtain the continued submission of the enslaved. Slavery's social and economic importance in the South, on the other hand, offered a venue for the practice of martial masculinity.[36]

As the existence of Northern martial men like Francis Cutting and Galusha Grow shows, however, the practice of martial masculinity was not confined to Southern

[36] Bertram Wyatt-Brown, *Honor and Violence in the Old South*, (New York, NY: Oxford University Press, 1986), ix & 158.

slaveholding men. This fact, combined with the unique connection between slavery and Southern martial men, suggests that martial masculinity can be further divided into submasculinities. Breckinridge, Brooks, and Keitt thus adhered to a particular iteration of martial masculinity that grounded itself in the service of slavery's interests. The political arena of Congress offered to Southern martial men a venue where they could literally and verbally fight for slavery, thus revealing the connection between slavery and their violent definition of manliness. It then comes as no surprise that these men played the role of aggressor their respective conflicts: their identities as men were inseparably linked to slavery's survival, so they had every incentive to act quickly and aggressively. This fact accounts for the high prevalence of violent altercations between members of Congress over the Kansas question in the 1850s.

Martial, pro-slavery men found a modality for their manhood by fighting their anti- slavery opponents, which worsened the already apparent and intense hostility that existed between the free and slaveholding sections of the United States in the 1850s. The exchange between Breckinridge and Cutting, Brooks' caning of Sumner, and the 1858 melee on the House floor functioned as microcosms

for the relations between the North and South, a fact which portended a grim future for the Union's integrity. The press media did not miss this, as it predicted continued violence in the future. The *New York Herald* lamented the fact that the "quarrel" between Breckinridge and Cutting had "assumed a sectional nature." A day after the Sumner caning, the *New-York Tribune* expected "that Northern men in Washington, whether members [of Congress] or not" would continue to be "assaulted, wounded or killed" over slavery. In the wake of the 1858 brawl, the *Philadelphia North American and United States Gazette* applauded Grow and recommended that Northern men adopt Grow's violent "way of dealing with Keitt" in their interactions with irrational, unhinged Southerners whose low "grade of civilization" rendered them "insensible to the motives and feelings" of the North's "cultivated minds of Christendom."[37]

These visions of immense bloodshed between the North and South became a reality in 1861. The Civil War's roots grew from the soil of Congress, the principal playground of sectional strife in politics. Here, the pro-

[37] *Herald* (New York, NY), 30 March 1854, accessed at the Library of Congress' Chronicling America Database; *Tribune* (New York, NY), 23 May 1856, GNUS; *North American and United States Gazette* (Philadelphia, PA), 8 February 1858, GNUS.

slavery aggression of Southern martial masculinity violently exploded during the debate concerning Kansas and slavery in the 1850s. This debate pushed the country towards the concerning outcome Frederick Marryat foresaw in 1838: secession. Both as men and as political actors, the slaveholding, martial congressmen of the South impelled the United States closer to the Civil War by assailing those who they perceived as an obstacle to the preservation of slavery: martial and restrained Northerners.

Bibliography

Primary Sources

Atlas (Boston, MA), 10 April 1854, accessed at Gale's 19th Century US Newspapers Database.

———, 23 May 1856, accessed at Gale's 19th Century US Newspapers Database.

Benson, T. Lloyd. *The Caning of Senator Sumner*. Belmont, CA: Thomson Wadsworth, 2004.

Congressional Globe, 33rd Congress, 1st Session, Appendix of Speeches, 23 March 1854.

———, 33rd Congress, 1st Session, Debates, 27 March 1854.

———, 33rd Congress, 1st Session, Debates, 22 May 1854.

———, 34th Congress, 1st Session, Debates, 19 January 1856.

———, 34th Congress, 1st Session, Appendix of Speeches, 12 July 1856.

———, 35th Congress, 1st Session, Debates, 5 February 1858.

Daily Citizen (Lowell, MA), 9 February 1858, accessed at Gale's 19th Century US Newspapers Database.

Daily Register (Raleigh, NC), 5 April 1854, accessed at Gale's 19th Century US Newspapers Database.

Frederick Douglass' Paper (Rochester, NY), 31 March 1854, accessed at Gale's 19th Century US Newspapers Database.

Gazette (Pittsburgh, PA), 24 May 1856, accessed at Gale's 19th Century US Newspapers Database.

Herald (New York, NY), 30 March 1854, accessed at the Library of Congress' Chronicling America Database.

———, 8 April 1854, accessed at Gale's 19th Century US Newspapers Database.

Marryat, Frederick. *A Diary in America: With Remarks on its Institutions*. Philadelphia, PA: Carey and Hart, 1838, accessed at Gale's Sabin Americana Database.

Mississippian (Jackson, MS), 16 February 1858, accessed Gale's 19th Century US Newspapers Database.

North American and United States Gazette, 8 February 1858, accessed at Gale's 19th Century US Newspapers Database.

Spectator (Staunton, VA), 17 February 1858, accessed at the Library of Virginia's Virginia Chronicle database.

Times (New York, NY), 6 February 1858, accessed at the *New York Times*' Times Machine database.

———, 8 February 1858, accessed at the *New York Times*' Times Machine database.

Tribune (New York, NY), 23 May 1856, accessed at Gale's 19th Century US Newspapers Database.

Secondary Sources

Berry, Stephen. *All That Makes a Man: Love and Ambition in the Civil War South*. New York, NY: Oxford University Press, 2003.

Freeman, Joanne. *The Field of Blood: Violence in Congress and the Road to the Civil War*. New York, NY: Farrar, Straus and Giroux, 2018.

Glover, Lori. "'Let Us Manufacture Men': Educating Elite Boys in the Early National South," in Craig Thompson Friend and Lori Glover, editors, *Southern Manhood: Perspectives on Masculinity in the Old South*. Athens, GA: University of Georgia Press, 2004.

Greenberg, Amy S. *Manifest Manhood and the Antebellum American Empire*. New York, NY: Cambridge University Press, 2005.

Ilisevich, Robert D. *Galusha A. Grow: The People's Candidate*. Pittsburgh, PA: University of Pittsburgh Press, 1989.

Klotter, James C. *The Breckinridges of Kentucky: 1760-1981*. Lexington, KY: University Press of Kentucky, 1986.

Varon, Elizabeth R. *Disunion! The Coming of the American Civil War, 1789-1859*. Chapel Hill, NC: University of North Carolina Press, 2010.

Wyatt-Brown, Bertram. *Honor and Violence in the Old South*. New York, NY: Oxford University Press, 1986.

HISTORY AND IMPLICATIONS OF THE MISSOURI TEST-OATH CASE

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Introduction

On the morning of September 3, 1865, the Rev. John A. Cummings, a Roman Catholic priest of the Archdiocese of St. Louis, stood up to preach to the congregation of St. Joseph Catholic Church in northeastern Missouri's Pike County at the regular Sunday Mass. The next day, a grand jury was empaneled to indict him, and by the end of the week, Father Cummings had been arrested and brought before a local judge for his arraignment.[1] The cleric, prosecutors charged, had run afoul of Missouri state law—not for a felony or other criminal offense, but for the act of preaching at Sunday Mass. A new statute had gone into effect on September 2, and Father Cummings, according to its provisions, could not lawfully preach or otherwise function as a religious minister in Missouri because he had not sworn a loyalty oath to the United States. Father Cummings was quickly convicted of violating the oath law

[1] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 4.

by the county circuit court and fined five-hundred dollars (a significantly larger sum today), but he refused to pay the fine and swiftly appealed his conviction. Thus was inaugurated a years-long litigatory marathon involving compounded constitutional questions—one which eventually culminated in the 1867 United States Supreme Court decision *Cummings v. Missouri*. In his appeal, Father Cummings and his supporters argued that the oath law—commonly known as the 'Ironclad Test-Oath'—was unconstitutional because it violated constitutional prohibitions on *ex post facto* laws, bills of attainder, and laws impeding the free exercise of religious practice. Beginning with a summary of the contemporary historical and political circumstances at hand and proceeding with a detailed analysis of the court's ruling, this essay will examine the Supreme Court's decision in *Cummings* and will scrutinize the ruling's constitutional implications and its impact on future case law.

Background

The origins of Missouri's 'Ironclad Test-Oath' and the *Cummings* case can be traced to the waning days of the Civil War. During the bloody conflict, Missouri was officially a part of the Union, holding a similar status to

Kentucky, Maryland, and Delaware as a slaveholding 'border state.' But the state was a bitterly contested battleground, with various parts of Missouri falling under Confederate occupation during the war and the state harboring a large number of Southern sympathizers. Still, by early 1865 and with the Confederacy in retreat, Missouri was firmly back under the Union's control—the state was essentially under federal military occupation—and fiercely unionist Radical Republicans had seized control of state government.[2] The Radical Republicans, motivated by a fervent zeal for vengeance and more practical desires to preserve their newfound political hegemony in Missouri, called a convention to draft a new state constitution in January 1865. Under the leadership of Charles D. Drake, a future United States Senator and federal judge, Missouri's Radical Republicans proposed a wide swath of changes to the state constitution principally meant to "excommunicate from the political community those who had supported secession."[3] Under the new constitution's provisions,

[2] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 162-163.

[3] Kohl, Martha. "Enforcing a Vision of Community: The Role of the Test Oath in Missouri's Reconstruction." *Civil War History* 40, no. 4 (December 1994): 293.

slavery would be abolished, African-Americans would be given the right to vote, and all citizens would be required to swear the 'Ironclad Test-Oath' or face disenfranchisement and restriction from a wide array of professions—including law, teaching, business, and religious ministry. Crucially, the test-oath was retroactive—it required oath-takers to affirm the state constitution's requirement that they had never in the past "been in armed hostility to the United States, or to the lawful authorities thereof, ... or been in the service, of the so-called 'Confederate States of America.'"[4] The 'Ironclad Test-Oath' was passed by the convention

[4] The full text of the 'Ironclad Test-Oath,' according to the syllabus of *Cummings v. Missouri*: "I,[name], do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me." The terms of the state constitution referenced in the oath are what is quoted in the body of this essay. *Cummings v. The State of Missouri*, 71 U.S. 277, 332 (1867).

along with the rest of the 'Drake Constitution' in April 1865, and the new constitution was narrowly ratified by Missouri voters via statewide referendum in June.[5]

The intentions and practical effects of the new state constitution's test-oath provision were clear—because of the oath's retroactive nature, any individual who had previously supported the Confederacy or had otherwise demonstrated disloyalty to the Union cause could not truthfully swear the oath, even if they were willing to swear future loyalty. But rather than being merely a "punitive, partisan act," the disenfranchisement *en masse* of former Confederates and Southern sympathizers precipitated by the 1865 Missouri Constitution was part of Radical Republicans' broader strategy to "transform Missouri into a truly Northern state" through a dual-pronged approach of encouraging Confederate sympathizers to leave for more friendly states and incentivizing Northern Unionists and African-Americans to immigrate to Missouri.[6] This context is helpful

[5] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 164.

[6] Kohl, Martha. "Enforcing a Vision of Community: The Role of the Test Oath in Missouri's Reconstruction." *Civil War History* 40, no. 4 (December 1994): 293.

in understanding why Missouri's Radical Republicans were not satisfied with merely restricting the right to vote and the partisan voting advantage that would result—and why they chose to go further, essentially barring those who could not or would not swear the oath from significant aspects of public and professional life.

The constitutional requirement that members of certain professions swear the "Ironclad Test-Oath" came into force on September 2, 1865, and the state government was eager to strictly impose the provision. Republican Governor Thomas C. Fletcher ordered that state militia forces be deployed throughout Missouri to enforce the new requirements.[7] Father Cummings was among the first to be targeted for violating the new statute. Arrested and brought before Pike County Circuit Court Judge Thomas J.C. Fagg, the outraged priest refused to defend himself, demanded an immediate trial, and defiantly offered to plead guilty, freely acknowledging that he had violated the constitutional test-oath provision while maintaining that the provision itself

[7] *Historical and Biographical Notes*; Thomas Clement Fletcher, 1865-1869; Office of Governor, Record Group 3.18; Missouri State Archives, Jefferson City.

was unjust and unconstitutional.[8] Father Cummings repeatedly reiterated what he said was his natural and constitutional right to preach his Catholic faith without state interference; his defense cited guidance from his superior, Archbishop Peter Kenrick of St. Louis, who wrote a July 28, 1865 letter to priests in Missouri advising them to refuse to take the test-oath because it amounted to a "sacrifice of ecclesiastical liberty."[9] But his appeals to morality and justice had little impact on the circuit court; Judge Fagg found Father Cummings guilty of violating the constitutional provision and remanded him to jail until he paid the five-hundred dollar fine, which the cleric refused to do as a matter of principle.

With the assistance of a small team of sympathetic, politically prominent local attorneys, Father Cummings decided to appeal his conviction to the Supreme Court of Missouri, arguing that the 1865 constitution's test-oath provisions were unconstitutional under the terms of the

[8] "Finally, he declared that, although he had done what the indictment charged, it was patently false that he had violated any just or rightful law." Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 7.

[9] Johnson, William T. Missouri Test-Oath. In The Catholic Encyclopedia. (New York: Robert Appleton Company, 1912).

United States Constitution. Father Cummings's constitutional argument against the test-oath law was essentially three-fold: first, he asserted that the test-oath was an *ex post facto* law, and thus unconstitutional; second, that it was a bill of attainder, and thus unconstitutional; and third, that it infringed upon his rights to freedom of religion and conscience, and was thus unconstitutional.[10] Defining a "penalty or punishment" as the act of "depriving a man of a right enjoyed…in consequence of some act done by him" and arguing that the test-oath law "punish[es] an offence previously committed by a penalty not prescribed at the time of the commission of the act," Father Cummings's attorneys attempted to widen the scope of what could be considered bills of attainder and *ex post facto* laws as beyond those which merely imposed criminal penalties by legislative fiat, or which retroactively criminalized once-legal activity, respectively. They also alleged that the test-oath violated constitutional protections of freedom of religion, arguing that the test-oath privileged one 'church' over another ("the loyal church over the disloyal church") and "destroyed" the

[10] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 172-173.

ability of religious ministers to freely preach without state interference.[11]

Attorneys for Missouri argued that the test-oath law could not be a bill of attainder, since it "convicted no one of anything"—essentially, because the state legislature acted to restrict Father Cummings's ability to undertake a future action (namely, exercising his ministry), rather than convicting him for any prior criminal offense, which would infringe upon his right to not be attainted for a past action.[12] As to Father Cummings's *ex post facto* claim, the state ascribed a specific "technical" definition to *ex post facto* laws; one that confined them to legislative enactments making an act "punishable as a crime" which was not so when committed.[13] Missouri's attorneys argued that laws "restricting or prohibiting the exercise of any trade or profession" or "prescribing the qualification of persons who exercise such trade," even when they exercised a retroactive nature in their effects on individuals who previously practiced a given trade or profession, fundamentally

[11] State v. Cummings, 36 Mo. 263 (1865).
[12] Bradley, Harold C. "In Defense of John Cummings." *Missouri Historical Review* 57, no. 1 (October 1962): 11.
[13] State v. Cummings, 36 Mo. 263 (1865).

pertained to the creation of new laws and did not necessarily amount to the state's imposition of an *ex post facto* law. The test-oath law, Missouri maintained, was merely an exercise of the state's rightful duty to establish qualifications for those seeking to hold certain offices. Finally, the state argued, the religious freedom protections contained within the U.S. Constitution's First Amendment do not represent "a limitation of State power, but of the United States only." Missouri's claim here is relevant to the development of a constitutional doctrine of incorporation—in other words, the constitutional theory that protections afforded in the Bill of Rights are also applicable to the states—which is a legal doctrine whose history will be examined in greater detail later in this essay.

The Supreme Court of Missouri ruled against Father Cummings's appeal on October 30, 1865, in St. Louis. In a wide-ranging opinion, the state's high court unanimously rejected Father Cummings's constitutional claims, asserting that the 1865 constitution was neither an *ex post facto* law nor a bill of attainder and declaring that the judiciary had no authority to rule on the priest's broader moral appeals to liberty of conscience and religious practice. In short, the court essentially concurred with the sum of the state's

arguments. Writing for the court, Chief Justice David Wagner, a Pennsylvania-to-Missouri transplant, put forth a narrow interpretation of the U.S. Constitution's proscription of "any bill of attainder, *ex post facto* law, or laws impairing the obligation of contracts." Bills of attainder, wrote Wagner, are defined as legislative acts promulgating a criminal conviction and inflicting either capital punishment or a lesser criminal punishment—in the latter case, those being punishments which inflict "pains and penalties" such as corporal punishment, imprisonment, or the forfeiture of property.[14] The test-oath law, Wagner ruled, "confiscates no estates, declares no forfeitures, nor does it inflict any pains and penalties…it passes judicially on nothing." Therefore, he asserted, the test-oath could not reasonably be understood to amount to a bill of attainder, and Father Cummings had himself not been "attainted" according to the term's proper definition.

Wagner dismissed Father Cummings's *ex post facto* claim by writing that the test-oath was enacted "not with a view to punishment for any past offence, but for future protection." By making the test-oath a requirement for

[14] State v. Cummings, 36 Mo. 263 (1865).

various professions after a set future date, Wagner said, Missouri intended to exclude those who refused to take the oath from their professions after the law's enactment. Thus, in his view, the test-oath law could not be called *ex post facto* because, rather than necessarily entailing the retroactive proscription of past disloyal acts themselves, it merely sought to restrict persons who had committed disloyal acts from occupying certain professions in the future.[15] On the religious liberty question, Wagner and the court demurred entirely. Wagner wrote that the court did not have jurisdiction over the claims of "justice and injustice" raised by Father Cummings. He said that it was the court's duty to presume the legislature and constitutional convention's best intentions when they promulgated the test-oath statute and added that it was "not for the judiciary" to decide whether the test-oath violated "the general principles of liberty or natural justice." If Father Cummings thought the test-oath was morally wrong and infringed upon his just religious rights, Wagner wrote, he should seek to change the law's provisions either through the state legislature or through "the

[15] "He is not held liable for any acts supposed to have been done or committed antecedently, but for violating an actual subsisting law after its enactment." State v. Cummings, 36 Mo. 263 (1865).

people in their political capacity at the polls." As it stood, the state's high court held that religious freedom protections in Missouri were sufficient, and that the test-oath law's effects on religious practice were permissible under the state's ability to regulate religion.[16]

Missouri historian Lucas Volkman notes that Father Cummings faced a state Supreme Court which was composed entirely of Radical Republican-aligned jurists steadfastly unsympathetic to the cleric's unwillingness to submit to the test-oath and prove his loyalty to the Union. After all, the court's judges had been "handpicked" to sit on the court only a few months earlier by Governor Fletcher, after their predecessors were removed by the constitutional convention's March 17, 1865 'Ousting Ordinance' over allegations of disloyalty to the Unionist cause.[17] The extent to which political loyalties seemed to influence the judges'—and Missouri authorities'—treatment of the *Cummings* case was largely unprecedented before this period, and will be another important consideration for this

[16] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 173.
[17] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 173.

essay when it examines the U.S. Supreme Court's ruling in this case.

A relevant contrast can be drawn between Missouri Unionists' treatment of Father Cummings and another notable case of this period—that of Samuel Brown McPheeters, a prominent Presbyterian minister in St. Louis. Suspected by many in his congregation of harboring Confederate sympathies due to his Southern ties, McPheeters had been ordered banished from Missouri by the provost-marshal overseeing the Union's wartime military occupation after he refused to submit a written oath of loyalty to the United States.[18] Nevertheless, after the intervention of powerful allies seeking the return of political moderation in Missouri, McPheeters was granted an audience with President Abraham Lincoln in Washington, D.C. Lincoln, similarly inclined against the most radical Unionist elements in Missouri, ordered that Union forces—to their great consternation—rescind the order exiling McPheeters. "The U.S. government must not…undertake to run the churches," he wrote in a January 2, 1863, letter to the

[18] Apperson, George M. "Presbyterians and Radical Republicans: President Lincoln, Dr. McPheeters, and Civil War in Missouri." *American Presbyterians* 73, no. 4 (1995): 239–240.

commander of the Missouri occupation.[19] While Lincoln and the federal government in Washington were keen to place limits on wartime efforts to restrain religious practice, Unionist authorities in Missouri were eager to enact far-reaching policies to suppress dissident congregations—such as a test-oath law targeting religious ministers. Juxtaposing the *Cummings* case with the McPheeters affair highlights contemporary internal tensions between the Republican Party's moderate and radical factions, both of which viewed maintaining free religious practice and religious liberty with very different levels of importance.

Cummings v. Missouri

Father Cummings appealed the Missouri Supreme Court's ruling to the Supreme Court of the United States, which granted a writ of *certiorari* and heard oral arguments in the case during the court's December 1866 term. Both sides assembled fresh ranks of high-profile attorneys, each of which included a sitting United States Senator—

[19] "When an individual, in a church or out of it, becomes dangerous to the public interest, he must be checked; but let the churches, as such take care of themselves." *Lincoln to Curtis*, 2 Jan. 1863. From Lincoln, Abraham. *The Collected Works of Abraham Lincoln*, ed. Roy P. Basier, 8 vols. (New Brunswick, NJ, 1953-55) 6: 33-34.

Maryland Democrat Reverdy Johnson for Father Cummings, and Missouri Unionist John B. Henderson for the state. The self-evident partisanship of both sides' legal teams reflected the increased national attention the case was receiving, as *Cummings*—along with *ex parte Garland* (1867), a related case which this essay will refer to later—began to take shape as something of a judicial referendum on loyalty oaths and Reconstruction's most far-reaching policies. Nevertheless, despite the new attorneys, the substance of both sides' arguments remained essentially unchanged from when the Missouri Supreme Court first heard the appeal. After deliberations, the U.S. Supreme Court handed down a decision in January 1867.

The central constitutional questions put before the U.S. Supreme Court in *Cummings* were as follows: Can bills of attainder be broadly interpreted as laws that penalize citizens in any manner, including by the deprivation of rights once afforded, or are they only laws which inflict capital punishment, or "pains and penalties" as understood in the traditional sense? Are *ex post facto* laws strictly those which retroactively punish acts as crimes which were not crimes when they were committed, or are they broadly laws which render an act "punishable in a manner in which it was not

punishable when committed"?[20] Finally, regarding the doctrine of incorporation: are the federal Constitution's Free Exercise Clause and Establishment Clause protections applicable to the states, or can states discriminate on the basis of religion—and if so, to what degree?

In a narrow five-to-four ruling, the Supreme Court decided in favor of Father Cummings, and overturned the Missouri Constitution's test-oath statute as both an *ex post facto* law and a bill of attainder. The ruling was effectively a wholesale vindication of Father Cummings; his conviction was vacated, and the test-oath he had been subject to had its legal validity quashed. Additionally, the constitutional arguments presented by his attorneys were largely accepted by the court—including the broader definitions of bills of attainder and *ex post facto* laws which they maintained the Constitution should be interpreted as proscribing. Justice Stephen Field, writing for the court's majority, explained the court's rationale in invalidating the test-oath law as a bill of attainder. The test-oath's effects meant that "there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the

[20] State v. Cummings, 36 Mo. 263 (1865).

security of the citizen in the administration of justice by the established tribunals."[21] In other words, a "deprivation" of once-held privileges and rights was being imposed by an act of a legislative body, rather than by the courts and without the presence of typical forms of judicial recourse and remedy. As can be seen, this definition of what exactly constitutes a bill of attainder, and of what the federal Constitution's proscription of bills of attainder actually entailed, largely mirrors the claims Father Cummings's attorneys had presented to the court.

A crucial judicial precedent for the *Cummings* decision was *Fletcher v. Peck* (1810), which Field cited for its statements on *ex post facto* laws and its attempts to define the limits of state sovereignty in times of crisis. Field referred to Chief Justice John Marshall's definition of *ex post facto* laws in the *Fletcher* decision, in which the jurist wrote that such a law is one "which renders an act punishable in a manner in which it was not punishable when it was committed." The test-oath law fulfilled *Fletcher*'s description of an *ex post facto* law, Field said, because the statute was intended to target past actions—it was "aimed at

[21] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867).

past acts, and not future acts." Critically, the court held that the test-oath was intended to, and effectively did, impose penalties for past actions that were not liable to be penalized when they were committed. Field further noted that the drafters of the 'Drake Constitution' had full knowledge that "whole classes of individuals"—namely, anyone who had supported the Confederate cause at any point in the past—would be "unable" to swear to the test-oath, lest they commit perjury. Importantly, however, the Supreme Court declined to rule on the religious liberty and conscience claims presented by Father Cummings. Volkman notes that this was likely because, even for justices broadly sympathetic to Father Cummings, it would have been near impossible (with essentially no existing judicial precedent to draw on) for them to promulgate a decision establishing the federal judiciary's right to regulate religious liberty in the states prior to the Fourteenth Amendment's enactment in 1868.[22]

Unsurprisingly, as had occurred with the Missouri Supreme Court, the U.S. Supreme Court's divisions in *Cummings* reflected the political allegiances of the court's membership. Four of the five justices who voted to overturn

[22] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 174.

the test-oath law and vacate Father Cummings's conviction were appointed by Democratic presidents and were seen as ideologically aligned with Chief Justice Roger Brooke Taney, the overtly Confederate-sympathizing jurist who delivered the court's infamous ruling in *Dred Scott v. Sanford* (1857) which held that an African-American could not be a United States citizen. On the other hand, the four justices who would have upheld the test-oath law's constitutionality were appointed by President Abraham Lincoln and were aligned with the Republican Party and antislavery movements to varying degrees. Field was the court's anomaly—while he was a Unionist and had been appointed by Lincoln, he was also a Democrat from California, and had been chosen by the president to sit on the high court "in part to achieve sectional and ideological balance."[23] Essentially, Field had been selected as a sort of compromise nominee and was consequently more of a political nonconformist than the other eight justices.

Justice Samuel Miller, a Republican and staunch ally of Lincoln, authored the four-justice minority's dissent in the *Cummings* case. Miller wrote the dissent to apply both to

[23] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 175.

Cummings and *ex parte Garland*, another test-oath case which involved an Arkansas attorney, Augustus Hill Garland, who had been barred from resuming his profession after the Civil War because he could not swear a loyalty oath affirming that he had always been loyal to the United States.[24] The dissent denied that test-oaths amounted to bills of attainder or *ex post facto* laws because they lacked, according to the justices, essential features of both. Like the attorneys for Missouri, the dissenting justices echoed the state Supreme Court's ruling—they maintained that test-oaths do not themselves "inflict any punishment," and consequently could not reasonably be understood to "attaint" anyone according to the legal definition of the word, while also asserting that *ex post facto* laws "applied to criminal causes alone."[25]

While the majority left Father Cummings's religious liberty arguments essentially unanswered, Miller's dissent repudiated them. He excoriated "allusions…to the

[24] Garland had, at various points over the course of the war, been a member of the Confederate Senate and the Confederate House of Representatives. *Ex parte Garland*, like *Cummings* for Missouri, resulted in Arkansas's test-oath law being overturned as a bill of attainder and *ex post facto* law. Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 175.

[25] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867).

inviolability of religious freedom in this country," arguing that the courts had no power to question states' ability to regulate religion. Staunchly opposed to the notion that the First Amendment's Free Exercise Clause and Establishment Clause protections could be "incorporated" so as to be applicable to the states, he wrote that the U.S. Constitution places "no restraint" on the states to uphold religious liberty in any respect. Additionally, quoting the words of Justice Joseph Story in Story's *Commentaries on the Constitution of the United States*, Miller maintained that "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."[26]

The impact of the *Cummings* decision on Father Cummings was immediate. Intermittently incarcerated since his conviction due to his continued refusal to pay the fine, the U.S. Supreme Court ordered state authorities to release him and allow him to resume public ministry as a Catholic priest. He continued his ministry as pastor of a different Catholic parish, St. Stephen's in Monroe County, before he

[26] Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867) and Story, Joseph. "Commentaries on the Constitution of the United States."

retired due to illness in 1870.[27] Father Cummings died on June 11, 1873, at St. Vincent's Hospital in St. Louis in obscurity, but nonetheless as a judicially vindicated man. The principal legacy of the *Cummings* case, however, lies not in Father Cummings's exculpation, but rather in the impact that the decision had on future constitutional jurisprudence—both in the case's status as one of the last repudiations of efforts to apply Bill of Rights protections to the states, and in its precedent-setting interpretation of the federal Constitution's bans on bills of attainder and *ex post facto* laws. The following section will examine *Cummings*'s implications as judicial precedent and its practical effects on American constitutional jurisprudence.

Constitutional Implications

Justice William O. Douglas explained the important precedent set by the *Cummings* decision in his *An Almanac of Liberty* in 1954, in which he wrote that the case was crucial in guiding the Supreme Court's modern interpretation of the U.S. Constitution's proscriptions of bills of attainder and *ex post facto* laws. According to Douglas,

[27] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 13-14.

Cummings, to the delight of civil libertarians and civil rights advocates, correctly established a more expansive reading of the Constitution's prohibitions as precedent in future jurisprudence. In its invalidation of the test-oath law as a bill of attainder, Douglas argued that the court correctly found that by barring Father Cummings from his "calling" to ministry, the law "was in a real sense punishment for his conduct." Such an effect, wrote Douglas, was expressly forbidden under the Constitution's terms because a bill of attainder is—as the court held—simply defined as a "legislative act which inflict[s] punishment without a judicial trial."[28] Though it did not directly inflict a criminal conviction on Father Cummings, the test-oath law, Douglas noted, was "merely a means" of punishing him "because he had sympathized with the South," and thus had effectively attainted him. The *Cummings* decision's definition of *ex post facto* laws as broadly legislation "which punishes an act which was not punishable when it was committed" was also of critical importance—according to Douglas, it established the precedent that conduct could not be punished with laws that have "retroactive effect," lest those laws be struck down

[28] Douglas, William O. "An Almanac of Liberty." 205.

as *ex post facto*. This essay maintains that Douglas's view on *Cummings*'s importance as judicial precedent is substantially correct. Subsequent paragraphs will analyze the case's short-term impacts on contemporary historical and political events, along with its longer-term influence on modern constitutional jurisprudence.

The immediate effects of *Cummings* on Reconstruction 'Ironclad Test-Oath' laws were devastating for Radical Republicans and those seeking a heavy-handed government approach in dealing with former Confederates. In Missouri, many individuals facing prosecution for violating the test-oath statute had their charges dropped, and those found guilty had their convictions overturned.[29] The 'Ironclad Test-Oath' itself was formally repealed on November 8, 1870, when an amendment to the Missouri state constitution was adopted abolishing the test-oath provision.[30] At the national level, the widespread prevalence and harshness of test-oath laws began to recede in the period after the *Cummings* decision. State-enacted test-oaths were

[29] Volkman, Lucas P. "Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri." 177.
[30] Bradley, Harold C. "In Defense of John Cummings," *Missouri Historical Review* 57, no. 1 (October 1962): 14.

gradually repealed, and in 1871, Congress enacted a law allowing former Confederates to swear to a watered-down oath promising future loyalty only.[31] The final Reconstruction test-oaths were done away with in 1884, when, after numerous unsuccessful attempts by congressional Democrats to formally repeal the remaining federal test-oath statutes, President Chester A. Arthur signed legislation to do so.

Cummings's effects on American jurisprudence, though less observable in the period immediately following the decision, were crucial. Supreme Court cases beginning in the late 19th Century have relied on *Cummings* to various degrees in setting the judiciary's baseline interpretation of federal constitutional bans on *ex post facto laws* and bills of attainder. For example, in *Duncan v. Missouri* (1894), the court explicitly cited *Cummings*'s definition of an *ex post facto* law to rule that Missouri's decision to enact a law restructuring its state Supreme Court did not constitute one.[32] And in *Bouie v. City of Columbia* (1964), a Civil

[31] Hyman, Harold M. "To Try Men's Souls." 264-265.

[32] "It may be said, generally speaking, that an ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different

Rights-era case involving a segregated business's attempt to retroactively apply a trespassing policy to two African-American sit-in protestors, the court, referencing *Cummings*, affirmed that an *ex post facto* law was one "that makes an action done before the passing of the law, and which was innocent when done, criminal."[33] [34] On bills of attainder, the Supreme Court ruled in *United States v. Lovett* (1946) that Congress acted unconstitutionally when it promulgated a law restricting the payment of one specific government employee's salary. "Legislative acts…that apply either to named individuals or to easily ascertainable members of a

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testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage, (Cummings v. Missouri, 4 Wall. 277; Kring v. Missouri, 107 U.S. 221, 2 Sup. Ct. 443;) but the prescribing of different modes of procedure, and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of [the] crime, are not considered within the constitutional inhibition." Duncan v. Missouri, 152 U.S. 377 (1894).

[33] Continued: "and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed." Bouie v. City of Columbia, 378 U.S. 347 (1964).

[34] See Footnote 4. Bouie v. City of Columbia, 378 U.S. 347 (1964). "Thus, it has been said that 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time.'" *Kring v. Missouri*, 107 U.S. 221, 107 U.S. 235. See *Fletcher v. Peck*, 6 Cranch 87, 10 U.S. 138; *Cummings v. Missouri*, 4 Wall. 277, 71 U.S. 325-326.

group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution," the justices, citing *Cummings*, wrote in the case's brief, going on to refer to *Cummings*'s definition of bills of attainder as principal precedent for striking down the law.[35] The court's affirmation of *Cummings*'s definition of bills of attainder in *United States v. Lovett* influenced a series of the court's later cases dealing with the same subject, such as *United States v. Brown* (1965) and *Nixon v. Administrator of General Services* (1977).

One particularly cogent example of *Cummings*'s continued relevance in shaping the parameters of the Supreme Court's definition of bills of attainder and *ex post facto* laws is *Garner v. Board of Public Works of the City of Los Angeles* (1951). In the *Garner* case, the court evaluated the constitutionality of a required loyalty oath which the City of Los Angeles was attempting to apply to municipal employees—the oath, importantly and distinctly from *Cummings*, applied only to past conduct within a set period of time, and had been enacted for several years longer than that set period of time prior to the first instance of its

[35] United States v. Lovett 328 U.S. 303, 315 (1946).

enforcement.[36] While the municipal loyalty-oath's constitutionality was ultimately upheld by the court, justices on both sides of the decision cited *Cummings* as precedent to justify their position. Justice Tom C. Clark, writing for the court's majority in upholding the oath, described *Cummings* (along with *ex parte Garland*) as the "leading" Supreme Court precedents in "applying the federal constitutional prohibitions against bills of attainder." The majority's opinion in *Garner* was careful to uphold Los Angeles's municipal test-oath in a nuanced manner, interpreting *Cummings* more narrowly than dissenting justices in the case but maintaining it as a starting point and as overarching judicial precedent nonetheless. Unsurprisingly, dissenting justices similarly adhered to *Cummings* as correctly decided precedent on *ex post facto* laws and bills of attainder, differing from the majority only in the particulars of how they interpreted the decision's applications. Justice Douglas, along with Justice Hugo Black, wrote that *Cummings* defined potential "punishment" imposed by a bill of

[36] The case, of course, also pertained to public employees and not privately employed individuals or private occupations.

attainder, for the Supreme Court's purposes, as including "the deprivation of the right to follow one's profession."[37]

Cummings's influence on modern religious liberty jurisprudence, has, in contrast to its effects on cases involving alleged bills of attainder or *ex post facto* laws, been far more limited. Prior to the Fourteenth Amendment's enactment in 1868—more than a year after *Cummings* was decided—there was essentially no means by which the courts could apply the federal Constitution's religious freedom protections to the states. In 1867, the doctrine of incorporation, which is rooted in a modern interpretation of the Fourteenth Amendment's Due Process Clause and would not begin to enjoy jurisprudential prominence until decades after the amendment's adoption, was non-existent.[38] Indeed, in *Barron v. Mayor and City Council of Baltimore* (1833), the Supreme Court explicitly held that protections contained within the Bill of Rights were "intended solely as a limitation on the exercise of power by the Government of the United States" and were "not applicable to the legislation of the

[37] Garner *et al*. v. Board of Public Works of the City of Los Angeles *et al.*, 341 U.S. 716, 730 (1951).

[38] The Due Process Clause, contained within Section One of the Fourteenth Amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

States."[39] This was the precedent that the Supreme Court was working with when it decided *Cummings*. The court's decision to leave the religious liberty claims raised in *Cummings* unanswered was par for the contemporary course—without the Due Process Clause, it would have been extremely difficult for even the most sympathetic jurist to rule in favor of Father Cummings's bold assertion that the state of Missouri had no right to regulate his religious practice.

Conclusion

There is no doubt that *Cummings* is among the lesser-known court cases of the Civil War era. Other cases, such as *ex parte Merryman* (1861), *ex parte Milligan* (1866), and *Texas v. White* (1869), examined more high-profile constitutional questions and hold far more prominent places in the anthology of American legal history. Still, the historical and scholarly minimization of *Cummings* does a great injustice to the crucial role the case played in the development of the Supreme Court's interpretation of the U.S. Constitution's proscriptions of bills of attainder and *ex post facto* laws. Fundamentally, *Cummings* ought not to be

[39] Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

understood as a religious liberty case—it was a precedent-setting ruling that defined how the nation's courts would assess the constitutionality of retroactive laws and alleged bills of attainder in the future. As Justice Black approvingly remarked in his *Garner* dissent, the *Cummings* decision will be remembered in U.S. legal history as "one more of the Constitution's great guarantees of individual liberty."[40]

[40] Garner *et al*. v. Board of Public Works of the City of Los Angeles *et al.*, 341 U.S. 716, 730 (1951).

Bibliography

Apperson, George M. "Presbyterians and Radical Republicans: President Lincoln, Dr. McPheeters, and Civil War in Missouri." American Presbyterians 73, no. 4 (1995): 239–50.

Barron v. Mayor & City Council of Baltimore, 32 U.S. 243 (1833).

Bouie v. City of Columbia, 378 U.S. 347 (1964).

Bradley, Harold C. "In Defense of John Cummings." Missouri Historical Review 57, no. 1 (October 1962): 1-15.

Cummings v. The State of Missouri, 71 U.S. 277, 332 (1867).

Douglas, William O., An Almanac of Liberty (Doubleday & Company, Inc., Garden City, N.Y., 1954).

Duncan v. Missouri, 152 U.S. 377 (1894).

Historical and Biographical Notes; Thomas Clement Fletcher, 1865-1869; Office of Governor, Record Group 3.18; Missouri State Archives, Jefferson City.

Hyman, Harold M, To Try Men's Souls (Greenwood Press, Westport, Connecticut, 1981).

Ex parte Garland, 71 U.S. 333, 398 (1867).

Garner et al. v. Board of Public Works of the City of Los Angeles et al., 341 U.S. 716, 730 (1951).

J. T. M. “Supreme Court of the United States. Ex Parte A. H. Garland. John A. Cummings v. The State of Missouri.” The American Law Register (1852-1891) 15, no. 7 (1867): 394–411.

Johnson, William T. “Missouri Test-Oath.” In The Catholic Encyclopedia. (New York: Robert Appleton Company, 1912).

Kohl, Martha. “Enforcing a Vision of Community: The Role of the Test Oath in Missouri's Reconstruction.” Civil War History 40, no. 4 (December 1994): 292-307.

Lincoln, Abraham. The Collected Works of Abraham Lincoln, ed. Roy P. Basier, 8 vols. (New Brunswick, NJ, 1953-55) 6: 33-34.

Neff, Stephen C., Justice in Blue and Gray (Harvard University Press, 2010).

Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

Rau, Donald. Three Cheers for Father Cummings, Supreme Court Historical Society (1977).

State v. Cummings, 36 Mo. 263 (1865).

Story, Joseph. Commentaries on the Constitution of the United States (Hilliard, Gray, and Company, Boston, Mass., 1833).

Transcript, Cummings v. Missouri, pp. 7–9; Bay, Reminisces of the Bench and Bar, 445, 573–74;

Parrish, History of Missouri: Volume III, 122–23, 126–27, 233, 235.

United States v. Brown, 381 U.S. 437 (1965)

Volkman, Lucas P., Houses Divided: Evangelical Schisms and the Crisis of the Union in Missouri, Religion in America (New York, 2018; online edn, Oxford Academic, 22 March 2018).

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