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AVOIDING DEATH LIKE THE PLAGUE: WOUND CARE IN THE ROMAN ARMY

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Roman Imperial dominion was predicated on aggressive, almost incessant war in far-flung places over several centuries. When reflecting on Rome as a warrior culture, history presents Rome's wars as a simply two-sided event: the winners who triumphed and the losers who died. But there is another group that is often neglected, the wounded. The victors lived to fight another day, while the losers either ended up dead or sold into slavery. But what happened to the wounded? How did the Roman army tend to its injured? Rome controlled the world through military might, but could the Romans control or even begin to combat the world of infection and disease, a powerful and unseen enemy?

Before the invention of antibiotics, infection was a serious consequence of improperly treated battle wounds. Visible enemies were not the challenge; swords, clubs, and arrows could provide defense. Aside from the traditional battlefield, armies faced silent enemies that could wipe out a third of their forces overnight. Strong, healthy men were reduced to useless skeletons of soldiers within hours, dead in a few days' time if they were lucky; but most were not. Analysis of the ancient medical literature, such as that produced by the famed Galen of Pergamum (AD 129 – c. 216), indicates little knowledge of bacteria and other microbes by medical authorities. But scholars such as Galen understood that there were changes happening in the body because of wounds that had been inflicted. Having trained under the physicians Satyrus and Pelops, and having been exposed to numerous patients through clinical experiences and practical demonstration, Galen became a leading medical specialist in Rome.¹ It was this expertise that resulted in his understanding of infection and disease, one that made distinctions between the healthy and the ill as a consequence of activity and inactivity. As he himself noted:

For they consider the person in whom no activity of any part is impaired 'to be healthy', but someone in whom one of them is impaired 'to be sick'. Similarly they call someone in whom all the bodily parts are working naturally 'healthy', while someone in whom one of them is impaired is called 'sick'.²

Despite being the leading Roman authority, Galen's medical knowledge, like others in his field, was incomplete. While advanced scientific knowledge was lacking, the protocols of Roman physicians for treating wounds were impressive. Since warfare was an inherent part of Roman culture, death from injuries incurred on the field of battle was a regular experience, and always greeted the living with the same stomach-churning odor that would cling to every inch of their bodies. The ancient historians of Rome, such as Livy (59 BC – AD 17), offered vivid descriptions of such wounds in the infantry combat they describe:

Here and there amidst the slain there started up a gory figure whose wounds had begun to throb with the chill of dawn, and was cut down by his enemies; some were discovered lying there alive, with thighs and tendons slashed, baring their necks and throats and bidding their conquerors drain the remnant of their blood.³

The smell of death was an unmistakable odor when it made its presence known. The stench marked the dead, the living, and the severely infected. Death was not always immediate, however. Those who survived, but had suffered an injury, had another even more difficult battle to win – the one against infection.

Clostridium perfringens (*C. perfringens*), is a living death sentence. It is an invisible enemy more terrifying and destructive than any army the ancient world had seen. An infection by this bacterium marks its victims with fates worse than death itself.⁴ Starting with increased pain and swelling around the injured area – typically in the lower extremities – victims can come down with fever and tachycardia - rapid heart rate - as the infection begins. Within hours, the skin around the site turns pale, and as the battle continues, the skin progresses to dark red, then purple, then black in color, an indication of necrosis – the death of groups of cells in one area. The smell of death emanates from the area as pus drains out of the tissue, leaking from the infected site. What is worse, this is not a localized infection. It originates in tissue killed by an initial traumatic event – puncture wound, arrow, laceration, etc. Once inside, *C. perfringens* releases two devastating toxins that cause platelets to aggregate and eventually kill neighboring cells, allowing the bacterium to continue to spread.⁵

With a reproduction rate of approximately twelve minutes, *C. perfringens* rapidly colonizes wounds, and the host’s body is taken over unbeknownst to the injured. As the infection spreads and more tissue is killed, quite often one option remains – surgical removal of the dead tissue. If left on the body, the results could range from shock, to kidney failure, to death.⁶ The most common surgery option for this type of infection is amputation.

Later such tissue may become liquefied and slough. The margin between healthy and necrotic tissue often advances several inches per hour despite appropriate antibiotic therapy, and radical amputation remains the single best life-saving treatment. Shock and organ failure frequently accompany gas gangrene and when patients become bacteremic, the mortality exceeds 50%.⁷

If victims survive the infection and resulting surgery, they are left to live with scarred and dismembered bodies and the possibility that not all of the infection was removed, causing lifelong agony and fear.

Known today as gas gangrene, or simply gangrene, this highly virulent bacterium has caused many nightmares for healthcare workers and patients. While ancient Romans did not know

that bacteria caused this lethal disease, it was prevalent then as well. As Aulus Cornelius Celsus (c. 25 BC – AD 50) notes:

[S]ometimes there arises what the Greeks call gangrene. The former varieties occur in any part of the body; gangrene in the extremities, that is in the nails, armpits or groins, and generally in aged people or in those of a bad habit of body. The flesh in the wound becomes either black or livid, but dry and shriveled; the skin near it is for the most part occupied by dusky pustules; then the skin around these becomes either pallid or livid, and usually wrinkled, deficient in sensation: farther away from the wound the skin is inflamed...Now...an acute fever arises and great thirst...the stomach begins to be affected: even the breath gets a foul odor. This disorder at its commencement admits of treatment; but when thoroughly established it is incurable, and most patients die in cold sweat.⁸

Thanks to advances in immunology – the study of how the body protects itself – and microbiology – the study of microbes – death sentences handed out by microbes such as *C. perfringens* are no longer guaranteed. While severe cases of gangrene still result in amputations, cases caught early can be treated with an antitoxin, large doses of intravenous penicillin and clindamycin. In certain conditions, oxygen that is applied to the infection site under high pressure may be effective as well.⁹ Advances in medicine and medical technologies have aided patients across the ages – increasing survival rates, decreasing pain levels and increasing overall wellbeing.

While not as advanced as modern treatments, Roman doctors and physicians had their own techniques to combat infections. A common ancient practice by doctors was to use natural products, such as honey, olive oil and vinegar.¹⁰ Efficiency is key to a successful army, and Rome's army was prepared to deal with almost any situation in battle. This preparedness extended all the way to treating their injuries as, “the Roman soldiers seem to have been equipped for emergencies with bandages...”¹¹ These bandages were made of plant products and woven materials such as wool, cotton and flax.¹²

Not every wound treatment was as simple as wrapping it with a bandage. Often wounds required treatment from field doctors, known as *medici*, who cared for sick and wounded soldiers, “in well-designed and carefully built hospitals which provided insulation, quietness, and reduced likelihood of infection.”¹³ During the latter part of the Empire, around the time of Emperor Trajan (c. AD 53–117), field hospitals – *valetudinaria* – were constructed to accommodate approximately 200 men.¹⁴ The type of injury dictated a *medici's* course of action. Fractures were set with splints and any laceration was treated and covered with, “a variety of salves diluted in wine and made from a combination of salts (copper acetate, copper oxide, lead oxide), vinegar, nuts, flowers, grease, and fragrance (myrrh or frankincense – both bactericidal as well as fragrant).”¹⁵ With the number of deaths that Rome suffered from being almost constantly at war, the Romans could not

afford to lose many men to wounds and injuries. For this reason, when a man was found fit to fight again, he was sent back to the legions as soon as possible.

Once soldiers have been discharged for medical reasons, it is not usual to grant reinstatement on the grounds that they have recovered good health, since soldiers are not lightly discharged and only after doctors have declared that they have contracted an infirmity and this has been rigorously investigated by a suitable judge.¹⁶

With the cost of wars already extravagant, finding ways to reduce costs in training and equipping the legions was a priority. The more veterans who survived and the fewer new recruits the army had to train provided one method of cost reduction; now less money was spent on training and could be spent elsewhere.

As a medical practitioner, Galen himself used materials such as nut-juice and honey as well to make his remedies.¹⁷ Prior to his work as the personal doctor of Emperor Marcus Aurelius (AD 121 – 180), Galen polished and fine-tuned his practices as the head doctor of the gladiators in Pergamum.¹⁸ It was here that he practiced new treatments, such as the one for wounded tendons, and he altered techniques of previous doctors for such wounds:¹⁹

Earlier in his career, Galen had completed his studies and had been appointed physician to the gladiators in his hometown of Pergamum, now in modern Turkey. This afforded him excellent opportunities to observe a variety of anatomical conditions, wounds and other injuries of all kinds, and to record his findings.²⁰

Galen’s time working with the gladiators provided him with medical knowledge that continued to be used by his colleagues for centuries. Galen was the first to understand that optimal healing conditions included keeping the wound moist: “in his view keeping the wound moist was of great importance. He soaked linen cloths in wine and placed the folds on the wounds, covering the cloth in soft sponges which he moistened day and night.”²¹ The combination of moisture and acidity depleted the growing conditions of bacteria enough to interrupt any growth.

Just as soldiers lost in battle were not easily replaced, *lanistas* (trainers of gladiators) and *editores* (sponsors of gladiator games) could not afford to lose gladiators in the arena. “When a gladiator died or became disabled for a long time, the *editor* had to pay much more than the cost of his participation in a combat.”²² For this reason, any injured gladiator was given the best medical treatment possible. It is possibly for this reason that Galen developed certain medical philosophies, such as his “Therapeutic Method.”

So, taking as a starting-point, something agreed by all, this will be the business of the therapeutic model: to bring about health in bodies that are diseased; that is, to restore the natural activities of the parts wherever they happen to be impaired.²³

The ideas and philosophies developed by Galen reshaped how the Romans tended to their wounded. However, this is not to say before Galen soldiers did not address their wounds at all, though therapeutic treatment of wounds may not have been as prevalent prior to Galen. Commanders such as Julius Caesar (100 BC – 44 BC), saw the value in wound treatment. Not losing men in battle meant that he could focus his time elsewhere and not on dwindling manpower or having constantly to recruit and train new men; they could focus on conquering the world:

Under stress of this emergency Caesar had, by soliciting private individuals with touching appeals, amassed a certain amount of corn in his garrisons, and this he was using sparingly. Meanwhile every day he went round the field-works in person, and doubled the number of cohorts on guard duty in view of the large numbers of the enemy. Labienus gave orders that his wounded, who were very numerous, should have their wounds dressed and then be carried in carts to Hadrumetum.²⁴

When compared to modern medical technology, the medical remedies and treatments used by Galen and Caesar seem archaic at best. The use of plants and nature-made materials to aid the healing process evokes exotic images of medicine men and primitive understandings of medicine. There is, however, empirical evidence supporting the techniques and materials used by the Romans for medical treatment. Many of the products had naturally occurring bactericidal properties – the ability to stop bacterial growth.²⁵ These types of treatments are known today as topical antiseptics. When dealing with infections such as *C. perfringens*, which causes inadequate blood supply to infected areas, these types of antiseptics are highly effective as they are applied directly to the site of infection and have little distance to travel before encountering the pathogen.²⁶

Vinegar, known scientifically as acetic acid, has cleansing properties that make it a suitable antiseptic. Commonly used in “wound bed preparation,” the application of vinegar aids in the elimination of dead tissue and bacteria living in the wound:

Wound bed preparation refers to the clearance of necrotic and/or sloughy materials from the bed of the wound to produce granulation tissue. In the case of infected or necrotic tissue, the wound must be prepared either by using surgical debridement or by a progressive local treatment that eliminates dead tissue.²⁷

When applied to open wounds, the acetic acid enters the bloodstream and lowers the pH in the infected area, ultimately producing an acidic environment around the injection/infected area.²⁸ As

environments change and become more acidic, the bacteria growing in these areas react negatively; their growth rate decreases as an environment continues to become more acidic.²⁹ A similar effect happens when wine is used as an antiseptic agent. Wine creates a more acidic environment for the bacteria to live in, killing more bacteria as the environment continues to increase in acidity .

Olive oil was also used in treatment of lesions; it was applied to bandages and wrapped around wounds, keeping the environment moist. Like the mechanism of vinegar and wine, olive oil effects the environment as well, however, it targets the pathogen’s internal environment instead of the surrounding. The essential oils of olive oil are believed to increase the permeability of bacterial membranes.³⁰ This increased permeability results in the leakage of fluid from the bacterium; which can lead to lysis – breakdown and destruction of the cell if not stopped. The essential oils also inhibit microbial respiration, the process by which individual cells breathe; a vital process for cell growth. Although *C. perfringens* is an anaerobic bacterium, it too carries out respiration, using instead sulfur, nitrogen or carbon compounds, instead of oxygen, to breathe.³¹

Olive oil use, specifically extra virgin olive oil, produces an anti-inflammatory effect, “due to the inhibition of the cyclooxygenase enzyme release which is involved in prostaglandins synthesis.”³² Both cyclooxygenases and prostaglandins — active fat compounds – are important pro-inflammatory mediators. When a pathogen enters the body, in this case *C. perfringens*, an immune response is triggered. On the surface of these pathogens are receptors known as PAMPs – pathogen-associated molecular patterns. These patterns are recognized by receptors on the surfaces of immune cells known as PRRs – pattern recognition receptors. The binding of these two receptors can set off responses ranging from phagocytosis - a process by which specific cells destroy and eat invading cells - to an inflammatory response.³³

Another key response is the formation of cyclooxygenase 2 (COX2) - an enzyme formed in the body. Induced by PRR activation in different immune cells, COX2 is vital for converting a fatty acid, known as arachidonic acid, into prostaglandins.³⁴ Inflammation seems to be the ideal response to an infection such as *C. perfringens*; immune cells are alerted to the infected area and make their way over to fight off any antigens and pathogens. However the inflammatory response, is a catch-22. If done properly, the infection is fought off and the body will return to its normal state. However, as with any complex process, there is always the possibility that something could go wrong.

Resolution of this acute inflammatory response includes the clearance of invading pathogens, dead cells, and damaged tissue; the activation of the systemic acute phase response and additional physiological responses, including the initiation of wound healing; and the induction of adaptive immune responses. However, if the infection or tissue damage is not resolved, it can lead to a chronic inflammatory state that can cause more local tissue damage and potentially have systemic consequences for the affected individual.³⁵

This is the major problem when dealing with an infection such as *C. perfringens*. Due to its rapid reproduction rate, this bacterium is growing at a much more rapid rate than the body can handle. When the inflammatory response occurs, there is no way for the body's immune system to catch up to the growth rate of *C. perfringens*. This induces chronic inflammation immediately, which is one of the reasons increased swelling and pain are the first signs of a *C. perfringens* infection.

Olive oil disrupts the inflammation process. While PAMPs and PRRs still connect with each other, indicating an antigen has entered the body, olive oil acts to stop PRRs from inducing the synthesis of cyclooxygenase. This ultimately prohibits arachidonic acid from converting into prostaglandins and therefore stopping an inflammatory response. By disrupting this process, olive oil, and its essential oils, act as efficient anti-inflammatory agents.

Another anti-inflammatory agent the Romans used was honey. First used by the Egyptians around 1400 BC, honey has been used for centuries in medical practices:³⁶

Honey has been used for its healing properties for centuries and has been used to dress wounds with promising results. Honey dressings increase healing, minimize debridement, prompt successful graft, remove dry crust, prevent dry scab formation on burns, cleanse wounds, ease separation of sloughs, deodorize wounds, cause soothing of wounds, and minimize scar formation.³⁷

Numerous studies have analyzed the antimicrobial and anti-inflammatory effects of the use of honey to treat wounds. When honey is applied to a wound, research has found that this stimulates the release of cytokines – small proteins important in cell signaling – which aid in regulating the intensity and duration of an immune response, depending on which cytokine was released.³⁸ This response is highly regulated as excessive cytokines can cause an amplified inflammation response and characteristics similar to septic shock.³⁹ Honey is also full of endotoxins - toxins found on the walls of cells that releases when the cell disintegrates. These endotoxins activate macrophages - specific immune cells that perform phagocytosis - in order to produce pro-inflammatory cytokines.⁴⁰ Interestingly, honey has also been found to have anti-inflammatory properties. The exact mechanism for this property is unknown, however it is believed that similar to olive oil, honey inhibits prostaglandin synthesis.⁴¹

Researchers have found several mechanisms of actions used during the healing process by honey.⁴² It is remarkable that honey has two pathways that counteract each other; anti-inflammatory and pro-inflammatory. It is believed that the situation with which the honey is being used determines which of those two pathways it uses – if levels of inflammatory mediator are high or low.⁴³ For an infection such as *C. perfringens*, both pathways could be utilized. When honey is applied at the beginning of the infection, it could recognize that there are too many inflammatory mediators, causing the swelling and pain, which would cause the honey to act as an anti-inflammatory mediator. However, if the honey were applied later there may be fewer inflammatory

mediators in use, allowing the honey to produce more of a pro-inflammatory response. By having both pro- and anti-inflammatory properties, honey increases its medicinal uses making it a highly effective antiseptic.

The Roman legions comprised one of the most powerful and well-trained armies in the ancient world. They were a model of discipline and, for the most part, respected their commanders. Constantly being at war created serious problems for the soldiers. . The Roman army lost many men due to death on the battlefield, and some from their injuries after. It was too costly and time consuming to lose so many men; having to take the time to find new recruits, and then having to train them took away from the veterans’ continued training. To take care of the men, soldiers were equipped with bandages and field hospitals were set up to care for the more critically injured.⁴⁴

There is much to learn from how the Romans took care of their wounded. The ultimate goal was to get soldiers healthy enough to get them back on the battlefield.⁴⁵ There was no complex, cure-all solution that was passed around to heal the men. Everyday products that were abundant in the Roman Empire were the key. While they may not have understood the exact science as to why these products worked, the Romans knew that they did help and could make people better and heal their wounds. Simplicity was the solution.

From the modern perspective we think of the world of Galen as superstitious and simple-minded. However, he and others alike wanted to heal people with remedies that worked:

For all of Galen’s many faces...we should not forget that he regarded himself primarily as an *iatros*, a healer of patients and a restorer and preserver of health. Indeed, the principal job (*ergon*) or aim (*skopos*) of the medical art, he repeatedly says, is the treatment of disease and preservation of health; and it is his primary responsibility as a doctor to carry out that job in an indefinite number of particular cases.⁴⁶

There is more than one reason why the Roman army was the most powerful army in the ancient world. Discipline and rigorous training formed it into an unmatched killing machine. Wound care that used natural products to help the soldiers regain their health and strength was a powerful contribution that aided the success of the army for centuries. At first glance, the actions of the Roman army and doctors seem exotic and unscientific. Covering wounds with wine, olive oil, vinegar and honey could be construed as having come from the imagination of a child. How can covering wounds with food products and beverages have any sort of medicinal properties? Yet, when one analyzes the modern scientific literature cited, we find that there was legitimacy to the remedies and techniques used to treat the wounds of Roman soldiers.

Although wound treatment was known before him, Galen set a precedent for medical procedures that, at the time, were considered superior and extremely advanced. For centuries many of his findings and practices were used throughout the ancient world until the advancement of science further developed his techniques and theories.⁴⁷ It is clear that the natural remedies applied

by Galen are not able to combat every disease and infection; however, there are many microbes they can defeat. Rome's army was able to take simple, everyday products such as wine, honey, vinegar and olive oil and use them to great advantage in their conquests, for both sustenance and wound treatment. The use of such simple products of nature maintained a military at which the modern world still marvels.

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AN EXAMINATION OF SOCIAL CONSCIOUSNESS IN THE CIVIL WAR THROUGH THE LENS OF PHOTOGRAPHY

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During the American Civil War, battlefield photography helped shape the Northern consciousness by shaking it free from preconceived ideas of martial glory and valor. This paradigm shift allowed the North to approach war with a modern mentality, mirroring the modernity of military tactics and hardware, which arose out of tactical necessity. The North was the main progenitor of photographic material during the war, and therefore shaped not only the contemporary interpretation of the war but the historical narrative as well. The Union's archive is substantial, but it consists of a bias that tends to focus on the Eastern Theater along the Atlantic coast and the Appalachian mountains. This bias shapes the historical framework in which historians view the war.

Due to the Northern naval blockade the South, on the other hand, was unable to obtain the chemicals and materials to produce photographs in any meaningful volume. They were able to capture and produce a few images in the beginning of the war but lacked the infrastructure to disseminate the images on a wide scale to the public. This limited access to material and markets hurt the South's ability to shape public opinion. Furthermore, much of the Southern photographic record has been lost due to the destructive capacity of the war and the ravages of time. The disparity between North and South resulted in an advantage for Union supporters with regards to photographic propaganda, enabling the North to maintain public support even when morale ebbed during 1862 and 1863. Photography also allowed the North to shift its war aims to meet the contingencies that resulted from the volatility of the conflict.

Through an examination of pre-Civil War expression, found in both photography and traditional artistic mediums, a clear change can be delineated that will illuminate both the role that photography played in conveying the Union's message and how this message changed and adapted over time. Additionally, an examination of the technological aspects of photography will elucidate the advantages the Union held over their Confederate counterparts as well as how this technology spurred a sense of unity throughout the North. Examining individual photographers and their artistic expression will further lend credence to the concept that photography morphed during the war, supplying the cultural material that was both overtly and covertly utilized to alter public opinion and enabled the North to fight the *total war* necessary for victory.

Nineteenth-Century Landscape Painting and Its Effects on Photography

American photographers during this period derived their artistic perspective from their counterparts in the art world. European and American landscape painters differed in their approach toward nature and the wilderness, which reflected their divergent experiences and relations with this realm. The former perceived danger and evil lurking in the ever-decreasing forested regions that harkened back to their medieval heritage. The latter saw a space for the rebirth of humanity, a second Eden that had been squandered in the Old World. Art historian Eleanor Harvey states, "As Americans began to see positive resonance in their own natural landscapes, they developed a wilderness aesthetic that linked America's prospects for her future with two things: the potential for progress in cultivating the raw landscape and the virtues found in pristine aspects of those wild aspects."¹ This aestheticism lingers in photographs captured during the war and only changes to compensate for the level of destruction after the battle of Antietam (1862) but is never completely

abandoned. Often, the photographic scenes of destruction wrought upon nature and man reverberated with an echo of this "new" Eden being lost or destroyed.

Harvey states that, "Balancing the awe-inspiring power of nature was a renewed awareness of nature's amoral state – its indifference to human suffering as a signal of god's displeasure – which insinuated itself into the vocabulary of landscape."² This metaphorical analogy can be seen throughout the photographic record of the Civil War in the landscapes, which often were scarred and seemed to consume the individual through the interplay of scope and perspective. Pre-Antietam photographs regularly depict the devastation of nature in the distance while the presence of man is posed in the fore as an ancillary element disconnected from the grand scale of death and maiming that had recently occurred. This was the result of the legacy of nineteenth-century respectability combined with the "aesthetically pleasing" art that preceded the war.

In the years leading up to the outbreak of the Civil War in 1861, photography struggled to gain recognition as a valid form of artistic expression. Many of the photographers of the era, one of the most famous being Mathew Brady, had professional training in traditional artistic mediums such as painting or sketch work, social connections to artists, or a personal interest in art. To produce photographs that were aesthetically pleasing and commercially successful, photographers imitated their brethren in the traditional arts.

At the time, the two most popular forms of paintings, and by extension photography, were portraiture and landscapes. Portrait painters were able to conceal unflattering aspects of individuals through the use of artistic license and the use of favorable lighting. Despite the realism of photography, photographers were able to manipulate the lighting, the positioning of the subject, and the development process in order to generate works that "painted" their subjects in a flattering way. An example of this is Mathew Brady's adoption of skylights, which he cut into the roof of his studio at 205 Broadway in Manhattan, increasing the natural light and resulting in the production of exceptional photographs.³ This innovation enabled him to capture and manipulate the contrasts between light and dark and impress his clients, who tended to be political leaders and celebrities, with his final product.⁴ Historian George Sullivan states that, "Brady's skillfully lighted portraits, simple and straightforward, usually displayed a heroic quality."⁵ These techniques and thematic compositions would translate into his work during the war. Brady's work, which was modeled after the painters of his era, had a reputation for excellence, respectability, and artistic expression that gave him an advantage over his competitors at the start of the war.

Technical Aspects of Photography

One must first examine the technical difficulties faced by photographers in the field in order to understand how and why photographs were managed and staged, and how they represented the individual characteristics of the photographer in the same way that paintings and sketches did. Historian Alan Trachtenberg states, "Large cameras on tripods, lenses designed for landscape views, with the necessity of preparing the glass plate in a portable darkroom, then rushing with it to the camera—all these physical barriers to spontaneous pictures of action encouraged a resort to easily applied conventions of historical painting, casual sketches, and even studio portraits."⁶ The process of capturing a photograph involved an eight step procedure which was nearly universal, despite the different cameras utilized. The Wet-collodion process, the most popular mode of production during this period, consisted of:

1. A clean sheet of glass was evenly coated with collodion.
2. In a darkroom or a light-tight chamber, the coated plate was immersed in a silver nitrate solution, sensitizing it to light.

3. After it was sensitized, the wet negative was placed in a light-tight holder and inserted into the camera, which already had been positioned and focused.
4. The "dark slide," which protected the negative from light, and the lens cap were removed for several seconds, allowing light to expose the plate.
5. The "dark slide" was inserted back into the plate holder, which was then removed from the camera.
6. In the darkroom, the glass plate negative was removed from the plate holder and developed, washed in water, and fixed so that the image would not fade, then washed again and dried.
7. Usually the negatives were coated with a varnish to protect the surface.
8. After development, the photographs were printed on paper and mounted.⁷

Photographers carried out this procedure in the least ideal situations, on dusty fields, surrounded by flies and other insects congregating to feed on the corpses of men and animal alike all of which could despoil the photograph. Then the photographer would have to rush into their "studios," which were actually wagons with blackout cloth stretched over the frame. Temperatures inside these [Brady wagons](#)⁸ could be boiling in the summer or freezing in the winter and were full of noxious fumes generated by the chemical reactions.⁹ In order to accomplish this in the field, a team of two men would be employed. The complexity of the process limited the abilities of the photographer to produce large volumes and had the effect of accentuating their desire to make deliberately meaningful artistic representations that at times, and in the proper artists' hands, would challenge their audience's preconceived notions of war. Also, any pretensions of spontaneity, which the pictures often suggest, was lost within the reality of the complexity of the procedures. This resulted in a methodical approach of staging photographs with deliberate intent to affect the audience's interpretation of the captured scene.

The technological advancements in the production and dissemination of photographs during the war amplified the change in the public's conceptions, a change that was essential to conducting a total war. Photographs produced with glass negatives and paper were cheaper than their predecessor, the daguerreotype. This new format could be sold cheaply and reach a greater audience in a quicker manner than previous modes of production. Furthermore, utilizing a glass negative facilitated the production of an unlimited number of pictures from a single negative. For these reasons, "The Civil War has been described as the first 'living room war' one brought home to viewers in the form of mass produced cartes-de-visite and stereographs."¹⁰ These formats represented cutting edge technology in the 1860s and only further enhanced their desirability. The increased demand for this new technology, partnered with the realism of war, shocked viewers and aided in the shift from the traditional conceptualization of war as heroic to new perspective of war as the hell it was. Both cartes-de-visite and stereographs offered a rare glimpse of the war which most Northern audiences were far removed from and acted as a bonding agent that maintained social cohesion while simultaneously producing a catalyst for the acceptance of changes in war aims.

One of the most popular forms of photographs, stereographs, were based on the principle of binocular vision, which creates a sense of space and distance, an early form of 3-D.¹¹ "Made with a twin-lens camera, stereograph images are viewed in a lenticular device that allows virtual images to completely fill the viewer's perceptual field."¹² The twin lens cameras produced two

negatives, which were slightly offset from one another, producing a sense of suspended reality. Often, these negatives have been separated from their original mate over time, leading to the loss of their visual impact. Stereographs changed the way that practitioners of the art of photography "viewed the world both graphically and spatially."¹³ Photographers considered the 3-D effect when choosing their subject matter and reference points. Staging photographic scenes so that the value of depth could be further enhanced resulted in the war coming alive for spectators in the safety of their private sphere far removed from the front line.

Due to its size, which lent itself for greater mobility on the battlefield, and ability to produce a more visually appealing product, the twin-lens camera was used to photograph all the dead at Antietam and the majority of those at Gettysburg.¹⁴ Trachtenberg contends that to understand the photographic popular culture that arose during the Civil War the art of producing stereographs must be entered into the equation; "Indeed so popular was this mode of dissemination that any discussion of the Civil War photographs and the problems of reading they pose must take the stereograph into account."¹⁵ The fact that many of the photographs of the war dead were captured in this medium reveals the intent of the photographers as well as the desired impact they wanted to impart to their audience.

Another photographic form, the *carte-de-visite*, became popular in 1860-61 and quickly outstripped the popularity of all other forms of photography, creating a fad that swept the nation.¹⁶ *Carte-de-visites* were easy to mass-produce and trade among the civilian population, and measuring $2\frac{1}{8} \times 3\frac{1}{2}$ inches, they fit neatly into albums that could be found in nearly every home that could afford them.¹⁷ Historian Keith Davis states, "The *carte-de-visite* further democratized the production and consumptions of portraits" and "spurred a vastly increased social circulation of photographs."¹⁸ No longer were political and military leaders, battlefields or the death and destruction of the war abstractions muted by artistic renditions found in papers; they became real and entered the psyche of the individual and the public consciousness on an unprecedented level. These photographs became a form of cultural economy that was easily shared, spreading the realities of the war as well as the justification for the ever-greater sacrifices that would be needed to win a modern war of attrition. This shaped the consciousness of the civilian population, and as result of the photographs being produced by Union supporters with the explicit permission of the army, the message was controlled and uniform.

The Men behind the Photographs

Mathew Brady is arguably the most well-known Civil War photographer because of his foresight to finance and enlist photographers to travel with the army. However, many of the photographs attributed to him were from photographers' works that he purchased or by those he employed. Furthermore, he disliked going to battlefields because of their remote locations and limited amenities. As discussed earlier, Brady was renowned for both his ability to produce quality photographs as well as the social status of his clientele. When war broke he utilized his connections to gain access to the military and battlefields. Brady desired to be the "nation's historian" and with the breakout of hostilities "believed he would be contributing toward building a record of the war's events"¹⁹

Brady's exalted social status and penchant for aesthetically pleasing photographs resulted in an initial continuation of traditional artistic expression. American painters had "developed an American wilderness aesthetic, in which the landscape itself carried morally instructive overtones," and Brady continued within this heritage.²⁰ This formula, which had suited him before the war, hid the destructive nature of modern warfare and made it more palatable for him and his

audience's sense of respectability. Art historian Eleanor Harvey argues that "Beginning with [Brady's] pastoral and meditative photographs of the landscape at Bull Run taken 1862, Brady favored the metaphorical approach to the ravages of war, in keeping with the prevailing aesthetics of painting."²¹ However, Brady was a shrewd, if in the end unsuccessful, business man, and when opportunities arose to purchase or display photographs that attracted audiences and customers to his galleries he was not averse to the ideal. However, Brady conformed to the traditional artistic values in which he was bred and did not deliberately challenge the conceptions of military heroism. He was in many regards an elitist whose art reflected his position by minimizing the human and destructive elements of warfare. In the end Brady was not the man who was going to break with convention and alter the public's concepts of war.

Brady's photograph of [*Pontoon Bridge at Bull Run, Va.*](#)²² in 1862 follows the traditional landscape narrative; everything seems tranquil, bucolic even, and the casual observer might overlook the destruction on the hillside. The soldiers in the foreground are diminutive in scale when compared to the landscape in the background, a technique often employed by landscape painters. During peace time, these soldiers could fill in for a genial social gathering at a picnic after church services. The men's uniforms and the destruction of the landscape are the only indication that a battle had been fought at the site. However, even the loss of natural vitality in the photograph could be misconstrued and attributed to the taming of the wilderness via timber harvesting, another trope of prewar painting aesthetics. Perspective blurs the uniforms, making it difficult for the audience to grasp the nature and relationship of the human element. One would be hard pressed to distinguish any of the upheaval associated with war, so challenging of the preconceived public concepts of war through his photographic composition would be almost unfathomable.

Another, example of landscape aestheticism can be located in Brady's rendition of where [*General John F. Reynolds Was Killed*](#) at Gettysburg, 1863.²³ Lost again is the impact of modern warfare upon nature and man alike; without the caption it would be nearly impossible to delineate that one of the greatest struggles of the war had occurred on this spot. This photo could easily find its way into a carte-de-visite album in any respectable parlor due to its aesthetic beauty and picturesque landscape. A conclusion could easily be reached that the three fallen trees in the background collapsed due to a strong storm or other natural event, not as a result of the carnage of a struggle to the death between opposing armies. The men appear to be surveying the landscape as if they were planning where to plant crops. There is no indication that a general or for that manner anyone had died on the spot. The vista is awe-inspiring, but with regards to chronicling the historical record of the event, Brady misses the mark. In order to facilitate a paradigm shift of public consciousness other photographers would have to fill the void left by Brady's lack of vision.

Two photographers in the employment of Brady, and who would forever leave their imprint upon photo journalism, were Alexander Gardner and Timothy H. O'Sullivan. Due to their proximity to the death and destruction wrought by modern warfare, they both actually went to the scenes of battle immediately after the conclusion of hostilities, and they altered their artistic interpretations of battlefields and the resulting detritus. For example, in the aftermath of the Battle of Antietam (September 17, 1862), Gardner and O'Sullivan arrived together at the battlefield within two days of the Confederate Army's retreat. This allowed the men to capture photographs that capitalized on the realism of photography, resulting in a depiction of the carnage of the deadly struggle that still resonates with a modern audience as it did with their contemporaries.

The burial parties did not have the opportunity to intern the soldiers, which had sanitized the scene of previous other battlefields. Strewn across the landscape were the disfigured and

bloating bodies of young men from both the North and South. The pictures these men captured broke from the tradition of presenting war as respectable with heroic pageantry. Instead, the photographers decided to portray the *realities* of war, including men and horses in various degrees of decay and military supplies smashed, upturned and abandoned. There are some convincing arguments that some scenes were altered by the photographers, but their photographs at [Antietam](#)²⁴ (1862) and later [Gettysburg](#)²⁵ (1863) resulted in a landmark moment for photography and photojournalism that forever altered the way war was presented to the public. Gardner and O’Sullivan transixed a historical moment into a visual expression that revealed the horrors of war to all that viewed the macabre scenes. Only the most self-delusional individual could claim that war was heroic and glorious once they had viewed these photographs.

Within in a month of the battle these photographs were placed on display at Brady’s gallery in Manhattan, giving the public their first view of dead soldiers. The photographs measured 3 x 3 ¾ inches and were viewed through the use of a magnifying glass.²⁶ The astonishment of the spectators was palpable. The *New York Times* review of the exhibition stated, “They were shocking and terrible, yet at the same time they were mesmerizing and captivating.”²⁷ The clarity of the scenes combined with the magnifying glasses brought the war to the individual spectators resulting in an up-close and personal experience. One can only imagine a mother, wife, or sister viewing the scenes and discerning their loved one’s last moments, frozen in rigor mortis and captured for posterity. Many of these photographs were produced for public consumption as well and sold as stereographs, increasing the scope and effect of the gruesome vignette on the public’s consciousness.

When viewing Garner’s and O’ Sullivan’s photographs of Antietam it becomes crystal clear where their departure from Brady’s aesthetically pleasing formula occurs. Gone are the sweeping vistas with merely hints of destruction. For example, in Alexander Gardner’s photograph of dead [confederate soldiers in “Bloody Lane”](#) at Antietam, the corpses are stacked upon each other like cord wood.²⁸ Upon closer inspection via a magnifying glass, the individual bodies of the dead become untangled and visible. The *New York Times* review continued “Of all objects of horror one would think the battle-field should stand preeminent, that it should bear away the palm of repulsiveness. But, on the contrary, there is a terrible fascination about it that draws one near these pictures, and makes him loth [sic] to leave them. You will see hushed, reverend groups standing around these weird copies of carnage, bending down to look in the pale faces of the dead, chained by the strange spell that dwells in dead men’s eyes.”²⁹ The mutilated corpses left nothing to the imagination; it was both repulsive and enthralling, forever altering the audience’s perspective. The ability to view photographed scenes of death was a novelty that enticed the voyeuristic nature of the men and women who lined up and paid to see these photographic scenes. These spectators were transported directly to the battlefield and any vestige of the conceptions of the concocted fallacy of military valor was challenged, if not expunged completely from their mind set.

After leaving the employ of Brady, and only ten months after Antietam, Gardner and O’Sullivan displayed their photographs of Gettysburg at Gardner’s Washington gallery. These photographs focus even closer on the individualistic nature of war and have become the iconic visual images that many modern observers recall when reimagining the Civil War. Timothy H. Sullivan’s [Field Where General Reynolds Fell, Gettysburg](#) stands in stark contrast to [Brady’s rendition](#) of the same scene.³⁰ The most obvious departure can be gleaned from the lack of bodies in Brady’s compilation. The discrepancy alludes to the fact that Brady was not on scene immediately following the battle. Furthermore, the artistic expression that Brady exhibits is

manifested in the power of nature and the landscape, similar to that of a painter or sketch artist. O'Sullivan's rendition focuses on the deadly struggle and its aftermath. The bloated bodies, the blood stained shirts, and the limbs frozen in time reflect the loss of life, which only moments before was vibrant. The stylistic difference of the opposing artists transcends time, and the effects on the viewing public were probably dialectically opposed. Brady's images would make a young man giddy at the prospect of war while O'Sullivan's image would shake the confidence of the bravest soul.

Gardner and O'Sullivan were artists and they did not necessarily capture the reality of war in its purest form, as their modern detractors will so poignantly point out, but they manipulated their medium to convey a message or feeling or even to produce an aesthetically "appealing" (if this word can apply to death images) experience. In Gardner's *Dead Confederate Sharpshooter in the Devil's Den, Gettysburg, Pa.*,³¹ critics correctly argue that the sharp shooter's rifle and the shooter himself were more than likely moved to this locale and staged in this position. However, this does not eliminate the appeal or even the relevance of the photograph. The fact that the body in the photograph was moved and positioned reinforces the idea that Gardner and O'Sullivan were artists who constructed their artistic vision within their medium to meet their audience's expectations. The propping of the gun in the background would have added a layer of depth for the stereograph photos which only increased their appeal. The position of the face in the foreground drew in the audience toward what would normally repulse a viewer, as well as personalized the death by adding a level of humanity that would remove the individual from the abstract construct purveyed by the statistics found in a newspaper. Modern art theorist Jonathan Crary proposes that nineteenth-century, "Photography [was] an element of a new and homogenous terrain of consumption and circulation in which an observer becomes lodged."³² It was no longer possible to remove oneself from the carnage of the war, a war that was abstract and distant. Instead, the war became tangible and entered the universal lexicon of shared experience. Gardner and O'Sullivan were more keenly aware of this reality than the public and even most of their contemporaries, and they capitalized on this to shape public opinion. Nothing "lodges" a spectator into the realities of war more so than the images of disfigured dead bodies.

African American Representations in Photography, a Shift in Representation

Photography not only shaped public conceptions of the war, but even reshaped the justification for the war. Abraham Lincoln at the outset of his administration focused on preserving the Union because he realized that Border States and the majority of the population would not support a war fought over abolition of slavery. However, "On September 22, five days after the battle of Antietam, Lincoln called his cabinet into session," to advise them that he would be issuing the Emancipation Proclamation freeing slaves in rebel held territories.³³ The level of death and destruction up to this point in the war conflated with the unimaginable loss at Antietam created a need for the justification of the war to be raised to a higher plain. Much of this shift in Lincoln's perspective and that of the civilian populations came about as a result of the dissemination of photographs depicting the carnage of Antietam, first in newspapers, then in photographic installations at Brady's studio, and then in carte-de-visite and stereographs. The Emancipation Proclamation, in turn, resulted in a shift in the photographic record of African Americans from contraband and servants to noble warriors fit to wear the uniform and willing to fight for the Union. In order for this transition to be accepted by the public, the message transmitted via photography kept pace and often went beyond the written word.

Typical of early photographs of African Americans or "contraband" can be seen in the photograph of [A Black Family Crossing the Union Lines](#).³⁴ The agents within the photograph look destitute, disheveled, and certainly devoid of any possibility of being or becoming productive citizens. They appear to be driving a broken-down, arguably stolen, wagon which is overloaded with individuals and materials. This picture and its caption does not explain their "true" circumstances or whether the individuals were skilled or not, when many former slaves were as skilled as Northern workers in agriculture and domestic services. This family might even appear to be a threat to Northern society and countered the predominant eighteenth-century idea of respectability. Based on this photo, only a worker or farmer with a deep sense of altruism would go off and fight to free slaves depicted in this manner.

Another theme prevalent in the early days of the war was of African Americans portrayed as servants, and in the case of [John Henry](#),³⁵ retainers of their liberators in the army. Henry's position as servant to a white man, who was more than likely an officer, maintained the social and class hierarchy of white supremacy. The clothing he wears is torn at the shoulder and crudely repaired. It lacks martial vigor and seems to be of poor quality. As a result of the Emancipation Proclamation (January 1, 1863) these representations of African American decreased, and the ability to project upon African Americans a sense of honor, bequeathed to them through their duty to the Union, became more acceptable. This change allowed for many African Americans to serve the nation in the army and in many respects supported the ideas of racial equality for many. No longer were African America the alterity of American society, and this is reflected in the composition of photographs that were made available to the public.

An example of this shift can be found in the photograph of [Gordon](#),³⁶ which acted as a rallying cry for many abolitionist and Union supporters. "Based on photographs taken in Baton Rouge in April 1863, the image gained notoriety originally as a carte-de-visite, before being published as an engraving in *Harper's Weekly* in a special Fourth of July issue that same year."³⁷ The ability to quickly produce and disseminate the carte-de-visite enabled the Northern cause for Union and abolition to rapidly spread its message; gaining support for the Emancipation Proclamation and garnering much needed support for the war effort, which was at its nadir. In an article entitled "Typical Negro", *Harper's Weekly* printed a triptych that presumed to show the [transition of Gordon](#) from Slave to Union soldier.³⁸ Although there is considerable skepticism today regarding the authenticity of the photograph or Gordon's rise to become a soldier, the photograph did act as a rallying point for the Union. The transition to a new representation of African Americans served the Union's propaganda needs by expanding a visual narrative that now promulgated the edict of racial harmony in joint sacrifice for the cause, but it must be noted not necessarily racial equality. This shift in public opinion, brought about by political expediency and supported by photographic depictions, allowed the Union to field a larger army and depleted the Confederacy of laborers, which hastened the end of the war.

The image of an African American [Burial Party at Cold Harbor](#)³⁹ is a haunting juxtaposition of death and life. The African American crew is collecting the dead remains of Union soldiers, who arguably could have died for the Union as well as for the emancipation of blacks. "Unlike popular notions before the Civil War of the United States as a place where American culture would civilize the world through progressive advances in technology and wealth, the *Burial Party at Cold Harbor* exposed death, wildly uncontrolled and wreaking havoc on the idea that humans at the time had developed a more humane way to live."⁴⁰ Lost was any reverence or any ceremony of remembrance surrounding death, the bodies were just tossed upon the stretcher with no regard for the humanity that the corpses once represented. This photograph, by John Reekie,

takes the visual expression of death and destruction, began by Gardner and O'Sullivan at Antietam, to a level that would have been inconceivable regarding public sensibilities concerning martial valor of the war before 1861. This connotative expression of war would justify the total war approach taken by General Grant and Sherman in their bid to conclude a peace as rapidly as possible. Any opposition to destroying the South's will to resist was buried with photographs such as *Burial Party at Cold Harbor*.

The shift in public consciousness became more accepted after 1863, and the photographs of African American men in uniform, carrying weapons, and resisting oppression played a role in this transition. The Emancipation Proclamation and the Militia Act (1862) "empowered the president to enroll 'persons of African descent' for 'any service for which they might be found competent' including service as soldiers."⁴¹ The [picture of African American troops](#)⁴² taking an aggressive military stance, armed with rifles, aiming presumably at white adversaries would have been just as radical for the North as it was for the South at the outset of hostilities. However, the pictures of the war's devastation and of slaves' horrific abuses at the hands of overseers conditioned the public to accept African American men as soldiers, if not on moral grounds then on practical. From the structure of the buildings and their condition it is not difficult to imagine that these soldiers found themselves in a slave quarters on a plantation. The former slave returning to avenge the misdeeds perpetrated upon their people. A reinforcement of and a final justification for the shift in war aims that would have resonated with Unionist or abolitionist alike.

Conclusion

The Civil War was a political battle fought with modern concepts of mass production and technological advances. Only the subjugation of the South or the bleeding white of the North would have resulted in a termination of hostilities. Historian Gerald F. Linderman states that, "Conceptions initially embraced by society at large- national war aims, attitudes toward the enemy, views regarding the character of fighting-retain vitality for civilians long after the experience of the soldier rendered them remote or even false."⁴³ Photography played an integral role in changing the public's conceptions of war resulting in closer assimilation of the ideas and justification that soldiers on the front had already determined. Without this change the war would have lasted longer, which might very well have jeopardized the Union's ability to win. General Grant's bloody refusal to retreat despite great loss of life and material, and General Sherman's "March to the Sea" might not have been acceptable to a population trapped in an ideology that perceived warfare as glorious. Without the ability of the camera to show African Americans in service to the Union, public opinion might not have supported the use of black soldiers. This would have deprived the Union of a valuable tool in weakening the Confederacy while strengthening the Union. Photography shaped the political and moral attitudes of Northerners during the Civil War, as its modern counterparts continues to do. The new technologies, which increased production and expanded dissemination, cannot be overlooked. The photographers who mustered their artistic and personal connections with the war caused a change in public opinion that was essential to conducting a total war. Northern society was prepared to embark on this path because of the realism of the destruction, which was transmitted to them via photographs that reshaped their consciousness.

¹ Eleanor Jones Harvey, *The Civil War and American Art* (Connecticut: Yale University Press, 2012), 18.

² Harvey, *Civil War and American Art*, 19.

³ George Sullivan, *In the Wake of Battle: the Civil War Images of Mathew Brady* (New York: Prestel, 2004), 22.

- ⁴ Sullivan, *In the Wake of Battle*, 22.
- ⁵ Sullivan, *In the Wake of Battle*, 22.
- ⁶ Alan Trachtenberg, *Reading American Photographs: Images as History; Mathew Brady to Walker Evans* (New York: Hill and Wang, 1989), 73.
- ⁷ "Civil War: Glass Negatives and Related Prints," Library of Congress, accessed July 3, 2017, <http://www.loc.gov/pictures/collection/cwp/civilwarphotos.html>.
- ⁸ "Brady's Photographic Outfit in the Field near Petersburg, Va., 1864," photograph, from "Civil War Photos: Select Audiovisual Records at the National Archives," ed. Sandra Nickles and Joe D. Thomas, National Archives, last modified April 13, 2017, <https://www.archives.gov/files/research/military/civil-war/photos/images/civil-war-067.jpg>.
- ⁹ "Civil War: Glass Negatives and Related Prints," <http://www.loc.gov/pictures/collection/cwp/civilwarphotos.html>.
- ¹⁰ Keith F. Davis, *The Origins of American Photography: From Daguerreotype to Dry Plate 1839-1885* (Connecticut: Yale University Press, 2007), 173.
- ¹¹ Davis, *Origins of American Photography*, 170.
- ¹² Davis, *Origins of American Photography*, 170.
- ¹³ Davis, *Origins of American Photography*, 170.
- ¹⁴ Emily Godbey, "Terrible Fascination: Civil War Stereographs of the Dead," *History of Photography* 36, no. 3 (August 2012): 267, doi: 10.1080/03087298.2012.672225.
- ¹⁵ Alan Trachtenberg, "Albums of War: On Reading Civil War Photographs," in "American Culture Between the Civil War and World War I," special issue, *Representations* 9 (Winter 1985): 5, doi: 10.2307/3043765.
- ¹⁶ Davis, *Origins of American Photography*, 172.
- ¹⁷ Davis, *Origins of American Photography*, 172.
- ¹⁸ Davis, *Origins of American Photography*, 172.
- ¹⁹ Sullivan, *In the Wake of Battle*, 7.
- ²⁰ Harvey, *Civil War and American Art*, 5.
- ²¹ Harvey, *Civil War and American Art*, 83.
- ²² *Pontoon Bridge at Bull Run, Va., 1862*, photograph, from "Civil War Photos," ed. Nickles and Thomas, <https://www.archives.gov/files/research/military/civil-war/photos/images/civil-war-024.jpg>.
- ²³ Mathew Brady, *Woods in Which General John F. Reynolds Was Killed*, 1863, photograph, from "The Pictures that Captured a Nation at War: Civil War Photographer's Iconic Photos from the Front Line Show America's Darkest Days," *Daily Mail*, last modified August 6, 2013, <http://www.dailymail.co.uk/news/article-2385208/Matthew-Bradys-American-Civil-War-photographs-dramatic-images-line.html#ixzz5D3RFAoKn>.
- ²⁴ Alexander Gardner, *Ditch on Right Wing, Where a Large Number of Rebels Were Killed at the Battle of Antietam*, 1862, photograph, Library of Congress, Washington, D.C., accessed April 23, 2018, <https://www.loc.gov/item/2014646926/>.
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THE LAST CONTINGENCY: THE FINAL CHANCE FOR SOUTHERN VICTORY IN THE AMERICAN CIVIL WAR

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By the year of 1864, the North and South had been at war for roughly three years. A year previously, the Confederacy experienced a great military defeat at Gettysburg; a battle that many believe represented the South's last chance for victory and secession. However, there was still a chance of a negotiated independence for the Confederacy. The South's chance lay in making the war too tiring and costly for the Northern public to accept. 1864 was also a presidential election year, and if the Confederacy had not been so spectacularly defeated on the battlefield during the election, there is a chance that President Abraham Lincoln would have lost his bid for reelection to the Democratic hopeful, George B. McClellan. Had he won, the outcome of the Civil War would likely have been very different. However, McClellan did not win, and Lincoln became the President, ensuring the North's continued commitment to the war. This course of events in 1864 is an example of historian James McPherson's contingency theory, which asserts that the Union's Civil War victory was not pre-determined, and instead it was contingent on the outcome of key event that could have went the other way and led to a Confederate victory. This paper will argue that the outcome of the Civil War hinged, not on the well-known numerical superiority of the North, but rather on the avoidable failures of Confederate leadership, which led to massive battlefield defeats in 1864.

The North did have superior manpower and resources. The North had a greater population, larger industrial capacity, and better logistical systems than the South did. They had a better navy that they were able to blockade and corner the South, and the North had the better diplomatic game with overseas nations. Finally, the North was more united than the South; many areas in the South were Unionist, most notably the area of West Virginia and this has led many to argue that the North simply overwhelmed the Confederate forces. This explanation originated first from the defeated Confederate soldiers themselves. Robert E. Lee's speech at Appomattox implies this with his remarks about how "The Army of Northern Virginia has been compelled to yield to overwhelming numbers and resources."¹ Similarly, when asked about the Confederate defeat, a Confederate soldier replied that, "they never whipped us, Sir, unless they were four to one. If we had anything like a fair chance or less disparity of numbers, we should have won our cause and established our independence."² Later generations continued to point to the Union's undeniably superior resources as the primary cause of their victory. Historian Richard Current stated that "God was on the side of the heaviest battalions,"³ while Shelby Foote in Ken Burns's Civil War documentary noted that "the North fought with one hand behind its back: and that the South never had a chance at all."⁴

Other historians, however, have challenged the assertion that the North's victory was inevitable. In particular, James McPherson's posited "contingency theory," which argues that

the South had many chances for victory at various points during the war.⁵ Historians like Gabor S. Boritt and Gary Ecelbarger have supported McPherson's theory, with Ecelbarger citing the conflict for Atlanta as being a critical turning phase in the war.⁶ Others like Reid Mitchell, accept the contingency theory, but also acknowledge that the Union had the odds stacked in their favor due to their superior resources.⁷ Whereas, Albert Castel explicitly rejects the idea that superior numbers and logistics guaranteed Northern victory.⁸

Of all the potential outcomes during the war, McPherson's argument that the events of 1864 and Lincoln's resulting reelection represented both the last and best chance for Confederate victory is the strongest.⁹ By 1864 there was a peace faction movement in the North that sought to achieve a negotiated peace with the South. On varied fronts, the Union forces seemed stalled, and with no foreseeable end in sight to the war. After three years, the carnage of war had taken its toll on many on both sides. There was a real danger that the Northern public would grow tired of the war and elect another President to push forth a negotiated peace settlement. The North's advantages were only relevant to the victory if they had the willpower and competence to utilize them properly. and if the Northern public had realized that they had effectively won by the fall of 1864.

Abraham Lincoln's reelection was uncertain. If he did not win, then the war may have ended in a negotiated peace settlement. Lincoln faced a popular opponent, former Union General George B. McClellan. McClellan was charismatic, determined and an easy candidate for the Democrats to rally behind. Lincoln's potential defeat at the hands of McClellan was contingent on the outcome of two events on the battlefields in 1864. One was the Confederate government's decision to replace General Joseph E. Johnston with General John Bell Hood in Georgia. The change in leadership prompted a foolish assault that decimated the Confederate forces in Georgia and allowed General William Tecumseh Sherman to take Atlanta and win a smashing victory for the Union forces. The other event that impacted the election was General Philip Sheridan's campaign in the Shenandoah Valley and his defeat of the Confederate forces led by Jubal Early. These two great battles were key victories for the Northern war effort. They raised Northern morale and convinced the people that victory was very much possible.¹⁰ The war continued for several more months, but these two events played a pivotal role in deciding the outcome.

However, in the years leading up to 1864 there was a possibility for the Confederates to gain the upper hand. In the eastern theater, the Army of the Potomac was plagued by a series of ineffectual or timid commanders who could not utilize their resources effectively to defeat the Confederacy. Lincoln was frustrated with his commanders until he was able to find the generals he was looking for that could achieve victory with ruthless drive. He found those generals in Ulysses Grant and William Sherman who quickly made his Civil War victory dreams a reality.¹¹ By late 1864, the South had lost the will to fight as the North pushed forward. Apart from the morale boost brought by these victories, they had the very real strategic and tactical effects of shutting down Southern supply lines and dealing immense damage to Southern infrastructure,

especially in the fertile granaries of the Shenandoah Valley. The South was defeated, and the North won the military portion of the Civil War.

To understand why 1864 presented the last chance for a Confederate victory, one must look at the military and political situation of the events leading up to 1864. The North and the South had engaged in military warfare for three years now. The South tended to dominate in the Eastern part of the war while the North dominated in the Western and home fronts of the war. In political and military terms, the South had some chances for independence. Given the North's inherent advantages in manpower and logistics, the most optimal of all those chances relied on the North not choosing to go to war at all. If the North had realized these advantages, then they could gradually grind down and crush the South.¹²

Early in the war certain individuals like Winfield S. Scott realized this and drew up the Anaconda plan to crush the South. This plan would become the bedrock of Northern victory. By contrast, the South adopted a more reactive strategy, of waiting on the defensive to repel the Northern invaders and hold out until they gained sovereign recognition of their new state. The North would play the role of the attacker and the South that of the defender. It was a dynamic that held true save for a handful of instances such as Lee's two invasions of the North in 1862 and later in 1863, both with the intent of gaining European recognition of the Confederacy in what they hoped would be a "Southern Saratoga," In both aspects, Lee failed to achieve that sort of great victory, and indeed he avoided destruction narrowly.¹³

The year of 1864 saw the long-awaited clash between the two leading generals of both sides, Robert E. Lee and Ulysses S. Grant. Each had won a series of victories for their respective sides and both here highly regarded by the Presidents of their nations. It proved to be a great clash in the East. Lee had won victories against the Union army in the East before, and Grant had cut his teeth in carving up Confederate territories in the Western theater. By 1864, Lincoln had called Grant to command the Army of the Potomac and thus set the stage for the finale of the war. While Lee had won bold and stunning victories against previous Union generals, his victories were as much his tactical skill as his opponent's hesitation and incompetence. Most of his previous Union opponents were not inspiring men. That would change when he fought Grant who possessed both the skill and more importantly the willpower to achieve victory.

Grant's conduct of the war in the East was different than that of the previous generals and contributed to the South's loss. Previously the armies retired after great set-piece battles to give the soldiers time and rest to recuperate for the next battle. Grant pursued total warfare and continuous attrition warfare against Lee. It had the effect of whittling down the numbers of Lee's army in continuous attrition warfare. The Confederate army steadily disintegrated because it could not absorb the kinds of losses it was sustaining from the battles with Grant. Eventually, the Confederate army was forced into the bloody siege of Petersburg where the first instances of trench warfare appeared to observers. This siege warfare strategy allowed the Confederacy to hold off the Union forces for the nine months they fought there until Grant extended the lines so

much that Lee was forced to retreat. This series of battles concluded in Lee's famous surrender at Appomattox.¹⁴

While Grant pinned down Lee in Virginia, he had capable subordinates who won battles that the North needed to achieve that victory on the home front. The victories in the other theaters provided the needed impetus for Lincoln to win a second term. Grant issued orders for General Philip Sheridan to take care of the Shenandoah Valley and end the Confederate control of that area. He also issued orders for General Sherman to go through Georgia and split the South in half. Both campaigns had great consequences. According to Grant "It was followed later by Sheridan's campaign in the Shenandoah Valley; and these two campaigns probably had more effect in settling the election of the following November than all the speeches, all the bonfires, and all the parading with banners and bands of music in the North."¹⁵ The two conflicts were the last chance for the South to achieve a negotiated peace. They were unable to avoid the outcome and thus could not secure their independence.¹⁶

In Georgia, the Union advance was commanded by William T. Sherman, one of the generals Grant promoted and charged with defeating the Confederates in the state. He initiated a strategy of total war in order to destroy the Southern war industry. Opposing him was General Joseph E. Johnston, a skilled and cautious general who stymied Sherman's advance into Atlanta. This defensive strategy worked well for the Confederacy because of technological advances in weaponry during the Civil War; firepower had become more lethal and advanced. Much of this had been proven on Civil War battlefields like Fredericksburg, Gettysburg, Cold Harbor and other destructive direct assaults that fared poorly in the attack.¹⁷

In response to criticisms from Jefferson Davis, Johnston summarized the strategic situation in Georgia, concluding, "Therefore, a victory gained by us could not have been decisive, while defeat would have been utterly disastrous."¹⁸ The risks of a defeat outweighed the rewards of a victory. Rather the victory for the Confederacy in 1864 relied on simply holding out long enough. Johnston preserved the lives of his men and refused to give Sherman the kind of grand setpiece battle that would allow the Union forces to bring their logistical advantages to bear against him.

Even Johnston's opponents agreed that he was making the correct tactical decisions. Grant himself wrote in his memoirs, "For the most part I think Johnston was correct" explicitly noting that Johnston might have been able to delay Sherman's advance by a year to the point where the North might have gotten tired of the conflict.¹⁹ General Sherman, Johnston's opponent in that campaign, also agreed that Johnston had made the correct decisions, stating that his tactics were "cautious but prudent."²⁰ Johnston's tactics would preserve his army and effectively stymie Sherman's advance into Georgia. The one frontal assault that Sherman did execute at Kennesaw Mountain ended in a bloody repulse of Northern forces who suffered heavy losses.²¹

Johnston's cautious tactics eventually got him replaced. Despite his sound and prudent generalship, he had a terrible relationship with Confederate President Jefferson Davis.²² The two men did not get along very well. Davis was also notorious for interfering in the military

commands of his generals.²³ These faults were combined with his frustration at Johnston's defensive tactics. He replaced Joseph E. Johnston with a general named John Bell Hood, who had served with the army of Northern Virginia. John Bell Hood brought a much more direct and aggressive command structure to the army in Georgia that ended with its destruction. Hood proceeded to leave Johnston's fortifications in Atlanta and run his army into the ground through a series of frontal assaults. The Army of the Tennessee simply disintegrated in a series of costly attacks on the prepared Union defenses. Even after Sherman moved on, General Hood continued to run his army into the ground by attacking Nashville and Franklin.²⁴

The change in command was greatly benefited Sherman in Georgia. He asked his officers, some of whom knew Hood from the prewar days, what kind of man he was. Sherman learned that Hood was a brave and reckless fighter, but not as intelligent or reserved as Johnston.²⁵ Sherman was faced with a different kind of opponent from Hood, an aggressive one that finally gave Sherman the fight he was looking for. He was able to force the Confederate army into a series of battles that would whittle them down due to attrition and destroy them, which allowed Sherman to take Atlanta and move through Georgia and into South Carolina.²⁶

Northern reaction to the fall of Atlanta was filled with delight. Harper's Weekly celebrated the news with joy noting that "There is not a man who did not feel that McClellan's chances were diminished by the glad tidings from Atlanta; nor any one who does not know that if Sherman had been defeated, the friends of the Chicago candidate would have felt surer of his success."²⁷ General Sherman himself noted in his memoirs of the fortunate timing of the victory, stating that "This victory was most opportune; Mr. Lincoln himself told me afterward that even he had previously felt in doubt, for the summer was fast passing away; that General Grant seemed to be checkmated about Richmond and Petersburg, and my army seemed to have run up against an impassable barrier, when, suddenly and unexpectedly, came the news that "Atlanta was ours, and fairly won." It was welcome news for the Union.²⁸

By contrast, the mood of the Confederacy to the fall of Atlanta, demonstrated the other side of the contingency theory. The loss was a blow to Southern morale on home front. Mary Bodkin Chestnut wrote with lamentation that Atlanta had fallen, and the Confederate Army faced misfortune, saying that "These stories of our defeats in the valley fall like blows upon a dead body. Since Atlanta fell I have felt as if all were dead within me forever. Captain Ogden, of General Chesnut's staff, dined here to-day. Had ever brigadier, with little or no brigade, so magnificent a staff? The reserves, as somebody said, have been secured only by robbing the cradle and the grave-the men too old, the boys too young. Isaac Hayne, Edward Barnwell, Bacon, Ogden, Richardson, Miles are the picked men of the agreeable world."²⁹ The citizens of the Confederacy lost their will to continue fighting the war.

In his memoirs, Johnston himself recognized the vital nature of taking Atlanta noting that "The importance to the Confederacy of defeating the enterprise against Atlanta was not to be measured by military consequences alone. Political considerations were also involved, and added much to the interest of that campaign."³⁰ This provided the Confederacy with the breathing room

they needed on the negotiating table as Johnston further notes: “If Sherman had been foiled, these teachings would have caused great exaggeration of the consequences of his failure, which would have strengthened the peace party greatly; so much, perhaps, as to have enabled it to carry the presidential election, which would have brought the war to an immediate close.”³¹

Unfortunately, his opponents recognized this as well.

Sherman was able to do this only because of Johnston’s removal and his replacement with John Bell Hood. Hood sent his army against the Union forces, leaving Georgia open to Sherman’s advances. The reason for this mistake is due to the flaws of Confederate President Jefferson Davis, who interfered too much and played favorites with his generals. At first glance Davis might appear to have the excellent qualifications for a wartime commander, since he served as secretary of war for Franklin Pierce. Unfortunately, his flaw of micromanaging and playing favorites would be his undoing.³² It was because of Davis’s choice that the defensive-minded commander that the South needed in Georgia, was replaced Hood who was not suited for the task at hand.

The North’s Shenandoah Valley campaign of 1864 led to another decisive military victory that convinced the home front that victory was near. The campaign was ordered by General Grant to clear out the Shenandoah Valley of Confederate forces. It was a fertile area that supplied Confederate army with food and resources. In the words of General Grant “The Shenandoah Valley was very important to the Confederates because it was the principal storehouse they now had for feeding their armies about Richmond. It was well known that they would make a desperate struggle to maintain it.”³³ Burning and destroying the valley’s resources would be a prudent strategic move to weaken the Confederate armies and increase Northern fortunes in Virginia.

Grant put General Philip Sheridan in charge, a daring young cavalry officer who made it his mission to destroy the Confederate forces in the valley. According to his own memoirs “General Grant had not only decided to retain in the Shenandoah Valley a large force sufficient to defeat [General Jubal] Early’s army or drive it back to Lee, but he had furthermore determined to make that sections by the destruction of its supplies, untenable for continued occupancy by the Confederates. This cut off one of Lee’s mainstays in the way of sustenance, and at the same time diminish the number of recruits and conscripts he received.”³⁴ Sheridan would face Confederate forces under the leadership of Early, one of Lee’s officers. There would be some battles and clashes until Sheridan made great successes at the battles of Fisher Hill and Cedar Creek that saw the Confederate forces smashed in battle. Both of these battles were great propaganda victories for the Union. Over the course of the campaign, Sheridan followed the example of General Sherman and proceeded to destroy as much as he could of the farms and mills in the Shenandoah region to deny it as a place of operation for future Confederate forces. It was an excellent example of contingency, with both obtaining a political victory for Lincoln and achieving a strategic goal at the same time.³⁵

The Shenandoah Valley campaign unquestionably affected the election of 1864. According to Sheridan's memoirs "the authorities at Washington having impressed upon me that the defeat of my army might be followed by the overthrow of the party in power, which event, it was believed, would at least retard the progress of the war, if, indeed, it did not lead to the complete abandonment of all coercive measures."³⁶ Sheridan's victory at Cedar Creek was said to have averted a "national disaster" due to the upcoming nature of the elections.³⁷ General Grant himself noted that "I had reason to believe that the administration was a little afraid to have a decisive battle at that time, for fear it might go against us and have a bad effect on the November elections. The convention which had met and made its nomination of the Democratic candidate for the presidency had declared the war a failure." In this case, the North won that decisive victory.³⁸

For the election of 1864, it was between the "National Union" led by Lincoln, which was the Republican Party with some pro-War Democrats added to the mix. They were opposed by the Democratic Party, most notably the anti-war faction among the Democrats, who were derisively called "copperheads" by their detractors. The Democratic Party had nominated George McClellan. A proud and charismatic man, he had served as a successful railroad president before the war and was effectively the army's golden boy in the immediate prewar years. However, he was too timid as a soldier. After he was dismissed by Lincoln, McClellan would reappear as the Democratic candidate for victory, railing against Lincoln's continuation of the war. As things stood at the latter half of 1864, he had a good chance of victory. McClellan and Lincoln had not gotten along in their previous years. Lincoln saw McClellan as being too cautious and ineffectual. McClellan had nothing but disdain for Lincoln, referring to him in derogatory terms. While McClellan himself was pro-war and favored the Union, the Democratic Party as a whole pushed forth a platform for peace. It was likely that a Northern victory with McClellan in command, may have led to a more generous peace settlement for the Confederacy. Due to the great Union military victory at Atlanta in 1864, Lincoln was able to rally the popular support that he needed to carry the election successfully. Lincoln won over seventy percent of the electoral vote. This is the contingency theory that had Lincoln not won that election due to the Northern military successes on the battlefield; then the Confederacy would have a peace settlement.³⁹

The summer of 1864 was a decisive moment in Civil War history. Military success on the battlefield led to political success at the home front. It helped to ensure the reelection of President Abraham Lincoln and the successful conclusion of the war. These events are centered on the theory of contingency, that the South had opportunities to win a psychological victory over the North. Contingency theory in the summer of 1864 hinged largely on two campaigns, the Battle for Atlanta and the Shenandoah Valley campaign. The fall of Atlanta was caused by the removal of General Joseph E. Johnston whose replacement John Bell Hood, destroyed his army in an unwise series of reckless assaults. Because of these two campaigns, the Northern victory in the following year was assured, and the South lost their will to fight.

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- ² McPherson, “American Victory, American Defeat,” 18.
- ³ Richard N. Current, “God and the Strongest Battalions,” in *Why the North Won the Civil War*, ed. David Herbert Donald (New York: Simon and Schuster, 2005), 22-38
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- ⁵ McPherson, “American Victory, American Defeat,” 18, 28
- ⁶ Boritt, *Why the Confederacy Lost*, 15; Gary Ecelbarger, *The Day Dixie Died* (New York: St. Martin’s Press, 2010), 222-225.
- ⁷ Reid Mitchell, “The Perseverance of the Soldiers,” in Boritt, *Why the Confederacy Lost*, 63.
- ⁸ Albert Castel, “Why the North Won and the South Lost,” *Civil War Times Illustrated* 39, no.2 (May 2000): 56-61.
- ⁹ James McPherson, *Battle Cry of Freedom* (New York: Oxford University Press, 1988), 854-856.
- ¹⁰ McPherson, *Battle Cry of Freedom*, 692, 713, 715, 718, 721, 743, 750, 754, 771, 858.
- ¹¹ McPherson, *Battle Cry of Freedom*, 718.
- ¹² McPherson, *Battle Cry of Freedom*, 858.
- ¹³ McPherson, *Battle Cry of Freedom*, 333, 334, 336, 337, 338, 545, 664, 665.
- ¹⁴ McPherson, *Battle Cry of Freedom*, 722, 726, 732, 734, 735, 756.
- ¹⁵ Ulysses S. Grant, *Memoirs and Selected Letters*, ed. Mary D. McFeeley and William S. McFeeley (New York: Literary Classics of the United States, 1990), 511.
- ¹⁶ McPherson, *Battle Cry of Freedom*, 758, 722.
- ¹⁷ McPherson, *Battle Cry of Freedom*, 473,474, 475, 476, 722, 743, 744, 748, 749.
- ¹⁸ Joseph E. Johnston, *Narrative of Military Operations Directed During the Late War Between the States*, ed. F. E. Vandiver (Bloomington: Indiana University Press, 1959), 356.
- ¹⁹ Grant, *Memoirs and Selected Letters*, 505.
- ²⁰ William T. Sherman, *Memoirs of General William T. Sherman* (1875; repr., New York: Da Capo Press, 1984), 2:75
- ²¹ McPherson, *Battle Cry of Freedom*, 748, 749.
- ²² McPherson, *Battle Cry of Freedom*, 365, 366.
- ²³ David M. Potter, “Jefferson Davis and the Political Factors in Confederate Defeat,” in Donald, *Why the North Won*, 106, 107, 108.
- ²⁴ McPherson, *Battle Cry of Freedom*, 753, 754, 755, 774, 812, 812.
- ²⁵ Sherman, *Memoirs*, 2:72, 75.
- ²⁶ McPherson, *Battle Cry of Freedom*, 774, 809.
- ²⁷ “The Effect of the News From Sherman,” *Harper’s Weekly*, September 17, 1864.
- ²⁸ Sherman, *Memoirs*, 2:109.
- ²⁹ Mary Boykin Chestnut, *A Diary from Dixie*, ed. Ben Ames Williams (1949; repr., Cambridge, MA: Harvard University Press, 1980), 436.
- ³⁰ Johnston, *Narrative of Military Operations*, 363.
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- ³² Potter, “Jefferson Davis,” 102-104, 107, 109.
- ³³ Grant, *Memoirs and Letters*, 614.
- ³⁴ Philip H. Sheridan, *Personal Memoirs of P. H. Sheridan* (1888; repr., New York: Da Capo Press, 1992), 265, 266.
- ³⁵ McPherson, *Battle Cry of Freedom*, 758, 777, 778, 779, 790.
- ³⁶ Sheridan, *Personal Memoirs*, 2:273.
- ³⁷ “Phil Sheridan Riding to Victory,” *Harper’s Weekly*, November 5, 1864.
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- ³⁹ McPherson, *Battle Cry of Freedom*, 716, 771, 772, 804, 805, 858.

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SOUTHERN SLAVERY AND ANTEBELLUM LAW: MODIFICATIONS SUITED TO THE STATE AND MASTER CLASS

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During the Antebellum period, the United States' slave law began changing in both the North and the South. On a state-by-state basis, laws were made, reformed, or removed to fit the time. Some states began amending laws in ways that appeared to benefit the slave. What the slaves and the slave-owners both knew though, and as historian Eugene Genovese claimed, was that "slave laws existed as a moral guide and an instrument for emergency use, although the legal profession and especially Southern judges struggled to enforce them as a matter of positive law; wherever possible, the authority of the master class, considered as a perfectly proper system of complementary plantation law, remained in effect."¹ However, as the North began moving on a more progressive path to reform, the South remained rooted in the sort of reactionary legal culture expected of the paternalistic, agricultural, slaveholder.

In the slave South, the legal system that emerged during the Antebellum period was built on several different foundations. These foundations of slavery were also the foundations of Southern culture, economy and overall way of life. The South was built on an agricultural system designed to produce high-demand products for export outside of the southern United States. To stay within the confines of an agricultural economy for the South, also meant in their view, staying within the system of slavery. Since English common law did not recognize hereditary unfree labor, the master class saw that it needed laws that would protect their interests. In fact, the complex Southern legal system was an extensive construct that balanced several interests. These included: the control, obedience and submissiveness of slaves; economic interests or the investment amount in the slave and the desire in long-run profits; the interest in continuing the plantation-style system of the South; and the master class' control over working class overseers, the poor, and other whites.² It was these components that slave law of the Antebellum period attempted to meet. With the lack of a unified government particular to the South as a whole, it was up to each individual state to establish and enforce this legal structure in the Southern slavery-state system.

The South experienced several noticeable changes before and throughout the Antebellum period that instilled a new sense of anxiety in the master class. Those who could afford large numbers of slaves found it more and more difficult to find slaves at prices they had paid in the past, due to the 1807 ban on the Atlantic Slave Trade. In Georgia for example, the average price of a "prime field hand" rose from \$450 dollars in 1800 to \$1,650 in 1859, even as the average New York price of upland cotton dropped by almost twenty cents.³ As the cost of owning slaves increased, so did the importance of the slave himself.

Despite the rising price of owning a slave, slave sales continued to skyrocket in the years just after the War of 1812. Around that time, the master class began to worry about the increasing percentage of the enslaved population. In fact by 1860, four states had slaves accounting for more

than one-third of their total population. In South Carolina, the number was as high as sixty percent.⁴ This essence of this type of economy contributed to a "social and economic class structure" that was based largely on wealth valued through the amount of slaves rather than amount of specie.⁵ The master class feared the increasing number of slaves, believed it to be a precursor to rebellion, and on occasion passed laws to limit the number of African-Americans.⁶ The master class began moving toward a new phase of plantation-style life with a more limited number of African-Americans, which historian Andrew Fede describes as the "mature plantation period."⁷

Doing so meant limiting a master's right to property, which was not something that the South was known for doing in order to maintain their socioeconomic system and the balance of interests in the Southern states. Pro-slavery advocates attempted to focus their property rights argument down to two basic forms of property, realty and personalty.⁸ The South believed that slavery fell under the latter of these two categories, the criteria being that a slave was chattel, or moveable property.

However, it was also argued in the South that, due to the expensive nature of purchasing and owning a slave, it was a more valuable type of property than land or tools. In the well-known *A Treatise on Political Economy*, Jean-Baptiste Say argued that "a nation, awake to its true interest, is careful...to husband its pecuniary bounty, where it is prodigal of distinction and authority."⁹ In this case, the idea of the paternalistic father-figure remained prominent in the South for reasons of both social and economic stability. The South wished to maintain its social order, while at the same time ensuring its economic success with the slaves responsible for its "pecuniary bounty."

According to Genovese, the Antebellum South was made up of a "complementary system of complementary plantation law."¹⁰ This essentially meant that all authority on the plantation resided in the master, which complimented both public law and police laws. However, by the dawn of the Antebellum era, public law also implemented limits on slave abuse and violence on the part of the master. In essence, this system was accepted as common law, but only up to a point. The Southern analysis of their own system was that there was no contradiction between owning an unpaid worker while at the same time, participating in a greater capitalist, trans-Atlantic marketplace.¹¹ Political economists in the South combined the institution of slavery with their own analysis of the Southern master class to explain how they believed that planters in the Southern states were no different than capitalists in the North, on the grounds that they invested their resources into methods of production and attempted to maximize profits.¹² They then used this to argue for a new industrial future for slavery and at the same time the maintenance of their current legal and socioeconomic status.

In states like South Carolina, for example, industrial interests made some headway but only secondary to the maintenance of control over the plantation system. However, if the South was able to maintain its economy with a low, stable amount of slaves, it might be possible to develop a system that functioned with fewer numbers of slaves to the point where the cost of rearing slaves was higher than the market price, in which case the opportunity costs associated with slavery would be too high and the system could collapse economically.¹³

This all falls under Genovese's theory of a complimentary legal system and the premise of free trade, which comes with economic consequences in and of itself. Georgia planter W.W. Hazard, for instance, told his newly acquired slaves how the state was legally required to take care of them at any age, and that he faced limits on what he could do in regards to harming them. Instead of using the law to assure his slaves of their own safety, he was really using it to try and convince them they were well-off. In reality, of course, ensuring the enforcement of state laws that actually countered the interests of the master class became an increasingly arduous task.¹⁴

Kentucky planter Henry Clay questioned even these weak laws imposed on masters and the internal slave trade. Clay, normally an advocate of federal power, insisted that regulation or abolition was not a legitimate method of control but rather a systematic "annihilation" of the institutions of free trade and slavery.¹⁵ Clay believed that the federal courts did not have the constitutional right to regulate interstate trade regardless of what was being traded. The goal for the South was not just to make a profit but to maximize it. This is why the South argued so vehemently against the northern efforts at emancipation.

Opponents of Clay, like anti-slavery evangelicals in the North, argued that God's vision for the world could not possibly include a system like slavery. In response, Southern evangelicals like Baptist Richard Fuller disputed this and welcomed slave-imposed "reforms," saying that "religion allows no compromises with evil" (the evil in his view being the idea of straying from the institution of slavery which the North had done decades earlier).¹⁶ For the Southern argument, slavery was an ingrained concept, cemented into the legal and socioeconomic makeup of the plantation-style system of the South. However, these legal and economic arguments were by no means the only types of justifications that the South used.

Religious idealism spread into the social aspect of the South as well, and ideas like the legal protection of human life existed within the social hierarchy. In *Fields v. State* (Tennessee, 1829), the clearly paternalistic attitude in a religious context had a bearing on the court's decision. The judge's decision read: "Christian nations do not consider themselves at liberty to sport away the lives of captives."¹⁷ The judge ruled that the children of the nation were the slaves and the parents were the slaveholders. This paternalistic attitude was also rooted in Jeffersonian idealism. Jefferson viewed slavery as a necessary evil despite owning more than one hundred slaves himself. The idea of being the benevolent father-figure existed in the South long after Jefferson's death, despite the fact that no slaves saw it this way.

Religious paternalism was an Antebellum concept, but since 1618, the term "slave" had an understood rather than a defined meaning in any law books.¹⁸ Historian Thomas Morris describes slavery using five elements that always existed in the Southern system of slavery: claim of ownership, claim of alienability, claim of heritability, claim to product of labor, and a general rightlessness.¹⁹ The early lack of a legal definition, however, made the job of some of the earlier courts more difficult. In New Orleans, Louisiana, the old French colonial code, referred to as the Black Code, existed to establish procedural safeguards and constraints. However, it had nothing in it requiring jurors to seek the truth or justice in a case. Rather, it required the jury to be made

up of free white males who owned slaves of their own.²⁰ This Black Code was used in slave cases and even in some cases involving free blacks. Courts often tried to work together from state to state, but in the end, the law really depended on what an individual judge believed best for his state. Historian Christine Macdonald defines the right of jurisdiction as “the authority of a court to hear a dispute, to decide the outcome, and to articulate the reasons for its decision.”²¹

In the 1802 case of *Gobu v. Gobu*, Judge John Lewis Tayler held that in North Carolina, being black was enough for the court to assume concurrent slave status.²² Not only could the judge summon an African-American to Court, but the court could then rule them a slave, especially in the absence of any proof to the contrary. Race and status were at this point legally intertwined regardless of whether or not the individual held slave status by law. It simply became another way that the master class could legally assert its authority.

Many Southern states started their own laws by building upon the pre-existing legal traditions of earlier cultures. Specifically, they looked to laws of England, which had at one point controlled the original colonies and which took some of its own laws from the ancient Roman tradition. One example of English law that extended into the Southern system was what was known as Hue-and-Cry Law. Hue-and-Cry was an old English act requiring bystanders to yell out when they saw a runaway slave escaping and to in turn, pursue this slave until captured. The Southern Antebellum equivalent of this was the practice of slave patrols. In many cases, they were even more harsh or strict than the actual police force assigned to a specific town or city.²³

Another of the South’s laws came from the English document the Magna Carta. This was called the “law of the land clause,” which limited the government’s power to regulate state constitutions.²⁴ This way, the Federal Government had no authority to block the South’s control over their slaves. Two other laws focused on the rights of a slave in regards to emancipation. That is, what would the status of a freed slave’s family be in the eyes of the court? Unless the entire family was purchased or given freedom by manumission, they by law would remain slaves. However, there were exceptions. For instance, *partus sequitur ventrem* granted the unborn child of a freed pregnant slave its freedom as well. This was seen as *in futuro* manumission or, manumission by future event.²⁵ This, however, all changed if a slave that was due to be freed in the future was found guilty of a crime. The final example of law extending from the Old English tradition was the idea of *caveat emptor*. *Caveat emptor* means “let the buyer beware.” In essence, it applied to slaves who had been sold: the buyer was getting whatever they appeared to be buying. There were even several newspapers that warned buyers of “stock” that looked good because of the legal condition *caveat emptor*.²⁶ *Caveat emptor* would be upheld a number of times and applied to *physical* problems with a slave but not *psychological* ones. If a buyer could prove that the slave was so mentally unfit that he or she could not work, and that this condition existed before the sale, then the original master could be held liable.²⁷

A commonplace practice among slave owners was the hiring out of a slave to another master for a predetermined amount of time. Masters “hired out or sold slaves when work was slow at home; they sent their slaves to market or distant plantations...and...if one party failed to live up

to his part of the deal and the other party suffered a loss, judges typically awarded damages for breach of contract.”²⁸ These contracts were a way to hold both parties liable. However, problems within these deals emerged on a regular basis, for quite obvious reasons. As Fede points out, “The slave owner’s interest in preserving the value of a hired slave clashed with the hirer’s interest in getting as much work out of the slave as possible during the period of hire.”²⁹

Finally, enforcement of these contracts was also difficult due to the fact that the South had weak central power at the state level across the board. This was done to protect against infraction of the *contra bonos mores* principle (literally, against the good way of life) but it also led to a difficulty in Southern contract enforcement.³⁰ The lack of a strong central authority usually meant the growth of smaller regional ones with less uniform laws that would vary from county to county and state to state.

In the judicial case of *Spencer v. Pilcher* (1837, Virginia), the judge declared that the “bailee” or hirer of a slave did not have the official rights of the master during the period of hire for that slave.³¹ If the slave was killed or died by some other mistreatment from the hirer, then the hirer himself was responsible. However, if the slave ran away and could not complete the contract, it was grounds for the hirer to claim bad behavior on the part of the slave in which case it was the fault of the master.³²

In almost any case across the South, it was an almost understood principle that the power of the master had to prevail. This was because of a landmark decision in *State v. Mann* (1829, North Carolina) by Judge Thomas Ruffin. Ruffin was a well-known supporter of slavery, so this decision was really no surprise. He declared that the slave must at all times remain submissive to ensure the power, authority, and rights of the master above all else.³³ This decision would carry across state lines of the South. Yet despite this decision, judges did not rule that all whites in the South were on equal class footing. The courts were usually more inclined to place economic burden of responsibility on the party more likely to be able to afford it. However, if through connections and support, an upper class member of society was involved, they could often change the opinion of the jury and in turn shift the burden onto the lower class party.³⁴

It was common knowledge and even law in the nineteenth century South, that a master was allowed to harm and even kill his slave for various legally “qualified” reasons. However, there also were laws in place designed to protect a slave from abuse or mistreatment without due cause. These laws were, of course extremely hard to enforce, despite the fact that they were in place not for the slave’s benefit but rather for the master’s, so that they would not suffer an economic loss from an injured or dead worker.³⁵ This once again followed the legal principle in the South of *contra bonos mores*. Many such laws were in place because of the fears of the slave-owning class. There were documented cases in which slaves who experienced abuse retaliated by harming or even killing their master or another white involved in the abuse.

In a few cases, what was deemed as a “malicious” killing of a slave was not tolerated. In *Witsell v. Earnest* (1818, South Carolina³⁶), the judge recognized the conflict between “the requirement that slaves be controlled and the need to protect slaves from whites who the court

called 'violent' and 'unthinking' people of the community."³⁷ Eventually in 1821, the death penalty was implemented for such maliciousness. If said maliciousness could be proved, it meant that in South Carolina at least, that simple monetary compensation for a killed slave by another white (not his or her master) was no longer considered proper or severe enough punishment. That does not however mean that it still did not occur or that the law was not often overlooked in such cases.

In contrast, the law recognized that a runaway slave was a matter of private not public offense.³⁸ According to *Bird v. Wilkinson* (1833, Virginia), if a master so chose, they could make the matter public. Many cases involving runaway slaves also involved the process of slave transport by someone other than the original master. If it could be proven that it was the fault of this other white or that they had allowed it intentionally for the purpose of emancipation, they could indeed be held liable.³⁹

As historian John Hope Franklin wrote, "physical handicap did not dissuade slaves from attempting to escape."⁴⁰ For the slave, the consequences of running away and being captured were high. It often made no difference whether the runaway in question was male or female, because neither was spared the lash, and so the South would turn to the aforementioned slave patrols, or a reward offered to the general public to increase the number of ordinary citizens, slave-owning and otherwise, who would actively search out runaways with the expressed goal of returning them to the master.⁴¹ Escape was one of the instances where a Southern court might find murdering a slave not only legally justified but warranted as well.

In cases where the slave was convicted of a crime, their testimony, or rather the validity of such a testimony, varied depending on state and time. Legally, the rights of a slave were all but nonexistent under the master, however it was recognized in later Antebellum years that a slave had human intelligence even if he or she was still classified as chattel.⁴² Therefore in some less common cases toward the end of the Antebellum period, the courts were willing to look at the testimony of a slave. In 1856, a New Orleans court recognized the testimony of two slaves against the word of another slave.⁴³ It is important to note again here the later date of this case. It was also the testimony of a slave against another slave. In cases where a slave was involved in a crime against another slave, the courts were more willing to hear and consider the testimony of slaves.

Slaves' names and directions for what to do with those slaves were abundant in Southern property deeds and especially in final wills. In some cases, masters would grant manumission to a slave upon their death in a will. Walter Johnson notes that manumission was defined as "the right to grant slaves their freedom...posed between the privileges of property and the demands of public policy."⁴⁴ Manumission would be granted in almost every case to ensure the will was carried out properly. If the state went against the direction of the will, they would in turn be going against the will and authority of the master and usurping their own laws and the core principle of Southern slavery. In some cases, a master would promise their slave manumission in the will but could not put that into a contract due to the fact that slaves could not legally be allowed to enter into a contract. Rather, the master represented these obligations and actions in some sort of

agreement or transaction. This action was upheld in the case of *Stevenson v. Singleton* (1829, Virginia), continuing the barring of slaves from contracted arrangements.⁴⁵ There were cases, though, where slaves could be sold off despite manumission in a will, if the master owed anyone money from outstanding debts.

In the case of *Morris v Owen* (1801, Virginia), a number of slaves were left to a widow by their original master. She was granted the slaves for the remainder of her life and was then to do as she wished once she wrote her own will. Her children, however, sued the widow for possession after the original master died. The court denied the children ownership. This was because the state of Virginia intended to keep the will and authority of the master and his dominion over his slaves intact, despite the protests of the surviving heirs of the master.⁴⁶

The case of *Kendall v. Kendall* (1816, Virginia) followed with a similar result of *Morris v. Owen*, but took a different route to get there. In this case, a will granted freedom for slaves upon the death of a master, but the master on his deathbed revoked this part of the will that granted manumission and instead wished not to free his slaves. In this case the courts still recognized the intent and wishes of the master, but revoked the manumission present in the will itself. The Virginia court saw the wishes of the master as more relevant than the will because he was altering the will before death.⁴⁷

When looking at legal cases state by state, a general trend emerges. Nearly every state saw an increasing number of cases involving slaves during the Antebellum period. This increase was due in part to some of the social tensions evident between the North and South and part to the court decisions themselves that led to further tension between different members of society. Not only did the codes and laws of the South permeate the years of the Antebellum era of American history, but the legacy of those Southern judges critically involved in the formation, upkeep, and alterations of these laws did so as well. Wahl observes that besides upholding the doctrine of the dominion and authority of the master class, “by devoting considerable effort to preserving property rights in slaves, southern judges in fact left a legacy of legal doctrines that eventually served the interests” of the South as a whole in the era leading up to the Civil War.⁴⁸ During the late Antebellum period, the Fugitive Slave Act of 1850 was signed into law by President Millard Fillmore. This was followed ten years later by the election of Abraham Lincoln to the Presidency and the secession of South Carolina from the United States.⁴⁹ These acts were a result of the culmination of the tensions between North and South to date.

Ultimately, one of the greatest tensions between North and South existed in the Southern legal structure. “The changing law of white slave abusers represented the shifting accommodation of the interests of the white rulers,” writes Historian Andrew Fede, “...nothing more.” Regardless of what law was passed, no calculations were ever made in regards to slave rights or benefits by any such Southern lawmaker. Rather, any unintended effects that benefitted the slave usually had evident motives, and were simply a by-product of the South attempting to strengthen its hand in the ever-growing conflict with the North.⁵⁰ The legal structure of the Southern states leading up to the Civil War was designed to defend the social, economic, and political position of the South.

Because of this legal system, the socially ingrained ideals that one would consider to be an identifying factor of a Southern citizen remained intact throughout the Antebellum period. Indeed, nearly every Southern slaveowner in the years leading up to and during the Civil War would have advocated for slavery using a variety of justifications from paternalism and the Jeffersonian idealism associated with the early Antebellum period, all the way to slavery’s potential impact to a possible future of industrialization, increased production, and on the Southern socioeconomic system.

¹ Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1974), 47.

² Andrew Fede, “Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States,” *The American Journal of Legal History* 29, no. 2 (1985): 96.

³ Fede, “Legitimized Violent Slave Abuse,” 108.

⁴ Fede, “Legitimized Violent Slave Abuse,” 103.

⁵ Fede, “Legitimized Violent Slave Abuse,” 101.

⁶ This was especially the case in the state of South Carolina by the 1790s. For more information on the subject see Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740–1790* (Ithaca: Cornell University Press, 1998).

⁷ Fede, “Legitimized Violent Slave Abuse,” 104.

⁸ Thomas D. Morris, *Southern Slavery and the Law: 1619-1860* (Chapel Hill: The University of North Carolina Press, 1996), 62-63.

⁹ Jean-Baptiste Say, *A Treatise on Political Economy or the Production, Distribution, and Consumption of Wealth* (Philadelphia: Lippincott, Grambo & Co., 1851).

¹⁰ Morris, *Southern Slavery and the Law*, 3.

¹¹ Jay R. Carlander and W. Elliot Brownlee, “Antebellum Southern Political Economists and the Problem of Slavery,” *American Nineteenth Century History* 7, no. 3 (2006): 391.

¹² Carlander and Brownlee, “Antebellum Southern Political Economists,” 395.

¹³ Carlander and Brownlee, “Antebellum Southern Political Economists,” 400.

¹⁴ Genovese, *Roll, Jordan, Roll*, 31-32.

¹⁵ Maurice G. Baxter, *Henry Clay the Lawyer* (Kentucky: University Press of Kentucky, 2000), 96.

¹⁶ John Patrick Daly, *When Slavery was Called Freedom* (Kentucky: University Press of Kentucky, 2002), 75.

¹⁷ Jenny Bourne Wahl, *The Bondsman’s Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 148.

¹⁸ Helen Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro: Cases from the Courts of England, Virginia, West Virginia, West Virginia, and Kentucky* (Washington D.C.: The Carnegie Institution of Washington, 1926), 54.

¹⁹ Morris, *Southern Slavery and the Law*, 426.

²⁰ Christopher Waldrep and Donald G. Nieman, *Local Matters: Race, Crime, and Justice in the Nineteenth-Century South* (Athens: The University of Georgia Press, 2011), 57.

²¹ Christine Macdonald, “Judging Jurisdictions: Geography and Race in Slave Law and Literature of the 1830s,” *American Literature* 71, no. 4 (1999): 628.

²² Morris, *Southern Slavery and the Law*, 25.

²³ Hadden, *Slave Patrols*, 71-72.

²⁴ Baxter, “Henry Clay the Lawyer,” 98.

²⁵ Morris, *Southern Slavery and the Law*, 48, 371.

²⁶ *Connecticut Mirror*, December 5, 1825.

²⁷ Morris, *Southern Slavery and the Law*, 108-109.

²⁸ Wahl, *Bondsman’s Burden*, 4.

²⁹ Fede, “Legitimized Violent Slave Abuse,” 107.

³⁰ Fede, “Legitimized Violent Slave Abuse,” 136.

³¹ Catterall, *Judicial Cases*, 186-187.

³² Catterall, *Judicial Cases*, 113.

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- ³³ Mark Tushnet, "Review: Slave Law as Contrast and Hierarchy," *Reviews in American History* 24, no. 4 (1996): 590.
- ³⁴ Fede, "Legitimized Violent Slave Abuse," 112.
- ³⁵ Fede, "Legitimized Violent Slave Abuse," 124.
- ³⁶ *Tables of Cases of Alabama [-Wyoming] Reports* (St. Paul: West Publishing Company, 1901), 56.
- ³⁷ Fede, "Legitimized Violent Slave Abuse," 113.
- ³⁸ Catterall, *Judicial Cases*, 403.
- ³⁹ Catterall, *Judicial Cases*, 349.
- ⁴⁰ John Hope Franklin and Loren Schweninger, *Runaway Slaves: Rebels on the Plantation* (New York: Oxford University Press, 1999), 39.
- ⁴¹ Franklin and Schweninger, *Runaway Slaves*, 209.
- ⁴² Wahl, *Bondman's Burden*, 79.
- ⁴³ Waldrep and Nieman, *Local Matters*, 75.
- ⁴⁴ Walter Johnson, "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law & Social Inquiry* 22, no. 2 (1997): 417.
- ⁴⁵ Catterall, *Judicial Cases*, 158.
- ⁴⁶ Catterall, *Judicial Cases*, 107.
- ⁴⁷ Catterall, *Judicial Cases*, 127.
- ⁴⁸ Wahl, *Bondman's Burden*, 178.
- ⁴⁹ David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006), xv.
- ⁵⁰ Fede, "Legitimized Violent Slave Abuse," 149-150.

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CHURCH, STATE, AND THE LEMON TEST: THE SHORTCOMINGS OF THE SUPREME COURT WHEN DECIDING ESTABLISHMENT CLAUSE CASES

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The Establishment Clause in the First Amendment of the United States Constitution has been the subject of contentious debate. Advocates for a strict separation of church and state believe that it should be broadly interpreted, while critics think that it should be interpreted narrowly. The U.S. Supreme Court invented the Lemon test in its decision in *Lemon vs. Kurtzman* (1971) in order to provide clear guidance for establishment clause cases. The Lemon test set the standard for determining government entanglement with religion for over a decade after its creation. However, beginning in the 1980s, arguments that the test provided an overly broad interpretation of the Establishment Clause began to impact its use. The Lemon test's absence has led to Supreme Court decisions that have slowly eroded the wall of separation between church and state. Justices have tried to create new tests, but they have been unable to replicate the success of Lemon.

Justices have increasingly relied on subjective reasoning that has contradicted past precedent and further obscured the boundary between church and state. Their conflicting interpretations of the Establishment Clause have created questions about their abilities as decision makers. Justices' personal biases and ideological differences can create errors in judgment thus having the potential to influence their decisions, making tests, like Lemon, essential for interpreting the Constitution. The Lemon test provides a clear and concise method that is essential for ensuring that the government and the Supreme Court adhere to a strict set of rules for interpretation of the Establishment Clause. Analysis of the Court's decision making in *Lemon v. Kurtzman* (1971), *Marsh v. Chambers* (1983) and *Lee v. Weisman* (1992) highlights the strength of the Lemon test when it is used and reveals the shortcomings of Establishment Clause interpretation without it.

The Supreme Court's decision in *Lemon v. Kurtzman* (1971) established a comprehensive approach for the Justices to use in Establishment Clause cases. The Court ruled 8-1 that Pennsylvania and Rhode Island violated the First Amendment by providing public funds to private religious schools.¹ The Court, led by Chief Justice Burger, devised a three-prong approach to determine if the states violated the Clause. The first prong of the test held that a statute must have a secular legislative purpose; the second, "the principle or primary effect must be one that neither advances nor inhibits religion;" and third, "the statute must not foster an excessive government entanglement with religion."² Burger relied heavily on the third prong of the test when delivering the majority opinion. In his analysis he found that since the teachers were employed by religious organizations and were a part of a system that placed religious ideas in the minds of children, a teacher would find it difficult to navigate the line between secular and religious intent.³ In order to prevent an excessive entanglement of church and state, both state governments would be forced to oversee the schools to make sure teachers did not incorporate religious ideas into the curriculum.

The lone dissenting opinion of Justice Byron R. White was influenced by his personal beliefs and highlights the errors in judgment that the Lemon test was created to prevent. White found fault in the Court's decision to strike down the Rhode Island statute because he believed no evidence existed that teachers engaged in non-secular activities with their students.⁴ His reasoning is misguided because over two-thirds of the teachers were Catholic nuns and religious instruction was permitted.⁵ Even if secular teachings were a part of the curriculum, the schools were still sponsored by the Roman Catholic Church, which promotes learning through religious doctrine. Justice White continued his opinion by stating that he "cannot hold that the First Amendment forbids an agreement between the school and the State that state funds would be used only to teach secular subjects."⁶ White's subjective interpretation came into complete conflict with the Establishment Clause. The Pennsylvania and Rhode Island statutes violated the First Amendment because the laws respected a religious establishment. White's flawed opinion emphasizes how incorporating a structured test, like Lemon, is essential for preventing a Justice's personal bias from influencing his or her interpretation of the Establishment Clause.

Despite the Lemon test's effectiveness at countering the partiality of some Supreme Court Justices, critics believe that the test is flawed. Law author William B. Petersen argues that one of the biggest pitfalls of the test is "its assumption that a religious purpose, by itself, renders a statute unconstitutional."⁷ He proposes that if a law is passed that has a religious purpose, it should not automatically be deemed unconstitutional because religious purpose does not necessarily lead to religious effect. Peterson exemplifies his point by suggesting that laws against murder and theft should be unconstitutional because those ideas are found in religious holy books.⁸ Peterson's reasoning is flawed since laws against murder and theft have been included in secular governments prior to the creation of any popular holy texts. Religious organizations certainly do not hold a monopoly on human morality.

Peterson's argument misses the importance of the Lemon test's religious purpose prong by overlooking the implications of a statute that supports the purpose of one religion over another. If a law is passed with the purpose of favoring one religion, it infringes on the First Amendment rights of those that practice all others. The design of the Lemon test not only prevents entanglement with church and state, it stops religious organizations from influencing what should be a secular government open to all religions. Contrary to the belief of some critics, the Lemon test does not restrict religious freedom. The test defends the free exercise of religion by ensuring a single religious faith is not valued over others. The test is extremely important for finding distinctions between purpose and effect, especially when the religious rights of all faiths are on the playing field. Failure to do so can result in Supreme Court decisions that are decided based on biased opinions, rather than on a structured test that arrives at an objective conclusion.

In *Marsh v. Chambers* (1983) the Court did not use the Lemon test, and their decision emphasizes the problems that arise from not using it in establishment clause cases. The question laid out before the court asked if the State of Nebraska violated the Establishment Clause by paying a chaplain to lead a prayer before a legislative session. In a 6-3 decision the Court ruled that it did

not. In his opinion, Chief Justice Burger wrote that “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”⁹ Burger stresses that because chaplains opening legislative sessions with prayer has been an historically integral part of the United States, it does not violate the Establishment Clause. He concludes that “this unique history led us to accept the interpretation of the First Amendment draftsman who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”¹⁰ Burger’s conclusion was not based on the Constitution and instead relied on his subjective interpretation of the country’s history.

Both Justice William J. Brennan and Justice Thurgood Marshall joined together in dissent against the Court’s opinion and found that the ruling was in violation of the Establishment Clause. In his dissent, Brennan declared that “every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years,” which the Court did not do.¹¹ Chief Justice Burger and the other concurring Justices completely ignored using the Lemon Test when forming their decisions and instead relied on historical context. Since Congressional Chaplaincies have been a part of the legislative process for much of the history of the United States, they believed that they did not violate the First Amendment.

Analysis of relevant past Supreme Court decisions is important because it provides helpful context that Justices can use to formulate their own opinions. Completely ignoring the Lemon test led to the possibility of setting a precedent where past decisions no longer matter. In regard to the practice of legislatures hiring chaplains, if the Court decided to make use of the Lemon Test, Justice Brennan asserted that “it would have to strike it down as a clear violation of the Establishment Clause.”¹² Brennan’s conclusion emphasizes the need for the Court to use a structured test like Lemon when forming their opinions.

The Court’s decision in *Marsh v. Chambers* relied on questionable reasoning that created new precedent against the Establishment Clause. Legal scholar Jeremy G. Mallory notes that the chaplain appointed for prayer in *Chambers* was from one religious denomination, payment for the chaplain came from public funds and no analysis of what the prayers said was conducted.¹³ If the Lemon test was used, all three of these points would have shown a clear violation of the Establishment Clause. Chief Justice Burger’s use of historical context to justify legislative prayer contains serious faults. The fact that chaplains have led prayers since the founding of the United States does not mean it is protected by the Constitution. Using the same reasoning, one could defend the constitutionality of slavery by arguing that it was a historically long-standing tradition since the establishment of the country. Even though slaves were an American tradition it does not make their use moral or constitutional. Suggesting that tradition holds more importance than the Constitutional misses the whole reason for the document in the first place.

The Court’s decision in *Chambers* incorrectly held legislative chaplaincies as an exception to the First Amendment. Chaplains engaging with politicians during legislative sessions clearly demonstrates an interaction between church and state. Mallory asserted that a distinction should be made between situated and rotating chaplains. He wrote that the situated chaplain in *Marsh* was

reappointed for good job performance, leading the Supreme Court to believe that, "there was no impermissible motive involved in his sixteen year tenure."¹⁴ In contrast, a rotating chaplain had less of an established relationship with the legislative body and had "less incentive to deal with the pluralistic nature of [the] congregation."¹⁵ The degree to which a situated or rotating chaplain had the potential to violate the Establishment Clause is insignificant when the very act of incorporating a spokesperson for any religion into the legislative process violates the Constitution. A chaplain that associates with the legislative process, even indirectly, threatens secular government. Arguing that legislators who reappoint a chaplain due to his secular tendencies should only raise questions, not answers.

In *Lee v. Weisman* (1992) the Supreme Court left out the Lemon test again in favor of a Coercion test. The Court considered whether conducting prayer during a high school graduation is constitutional. In a 5-4 decision the Justices ruled that religious exercise at the graduation service did in fact violate the Establishment Clause. The principal of the school provided a copy of guidelines that the rabbi had to follow in an effort to make his prayers nonsectarian.¹⁶ Justice Kennedy argued that because the principal was an employee of the state, he violated the Establishment Clause by controlling the religious content of the prayer, even if it was in an attempt to be secular. Kennedy wrote that "the undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction."¹⁷ Kennedy feared that students would be coerced to participate in a religious practice even if went against their own beliefs.

Chief Justice Rehnquist along with Justices Scalia, White and Thomas dissented against the Court's opinion and its argument of coercive intent. Scalia believed that the Court's opinion was flawed because it relied too heavily on the idea of coercion violating the Establishment Clause.¹⁸ In his dissent he wrote that "The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent."¹⁹ The use of coercion relies on slippery slope reasoning because it is largely based on assumption and not on hard evidence.

Legal scholar Suzanna Sherry correctly points out the issues that the Court ran into by ignoring the Lemon test. She writes that, "the majority opinion relied entirely on the coercive aspect of the setting; he [Justice Kennedy] cobbled together a majority by studiously ignoring *Lemon*."²⁰ Unlike the Lemon test, a test for coercion is based on a Justice's subjective interpretation that can be influenced by personal bias. Sherry argues that adopting the coercion test narrowed interpretation of the Establishment Clause while simultaneously creating an environment where "equal accommodation of religion nor equal indifference to religion is mandated. Instead, an unrestricted majority is authorized to indulge in discriminatory preferences."²¹ By substituting a coercion test for most of the Lemon test, the Court established further precedent that impaired future Establishment Clause interpretation.

While Justice Kennedy's majority opinion was flawed, it still contained some principles of the Lemon test within it. Kennedy determined that the principal, as an employee of the state, violated the Establishment Clause by actively working to incorporate prayer into graduation. The State was in fact entangled with religion and violated the entanglement prong of the Lemon test. Kennedy wrote that, "the principal chose the religious participant, here a rabbi, and that choice is also attributable to the State."²² Kennedy had enough evidence to show an entanglement with church and state without needing to use the coercion argument.

The cases *Marsh v. Chambers* (1983) and *Lee v. Weisman* (1992) show that the Supreme Court's failure to adhere to a consistent test for determining Establishment Clause cases has further obscured interpretation of the First Amendment. In *Chambers* the Court used historical context to justify the employment of chaplains within state and national legislatures, thereby disregarding the Lemon test that would have surely found paid chaplains in violation of the Establishment Clause. In *Weisman* the Court abandoned the test again by attempting to introduce a coercive test to determine if prayer was constitutional. The coercive test was not an improvement over Lemon and instead raised more questions than answers. Even though the test could have provided clear utility in these cases, some Justices believed that the test was not good enough.²³ Even Chief Justice Burger, the creator of the test has said that "*Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue."²⁴ Others think that Supreme Court decisions involving the Clause have become unpredictable even with the structure the test provides. Despite the criticism against Lemon, not using it completely has shown why a structured test is needed.

The conflicting decisions in *Marsh* and *Lee* demonstrates the inconsistencies that arise when the Court rules on prayer cases without implementing Lemon. Legal Scholar Bruce P. Merenstein emphasizes that these two rulings created an exception for prayer in other contexts, such as at school board meetings. In *Marsh* the Supreme Court used historical context to determine that legislative prayer was constitutional and found school board prayer the same. Merenstein believes this ruling to be flawed and suggests that a decision based on historical constitutional analysis, fails "to acknowledge that social, cultural and material conditions change dramatically over decades, let alone over centuries."²⁵ In *Lee*, the Supreme Court employed the coercion test in its decision and used the same principles that would find school board prayer unconstitutional. Since these decisions still stand, the constitutionality of school board prayer is in limbo. Merenstein argues that "were the Court to come to the conclusion that prayer at a public-school board meeting is unconstitutional, it would be adhering to a half-century of consistent jurisprudence in the area of religion and public schools."²⁶ If the Lemon test had been used in both cases, school board prayer would certainly have been found unconstitutional.

Studies looking at the history of the Supreme Court's decisions in Establishment Clause cases, have shown that they have ruled consistently when using the Lemon test. Political scholar Joseph A. Ignagni gathered statistical data from the era of the Burger Court that displays their accuracy and consistency when using the Lemon test. Ignagni's findings showed that out of the 92 decisions the Burger Court decided, 63 were found to be in violation of the Establishment Clause

while 29 were not.²⁷ Ignagni writes that, "These cases are not as conflicting, confused, or unpredictable as some legal scholars have claimed . . . most of the decisions can be explained and predicted in a consistent matter."²⁸ His works shows the importance of the Lemon tests as a tool for guiding the Justices to make accurate and correct decisions.

A similar study conducted by Herbert M. Kritzer and Mark J. Richards analyzed cases involving Establishment Clause jurisprudence in an attempt to see how influential the Lemon test has been on the Court's opinion deciding those cases. Kritzer and Richards tested their hypothesis by creating tables of data that reflect the ruling of Justices when deciding Establishment Clause cases ranging from *Everson v. Board of Education* (1947) to *Mitchell v Helms* (2000). Their findings show that the Lemon test has "served to provide the framework for the decisions in Establishment Clause cases decided for over the last 30 years."²⁹ The framework has stayed in place in part because Justices have tried and failed to create a method that improves on the precedent the Lemon test has already established. More importantly the data shows that the Court has ruled consistently on Establishment Clause cases when Lemon was in use, contradicting critics that say the test has created an unpredictable environment for decisions involving the Clause.

A fundamental aspect of the Lemon test is its ability to prevent Justices from incorporating their own political and ideological beliefs in decisions. As Ignagni rightly points out, a Justice is not prevented from "voting compatibly with his or her personal policy preferences."³⁰ They do not face the same scrutiny that elected government officials experience. They do not have to worry about being reelected to the Court and being accountable to voters. Therefore, Justices can make decisions that may not necessarily match what the greater society views as acceptable. A more liberal minded Court may over step its bounds and infringe on religious liberty while a more conservative minded court may vote in favor of upholding a decision that might entangle the state with religion. Legal Scholar David M. Beatty argues that "religious liberty is better protected and democracy more respected when judges move past the interpretive phase of the review process and take a close, hard look at the facts."³¹ They should put their own political and personal beliefs in the background when interpreting the constitutionality of a case. Failure to do so can result in decision that is not only wrong but also hinders the jurisprudence that will be needed to decide cases in the future. The Lemon test is critical for ensuring that Justices follow the Constitution and not their personal political leanings.

The Justices are human beings, which means that they have limitations that can impede the reliability of Supreme Court decisions. Psychologist and political scientist Herbert A. Simon conducted extensive research on the limits of human computing power and rationality. His findings showed that by taking into account the limitations of knowledge and power of human beings, one will find that they are incapable of "making objectively optimal decisions . . . but if they use methods of choice that are as effective as decision making and problem-solving permit, we may speak of procedural or bounded rationality."³² Simon suggests through his research that human decision making is limited to the amount of information one knows when forming a conclusion. When his theory is applied to the Justices it explains how and why they have come to decisions

that do not always work within the context of the constitution and society as a whole. Each Justice comes from a different background and life experience that influences his or her decision making. The absence of a test that balances subjective reasoning with objective truth can be detrimental to Court rulings. The Lemon test is a way to counter the limits of human rationality, by incorporating set principles that help the Court come to a correct decision.

The sheer volume of cases the Supreme Court takes can also hinder its opinions. Joseph A. Ignagni found that the case load of the Court has increased dramatically over the decades. In 1930, 1,039 cases were docketed for the Court to hear, growing from 5,144 in 1980, all the way to between 7,000 and 8,000 in 2016.³³ Out of the thousands of cases, the Court only hears oral argument for about 80 per term. Their massive workload illustrates the unrealistic expectations placed on the Justices. Due to the extensive case load that they preside over, their ability to remain impartial in decision making diminishes. It causes stress and can make Justices form conclusions that may not have been reached in a reasoned matter. Due to this immense burden, Ignagni believes that the “Justices must often rely upon a simple decision-making structure.”³⁴ When coupled with Simon’s theory on the limits of human rationality, Supreme Court decisions absent of a core set of determined principles can inhibit the accuracy of their decisions. Ignagni emphasizes that Justices, “do not have the time, resources, or intellectual capacity to make all of their decisions in a more comprehensive manner.”³⁵ A refined tests such as the Lemon test can help relieve the stress and burden placed on Justices during the decision-making process.

In addition to providing a solid foundation for deciding Establishment Clause cases, the Lemon test also assists Justices in forming more objective opinions that are less influenced by their own political leanings. The test was created by the Court of a need to make better decisions when deciding Establishment Clause cases. Despite its value in Establishment Clause cases, it has not escaped criticism or attempts to remove its use completely from the Court. Critics of the Lemon test have unsuccessfully reduced the importance of Lemon, yet Justices have decided to try and rule Establishment Clause cases without using it.

Lastly, the sheer volume of work the Justices are responsible for makes utilizing a test essential for providing correct opinions on cases. Data has shown that when the Lemon test is in use, the Supreme Court has ruled consistently concerning Establishment Clause cases. A test also helps to remove political opinions that can arise among Justices when deciding cases by declaring a clear set of principles that reflect the words of the Constitution. It also helps Justices make correct decisions despite the limits of the human brain. Justices are not computers that can make precise calculations without corruption, they are people that are influenced by forces in and outside of the Court room.

The precedent set by the Lemon test continues to indirectly influence the Supreme Court to this day. When in use, the test has the ability to correctly determine violations of the Clause without the need for other tests. It provides a clear and concise method for Justices to use without relying on political leanings or limitations of the Justices. The perceived short comings of decisions regarding the Clause do not lie with the Test but rather with the Justices. By abandoning a

structured way to rule on Establishment Clause cases, the Court risks undermining the principles set by the Founding Fathers and eroding the wall between church and state further.

¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

² Amy J Alexander, "When Life Gives You The Lemon Test: An Overview of The Lemon Test and its Application," *Phoenix Law Review* 64, no. 3 (2010): 3.

³ *Lemon*, 403 U.S. 602.

⁴ *Lemon*, 403 U.S. 602.

⁵ *Lemon*, 403 U.S. 602.

⁶ *Lemon*, 403 U.S. 602.

⁷ William B. Petersen, "A Picture Held Us Captive: Conceptual Confusion and the Lemon Test," *University of Pennsylvania Law Review* 137, no. 5 (1989): 1842. <http://www.jstor.org/stable/3312241>

⁸ Petersen, "Picture Held Us Captive," 1842.

⁹ *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁰ *Marsh*, 463 U.S. 783.

¹¹ *Marsh*, 463 U.S. 783.

¹² *Marsh*, 463 U.S. 783.

¹³ Jeremy G. Mallory, "'An Officer of the House Which Chooses Him, and Nothing More': How Should *Marsh v. Chambers* Apply to Rotating Chaplains?" *The University of Chicago Law Review* 73, no. 4 (2006): 1453-1436.

¹⁴ Mallory, "Officer of the House," 1448.

¹⁵ Mallory, "Officer of the House," 1451.

¹⁶ *Lee v. Weisman*, 507 U.S. 577 (1992).

¹⁷ *Lee*, 507 U.S. 577.

¹⁸ *Lee*, 507 U.S. 577.

¹⁹ *Lee*, 507 U.S. 577.

²⁰ Suzanna Sherry, "Lee v Weisman: Paradox Redux," *The Supreme Court Review* (1992): 132.

²¹ Sherry, "Lee v Weisman," 152-53.

²² *Lee*, 507 U.S. 577.

²³ Petersen, "Picture Held Us Captive," 1829-30.

²⁴ Herbert M. Kritzer and Mark J. Richards, "Jurisprudential Regimes and Supreme Court Decision Making: The Lemon Regime and Establishment Clause Cases," *Law & Society Review* 37, no. 4 (2003): 829.

²⁵ Bruce P. Merenstein, "Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of *Marsh v. Chambers* and the School Prayer Cases," *University of Pennsylvania Law Review* 145, no. 4 (1997): 1071-72

²⁶ Merenstein, "Last Bastion of School Sponsored Prayer?" 1095.

²⁷ Joseph A. Ignagni, "Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions," *Journal of Church and State* 36, no. 2 (1994):324.

²⁸ Ignagni, "Explaining and Predicting," 327.

²⁹ Kritzer and Richards, "Jurisprudential Regimes," 839.

³⁰ Ignagni, "Explaining and Predicting," 304.

³¹ David M. Beatty, "The Forms and Limits of Constitutional Interpretation," *American Journal of Comparative Law* 49, no. 1 (2001): 22.

³² Herbert A Simon, "Human Nature in Politics: The Dialogue of Psychology with Political Science," *The American Political Science Review* 79, no. 2 (1985): 294.

³³ "Frequently Asked Questions," Supreme Court of the United States, accessed December 2016, <https://www.supremecourt.gov/faq.aspx#faqgi9> (Site revised.) The prior link is no longer active, but the site states, "The Court receives approximately 7,000-8,000 petitions...each term." "FAQs – General Information," Frequently Asked Questions, Supreme Court of the United States, accessed May 23, 2018, https://www.supremecourt.gov/about/faq_general.aspx.

³⁴ Ignagni, "Explaining and Predicting," 309.

³⁵ Ignagni, "Explaining and Predicting," 309.

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