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Absentee Soldier Voting In Civil War Law And Politics

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**ABSENTEE SOLDIER VOTING IN
CIVIL WAR LAW AND POLITICS**

by

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Submitted to the Graduate School

of Wayne State University,

Detroit, Michigan

in partial fulfillment of the requirements

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Advisor

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DAC

August 22, 2014

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INTRODUCTION

Ohio attorney Columbus Delano envisioned a bleak future if the state supreme court upheld a new voting law. The innovative 1863 statute allowed absent Civil War soldiers to vote in Ohio elections, just as if they were home. Delano's client, Democrat John McBride, would have won his election bid for Wayne County probate judge based exclusively on the votes cast within the county, but he lost the race when canvassers added the votes of absent soldiers to the home vote. Before the law's enactment, there was no such thing as absentee voting in Ohio, and Delano argued that the legislature lacked authority to invent it. The law giving absent soldiers an opportunity to vote was not only unconstitutional, Delano insisted, but also "subversive to the very foundation of the state government." It would transform the elective franchise intolerably, making it "a mere *transitory* or *migratory* thing, to be exercised not at any stated or prescribed election precincts, but anywhere, and in any part of the world."¹

To the modern American ear, this protest may sound puzzling. Twenty-first century Americans take absentee voting for granted as a convenience that facilitates participatory democracy by allowing citizens to cast ballots "anywhere, and in any part of the world." But such voting was completely unfamiliar to Ohioans in 1863. The statute created something altogether different from what they had come to understand about elections and voting. There was no precedent before 1863 for Ohioans to cast ballots

1. *Lehman v. McBride*, 15 Ohio St. 573, 582 (1863), italics in the original. Delano did not share his client's Democratic political views. A Whig turned Republican, Delano served in the state assembly when he argued McBride's case. Earlier he had served a term in congress and had narrowly lost to Benjamin Wade in the 1862 contest to represent Ohio in the U.S. Senate. Rossiter Johnson, ed., *The Biographical Dictionary of America* (Boston: American Biographical Society, 1906), 3:227.

anywhere other than in their own Ohio communities, in the company of neighbors and under the watchful eyes of community leaders. Now a subset of the state's qualified voters – soldiers – could vote in distant locations, not only away from their home communities but altogether outside the state. Delano lost his constitutional argument – the court upheld the new law – but even the court agreed that this was something new, something the framers of Ohio's constitution had never contemplated.²

During the Civil War, twenty northern states did what Ohio did by creating novel opportunities for absent Civil War soldiers to vote. Though mindful of what was going on in other states, states acted individually in doing so, and the stories of how it happened vary. For the newest state of Nevada, which became a territory during the war and achieved statehood barely a week before Election Day in 1864, absentee voting represented no jolting departure from earlier electoral practices, since Nevada was too young to have developed its own traditions of voting. Most states, however, entered the war with firmly established election habits, some tracing their legal origins back nearly two centuries. For them absentee voting departed dramatically from familiar election norms. Before enactment of these precursors to modern absentee voting laws, state laws had tightly tethered balloting to the voter's community, requiring strict supervision by local elites and in-person participation by voters. One scholar aptly describes antebellum elections as “masculine, communal” events.³ Under the new laws, elections remained decidedly masculine, but hardly communal in the prewar sense of that word. Now

2. *Lehman*, 15 Ohio St. at 612.

3. Adam I.P. Smith, *No Party Now: Politics in the Civil War North* (New York: Oxford University Press, 2006), 15.

eligible voters – as long as they were soldiers – could cast their ballots in distant places where they served as warriors, far from the watchful eyes of their neighbors and community leaders. In the absentee voting process that the new laws created, the absent party was as much the soldier’s civilian community as it was the soldier himself.

With the subordination of the home community’s role came the subordination of previously paramount legal values. Preserving “the purity” of elections, so evident as a value in the antifraud provisions of nearly all earlier election laws, suddenly gave way to the higher value of keeping absent soldiers within the community of voters. Dating from their earliest existence as political polities, most states had become progressively sterner in their laws’ attempts to discourage fraud. The anti-fraud provisions all depended for enforcement on the tight oversight of the voting process by election supervisors, men chosen from the social and political elites of each community. And while many states’ soldier-voting laws mimicked the oversight mechanisms of pre-war laws – including election judges and clerks selected from among the soldiers gathered in the field to vote, opportunities for challenging the qualification of soldiers to vote, sworn oaths for election officials and voters, the keeping of poll books, etc. – in operational reality such mechanisms were relatively toothless when implemented away from the states in military settings. Predictions of that toothlessness by opponents of enactment did not deter proponents, to many of whom it simply did not matter. For them, it was the legislature’s responsibility, and within the legislature’s constitutional authority, to subordinate the value of election “purity” to the more important wartime imperative of allowing absent soldiers to vote, no matter the far greater risk of fraud.

State by state, legislators, lawyers, and judges would disagree about whether the novelty of these new voting arrangements created constitutional problems, as Columbus Delano argued unsuccessfully that they did in the Ohio case. Constitutional or not, however, all could agree that the new laws created an entirely new form of political participation, upending settled views about what an election was.

The phenomenon was, in other words, legally radical. Chapters 1 and 2 undertake an examination of the contours of that radicalism. Chapter 1 is a case study of one state's experience with the invention of absentee voting. It constructs a history of election law in Ohio, comparing the prewar sense of what an election was, as revealed over six decades in statutes and constitutions, with the very different kind of election contemplated by the state's 1863 soldier-voting law. Voting had always been tethered firmly to local Ohio communities; that connection was integral to the very idea of an election. The state's 1863 soldier-voting law severed the link, albeit temporarily – the law expired at the war's end – and only for soldiers. All five Supreme Court justices who listened to Delano's arguments agreed that the law broke new ground by creating a mode of voting that constitutional framers had never contemplated. Over one strenuous dissent, however, the court majority ruled that the state constitution did not stand in the way and that the legislature had authority to invent something altogether new – a voting opportunity divorced from Ohio communities and correspondingly more vulnerable to fraud.

Chapter 1 stands for several propositions, some of them at odds with what other historians have said: that Ohio's new law departed radically and suddenly from a long tradition rooting elections in local communities in the state; that the departure did not

consist of a change in residency qualification (or any qualification) for suffrage, but that it was radical nonetheless; and that the context in which absentee voting took place under the new law – the soldier’s military “community” far from Ohio’s borders – was utterly unsuited for the operation of antifraud mechanisms grafted onto the new law *pro forma* from the state’s prewar election law.

Chapter 2 broadens the examination to describe the unfolding innovation of soldier-voting legislation in the other 19 states where it happened. Focusing on formal law, that examination demonstrates that Ohio typified the national experience in its struggle to find constitutional footing for a radical, albeit temporary, departure from legal antecedents, though not from antecedent residency (or other) suffrage qualifications. The struggle played out in various ways, each demonstrating the intensity of the collision with prewar law. Sometimes it played out in court, sometimes through constitutional amendment, and sometimes by limiting the new voting right to federal elections as a half-loaf way of avoiding the strictures of the state constitution. More than half the states acted late in the war, after the potency of the issue in the competition for civilian votes became evident in late 1863. The tardy start for these states created a time crunch that sparked procedural innovations designed to leap constitutional hurdles in time for the 1864 elections. It was another measure of the laws’ radicalism.

Supreme court decisions in Ohio and eight other states help demonstrate how legally problematic the new idea was, even in states where the courts concluded that it was constitutionally permissible. Four of the nine court opinions (California, Connecticut, Michigan, and Pennsylvania) struck down the laws altogether. Two other

state courts (New Hampshire and Vermont) struck down portions of the laws, permitting the legislation to stand as to federal but not state elections. The other three (Iowa, Ohio, and Wisconsin) upheld the laws. In all nine cases, justices tried to divine whether constitutional framers had intended, on the one hand, to fix the place of voting in local communities as a part of the state's foundational law or, on the other hand, to permit legislatures to set the "where" of voting as lawmakers thought best. The outcomes generally hinged on the court majority's approach to the challenge of teasing meaning out of constitutional text drafted by men who, as justices on both sides of the debate repeatedly recognized, had never dreamt of absentee voting. Judges who looked to state history for the meaning of a constitution's undefined words – words such as "election" or "vote" – tended to vote for overturning the laws. The historical examination by these jurists invariably concluded that constitutional framers incorporated traditional understanding when they used these words, and those understandings always attached the act of voting to a community setting within the state. In contrast, judges limiting their examination to the plain meaning of constitutional text tended to uphold the laws. These justices deferred to legislators unless they could find explicit and unambiguous prohibitions against absentee voting in constitutional texts. Judges adopting both approaches agreed that the laws departed from earlier understandings about elections, but those looking to history for interpretative assistance attached constitutional consequences to the departure, while those looking only to the plain meaning of constitutional text did not.

Chapter 2 also demonstrates two other ways that Ohio typified the national experience legally. At first blush, both invite the view that the legal innovation, characterized throughout this dissertation as radical, was nothing of the sort. First, neither Ohio nor any other state that invented this new way of voting for absent soldiers expanded its prewar suffrage qualifications, even for soldiers. None, for example, granted absent soldiers the right to vote if they were too young to vote under the prewar constitution or if their race or citizenship disqualified them. Even states that found it necessary to amend their constitutions to accommodate absentee voting limited the scope of the amendments to soldiers already enfranchised under prewar constitutions, generally white male citizens at least 21 years old.

A second feature of the legal innovation, common to Ohio and the rest of the country, follows from the first, but bears emphasis. In neither Ohio nor any other state did the soldier-voting law result from, or result in, a relaxation in the residency qualification for voting. In fact, contrary to the treatment of this subject by other historians, soldier-voting laws left prewar residency requirements completely undisturbed.

Viewed from a rights-conscious perspective, which looks above all to *who* belongs to the community of eligible voters, those two attributes strip the soldier-voting laws of any claim to radicalism. The radicalism of the laws becomes evident, however, when viewing voting rights through a contemporary lens as a communal, public right, belonging not to individuals as autonomous actors, but to the local community where individuals participated as members. Soldier-voting laws stripped elections of that communal quality. That was a radical change measured against the antebellum sense of

what elections were and how voters participated in them. In the court cases surveyed in Chapter 2, as in the Ohio case highlighted in Chapter 1, lawyers and judges disagreed about whether that change breached constitutional requirements, but all treated the change as a major departure. By demonstrating the legal radicalism of soldier-voting laws, Chapter 2 disputes and seeks to correct the scholarly theory that these laws culminated a long and gradual process of loosening residency restrictions associated with antebellum migration. In fact, the change was abrupt, and it did nothing to loosen residency requirements.

Chapters 3, 4, and 5 offer an explanatory theory for the change. Politics was the clearest driving force, of course, given the absence of so many electors whose votes both parties coveted. Historians correctly treat soldier-voting legislation as a vote-maximizing response to the temporary absence of a big slice of the electorate.⁴ To treat the soldier-voting phenomenon as nothing more than an effort to garner soldiers' votes, however, is to overlook a larger and more complex political picture. The creation of absentee voting for military servicemen was part of a temporary political phenomenon that assigned an important role to soldiers in the contest for civilian votes. Unique circumstances set the stage for political combat in 1863-1864, and those circumstances made it indispensable to both parties for soldiers to participate as political actors in unprecedented ways. They participated not only as voters, but also as spokesmen for the parties' major messages and endorsers of party candidates. The dissertation coins the term "politics of soldiers" to describe the political messaging of these years. In the politics of soldiers, the parties'

4. The Ohio Supreme Court put the figure at one-quarter to one-third. *Lehman*, 15 Ohio St. at 607.

support of soldiers, and each party's enlistment of the voice of soldiers in its political messaging, became essential to securing civilian votes. Both parties needed the conspicuous support of soldiers for credibility in communicating their campaign themes. Friction over soldier-voting laws was part of this larger partisan tug of war over the political kinship of servicemen.

Chapter 3 examines the unfolding of these dynamics in 1863 Pennsylvania politics, treating that state's experience as a proving ground for the political themes that characterized the national contest that unfolded the following year in the Lincoln – McClellan contest. At the start of the war, only Pennsylvania had a law allowing absentee voting by soldiers. In 1861 a losing candidate in a local election challenged the law. That contested election culminated in a Pennsylvania Supreme Court decision in 1862 striking down the law as unconstitutional. The court's decision, and the state elections the following year, served to politicize soldier voting and sparked a national surge in soldier-voting legislation. Before the case, states were just awakening to the concept of granting special voting accommodations to absent soldiers. Partisan alignment over the issue, with Republicans favoring the idea and Democrats opposing it, had not yet crystallized. That changed after the author of Pennsylvania's high court's decision, George Woodward, won the Democratic Party's nomination for governor in 1863. His opponent, Republican incumbent Andrew Curtin, used the court decision to portray Woodward as anti-soldier voting and therefore anti-soldier, while positioning himself as "the soldiers' friend."

The Woodward-Curtin contest field-tested the competing campaign themes that the national parties embraced in 1864 – treason v. loyalty, military competence v.

ineptitude, and solicitude for (white) soldiers v. neglect of the troops. And just as in the national contest of 1864, Pennsylvania Democrats and Republicans in 1863 enlisted the voice of soldiers in their political messaging to civilian voters. Republicans used the soldier-voting issue to gain an edge in the home vote in that year's version of the politics of soldiers. Curtin beat Woodward on the strength of the "soldiers' friend" meme, central to which was the soldier-voting issue.

Chapter 4 describes the politics of soldiers in the national competition between Lincoln and McClellan. By this time, largely because of what had happened in the Curtin-Woodward race, and also because by then it was clear that Republican candidates would win the soldier vote, a partisan divide over soldier voting had solidified. Republicans' conspicuous support for the new form of voting, and the party's success tarring Democrats as anti-soldier for opposing soldier-voting laws, became a major advantage in winning civilian votes. Riding the soldier-voting horse in the politics of soldiers, Republicans secured the status as the friend of the soldier, giving them correspondingly greater credibility in electoral messaging wars.

As with the 1863 Pennsylvania gubernatorial contest, both parties in 1864 needed, and therefore enlisted, the voice of soldiers in their political messaging. Republicans did so to portray McClellan as disloyal, cowardly, and militarily incompetent. Democrats did so to portray Lincoln a bungling commander-in-chief and as neglectful of the troops, particularly white troops whose wellbeing Lincoln purportedly subordinated to the interest of slaves and armed African-Americans. Soldiers spoke more credibly than any other citizens on all these subjects. So, in making and rebutting these charges,

Republicans and Democrats respectively relied on the voice of soldiers in appeals for civilian votes. Both parties brought the soldiers' voice to bear in letters from soldiers to partisan newspapers, straw polls in the same newspapers purporting to show that soldiers favored one party or the other, the selection of soldiers to speak at campaign rallies, the gathering of endorsements for one candidate or the other by prominent military figures, and the use of the lexicon of soldiering to praise or attack candidates.

Chapter 5 describes the predicament the soldier-voting issue created for Democrats. Starting with the experience of the Curtin-Woodward contest in Pennsylvania, they understood the political hazards of opposing soldier-voting laws, much as Republicans had learned the same lesson in 1862 when they opposed a soldier-voting bill in Ohio.⁵ Democrats naturally wanted to demonstrate their support of the troops and the troops' reciprocal support of Democrats, just as Republicans wanted to demonstrate the opposite. One way to do that was to endorse soldier-voting legislation. But Democrats could not easily do that. Unlike Republicans, many Democrats harbored deep misgivings about the laws. Their misgivings were both ideological and practical. Ideologically, Democratic Party purists believed that soldiering was incompatible with voting.⁶ Voters needed to exercise independent judgment, while soldiers had to accept subordination to the judgment of others. A related fear was that a standing army, always

5. As discussed more fully in Chapter 5, Republicans early in the war doubted that their candidates would get fair treatment in the army, given a command structure then dominated by officers of Democratic Party pedigree. It was the mirror image of the conviction Democrats would come to embrace starting in 1863, by which time the Lincoln administration had asserted its control over the military command structure.

6. This attitude was of a piece with Democrats' antipathy to war generally, and civil war in particular, as incompatible with liberty and an invitation to despotism. See, e.g., Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (New York: Fordham University Press, 1998), 148-158.

a bugaboo of Democratic orthodoxy, would corrupt and overwhelm democracy if armed with political power.

Practically, Democrats feared that Republican military leaders would cheat in administering the soldier vote. By 1863, the Lincoln administration held a strong grip on the military command structure. Democrats believed that Republicans would use that control corruptly to tilt the playing field of soldier voting in favor of Republican candidates. As evidence, they pointed not only to episodes of bullying and intimidation against Democratic soldiers by their military superiors, but also to cases of military interference in civilian elections, especially in Border States and always to the disadvantage of Democratic candidates.

Democrats coped with this predicament uneasily. Reluctant to oppose soldier-voting laws too loudly, they muted their opposition to the legislation and trumpeted evidence of Republican bullying and interference in implementing the laws when they passed. In keeping with the politics of soldiers, they enlisted the voice of soldiers to make their case that Republicans, if allowed by passage of soldier-voting legislation, would abuse their power to steal the soldier vote.

An appendix describes the operational features of each state's soldier-voting system and describes the legal frictions that arose in most states. As an organizing framework for that state-by-state discussion, the appendix distinguishes between "senior" states, defined as those entering the Union before 1800, and "junior" states that entered thereafter. That demarcation, concededly somewhat arbitrary, serves to demonstrate that the innovation of absentee voting was much more likely to clear constitutional hurdles in

the younger states, where the grip of the communal tradition of elections was not as tight as in the senior states.

To the extent that scholars have paid attention to these laws at all, they have focused on the direct effect of soldier voting on election outcomes and the partisan divide over the issue. The only full-length book on the subject of soldier-voting laws, entitled *Voting in the Field*, is a monograph by Josiah Benton, published in 1915.⁷ It is an encyclopedic examination of the legislative history of every military suffrage law. Benton painstakingly scoured state house and senate journals and legislative committee reports to construct a timeline of statutory enactment, state by state. His book also compiles the results of soldier voting, where those data were available. Benton's work, though not free of substantive errors, is an indispensable source of raw data about how the laws came into existence. James McPherson in 1988 cited it as one of the two best sources on soldier-voting laws.⁸

The other source McPherson salutes is an article by Oscar Osburn Winther, "The Soldier Vote in the Election of 1864."⁹ Winther discusses all the laws, though more sketchily than Benton, and not always accurately. Winther focuses less on the laws' legislative history than on the partisan friction they engendered and on the direct effect of soldiers' votes on election outcomes. Winther also assembles good evidence of military

7. Josiah H. Benton, *Voting in the Field; a Forgotten Chapter of the Civil War* (Boston: Priv. Print, 1915).

8. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 805n69. Examples of Benton's errors are his omission of a California soldier-voting law enacted in 1863 from his account of that state's experience and his statement that three Michigan high court justices rendered opinions in the case striking down that state's soldier-voting law. (Four Michigan justices wrote opinions in the 1865 case of *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127.)

9. Oscar Osburn Winther, "The Soldier Vote in the Election of 1864," *New York History* 25, no. 4 (October 1944).

interference with civilian elections, particularly in Indiana, which had no soldier-voting law. Neither Benton nor Winther attempts a contrast between the new laws and their prewar antecedents, beyond the obvious distinction that prewar laws did not permit absentee voting while the new statutes of course did. And neither Benton nor Winther probes the court cases arising out of the soldier-voting laws for a sense of the constitutional upheaval the laws created.

There are fine state-by-state studies of the subject. A leading scholar of the field is Jonathan W. White, who has examined both the Pennsylvania and New York laws, in separate articles in 2004. His article on Pennsylvania's experience focuses on the shifting partisan positions on soldier voting. White documents the early bipartisanship in both the support for and the opposition to soldier-voting laws in the Keystone State, noting that the sharp partisan divide took shape only in 1863 and 1864.¹⁰ White's second article describes the organizing efforts both parties launched, at the national level, to get ballots and partisan information to troops – a “get out the vote” drive aimed at soldiers. For Republicans, the Lincoln administration provided the organizing oomph, while New Yorkers associated with Governor Horatio Seymour provided it for Democrats. New York's national role emerged at the same time the state was grappling with passage and implementation of its own soldier voting law, all of which White describes lucidly.¹¹

A handful of other state-specific articles are similarly valuable. The best treatment of Ohio's experience with soldier voting, by Arnold Shankman, discusses the impact of

10. Jonathan W. White, “Citizens and Soldiers: Party Competition and the Debate in Pennsylvania Over Permitting Soldiers to Vote,” *American Nineteenth Century History* 5, no. 2 (2004).

11. Jonathan W. White, “Canvassing the Troops: The Federal Government and the Soldiers' Right to Vote,” *Civil War History* 50, no. 3 (September 2004).

the military vote on the 1863 Ohio gubernatorial election. Shankman shows for Ohio what White shows for Pennsylvania: that Republicans and Democrats were ambivalent about soldier-voting laws until 1863, when Republican support and Democratic opposition jelled. Shankman also documents the abuse of soldier voting by the politicized army command, up to and including Edwin Stanton. It is a story of sharp elbows and foul play, including discriminatory furloughs, destruction of Democratic ballots sent to army camps, and the physical abuse of soldiers who had the temerity to speak out as or for Democrats.¹²

Frank Klement offers perhaps the most cynical appraisal among scholars in the field in his article about Wisconsin. Klement characterizes Wisconsin's legislation as a raw power play by Republicans, who constructed the soldier-voting system to maximize opportunities for Republican officers in the army to control voting by their subordinates. And during the pendency of a court challenge to the law's constitutionality, Republicans amended the law to permit soldiers to vote in elections for state Supreme Court justices. According to Klement, this had the desired effect of securing the chief justice's vote upholding the law, since he needed support from voting troops to secure his own reelection.¹³

Another scholar writing in the World War II period (during which soldier voting again became a subject of national interest) offers a far more positive assessment than Klement's, this one with respect to the Minnesota statute. According to Lynwood G.

12. Arnold Shankman, "Soldier Votes and Clement L. Vallandigham in the 1863 Ohio Gubernatorial Election," *Ohio History* 82 (Spring 1973).

13. Frank L. Klement, "The Soldier Vote in Wisconsin during the Civil War," *The Wisconsin Magazine of History* 28, no. 1 (September 1944).

Downs, the absentee voting system created by that state's 1862 law should be a source of pride for Minnesotans because of the pains both parties took to assure evenhandedness in the balloting. The law fell short of full success, according to Downs, because the state lacked resources to implement the law for all of Minnesota's far-flung soldiers.¹⁴

Samuel T. McSeveney, in an article about Connecticut's experience with soldier voting, underscores the disadvantages Democrats suffered in securing a level playing field in the soldier vote. Furloughs played an unusually large role in voting by Connecticut soldiers, and (as all scholars of the subject have noted) these were far harder to come by for Democrats than for Republicans. Connecticut's law applied only to soldiers stationed outside the state, meaning that members of the provost guard and those convalescing in Connecticut hospitals had to travel back to their home towns on furlough in order to vote. Similarly, because the law gave absentee voting rights only to registered voters, and Connecticut required in-person voter registration, servicemen who came of age during the war had to return home on furlough to register before they could vote. The Lincoln administration's willingness and ability to manipulate furloughs worked to the disadvantage of Democrats in Connecticut even more than it did in other states. McSeveney also documents a phenomenon that sheds light on the driving force behind the laws. In the absence of soldier-voting laws, soldiers had reason to expect, or at least hope for, furloughs to return home for elections. Cherishing furloughs, many soldiers felt

14. Lynwood G. Downs, "The Soldier Vote and Minnesota Politics, 1862-1865," *Minnesota History* 26, no. 3 (September 1945).

ambivalent about laws allowing them to stay in their encampments to vote. Although the laws ostensibly benefitted them, soldiers themselves did not clamor for their enactment.¹⁵

This dissertation attempts to advance understanding of the subject beyond the scope that these scholars explore. Each of their works illuminates the subject importantly. Each describes the parties' efforts to secure soldier votes, the parties' differences over the issue in the legislative process, partisan conflict about the fairness of the laws' implementation, and the direct effects of soldier voting on election outcomes. But none situates soldier-voting laws in the legal and constitutional history of suffrage or elections. None, for example, mines pre-war election laws as a basis for comparison to the soldier voting law, with respect to either the mechanics of voting or the prewar intensity of anti-fraud values reflected in election law, for example.¹⁶ Nor do they attempt to place soldier-voting legislation in a larger context of soldiers as players and props in the political messaging necessitated by the structural features of 1863-1864 politics.

Civil War historians James McPherson, Phillip Shaw Paludan, Gary Gallagher, William C. Davis, and Allen Guelzo touch on soldier voting as part of their overall treatment of the war, but only briefly, focusing mainly on the strong preference soldiers expressed for Lincoln over Democrat George McClellan in the presidential election of 1864.¹⁷ Attention to soldier voting is equally light among most scholars of nineteenth

15. Samuel T. McSeveney, "Re-electing Lincoln: The Union Party Campaign and the Military Vote in Connecticut," *Civil War History* 32, no. 2 (June 1986).

16. The overarching antifraud objective of residency requirement becomes starkly clear from several of the high court decisions about the constitutionality of soldier-voting laws surveyed in Chapter 2, and the history of Ohio's prewar election laws discussed in Chapter 1.

17. McPherson, *Battle Cry of Freedom*, 803-806; Gary W. Gallagher, *The Union War* (Cambridge, MA: Harvard University Press, 2011). (Gallagher limits his treatment of the subject to a reprint from *Frank Leslie's* of soldiers from the Army of the Potomac gathered around a handbill, posted on a tree, announcing

century political culture. Jean Baker (*Affairs of Party*), Joel Silbey (*The American Political Nation: 1838-1893*), and Glenn Altschuler and Stuart Blumin (*Rude Republic: Americans and Their Politics in the Nineteenth Century*) hardly mention soldier voting or soldier-voting laws at all, intimating when they do that soldiers were outside the mainstream political community.¹⁸ An exception with particular significance for this dissertation is Kenneth Winkle, author of *The Politics of Community: Migration and Politics in Antebellum Ohio*.¹⁹ While Winkle sees Ohio's 1863 law as part of a decades-long loosening of residence restrictions in voting rights, this dissertation argues in Chapter 1 that the law departed with legal antecedents abruptly and did not change residency requirements.

The dissertation draws on the very rich historiography on Civil War politics, particularly in Chapters 3, 4, and 5. A prominent scholar on that subject is Mark Neely Jr. His *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1992), *The Union Divided: Party Conflict in the Civil War North* (2002), and *The Boundaries of American Political Culture in the Civil War Era* (2005) serve as essential sources. William Frank Zornow's *Lincoln and the Party Divided* (1957), John C. Waugh's 1997 book, *Reelecting*

an election in 1864.); William C. Davis, *Lincoln's Men* (New York: Touchstone, 1999), 211-213; Allen C. Guelzo, *Fateful Lightning: A New History of the Civil War and Reconstruction* (New York: Oxford University Press, 2012), 464. For the preference of union soldiers for Lincoln, see also Jennifer L. Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (New York: Oxford University Press, 2006), 194-199.

18. Baker, *Affairs of Party*. (In her sparse treatment of soldier voting, Baker characterizes the laws as "a suspension of the residency requirements that made out-of-district voting illegal." *Id.* In contrast, this dissertation demonstrates in Chapter 2 that all soldier-voting laws left residency requirements intact.); Joel Silbey, *The American Political Nation, 1838-1893* (Stanford, CA: Stanford University Press, 1991); Glenn C. Altschuler and Stuart M. Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century* (Princeton, NJ: Princeton University Press, 2000).

19. Kenneth J. Winkle, *The Politics of Community: Migration and Politics in Antebellum Ohio* (Cambridge: Cambridge University Press, 1988).

Lincoln: The Battle for the 1864 Presidency and Doris Kearns Goodwin's *Team of Rivals* are all excellent treatments of the 1864 election and Lincoln's political skills. But none situates the voice of soldiers generally, or soldier-voting laws in particular, in the political messaging wars of 1863 and 1864, as this dissertation attempts to do.

Joseph Allan Frank's 1998 book, *With Ballot and Bayonet: The Political Socialization of American Civil War Soldiers* is particularly important to this project. Frank suggests that Civil War soldiers were less the agents of political parties than the other way around. Passionate pro-war feelings within the army intensified the Republican prosecution of the war, Frank argues. His book documents the ways that a "core" of highly politicized Union soldiers influenced the terms of the national debate, pushing the North's war effort in radical directions. Frank's work shows the pervasiveness of bullying and intimidation by radical Republican soldiers of their Democratic-leaning fellows. In a 2007 essay about the political activism of Pennsylvania soldiers, Timothy Orr describes a similarly bottom-up phenomenon. Focusing on soldiers' letters to newspapers and political "resolutions" adopted by pro-administration military units, Orr describes the army as "an organized political body" that sought to eliminate the legitimacy of partisan conflict, sometimes with threats or acts of violence against Democrats.²⁰

In contrast to Frank and Orr, who describe a bottom-up direction – from soldiers in the field to civilian political operatives back home – in the formulation of party ideologies, this dissertation identifies a top-down character in the parties' enlistment of

20. Timothy J. Orr, "A Viler Enemy in our Rear," in *The View from the Ground: Experiences of Civil War Soldiers*, ed. Aaron Sheehan-Dean (Lexington, KY: The University Press of Kentucky, 2007), 174.

“the voice of soldiers” to communicate campaign themes, most demonstrably in the branding of Republican candidates like Andrew Curtin as “the soldiers’ friend.” Taken together, Frank and Orr’s arguments and this dissertation suggest that perhaps soldiers and political parties used each other.²¹

Adam I.P. Smith’s 2006 book, *No Party Now: Politics in the Civil War North*, buttresses Frank and Orr and is helpful for its insights about the dilemma Democrats faced, the subject of Chapter 5, below. Wartime makes partisanship at least marginally illegitimate, Smith argues, thereby complicating the challenge of the party operating as a loyal opposition. In a wartime environment, it is easy to paint politicians opposing an incumbent president as treasonous, and Smith demonstrates how effectively Republicans applied that paint to antiwar Democrats in the Civil War, effectively delegitimizing Democrats’ objections to the Lincoln administration’s war policies.²²

Smith documents ways that politicized soldiers participated in, and lent moral authority to, the Republicans’ project of delegitimizing partisan opposition and thereby marginalizing Democrats. Smith calls the Republican project the “doctrine of patriotism.” In agreement with Frank and Orr, Smith describes the politically aware volunteer army (though not regulars) as a forum for political action that pitched into partisan combat enthusiastically, often heavy-handedly, in support of that doctrine.²³ To this extent, these three scholars capture one element of the multi-faceted phenomenon referred to in this dissertation as the politics of soldiers. “No-partyism” as a pro-war partisan ideology was

21. Joseph Allan Frank, *With Ballot and Bayonet: The Political Socialization of American Civil War Soldiers* (Athens, GA: The University of Georgia Press, 1998), 66, 95, 102, 133.

22. Smith, *No Party Now: Politics in the Civil War North*.

23. *Id.* at 73, 93-99.

a variant of the Republican campaign theme disparaging anti-war politicians as disloyal, and Smith shows that soldiers were instrumental in communicating that theme.

Frank, Orr, and Smith describe a pervasive climate of enforced one-partyism, with soldiers serving the role as its moral legitimizers and, sometimes thuggishly, as enforcers of the pro-war orthodoxy. In this telling, with respect to loyalty, soldiers shaped a political phenomenon broader than the political messaging of election seasons. Instead, soldiers put their considerable and muscular imprimatur on a wartime culture of ubiquitous loyalty that included but extended beyond election campaign themes. This dissertation focuses on the narrower role of loyalty and disloyalty as political campaign messages, with soldiers serving on both sides of the messaging wars. And unlike their scholarship, this dissertation identifies loyalty and disloyalty as just one of the contested themes in the partisan messaging for which soldiers were enlisted, the others being military incompetence, cowardice, and solicitude for white troops. The politics of soldiers drew servicemen into the partisan point and counterpoint on each of these subjects in ways that Frank, Orr, and Smith do not address, although their work certainly helps in the thematic construction of this dissertation.

The scholarly debate about whether peace Democrats like George Woodward were actually disloyal remains unsettled, though it matters in this dissertation only as historiographical background. Scholars including Eric McKittrick, Jean Baker, Joel Silbey, and Frank Klement argue that they were in fact loyal and even helpful to the Union cause. They point to evidence showing that many Democrats supported most aspects of the Lincoln administration's war effort, other than those connected with

emancipation and arming former slaves. Michael Holt has taken issue with that consensus. In a 1998 essay, Holt argues that proponents of the view that Democrats were loyal erred by looking too exclusively at the conduct of Democrats at the federal level, disregarding more problematic examples of Democratic opposition at the state level. Pennsylvania's George Woodward is among the "strident antiwar Democrats" Holt cites as an "embarrassment" to the party's claim to loyalty. (The others were Clement Vallandigham of Ohio and Thomas Seymour of Connecticut.)²⁴

Jonathan W. White mounts a careful rebuttal to Holt and a defense of Woodward. White argues that in Woodward's view of constitutionalism, under which states had the right to secede, citizens who supported the exercise of that right could not be guilty of treason. To Woodward and other adherents to a contractual view of constitutionalism, any loyal American could express approval of southern secession. And, as White makes clear, at no point did Woodward ever advocate taking up arms against the United States, which would indeed have constituted treason. He simply believed that there was no disloyalty in the act or advocacy of peaceable secession.²⁵

This dissertation tries to steer clear of the merits of the parties' attack themes, focusing instead on the uncontested fact that the parties deployed the themes and used

24. Eric McKittrick, "Party Politics and the Union and Confederate War Efforts," in *The American Party Systems*, ed. William Chambers and Walter Burnham (New York: Oxford University Press, 1967); Baker, *Affairs of Party*; Joel Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (New York: W.W. Norton & Company, Inc., 1977); Frank L. Klement, *Dark Lanterns: Secret Political Societies, Conspiracies, and Treason Trials in the Civil War* (Baton Rouge: Louisiana State University Press, 1984); Michael F. Holt, "An Elusive Synthesis: Northern Politics During the Civil War," in *Writing the Civil War: The Quest to Understand*, ed. James M. McPherson and William J. Cooper, Jr. (Columbia, SC: University of South Carolina Press, 1998).

25. Jonathan W. White, George Washington Woodward and J.S. Black, "A Pennsylvania Judge Views the Rebellion: The Civil War Letters of George Washington Woodward," *The Pennsylvania Magazine of History and Biography* 129, no.2 (April 2005): 199-201.

soldiers whenever they could to communicate them. The merits of the claims and counterclaims of disloyalty, for example, matter less for purposes of this dissertation than the undisputable fact that the claims and counterclaims were made and that soldiers participated in making them. The same is true about the merits of the other themes of the messaging wars. Was George McClellan really a physical coward, as Republican propagandists asserted in 1864? His major biographer, Stephen Sears, lends credence to the charge without using the word “coward” in his indictment of McClellan.²⁶ Many of McClellan’s contemporaries, including some who supported Lincoln, heatedly disputed the assertion, as Chapter 4 elaborates. This dissertation attempts agnosticism on the question, since all that matters for the argument here is that Republicans accused McClellan of cowardice, Democrats denied the accusations, and that, because of unique structural features of 1863-1864 politics, each side enlisted the voice of soldiers in advancing its side of the debate. It is likewise with the merits of the other themes that drew on the voice of servicemen in the politics of soldiers.

The soldier-voting phenomenon deserves more attention than it has received in the historiography of voting rights. Attorney Columbus Delano, introduced here at the outset, lamented the portent of voting becoming “a mere transitory thing” if the Ohio Supreme Court upheld the 1863 soldier-voting law. Delano had his feet firmly planted in voting tradition in expressing that lament, and his forebodings were in a way prescient of a very different kind of voting in the future. Historians of the arc of American suffrage rights have described a bumpy trajectory. Starting with the colonial model of elections as

26. Stephen W. Sears, *George B. McClellan: The Young Napoleon* (New York: Da Capo Press, 1988), xi, 200-222

town meetings in a system of virtual representation by white male property owners voting *viva voce* and theoretically representing the interest of their disfranchised neighbors, the trajectory culminates in a system of individualized and portable voting by secret (and sometimes electronic) ballot, with each elector representing his or her own interests.²⁷ One terminus of the arc is rooted in republicanism, with voting as a communal right, and the other in liberalism, with voting as an individual and portable right. Community control over eligibility determinations and the process of voting became decreasingly important over the course of the trajectory.²⁸

Civil War soldier voting straddled these two worlds interestingly, but it has largely escaped notice by historians. George Frederick Miller includes a short section of one chapter about the Civil War laws in his brief 1948 book about absentee voting, noting that some of the laws pioneered the modern mechanism of absentee balloting and cursorily describing the way they functioned.²⁹ In his 2000 book, *The Right To Vote: The Contested History of Democracy in the United States*, Alexander Keyssar surveys the nation's entire experience with voting laws, a prodigious and highly successful undertaking, including the halting, off and on trajectory toward expanded participation in

27. See Marc K. Kruman, "Legislatures and Political Rights," in *Encyclopedia of the American Legislative System: Studies of the Principal Structures, Processes, and Policies of Congress and the State Legislatures since the Colonial Era*, ed. Joel H. Silbey (New York: C. Scribner's Sons, 1994), 3:1237.

28. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000). Over the course of the eighteenth and nineteenth centuries, Keyssar writes, as individuals' attachments to particular communities waned, "the laws governing elections, like most areas of law, stressed the primacy and protection of individual rights." *Id.* at 300. Keyssar sets the modern terminus of the trajectory at the emergence of the Supreme Court's one-person, one-vote doctrine [*Reynolds v. Sims*, 377 U.S. 533 (1964)], although one could argue that the 26th Amendment (1971), extending suffrage protections to 18-year olds, deserves a place in the story.

29. George Frederick Miller, *Absentee Voting and Suffrage Laws* (Washington, DC: The Daylton Company, 1948), 29-35.

America's political universe.³⁰ But Keyssar devotes barely a paragraph to Civil War military suffrage and omits analysis of the soldier-voting laws from his otherwise extensive appendices. Moreover, Keyssar understates the extent to which residency requirements reflected not so much a desire to assure that prospective voters had a modicum of "attachment" to or stake in their community as a rather sharp-edged determination to prevent fraud, particularly voting by pretenders and multiple voting in the same election by people moving from one voting district to another on Election Day.³¹

The radicalism of soldier-voting laws in dislodging hometown communities from the voting process has a conservative counterpoint in the laws' narrow coverage, but the laws have escaped attention by scholars otherwise attentive to conservative impulses in suffrage law. Some scholars of the evolution of political rights point to the privilege that white males sustained through at least the 1920s, even in circumstances that might have invited political reform. The Civil War soldier-voting phenomenon arguably supports their arguments. Without reference to the conservative side of soldier-voting laws, Barbara Welke, for example, traces the persistence of the legal exclusion of minorities,

30. *Id.*

31. In Keyssar's defense, the insistence on a citizen's "attachment" to or stake in the community may be a positive way to frame the anti-fraud objectives that residency requirements served. Arguably, the two formulations of the purpose of residency requirements are merely flip sides of each other. Tellingly, however, none of the soldier-voting court decisions that reviewed the history of residency requirements uses the positive framing of the concept that Keyssar emphasizes. None refers to "attachment" or "stake." As elaborated in Chapter 2, all talk about fraud prevention and the imperative of preserving the "purity" of elections. Keyssar is not alone in emphasizing community attachment as the primary purpose of residency requirements. See, e.g., Silbey, *The Political Nation*, 148.

women, and various categories of immigrants in favor of “able white manhood.”³² Similarly, in her account of women’s quest for equality in public spheres (including but not limited to political spheres), Sandra VanBurkleo notes that women realized political gains from neither the Revolutionary War nor the Civil War, both of which catalyzed such gains for white men.³³ And Rogers Smith posits that “multiple traditions,” including a “persistent belief in white Anglo-Saxon Protestant male superiority,” shaped the formation of political rights in American law, trumping Lockean liberalism as American law’s animating force.³⁴

The limited scope of soldier-voting laws, which would come as no surprise to these scholars, may obscure the laws’ radicalism, since in rights conscious terms the laws broke no new ground. But in divorcing communities from elections the laws were something radically new. This dissertation undertakes to document that radicalism and identify its causes.

The Machinery of Soldier Voting

Before embarking on an examination of the legal and political frictions associated with enactment of soldier-voting laws, it is useful to consider how the laws designed absentee voting to work in practice.

32. Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth-Century United States* (New York: Cambridge University Press, 2010). Welke’s categories of historic exclusion extend beyond women and minorities to the disabled.

33. Sandra F. VanBurkleo, *Belonging to the World: Women’s Rights and American Constitutional Culture* (New York: Oxford University Press, 2001).

34. Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997), 3.

There was a snowflake quality to the voting arrangements the laws created — no two were identical. The variations, however, tended to cluster around two alternative models, designated here as the Iowa and Minnesota models.³⁵ The appendix examines each state’s version of the two general models, but the models themselves merit a brief introductory description.

Laws following the Iowa model called for setting up election sites in military encampments where soldiers served. These voting sites “in the field” tried to recreate the full choreography of elections back home, complete with election judges, poll books, procedures for challenging qualifications, etc. Fourteen states adopted variations of this approach: California, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Nevada, New Hampshire, Ohio, Pennsylvania (which used the Minnesota model as well), Vermont, and Wisconsin.

In contrast, laws following the Minnesota model, presaging modern forms of absentee voting, allowed soldiers to complete their ballots individually in the field and forward them sealed to their voting precincts back home, to be counted with civilian ballots. Seven states adopted the Minnesota model: Connecticut, Illinois, Minnesota, New York, Pennsylvania (which also adopted the Iowa model), Rhode Island, and West Virginia.

The details of voting under both models varied from state to state as to such matters as the categories of soldiers covered, the offices for which soldiers could vote, the mechanisms for providing advance notice of elections in the field, structures for

35. Pennsylvania, after amending its constitution to overcome the 1862 court decision striking down the state’s prewar law as unconstitutional, adopted both models.

supervising balloting, oaths for voters and election supervisors, the form of ballots and poll books, mechanisms for challenges, the assignment of commissioners to assist with implementation and the duties of commissioners, etc. The following description of the laws' operation in the eponymous states is offered for illustrative purposes.

Iowa³⁶

The Hawkeye State enacted its bill on September 11, 1862.³⁷ Voting under the law occurred at election sites set up “at every place where a Regiment, Battalion, Battery or Company of Iowa soldiers may be found or stationed.”³⁸ That formulation effectively excluded sailors in the navy, since naval organization included none of the listed designations. But the law covered every “soldier in the military service of this state or the United States,” including draftees and army regulars. This coverage provision also specified surgeons and chaplains.³⁹

Setting the template for many military suffrage laws, this one dictated that the provisions of the general election law would apply to voting in the field, “so far as applicable, and not qualified by the provisions of this Act.”⁴⁰ As we shall see in chapter 1

36. The choice of Iowa as a model for its form of absentee voting is debatable. Pennsylvania had enacted a soldier-voting law long before the Civil War, in 1813. It called for establishing voting sites “in the field” for absent Pennsylvania soldiers. So, while the Pennsylvania Supreme Court set that law aside early in 1862 before any other state had acted, the 1813 law based on its seniority arguably deserves the honor of designation as a model. Missouri, too, provided for absentee voting before Iowa did, following a similar model, but Missouri acted non-legislatively and arguably illegitimately in doing so. As the first state to adopt this model legislatively during the Civil War, Iowa gets the nod as the model for purposes of this study.

37. An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service, to Vote at Certain Elections, ch. 29, 1862 Iowa Acts 28.

38. *Id.* at § 8.

39. *Id.* at § 2.

40. *Id.* at § 6.

describing the soldier-voting experience in Ohio, this language indulged a fiction. Unavoidably, field elections in fact resembled civilian elections only superficially, since the laws could not replicate in military camps the mechanisms that served to protect against fraud in elections back home, above all supervision by members of the voters' own community. But the Iowa model tipped its hat, however synthetically, to the communal quality of elections that had predominated before the war in every state. The notable difference, of course, was that the statutes substituted the temporary community of the absent soldier's military unit for the permanent community of his neighbors back home.⁴¹

The law called for polling sites to open for each Iowa regiment. If that failed to make it "practicable for all to vote together," as when part of the regiment was on "detached service," then the detached unit could open its own polling site.⁴² The eligible Iowa soldiers at each site elected three election judges, who in turn appointed election clerks. The only qualification was that the judges (though not necessarily the clerks) had to be eligible Iowa voters.⁴³ That meant they had to be white males, at least 21 years old, U.S. citizens, with at least six months of residence in Iowa and 20 days of county residency.⁴⁴

41. Joseph Allen Frank asserts that in many army units, soldiers remained tied to their communities back home and that military units often retained "a communal character." Frank, *With Ballot and Bayonet*, 14-15. To the extent that this typified military life, the Iowa model's attempted replication of civilian elections was not synthetic. But not even Frank argues that the "community" in the field resembled the community back home on Election Day.

42. An Act to amend Title IV of the Revision of 1860 at § 9.

43. *Id.*

44. IOWA CONST. of 1846, art. III, § 1.

As in elections back home, judges and clerks swore oaths, promising among other things to “studiously endeavor to prevent fraud, deceit and abuse” in the election.⁴⁵ To assist the election judges and clerks, the law provided for commissioners to travel from Iowa with necessary election paraphernalia: copies of the law, forms of poll lists and returns, and the text of oaths to administer to judges, clerks, and challenged voters. Commissioners also carried the election returns back home to Iowa.⁴⁶ The commissioners, appointed by the state census board, each covered just one regiment, although the law authorized the governor to supplement that allocation with more commissioners if he thought it necessary. Commissioners had to swear an oath that included the promise to perform their responsibilities “without reference to political preferences,” and, like election judges and clerks, to “studiously endeavor to prevent fraud, deceit and abuse.”⁴⁷

The statute specified the information that each ballot had to include, starting with the voter’s home county and followed by the name of the voter’s preferred candidate for each office. The offices up for election, and the preferred candidates names, could be printed in advance on the ballot (assuming that the party organization found a way to deliver such prepared ballots to the military camps) or written by hand by the voter.⁴⁸

Soldiers announced themselves to the judges and clerks, by name, county of residence, and military attachment. The clerks entered all this information in the poll

45. An Act to amend Title IV of the Revision of 1860 at § 11.

46. *Id.* at §§ 25, 26.

47. *Id.* at §§ 29, 30.

48. *Id.* at § 15. In two states, Minnesota and Connecticut, the soldier-voting laws expressly allowed commissioners to carry ballots to the states’ military encampments, but only if the political parties provided the ballots. (See discussion of those states in the Appendix, *infra*.) Iowa’s statute did not so state.

books.⁴⁹ If no one challenged the voter, the soldier placed his ballot in the ballot box.⁵⁰ If there was a challenge, the judges administered an oath to the soldier testing all elements of eligibility – U.S. citizenship, state and county residency, and age. (As to age, the oath read, “Do you solemnly swear ... that you are twenty one years of age, as you verily believe?”) If the soldier swore the oath, his vote was accepted.⁵¹

At the close of voting, the judges tallied the votes, the clerks double-checked the tally, and the judges entered the final result on the return form. Then the returns, together with the poll books and ballots, were given to a commissioner (or if no commissioner was on hand, placed in the mail “or other safe mode”) for delivery to the Board of Canvassers in Iowa. There the results of the soldier voting were added to the civilian results to determine election winners.

Minnesota

Minnesota enacted its soldier-voting law on September 27, 1862, hardly two weeks after Iowa had acted. Unlike Iowa, Minnesota did not try to open election sites “in the field,” opting instead for a system that allowed soldiers to send completed ballots from their military encampment back home to their election districts in Minnesota. It was the first state to do so.⁵²

49. *Id.* at § 16.

50. *Id.*

51. *Id.*

52. An Act to Enable Citizens of this State, who are or may be Engaged in the Military or Naval Service of the United States, to Vote in the Election Districts where they Reside, at the General Election to be held in the Month of November, 1862 and all Subsequent General Elections, during the Continuance of the Present War, ch. 1, 1862 (extra session) Minn. Laws 13. [hereinafter this law will be referred to as the Minnesota’s Soldier-Voting Law]

The law covered military personnel comprehensively, allowing absentee voting by “all persons ... in the military or naval service,” provided they were eligible electors “when they mustered into the service.”⁵³ This included volunteers, draftees, regulars, and sailors in the navy. The law went a step further, authorizing voting by servicemen who turned 21 during their military service, provided they qualified as residents before enrolling. The law applied comprehensively to elections, as well, authorizing absent soldiers to vote in “all” annual elections, starting in 1862, but only “during the continuance of the present war.”⁵⁴

Commissioners were key to the law’s functioning. The governor, with the advice and consent of the state senate, appointed the commissioners. They were stretched thin, a total of eight commissioners being assigned for all the states where Minnesota servicemen were stationed. By the terms of the law, four commissioners were Democrats and four Republicans.⁵⁵

The law allowed the two political parties to supply their pre-printed ballots to the commissioners, who then provided the ballots to the voting soldiers. The soldier’s completed ballot would get forwarded home to Minnesota only after he first swore an oath, which a commissioner administered in person. The oath touched on the elements of voting eligibility other than race and gender. It covered age (21), residence (four months in Minnesota and ten days in the election district), and U.S. citizenship. Minnesota was unusually generous in its citizenship qualification for suffrage, enfranchising not only

53. Minnesota’s Soldier-Voting Law at § 1.

54. *Id.*

55. *Id.* at § 6.

then-current United States citizens, but also foreigners who had declared their “intention to become such citizen, conformably to the laws of the United States on the subject of naturalization.”⁵⁶ The oath covered both citizenship categories.⁵⁷

The soldier would complete his ballot, place it in an envelope supplied by the commissioner, “seal the same with sealing wax” (also provided by the commissioner), and swear the above oath. The commissioner then signed a form in the nature of a notarization on the back of the sealed envelope. It attested to the name of the soldier, the name of the commissioner, the soldier’s military attachment, the fact that soldier had taken the oath, and the commissioner’s assurance that the soldier’s vote was “free and voluntary.”⁵⁸

The commissioner then mailed the envelope to the soldier’s voting district in Minnesota. The election judges there, after confirming that the soldier named on the envelope was on the district’s voting registry, opened the envelope and added the enclosed ballot to the civilian votes in the ballot box.⁵⁹ This meant that there could be no separate tally of the soldier votes. The same was true of other states adopting this model.⁶⁰

56. MINN. CONST. of 1857, art. VII, § 1. The constitutions of Michigan, Wisconsin, and Kansas similarly allowed prospective citizens to vote. MICH. CONST. of 1831, art. VII, § 1; WIS. CONST. of 1848, art. III, § 1; KAN. CONST. of 1859, art. V, § 1. The Minnesota oath did not address the two categories of Native Americans allowed to vote under this section of the constitution. One was “Persons of mixed white and indian blood who have adopted the customs and habits of civilization.” The other was those Indians found by a court to be “capable of enjoying the rights of citizenship within this State.” Minnesota’s Soldier-Voting Law at § 1.

57. Minnesota’s Soldier-Voting Law at § 3.

58. *Id.*

59. *Id.* at § 5.

60. Benton, *Voting in the Field*, 312.

Like many soldier-voting laws, this one included an argumentative provision in the nature of a legal fiction. Its title pronounced that the voting system set forth in the law would enable absent soldiers “to vote in the Election Districts where they reside....”⁶¹ The statement had a purpose. Soldiers voting under the law filled out their ballots in the field, far from home and arguably in violation of the state constitution’s requirement that the elector must vote “in the election district” where he met a ten-day residency qualification.⁶² In the event of a challenge to the law’s constitutionality, a court would have to decide whether an absentee ballot, prepared in the field but ultimately deposited in the local ballot box, would satisfy the requirement. The statement in the law’s title was meant, in bootstrap fashion, to help cement the argument that it would.

In one form or another, it was an argument waged across the country as states sought to conform the novelty of absentee voting to constitutions framed by men who had never contemplated such a thing. Minnesota’s law never faced a court challenge testing the fit of its soldier-voting law with its constitution. Iowa’s law did, as did many others, among them Ohio’s.

61. Minnesota’s Soldier-Voting Law.

62. MINN. CONST. of 1857, art. IV § 1.

CHAPTER 1

“WORDS BECOME THINGS:” THE EXPERIENCE OF OHIO*

In the 1863 election for probate judge of Wayne County, Ohio, Republican Henry Lehman ran against Democrat John McBride in a tight race. Election Day fell only six months after passage of Ohio’s military suffrage law, which allowed absent soldiers to vote. Of the ballots cast at the polling places in Wayne County’s sixteen townships, McBride won by 183 votes. But Lehman did much better than McBride among the county’s absent soldiers. Lehman got 380 of those votes to only 57 for McBride. That advantage overcame Lehman’s deficit among the civilian voters. So, in accordance with the new law, the county clerk dutifully certified Lehman the winner – and Wayne County’s newest probate judge – by a final tally of 3369 to 3227.

McBride challenged the election results in a lawsuit. His court papers asked the Wayne County Court of Common Pleas to install him as the winner on the grounds that Ohio’s military suffrage law was unconstitutional and that the ballots of the absent soldiers therefore should not count. McBride’s complaint alleged all sorts of constitutional infirmities in the law. The new statute, said his lawyers, violated the proscription against class legislation, since it allowed absent electors to vote only if they were soldiers, thus discriminating against electors who might be absent for other reasons. Moreover, McBride’s attorneys insisted, the legislators in Columbus could not constitutionally adopt laws having effect outside Ohio (all but two of the absent soldiers

* The author borrows this title from his Masters Thesis, entitled, “Words Become Things: Absentee Soldiers and Ohio Election Law,” (Wayne State University, 2003).

voting in the Lehman-McBride election had cast their ballots outside the state), and in fact the Ohio constitution, properly interpreted, allowed electors to cast their ballots only in the town where they resided. The county judge agreed with McBride that the state's 1851 constitution barred the legislature from allowing voting outside Ohio. So he set aside the election results and declared McBride the winner.¹

Now it was Lehman's turn. He appealed to the Ohio Supreme Court, insisting that the new law was indeed constitutional. His lawyers argued that the constitution left it for the legislature to decide where elections could be held and that the soldier-voting law, in creating a way for soldiers to vote away from home, was a legitimate exercise of that legislative authority. In a lengthy opinion, the court majority ruled that the legislature was within its constitutional authority in allowing out-of-state Ohio soldiers to vote. It reversed the lower court ruling and declared Henry Lehman the winner.

Of the five justices on the court, only one took McBride's side of the argument. In a dissenting opinion even lengthier than the majority's, Justice Rufus Ranney traced the meaning of the word "election" and the nature of voting through Ohio's legal and constitutional history. Ranney maintained that by 1851, when the state ratified a revised constitution, "election" had come to mean a public meeting, occurring in an Ohio election district and overseen by election officials who, as district residents, knew the community and its voters well enough to ensure that only qualified electors cast ballots. Framers

1. *Lehman*, 15 Ohio St. at 573, 574. The lower court disallowed only the votes cast outside of Ohio. It allowed the two votes by soldiers absent from their townships but within the state, both of which went to Lehman. The court's distinction between in-state and out-of-state absentee ballots was part of the inspiration for an 1864 amendment to the soldier-voting law. It expressly extended the absentee voting right to servicemen both within and without the state. An Act to Enable the Qualified Voters of this State in the Military Service to Exercise the Right of Suffrage, 61 Ohio Laws 88 (1864).

hadn't expressly defined the word, since there was no need to do so. "Election" was a word of common usage, understood to mean what it had always meant in Ohio law. Now, by allowing voting outside the state and beyond the reach of community-based enforcement, Ranney objected, the soldier-voting law had unconstitutionally redefined the very concept of an election.²

To the consternation of Democrats and the relief of Republicans, Ranney's opinion persuaded none of his four colleagues on the bench. The court ruled 4-1 in Lehman's favor. So it was that Henry Lehman moved triumphantly into his new chambers in Wooster, Ohio, as the duly elected probate judge of Wayne County. Like it or not, Ohioans would live with the novelty of absentee voting for their servicemen for the rest of the war.

Though McBride's lawyers lost their argument, they were right that the 1863 election law broke abruptly from well-settled state law that had anchored elections to Ohio communities and granted control of election sites to local community leaders. The law had long empowered those leaders (usually township trustees) to decide, for example, whether a migrant recently arrived in town met the state constitution's qualifications for suffrage, including particularly whether he qualified as a resident.

This chapter examines the prewar evolution of Ohio election law to demonstrate, as a measure of the 1863 law's novelty, the decades-long stasis in the control that local elites enjoyed over legal voting rights. Community control over elections endured undiminished through the state's growth, maturation, and experience with heavy

2. *Lehman*, 15 Ohio St. at 630.

migration in the first half of the nineteenth century. Throughout that antebellum experience, Ohio's election laws showed a fierce determination to prevent fraudulent voting – to preserve the “purity” of elections, as the statutory language often put it – by entrusting oversight of the election process to community leaders who knew their neighbors and could presumably distinguish between qualified voters and pretenders. All that changed abruptly in 1863 when absent Civil War soldiers briefly gained voting rights away from the watchful eye of township leaders. Just as abruptly, the *status quo ante* returned at the war's conclusion, with community leaders back in charge.

Fitting Soldiers into an Election System Designed for Civilians

Ohio was an early mover among states that experimented with the innovation of absentee voting for soldiers. It was the fifth state to enact a soldier-voting law, passing its statute in early 1863.³ Partisan alignments on the issue had not yet crystalized. The bill in fact received bipartisan support.⁴ When the idea for such a law was first floated in 1862, Republicans had opposed it, fearing that Democrats in high positions in the military would abuse their power in the army to cheat Republican candidates in soldier voting. After Republicans did poorly in the 1862 elections, they concluded that the absence of soldiers from in-state election sites hurt their side more than it hurt Democrats. They therefore joined Democrats in supporting the legislation in 1863.⁵

3. The first four were Missouri, Iowa, Wisconsin, and Minnesota. Benton, *Voting in the Field*, v.

4. The bill passed the Ohio house of representative by a 79-2 vote. *Id.*, 73.

5. Arnold Shankman, “Soldier Votes and Clement L. Vallandigham”.

Ohio's law followed the Iowa model, calling for election sites to open at the encampments where Ohio soldiers served. Under the law, these faraway elections mimicked elections at home, complete with ballot boxes, election judges and clerks, ballot challenges, poll books, and tally sheets.⁶ Election officials in the field forwarded the vote count back to election districts back home, where the soldier results were added to civilian votes to determine winners and losers.

In its coverage, Ohio's law was more comprehensive than most. By an 1864 amendment, it defined "military service" to mean more than just service as army soldiers. The law now explicitly extended the opportunity for absentee voting to men working in the service as "teamsters, wagoners, quartermasters and their employees, and those engaged in the subsistence, transportation and naval departments of said service."⁷ A separate amendment in 1864 enlarged the types of elections in which absent servicemen could vote. The 1863 enactment covered county, state, congressional, or presidential elections. As expanded in 1864, the law also covered municipal elections.⁸ Neither the original 1863 law nor its 1864 amendments excluded draftees or army regulars, as laws in several other states did. Overall, no state had a soldier-voting law broader in its scope, as

6. An Act to Enable Qualified Voters of this State, in the Military Service of this State, or of the United States, to Exercise the Right of Suffrage, 60 Ohio Laws 80 (1863). [Hereafter cited as "Ohio Soldier-Voting Law of 1863"].

7. An Act to Enable the Qualified Voters of this State in the Military Service to Exercise the Right of Suffrage, § 1, 61 Ohio Laws 88, 88 (1864). The same amendment eliminated any lingering doubts about the geographic scope of the law, stipulating that it applied to absent soldiers whether inside the state or beyond Ohio's borders. *Id.* As we shall see, the majority in *Lehman* construed the 1863 act as already having this broader scope. In this sense, the 1864 amendment was redundant. The amendment also limited the law's duration to "the existence of the present rebellion." *Id.*

8. An Act to Enable the Qualified Voters of Cities and Incorporated Villages which are Divided into Election Districts and Wards, of this State, who may be in the Military Service of this State, or of the United States, to Exercise the Right of Suffrage, 61 Ohio Laws 49 (1864).

to both covered personnel and applicable election categories, than Ohio's law as amended.

One reason soldier-voting laws have received relatively little attention among Civil War scholars is that absentee voting results did not alter the outcome of major elections. In his fine article about the Ohio soldier vote in the state's 1863 gubernatorial election, for example, scholar Arnold Shankman shows the insignificance of the soldier vote. In that election, John Brough, the candidate of the Unionist party (an amalgam of Republicans and war Democrats) trounced Democrat Clement Vallandigham, a strident opponent of the war. Brough's margin of victory in the civilian vote (62,920) was larger than the total number of votes cast by absent soldiers (43,765). So, even though Brough won 95% of the soldiers' votes, he didn't need any of them to win.⁹ Similarly, in the 1864 elections, the soldier vote from Ohio, though more than 81% for Lincoln, had a marginal effect. Lincoln, who won the Ohio soldiers' vote 80%-20%, would have carried the state even if he had lost 100% of the state's 51,000 voting soldiers, just as he would have won nationally even without any of the soldier votes cast.¹⁰

But sometimes the soldier vote mattered a great deal, as it certainly did in the contest between Henry Lehman and John McBride in Wayne County, Ohio. The example illuminates the relevance of military suffrage in down-ballot elections. And because the election sparked a contest that went all the way to the Ohio Supreme Court, where the

9. Shankman, "Soldier Votes and Clement L. Vallandigham," 104. Brough's lopsided win among soldiers compares to his more modest, though still solid, margin in the civilian vote, which he won 57.3% to 42.7%. Shankman shows that at least some of Brough's oversized win among soldiers owed to manipulation, coercion, and fraud by pro-administration military commanders.

10. Winther, "The Soldier Vote," 457; McPherson, *Battle Cry of Freedom*, 804-805.

adversarial process of litigation brought sharp focus to the constitutional issues the new law raised, the case also helps illuminate the novelty of the statute.

Before returning to *Lehman v. McBride*, it is useful to situate the new law in the history of Ohio's prewar election laws, starting with a caveat. While elections are artifacts of law, and an understanding of what it meant to have an election begins with a close look at Ohio's election laws before 1863, the similarities and contrasts in statutory wording between the 1863 law and its antecedents reveal only part of the new law's radicalism, albeit the biggest part.¹¹ In many of its provisions governing operational details, however, the military suffrage law achieved a deceptive appearance of harmony with the state's electoral traditions by borrowing much of its wording from earlier Ohio election laws. Nevertheless, the core provision permitting voting elsewhere than in Ohio's cities and townships was dramatically different from earlier prewar laws. The new law also authorized voting in the midst of war. Earlier laws were written for peaceful, civilian venues, under the supervision of civilian leaders. The new law operated in sometimes violent, and always martial, settings controlled by the military hierarchy. Close attention to the operational effects of that contextual difference helps illuminate the 1863 soldier-voting law's dissonance with Ohio's election traditions as defined by earlier legislation.

In enacting election laws, the legislature of course had to operate within a constitutional framework. By the time it adopted its military suffrage law in 1863, the

11. The 1864 law, already discussed, did not substantially alter the voting procedures of the 1863 law, and of course added nothing to its novelty. Because it was the 1863 law that broke with tradition and was the focus of the court case, that law forms the basis of the comparisons drawn in this chapter.

Ohio legislature had functioned under two state constitutions, the first drafted in 1802 (the year before Ohio entered the union) and the second nearly half a century later, in 1851. In their treatment of elections and suffrage, the two constitutions differed only in minor ways, most of which had little or no bearing on the dispute in *Lehman v. McBride*. Both required voting “by ballot,” and both restricted suffrage to substantially the same category of people: 21-year-old white men with at least a year of residency in Ohio.¹² The 1851 constitution deleted a taxpaying qualification of the 1802 version, and while the 1802 constitution left it for local election judges to decide which men were “residents,” the 1851 version authorized (but did not require) the legislature to specify durational local residency requirements.¹³ More significantly, the two constitutions differed in the way they addressed the matter of where election balloting was to take place. In the section that established voting qualifications, the 1802 constitution specified, “no person shall be entitled to vote except in the county or district in which he shall actually reside at the time of the election.”¹⁴ The 1851 constitution omitted those words, a change that defenders of the 1863 soldier-voting law pointed to as evidence that the new constitution no longer fixed the place of voting.

In the *Lehman* case, the justices would debate the significance of that omission, as we shall see later in this chapter. But by 1863, when the legislature passed the soldier-voting law, a long succession of election laws enacted under both constitutions had firmly

12. OHIO CONST. of 1802, art. IV, §§ 1, 2; OHIO CONST. of 1851, art. V, §§ 1, 2.

13. OHIO CONST. of 1851, art. V, § 1. Ohio’s 1851 constitution was unusual in its delegation to the legislature of authority to set the durational minimum for local the local residency qualification. Neither side in *Lehman* disputed the suffrage qualifications applicable to absent soldiers, including residency requirements.

14. OHIO CONST. of 1802, art. IV, § 1.

established what it meant to have an election in Ohio. In remarkably consistent terms, and with subtle shifts over time, these laws described the ornate stagecraft of public elections, and the strict choreography that voters and election officials followed in casting, challenging, counting, and communicating the votes. The 1863 soldier-voting law tried self-consciously to replicate these familiar steps in as many ways as possible for Ohio's far away troops. War and geography, however, made perfect replication impossible.

The 1863 law's starkest departure from previous law related, of course, to the site of voting. Before 1863, Ohio law had rooted elections inseparably to locations in Ohio. An election had always been a community event, and election laws had consistently provided that voters could cast their ballots only in the community where they resided. Each township constituted an election district, and the law called for voters to gather at a specified location in their township to conduct their elections. The state's first election law, adopted in 1803, instructed each county court of common pleas "to name a certain house" in each of the county's townships where voters "shall meet" to conduct their election.¹⁵ By 1809, the authority to designate the election site had shifted from the county court to each township's own trustees, but elections remained occasions at which qualified citizens would "meet and vote" somewhere in the township.¹⁶ The 1824 election law spoke of elections in the same terms, as an occasion to "meet and vote."¹⁷ The verb "meet" appears less frequently in the election law in 1831, but the sense of an election as

15. An Act to Regulate Elections, § 2, 1 Ohio Laws 76, 76 (1803).

16. An Act to Regulate Elections, § 3, 8 Ohio Laws 550, 551 (1809).

17. An Act to Regulate Elections, § 3, 22 Ohio Laws 32, 32 (1824).

a township meeting remained evident. The law, as it always had, still spoke of electors voting “at” elections.¹⁸

In these years, as elections became more protracted affairs with more participants, they became less like traditional meetings.¹⁹ But they still constituted public gatherings. The 1841 election law omitted the verb “meet,” but still referred to elections as events at which voters “assembled” in the community. As late as 1859, the legislature spoke of elections as events that people “attended.”²⁰ Over the entire span of nearly six decades between Ohio’s statehood and the war, state law consistently connected elections and voting to location, and the location was always at a gathering place within the community.

Participation in these public election events was limited to qualified voters residing in the township – men known to each other, with interests and feelings tied to the community, and presumably well positioned to know whether other prospective electors actually qualified to vote.²¹ Tethering elections to the place of voters’ residence thereby served a policing function, which remained an integral element of election laws throughout the six decades leading up to the war. The 1841 law, in terms virtually

18. An Act to Regulate Elections, § 11, 29 Ohio Laws 44, 46 (1831). The law used the verb “meet” in describing elections to fill vacancies (§ 38) as well as elections in newly formed counties (§ 39).

19. An 1837 statute hinted at the shifting nature of election “meetings” by relieving election judges of the duty to finish the vote tally on Election Day. Amendatory of ‘An act to regulate elections,’ passed February 18, 1831, 35 Ohio Laws 56 (1837). For a description of how antebellum elections operated in practice, see Kenneth Winkle, “Ohio’s Informal Polling Place: Nineteenth-Century Suffrage in Theory and Practice,” in *The Pursuit of Public Power: Political Culture in Ohio, 1787-1861*, ed. Jeffrey Brown and Andrew Cayton (Kent, OH: Kent State University Press, 1994), 169-184.

20. An Act to Preserve the Purity of Elections, § 19, 39 Ohio Laws 13, 18 (1841). An Act to Amend Section Seven of an Act to Regulate the Election of State and County Officers, passed May 3, 1852, § 1, 50 Ohio Laws 311, 311 (1852).

21. For the justification of early nineteenth century residency requirements, see Keyssar, *The Right to Vote*, 33; and Kruman, “Legislatures and Political Rights,” 3:1235-1253.

identical to the 1831 law before it and the 1824, 1809 and 1803 laws before that, provided that “no elector shall vote except in the township or ward in which he resides.”²² The 1841 provision to this effect remained in force up to the 1863 legislative session. It clearly barred voting by anyone – soldier or civilian – away from his hometown on Election Day. The whole purpose of the 1863 soldier suffrage law was to change that restriction for absent Civil War soldiers. Constituting a major step away from a long tradition rooted in all preceding election laws, the change was radical.

The new law allowed each Ohio soldier in the field (assuming he qualified as an eligible voter) to cast his ballot at one of three remote locations. First, the law required a poll to open at the quarters of the commanding officer of the military company in which Ohio soldiers served.²³ All soldiers attached to that company who were within two miles of that location could vote there and only there. Second, servicemen not attached to a company and those more than two miles from a company commander’s quarters could vote at the polls of any company that might be “most convenient to them.” This group included not only artillerymen (organized by batteries, not companies), but also infantry officers with command over units larger than a company, such as regimental, brigade, or divisional commanders. Thus the Ohio colonel who commanded a regiment, and his

22. An Act to Regulate Elections of 1803, § 13; An Act to Regulate Elections of 1809, § 10; An Act to Regulate Elections of 1824; Ohio enacted a second election law in 1824: An Act to Regulate Elections in the township of Cincinnati, § 5, 23 Ohio Laws 14, 15 (1824). This law established each of Cincinnati’s four wards as an election district. The act states the residency restriction as follows: “That the qualified voters of said township or city [i.e., Cincinnati] shall vote in the respective ward in which they reside, and not elsewhere.” Throughout the period covered by this chapter, references to “wards” in Ohio election law appear to apply only to Cincinnati.; An Act to Regulate Elections, § 9, 29 Ohio Laws 44, 45 (1831); An Act to Preserve the Purity of Elections, § 3, 39 Ohio Laws 13, 15 (1841). References to these statutes in subsequent footnotes are abbreviated as “Ohio election law [year],” followed by the pertinent section number.

23. Companies were organizational units in both the infantry and the cavalry, but not the artillery or navy.

staff, could drop in to vote at the quarters of any of the ten or so companies in his command, as could the brigadier general above him (commanding perhaps five regiments), the divisional general above him (typically in charge of three brigades), and up to the corps and army commanders above them, each with a staff of aides. Third, if twenty or more Ohio servicemen found themselves in a place more than two miles from any company commander's quarters, they could create their own polling place on the spot.²⁴

By 1863, Ohio infantrymen and cavalry troopers served in about 140 regiments, each nominally with ten companies, scattered across many states, with the heaviest concentrations in Mississippi, Tennessee, and Virginia. That meant potentially at least 1400 polling stations outside Ohio, not counting those that might be set up as needed by detached units of twenty or more. More than fifty additional infantry regiments – 500 more companies – were added by the time of the 1864 election.²⁵ The total number of potential voting sites thus created for Ohio soldiers in the field exceeded the number of election sites for civilians back home.²⁶

Having established this critical difference in the permissible voting site, the new law required the Ohio servicemen, gathered at the makeshift polling stations set up for them in the field, to follow most of the same ritualized voting procedures that election

24. Ohio soldier-voting law (1863), § 2.

25. "The Civil War Archives," <http://www.civilwararchive.com/unionoh.htm> (accessed July 15, 2013). For information on the organization of Union forces, see McPherson, *Battle Cry of Freedom*, 322-327.

26. This conclusion is derived from the conservative assumption that Ohio had no more townships in 1863 than it does today. According to its Secretary of State, as of 2011 Ohio had 1309 townships, a number probably greater than the total in the Civil War. Ohio Secretary of State, *Municipal roster for 2010-2011*, accessed July 15, 2103, www.sos.state.oh.us/sos/upload/publications/election/muniroster2010_2011/Townships.csv.

laws had long imposed on polling sites for civilians. As in Ohio's townships and wards, three election judges presided over the process at each voting site for soldiers, wielding nearly absolute power over the election. Whereas election judges back home were usually township trustees, in the field they were soldiers, elected by the Ohio soldiers gathered at the site. As at home, two election clerks served under the election judges. Judges and clerks alike swore an oath, including the promise "to studiously endeavor to prevent fraud, deceit, or abuse" in conducting the election.²⁷

The clerks' job included recording the voters' names, and the tally of votes given for each office, in "poll books." These were in the nature of files with record-keeping formats that conformed to a template printed in the statutes. The two election clerks had to keep duplicate copies of the poll books, recording everything identically in both.

Soldiers and civilians alike voted "by ballot." The election laws barely addressed the form of the ballot, requiring only that it be a "single piece of paper, on which shall be written or printed" the names of the preferred candidates.²⁸ In most elections, voters could fashion their own ballots, but more typically they used pre-printed ballots provided to them by the political parties or published in partisan newspapers before the election.²⁹ A few soldier-voting laws made provision for both political parties to distribute their ballots to soldiers through the agency of "commissioners" who traveled to army posts to help implement the laws, but Ohio's law did not.³⁰

27. Ohio Soldier-Voting law (1863), § 5.

28. Ohio election law (1803), § 13; Ohio election law (1809), §10; Ohio election law (1831), § 9. The soldier-voting law said nothing about the form of the ballot.

29. Keyssar, *The Right to Vote*, 28; Silbey, *The American Political Nation*, 59.

30. Minnesota's law is an example. An Act to Enable Citizens of this State, who are or may be Engaged in the Military or Naval Service of the United States, to Vote in the Election Districts where they Reside, at

The 1863 law's replication of earlier election law provisions about ballots masked another of many profound practical differences between the two election contexts. By the mid-nineteenth century, the major political parties had achieved modern levels of organizational efficiency and were adept at supplying the party faithful and prospective voters with the party's ballots. Organizational prowess in ballot distribution was a key to electoral success, but neither party had experience distributing ballots to absent voters. As the war progressed, access to ballots became increasingly problematic for absent soldiers, especially if the soldier was a Democrat.³¹

Once he had either prepared his own ballot or obtained one pre-printed, the voter – whether civilian or soldier – handed it to one of the election judges. The civilian election laws had always insisted that the voter do so “openly and in full view,” a requirement eliminated in the 1863 law.³² Upon receiving the ballot, and while still holding it, the election judge publicly announced the voter's name.³³ At this point, the prospective voter was subject to challenge by any other voter present or any of the election judges. When someone challenged the voter's eligibility, it became the election judges' duty to conduct an immediate and formal inquiry. For civilian elections, this meant administering an oath, interrogating the voter, and finally deciding whether to

the General Election to be held in the Month of November, 1862 and all Subsequent General Elections, during the Continuance of the Present War, ch. 1, §6, 1862 (extra session) Minn. Laws 13, 16.

31. Frank, *With Ballot and Bayonet*, 140; Shankman, “Soldier Votes and Clement L. Vallandigham,” 99. Chapter 5 elaborates on this difficulty for Democrats.

32. Ohio election law (1803), § 13; Ohio election law (1809), §10; Ohio election law (1824), § 10; Ohio election law (1831), § 9.

33. Ohio election law (1803), § 13; Ohio election law (1809), § 10; Ohio election law (1824), § 10; Ohio election law (1831), § 9.

accept or reject the ballot.³⁴ The soldier suffrage law did not prescribe any procedure for handling a challenge, stating only that before accepting the ballot, the election judge had to “be satisfied” that the voter was qualified.³⁵ For all practical purposes, the election judges’ decision about the challenge was final. No mechanism existed, either for soldiers in the field or civilians back home, for immediate appeal. Review happened, if at all, only in an election “contest,” held in an Ohio court and occurring days or even weeks later, after an election winner was declared.³⁶

If no one challenged the voter, or if the judges satisfied themselves that a challenged voter was indeed eligible, the election judges accepted the ballot. A judge placed the accepted ballot in a locked ballot box, and the election clerks entered the name of the voter in the duplicate poll books.³⁷ Voters, judges, and the clerks continued this process for the six or eight hours that the polls stayed open.³⁸ At the close of the voting, with the ballot box still locked, the clerks counted the names they had entered in the duplicate poll books and noted the total. The judges then signed the poll books and turned to the task of counting the votes.³⁹

34. Ohio election law (1803), § 15; Ohio election law (1809), § 12; Ohio election law (1824), § 12; Ohio election (1831), § 10.

35. Ohio Soldier-Voting law (1863), § 8.

36. Ohio election law (1831), § 43. Neither the 1841 election law nor the soldier-voting law changed this procedure.

37. Ohio election law (1803), § 14; Ohio election law (1809), § 11; Ohio election law (1824), § 11; Ohio election (1831), § 10; Ohio soldier-voting law (1863), § 8.

38. Under the 1831 law, the polls in Ohio townships opened between 8:00 AM and 10:00 AM and closed at 4:00 PM, except in Cincinnati, where they closed at 6:00 PM. Ohio election law (1831), § 5. The soldier-voting law opened the polls at 10:00 AM and split the difference in the civilian closing times, closing the polls for soldiers at 5:00 PM. Ohio soldier-voting law (1863), § 3.

39. Ohio election law (1803), § 16; Ohio election law (1809), § 13; Ohio election law (1824), § 13; Ohio election (1831), § 13; Ohio soldier-voting law (1863), §§ 8-9.

Vote counting followed an elaborate and labor-intensive process far better suited to placid civilian settings than to hectic war zones, but the election laws described them almost identically for both settings. One election judge opened the ballot box, began removing the ballots one at a time, and publicly announced the votes shown on each one. Then he handed the ballot to the second judge for his examination, and he in turn passed it to the third judge, who finally strung the ballot on a thread.⁴⁰ All the while, the election clerks entered each vote in the duplicate poll books. After processing all the ballots in this fashion, the clerks tallied the votes, entered the tallies in the poll books, then sealed and forwarded one of the poll books to the clerk of the county court of common pleas.⁴¹ The 1863 law required all these tallying and bookkeeping steps in terms virtually identical to the provisions of law governing elections in Ohio.

By requiring so many of the time-honored election procedures that Ohio law had provided since 1803, the soldier-voting law sought to do more than just give the absent serviceman a way to cast his ballot. The 1863 law tried to recreate, in each of these 1500 or so remote locations where soldiers might find themselves on Election Day, full-blown Ohio elections. In statutory text, the transplanted events resembled elections that had grown familiar to Ohioans for nearly six decades. But the remote settings contemplated for these recreated Ohio elections, and the differences between a temporary community of absent soldiers and a permanent community of civilians back home, made perfect replication of the home-front election impossible in the field. The constitutional issues

40. The threading of ballots was a consistent feature of Ohio election laws, appearing in the 1803 election law, § 17, and the 1809 election law (§ 14). The 1831 election law preserved it (§ 14), as did the 1863 soldier-voting law (§ 10).

41. Ohio election law (1803), § 23; Ohio election law (1809), § 19; Ohio election law (1824), § 21; Ohio election (1831), § 21; Ohio soldier-voting law (1863), §§ 8-9.

that divided the *Lehman* court grew out of that impossibility; the law could not graft all the features of an Ohio election onto an election held far outside the state's borders, sometimes in zones of active combat.

Some differences between the elections that soldiers experienced and the election process for civilians would hardly have mattered to any voters. In the townships back home, for example, the township clerk kept the second poll book – the one not forwarded to the county courthouse – “for the use of persons who may choose to inspect it.”⁴² For soldier voting in the field, election officials forwarded the second poll book to the secretary of state, where the county clerk could obtain it on demand.⁴³ The ballots cast in the field were mailed to the county court along with the first poll book.⁴⁴ But the state election laws had never directed election officials to do anything at all with ballots cast in Ohio.

In other ways, however, elections in the field differed substantially from elections held back home. Soldiers could experience only a pale imitation of the cultural phenomenon of an election among civilians. Scholars of nineteenth century American politics such as Jean Baker, Joel Silbey, Glenn Altschuler, Stuart Blumin, and Richard Bensen have vividly described the remarkable spectacle of Election Day. By the mid-nineteenth century, an election was as much a social as a political event. Baker portrays elections of this era as “secular holy days, a time when daily routines were interrupted,

42. Ohio election law (1831), § 22.

43. Ohio Soldier-Voting Law (1863), § 16.

44. *Id.*

work was suspended, and communities observed a public festival.”⁴⁵ On a typical Election Day in civilian America, according to Silbey,

... there was intense excitement and an exuberant, busy atmosphere. In addition to the voters streaming in and out, and the party workers and election officials who had to be there, large crowds bustled around the polling places: wives, children, and other family members, as well as vendors, entertainers, and simple gawkers. Elections were special events. Amid the continuous electioneering and political arguments, picnic, drinking, and boisterous celebration went on throughout each polling day.⁴⁶

Beyond listing all the ingredients and steps to follow in the statutory recipe for making an election, Ohio election law had never defined the term “election.” Neither did the state’s constitution. It was a word that constitutional framers and legislators believed had a commonly understood meaning, making definition unnecessary in drafting. Of course no amount of care in legislative drafting could transplant to the war theater the familiar features of the civilians’ “secular holy day.” Wives, children, and entertainers could not materialize at the typical site of soldier voting in the field. If Election Day fell during one of the many lulls in fighting, when armies rested or regrouped during interludes of peace between engagements, a degree of festivity might have crept into the election process for servicemen; drinking and carousing were not alien to the soldiers’ experience. But how completely foreign to civilian sensibilities the soldiers’ voting experience must have been when Election Day fell during battle. For fighting soldiers, an election was no picnic. Consider the voting experience of a fervently Republican Ohio soldier whose unit found itself engaged in combat on election day in October 1864:

45. Baker, *Affairs of Party*, 271. See also, Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* (New York: Cambridge University Press, 2004).

46. Silbey, *The American Political Nation*, 143. See also Altschuler and Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century*, 69-79.

The election judges and clerks moved along our lines in ambulances. It was a day of constant marching and fighting. At every halt of a few minutes' duration balloting progressed vigorously, votes being more than once sandwiched in between volleys of musketry scarcely fifteen minutes apart. The rebels at every charge advanced with vociferous cheers for McClellan to which our boys reacted with cheers for Lincoln and solid arguments with their Enfields. It produced a marked effect upon our soldiers. What wonder that they voted almost unanimously for the Union ticket? How could they fight rebels one moment, hazarding life and limb for the dear old government, and the next undo all they were doing by voting for Treason's cowardly allies at the rear.⁴⁷

Ohioans contemplating soldier voting in 1863 – a year earlier than this Ohio's soldier's 1864 experience – had already developed a well-informed understanding that voting soldiers would experience an election environment starkly different from what civilians back home had come to expect on Election Day. By April 1863 when the Ohio legislature enacted the soldier-voting law, the country had seen photographs of the grotesque scenes of battlefield carnage at Antietam. They had read newspaper accounts of Bull Run, Shiloh, Fredericksburg, and Murfreesboro, and countless smaller engagements. They had read first hand accounts in letters from servicemen at the front and heard the stories in person from returning soldiers. They surely knew that for many soldiers, elections would not resemble the familiar home front spectacle. If it troubled lawmakers that they were inventing something radically different from the “secular holy day,” they obviously did not let their misgivings stand in the way legislatively.

The soldier-voting law of 1863, however, did create election novelties with more obviously legal significance. For example, the Ohio soldiers who assembled to vote at the makeshift polling stations in the field were from any number of Ohio's eighty-seven

47. William Lewis Young, “Soldier Voting in Ohio During the Civil War” (master's thesis, Ohio State University, 1948), 70. Young's treatise does not examine the legal or constitutional aspects of soldier voting, but it serves as an excellent source on the impact of soldier voting on Ohio politics during the Civil War.

counties. Even on peaceful days, this meant coping with daunting logistical challenges unknown to voters and election officials at civilian polling stations. The soldier-voting law required the election clerks and judges to keep separate sets of poll books, in duplicate, for the voters of each Ohio county and to separately thread the ballots for each county. Back home, where only electors from the township could vote, only one pair of poll books and one thread of ballots were needed.⁴⁸ Even that could pose logistical challenges. An historian of Ohio elections describes the difficulties civilian election clerks had working, “sometimes feverishly,” to keep up with the pace of voting and maintaining accuracy in the two poll books.⁴⁹ When voting occurred for soldiers at the battle front, any unit of which could include men from several counties, one wonders how, in the heat of combat, election officials jostling about in rolling wagons could have managed to keep accurate records in the different duplicate sets of poll books, segregating ballots from different counties on different threads, all the while dodging bullets.

Then there was the problem of notice. How did absent soldiers know when and where to vote? For elections in Ohio, the law required the county sheriff, fifteen days in advance, to publish a “proclamation” announcing the date of the election and the offices at stake. He also had to post a copy of the proclamation at the election site in each

48. Ohio Soldier-Voting Law (1863), § 7; Ohio election law (1831), § 10.

49. Winkle, “Ohio’s Informal Polling Place,” 169-184, 173.

township and publish a copy of it in a county newspaper, if the county had a newspaper.⁵⁰

The soldier-voting law made no provision at all for advance notice.

The 1863 law also departed from the procedures civilian election judges followed when deciding the eligibility of a challenged voter. Ohio law had always vested election judges with wide discretion in resolving challenges to a voter's eligibility. The 1803 election law granted election judges "power to examine [the prospective voter] on oath or affirmation, touching his qualification as an elector," and authorized him to accept the ballot if he was "satisfied that the elector is legally entitled to vote."⁵¹ The 1809 law expanded the election judges' authority by allowing them to swear in and interrogate "disinterested witnesses" during the challenge process.⁵² The 1824 and 1831 laws made no substantial changes in the election judges' duties or responsibilities in resolving challenges.⁵³

The election law of 1841 left almost all provisions of the 1831 law intact, but it overhauled the procedures governing challenges and added stiff new penalties for violating election rules. The new law equipped township officials with powerful tools for disciplining the voting process, and more insistently than ever before it required those officials to use the tools. Entitled "An Act to preserve the purity of elections," this anti-fraud statute particularly targeted voters who cast ballots in the wrong township or in more than one township. Legislators designed the law to impose greater uniformity and

50. Ohio election law (1831), § 4. Before 1831, the laws required only the proclamation; there was no mention of newspaper notice. Ohio election law (1803), § 5; Ohio election law (1809), § 5; Ohio election law (1824), § 5.

51. Ohio election law (1803), §§ 14, 15.

52. Ohio election law (1809), § 12.

53. Ohio election law (1824), § 12; Ohio election law (1831), § 12.

tighter discipline on the enforcement of the residency qualification for suffrage. While all earlier election laws had straightforwardly required electors to vote “only in the township, or ward, in which he resides,” statutory penalties for voting in more than one township had not existed in the early Ohio election laws.⁵⁴ The 1803 law imposed up to \$500 in penalties on candidates who gave or promised “any meat, drink or any other reward” in exchange for votes and punished voters who accepted such inducements with up to a \$100 penalty, but it imposed no penalty for violating the residency restrictions.⁵⁵ The 1824 law preserved the penalty for giving inducements, deleted the penalty for accepting them, and added a \$100 fine for tricking an illiterate voter into casting a pre-printed ballot “contrary to his inclination.”⁵⁶ It imposed no penalty for voting outside the township of residence.

The 1831 law was the first to penalize “voting in more than one township or ward at the same election,” imposing a \$50 penalty.⁵⁷ This coincided with Ohio’s first statutory accommodation of absent electors. If a voter’s “actual employment in the business of his trade, occupation or profession” took him temporarily to another township in the same county, he could vote there.⁵⁸ But the 1841 law, in its assault on voter fraud, ended this modest experiment in voting outside one’s own township and added a flurry of new strictures and far harsher penalties focused mostly residency fraud. It started by tightening the familiar provision of all earlier laws that “no elector shall vote except in

54. *Supra*, note 1.

55. Ohio election law (1803), § 29.

56. Ohio election law (1824), § 29. In 1839, the legislature added penalties for wagering on elections, imposing a fine equal to “the amount hazarded” in the wager. An Act to Punish Betting on Elections, and for other Purposes, 37 Ohio Laws 79 (1839).

57. Ohio election law (1831), § 11.

58. *Id.* at § 9.

the township in which he resides.”⁵⁹ It then painstakingly defined residency, addressing nine different scenarios that had made residency debatable before 1841, including a voter’s temporary absence from the township (he retained his residency), his temporary presence in a township (it did not count as residency), and his conducting business in one town while keeping his family in another (his family’s place of residence controlled).

Among the 1841 law’s innovations for “preserving the purity of elections” were precise, step-by-step instructions for election judges to follow when interrogating a challenged voter. The new law scripted the oath to administer when swearing the voter before interrogation. It prescribed exact questions to ask for each category of challenge – citizenship, residency, and age. It listed two questions to pose when someone challenged the prospective voter’s U.S. citizenship (and follow-up questions when the voter claimed to be a naturalized citizen, including a demand that he produce a certificate of naturalization), five questions to test Ohio residency, four for challenges to his county residency, and so forth. For a challenge to the prospective voter’s age, election judges had to ask the young soldier, “are you twenty one years of age to the best of your knowledge and belief?” Only for challenges based on the voter’s race was the 1841 law silent on the form of questioning.⁶⁰

In one sense, these tightly drawn interrogation requirements diminished election judges’ discretion as gatekeepers – a rare thing in prewar election law – by dictating the precise questions to ask challenged voters. But it did so not in a way that protected

59. Conforming that wording more precisely to the language of the 1802 constitution, the 1841 law added the qualifying adverb “actually,” so that now a voter could cast his ballot only “in the township or ward where he *actually* resides.” Ohio election law (1841), § 3 (emphasis added).

60. *Id.* at § 13. The law was silent about challenges based on race, suggesting that such challenges were rare before 1841.

migrants whose ballots the election judges had unjustly rejected in the past or diminished the power of local officials to block unwelcome voters. The purpose was the opposite: to impose discipline on election judges who, the legislature believed, had neglected their duties in the past by allowing unqualified migrants to vote. The statute, then, was an anti-migrant election law meant to discourage careless or corrupt election judges from exercising their gatekeeping obligation to bar unqualified migrants from voting.⁶¹

The law still vested all power in the election judges, who still had the final word on challenged votes. They could reject a ballot even after the prospective elector personally swore that he met the eligibility criterion under challenge, “if they [the election judges] shall be satisfied,” from the evidence they chose to hear, that the voter was unqualified.⁶²

It was a tough law, meting out stiff penalties against fraud, especially residency fraud. Four of the penalty provisions specifically targeted non-residents: six months in the penitentiary for voting in a township “in which [the voter] does not actually reside;” three years of “hard labor” for voting in a county and “not being a resident thereof;” five years at hard labor for voting by “a resident of another state;” and five years, also at hard

61. Not surprisingly, this anti-migrant tilt arose in a political context. Whigs had won the elections of 1840 and dominated the Ohio legislature the following year. As a rule, Whigs before 1850 looked with a jaundiced eye on suffrage expansion, even for white males. Democrats, in contrast, favored easier suffrage for immigrants and other lower class white men, among whom Democrats outpolled Whigs in most elections. The 1841 election law bears all the hallmarks of Whig skepticism about enlarging the electorate and Whig belief that Democrats corrupted the election process. Rush Welter, *The Mind of America, 1820-1860* (New York: Columbia University Press, 1975), 42; Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860* (Princeton: Princeton University Press, 1960), 261; Winkle, *The Politics of Community*, 77.

62. Ohio election law (1841), § 16.

labor, for voting more than once “at the same election.”⁶³ Persons aiding or abetting a non-resident’s voting also faced up to five years at hard labor.⁶⁴ Justice Rufus Ranney did not exaggerate when he described the law, in his dissenting opinion in the *Lehman* case, as “perhaps one of the most perfect and stringent for the prevention of fraud at elections to be found in any state.”⁶⁵ It certainly imposed far harsher maximum penalties than any earlier Ohio election law ever had.⁶⁶

Moreover the penalties tilted the balance of power away from aspiring voters. No provision of the statute punished election judges for rejecting the ballot of a voter they knew to be qualified, but the law subjected them to punishment for up to five years “at hard labor” for accepting the ballot of a voter they knew to be unqualified.⁶⁷ This imbalance would encourage an election judge in a close case to play it safe by rejecting the voter’s claim of residency. And the law imposed an affirmative duty on election judges to challenge voters they knew “or suspect[ed]” to be unqualified, again on penalty of up to five years at hard labor.⁶⁸ The law directed its muscle disproportionately at voting by unqualified migrants. In contrast to the severe penalties a non-resident faced,

63. *Id.* at §§ 4, 5, 6, and 7. The stated terms of confinement were, in each case, maximum penalties for the offense described.

64. *Id.* at § 10.

65. *Lehman*, 15 Ohio St. at 627. Ranney believed the 1841 law shed light on the intent of the framers of Ohio’s 1851 constitution, since none of those framers (and Ranney had been one of them) expressed dissatisfaction with it. Neither the majority opinion nor *Lehman*’s attorneys disputed Ranney’s characterization of the 1841 law as having been intended to target fraud.

66. For a differing view, arguing that the 1841 law was part of a trend toward relaxed residency qualifications and was in fact more lenient than its antecedents, see Winkle, *The Politics of Community*, 62. Winkle’s theory of “volitional residence” posits that migrants in the decades before the Civil War gained ever greater autonomy in determining their own residence, and to that extent their eligibility to vote. It is a theory at odds with the arguments and supporting evidence set forth in this chapter.

67. An Act to Preserve the Purity of Elections, § 24, 39 Ohio Laws 13, 18 (1841).

68. *Id.* at §§ 18, 24.

the maximum punishment for underage voting or voting by a convicted felon was six months in the penitentiary.⁶⁹

In 1857, the legislature amended some provisions of the 1841 act without altering its decidedly anti-fraud spirit or diminishing the authority of election judges to superintend the process. The 1857 law imposed Ohio's first specific durational requirements both for county and township residency, requiring 30 days of residency in the county and 20 days in the township. It also made corresponding adjustments in the oaths for testing challenged voters' residency and imposed the same penalties as the 1841 act for violations of the now precisely stated residency rules.⁷⁰ Election judges enjoyed as tight a grip over the proceedings as under the 1841 law, and they still functioned under a mandate to enforce suffrage qualifications strictly, under risk of harsh penalty for waiving them. Fraud prevention remained their paramount legal responsibility.

In contrast, the 1863 soldier voting law gave virtually no guidance to election judges faced with a challenge. In much the same terms as earlier election laws, it provided merely that the election judges in the field should accept the soldier's ballot if "the judge be satisfied" that the voter met the state's eligibility requirements, but it provided no instruction about how the election judge might pursue his doubts.⁷¹ The 1863 law left intact the anti-fraud provisions of the 1857 law for voting within Ohio,

69. *Id.* at § 8.

70. The 1851 constitution addressed voters' qualification in Article V, § 1, which provided as follows: "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, *and of the county, township, or ward, in which he resides, such time as may be provided by law*, shall have the qualifications of an elector, and be entitled to vote at all elections." (emphasis added to highlight the new legislative authority to impose durational residency requirements); An Act to Further to Amend the Act Entitled 'An Act to Preserve the Purity of Elections,' passed March 20, 1841, 54 Ohio Laws 136 (1857).

71. Ohio Soldier-Voting Law (1863), § 8.

explicitly stating that in elections set up for soldiers away from their home townships but still within the borders of Ohio, “all the provisions of the general law in relation to fraud at elections and the punishment thereof” applied.⁷² It did not say this about elections set up for Ohio soldiers in other states. This created the anomaly of tight statutory discipline in resolving election challenges in Ohio, but relative laxity over challenges in the field.

As the 1841 and 1857 statutes made clear, the system relied heavily on election judges to preserve the “purity of elections.” Who were these critically important people? For elections in Ohio, the law assigned the posts to the “township trustees,” or in the case of Cincinnati to city councilmen. Every April, each Ohio township elected local officers, including appraisers, a treasurer, two “fence viewers,” two overseers of the poor, a township clerk, and three township trustees.⁷³ The trustees stood atop the local governmental hierarchy with authority to designate how many constables and highway supervisors the township would have and power to impose taxes on local property.⁷⁴ They were generally older and richer than average voters and more likely to be merchants and professionals instead of farmers and laborers. As the town’s most prestigious politicians, they knew and were known by the local voters.⁷⁵ Who better to safeguard the “purity” of elections by identifying the town’s legitimate voters and weeding out the pretenders? From 1809 to the Civil War, election laws always assigned the role of election judges to these trustees. The township clerk – also elected annually – was

72. *Id.* at § 19.

73. An Act Providing for the Incorporation of Townships, § 7, 22 Ohio Laws 412 (1824). In 1831, Ohio abolished the position of overseer of the poor and assigned the duties of the position to the township trustees. An Act to Amend the Act to Provide for the Incorporation of Townships, §§ 1, 2, 31 Ohio Laws 18, 19 (1832).

74. An Act Providing for the Incorporation of Townships (1824) at §§ 10, 11, 12.

75. Winkle, “Ohio’s Informal Polling Place,” 174.

automatically assigned as one of the two election clerks, and the three election judges selected the other.⁷⁶

The election laws recognized that the township trustees and the township clerk could not always perform their election duties. They might be absent or they might themselves run for an office. When that happened, the law provided for replacements. The voters on hand when the polls opened would elect from among themselves, *vive voce*, the necessary substitutes. Upon their selection, and before the rest of the election process proceeded, these substitute election judges or clerks took an oath – a step not required of the township trustees or the township clerk – to perform their election duties as best they could and to “studiously endeavor to prevent fraud, deceit, or abuse.”⁷⁷ But because voters chose the substitutes from among the community’s eligible voters, the policing function remained in local hands. Whether the election judge was a town trustee or a substitute, he shared his township residency with the qualified electors and brought the advantage of familiarity with his neighbors to the task of refereeing challenged ballots.

The 1863 soldier-voting law could not replicate this critical feature of civilian elections. The polling sites in the field could never draw on the services of township trustees or clerks, who of course performed their duties back home. More fundamentally, the military polling stations did not draw Ohioans from just one township. Although

76. Ohio election law (1831), § 6; Ohio election law (1824), § 7; Ohio election law (1809), § 7. The 1803 election law provided that the qualified voters present when the polls opened should elect the three election judges, *vive voce*. Ohio election law (1803), § 7.

77. Ohio election law (1831), § 7; Ohio election law (1824), § 8. The 1809 Ohio election law required the oath even when the township trustees and the township clerk served as the election officer. Ohio election law (1809), § 9.

Union infantry companies typically consisted of men from the same town, or at least the same county,⁷⁸ the identity between a company and a single township was never perfect. The Conscription Act of 1863 permitted a drafted man to hire a substitute to fill his place. While conscripts represented a relatively small percentage of the Union's overall force, they often took advantage of the substitution opportunity.⁷⁹ These substitutes, according to James McPherson, were likely to be eighteen and nineteen year olds and immigrants.⁸⁰ Neither category was eligible to vote in Ohio, but even if the draftee found a substitute from Ohio who did qualify as an elector, there was no telling what part of Ohio he might come from. Moreover, Ohio soldiers unattached to the company could still vote at the company's polling station, no matter where they resided in Ohio, if they were officers above the rank of company commander, or if they were artillerymen, or if election day found them more than two miles away from their own company's headquarters. In each of these situations, Ohioans from multiple townships, and probably multiple counties, would mix at the same polling place. And the law's allowance for any group of twenty Ohioans to set up their own election site when no Ohio company was within two miles further assured that residential homogeneity among Ohio's voting soldiers would be a hit or miss proposition.

So, not only did the 1863 law permit Ohioans to cast ballots out-of-state, and to do so in the company of men from different Ohio communities, without oversight by civilian leaders, but now for the first time the voters and election judges might not have

78. McPherson, *Battle Cry of Freedom*, 326; Frank, *With Ballot and Bayonet*, 14.

79. McPherson, *Battle Cry of Freedom*, 601; Frank, *With Ballots and Bayonets*, 7.

80. McPherson, *Battle Cry of Freedom*, 601.

common residential ties. Here surely was a paradigmatic shift in what it meant for Ohioans to have an election.

To accommodate the unavailability of township trustees and clerks for service as election officers, and the inevitable mix of soldiers from different communities at the polling sites, the 1863 law provided for choosing the three election judges by a *vive voce* vote among the soldiers on hand when the makeshift military polling place opened, as long as the judges were qualified Ohio voters. The three election judges then appointed the two election clerks.⁸¹ Like substitute election judges and clerks in the townships back home, the soldiers chosen to serve these functions had to swear to perform their duties diligently and to “studiously endeavor to prevent fraud, deceit, or abuse.”⁸²

But beyond borrowing from the text of statutes that applied to civilian elections, the law could not replicate for military elections an officiating system resembling the system back home. Consider first the handicaps imposed by military hierarchy. Soldiers could hardly overlook the command structure when choosing their election judges. Some might think it foolhardy to run or vote against a superior officer seeking that position, or against another soldier whom the superior openly preferred. Joseph Allen Frank has documented the sometimes heavy-handed way that officers in the Union army monitored the political preferences of soldiers under their command and punished subordinates who espoused views deemed anti-administration. Soldiers were mindful of the risks of offending the political sensibilities of their superiors.⁸³ The known political preferences

81. Ohio soldier-voting law (1863), § 4.

82. *Id.* at § 5.

83. Frank, *With Ballot and Bayonet*, 120, 133, 137.

of the officer serving as election judge might deter ballot challenges by his subordinates, and many soldiers would find it reckless to challenge their superior's ballot no matter who was election judge. When a superior officer's proffered vote drew a challenge from some bold trooper, would a subordinate soldier serving as election judge have the temerity to reject the ballot? Or would he dare overrule the officer's challenge of another voter? Might not the election judge in that position imagine that an officer displeased by his decision would express that displeasure by assigning the offending election judge to hazardous or tedious duties or withholding his furloughs?⁸⁴

Apart from problems the military hierarchy imposed, military culture itself defied the logic of the policing devices designed for civilian elections. Devotion to the purity of elections could not rank as high on the scale of virtues for soldiers working as election judges as it did for their civilian counterparts, their identical oaths notwithstanding. If the election judge and a challenged voter were messmates who had marched and fought within the same small band of warriors, the duties of election judge would collide with the far more powerful forces of "group cohesion," which tied soldiers in a fighting unit together with unbreakable bonds of loyalty. In his study of Civil War soldiers' experience with combat, Gerald Linderman quotes a soldier as describing the ties that bound messmates. "He learns to look upon them as brothers; there is no sacrifice that he will not make for them.... Fellowship becomes almost a religion."⁸⁵ An Ohio artilleryman wrote in a letter home, "You would not believe that men could be so attached to each other –

84. Both Frank and Shankman document the ubiquity of officers wielding their power over subordinates for harboring or expressing disfavored political views. Frank, *With Ballot and Bayonet*, 120, 133, 137; Shankman, "Soldier Votes and Clement L. Vallandigham," 99-100.

85. Gerald F. Linderman, *Embattled Courage: The Experience of Combat in the American Civil War* (New York: The Free Press, 1987), 235.

we are all like brothers.”⁸⁶ An Ohio infantryman wrote in 1862 that he and his combat buddies “were hooped ... with bonds stronger than steel.”⁸⁷

The unique group dynamics of combat units invites reflection on the relationship between soldier and community. On the one hand soldiers saw themselves as belonging to cohesive communities in the army, distinctive from their civilian communities back home. On the other hand, they remained products of those home communities, with enduring political habits and civilian identities formed there. They straddled the two worlds, one foot in each kind of community.

Their absentee voting under the new law had an active communal aspect in the context of their intense belonging to a tightknit military unit. One can think of that unit as their new residence, not fixed geographically, but coherent nevertheless. Soldiers clearly felt attachments to it, perhaps more powerfully than the attachments they felt to their permanent hometowns in Ohio. And they certainly had a stake in the health of these communities similar to or bigger than their stake in the township they came from; the soldier’s very survival might depend on his military unit’s smooth functioning.

In their role as members of these communities, soldiers surely saw themselves as at least partially removed from the communities they had left behind, and in some ways better than citizens who remained in those communities. Rogers Smith argues that lawmakers through most of American history crafted citizenship laws to encourage groups receiving privileged status under new law to think of themselves “as a distinctive

86. James M. McPherson, *For Cause and Comrades: Why Men Fought in the Civil War* (New York: Oxford University Press, 1997), 86.

87. *Id.* at 87.

and especially ‘worthy’ people.” They were generally white, Protestant males, in Smith’s thesis.⁸⁸ Although Smith does not discuss them, soldier-voting laws treated soldiers – at least most of those who were white and 21 – as specially privileged voters.

Evidence indeed suggests that some soldiers saw themselves as distinctively worthy of special treatment compared to their civilian counterparts, whom they sometimes scorned. In the 1863 elections, for example, the Eighth Ohio regiment elected an eighteen-year old soldier to serve as an election judge, in defiance of the Ohio soldier-voting statute’s requirement that military election judges meet the qualifications of an Ohio elector. His fellow soldiers, the under-aged election judge wrote proudly to his wife, had insisted that “a man who is old enough to fight for his country and to risk his life for it is better qualified to vote than are stay-at-home patriots.”⁸⁹ The episode suggests an attitude among soldiers of belonging to a distinctive community. Indeed, as James McPherson has documented, soldiers felt the attachment to their community away from home very intensely. “All other groups,” writes McPherson, “were secondary: regiment, brigade, army, country, even community and family so long as he remained in the army.”⁹⁰

88. Smith, *Civic Ideals: Conflicting Divisions of Citizenship in U.S. History*, 6.

89. Papers of Thomas Taylor (microfilm at Emory University, as quoted in Shankman, “Soldier Votes,” 100). In the civilian context, the age component of suffrage qualification was difficult to enforce, since men often did not know their own age precisely. It was a less “age conscious” era, one historian has noted, before rigorous recordkeeping about age that characterizes modern America. Winkle, “Ohio’s Informal Polling Place,” 169-184, 176. Ohio election law reflected that imprecision. Under the 1841 election law, if a voter was challenged as under-aged, election judges had to ask him, “are you twenty one years of age to the best of your knowledge and belief?” Ohio Election Law (1841), § 13. This imprecision in civilian voters’ awareness of their ages, however, differed from the willful misrepresentation of age by the defiant eighteen year old election judge in the Eighth Ohio.

90. McPherson, *For Cause and Comrades*, 85.

In other ways, soldiers remained linked to the communities they left behind. One scholar argues that the communal character of militia units that became building blocks of the volunteer army's organization kept alive a sense among soldiers that they remained a part of their home communities, especially compared to army regulars. In their politics, according to Joseph Allen Frank referring to volunteers, "the men remained civilians," whose ties to their home communities "prevented the total absorption of the citizen-soldier into the military culture."⁹¹ In this sense soldiers never left home; they remained products of the political culture of their home communities. "These men were politicians and voters in their civilian life," writes one scholar of soldier voting, and as soldiers they "remained politicians and voters."⁹² Even when they voted in the field, soldiers saw themselves as participating in the kind of political ritual that had engaged them in their civilian lives. Voting in their military camps, one historian has written, "affirmed republican government" for absent citizen-soldiers.⁹³

The two communities clashed in soldier-voting statutes. Legislatures enacted soldier-voting laws in acknowledgment that white citizen-soldiers, by virtue of their noble participation in the distinctive community of servicemen, were "worthy people," deserving of the special privilege the laws bestowed. But legislatures crafted the operational details of the laws as if soldiers in the field lived in communities no different from the civilian communities they had left behind in Ohio. The same rules of inclusion and exclusion applied. As members of tight knit communities in the field, soldiers could

91. Frank, *With Ballot and Bayonet*, 14.

92. T. Harry Williams, "Voters in Blue: The Citizen Soldiers of the Civil War," *The Mississippi Valley Historical Review* 31, no. 2 (September 1944): 193.

93. Smith, *No Party Now: Politics in the Civil War North*, 93.

respect distinctions among themselves based on military rank. But notwithstanding the terms of the law, they were far less likely than civilians to respect distinctions based on residence, citizenship, or age, as the experience of the 18-year old election judge from the Eight Ohio Regiment demonstrates.

When a soldier election judge, of any age, pondered a ballot challenge involving his comrade in this new community, the merits of the challenge might matter little compared to the “bonds stronger than steel” that attached him to his comrade. And the strength of those bonds might trump misgivings a soldier could entertain about the qualifications of a comrade to vote under Ohio law. That would facilitate improper voting in ways that the new law technically disallowed. These voters related to each other in ways very different from the relationship between township trustees and prospective civilian voters in Ohio, confounding the anti-fraud machinery built into antebellum laws governing civilian elections. Legal historian Christopher Tomlins expansively defines “law” to include not just law’s formalities – written constitutions, statutes, and court decisions – but also what he terms “legalities,” meaning the effects and adaptations of those formalities in people’s lives.⁹⁴ To borrow Tomlins’ parlance, servicemen’s adaptation of soldier-voting statutes to the realities of their lives in military communities produced legalities, or effects conforming logically to those realities while departing from the letter of the statutes. The statutes’ critics back home would call such legalities fraud, and according to formal law they were indeed fraud, but servicemen themselves might

94. Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* (Chapel Hill: University of North Carolina Press, 2001), 7. The book collects essays about facets of law in colonial America.

understandably regard them as sensible adaptations fully justified by soldiers' circumstances.

This was just one of several discordant features of elections contemplated for soldiers by the 1863 statute and elections familiar to Ohio civilians. As we have seen, much else was also different. The number of election sites for Ohio voters potentially doubled with the addition of the soldier polling places. Elections for soldiers lacked the holiday atmosphere that characterized many civilian elections. The politicization of the military command deprived many soldiers of equal access to ballots.⁹⁵ Soldiers had less advance notice of elections than civilians enjoyed. Record keeping duties for election officials in the field created frightful logistical challenges unknown to civilian officials. And ballot challenges were subject to different procedures for resolutions, controlled by men in a hierarchical structure unlike the civilian hierarchy contemplated by all the law's antecedents.

The source of most of these operational differences, and by itself the biggest difference of all, was the new law's core feature: for the soldiers it covered, the law removed the venue of elections away from Ohio's townships. That difference alone profoundly altered the meanings that Ohio law and custom had previously attached to the word "election." The operational differences flowing from the change of venue, and particularly the change from civilian communities at peace to remote military communities at war, bring the law's radicalism into even sharper relief.

95. Frank, *With Ballot and Bayonet*, 140. Chapter 6 elaborates on this well-documented phenomenon.

The Constitutionality of the 1863 Soldier-Voting Law

Could a law creating all these differences be constitutional? That was the issue the five justices of the Ohio Supreme Court faced in *Lehman v. McBride*. The case came before them as a legal problem calling for dispassionate judicial resolution. But these five men were themselves creatures of politics and society. In 1863, Ohio's justices were popularly elected, and they well understood the politics of the soldier-voting issue.⁹⁶ They knew, first, the numbers involved. In Ohio, about one quarter of eligible voters served as Civil War soldiers.⁹⁷ No politician could safely ignore such a huge bloc of voters.⁹⁸ And by the time the Ohio court took up the case, it was clear how those soldiers were likely to vote. Especially in Ohio, absent soldiers voting under the 1863 law overwhelmingly favored Republicans. In the 1863 Ohio gubernatorial race, decided a month before the high court ruled in *Lehman*, Democrat Clement Vallandigham, a strident opponent of the war, had lost in a landslide to Republican John Brough. Vallandigham won 42% of the votes cast in Ohio, but only 5% of the soldier vote.⁹⁹

John Brinkerhoff, a Republican, led the court's majority. He had represented Ohio in Congress for two terms in the 1840s and after the war served as an alternate delegate to the Republican National Convention. To the extent that politics colored his approach to the *Lehman* case, he seemed a safe bet to favor upholding the soldier-voting

96. OHIO CONST. of 1851, art. IV, § 2.

97. *Lehman*, 15 Ohio St. at 606-607.

98. A scholar of the Wisconsin soldier-voting law argues that the legislature permitted absent soldiers to vote in elections for judicial offices calculating that this would deter elected judges from ruling against the constitutionality of the absentee voting law. Such a ruling would have been "political suicide" for a popularly elected judge seeking soldier votes for his own reelection, according to this argument. Klement, "The Soldier Vote in Wisconsin During the Civil War," 44.

99. Shankman, "Soldier Votes," 88, 104.

law. The other three justices who joined with Brinkerhoff as the majority in the *Lehman v. McBride* opinion were also Republicans.¹⁰⁰

Rufus Ranney, the court's lone dissenter in *Lehman*, brought the opposite political perspective to the case. Ranney was an active Democrat. Less than a year after the *Lehman* decision, he served as a delegate to the Democratic National Convention that nominated George McClellan to run for president against Abraham Lincoln.¹⁰¹ Earlier in his career, he had served as a delegate to the convention that drafted the 1851 constitution. There he exhibited strong misgivings about legislative power: at one point in the proceedings he offered this assessment of how effectively the legislature supervised state finances: "About as a dog would a man's dinner."¹⁰² He had specifically opposed giving the legislature authority to set durational residency requirements, believing that doing so could result in frequent changes in voting eligibility "to suit the caprices and changes of opinion of the General Assembly."¹⁰³

Democratic party orthodoxy, to which Ranney likely subscribed, held that while any war threatened republicanism by spawning standing armies and a tyrannical central government, civil war in particular was "the worst of all society's disorders."¹⁰⁴ Ranney may also have shared his party's indignation about military interference in civilian elections and its skepticism about the chances that soldier voting could be fair under a

100. Winkle, *The Politics of Community*, 68.

101. Lawrence Kestenbaum, "The Political Graveyard: Index to Politicians," *The Political Graveyard*, last modified December 29, 2013, <http://politicalgraveyard.com/bio/ranney-ransohoff.html>.

102. Nicole Etcheson, "Private Interest and Public Good: Upland Southerners and Antebellum Political Culture," in *The Pursuit of Public Power*, ed. Jeffrey Brown and Andrew Cayton, (Kent, OH: Kent State University Press, 1994), 88.

103. Winkle, *The Politics of Community*, 81.

104. Baker, *Affairs of Party*, 150.

military command structure dominated by Republicans. If Republican political biases inclined Brinkerhoff and his Republican colleagues to favor the soldier-voting law, Democratic political biases seemed just as likely to incline Ranney against it. It was with these prejudices, subordinated, one would hope, to the higher calling of the law and their oaths of office, that the five justices approached the constitutional issues raised by the *Lehman* case.¹⁰⁵

Both Lehman and McBride brought powerhouse lawyers to the high court battle, befitting the importance of the showdown to both sides. The legal teams reflected the partisan alignments that by this time had formed about the pros and cons of absentee soldier voting. Democrats saw that their man McBride, who won more than 51% of the civilian votes, had secured barely 13% of the soldier vote. This was better than Vallandigham's 5% performance among soldiers, but it clearly foretold major problems for Democrats in the upcoming elections in 1864. Republicans, of course, liked the soldier-voting results as much as Democrats disliked them. For both sides, the high stakes justified bringing the best legal talent to bear in the fight over the law's validity.

Lehman's lead lawyer was Columbus Delano, a prominent Republican. He had served one term in the House of Representatives as a Whig from 1845-47 and would serve again from 1865-67. He had been a state delegate to the 1860 Republican convention in Chicago. Later in life his career would suffer a setback when scandals in

105. Chapter 2 demonstrates that elected justices reviewing the constitutionality of soldier-voting laws sometimes ruled contrary to the political preferences of their own party's legislators. The Michigan and California decisions, in which predominantly Republican courts struck down soldier-voting laws, are examples.

the Indian Bureau forced his resignation as Secretary of the Interior under President Grant, but his star shone brightly in 1863.¹⁰⁶

Martin Welker assisted Delano as Lehman's co-counsel. Like Delano, Welker had been a Whig before joining the Republican Party. He had served as Ohio's Lt. Governor from 1858 to 1860 under Salmon Chase. Earlier in the war, he was Judge Advocate General of Ohio. After the war he would serve three terms in the U.S. House of Representatives.¹⁰⁷

McBride's lawyers brought even more lustrous credentials to the fight. Thomas W. Bartley was lead counsel. A loyal Democrat and a "strong Van Buren man," he had served briefly as Ohio's governor in 1844 upon the resignation of the incumbent. (He did not win his party's nomination for the office that year, and maybe he was grateful to have lost. If he had won, he would have found himself in the extraordinary position of running against his own father, the Whig politician Mordecai Bartley. Mordecai won that election.) Bartley had served as Chief Justice of the Ohio Supreme Court for three years. Two of his fellow justices, fellow Democrat Ranney and Republican Brinkerhoff, still sat on the high court and would hear the arguments.¹⁰⁸

John McSweeney assisted Bartley as McBride's co-counsel. Another prominent Democrat, McSweeney had served a term in the Ohio senate and several terms as the

106. William S. McFeely, *Grant* (New York: W.W. Norton & Company, 1982), 431-432; Jean Edward Smith, *Grant* (New York: Simon & Schuster, 2001), 586-587; "Columbus Delano," *Biographical Directory of the United States Congress*, accessed July 15, 2013, www.bioguide.gov/scripts/biodisplay.pl?index=D000214.

107. George Irving Reed, ed., *Bench and Bar of Ohio* (Chicago: Century Publishing Company, 1897), 1: 224.

108. S. Winifred Smith, "Biography of Thomas W. Bartley," *The Ohio Historical Society Ohio Fundamental Documents*, accessed July 9, 2013, ww2.ohiohistory.org/online/doc/ohgovernment/governors/bartley/.html.

prosecuting attorney for Wayne County. On his death in 1890, his obituary referred to him unqualifiedly as “the greatest criminal lawyer the State of Ohio ever produced.” (It also spoke highly of his rhetorical skills: “His language was the purest Saxon, adorned with poetic flowers and jolly Irish wit.”)¹⁰⁹

That was the rich mix of political savvy and legal experience, both on the bench and on the legal teams, that grappled with the legal issues raised by Lehman’s appeal. McBride lawyers argued, first, that the 1863 law unconstitutionally discriminated in favor of a single class of eligible voters, i.e., soldiers. But it was clear that McBride’s team would have objected even if the statute gave absentee voting rights to all voters. The main thrust of their attack on the law was that the constitution did not give the legislature power to separate voting from the voter’s place of residence. “The right of the elective franchise,” they insisted, “is, by the terms of the constitution, not made incident to the locality of the elector’s residence in a local election district, but inseparable from it.”¹¹⁰ Allowing voting outside the voter’s place of residence would “make the elective franchise a mere *transitory* or *migratory* thing, to be exercised not in any stated or prescribed election precincts or districts, but anywhere, and in any part of the world where an elector may happen to be on the day of the election.”¹¹¹ And to allow voting under the exclusive control of military authorities, beyond the reach of civilian oversight,

109 . “John McSweeney,” *Find a grave.com*, last modified October 1, 2011, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GSln=McSweeney&GSfn=john&GSbyrel=all&GSdyrel=all&GSst=37&GSentry=4&GSob=n&GRid=78868069&df=all&> .

110. *Lehman*, 15 Ohio St. at 584.

111. *Id.* at 582. (Italics in the original.)

was “subversive of the very foundation of the state government,” and therefore surely unconstitutional.¹¹²

The main difficulty facing the McBride team was that their challenge required the court to infer constitutional limitations on legislative authority that the constitution itself did not expressly state. The inference – that voting was constitutionally inseparable from the voter’s residence – was reasonable but not inescapable. The constitution had been adopted in 1851. As in the state’s 1802 constitution, the 1851 instrument both fixed the qualifications of voters and granted the legislature some authority over the conduct of elections. That authority had limits, and the court in *Lehman v. McBride* had to decide whether it fell within those limits for the legislature to let soldiers vote away from “the township or ward of their residence,” where all other Ohio electors had to vote. The language of the 1851 constitution made this question debatable.

It would not have been debatable under the 1802 constitution. In defining who among Ohio’s citizens enjoyed suffrage rights, that instrument stated, “no person shall be entitled to vote except in the county or district in which he shall actually reside at the time of the election.”¹¹³ That left no room for absentee voting. The 1851 constitution had omitted this wording, a point Lehman’s lawyers emphasized. But other provisions in the 1851 instrument made the issue uncertain enough for the justices to need more than seventy pages to set out their competing opinions.

Some provisions about voting eligibility were clear enough. To qualify as a voter, an Ohioan had to be white, male, and at least twenty-one years old. He also had to be a

112. *Id.* at 583.

113. OHIO CONST. of 1802, art. IV, § 1.

citizen of the United States.¹¹⁴ None of those qualifications mattered in *Lehman*, but the constitution required more. The voter had to meet a two-pronged residency test, one covering Ohio residency and the other covering local residency. He must have been a resident of Ohio for “one year next preceding the election,” and of “the county, township, or ward” for “such time as may be provided by law.”¹¹⁵

The legislature waited until 1857 to exercise its constitutional authority to impose durational requirements for county and township residency, settling on modest requirements of 30 and 20 days, respectively. Soldiers who met that qualification when they entered the service ran no risk of losing it during their temporary absence, even without the soldier-voting law. The 1841 election law provided that protection by stating, “a person shall not be held to have lost his residence, who shall leave his home and go into another state ... for temporary purposes only, with an intention of returning.”¹¹⁶ The 1851 constitution left this provision undisturbed, and Civil War soldiers surely fit within its terms. The soldier-voting law made no change in residence (or any other) qualifications for soldiers. By its terms, it applied only to soldiers who were already qualified electors, neither adding to nor subtracting from prewar eligibility requirements.

The change the law wrought, in other words, related not to *who* was eligible to vote, but to *where* an election could be held. In observing that “qualifications which confer the right to vote, and the place at which that right may be exercised, are things quite distinct from each other,” the Supreme Court majority framed the issue as whether

114. OHIO CONST. of 1851, art. V, § 1.

115. OHIO CONST. of 1851, art. V, § 1.

116. Ohio election law (1841), § 2, second paragraph.

the 1851 constitution on the one hand fixed “the place at which” eligible voters could vote, or on the other hand allowed the legislature to set up elections in places of its choosing, including places outside Ohio for absent soldiers.¹¹⁷

Most of the debate centered on the last three words of the constitution’s definition of voter eligibility. Article V, section 1 said that a person meeting all the qualifications of an elector – citizenship, race, gender, age, and residency – could vote “at all elections.”¹¹⁸ At *all* elections? McBride’s lawyers, arguing to have the law set aside, pointed out that the constitution could not have intended to permit “holding an election in Louisiana, or in England, or in China,” since Ohio had no way to enforce its election laws extra-territorially.¹¹⁹ To avoid that absurdity, McBride’s lawyers argued, the terms “at all elections” must be read with an implicit qualification. As qualified by the implication they urged the court to accept, the clause meant “at all elections *at such place of his residence*.”¹²⁰

This asked more than the court’s majority was willing to grant. Justice Josiah Scott wrote the majority’s opinion. Scott was a Republican with a Whig heritage, who had served in the state legislature.¹²¹ His admiration for the law became clear from his characterization of its purpose: to assure that soldiers “shall not be disfranchised through their devotion to the vital interests of their country.”¹²² Scott denounced the effort to strike down such a virtuous law, or indeed any law, absent clear language in the

117. *Lehman*, 15 Ohio St. at 601.

118. OHIO CONST. of 1851, art. IV, § 1.

119. *Lehman*, 15 Ohio St. at 586.

120. *Id.* at 584.

121. Joseph P. Smith, ed., *History of the Republican Party in Ohio* (Chicago: the Lewis Publishing Company, 1898), 1:66-67.

122. *Id.* at 607.

constitution prohibiting the enactment. He could find no such language in this case, and to him that was decisive. He declared, “Had it been the intention of the framers of our present constitution to fix or limit ... the place at which the elective franchise should be exercised by the voters respectively, it is quite remarkable that no attempt should have been made to do so in express terms.”¹²³ Scott agreed that “at all elections” did not really mean *all* elections, but he was not inclined to read into the 1851 constitution words that McBride’s lawyers urged on the court, which would have the effect of striking down the law. In his opinion for the court, Justice Scott found in the constitution no implied limitation as to the place of voting. Instead, he saw an implied limitation on the elected positions for which the constitution allowed electors to cast ballots. A man’s constitutional right to vote in “all elections” meant, wrote Scott, that he could vote at the elections of all officers – state, county, and municipal – whose jurisdiction extended over him and over the township where he resided. And the constitution placed no limits on where the legislature could decide to situate those elections. If they chose to situate elections outside the state, they were constitutionally free to do so.¹²⁴

Justice Scott brushed aside McBride’s arguments that the soldier-voting law’s extra-territorial effects rendered the statute unconstitutional. The election involved office holders “whose sphere of official action lies wholly within the state and who are creatures of its sovereign will.”¹²⁵ There was ample precedent for Ohio laws having effect outside of Ohio, such as laws permitting depositions to be conducted, and wills and deeds

123. *Id.* at 599.

124. *Id.* at 598.

125. *Id.* at 608.

executed, outside the state.¹²⁶ Moreover, said Scott, those who violated the law could be punished when they returned to Ohio. Besides, as an “independent sovereignty” Ohio was free to make any arrangement it chose for the selection of its officers unless the constitution specifically said otherwise. Scott insisted that even if Ohio should “see fit to declare that all her officers should be appointed and commissioned by the Dey of Algiers, in so far as the result would affect herself, or her citizens or subjects alone, I do not readily perceive how, or by whom, her right to do so could be questioned.”¹²⁷ It might be a poor policy choice for the legislature to do so, Scott conceded, but that did not make it unconstitutional.

Scott made short shrift of McBride’s argument that the law unconstitutionally discriminated in favor of a single class of voters. The constitutional requirement of uniformity, he ruled, meant only that the law had to apply uniformly to all parts of Ohio, which this law did. There was ample precedent for laws that apply to just one group of Ohioans, including laws regulating lawyers and brokers, for example.¹²⁸ In short, Scott concluded, the legislature acted within its constitutional authority in allowing soldiers to vote outside the state.

All of this appalled Rufus Ranney, the court’s sole Democrat. He identified four constitutional defects in the 1863 statute. First, it effectively nullified the protection afforded to voters by a constitutional provision that voters, “during their attendance at elections and in going to and returning therefrom, shall be privileged from arrest.”¹²⁹

126. *Id.*

127. *Id.*

128. *Id.* at 606.

129. OHIO CONST. of 1851, art. V, § 3.

Ranney observed that Ohio had no way to confer that protection outside its borders.¹³⁰ The soldier-voting law also violated the constitution's requirement that county officers be elected "in such manner ... as may be provided by law."¹³¹ To Ranney, "law" meant rules backed by enforceable sanctions, and the criminal sanctions that Ohio had designed to punish violations of its election rules could not reach outside the state. Ranney contended it was an "absurdity" to imagine that the framers of Ohio's constitution contemplated extra-territorial legislative sanctions for election violations.¹³²

Third, Ranney argued that absentee voting eviscerated the constitutional suffrage qualifications, including particularly the requirement that electors reside in their township for a period "next preceding the election." By stripping away the mechanism by which those requirements could be policed, Ranney asserted, the law effectively gutted the qualifications.¹³³ In terms of local residency, while it was for the legislature to decide what the required period should be, the soldier-voting law, by allowing voting away from the township, "completely annihilates the means, and the only means, [the framers] relied upon to make this provision practically operative."¹³⁴ The "evil" targeted by the constitution's residency requirement, Ranney maintained, was multiple voting by people falsely claiming to be actual residents of the township. Local voters knew who was entitled to vote, and the residency requirement permitted them to "protect themselves from fraud." Removing the election from the community defeated that protection,

130. *Lehman*, 15 Ohio St. at 647. Complaints about the politicization of the military made this more than a hypothetical concern, especially to Democratic sensibilities like Ranney's.

131. OHIO CONST. of 1851, art. X, § 2.

132. *Lehman*, 15 Ohio St. at 646.

133. OHIO CONST. of 1851, art. V, § 1.

134. *Lehman*, 15 Ohio St. at 633.

rendering it “not worth the parchment upon which it is written.” Assigning oversight for one county’s election to officials from another county, as the 1863 law permitted, similarly undercut the protection intended by the constitution’s residency requirement, according to Ranney. Those election officials would have no “interest ... to guard the election of officers whose official acts can never concern them.”¹³⁵

Ranney’s fourth and overarching constitutional concern related to the meaning of “election” as he believed the 1851 framers used that term. While Scott limited his search for constitutional meaning to the black letter of the text, Ranney in contrast searched history for evidence of the framers’ understanding of the words they used. The constitution itself provided no express definition, but Ranney believed that the framers had a clear and discernible meaning in mind when they used the word. “Words become things,” Ranney maintained, “and are to have the effect intended by those who employed them.”¹³⁶ By 1851, Ranney claimed, the word “election” in Ohio had taken on a meaning and had become a thing constitutionally incompatible with the concept of absentee balloting. The 1863 law violated the constitution, then, by departing from the 1851 definition of “election.”

Ranney maintained that an election in the constitutional sense had four “indispensable elements.” It was, first, a public meeting. Second, it was held within the election district. Third, qualified electors could vote at the meeting. And fourth, those same electors had the right “to guard the ballot box from illegal voting or other

135. *Id.*

136. *Id.* at 630.

frauds.”¹³⁷ By cutting elections loose from their mooring in Ohio townships, the soldier-voting law violated the second and fourth of these elements. In reaching his conclusion, Ranney drew heavily from the 1841 election law – the one intended to “preserve the purity of elections.” The 1851 framers had expressed no disagreement with that law’s concern about election fraud, particularly cheating by voters “falsely” presenting themselves at a township’s polling place. As Ranney saw it, the 1851 framers brought this sense of vigilance for the purity of elections to their notion of what a constitutional election was. “Nobody [in 1851] had ever heard of any other sort of election,” he insisted.¹³⁸ Removing an election from its proper setting in a township stripped it of the safeguards that the framers thought essential.

Henry Lehman’s lawyers had argued, in defense of the law, that the constitution guarded voting as a personal right, which the 1863 law properly protected by permitting the soldier, in effect, to carry it with him.¹³⁹ While it ruled for Lehman, the majority ignored this argument. Rufus Ranney did not. The right to vote, he insisted, derived from the constitution and was therefore a “public franchise, belonging to the whole community,” although it was conferred on only some citizens. The community had an interest in safeguarding this public belonging “against abuse and perversions.” Dislodging the act of voting from a location within the community deprived the community of its ability to protect itself “from the unlawful intrusions of those not qualified [to vote]” and was therefore a public wrong.¹⁴⁰ Ranney saw the importance of

137. *Id.* at 630-631.

138. *Id.* at 629.

139. *Id.* at 579.

140. *Id.* at 649.

the majority's error as "impossible to overstate" because it "undermines the very foundation-principles upon which the constitution has founded the exercise of the elective franchise."¹⁴¹

Ranney's lament about the "abuse and perversions" that would result from allowing soldiers to vote at locations remote from their home communities seem well founded. The results of the 1863 gubernatorial elections point powerfully to gross irregularities in the soldier vote. The vote in some counties virtually screamed "fraud"! In Trumbull County, Brough won handily in the home vote, 74% to 26% for Vallandigham. But Brough won 99% of the votes from Trumbull's absent soldiers. In Williams County, Brough won the home vote, 60% - 40%, while winning better than 99% of the 365 votes cast by absent soldiers. The home vote in Mahoning County went to Brough, 57% to 43%, while 99.8% of the county's 370 absent soldiers voted for Brough. In Lake and Paulding counties, Vallandigham won a grand total of zero votes out of the combined 396 soldiers absent from those counties.¹⁴²

Ranney's differences with Scott about the overarching values of the constitution and relevance of history in divining the meaning of constitutional text found echoes in judicial disagreements in cases challenging other states' military suffrage laws, as we shall see in more detail in Chapter 2. Decisions supporting the constitutionality of such laws did so based on one or more of the values that Scott extolled – the right to vote, the injustice of "disfranchising" soldiers, and a state's sovereign right to respond to

141. *Id.* at 614, 649.

142. Shankman, "Soldier Votes," 103-104. Ranney did not cite these results and may not have been aware of them, though they were available before the court ruled.

exigencies legislatively. Like Ranney, other justices voting to strike down the laws looked to history for guidance about the framers' intentions and extolled the values anchoring Ranney's dissent – the “purity” of elections, the community's right to oversee voting, and the constitutional status of time-honored election practices.

A gulf of disagreement about constitutionalism separated Ranney from his four colleagues, but all five justices substantially agreed that the 1863 soldier-voting statute law broke new ground for Ohio's election system. Whether Ohio's constitution permitted the innovation of absentee voting or not, all five justices concurred that it was an innovation. None of Rufus Ranney's colleagues could have disputed his speculation about the 1851 constitutional framers. “I cannot bring myself to the belief that a single individual [among the framers] supposed it possible that the officer of one county could be elected by the votes given in another, much less by votes given out of the state.”¹⁴³ Ranney drew conclusions of unconstitutionality from that dissonance with the past. His colleagues did not, though they too recognized the dissonance. Either way, the legislature in 1863 had created something radically different.

The law was radical, first, in its unprecedented elevation of the individual voter over the community as the central player in an Ohio election, and second in its subordination of overall election “purity” to the expanded suffrage rights of a class of voters. Henry Lehman's attorneys argued correctly that the 1863 law protected suffrage as a personal right and was intended “to guard this right wherever the *person* may be.”¹⁴⁴ And Justice Ranney was correct in observing that this inverted the historical relationship

143. *Id.* at 679-680.

144. *Lehman*, 15 Ohio St. at 579 (emphasis in the original).

among elections, communities, and individual voters. Before 1863, voters participated in elections only in their capacities as members of an Ohio community, as attendees at gatherings of townspeople. An election untethered to the community was no more imaginable than a meeting without people. In 1863, Ohioans for the first time conceptualized voting as an activity divorced from the community, and suffrage as a private right.

It was equally radical to expand voting rights at the expense of election “purity.” From 1803 through 1857, Ohio election laws successively tightened strictures against fraud and strengthened the hand of community leaders in enforcing them. We have seen that the 1863 law fit incongruously with those antecedents, and most of the incongruities related to the system’s capacity to assure accuracy and prevent fraud. Severed from their moorings in civilian communities, elections under the 1863 blueprint opened opportunities for voting irregularities that Ohio would not have tolerated before the war. The new law weakened one time-honored protection after another. Prior notice of an election, a voter’s familiarity to fellow voters and to election judges (and vice versa), an atmosphere conducive to ballot challenges and their resolution, the primacy of allegiance to the community, a setting for orderly management of logistical necessities like tallying and recording, enforceable sanctions for cheating, bribery, or intimidation – all these attributes of civilian elections were diluted or altogether missing in the 1863 military elections.

In light of the state’s longstanding aversion to risks of voting irregularities, this amounted to an expensive tribute to soldiers. The statute Ohio passed in 1863 addressed

the problem of suffrage rights for distant soldiers at the expense of a value that had always been paramount in the statutory structure: preserving electoral purity, largely through community supervision of the voting process. In the novel elections that the law created that year, the absent party was not the distant soldier, but the Ohio community he left behind.

The novelty was short lived. By the terms of an 1864 act amending the 1863 law, the opportunity for absent soldiers lasted only as long as “the existence of the present rebellion.”¹⁴⁵ When Ohio’s soldiers returned from the service, they returned as voters to the form of elections they knew from their prewar experience. Voting was restricted to locations in their Ohio townships, under the watchful eyes of the township trustees charged, as always, with guarding the “purity” of the ballot box by keeping out pretenders.

What caused this profound change in law? While this dissertation focuses on political forces underlying the invention of absentee voting opportunities for soldiers, a potential cause apart from politics deserves mention. Specifically, the ubiquity and scale of migration in antebellum America in general and Ohio in particular may have played a role. According to Kenneth Winkle, a scholar of the intersection of migration and politics in Ohio, as many as half of all Americans moved every decade over the first half of the nineteenth century, more of them to Ohio than to any other state. Intrastate migration was also heavy.¹⁴⁶ The scholarship of Joel Silbey and Alexander Keyssar support Winkle in

145. An Act to enable the qualified voters of this state in the military service to exercise the right of suffrage, §1, 61 Ohio Laws 88, 88 (1864).

146. Winkle, *The Politics of Community*, 11-70.

positing that the rapid movement of populations naturally weakened the attachment many people felt toward individual communities.¹⁴⁷

It is entirely possible that residential volatility attendant to nineteenth century migration, together with the general weakening of individual ties to particular communities, helped create an environment conducive to 1863's election law reform by softening up attitudinal resistance to absentee voting. For example, a man leaving his longtime home in Warren Ohio for Florence Township, then departing Florence for Henrietta Township two years later, might end up residing in Toledo and regarding himself as a bird of passage more than as a man *of* any Ohio township. He and voters like him might find little objectionable in a law diminishing the role of township trustees in certain elections.

These long running societal forces by themselves could not account for the electoral innovation of absentee voting. Otherwise we would expect the innovation to have begun earlier and to have taken root more gradually than it did, and we would expect it to have endured. Instead it emerged abruptly in the context of the Civil War, and it ended just as abruptly when the war ended. But in conjunction with more immediate causes associated with the war, the impact of this societal phenomenon as a "softening up" agent is entirely plausible.¹⁴⁸

147. See Silbey, *The American Political Nation*, at 148-149; Keyssar, *The Right to Vote*, 300 ("In the course of the nineteenth and twentieth centuries, the identification of individuals with their once-homogeneous geographic communities declined, while their sense of belonging to other types of communities – religious, racial, ethnic, occupational – became more salient.") Keyssar argues that the erosion of property qualifications for suffrage also diminished the hold of communities over suffrage. *Id.* at 9.

148. For reasons elaborated in this and the following chapter, Winkle takes the connection between migration and electoral reform too far. In particular, he outdistances the evidence in arguing that Ohio's

For the primary cause one must look to politics, mainly the natural appetite of politicians to recapture the votes of electors absent in large numbers while in military service. When Ohio acted, that appetite produced bipartisan support for the law. As the war progressed and states, including Ohio, gained experience with actual voting by absent soldiers, bipartisanship gave way to sharp partisan divisions. The unique political circumstances of late 1863 and 1864 would heighten those differences and put soldier-voting laws on center stage, as elaborated in Chapters 3 and 4.

First, however, it helps to understand how Ohio's law fit into soldier-voting reforms as a national phenomenon.

soldier-voting law culminated a long evolution in residency requirements rooted in the effect of migration on Ohio's poor laws. Winkle, *The Politics of Community*, 48-70.

CHAPTER 2
DISLOCATED SUFFRAGE: THE RADICALISM OF SOLDIER-VOTING
LAWS NATIONALLY

Laws allowing absent soldiers to vote swept the Union states from 1862 to 1865, departing from legal antecedents almost everywhere. In many ways, the national experience was Ohio writ large. In all states but one, laws untethering voters from their civilian communities jarred the prewar legal order, as it did in Ohio.¹ The centrality of communities to the election process, not only as fixed venues for casting ballots but also as oversight mechanisms to prevent fraud, abruptly gave way – if only for soldiers – to a notion of voting as an individualized and portable right, dislocated from communities. That transition upended previous assumptions about the nature of voting and of elections.

This chapter begins by surveying the national phenomenon with attention to the laws' common features and major differences. The broad categories of commonality and variation among the laws shed light on what the laws accomplished, what they failed even to attempt, what they changed, and what they left alone. By one measure, the phenomenon was profoundly conservative. In particular, the laws did nothing to enlarge the community of qualified voters. Instead, they granted a new procedural privilege to a slice of the electorate that already enjoyed the substantive benefits of suffrage. The chapter then turns to an examination of the laws' radicalism as measured not by their

1. The sole exception was Nevada, which entered the union in 1864 without a prewar political identity or a prewar legal infrastructure, even as a territory. Therefore its construction that year of a legal opportunity for absent soldiers to vote upended no prewar legal traditions.

effect on the boundaries of political belonging, but rather by contemporary understandings of what elections and voting were as a process. Prewar, the community's role in that process imparted to the "right to vote" a public, collective quality. As the 1863 law did in Ohio, similar laws in other states altered that communal quality and thereby challenged earlier understandings, rooted in law, about the essential nature of that process.

Compounding the laws' substantive radicalism was the legal creativity many states exhibited in the states' rush to implement soldier voting in time for the 1864 elections. Only in late 1863 did it become clear nationally that the issue of soldier voting would become politically potent in the pursuit of *civilian* votes. The majority of states awakened to that reality tardily, often with too little time remaining on the election calendar for the orderly process of constitutional amendment followed by legislation. They coped with the time crunch inventively. The same political urgency that prompted states to abandon long-held substantive notions about the nature of elections also inspired them to invent aggressive ways to accelerate the usual pace of constitutional change.

Voting Qualifications: "Justice" and the "Disfranchised" Soldier

Like Ohio's 1863 law, the laws in every state left intact prewar qualifications for suffrage. The statutes expressed this in various ways, always making it clear that the only soldiers whom the laws covered were servicemen already eligible to vote. Ohio's law applied only to "the qualified voters of this state ... in the actual military service of this

state, or of the United States.”² The statutes of Kentucky, Maine, Vermont, and Wisconsin used virtually the same limiting language.³ California’s law applied to “all electors, resident of the State of California ... in the military service of the United States.”⁴ West Virginia’s statute similarly limited its coverage to soldiers “entitled to vote in the township, who [are] necessarily absent therefrom on the day of any election....”⁵ Iowa and Michigan incorporated the limitation not only in the operational text of the laws but also into their titles, but also in the laws’ title, describing the respective statutes as allowing “qualified electors of this State in the military service to vote....”⁶

So it was, in one form or another, with every soldier-voting law. None extended the voting franchise to a previously excluded category of citizen, even if the citizen in that category served as a soldier. That left out a great many soldiers. For example, most African-American soldiers, disfranchised by state constitutions by virtue of their blackness, gained no voting opportunities under the new laws.⁷ Neither did white soldiers

2. Ohio Soldier-Voting Law (1863), § 1.

3. An Act Regulating the Manner of Soldiers Voting for Electors of President and Vice President of the United States, within and without this State, ch. 572, § 1, 1863 Ky. Acts 122, 122.

4. An Act in Addition to an Act Entitled an Act to Regulate Elections, approved March Twenty-Third, Eighteen Hundred and Fifty, and all Acts Amendatory thereof and Supplemental thereto, ch. 355, § 1, 1863 Cal. Stat. 549, 550; An Act Authorizing Soldiers Absent from the State in the Military Service to Vote for Electors of President and Vice President, and for Representatives to Congress; also Regulating the Manner of Electing Registers of Deeds, County Treasurers and County Commissioners, so that such Soldiers may be Allowed to Vote therefor, ch. 278, § 1, 1864 Me. Acts 209, 209; An Act Providing for Soldier Voting, P. L. No. 5, § 1, 1863 Vt. Laws 7, 8; An Act to Enable the Militia and Volunteers of this State, when in the Military Service of the United States or of this State, to Exercise the Right of Suffrage, ch. 11, § 1, 1862 (extra Session) Wis. Laws 17, 17.

5. An Act to Regulate Elections by the People, ch. 100, § 26, 1863 W. Va. Acts 114, 119.

6. An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service, to Vote at Certain Elections, ch. 29, 1862 Iowa Acts 28; An Act to Enable the Qualified Electors of this State, in the Military Service, to Vote at Certain Elections, and to Amend Sections Forty-Five and Sixty-One, of chapter six, of the compiled laws, No. 21, 1864 (extra session) Mich. Pub. Acts 40.

7. At the time of the Civil War, the constitutions of all but five Union states had race-based prohibitions against African-American voting (The exceptions were Maine, Massachusetts, New Hampshire, Rhode

who were not citizens or who were younger than twenty-one years old.⁸ And neither did women, including the many women who supported the war effort away from home as nurses or the few women who actually fought in battle.⁹ The soldiers whom the new laws privileged – always male, always at least twenty-one years old, and almost always white citizens – suddenly enjoyed brand new procedural opportunities to vote away from home. But back home they already enjoyed voting privileges as previously qualified electors.

Even the eight states that amended their constitutions to authorize soldier voting did so without creating suffrage rights for soldiers previously excluded from voting.¹⁰ In amending their constitutions, none went beyond the objective of allowing absent *qualified* soldiers to vote. Only one state even attempted to expand prewar suffrage qualifications by constitutional amendment, and that attempt failed. Rhode Island's antebellum rules had a property qualification that applied more onerously to naturalized U.S. citizens than to native-born citizens.¹¹ Viewing this discrimination as unfair to its foreign-born veterans, Rhode Island legislators who favored absentee voting for soldiers tried to eliminate the inequity by constitutional amendment.¹² The proposed amendment failed to win ratification; only the absentee voting amendment secured popular

Island, and Vermont). In addition, New York granted African-Americans voting rights qualified by a discriminatory property qualification. Keyssar, *The Right To Vote*, 57, Appendix A9.

8. All state constitutions limited voting rights to 21-year old males.

9. For an account of women serving in Civil War combat, see Deanne Blanton and Lauren M. Cook, *They Fought Like Demons: Women Soldiers in the Civil War* (New York: Knopf Doubleday Publishing Group, 2003).

10. The eight states that amended their constitutions to authorize absentee voting for soldiers were Kansas, Kentucky, Maine, Maryland, New Hampshire, New York, Pennsylvania, and Rhode Island.

11. R. I. CONST. of 1842, art. II, §§ 1, 2. Among the distinctions was that by paying a small tax or serving in the militia for a year, native-born citizens could avoid an otherwise universal property qualification for suffrage, while naturalized citizens had no way around the property requirement.

12. Benton, *Voting in the Field*, 182-188.

approval.¹³ The effort distinguished Rhode Island from the other nineteen states that enacted absentee voting rights for soldiers, but the outcome aligned Rhode Island with its sister states in preserving all prewar categories of disfranchisement even as they granted absent soldiers a new way to vote.

The failure of the laws to extend suffrage rights to previously excluded groups buttresses the theories of several scholars who have observed in the evolution of American citizenship rights a recurrent pattern of privilege and exclusion, i.e., privilege for able-bodied, non-alien, white males – exactly the group privileged by soldier-voting laws – and exclusion for everyone else. Alexander Keyssar, Eric Foner, Barbara Welke, and Rogers Smith, to name some who have noted this stubborn pattern, would find nothing surprising in the privileges and exclusions that characterized all twenty of these laws.¹⁴ This feature of the laws qualifies them all as conservative in modern, rights-

13. An Act to Approve and Publish and Submit to the Electors a Certain Proposition of Amendment to the Constitution of the State, ch. 529, 1864 R.I. Acts & Resolves 3. Had Rhode Island's effort succeeded, it would have extended suffrage equality only to a slightly larger group of white males than already enjoyed full belonging in the state's political community, since the naturalized citizens it targeted were white, male, and at least 21-years old. But even that baby step failed. According to Benton, no record remains of the tally of the popular votes for and against the amendments. Benton, *Voting in the Field*, 186.

14. Keyssar and Foner both dispute the whiggish notion of progressively more expansive political rights for women, minorities, and immigrants through the march of American history. They note, for example, the tortured trajectory of suffrage rights for African-Americans from exclusion starting in the early 19th century, to inclusion following the Civil War, to exclusion again after Reconstruction and into the Gilded Age. Keyssar, *The Right to Vote*, 54-61; Eric Foner, *The Story of American Freedom* (New York: W.W. Norton & Company, 1998), 79-116; Welke argues that the development of political rights in American law from the founding through the "long nineteenth century" was marked by the recurrent privileging of white, able-bodied men and the exclusion of everyone else. "[W]hite men alone were fully embodied legal persons," Welke asserts, "they were America's 'first citizens,' they were the nation." Barbara Young Welke, "Law Personhood, and Citizenship in the Long Nineteenth Century: The Borders of Belonging," in *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 2: 345; Smith, too, describes repeated resurgences of inequalities and dominion by white male elites in the development of American citizenship. For most of U.S. history, Smith asserts, most peoples of world were legally excluded from American citizenship by their race, nationality, or gender. The egalitarianism within the community of white male citizens, such as it was, has been "surrounded by an array of fixed, ascriptive hierarchies" built into the law, always to the advantage of white males. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*, 17.

conscious terms. Their contemporary radicalism consisted not in disturbing prewar definitions of who qualified for the voting franchise, but in severing soldiers' voting from hometown communities.

That the laws' new privilege applied only to already qualified electors sheds light on claims, made ubiquitously by proponents of the laws, that "justice" demanded giving absent soldiers the vote. Soldiers would suffer "disfranchisement" unfairly without the right to vote in the field, they insisted. In state after state, a rallying cry for enactment was that justice required it. Republican Governor Edward Salomon of Wisconsin, for example, in a message to the legislature urging passage of that state's law, wrote that "justice seems to demand that [soldiers] should be rewarded ... for their patriotism" with an opportunity to vote in the field. Vermont Governor Frederick Holbrook urged passage of a soldier-voting law "as an act of justice to the brave sons and freemen of Vermont who are so nobly doing battle in the cause of the country...." Illinois Governor Richard Yates urged passage in the same terms ("[L]et this General Assembly signalize its patriotism by this [soldier-voting bill] of prompt and necessary justice to the gallant citizen soldier of the State") as did Maine's Governor Samuel Cony ("The justice of extending to our citizen soldiers in the field an opportunity for exercising the right of suffrage in our elections has been considerably discussed and generally conceded.") In New York, a minority report of the Senate Judiciary Committee proclaimed "the overruling justice" of a soldier-voting law.¹⁵ The purported justice of the cause also found

15. 1862 (extra session) Wisconsin Assembly Journal, 11; 1863 Journal of the Vermont House of Representatives, 44-46; 1865 Illinois Senate Journal, 33; 1864 Documents printed by order of the Legislature of the State of Maine, 22-23; 1863 New York Senate Journal, 740; all as quoted in Benton's

judicial expression. Justice James Campbell, apparently discomfited by the implications of his own opinion that Michigan's soldier-voting law violated that state's constitution, suggested almost apologetically "the only remedy is to invoke the people to amend a restriction which has become too narrow for complete justice."¹⁶ The Republican press similarly deployed the rhetoric of justice in advocating passage of such laws. A *New York Times* editorial spoke indignantly of stay-at-home opponents of proposed soldier-voting legislation in New York:

We cannot comprehend either the mind or the heart of any really loyal man who interposes wretched quibbles and cavils to prevent his neighbor, who has answered his country's call, from exercising the same civil rights he himself enjoys, though he has not answered it. We should suppose the mere thought would overwhelm him with shame.¹⁷

Given that the laws applied only to soldiers already qualified to vote, this rhetoric reveals a distinctive notion of justice, different from the justice repeatedly invoked by disfranchised groups demanding suffrage in reciprocity for fighting the country's wars. German historian Otto Hintze succinctly stated the now familiar formulation linking suffrage to military service as a matter of justice. "Whoever puts himself in the service of the state," Hintze wrote, "must logically and fairly be granted the regular rights of citizenship."¹⁸ That is not what advocates of soldier-voting laws meant when they

Voting in the Field, at 53, 80, 264, 120, and 142. Benton gathers these and similar quotations from politicians in assembling the legislative history of each of the laws.

16. *Twitchell*, 13 Mich. at 148.

17. *New York Times*, April 1, 1863.

18. As quoted in Ronald R. Krebs, *Fighting for Rights: Military Service and the Politics of Citizenship* (Ithaca: Cornell University Press, 2006), 17. African-Americans and women have asserted the fairness principle of reciprocity as the strategy underlying their efforts to secure an equal place in the military for their respective groups. "Once let the black man get upon his person the brass letters, US," wrote Frederick Douglass with his eye on citizenship rights for African-American enlistees, "let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket, and there is no power on earth which can deny that he has earned the right to citizenship in the United States." [Frederick Douglass, *Douglass'*

demanded “justice” for absent Civil War servicemen. Even when they explicitly linked arms bearing to voting rights, their meaning was narrower than the literal meaning of the words they spoke. In advocating enactment of Wisconsin’s law, for example, Governor Solomon said at one point, “who bears arms should not be disfranchised, but permitted to vote, should be the policy of the country.”¹⁹ But the bill Solomon proposed applied only to already enfranchised soldiers. It left all other soldiers disfranchised, notwithstanding their arms bearing.

By their invocations of justice, Salomon, Holbrook, Coburn and Yates meant only that it would be unjust for fully enfranchised men (generally white, twenty-one year old male citizens) to lose the opportunity to vote when they left home in answer to their country’s call for service. That was a far cry from the notion that their military service rendered unjust the disfranchisement of African-Americans, aliens, and men younger than twenty-one. If governors or legislators really believed during the war that justice required enfranchising all men who bore arms in their country’s service, the laws they advocated when decrying soldiers’ disfranchisement did not say so.

Monthly 5, (August 1863), 852, as quoted in James M. McPherson, *The Negro’s Civil War* (New York: Ballantine Books, 1965), 163]. For women’s use of the principle, see Linda Kerber, *No Constitutional Right to Be A Lady* (New York: Holland Wang, 1998). Ronald Krebs documents the ubiquity in American history of group claims that suffrage is “the just reward for their people’s sacrifice” in wartime. Krebs, *Fighting for Rights*, 3. So does Alexander Keyssar, who documents both the general phenomenon of suffrage expansion during wartime and the use of the soldiering-voting nexus as an argument against woman suffrage. Keyssar, *The Right to Vote*, 169, 191. See also Kruman, “Legislature and Political rights,” 1235, 1238. Linda Kerber examines the converse of the same proposition, observing in the context of women’s rights that political inequality flows from disparities in citizens’ obligations to the state, such that exclusion of women from military service has served to justify their unequal enjoyment of political rights. Linda K. Kerber, *No Constitutional Right to Be Ladies*, 221-303. Chapter 6 of this dissertation elaborates on the way the Civil War soldier-voting phenomenon fits in the pattern linking suffrage rights to military service in American history.

19. 1862 (extra session) Wisconsin Assembly Journal, 11, as quoted in Benton, *Voting in the Field*, 53.

A variant of this narrow definition of justice found expression in partisan arguments about whether soldier-voting laws were needed to “enfranchise” absent soldiers. In the political realm, described in the following three chapters, proponents of the laws branded opponents as anti-soldier for favoring “disfranchisement” of servicemen, a term that spoke for itself as an injustice in the political context. By 1863, opponents were mostly Democrats, and they challenged the accusations as illogical, if not mendacious. Even without a soldier-voting law, qualified absent soldiers remained enfranchised, Democrats insisted. The obstacle to voting by absent soldiers who met their states’ suffrage qualifications, they asserted, was not their disfranchisement as voters – they remained franchised – but their absence from home on Election Day. Thousands of soldiers proved this by returning home on furlough to vote, either in states that never passed a soldier-voting law (e.g., New Jersey and Indiana) or for elections in 1863 and 1864 in states that enacted such laws only late in the war. Democrats believed that it strengthened their side of the debate to point out that soldiers themselves were not clamoring for absentee voting rights.²⁰ Indeed, there is evidence that many soldiers quite sensibly disliked soldier-voting laws, since the laws diminished their chances of securing cherished furloughs to return home to vote.²¹ These were logical arguments that generally failed to resonate in the world of politics.

Republicans’ counterarguments about enfranchisement had logical merit as well, and they resonated far better politically. Because soldiers could not return home for

20. Klement, “The Soldier Vote in Wisconsin During the Civil War,” 40.

21. McSeveney, “Re-electing Lincoln: The Union Party Campaign and the Military Vote in Connecticut,” 147. McSeveney himself characterizes soldiers as “disfranchised” without soldier-voting laws. *Id.* at 143.

elections on their own volition, their status as a practical matter differed little from those back home whom state constitutions formally excluded from the suffrage. Soldiers could not come and go as they pleased from their out-of-state military stations, and the exigencies of war sometimes made furloughs impossible. One could plausibly argue that this was tantamount to disfranchisement. Republican Governor Ramsey of Minnesota, urging passage of a soldier-voting law, captured his party's view. Without the new law, the governor argued, "volunteer soldiers remain disfranchised."²² Or as a Republican-dominated legislative committee in New York put it, absent soldiers were "practically disfranchised" unless they had access to absentee voting.²³ These Republicans had a point, and to that extent it was fair to characterize a law giving soldiers a way to vote in the field as "enfranchising" them. By the same logic, it was fair to characterize the absence of such a law as "disfranchising" them.

Fair or not, as chapters 3, 4, and 5 describe, Republicans used the debate to good effect in the political combat of 1863-1864. They leveraged partisan divisions over soldier-voting laws to seize the mantle for Republican candidates as "the soldiers' friend" and used that argument to secure votes of both soldiers and civilians. It was somewhat different in the legal realm. The same rhetorical debate surfaced in judicial decisions about the laws' constitutionality, but in a more bi-partisan way, with Democratic and Republican justices sometimes departing from the script of their legislative counterparts. In upholding Pennsylvania's soldier-voting law against a challenge to its

22. As quoted in Benton, *Voting in the Field*, 67.

23. Report of the Judiciary Committee of the New York Senate, Senate Journal, 1863, p. 1799, as quoted in Benton, *Voting in the Field*, at 140.

constitutionality, for example, trial court judge John Nesbitt Conyngham, a Democrat, observed that the challenge, if successful, would “disfranchise thousands of our fellow-citizens, who have been drawn from their homes in obedience to the Constitution and for their country’s defence, and whose disfranchisement will arise” when they answer the call.²⁴ Byron Paine, a Republican justice on Wisconsin’s high court disagreed. “So long as electors are at liberty to vote at their places of residence,” he wrote reviewing Wisconsin’s soldier-voting law, “they cannot be said to be disfranchised.”²⁵

Political and legal arguments about “justice” and “disfranchisement” aside, a common feature of all soldier-voting statutes was that they privileged only soldiers who already qualified as electors.

Soldier-Voting Laws and Residency Requirements

A second noteworthy feature common to all the laws follows from the first. All soldier-voting laws left the residence requirements of prewar election laws entirely intact. We have just seen that no soldier-voting laws changed any prewar suffrage qualifications. The unchanged eligibility requirements differed from state to state, but usually included race (white) and U.S. citizenship, and always included age (21 years and older), gender

24. John Nesbitt Conyngham, “In the Matter of the Contested Election of District Attorney,” *Philadelphia Inquirer*, January 16, 1862. In the decision overturning Conyngham’s ruling, the Supreme Court took him to task for his use of the term “disfranchise” in this context. “It strikes us,” wrote Justice George Woodward for the majority in *Chase v. Miller*, “that this is an inaccurate use of language.” Striking down the soldier-voting law “would disfranchise no qualified voter,” he ruled. *Chase v. Miller*, 41 Pa. 403, 427 (1862).

25. *State ex rel. Chandler v. Main*, 16 Wis. 398, 418-419 (1863). For Paine’s party affiliation, see Joseph Ranney, “Concepts of Freedom: The Life of Justice Byron Paine,” *Wisconsin Lawyer* 75, no. 11 (November 2002), accessed June 22, 2014, <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=75&Issue=11&ArticleID=231>.

(male), and a minimum period as a “resident.” To be enfranchised, a person had to meet all the tests. While the enforcement of voter eligibility rules became more difficult with absentee voting, no soldier-voting law expressly altered any of the tests of voter eligibility, including residency. The laws changed only the place where the soldier – having met exactly the same eligibility requirements as civilian voters back home – could cast his ballot.

This point about residency merits elaboration, since it is a source of easy confusion about the laws.²⁶ In defining suffrage rights, all states by the beginning of the war required a minimum period of residence in the state. Illinois, Minnesota, and Wisconsin required nothing more by way of residence, but most states required in addition that the voter have resided a minimum time in the relevant subdivision (or subdivisions) of the state, such as county, township, ward, or election district.²⁷ The constitutions and statutes measured the residency periods by counting back in time from the date of the election, always some specific number of months or days “next preceding the election,” meaning immediately before the election.

Most Civil War soldiers were absent from their homes far longer than the residency durations required in any of the laws. Many were gone for years. Prewar state

26. One historian characterizes soldier-voting laws as “a suspension of the residence requirements that made out-of-district voting illegal...” (Baker, *Affairs of Party*, at 291.) Another asserts that the Ohio soldier-voting law and the Supreme Court decision upholding it culminated a gradual relaxation of residence requirements occurring over the antebellum decades. (Winkle, *The Politics of Community*, 48-70). The latter argument is grounded on the assertion that relaxed residency rules for voting grew out of a gradual loosening of residence rules in Ohio poor law, which then spilled over into the state’s election law. While the two bodies of law both dealt with the rights of residents, residence qualification for voting differed definitionally and conceptually from the settlement rules for pauper relief. The theory’s more fundamental problem, however, is in treating Ohio’s soldier-voting legislation as a law about the residence qualification for voting. It was not.

27. ILL. CONST. of 1848, art. VI, § 1; MINN. CONST. of 1857, art. VII, § 1; WIS. CONST. of 1848, art. III, § 1.

law everywhere, however, made it clear that any citizen, having achieved status as a resident, retained that status while temporarily away from home. The source of this rule was variously constitutional, statutory, common law, or some combination of the three, but the rule applied everywhere. Under this legal principle, well established long before the war, any resident away from home temporarily, who intended to return home, retained his residency qualification during his absence. There was no novelty in the application of this rule to absent Civil War soldiers. Servicemen needed no loosening of residency rules to retain their voting qualification while temporarily away from home, and soldier-voting laws provided none.

In Ohio, for example, we have seen in Chapter 1 that statutory law provided this protection of an absent voter's residency qualification long before the war. The state's 1841 election law provided, "A person shall not be considered or held to have lost his residence, who shall leave his home and go into another state, or county of this state, for temporary purposes merely, with an intention of returning."²⁸ Kansas's prewar election law had a similar provision.²⁹ The election law in New Hampshire provided an elector's residence in town "shall not be interrupted or lost by a temporary absence therefrom with the intention of returning thereto."³⁰ Pennsylvania had no such statute, but its Supreme Court ruled that common law achieved the same result under principles of "domicile,"

28. Ohio Election Law (1841) § 2.

29. An Act to Regulate Elections and to Prescribe the Qualifications of Voters, and to Prevent Illegal Voting, ch. 28, § 9 1861 Kan. Sess. Laws (legisl. 1st session) 133,134-135. The Kansas soldier-voting law of 1864, ch. 59, § 6, 1864 Kan. Sess. Laws 98, 99. incorporated this provision by reference.

30. The Rights and Qualifications of Voters, ch. 25, § 7, N.H. COMP. STAT., 85, 86 (1853).

which controlled determination of a voter's residence.³¹ Vermont's Supreme Court reached the same conclusion in its review of that state's soldier-voting law. A soldier's absence for war, the court said, "like a absence from the state upon a journey, or business, is of a temporary character, and the domicil, or residence, continues within the state, while the person is actually without the state."³²

The same common law rule applied in every state, including Ohio and Kansas, making those states' statutory provisions legally redundant, though useful as a guide to election judges unfamiliar with common law. In some states, the point was made in the state constitution, though only for the benefit of certain categories of voters. Wisconsin's constitution, for example, provided that "no person shall be deemed to have lost his residence in this state by reason of his absence on business of the state or the United States."³³ That provision covered not only soldiers, but also federal contractors and the state's federal office holders. Michigan's constitution had language virtually identical to Wisconsin's, as did New York's, California's, and Nevada's.³⁴

31. The state's high court explained that a man's domicile, and therefore his residence for voting purposes, was the place of his permanent home, to which he intended to return when temporarily away. The local residency requirement in Pennsylvania's constitution, according to the court, meant "the equivalent of domicile," and soldiers met it notwithstanding their temporary absence from Pennsylvania. Upon his return home from service, the court stated, the soldier "resumes all the civil rights of citizenship, and, his residence being unimpaired by his temporary absence, he has a right to vote on election day." *Chase*, 41 Pa. at 421, 423.

32. Opinion of the Judges of the Supreme Court on the Constitutionality of "An Act Providing for Soldier Voting," 37 Vt. 665, 670-671 (1864). The court did not discuss a state law predating the decision and stating that an absence from Vermont for more than one year extinguished voting rights in the state. VT. COMP LAWS Title I, ch. I, §§ 6, 7 (1851). Research for this dissertation uncovered no similar law in any other state.

33. WIS. CONST. of 1848, art III, § 4.

34. MICH. CONST. of 1851, art. III, § 5; N.Y. CONST. of 1846, art II, § 3. This provision extended beyond service to the United States to cover any person absent while "engaged in the navigation of the waters of this state, or of the United States, or of the high seas" or while being a "student of any seminary of learning" or "while kept at any almshouse or other asylum, at public expense," or even "while confined in any public prison." The New York provision not only protected eligible voters from losing their

In no state did the residency requirements of election law demand that a voter, having qualified as a resident, stay in town for the specified number of days “next preceding the election” in order to preserve his voting right. He was free to come and go without risking his voting eligibility. He could leave town even for extended periods without jeopardizing his status as a resident, as long as his absence was temporary. Iowa Supreme Court Justice George Wright, in his opinion upholding the constitutionality of that state’s military suffrage law, stated the proposition plainly: “It is not claimed, nor could it well be, that soldiers in the volunteer service of the government, by their absence have lost or changed their residence.”³⁵ Or, as California Chief Justice Silas Sanderson put it, “A man is just as much a qualified elector when absent from the place of voting as when present. In the former case he has the right to vote, but not the opportunity. In the latter he has both.”³⁶ That was true everywhere. Soldier-voting laws simply equalized the opportunity for absent soldiers.

Scope of Coverage: Which Soldiers Did the Laws Cover?

The categories of eligible servicemen varied from law to law.³⁷ Soldiers serving in the regular army presented a particular challenge and were often excluded. According

residency qualification on account of these activities, but also prevented outsiders from gaining a New York residency qualification by conducting any of the identified activities while in New York temporarily. N.Y. CONST. of 1846, art II, § 3; California’s 1849 tracked the New York language verbatim. CAL. CONST. of 1849, art. II, § 4. That provision, the California Supreme Court noted, merely affirmed the common law, which held that temporary absence did not change a citizen’s domicile. *Bourland v. Hildreth*, 26 Cal. 161, 212 (1864); NEV. CONST. of 1864, art II, § 2.

35. *Morrison v. Springer*, 15 Iowa 304, 344 (1863).

36. *Bourland*, 26 Cal. at 238.

37. As amended in 1864, Ohio’s law was unusually broad, explicitly extending to men in such non-combat roles as “teamsters, wagoners, quartermasters and their employees, and those engaged in the

to republican theory, standing armies were invitations to tyranny, especially when they wielded political power. Those sentiments still had vitality at the outbreak of the Civil War, finding expression in many prewar state constitutions and in some cases standing as obstacles to enfranchisement under prewar law.³⁸ The new laws removed none of those obstacles.

Of the twenty northern states that provided for absentee soldier voting, fifteen had constitutional provisions either flatly excluding regulars from the franchise³⁹ or complicating their enfranchisement by barring regulars from gaining residence by reason of being stationed in the state.⁴⁰ In addition, regulars suffered more generalized

subsistence, transportation, and naval departments....” An Act to Enable the Qualified Voters of this State in the Military Service to Exercise the Right of Suffrage, (Ohio 1864) § 1.

38. Baker, *Affairs of Party*, 154; Gordon S. Wood, *Empire of Liberty* (New York: Oxford University Press, 2009), 7, 172. For the roots of American hostility to standing armies in English political thought, see Lois G. Schworer, *No Standing Armies: The Anti-army Ideology in Seventeenth-Century England* (Baltimore: The Johns Hopkins University Press, 1974).

39. The constitutions of Kansas, Missouri, and Connecticut flatly excluded regulars from suffrage eligibility. KAN. CONST. of 1859, art. V, § 3. [Kansas amended its constitution in 1864 to shore up the foundation for the soldier-voting law it had already passed that year. The amendment preserved the 1859 exclusion of regular servicemen. Joint Resolution, to Amend Section Three of Article Five of the Constitution of the State of Kansas ch. 45, 1864 Kan. Sess. Laws 81 (1864)]; MO. CONST. of 1820, art III, § 10. Connecticut amended its constitution in 1864 to authorize absentee soldier voting, specifically excepting regulars from eligibility. For the language of Connecticut’s 1864 amendment, see An Act Relating to the Proposed Amendment to the Constitution, ch. 11, 1864 Conn. Pub. Acts 24.

40. The constitutions of Iowa, Ohio, Michigan, New York, Maine, Rhode Island, Illinois, California, Minnesota, Nevada, West Virginia, and Wisconsin blocked regulars from gaining a residence qualification by reason of being stationed in the state. IOWA CONST. of 1846, art. II, § 4; OHIO CONST. of 1851, art. V, § 5; MICH. CONST. of 1850, art. VII, § 7; N.Y. CONST. of 1846, art. II, § 3; ME. CONST. of 1820, art. II, § 1; R.I. CONST. of 1842, art. II, § 4; ILL. CONST. of 1848, art. VI, § 6; CAL. CONST. of 1849, art. II, § 4; MINN. CONST. of 1857, art. VII, § 4; NEV. CONST. of 1864, art. II, § 2; W. VA. CONST. of 1863, art. I, § 6; WIS. CONST. of 1848, art. III, § 5. In addition, some state constitutions expressed disfavor for standing armies in ways not directly relevant to voting, such as by banning them in peacetime as “dangerous” (e.g., N.H.. CONST. of 1792, Part First, art. XV; VT. CONST. of 1793, CH. 1, art. XVI; ME. CONST. of 1820, art. I, § 18) or barring the coerced quartering of troops (e.g., CONN. CONST. of 1818, art. I, § 19; ME. CONST. of 1820, art. I, § 19).

constitutional disfavor under language sometimes banning them in peacetime as “dangerous” or barring them from nonconsensual quartering with civilians.⁴¹

The upshot was that eight states explicitly excluded soldiers in the regular army from their absentee soldier-voting laws, sometimes tellingly referring to the regulars as “the standing army.”⁴² The soldier-voting laws of Ohio and seven other states with constitutions barring in-state regulars from gaining residence qualification, remained silent about the eligibility of absent regulars to vote in the field; the new laws neither expressly included nor excluded these men.⁴³ That left it for election judges in the field to decide the eligibility of regulars’ case by case as challenges arose. Just as Ohio’s

41. Standing armies as “dangerous,” see, e.g., N.H. CONST. of 1792, Part First, art. XV; VT. CONST. of 1793, CH. 1, art. XVI; ME. CONST. of 1820, art. I, § 18. Provisions barring quartering, see, e.g., CONN. CONST. of 1818, art. I, § 19; ME. CONST. of 1820, art. I, § 19.

42. The eight were Connecticut, Kansas, Maine, Michigan, Missouri, New Hampshire, Vermont, and Wisconsin. An Act to Secure the Elective Franchise to Soldiers in the Field, ch. 37, § 1, 1864 Conn. Pub. Acts 51, 51; An Act Supplemental to an Act Entitled ‘An Act to Regulate Elections and to Prescribe the Qualifications of Electors, and to Prevent Illegal Voting.’ Approved June 3, 1861, ch. 59, § 1, 1864 Kan. Sess. Laws 101, 101; An Act Authorizing Soldiers Absent from the State in the Military Service to Vote for Electors of President and Vice President (Me. 1864), § 9; Missouri Convention, “An ordinance to enable citizens of this state, in the military service of the United States or the State of Missouri, to vote, June 12, 1862,” *Journal and proceedings of the Missouri State Convention: Held at Jefferson City, June, 1862*, (St. Louis: G. Knapp & Co, 1862) 15-16; An Act to Enable the Militia and Volunteers of this State, when in the Military Service of the United States or of this State (Wis. 1862) § 1; An act Providing for Soldier Voting (Vt. 1863) § 1. Three of these eight states – Maine, New Hampshire, and Vermont – had prewar constitutions with no bar against regulars’ voting or gaining a residence, though the constitutions in each case prohibited nonconsensual quartering or barred standing armies in peacetime.

43. The seven states in addition to Ohio were California, Illinois, Iowa, Minnesota, Nevada, New York, and West Virginia. Ohio Soldier Voting Act (1863); An Act in Addition to an Act Entitled an Act to Regulate Elections (Cal, 1863); An Act to enable the Qualified Electors of this State, Absent there from in the Military Service of the United States, in the Army or Navy thereof, to Vote, 1865 Ill. Laws 59; An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service (Iowa 1862); An Act to Enable Citizens of this State, who are or may be Engaged in the Military or Naval Service of the United States, to Vote in the Election Districts where they Reside, at the General Election to be held in the Month of November, 1862 and all Subsequent General Elections, during the Continuance of the Present War, ch. 1, 1862 (extra session) Minn. Laws 13; Election Ordinance of 1864, §2, 1 Nev. Comp. Laws; Embracing Statutes of 1861 to 1873, (Bonnifield & Healy) cxxxvii, cxxxviii (1873); An Act to Enable the Qualified Electors of this State, Absent therefrom in the Military Service of the United States, in the Army or Navy thereof, to Vote, ch. 253, 1864 N.Y. Laws 549; An Act to Regulate Elections by the People (W. Va. 1863) § 26.

soldier-voting law provided no instructions for election judges facing such challenges, neither did any of the other five.

Eleven laws excluded sailors in the navy, though the laws never stated the exclusion explicitly. Rather, statutes implied the exclusion by operation of their positive terms, which created polling places where “soldiers” served in “regiments,” “companies,” or “battalions.” These were organizational units of armies, cavalries, or artillery, but not of the navy.⁴⁴ The exclusion may have resulted from the size and demographic composition of naval forces. There were far fewer sailors than soldiers in the Civil War, particularly from western states. More often than with army enlistees, navy recruits were predominantly foreign-born and African-American, men that most prewar constitutions disfranchised. The white contingent was largely an unsympathetic cohort: rowdy, heavy-drinking men from the margins of respectable middle class society. Compared to their counterparts in the army, most were motivated not by patriotism but by the desire to escape the draft. They resented service in the racially integrated shipboard environment, and they served grudgingly.⁴⁵ These men, though they contributed greatly to the Union’s

44. The eleven were Connecticut, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Rhode Island, Vermont, and Wisconsin. An Act to Secure the Elective Franchise to Soldiers in the Field, (Conn. 1864); An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service (Iowa 1862), § 1; An Act Regulating the Manner of Soldiers Voting for Electors of President and Vice President of the United States (Ky. 1863) § 1; An Act Authorizing Soldiers Absent from the State in the Military Service to Vote for Electors of President and Vice President, and for Representatives to Congress (Me. 1864) § 1; MD. CONST. of 1864, art. XII (“Schedule”); An Act to Enable the Qualified Electors of this State, in the Military Service, to Vote at Certain Elections, (Mich. 1864) § 1; Missouri Convention, “An ordinance to enable citizens of this state, in the military service of the United States” 15-16; An Act to Approve and Publish and Submit to the Electors a Certain Proposition of Amendment to the Constitution of the State (R.I. 1864); An Act Providing for Soldier Voting (Vt. 1863) § 1; An Act to enable the militia and volunteers of this state, when in the military service of the United States or of this state (Wis. 1862) § 1.

45. Michael J. Bennett, *Union Jacks: Yankee Sailors in the Civil War* (Chapel Hill: University of North Carolina Press, 2004).

military effort, may have escaped the attentions or the respect of state lawmakers with whom they had little in common socially or demographically. In any event, more than half of military suffrage laws effectively excluded them.

Duration of Soldier-Voting Laws

Civil War soldier-voting laws paved the way for similar laws in subsequent wars and also served as a milestone in the development of absentee voting rights generally.⁴⁶ But the laws themselves were generally short-lived. Only five of the twenty soldier-voting arrangements that came into existence during the Civil War survived very long past the war.⁴⁷ In one way or another, most states followed Ohio's example in limiting the laws' duration.⁴⁸ Four expired at war's end by their own terms, with language limiting the laws' duration to the period of the "present war" (Missouri, Minnesota), "during the present rebellion" (Connecticut), or "during

46. Miller, *Absentee Voters and Suffrage Laws*, 29-35; Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright Publishing, 2013), 197.

47. The five were Kansas's, Maine's, Michigan's and Nevada's (all of which endured well into the twentieth century) and New Hampshire's (which remained in effect until 1897). The Kansas soldier-voting law survived the Civil War and remained in effect until at least 1947. [Elections, KAN. STAT. ANN. Ch. 25, art. XII, §1201 et. seq. (1947)] Maine election law preserved the right of absent soldiers to vote through World War II. In 1944, the state extended absentee voting rights more generally to citizens away from their homes on Election Day. [Elections, ME. REV. STAT. tit. I, ch. 8, §§ 83, 84, (1930). ME. REV. STAT. ANN. Tit. 1, ch. 8, § 83-84. (1930). ME. REV. STAT. ANN. Ch. 6, §§ 1, 7 (1944)] Michigan's soldier-voting law expired by its terms at the end of the war and was ruled unconstitutional by its state supreme court even before that. But the state amended its constitution in 1866 to authorize the legislature, during wartime, to "provide the manner in which, and the time and place at which" absent servicemen could vote. The state incorporated that provision in its revised constitution in 1908. It was subsumed in the 1963 constitution's more general grant of legislative authority for all classes of absent voters, not just soldiers. [Benton, *Voting in the Field*, at 103; MICH. CONST. of 1908, art. III, § 1, MICH. CONST. of 1963, art. III, § 4] In Nevada, the legislature incorporated military suffrage provisions into the general elections law in 1866. These remained a part of Nevada law into the twentieth century. [An Act Relating to Elections, NEV. REV. STAT. Ch. CVII, § 23 (1866); An Act to Provide for Taking the Votes of Electors of the State of Nevada, who may be in the Military Service of the United States, Nev. Rev. Stat. § 1887, et seq. (1912). See the Appendix for additional discussion of each state.

48. An Act to Enable the Qualified Voters of this State in the Military Service to Exercise the Right of Suffrage, (Ohio 1864). This amendment to the 1863 law limited the duration of that law to "the existence of the present rebellion."

the existence of the present rebellion” (Ohio).⁴⁹ The remaining states either repealed soldier-voting statutes legislatively after the war or effectively erased them with postwar revisions to state constitutions or election laws omitting soldier-voting provisions.⁵⁰ That five out of twenty

49. Missouri Ordinance, § 1; An Act to Enable Citizens of this State, who are or may be Engaged in the Military or Naval Service of the United States (Minn. 1862), § 1; An Act to Secure the Elective Franchise to Soldiers in the Field, (Conn. 1864) § 1; An Act To Enable the Qualified Voters of this State in the Military Service to Exercise the Right of Suffrage, (Ohio 1864) § 1.

50. Pennsylvania: The election law of 1868 made no reference to absentee voting for soldiers and included this provision: “No body of soldiers, armed or unarmed, shall be present at any place of election during the time of election.” An act Relating to the Elections of this Commonwealth, P. L. No. 192, 1839 Pa. Laws 519; Iowa: The general election law of 1880 stated, “no person is entitled to vote at any other place than in the township in which he resides at the time he offers to vote.” There was no exception for absent soldiers. IOWA CODE, Ch. 32, § 492 (1880); Vermont: By 1870, the required location for voting for congressional representatives was “any town in the congressional district in which he [the voter] resides.” For electors for U.S. president and vice-president, it was “in any town in this state.” There were no exceptions for absent soldiers. VT. COMP LAWS Title I, § 37, (1870); Kentucky: The state repealed its military suffrage law in 1866, an arguably redundant exercise, since by its terms the soldier-voting law applied only to the election of 1864. An Act to Repeal an Act, entitled “An Act Regulating the Manner of Soldiers Voting for Electors for President and Vice President of the United States within and without this State, ch. 370, 1866 Ky. Acts 25; Maryland: The state constitution of 1864, which enabled absentee voting for soldiers, had a very short lifespan. A new constitution replaced it in 1867. It deleted the 1864 soldier-voting provisions and restored the prewar suffrage rules, once again entitling each elector “to vote in the ward or election district in which he resides.” MD. CONST. of 1867, art. I, § 1; Wisconsin: The Badger State repealed its soldier-voting law in 1871, WIS. STAT. tit. XXIX, ch. CLXXXVIII, § 1(1871); West Virginia: The state omitted military suffrage provisions from the state’s election law in the first post-war statutory codification, in 1870. Elections by the People for State, District, County, and Township Officers, W. Va. Code, Ch. III (1870); California: Not long after the Supreme Court’s ruling in 1864 that absentee soldier voting was unconstitutional [*Bourland* , 26 Cal. at 161], the California legislature repealed the state’s Civil War soldier-voting laws in 1866. CAL CODE, Para 7979, § 9 (1864 - 1871); Missouri: In July 1865, a new constitution took effect in Missouri. It’s ratification process allowed absent soldiers to participate, and its suffrage provision granted absentee voting rights to members in “the volunteer army of the United States, or in the militia force of this state....” MO. CONST. of 1865, art II, § XXI. On revision in 1875, the state constitution omitted this provision; Illinois: No soldier-voting provisions appear in the election law section of the state’s 1871 compilation of laws then in effect. Eugene L. Gross and William L. Gross, *The Statutes of Illinois: An Analytical Digest of All the General Laws of the State in Force at the Present Time, Second Volume: Acts of 1871 and 1872* (Springfield: E. L. & W. L. Gross, 1872), 252; New York: The Empire State repealed its soldier-voting law in 1866. An Act to Repeal an Act Entitled “An Act to Provide the Manner in which and the Time and Place at which the Electors of this State, Absent therefrom in the Actual Military Service of the United States, may Vote, and for a Canvass and Return of their Votes,” Passed April Twenty-Fourth, Eighteen Hundred and Sixty-Five., ch. 524, § 1, 1866 N.Y. Laws 1132.

laws survived the war marks the phenomenon as more than ephemeral, but its status as genuine reform is diminished by the laws' quick extinction in fifteen of twenty states.

High Courts Grapple with Radicalism in Soldier-Voting Laws

The laws' commonalities and differences underscore what the soldier-voting phenomenon was not. It was not an expansion of the elective franchise to previously excluded groups; many laws fell short of covering even the entirety of their states' voting-eligible soldiers, and none attempted to open suffrage to soldiers left out of their states' prewar suffrage qualifications. The phenomenon was not about gradually shifting residency requirements, or fundamentally about the residency qualification at all. It did not reflect a bottom-up demand for absentee voting rights by absent soldiers themselves, many of whom preferred the alternative of returning home on furlough to vote alongside their neighbors back home. Nor was it long lasting; most absentee-voting arrangements expired when the war ended or shortly thereafter.

Nevertheless, the laws were radical. Their radicalism emerges from application of a different yardstick, a yardstick giving primacy to process. By divorcing the process of voting from soldiers' in-state communities, soldier-voting laws changed an attribute of elections that all earlier law had embedded in the constitutional order in every state. That shift, brief and limited though it was, marks the laws as radical and potentially transformative.

Just as it did in Ohio, the picture of radicalism emerges from court decisions weighing the laws' constitutionality. The debate between Ohio Supreme Justices Rufus Ranney and Josiah Scott in the Ohio case of *Lehman v. McBride* played out in similar terms in other states. Everywhere the question was the same: did the state constitution, in addition to identifying who could vote, fix the location of voting, or did the constitution leave that subject for legislatures to decide? To answer that question, justices approaching the question as Rufus Ranney did in the Ohio case, looked to history for definitions of key constitutional terms, terms like "election" and "vote." Their search revealed to them a legal tradition of exclusively in-person, community-based voting, which had achieved constitutional status by the time of the Civil War. Their interrogation of history also revealed a paramount constitutional value of protecting electoral "purity." These justices saw fixing the place of voting within local communities as their constitutions' device for advancing that value, such that divorcing the process of voting from voters' home communities constituted an unconstitutional invitation to fraud.

In contrast, justices approaching the constitutional question as Josiah Scott did in the Ohio case, while agreeing that absentee voting was a legal novelty and indeed conceding that the concept was unimaginable to constitutions' framers, attached no constitutional significance to the novelty. For them the question's answer lay in whether the plain meaning of constitutional text, contemporaneously understood, unambiguously prohibited absentee voting. If it did not, then the legislature had a free hand. Chief Justice George Martin of Michigan captured this approach vividly in his dissenting opinion in support of Michigan's statute. "I find myself unable to put my finger upon any

express provision of the constitution,” Martin protested, “which deprives the legislature of the right” to pass such a law.⁵¹ These justices saw a paramount constitutional value in protecting the right of qualified electors to vote, and they saw absentee-voting laws as consistent with that value. Like their brethren taking the other side of the issue, however, they saw the laws as departing pronouncedly from established traditions.

The first state to confront the question was Pennsylvania, the only state in the union with a soldier-voting law on the books at the outset of the war. That law was first enacted in 1813.⁵² After the state revised its constitution in 1838, the law was retained, in a slightly revised form, as a brief section in a long and comprehensive election passed in 1839. It allowed absent soldiers “to exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop, or company, to which they shall respectively belong, as fully as if they were present at the usual place of election.”⁵³ A precursor to Civil War soldier-voting laws on the Iowa model, it called for election sites to open at the encampments where soldiers served, overseen by officers of each company.⁵⁴ Before the Civil War, the law never received judicial attention, if indeed it was ever used at all.⁵⁵ But it was used in elections in 1861, and in some of those elections soldiers’ ballots tipped the outcome.

51. *Twitchell*, 13 Mich. at 185-186.

52. An ACT to enable the militia or volunteers of this state, when in the military service of the United States or of this state, to exercise the right of election, ch. CLXXI, 1812 Pa Laws 213.

53. An Act Relating to the Elections of this Commonwealth, P.L. 192, 1839 Pa. Laws 519.

54. *Id.* at § 44.

55. In attacking Democrats in general, and Democrat George Woodward in particular, for opposing soldier voting, Republicans in 1864 charged in an election pamphlet that Pennsylvania soldiers had indeed voted under the law during the Mexican War. William E. Chandler, *The Soldiers’ Right To Vote: Who Opposes It? Who Favors It?* (Washington: Lemuel Towers, 1864), 8; Claims that absent Pennsylvania soldiers had voted in the Mexican War surfaced in a few newspapers during the Civil War. An unsigned letter to a Republican newspaper asserted that Pennsylvania soldiers had voted in the 1847 gubernatorial

The constitutionality of the law came before Pennsylvania's high court in the 1862 case of *Chase v. Miller*, which struck down the law as unconstitutional. More than any other court decision dealing with soldier-voting laws, this one reverberated nationally, both legally and politically. Legally, it drew attention as a potential precedent in the other eight states where high courts subsequently reviewed the constitutionality of similar laws, including Ohio.⁵⁶ Politically, the decision took center stage when its author, Democrat George Woodward, ran for governor in 1863. Citing his decision in *Chase*, Republicans charged over the following two years that Woodward in particular and Democrats in general were anti-soldier because they opposed soldier-voting laws.

None of those repercussions were foreseeable when the case arose in 1861. In the race that year for district attorney of Luzerne County, Democrat Chase won the home vote, but Republican Miller won the overall tally by outpolling Chase among voting soldiers. The return judges excluded the soldier votes and declared Chase the winner. Miller contested the outcome in court.⁵⁷ The lower court judge, a Democrat named John Conyngham, agreed with Miller that the soldier vote should have counted. Their

election, most of them for winning Democratic candidate Francis Shunk. (Wellsboro *Agitator*, June 4, 1862). Another Pennsylvania paper simply stated, without elaboration, that absent soldier votes had been counted during the Mexican War (Chambersburg *Franklin Repository*, July 20, 1864). Cf. Neither Josiah Benton nor Jonathan White, in writing about the Pennsylvania soldier-voting law of 1864, corroborates that assertion. A likely reason for enactment of the 1813 version of the law was to assist in recruiting for the War of 1812. See Keyssar, *The Right to Vote*, 37, 137. For the connection between voting and suffrage during that war, see Williamson, *American Suffrage From Property to Democracy*, at 188.

56. Justice Josiah Scott cited the Pennsylvania decision in his majority opinion, opining that differences between the Pennsylvania and Ohio constitutions rendered the case inapplicable. (*Chase*, 41 Pa. at 611.) Rufus Raney cited it in his dissenting opinion as support for his argument that tying elections to local communities served the constitutional imperative of protecting the "purity" of elections. (*Id.* at 649.)

57. *Chase*, 41 Pa. at 414. A fair assumption is that the election officials acted based on their interpretation of the Pennsylvania constitution, but no record of their reasoning has survived.

exclusion “disfranchised” soldiers, in Conyngham’s opinion, and denied the legislature’s “sovereignty.”⁵⁸ Chase appealed to the state Supreme Court.

The legal dispute hinged on the meaning of the suffrage provision of Pennsylvania’s 1838 constitution. Article III, section 1 granted voting rights to “every white freeman of the age of twenty-one years, having resided in the State one year, and *in the election district where he offers to vote*, ten days immediately preceding such election....”⁵⁹ The central question was whether the language italicized here imposed a constitutional requirement that voters cast their ballots in person within their Pennsylvania election districts.

Woodward approached the question as a subject for historical inquiry, just as Rufus Raney would the following year when he dissented in the Ohio case. Woodward sought to answer the question as the constitution’s framers would have answered it. In this he had the advantage of having been one of the framers himself, although his authority on questions of original intent was presumably no greater than James Thompson’s, a fellow Democrat on Pennsylvania’s high court. Thompson too was a delegate to the 1838 convention that drafted the constitution.⁶⁰ He dissented from Woodward’s opinion for the 4-1 *Chase* majority, although, because he did not file an explanatory dissenting opinion, we are left to guess at his reasons.

58. *Philadelphia Inquirer*, January 16, 1862.

59. PA. CONST. of 1838, art. III, § 1, italics added. The same section also conditioned the suffrage on the payment of a tax. Specifically, the prospective voter must have “within two years paid a State or county tax, which shall have been assessed at least ten days before the election....”

60. Woodward participated actively at the convention. On the suffrage provision of the new instrument, Woodward supported the addition of “white” as a qualification for voting. Giving Negroes the vote, he was reported to have said in a convention speech, would “offend against nature.” *Democratic Banner* (Clearfield, PA), August 26, 1863, 2; For Thompson’s role as a delegate, see “James Thompson,” *Biographical Directory of the United States Congress*, accessed November 26, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000204>.

We do know Woodward's reasons. The framers, he ruled, went beyond deciding *who* could vote (white, 21-year old men meeting residency and taxpaying requirements) and purposely made the precise *place* of elections a constitutional element of suffrage, thereby putting the subject beyond the reach of legislation to alter. They did this in Article III, Section 1 by linking the act of voting physically to the election "district" in which the voter met the 10-day residency requirement. It was in that district, and only in that district, that the voter could "offer" his vote by appearing there in person to cast his ballot.

In the Ohio case, Rufus Raney looked to history for a definition of the word "election" in that state's 1851 constitution; for Woodward, the key word in the Pennsylvania constitution was "district." Pennsylvania's constitution provided no definition, but Woodward concluded that by 1838 the word had taken on a clear meaning from the state's long history of election laws. Year after year, starting long before the 1838 constitution, legislation had specified the places of voting and called those places – always within Pennsylvania – "election districts." By law, the word had come to mean the location where voters convened in person to cast their ballots. The framers had that definition in mind when they used the word "district," according to Woodward.⁶¹

The history of election law in Pennsylvania also revealed to Woodward a consistent record of ever-tightening guards against fraud. The purpose of requiring voting in election districts in the 1838 constitution, he said, was "to exclude disqualified

61. *Chase*, 41 Pa. at 421. The constitution did not limit the legislature's authority to create new districts, Woodward wrote, including a district defined as a specific military encampment within the state, if legislators wished. But the 1839 soldier-voting law did no such thing. It simply ignored the constitution's requirement of voting in a district, saying instead that absent soldiers could vote "at such place" as the soldier's commanding officer shall appoint. This, Woodward concluded, violated Article III, § 1. *Id.*

pretenders and fraudulent voters of all kinds.” The soldier-voting law offered none of these protections. It “opens a wide door for most odious frauds,” Woodward wrote, by allowing soldiers to vote “where the evidence of their qualifications is not at hand and where our civil police cannot attend to protect the legal voter.” All this collided with what Woodward called “the labour of the constitution,” which was to assure that suffrage rights “be preserved from abuse and perversion.”⁶²

In concluding that the soldier-voting law could not stand, Woodward wrote, “We cannot be persuaded that the constitution ever contemplated any such mode of voting.”⁶³ Rufus Raney would echo Woodward’s conclusion about the lesson of history. At the time Ohio’s constitution was drafted, “Nobody had ever heard of any other sort of election” than one held within the voters’ hometown, Raney would say in his dissent in the Ohio case.⁶⁴ The supposed inconceivability of absentee voting to framers became a common refrain among justices looking askance on the concept of absentee voting.

62. *Id.* at 425 - 427. Woodward treated the fraud attendant on soldier voting not as a hypothetical risk, but as a documented certainty. In 1861, the soldier-voting law had come before the court on procedural issues not involving the law’s constitutionality. The undisputed record in that case showed rampant fraud. *Hulseman and Brinkworth v. Rems and Siner*, 41 Pa. 397 (1861). With that record apparently in mind (though he did not cite *Hulseman* in his *Chase* opinion), Woodward said, “the cases of fraud that have been before us” proved that soldier voting was subject to cheating and manipulation. He was careful to absolve the soldiers themselves from culpability for the fraud, noting – again undoubtedly from the *Hulseman* record – that the actual culprits “... were political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law.” (*Chase*, 41 Pa., at 421.)

63. *Id.* at 418-419, 424-425. Woodward had to square that conclusion with the fact that the 1813 precursor of the 1839 soldier-voting law was on the books when the 1838 constitution was drafted. He did so in a lengthy discussion about the legislative history of the 1839 law. In reenacting the 1813 law in a hasty rush to adjournment, lawmakers had lost sight of the new constitution. It was “careless legislation,” he said, pointing as proof to a separate provision of the same 1839 law that prohibited troops from attending elections. *Id.* at 417.

64. *Lehman*, 15 Ohio St. at 629.

The *Chase* decision sparked a successful initiative to amend the Pennsylvania constitution so as to authorize soldier-voting legislation. Acting on that authority, the legislature passed a soldier-voting law in time for the 1864 elections.⁶⁵ The decision also doomed Woodward's run for governor in 1863 and marked a watershed moment in the general politicization of the soldier-voting issue.

Five other state high courts rendered decisions finding soldier-voting laws unconstitutional. All did so following the approach that Woodward used in striking down Pennsylvania's prewar law and Ranney used unsuccessfully in urging his colleagues to strike down Ohio's 1863 law. To lend meaning to otherwise undefined words of their state constitutions, these justices searched the history of suffrage in their states, as reflected in earlier constitutions and elections laws. The definitions they extracted from that search took on constitutional status and, in their minds, left no room for the novelty of absentee voting.

Three of the cases reaching this conclusion arose in the New England states of Connecticut, Vermont, and New Hampshire. Unlike the Pennsylvania and Ohio cases, each of these court opinions was advisory, because it responded to a legislative request for the court's views on the constitutionality of an enacted law or a bill under consideration. The very fact that they made the requests showed legislative uncertainty about the constitutionality of the laws under consideration. In concluding that absentee voting was unconstitutional, the three New England court opinions validated the legislative doubts.

65. An Act to Regulate Elections by Soldiers in Actual Military Service, P.L. No. 871, 1864 Pa. Laws 990.

Connecticut's opinion came first. The 1862 law under consideration followed the Iowa model of calling for election sites to open at out-of-state encampments where Connecticut soldiers served.⁶⁶ Justice Thomas Butler, a Whig in his earlier days in the state legislature, wrote the unanimous court opinion finding the law defective.⁶⁷ The problem, the high court held, was that the state's constitution quite clearly fixed the place for elections in "electors' meetings" held in towns within the state. Like Woodward in Pennsylvania and Ranney in Ohio, Butler reached this conclusion by analyzing the history of the state's election laws. Dating from its colonial charter, the Fundamental Orders of 1639, and continuing through its most recent amendment to the state's constitution in 1836, "elections" were virtually synonymous with town meetings of freemen, such that an election held elsewhere than in a town meeting, let alone out of state, was a constitutional impossibility. The constitution repeatedly referred to elections as "meetings of electors." It called for electors to choose state officers and legislators "at their meeting" every April and for the casting of ballots "by each elector present at such meeting."⁶⁸ In language echoing George Woodward, and anticipating Rufus Ranney, Butler wrote, "there has never been an election, *by the people*, of representatives or state officers, in any other manner or place" than by personal attendance by electors at town

66. An Act in addition to an Act entitled "An Act relating to Electors and Elections," ch. 17, 1862 Conn. Pub. Acts 15, (hereafter cited as "the 1862 Connecticut Military Suffrage law").

67. Opinion of the judges of the Supreme Court, 30 Conn. 591 (1862). (hereafter cited "*Connecticut Supreme Court 1863 Advisory Opinion*"). For Butler: "Thomas Butler," *Biographical Directory of the United States Congress*. Accessed June 19, 2014, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001191>.

68. *Connecticut Supreme Court 1863 Advisory Opinion*, 30 Conn. at 596-600. Butler's citations were to several sections of Articles 3, 4, and 6 of the 1836 Connecticut constitution. The centrality of town meetings to local government in early America is well documented in a rich body of literature. See, e.g., David Hackett Fischer, *Paul Revere's Ride* (New York: Oxford University Press, 1995); Brian P. Janiskee, *Local Government in Early America* (Lanham, MD: The Roman & Littlefield Publishing Group, Inc., 2010).

meetings in Connecticut. The constitution tethered voting so tightly to township meetings that soldier voting would be impermissible even if it happened in the soldier's own township within Connecticut, unless it happened in that township's annual meeting, Butler added.⁶⁹

Anticipating the constitutional problem that Butler identified, the legislature had attempted a creative legal fiction in crafting the 1862 statute. The law declared that soldiers' out-of-state voting under the law was to "be considered, taken and held to have been given by them in the respective towns of which they are residents."⁷⁰ It was a creative provision, but it failed to carry weight with the court. Voting under the 1862 act clearly meant voting away from Connecticut, and the court said that the legislature's effort to call it something else was the equivalent of "legislative alchemy."⁷¹ If lawmakers could get away with that, the court anticipated, the state's constitution would count for little. Focusing just on suffrage qualifications, the court imagined where the slippery slope would lead if not nipped in the bud:

They [the legislators] may authorize minors to vote, and say that their votes shall be considered, taken and held to be votes of electors of full age; or colored men, and say their votes shall be considered, taken and held to be the votes of white men and electors; and so may authorize the taking and counting of women and aliens.

The Connecticut legislature responded by launching an initiative to amend the constitution. That project succeeded in time for legislation in 1864, allowing absent Connecticut soldiers to vote. For the first time in Connecticut's history, voters could cast

69. *Connecticut Supreme Court 1863 Advisory Opinion*, 30 Conn. at 597, 601 (emphasis in the original).

70. The 1862 Connecticut Military Suffrage Act, § 8.

71. *Connecticut Supreme Court 1863 Advisory Opinion*, 30 Conn at 602.

ballots without attending their township meetings, as long as they were qualified soldiers.⁷²

In Vermont, the decisive constitutional word was “constable.” In elections for executive branch offices including governor, the state’s 1793 constitution directed voters in each town to “bring in their votes ... to the Constable....”⁷³ To protect the argument that absent soldiers were “bringing in” their votes “to the constable,” the soldier-voting law designated the presiding election officials at the far away military voting sites as “special constables.” Treating that statutory wording as legerdemain, the court found that absentee voting violated the constitution. Throughout Vermont history, the court noted, “constables” presided at town meetings, and they had no authority other than as town officials. That historical meaning defined the otherwise undefined word in the constitution. So, in requiring voters to “bring in” their votes to the constable, the constitution meant they had to present their votes in person to the constable presiding at the town meeting where civilian Vermonters had always held their elections. That ruled out absentee balloting.⁷⁴ As discussed later in the chapter, the Vermont court sustained the legislature’s authority to prescribe absentee voting in purely federal elections. Vermont’s absent soldiers used that law to vote by absentee ballot, marking a first in the state’s history.

72. An Act Relating to the Proposed Amendment to the Constitution, (Conn. 1864); An Act to secure the Elective Franchise to Soldiers in the Field, (Conn. 1864).

73. VT. CONST. of 1793, CH. II, § 10.

74. *In re Opinion of the Judges*, 37 Vt. at 670-671. As discussed later in the chapter, the Vermont court sustained the legislature’s authority to prescribe absentee voting in purely federal elections. Vermont’s absent soldiers used that law to vote by absentee ballot, marking a first in the state’s history.

The New Hampshire Supreme Court made similarly short work of an 1863 soldier-voting bill patterned on the Minnesota model, relying on history in concluding that absentee voting was unconstitutional. The court cited treatises and a string of cases establishing the common law rule that “every vote must be personally given.” The court determined the meaning of the constitutional word “vote” by examining, in the court’s words, the “history of the origin of the powers of towns in New England, and of the nature and usages of their meetings.” That examination persuaded the court that framers had the common law meaning of voting in mind and that “the right of suffrage established by [the constitution] is to be exercised by the voter in person, at the meetings duly held for the purpose in the places of the State pointed out by the Constitution.”⁷⁵ That left no room for the absentee balloting contemplated by the proposed law.

California’s law met a similar fate at the hands of its high court. The state’s 1849 constitution conditioned suffrage on thirty days residence in the “county or district in which [the voter] claims his vote....”⁷⁶ In crafting the 1863 soldier-voting law, legislators clearly anticipated the difficulty this language presented, so, like their counterparts in Connecticut, they inserted a provision to finesse the problem. It provided that the absent

75. Opinion of Justices, 44 N.H. 633, 636 (1863). The legislature responded with a bill limiting the absentee voting opportunity to federal elections. An Act to Enable the Qualified Voters of this State Engaged in the Military Service of the Country to Vote for Electors of President and Vice President of the United States, and for Representatives in Congress, ch. 4030, 1864 N.H. Laws 3061. As discussed later in the chapter, the high court endorsed that approach for the same reason that Vermont’s court had done so. Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldier’s Voting Bill, 45 N.H. 595 (1864).

76. CAL. CONST. of 1849, art. II, § 1.

soldiers' votes "shall be considered, taken, and held to have been given by them in the respective counties of which they are residents."⁷⁷

The California Supreme Court showed the finessing language no more respect than its Connecticut counterpart had in reviewing a similar provision. The case was *Bourland v. Hildreth*.⁷⁸ Justice Oscar Shafter, writing for the court majority, ridiculed the deeming provision. If the legislature can deem an absentee vote to have been cast locally, Shafter wrote, it could just as easily deem a minor's vote to have been cast by an adult, or an alien's vote to have been cast by a citizen, or a "colored" man's vote to have been cast by a white man. Far from protecting the law from constitutional scrutiny, the deeming provision's effect was to "efface" the constitution, Shafter said in a tone of indignation.⁷⁹

In reaching the substance of the constitutional question, Shafter relied heavily on what he saw as the instruction of history. For the framers of the 1849 constitution, he wrote, the meaning of the word "vote" was "imparted by traditions that became historical" and by "habits of thought that became chronic, and habits of action that became muscular almost, both in England and this country, ages before 1849." Under those traditions and habits, a vote was the physical act of casting a ballot (or giving a voice vote) in person.⁸⁰

77. An Act in Addition to an Act entitled an Act to regulate Elections (Cal 1863) § 4. As discussed in the Appendix, the 1863 law applied by its terms only to the 1863 elections. Two separate laws, both similar to the 1863 law, were enacted the following year. The 1863 law, following the Iowa model for voting in the field, is hereafter cited as "California's 1863 law." It included an additional deeming provision meant to cope with the potential constitutional problems associated with punishing violations occurring outside the state. It stated that the misconduct "shall be considered, taken, and held to have been committed by such officer within the jurisdiction of this State...." *Id.*

78. *Bourland*, 26 Cal. 161.

79. *Id.* at 201.

80. *Id.* at 197.

In a concurring opinion, Justice Lorenzo Sawyer leaned even harder on the lessons of history. His concurrence echoes the 1862 opinions of Pennsylvania Justice George Woodward in *Chase v. Miller* and Justice Thomas Butler in the Connecticut Supreme Court’s advisory opinion, as well as the 1863 dissent of Ohio Justice Rufus Ranney in *Lehman v. McBride*. Settlers from all over the country had populated California by the time of statehood, and they brought with them a universal understanding of what an election was, Sawyer reasoned. In all states,

the personal presence of the elector was required at the place established by law for receiving votes.... The very idea of an election embraced the idea of a place appointed within the district for the meeting of the voters ... and the presence of the elector in person to offer or claim his vote.... Men had no other conception of the process of voting, or of offering to vote, or of claiming their votes. This conception and these ideas were necessarily in the minds of the men who framed our constitution and the people when they adopted it.⁸¹

Sawyer’s point was essentially the same as Ranney’s: “words become things.”

Michigan’s Supreme Court struck down that state’s 1864 law as unconstitutional in early 1865 in a case arising out of a contested election for prosecuting attorney in Washtenaw County.⁸² It was the last of nine state high court rulings judging the constitutionality of soldier-voting laws, and it echoed the first, in Pennsylvania. At issue was the 1850 constitution’s provision that “no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he has resided in the township or ward in which he offers to vote, ten days next preceding the election.”⁸³ The question was whether that language pertained only to the qualifications of the voter – he had to be a resident of the

81. *Id.* at 216.

82. *Twitchell*, 13 Mich. at 127.

83. MICH. CONST. of 1851, art. VII, § 1.

township where his vote is received, no matter where he casts that ballot – or whether it dictated *where* the elector casts his ballot, requiring him to be physically present in the township or ward when he voted. The majority concluded that an elector met the constitutional requirement only by personally casting his ballot in the township where he resides and that the soldier-voting law was therefore unconstitutional. Justice James Valentine Campbell explained that framer’s intent in requiring that voters be personally present in their township or ward when they cast their ballots was fraud prevention. “If the voter is required to present himself personally at his own place of abode,” wrote Campbell, “his neighbors will know his person, and will be likely to know his qualifications.... That other means of protection may be devised is possible; but the test by neighboring eyewitnesses has always been the favorite resort of the law, and it is the best.”⁸⁴

Justice Isaac Christiancy concurred. Relying on history, he concluded that the term “offers his vote” in a township or ward, as the 1850 framers must have understood the term, meant “personal presentation of the vote at that place to the inspectors or officers presiding at such election.” This had been the “uniform mode in all the American states from their first organization,” with the single exception of Pennsylvania’s 1813 law, which Christiancy brushed aside, observing that Michigan had certainly known no other mode in her history.⁸⁵

Although Christiancy did not base his conclusion on previous opinions, he similarly rooted his reasoning in the lessons of history. Courts should give undefined

84. *Twitchell*, 13 Mich. at 127, 144.

85. *Id.* at 155.

words in constitutional text the meaning that the framers attached to those words. For Woodward in Pennsylvania, the word was “district.” For the five Vermont justices it was “constable,” and for Ranney in Ohio and Butler in Connecticut, it was “election.” For Christiancy in Michigan and Shafter and Sawyer in California, it was “vote.” In each case, the word had meant something quite specific to the framers of the respective constitutions. For these justices, that meaning attached to the words in the constitution and left no room for absentee voting laws.

The countervailing judicial approach, typified by Josiah Scott in the opinion upholding Ohio’s law, attached no constitutional significance to the novelty of absentee voting. Justice Byron Paine, a radical Republican, authored the opinion of the Wisconsin Supreme Court upholding that state’s soldier-voting law.⁸⁶ He conceded “the framers never contemplated or ‘dreamed’ of a law authorizing a ballot to be cast outside of the state.”⁸⁷ But for Paine, this undisputed fact said nothing about the legislature’s authority under the constitution. The legislative power, Paine wrote, “is sovereign and uncontrollable, except as specially restricted in the constitution.” Nowhere did the constitution expressly limit the legislature’s power to fix the place of voting. Paine believed the statute should stand unless constitutional text said, expressly and without ambiguity, that voting could occur only inside the state. No such text existed.⁸⁸ For Paine,

86. *Chandler*, 16 Wis. at 433. As an attorney before the war, Paine had defended an abolitionist accused of impeding enforcement of the fugitive slave act. See “Byron Paine,” Wisconsin Court System, accessed May 19, 2014. <http://www.wicourts.gov/courts/supreme/justices/retired/paine.htm>. The enforcement episode that drew Paine into his role is described in H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Columbus: Ohio University Press, 2006).

87. *Id.* at 439.

88. *Id.*

the constitution's silence empowered the legislature to do as it pleased. The court's opinion was unanimous.⁸⁹

There was a similar outcome in Iowa, where the high court sustained its soldier-voting law with reasoning akin to Paine's in Wisconsin and Scott's in Ohio. Under the state's 1857 constitution, voting eligibility required a citizen to have been for at least 60 days a resident "of the county in which he claims his vote."⁹⁰ In an election contest challenging the law's constitutionality, the trial judge, Norman Isbell, adopted the approach of Justices Woodward of Pennsylvania, Ranney of Ohio, Butler of Connecticut, Sawyer of California, and Christiancy of Michigan; history gave meaning to the constitution's terms, he said. The idea of absentee voting was utterly foreign to the experience of the constitution's framers. When they crafted the suffrage provision requiring 60 days of residence in the county "of which he claims his vote," the notion that voters might cast ballots elsewhere than in their own county "would never enter their minds," Isbell wrote. "We cannot believe that any man, at the adoption of the

89. According to the leading scholar of the Wisconsin law, the state legislature tried to tip the scales of justice to influence the court's decision. The device for doing so was an amendment to the soldier-voting law to permit soldier voting in elections for state judges. (An Act to Amend Chapter 11 of the General Law of the Extra Session of 1862, entitled "An Act to Enable the Militia and Volunteers of this State, when in the Military Service of the United States or of this State, to Exercise the Right of Suffrage, ch. 59, 1863 Wis. Laws 77.) The intention, according to historian Frank Klement, was to pressure the justices to favor soldier voting so as not to antagonize soldiers whose votes they needed for their own elections. It would have been "political suicide" for the justices to rule against the law. Klement argues that the legislature's gambit succeeded in influencing the outcome of the court case. Klement, "The Soldier Vote in Wisconsin During the Civil War," 37-47, 45. It is a plausible but not a provable assertion. Paine's analysis, after all, employed a respectable approach, entirely in step with the approach of justices elsewhere who voted to sustain soldier-voting laws based on judicial restraint and deference to legislatures.

90. IOWA CONST. of 1857, art. II, § 1.

Constitution, regarded its meaning in the light claimed [by the law's defenders], much less any of its framers."⁹¹

Without disputing Isbell's statement of how the framers envisioned elections, the Iowa Supreme Court reversed his decision, holding that the soldier-voting law was constitutional. George Wright, a Republican, wrote the court's unanimous opinion.⁹² He ruled that the disputed constitutional language defined *who* could not, but did not fix *where* he could vote. The legislature was free to set the "time, place, and manner" of voting, including out-of-state locations, Wright concluded. He cited Justice Paine's reasoning in upholding the Wisconsin law, agreeing with Paine that it was constitutionally irrelevant that the framers "never contemplated or 'dreamed'" of absentee voting. Only if the constitution restricted the legislature in "clear, palpable, plain" text could a court invalidate a statute, and no such prohibition appeared in the text of Iowa's constitution.⁹³

In each of the nine court decisions, justices observed that constitutional framers had never contemplated the possibility of absentee voting. The very notion was foreign to their experience and to their idea of what it meant to vote. They disagreed about the

91. *Morrison*, 15 Iowa 309.

92. For Wright's political leanings, see "George Grover Wright," *Biographical Directory of the United States Congress*, accessed May 29, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000759>.

93. *Morrison*, 15 Iowa at 347-349. Two other states' high courts, in reviewing the constitutionality of soldier-voting laws, commented negatively on the Iowa Supreme Court decision. Vermont's Supreme Court, concluding that the constitution of that state barred absentee voting laws covering state (but not federal) elections, expressly declined to adopt the Iowa court's reasoning, declaring "we are not prepared to say it is sound." [*Opinion of the Judges*, 37 Vt. at 674.] California's high court, in striking down that state's law, said in somewhat harsher language that adopting the reasoning of their Iowa brethren would "throw the whole law relating to the construction of written instruments into hopeless confusion." [*Bourland*, 26 Cal. at 206.]

consequences of the change. To some, it had constitutional effect by violating prewar election norms that defined the language of state constitutions. For others, it did not, leaving legislators free to invent something that departed from tradition. Either way, all recognized that they were dealing with something altogether new.

Seven States Take Creative Legal Steps to Meet Political Deadlines

Compounding the radical impact that the new laws had on the substance of prewar law was a variety of inventive steps some states took in their haste to implement voting in the field in time for the 1864 elections. As chapters 3 and 4 describe, by 1864 the political potency of the issue had become clear, particularly from the 1863 election experiences in Ohio and Pennsylvania. From the Ohio experience, the country learned that absent soldiers would vote overwhelmingly for Republicans. Even more importantly, Pennsylvania in 1863 proved that Republicans could win *civilian* votes by blaming Democrats for the absence of a soldier-voting law. With 1864 elections on the horizon, states that had done little or nothing on the issue before November 1863 suddenly swung into action.⁹⁴

Seven of these late-acting states – Vermont, New Hampshire, Kentucky, Rhode Island, Maryland, Maine, and Kansas – faced constitutional obstacles to absentee voting. By the time they awakened to the political rewards of enacting voting rights for their absent soldiers, with the 1864 election season fast approaching, time was running short

94. For detail on the timing of enactments, see the text accompanying notes 84-87 in Chapter 3.

for the often-cumbersome process of constitutional amendment.⁹⁵ The time squeeze inspired inventive legal measures in all seven states.

Three states solved the time shortage by enacting soldier-voting arrangements limited to federal elections. This half-loaf solution was not the preferred approach anywhere, since it left absent soldiers unable to participate in elections for state offices. It was better than nothing, however, and unlike amending a constitution, it could be done quickly. Vermont, New Hampshire, and Kentucky, each having concluded that its state constitution barred absentee voting in elections for state officers, seized on the approach as a quick way around their constitutional obstacles. Their soldier-voting laws accordingly applied only to representatives to Congress and electors for President and Vice President.

Vermont's Supreme Court produced the legal analysis that achieved this outcome, and the other states followed the Green Mountain State's lead. Vermont's high court, in an advisory opinion requested by the state legislature, concluded that the state constitution barred out-of-state voting.⁹⁶ But the court added that the constitutional bar was irrelevant to elections for congressmen and presidential electors, since the federal constitution alone controlled that subject. Language in Articles I and II of U.S. Constitution, the court concluded, delegates to state legislatures the power to determine

95. Vermont, Kansas, Maine, New Hampshire, Kentucky, Rhode Island, and Maryland faced this problem.

96. The state constitutional provision that created the difficulty stated that the "freemen" of each Vermont town must "hold elections therein" for their representatives in the state House of Representatives. (VT. CONST. of 1793, Ch. II, § 7.)

where to hold elections for federal offices. Absentee voting legislation was within that delegated authority, the court concluded.⁹⁷

That interpretation gave the Vermont legislature a free hand to allow absent soldiers to vote away from home in federal elections, no matter what the state constitution said about elections. The New Hampshire Supreme Court, in an advisory opinion shortly afterwards, seized on the Vermont court's logic to reach the same conclusion.⁹⁸ Kentucky's legislature, which had taken no action before 1864, recognized state constitutional obstacles similar to Vermont's and New Hampshire's, but did not bother asking its high court for advice. It simply enacted a soldier-voting law limited to federal elections.⁹⁹ Maine did as well, though that state simultaneously launched an initiative, which ultimately succeeded, to amend its constitution to permit the application

97. For congressional elections, Article I requires that voters meet the same qualifications as voters "for the most numerous branch of the state legislature," but that speaks only to who can vote for congressional representatives. It says nothing about where they can vote. Elsewhere in Article I, the court pointed out, the Constitution authorizes state legislatures to determine "the place and manner" for electing congressmen; "the Times, Places and Manner of holding Elections for Senators and Representatives," reads the U.S. Constitution, "shall be prescribed in each State by the Legislature thereof." (*In re Opinion of the Judges*, 37 Vt. at 677, quoting section 4 of Article I of the U.S. Constitution.) For presidential electors, the Constitution's delegation of power to state legislatures is similarly broad. Article II provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct...." (*Id.*)

98. An Act to enable the qualified voters of this State engaged in the military service of the country to vote for electors of President and Vice President of the United States, (N.H. 1864). In an earlier advisory opinion issued in 1863, the New Hampshire court concluded that a bill authorizing soldier voting for state elections would be unconstitutional under the state's 1792 constitution. In reaching that conclusion, the court pointed to a provision of the constitution stating that, in choosing state representatives and senators, eligible voters "shall be entitled to vote within the district wherein they dwell." Elections for other offices, including governor, were to be "in the same manner" as elections for state representatives. Overall, the court opined, the "provisions of our Constitution ... require that the right of voting shall be exercised by the voter in person at the meetings duly held for the purpose in the places of the State pointed out by the Constitution." That left no room for absentee balloting for state offices. *Opinion of Justices*, 44 N.H. at 636. The legislature took no action in 1863 to initiate a constitutional amendment to solve the problem, leaving insufficient time to do in 1864. When the legislature that year enacted a bill limited to elections for federal offices, the court rendered a second advisory opinion finding the second bill constitutional. In so doing, it endorsed the Vermont court's approach. [*Opinion of the Justices*, 45 N.H. at 606].

99. An act regulating the manner of soldiers voting for Electors of President and Vice President of the United States (Ky. 1863). The act did not extend to the election of congressmen. (*Id.* at § 1.)

of soldier voting to state officers, as well. (More on Maine's approach in a moment.) In short, the Vermont gambit succeeded everywhere it was tried.¹⁰⁰

As discussed earlier, Rhode Island amended its constitution to overcome the prewar provision confining voting to "town or ward meetings." While the amendment granted the legislature "full power to provide by law for carrying this article into effect," ratification would come too late for the legislature to act on its new authority before the election.¹⁰¹ The amendment itself solved that problem by authorizing absentee voting for soldiers, and describing how that voting would work, "until such provision shall be made by law."¹⁰² The description provided far less detail than any state's soldier-voting law, but more detail than other states' constitutional provisions enabling such laws. It was, in effect, legislation masquerading as constitution. But it worked. For the elections in 1864,

100. The logic of the Vermont decision, and of the decision of the New Hampshire Supreme Court that followed it, was not inescapable. Neither decision arose out of a contested election, and neither was a "case or controversy" of the sort that federal courts have authority to review under art. III, § 2 of the U.S. Constitution. Instead, they were advisory opinions provided at the request of the state legislatures. Neither the Vermont nor the New Hampshire court had the advantage of a factual record or arguments for and against, as they would in a case arising out of a dispute between two parties represented by counsel. The countervailing logic, which did not surface in either advisory opinion, did find expression in a contested federal election for the seat representing Michigan's 5th congressional district in 1864. Lawyers briefed and argued both sides of that contest, albeit to a congressional committee and not to a court. Republican Rowland Trowbridge had defeated Democrat Augustus Baldwin, with absent soldiers providing Trowbridge's margin of victory. Baldwin challenged the outcome, arguing that the soldier vote should not have counted. By then the Michigan Supreme Court had ruled that Michigan's 1864 soldier-voting law was unconstitutional (*Twitchell*, 13 Mich. at 127) and Baldwin maintained that the statute's unconstitutionality should have disqualified the soldier votes that had given Trowbridge his putative victory. The committee ruled against Baldwin, applying the logic of Vermont's high court. The committee's minority issued its own report, arguing that the "legislature" to which the U.S. Constitution refers can act only in subordination to the state constitution. The minority cited a case [*Shiel v. Thayer*, 2 Cong. Elect Cas. 319 (1861); Asher Crosby Hinds, *Hinds' Precedents of the House of Representatives of the United States*, Vol. II, (Washington: Government Printing Office, 1907), 3-4] arising out of an 1860 election in Oregon for that state's seat in the House of Representatives. The state legislature had set the election on a date different from the date fixed for such elections in the state constitution. One candidate won the most votes on the election date set by the constitution, but another won the most votes on the date the legislature had set. Congress resolved the dispute by rejecting the legislature's power to ignore the state constitution in setting the election date.

101. Benton puts the ratification date as September 10, 1864. Benton, *Voting in the Field*, 186.

102. An Act to Approve and Publish and Submit to the Electors (R.I 1864).

the state enacted no military suffrage legislation, and this creative constitutional language sufficed to support voting by absent Rhode Island soldiers.

As in Rhode Island, military suffrage in Maryland depended on a creative solution to the combined challenge of a constitutional obstacle and dwindling time. Maryland's prewar constitution said that a qualified elector "shall be entitled to vote in the ward or election district in which he resides."¹⁰³ To eliminate that obstacle, a constitutional convention in 1864 crafted an amendment authorizing the legislature to "provide by law for taking the votes of soldiers in the army of the United States serving in the field."¹⁰⁴ Recognizing that ratification would not happen in time for legislative action before November, the convention proposed a shortcut much like Rhode Island's. In an article entitled "Schedule," it permitted absent soldiers to participate both in the ratification process and, while they were at it, to vote in elections for state and federal offices, with the proviso that their election votes would count only if ratification succeeded.¹⁰⁵ It did succeed, and like Rhode Island's men in blue, Maryland servicemen voted in 1864's elections without the benefit of legislation.¹⁰⁶

Kansas, too, showed legal ingenuity in coping with a time crunch in 1864. The suffrage provision of its prewar constitution included a problematic proviso stating, "nor

103. MD. CONST. of 1851, art. I, § 1.

104. In addition, the amendment achieved an array of even more radical reforms, including the abolition of slavery and the disfranchisement of former confederates. MD. CONST. of 1864, art. I, §§ 1, 2.

105. MD. CONST. of 1864, art. XII ("Schedule"), § 11.

106. Maryland's legislature did act on its new constitutional authority in its January session, 1865. An Act to Enable the Qualified Voters of this State, in the Military Service of the United States or this State to Exercise the Right of Suffrage, and to add the following Sections providing therefor to the Thirty-Fifth Article of the Code of Public General Laws, ch. 124, 1865 Md. Laws 187. Enacted on March 23, 1865, this was the last of the Civil War soldier-voting laws.

shall any soldier, seaman, or marine have the right to vote.”¹⁰⁷ Without conceding that the proviso applied to Kansas volunteers, lawmakers acted as if it might and proposed for ratification a constitutional amendment to get around the potential problem.¹⁰⁸ It stated, “the legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state.”¹⁰⁹ Lawmakers did not wait for ratification, however, before enacting a soldier-voting law, passing its statute in June.¹¹⁰ Absent soldiers used that law to vote in the 1864 elections. Because it was enacted before the amendment took effect, the statute’s constitutionality was debatable. The gambit succeeded, however. Soldier voting under the new law occurred after the amendment’s ultimate ratification, and the statute never faced judicial review.

It took a force more powerful than the abstraction of “justice” to account for legal changes this abrupt and this radical. Comparing the laws’ supposed foundation on justice with their relatively short life span, one might wonder if justice had very much to do with it all. Future soldiers in future wars would surely experience the same injustice unless they, too, enjoyed absentee voting opportunities. Indeed, in a few states the laws endured.

107. KAN. CONST. of 1859, art. V, § 3.

108. One can read the proviso cited in the previous footnote either as excluding all servicemen from voting or as applying only to the those servicemen identified in a preceding clause of the same section: soldiers and sailors in the army or navy of the United States – presumably regulars – and stationed in Kansas. Read the latter way, the final clause stood not as a flat prohibition of a military suffrage statute, but as a bar to voting by career servicemen stationed in Kansas. The attorney general, Republican Warren Guthrie, provided the state senate with a written opinion to exactly this effect, stating that before 1861 (the state constitution was drafted in 1859), the term “soldier” never applied to volunteers and militiamen, but only to “that branch of the national military service known as ‘regulars.’” Kansas Senate Journal, 4th Cong., reg. sess., February 25, 1864, 413-414.

109. Joint Resolution, to Amend Section Three of Article Five of the Constitution of the State of Kansas, (Kan. 1864). The amendment explicitly excluded from suffrage rights “any soldier, seaman or marine in the regular army or navy of the United States.” *Id.*

110. An Act Supplemental to an Act Entitled ‘An Act to Regulate Elections,’ (Kan 1864).

Moreover, the Civil War era laws set precedents for soldier-voting laws enacted during subsequent wars and for more inclusive absentee voting opportunities created in the twentieth century.¹¹¹ In the short term, however, the innovation did not endure in most states. It fizzled out with the end of hostilities, when states restored the primacy of communities in their voting laws, notwithstanding the potential injustice to soldiers absent in future wars.

One can credit the sincerity of advocates' invocation of justice and still acknowledge that baser political motives certainly played a part in inspiring enactment of the laws. Early in the war, the political motive was simply to garner the votes of the absent soldiers themselves, and both parties saw reasons to do it. Until 1863, as the scholarship of both Jonathan White and Arnold Shankman documents, partisan divisions on the issue had not fully formed. In Ohio and other early-acting states, both parties supported or opposed soldier-voting bills, and challenged the validity of the laws in election contests, depending on their calculation of electoral benefit and harm from the votes of soldiers.¹¹² That calculation shifted late in 1863 as it became apparent not only that Republicans would win the soldier vote, but also that the issue would have an even larger impact on civilian votes. A surge in legislative activity resulted from the late dawning of that awareness.

The following chapters elaborate on that broader political reality, ascribing the late-blossoming political attraction of soldier-voting legislation to the unique

111. Miller, *Absentee Voter and Suffrage Laws*, 35.

112. White, "Citizens and Soldiers," 5:2; Shankman, "Soldier Votes and Clement L. Vallandigham."

circumstances of 1863-1864 politics. It was the politics of soldiers, in which soldiers became the most authoritative spokesmen for both parties' major campaign themes. In the politics of soldiers, soldier-voting laws took on their greatest significance in the quest for *civilian* votes. After 1865, the politics of soldiers having ended, the appetite for soldier-voting laws ended, too. As soldiers returned home, considerations of justice for absent soldiers in future wars undoubtedly waned, as well.

It speaks to the enduring power of prewar election norms that at war's end most states reverted to them and to a legal system in which absentee voting once again had no place.

CHAPTER 3

1863 PENNSYLVANIA: PROVING GROUND FOR 1864 POLITICAL

MESSAGING

Starting in 1863, soldier-voting laws played an increasingly important role in the messaging war of Civil War politics. We shall see in Chapters 4 and 5 how powerful that role had become in national politics by 1864. Republicans that year harnessed the soldier-voting issue to fortify their status as the “soldiers’ friends” and to portray Democrats as “enemies of soldiers.” That status underlay the more specific themes that Republicans used to attack Democrats and their standard-bearer, George McClellan: that Democrats including McClellan were disloyal, and that McClellan was both a coward and an incompetent field commander. Soldiers enjoyed unmatched credibility as messengers of those themes, so Republicans deployed the voice of soldiers in attacking Democrats and McClellan. The “soldiers’ friend” meme undergirded the party’s strategy by communicating the broad affinity between Republicans and the soldiers who were so indispensable to their messaging. Republicans’ support for soldier-voting laws helped cement that affinity.

Democrats in 1864 needed soldiers’ voices as well, not only to refute the Republican attacks but also to carry their own attacks themes: that Lincoln was an inept commander-in-chief, that he neglected his own troops, and that he subordinated their wellbeing to the interests of blacks. Soldiers spoke authoritatively on these subjects, so Democrats harnessed the voice of soldiers in attacking Lincoln. Democrats’ opposition to

soldier-voting laws complicated the party's claim to the status of "soldiers' friend" and correspondingly impeded the party's messaging.

Most of these 1864 partisan political attack themes had been developed and perfected a year earlier in the context of Pennsylvania's gubernatorial contest. Unlike most states, the calendar for statewide elections in Pennsylvania (like Ohio) was out of phase with the schedule for nationwide elections held in even numbered years. That unique electoral calendar heightened the national visibility of the state's contests, making it, in the words of Mark Neely, a "bellwether" for national politics.¹ So the antennae of political operatives around the country were up as Democrats and Republicans faced off in the Keystone State's 1863 contest for Pennsylvania's governor. The lessons learned in that contest would inform the strategies of contestants elsewhere when they faced off in 1864 elections. After the dust kicked up by Pennsylvania's political storm in 1863 finally settled down, the political potency of the soldier-voting issue became perhaps the most important lesson of all.

The 1863 race for Pennsylvania governor pitted Republican incumbent Andrew Curtin against Democratic challenger George Woodward. Curtin positioned himself as the "soldiers' friend," in juxtaposition to Woodward, whom Republicans assailed as anti-soldier. Democrats resisted this labeling as energetically as Republicans advanced it. Both parties in Pennsylvania needed the imprimatur of "soldiers' friend" in 1863 as much as the national parties would need it in 1864, because the voice of soldiers was central to the political combat in both contexts. The differences between Curtin and Woodward

1. Mark E. Neely Jr., "Civil War Issues in Pennsylvania," *Pennsylvania Magazine of History and Biography* 135, no. 4 (October 2011): 389-417.

over the state's soldier-voting law became a linchpin in their competition for soldiers' friend status.

Andrew Curtin grew up in Pennsylvania politics as a Whig, switching his allegiance to Republican in 1860. He won the governorship in 1860 as the candidate of the People's Party, an amalgam of Pennsylvania factions – mostly Republicans, but also Know-Nothings, and Anti-Masons – united mainly by their opposition to Democrats. He became an enthusiastic ally of Lincoln and a strong supporter of the president's war policies.² His constitutional powers as governor included “commander-in-chief of the army and navy of this Commonwealth, and of the militia, except when they shall be called into the actual service of the United States.”³ While his military authority operated at a level removed from the direction of Pennsylvania's troops in the war, he ran for reelection in 1863 as the incumbent commander-in-chief, just as Lincoln would in 1864. And just as Democrats in 1864 attacked Lincoln as a bungling commander, so Democrats in Pennsylvania assailed Curtin in 1863 as an inept commander-in-chief of the commonwealth's forces.

Curtin would cultivate the “soldiers' friend” brand as a reelection device in 1863, and his early service as governor in support of the war effort made the later branding credible. Even before the fall of Fort Sumter, Curtin pushed through legislation improving the organization of the state militia. When Lincoln called for 75,000

2. Erwin Stanley Bradley, *The Triumph of Militant Republicanism: A Study of Pennsylvania and Presidential Politics 1860-1872* (Philadelphia: University of Pennsylvania Press, 1964), 49-50, 89-90, 127-129.

3. PA. CONST. of 1838, art. II, § 7.

volunteers following Sumter, Curtin's zealous response generated troops far in excess of the state's quota, more in fact than the Department of War could absorb.⁴

Evidence indicates that Curtin indeed genuinely cared about the welfare of Pennsylvania's troops. He pushed the legislature to address arrearages in soldiers' pay. He secured pensions for soldiers' widows and orphans. He or his representatives frequently visited Pennsylvania troops in their field camps and hospitals. He answered every letter sent to him by soldiers. Soldiers of even the lowest ranks were the first visitors ushered into the governor's chambers. He pushed for legislation to fund the return of bodies of deceased soldiers for burial at home. The memoirs of one of Curtin's closest advisors, attorney Alexander McClure, attest to the sincerity of Curtin's solicitude for soldiers. McClure, a practicing lawyer, former state legislator, and one-time chairman of the state Republican committee, wrote, "Curtin's affection for his soldiers was that of the most loving father for his own children."⁵

If Curtin's claim to the status as "soldier's friend" was grounded on his behavior toward actual servicemen, the branding of George Woodward as the enemy of soldiers was a political construct. It lay somewhere between, on the one hand, a cruel caricature that stood truth on its head, and, on the other hand, a defensible inference drawn from Woodward's political ideology and his jurisprudence. In either case, it had nothing to do with Woodward's personal behavior or attitude toward soldiers. In fact, in his private life, Woodward demonstrated decidedly pro-soldier inclinations. Two of his

4. Bradley, *The Triumph of Militant Republicanism*, 130-132. The surplus became the Pennsylvania Reserve Corps, which served as ready reinforcements later in the year following the federal defeat at Bull Run. *Id.*

5. *Id.* at 176; Alexander K. McClure, *Old Time Notes of Pennsylvania* (Philadelphia: The John C. Wilson Company, 1905), 1:497-498.

own sons served in the Union army, and Woodward himself paid the expenses of raising a company of volunteers for the 2nd Pennsylvania Reserves.⁶

We can get some feel for Woodward the private man from Curtin's ally Alexander McClure. Notwithstanding their political differences, McClure had come to know and respect Woodward within Pennsylvania's tight-knit legal community. McClure admired Woodward as a "sincere" and "courteous" man. In his memoirs, written decades after the war, McClure praised him not just as a capable lawyer and jurist, but also as being sincerely devoted to servicemen. McClure described an encounter he had with Woodward on a train ride from Philadelphia to Allentown during the 1863 gubernatorial campaign. Sitting together, the two men candidly exchanged their differing views about the war and politics, "with entire freedom, and of course, with utmost courtesy." The subject of supporting the "cause of the soldiers" came up. Recalling the conversation, McClure wrote in his memoir,

I reminded him that he had two sons in the army who had won distinction and stood among the heroic soldiers of the state, and asked him whether he or I in the opposing positions with the soldiers was best supporting the cause of the soldiers in the field. He answered with visible pride that his sons were soldiers, and as soldiers they would do their duty.⁷

Personally, then, each man – Woodward and Curtin (through his surrogate McClure) – reasonably and sincerely saw himself as the soldiers' friend. Politically, however, Republicans saw to it that the label stuck only to Curtin.

6. *Erie (PA) Observer*, October 3, 1863, 2; White, Washington Woodward and Black, "A Pennsylvania Judge Views the Rebellion," 201-202.

7. McClure, *Old Time Notes of Pennsylvania*, 2:55-61.

Woodward was born in March 1809, a month after Lincoln. By 1861, he had a long track record as a Democrat and as a jurist. He served as a delegate to the 1837 Pennsylvania constitutional convention, where he advocated successfully for disfranchising free African-Americans and pushed unsuccessfully for restrictions on the right of immigrants to vote and hold office, a position that Republicans would use against him in 1863.⁸ He first became a judge in 1841, serving for eleven years on the Fourth Judicial District where he had both trial and appellate duties. While still in that judicial post, Simon Cameron defeated Woodward in a race for the US senate in 1845. The next year, James Polk nominated Woodward to the United States Supreme Court, but the president failed to push the nomination forcefully enough to overcome energetic opposition led by Cameron, who bore grudges from the previous year's senate race. The senate rejected Woodward, 29-20.⁹

Woodward did not slip quietly into obscurity after that setback, but resumed his state court duties and remained an active figure in Pennsylvania politics even while serving on the bench. He was elected associate justice to the Pennsylvania Supreme Court in 1852 and ran against Curtin for governor in 1863 while still occupying this post on the state's high court. By then, he had earned notoriety as author of the court's 1862 decision in *Chase v. Miller*, striking down the state's prewar soldier-voting law. That decision became the centerpiece of the Republicans' argument the following year that Woodward

8. Daniel J. Curran, "Polk, Politics, and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court," *The Pennsylvania Magazine of History and Biography* 121, no. 3 (July 1997): 163, 166.

9. *Id.* at 163; McClure, *Old Time Notes of Pennsylvania*, 2:62. Curtin, too, would come to suffer Cameron's political enmity after supporting Lincoln over Cameron for the Republican presidential nomination in 1860.

was anti-soldier. And the year after that, 1864, Republicans would use it against George McClellan based on McClellan's endorsement of Woodward's candidacy in 1863.

Woodward's role in striking down the soldier-voting law was not the only count in the Republicans' indictment of him as anti-soldier. The others were his membership in the peace wing of the Democratic Party and specific statements he made against the war in 1861. Woodward was avowedly a peace Democrat, but not an extremist within that group. Like others who regarded themselves as good Americans but who opposed the Lincoln administration's approach to the war, Woodward's loyalty was to "the Constitution as it is, the Union as it was." By that standard, Woodward was no more a traitor than countless other northern Democrats, all believing themselves to be stalwart patriots.¹⁰

Still, his prominence as a Democrat and the reservations he expressed about the Lincoln administration's policies made him an easy mark for opposition propagandists. Like many conservative Democrats, Woodward thought civil war invited dangerous growth of centralized power. A "centralized despotism," he wrote to a friend in 1863 about his fears that the country was headed in the wrong direction, "would be the death knell of popular liberty."¹¹ Here is McClure's distillation of Woodward's ideology: Woodward "was a Democrat of the old school, a strict constructionist and sincerely convinced that there was no safety to popular government in the revolutionary

10. For Woodward's comfortable fit within the mainstream of Pennsylvania's substantial anti-war (and anti-African-American) sentiment, see Arnold M. Shankman, *The Pennsylvania Antiwar Movement, 1861-1865* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1980), 40, 54-55, 126.

11. Letter from Woodward to Lewis Coryell, June 1, 1863, as quoted in Shankman, *The Pennsylvania Antiwar Movement, 1861-1865*, 126.

innovations which are ever precipitated by civil war.”¹² He subscribed to Calhoun’s “compact theory,” under which states formed the Union in a contractual relationship. Though he opposed secession, he supported the right of states to secede if they concluded that the national government had violated the terms of the contract. Southern apologists for secession pointed to contract violations as their justification, and Woodward saw their point. He sympathized with southern slaveholders; in an 1860 speech in Philadelphia, he characterized slavery as an “incalculable blessing” to the North. He agreed that Republicans were trying to install a “negro despotism,” as he said in a letter to a former colleague on the state’s high court. He did not think that the electoral success of Republicans, misguided though he believed them to be, justified secession by southern states, and he did not believe that states having seceded had the right to attack the United States, as South Carolina had done at Fort Sumter. He did believe, however, that each state had a right to secede peacefully if it chose to. He thought it pointless for the North to resist southern independence forcibly. Better to let the southern states depart the union than to coerce them to stay. “We hear it said, let the South go peaceably,” Woodward said in speech in 1861. “I say LET HER go peaceably.”¹³

That kind of rhetoric played into the hands of Republicans eager to tar not just Woodward, but the whole Democratic Party as disloyal. To many Republicans and their allies in the pro-war wing of the Democratic Party, anything short of full-throated support for the Lincoln’s administration’s prosecution of the war constituted disloyalty. There

12. *Id.* at 61.

13. George Woodward, letter to Rufus E. Shapley, *The Press* (Philadelphia, PA), October 12, 1863; White, Woodward and Black, “A Pennsylvania Judge Views the Rebellion,” 195-225; Speech by Woodward in 1861, *Huntingdon (PA) Globe*, September 9, 1863.

was no room in the community of loyal Americans for opposition, they sincerely believed, especially organized, partisan opposition. Only “no-partyism” sufficed.¹⁴ By that standard, Woodward was indeed disloyal. He not only opposed the Lincoln administration’s war policy, but he opposed it as an active partisan, a prominent Democrat and, by 1863, the party’s standard-bearer for governor.

So, even without the 1862 court decision striking down the prewar soldier-voting law, Woodward’s sympathy with the right of secession and his outspoken opposition to Lincoln’s war policy provided his detractors with ample ammunition for characterizing him as disloyal. But those attitudes by themselves did not distinguish Woodward from untold numbers of peace Democrats holding the same view and do not by themselves account for Woodward’s place at the head of the Republicans’ rogue gallery of traitors. It was the court case of *Chase v. Miller*, together with Woodward’s run for governor in 1863, which earned him that distinction.

As discussed in Chapter 2, *Chase v. Miller* was the first of nine state supreme court decisions addressing the constitutionality of a soldier-voting law. Authoring the court’s opinion striking down the law, Woodward concluded that the framers of Pennsylvania’s 1838 constitution went beyond deciding *who* could vote (white, 21-year old men meeting the residency and taxpaying requirements) and purposely made the precise *place* of elections a constitutional element of suffrage, thereby putting the subject beyond the reach of legislation to alter. Woodward’s decision striking down

14. Smith, *No Party Now: Politics in the Civil War North*, 160-162.

Pennsylvania's prewar military suffrage law typified the approach that looked to history for the meaning of relevant constitutional text. (In *Chase*, Woodward drew on history to establish the meaning of the word "district.") As elaborated in Chapter 2, that approach predominated in the six high court decisions rejecting the laws. The court majorities in Connecticut, Vermont, New Hampshire, California, and Michigan all applied reasoning similar to Woodward's in striking down soldier-voting laws, as did the dissenting opinion by Rufus Ranney in Ohio, where the court majority upheld that state's law. The majority opinion in each case cited Woodward's conclusion approvingly.¹⁵ Majority opinions upholding the laws in Iowa, Wisconsin, and Ohio distinguished Pennsylvania's case from their own, but none criticized Woodward's opinion as wrongly decided.¹⁶

From this we can conclude that Woodward's opinion was well within the mainstream of respectable jurisprudence. Nor did partisanship mark the Pennsylvania court's approach to the issue of absentee voting by soldiers in any noticeable way. Of the five justices on Pennsylvania's high court, three were Democrats (Woodward, Walter Lowrie, and James Thompson) and two were Republicans (John Read and William Strong).¹⁷ In the *Chase* decision, both of the court's two Republicans joined Democrats

15. In the California case, for example, Justice Shafter wrote that Woodward's opinion "must be admitted to be a very able and almost exhaustive opinion," and Justice Sawyer noted the universality of respect for the "correctness" of Woodward's opinion. *Bourland*, 26 Cal. at 207, 223.

16. Justice Christiancy of the Michigan high court tempered his approval of Woodward's conclusion with misgivings about Woodward's having considered "the inexpediency of [Pennsylvania's prewar soldier-voting law] and the dangers to be apprehended from it..." *Twitchell*, 13 Mich. at 161. The "inexpediency" that Christiancy apparently had in mind was the risk of fraud in soldier voting, which in Woodward's analysis rose to a constitutional problem. Christiancy saw that line of reasoning as having "weakened rather than strengthened" Woodward's otherwise sound conclusion. *Id.*

17. "Walter Lowrie," *Biographical Directory of the United States Congress*, accessed March 2, 2014, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000485>; "James Thompson," *Biographical Directory of the United States Congress*, accessed November 18, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000204>; "John M. Read," *Find a grave.com*,

Woodward and Lowrie in the majority opinion striking down the soldier-voting law, while one of the three Democrats, Thompson, was the sole vote to uphold the law. A Democratic judge (John Nesbitt Conyngham) also authored the lower court opinion upholding the law.¹⁸ In the final *Chase* tally, then, the political pedigree of the judges in no way predicted the partisan alignment that would crystalize over the soldier-voting issue by 1863. Of the six judges who considered the case, the four Democratic jurists split 2-2 on whether to sustain the law, while the two Republicans both voted to strike down the law. That distribution of votes hardly seemed a promising foundation for a political attack against Democrats as anti-soldier. And the year before deciding *Chase*, the high court had voted unanimously against overturning an election in which the soldier vote was both decisive and manifestly fraudulent. That case was *Hulseman and Brinkworth v. Rems and Siner*, and both Republican jurists joined their three Democratic colleagues in lamenting the fraud while declining, on procedural grounds, to set aside the election.¹⁹

Judicial nonpartisanship about the prewar soldier-voting law corresponded to a broader nonpartisanship among Pennsylvanians on the issue in 1861 and 1862. By the end of the war, the laws had become a sharply partisan issue within elective politics, with Republicans favoring the laws and Democrats opposed. As we shall see, the *Chase* decision itself would hasten the process of coalescence, after Woodward threw his hat in

Last modified February 33, 2006, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GSln=read&GSfn=john&GSbyrel=all&GSdyrel=all&GSst=40&GSctry=4&GSob=n&GRid=13341442&df=all&> ; “William Strong,” *nndb.com*, accessed November 18, 2013, www.nndb.com/people/902/000180362

18. For Coyningham’s party affiliation, see “John Nesbitt Coyningham,” *Find a grave.com*, October 8, 2012, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=98487037>.

19. *Hulseman*, 41 Pa. 397.

the political ring as Democratic candidate for Pennsylvania's governor in 1863. But in May 1862, when Pennsylvania's high court decided *Chase v. Miller*, there was still bipartisan uncertainty over the political effect of soldier-voting laws, and partisanship around the issue had not yet coalesced.²⁰ Voting by soldiers in several of Pennsylvania's 1861 elections, as permitted by the state's prewar soldier-voting law, sparked several election contests.²¹ Losing candidates in races for the state House of Representatives, municipal offices in Philadelphia, and at least one county position, challenged the soldier vote. Some challengers were Republicans and others Democrats. As historian Jonathan H. White documents in his study of party competition for the soldier vote in Pennsylvania, both parties at this early stage of the war viewed the matter the same way. They favored soldier voting when it helped their candidates win and opposed it when it contributed to their candidates' defeat. Similarly, the partisan press viewed the subject ambivalently, with newspapers of both political stripes coming down for and against soldier voting.²²

20. Williams, "Voters in Blue: The Citizen Soldiers of the Civil War," 187, 189-90; Jonathan White, "Citizens and Soldiers," 47. Both Williams and White point to Republican electoral losses in the 1862 elections as catalyzing partisanship on the soldier-voting issue, while Williams also gives weight to the shifting suspicions of the parties about the dangers to their candidates from abuse of soldier suffrage by military commanders.

21. There is scant evidence that any absent soldiers voted under the 1813 law in the War of 1812 or under its 1839 progeny in the Mexican War. A plausible explanation for the prewar law's origins is that the legislature calculated that it would help wartime recruitment. Alexander Keyssar has identified military security as a reason for expanding male suffrage beyond property and taxpaying qualifications, on the logic that disfranchised men might be reluctant to serve in state militias on the same terms as enfranchised men. This law might have grown out of a similar calculation. (Keyssar, *The Right to Vote*, 15.) No published court decisions address the laws before the Civil War. When the soldier-voting issue became politicized following Woodward's decision in *Chase*, some Republican attacks on Woodward asserted that Pennsylvania soldiers did in fact vote under the 1839 law during the Mexican War. For example, New Hampshire Republican William Chandler said so in his 1864 pamphlet, *The Soldiers' Right to Vote. Who Opposes It? Who Favors It?* (Washington, DC: Lemuel Towers, 1864), 8. Chandler did not claim that any soldiers voted under the 1813 law during the War of 1812.

22. White, *Citizens and Soldiers*, 50-51.

Neither the widespread judicial respect for Woodward's *Chase* decision nor the support it garnered from Woodward's Republican brethren on the bench would spare the decision from becoming a centerpiece in the political wars that took shape starting in 1863. As Republicans (pro) and Democrats (con) staked out their respective positions about soldier voting, the *Chase* decision became synonymous with Democratic opposition. And after its author won his party's nomination for governor in 1863, Republicans saw to it that he became the face of that opposition.

The Democratic nominating convention chose Woodward in June 1863 as Robert E. Lee mounted a northward offensive that would culminate in the Battle of Gettysburg in early July. Lee's campaign and its denouement on Cemetery Ridge shaped the Woodward-Curtin political campaign profoundly.²³ With the benefit of hindsight, the contemporary political operative Alexander McClure believed that the best candidate for the Democrats would have been General William Franklin, a career soldier with a solid record of service in the first two years of the war. Choosing Franklin would have avoided "the crushing millstone of actual or apparent disloyalty that always more or less hindered Democratic success," McClure speculated in his 1905 memoirs. But peace Democrats dominated the convention, and Woodward was a comfortable choice for them. He was a familiar and respected stalwart of the party, well liked by the delegates and best qualified, they believed, to help Pennsylvania address "the gravest constitutional and legal questions that would be presented" at the close of the war.²⁴

23. McClure, *Old Time Notes of Pennsylvania*, 2: 53.

24. *Id.* at 54.

For Republicans, the absence of Pennsylvania's 75,000 soldiers presented the biggest challenge in the 1863 election season. The party believed most of them to be reliable Curtin votes, but now, thanks to the high court's decision in *Chase v. Miller*, they could vote only by returning home on furlough. Many would do so, but in a state where Democrats outnumbered Republicans by 75,000, the absence from the polls of tens of thousands of likely Republican votes loomed as a potentially insurmountable obstacle. The solution, devised by the Republican State Committee, was Curtin's "Soldiers' Friend" strategy. The idea was to harness the political power of the absent soldiers as advocates for Curtin in letters to their families and friends back home.

Republicans laid the groundwork for the Soldier Friend strategy at the nominating convention. The convention adopted a resolution saluting Curtin's "vigilant care of our soldiers alike in the field, in the camp, and in the hospitals" and offering him to the electorate as the candidate who "is alike the friend of the soldier and a favorite of the people."²⁵ Public meetings called after the convention to ratify Curtin's nomination picked up the theme. The newspaper notice of one such meeting invited "all who love their country" to attend an 8 pm gathering at Penn Square for ratifying the nomination of "Andrew G. Curtin, The Soldiers' Friend."²⁶

The Republican State Committee then organized the machinery for converting the "soldiers' friend" brand into actual votes. Because the target voters were civilian Democrats, the Republican organization identified Democratic families with soldiers in the field and then organized pro-Curtin letter-writing campaigns by those soldiers. It

25. *North American and United States Gazette* (Philadelphia, PA), August 6, 1863.

26. *Id.*, August 21, 1863.

worked. “The army is known to be devoted to Curtin,” wrote one Republican newspaper as the strategy unfolded, “and its home influence can hardly be overstated.” A flood of letters from absent soldiers praising Curtin as “the soldiers’ friend” persuaded enough Democrats back home to give Curtin a 15,000 majority. Alexander McClure, who worked in Curtin’s campaign, later estimated that three quarters of the state’s absent soldiers participated in this letter-writing campaign. Looking back on the campaign as a memoirist in the early twentieth century, McClure marveled at the efficient implementation of this strategy. It “was systematically undertaken and carried out with a degree of perfection that has never been surpassed in political management,” he recalled effusively.²⁷

Even allowing for the likelihood that McClure overestimated the level of participation by soldiers, evidence of the troops’ widespread embrace of the branding of Curtin as soldiers’ friend certainly abounds, as does evidence that the project was a decidedly top-down affair, with soldiers responding to and embracing political themes crafted for their consumption by political operatives back home.²⁸ One Republican newspaper, for example, published a pro-Curtin letter purportedly speaking for 364 Pennsylvania soldiers, each identified by name. The soldiers were all convalescing in an unidentified hospital, according to the letter, and each one of them had told the “ward master” in person that he favored Curtin. The letter explicitly addressed itself to the

27. McClure, *Old Time Notes of Pennsylvania*, 2: 56-58; *Tribune* (Chicago, IL), October 10, 1863.

28. There is ample scholarship supporting the proposition that soldiers, in a bottom-up process, often inspired political themes, particularly radical themes, and successfully advocated them to party leaders back home. See, e.g., Frank, *With Ballot and Bayonet*; Smith, *No Party Now: Politics in the Civil War North*; and Orr, “A Viler Enemy in our Rear,” 171-198. The Pennsylvania Republicans’ “soldiers’ friend” project, in contrast, is an example of inspiration and leadership flowing in the other direction, in a top-down process orchestrated by political operatives and embraced by soldiers.

newspaper's civilian readership. "Reader," it asked, "have you a son, brother, or friend in the army? If so, that one can tell you how it would grieve him if you cast your vote against Gov. Curtin." It praised commander-in-chief Curtin as a "protector of Pennsylvania" against southern invaders and as "a friend of its defenders. We know him to be a friend of the soldier," a man who "feels for us," the letter assured readers.²⁹

The same letter assailed Woodward as a pro-Confederacy traitor. Not only had he, like other peace Democrats, embraced as a motto that "slavery must live, though the Union should perish," but he had also "decided against giving us, who are fighting for your liberties, a right to vote." Woodward's purpose in doing so, the letter accused, was "to aid the rebels in achieving their hellish ends." The letter concluded with an emotional and pointed appeal:

We ask you in the names of our comrades who have fallen victims to this infernal rebellion; we ask it in the names of such us [sic] are still suffering in the hospitals; we ask it in the names of those who are wasting their lives in rebel prisons; we ask it in the name of liberty, the Constitution, and the Union, to go to the polls and vote for A.G. Curtin, the man who never failed us. We leave the matter with you, reminding you that on your shoulders rest the responsibilities for which posterity will hold you responsible.³⁰

In another letter purporting to speak for entire units of soldiers, the commander of the 13th Pennsylvania cavalry forwarded pro-Curtin "resolutions" his troopers adopted. One expressed gratitude to Curtin for his "constant and successful exertions" on behalf of soldiers, proving Curtin to be "the Soldiers' Friend." Another, taking aim at Woodward, lamented that soldiers had been "deprived of some rights of citizens by a decision of the

29. *North American and United States Gazette* (Philadelphia, PA), September 16, 1863.

30. *Id.*

Supreme Court, in which the candidate opposing Governor Curtin has rendered himself conspicuous.”³¹

A soldier speaking only for himself wrote from a Philadelphia hospital to assure readers of a Republican paper that Curtin was “emphatically the friend of the soldier.... We all want to vote for him, if the copperheads will grant us the glorious privilege.” In contrast to the soldiers’ friend Curtin, he added, Woodward was “the copperhead candidate [who] robbed the boys of their right to vote.”³² A Republican newspaper in Wellsboro collected pro-Curtin testimonials from individual soldiers. One, a member of the 6th Pennsylvania Reserves, wrote, “If the soldiers could vote, I know Curtin would be elected. If you wish to do your country good, vote for Curtin, the soldiers’ friend.”³³ Another wrote beseechingly, “Are you, citizens of Penna, going to allow the soldiers’ friend to be defeated? If he be defeated, the soldiers of the Army of the Potomac will lose their dearest friend on earth.”³⁴ Referring to these servicemen as “the brave Tioga Soldier Boys,” the paper challenged peace Democrats to listen to their message. “Do you hear it, ye Coppers? Is this thunder?”³⁵

A different soldier made the same point in a letter to another Republican newspaper. Captain Harry Forster wrote to the *Central Press* (Bellefonte, PA) describing himself as a Democrat. Forster claimed that his admiration for Woodward had given way to the conviction that Woodward held “extreme Southern views” and “would give aid and comfort to traitors.” In contrast, said Forster, Curtin “is the soldier’s friend” and will

31. *Id.*, October 6, 1863.

32. *Id.*, August 28, 1863.

33. *The Agitator* (Wellsborough, PA), October 9, 1863.

34. *Id.*

35. *Id.*

“give the National government all proper aid and assistance.”³⁶ Moving up the chain of command, General George Meade added his voice to the pro-Curtin branding effort. Meade, a Pennsylvanian himself, had become a hero in his home state as commander of the triumphant Union troops at Gettysburg. When a unit of the Pennsylvania Reserves presented him with a sword, he responded with a speech endorsing Curtin as “the friend of the soldier and the friend of the Government.”³⁷

The theme found its way into partisan song. A pro-Curtin newspaper in Harrisburg published a song implicitly indicting Woodward for opposing soldiers’ voting rights while praising Curtin as the soldiers’ friend. Entitled simply, “Campaign Song for Curtin,” it followed the tune of “Battle Cry of Freedom”:

He’s the champion of our rights, boys,
The soldiers’ faithful friend,
Standing firm for Liberty and Union.
He’s been faithful in the past, boys,
We’ll trust him to the end.
Standing firm for Liberty and Union.³⁸

Straw polls purporting to show the pro-Curtin preferences of absent soldiers fortified the message that Curtin was the friend of soldiers. One, reported by the pro-Republican Chicago *Tribune*, showed Curtin beating Woodward 93-15 among Union soldiers held captive at Libby Prison in Virginia.³⁹ Another, from a Republican paper in Harrisburg, described the apparently *viva voce* polling of two Pennsylvania units at Camp

36. *Central Press* (Belafonte, PA), September 18, 1863.

37. *The Press* (Philadelphia, PA), October 3, 1863.

38. *Evening Telegraph* (Harrisburg, PA), October 2, 1863.

39. *Tribune* (Chicago, IL), October 30, 1863.

Tyler in Baltimore. Both units purportedly favored Curtin overwhelmingly, one by 357 to 1, and the other by 323 to 10.⁴⁰

The soldiers' friend label served as the backdrop for Republicans' contrasting characterizations of Woodward as anti-soldier and disloyal. Among the 1863 attack themes that presaged attacks Republicans would mount against McClellan in 1864 was the proposition of a symbiotic alliance between Confederate armies and northern peace Democrats like Woodward. The southern rebels, in common with northern peace Democrats, hoped for the defeat of Republican politicians bent on subduing the Confederacy. The alignment of their interests, according to the Republican argument, proved the disloyalty of peace men like Woodward. Woodward, argued a Republican paper in Huntingdon, is "the candidate the rebels wanted elected."⁴¹ Reciprocally, another Republican paper claimed, peace Democrats "rejoice at the success of the rebels. Loyal Democrats remember," the paper exhorted, "Woodward is one of them. Remember he disfranchised the soldiers."⁴² In a pro-Curtin speech in Philadelphia, retired Union general Richard Busted told his audience, "News of Woodward's election would be hailed in the rebel capital (sic)." Curtin, in contrast, is "the soldier's friend," Busted added.⁴³

In what may be the most vituperative of all expressions of hostility for pro-Woodward voters back home, a member of the 42nd Pennsylvania volunteers lashed out at

40. *Evening Telegraph* (Harrisburg, PA), October 1, 1863. The soldiers voted after the units "were called into formation" and asked by their commanding officer for "an expression as to their choice for Governor of their state." *Id.*

41. *Globe* (Huntingdon, PA), October 21, 1863.

42. *Central Press* (Belafonte, PA), October 2, 1863.

43. *The Press* (Philadelphia, PA), October 12, 1863.

peace Democrats in his hometown of Nelson. “I cannot help sending my compliments to the copperheads of Nelson,” wrote the soldier, A. Miles, “by hoping that the grass may refuse to grow upon their graves after they are dead.... Their backbones ought to be used to whip sheep-killing dogs about the streets.”⁴⁴

Such was the commonality of interests between peace Democrats and southern rebels, claimed Republicans extravagantly, that the Curtin-Woodward contest took on an importance as great as the recent military clash at Gettysburg. Pennsylvania Democrats, observed a Republican newspaper in Connecticut,

... are fighting Jeff Davis’s battles on the hustings and at the polls, and their selection of [Woodward] as their candidate for governor was an act scarcely less significant of their spirit than would have been the display of the Confederate flag over the convention hall. Mr. Woodward is a disunionist, pure and simple. His secessionist opinions have been as openly and positively expressed as those of Jeff. Davis himself.... [Beating Woodward] will be a union victory scarcely inferior in importance to that achieved at Gettysburg.⁴⁵

Prominent Union general Benjamin Butler made a similar argument to an audience in Harrisburg. Citing Richmond newspapers, Butler claimed that the Confederacy was hatching a plot to invade Pennsylvania again, not to gather supplies for Lee’s army, but “to give aid and encouragement to the Democratic Party in Pennsylvania.... You want the soil of Pennsylvania to be free from the invader,” Butler proposed, then “vote for Curtin.” A Republican state senator, T.J. Bigham, made the same point at a political rally in Pittsburg. Lee would invade Pennsylvania again in the fall, Bigham predicted, for the purpose of helping elect George Woodward.⁴⁶ According

44. *The Agitator* (Wellsborough, PA), October 9, 1863.

45. *Daily Palladium* (New Haven, Conn.), September 10, 1863.

46. Butler’s speech was quoted in *The Liberator* (Boston, MA), October 9, 1863. Bigham’s was described in the *Daily Gazette and Advertiser*, (Pittsburgh, PA) September 30, 1863.

to a Harrisburg newspaper, Democrats feared that Union military success would hurt their candidates at the polls by liberating pro-Curtin soldiers to come home in time for the election. “The Copperheads are opposed to enlisting or reinforcing the army,” the paper claimed, “for fear the war will be brought to a close and the soldiers come home to vote.” It was because Woodward knew that soldiers opposed him, the paper claimed, that he struck down the soldier-voting law. “The soldiers in the field support the Government, and for this they were disfranchised by the action of a Democratic Supreme Court.”⁴⁷

Democrats fought back. A Democratic newspaper in Erie attributed Curtin’s “soldiers’ friend” image not to the heartfelt sentiments of soldiers but to the conniving of Republican politicians. It claimed, “prominent politicians are constantly visiting the army, and by speeches and the circulation of lying documents, attempting to convince them that Gov. Curtin has been their special friend, while Judge Woodward is their bitter enemy.” Democrats operated at a big disadvantage in securing the support of soldiers, the paper complained, since “Democratic papers are not permitted to be sold in most of the camps, while Republican journals are flooded into the army by wholesale.” The paper encouraged its readers to reach out to absent soldiers by sending them “sound, conservative newspapers.”⁴⁸

Notwithstanding the difficulties Democrats purported to face in communicating with absent soldiers, the party managed to enlist the voice of soldiers to undercut Curtin’s claim to be the soldiers’ friend and to make the case for Woodward’s popularity among the troops. Sergeant U.R. Burkert of the 6th Pennsylvania reserves wrote a letter to a

47. *Evening Telegraph* (Harrisburg, PA), August 20, 1863 and August 23, 1863.

48. *Erie (PA) Observer*, September 5, 1863.

Democratic paper in his hometown mocking Curtin's claim to be the soldiers' friend. Woodward had at least as many friends as Curtin in his unit, claimed Burkert, and they would vote for Woodward if they could.⁴⁹

A Democratic paper in Erie published a letter from a Democratic soldier to his mother similarly claiming, "All our boys would vote for Woodward if they could get a chance." The letter, signed only "Your dutiful son," provides vivid evidence of the top-down nature of the Republican project to secure soldiers' support for Curtin's candidacy.

The other day an Abolition tract man brought Curtin's pictures to the camp and gave copies out for nothing. Most of the men wouldn't have them even at that price, but some of us took them just for fun. Somebody stuck one up on a tree, and wrote "The Soldiers' Friend" over it. ... The boys then amused themselves throwing quids of tobacco at the picture, and, before we were done, Andy's face was changed into the more popular color of his favorite niggers.⁵⁰

A soldier from the 5th Pennsylvania Reserves wrote from his camp in Culpepper, Virginia, disputing Curtin's claim to lopsided support in the army. Signing his letter "Musket," he claimed that straw polls purporting to show that Curtin was "the soldiers' friend" were false.⁵¹ Another serviceman, who signed his letter to the same Democratic paper in Harrisburg "A Private in the Army of the Potomac," made the same point. In another indication of the top-down nature of the effort to brand Curtin as the soldiers' friend, he wrote, "'the powers that be' are making a political machine of the Army of the Potomac for the advancement of Andy Curtin" by orchestrating meaningless votes of soldiers in the camps to give the appearance of support for Curtin among soldiers. Soldiers like himself who preferred Woodward were told they "can never expect any

49. *Reading (PA) Gazette and Democrat*, October 3, 1863. Burkett disparaged abolitionists populating the army as "smoked yankees," a term of derision this author has not found in other sources.

50. *Erie (PA) Observer*, November 28, 1863.

51. *The Patriot and Union* (Harrisburg, PA), October 6, 1863.

favor from those who wear shoulder straps [i.e., officers].... Let a man vote for Woodward and he is given to understand that his life in the army will be anything but pleasant. O ain't this a manly game?"⁵²

A particularly bitter Democratic soldier identifying himself only as "W.C." wrote of mistreatment he had suffered for expressing anti-Curtin sentiments. While his pro-Curtin comrades received furloughs to return home to vote, he drew a grubby assignment in a military prison in Baltimore formerly used to incarcerate slave criminals. Now, he reported indignantly, most of its staff was Negro soldiers, some of whom he and other white servicemen were under orders to salute. He wrote derisively of Curtin's claim to be the soldiers' friend: "Yes, my Democratic friends, we are all here together, niggers and whites, deserters and conscripts, criminals and convalescents, all used alike. All alike are the subjects of Abe and Andy, the 'soldiers' friend.'" ⁵³

One line of defense that Democrats tried to construct for Woodward was that his decision in *Chase* was actually pro-soldier. By striking down the soldier-voting law, some Democrats claimed, Woodward vindicated the very constitution that Pennsylvania soldiers were fighting to preserve. "Abolitionists [complaining about the decision] would violate the constitution the soldier is fighting to defend," wrote the editors of a Democratic newspaper in Harrisburg.⁵⁴ Another Democratic paper reminded readers that Woodward's Republican colleagues on the high court, Justices Reed and Strong, had agreed with his decision in *Chase*. Moreover, the same paper pointed out that in the case

52. *Id.*

53. *Democratic Banner* (Clearfield, PA), October 12, 1863.

54. *The Patriot and Union* (Harrisburg, PA), August 17, 1863.

of *Ewing v. Thompson*, it was a Republican judge on the court of common pleas who ruled that the prewar soldier-voting law was unconstitutional. That decision had the effect of excluding soldier votes from an election for sheriff of Philadelphia. The Democratic candidate would have won if the soldier vote had counted. By excluding those votes, the Republican judge effectively handed the election to the Republican candidate, the paper correctly pointed out. Viewed in that light, Democrats argued, Woodward was no guiltier of enmity to soldiers for his ruling in *Chase* than were the several Republican judges who reached the same conclusion. “If you want to elect the real ‘soldiers’ friend,’ vote for Woodward,” urged the paper.⁵⁵

Democratic newspapers also complained that Republicans’ branding of Curtin as the soldiers’ friend masked the Lincoln administration’s widespread abuse of the furlough process. A soldier identified only as “Member of the Third Regiment” of the Pennsylvania Reserves wrote to a Democratic paper in Gettysburg claiming that Republican officers convened a “secret meeting” to learn the politics of the regiment and then granted furloughs only to the pro-Curtin men. “In this way are the Democratic soldiers cheated out of those rights to which every American citizen is entitled,” he protested.⁵⁶ Knowing that officers granted furloughs selectively to soldiers thought to be safely pro-Curtin, soldiers of course expressed themselves as pro-Curtin in straw polls conducted by the same officers, claimed Democrats.⁵⁷ Lopsided pro-Curtin straw polls among soldiers, which Republican papers hailed as proof that Curtin was the soldiers’

55. *Democratic Watchman* (Bellefonte, PA), September 18, 1863. The paper correctly summarized the case of *Ewing v. Thompson*, 43 Pa. 372 (1862).

56. *Republican Compiler* (Gettysburg, PA), November 2, 1863.

57. *The Patriot and Union* (Harrisburg, PA), October 6, 1863; *Democratic Banner* (Clearfield, PA), October 12, 1863.

friend, to Democrats confirmed that corrupt officers dangled the promise of furloughs only to soldiers willing to commit publicly for Curtin.

Claims and counterclaims in the 1863 contest between Curtin and Woodward about who was or wasn't the soldiers' friend, about the purported treason of Democrats, and about the relevance of support for soldier-voting laws to those issues, all found Woodward and his supporters playing defense, just as those same issues would put George McClellan and his supporters on defense the following year. But, again presaging 1864, Pennsylvania Democrats in 1863 forced Republicans to play defense by asserting that the incumbent was an incompetent commander-in-chief and that he neglected the troops under his command, especially white troops. In their claims and counterclaims on these issues, too, both parties relied on soldiers as their most credible spokesmen, just as they would again in 1864.

By Election Day in October 1863, Pennsylvanians, like the rest of the Union, regarded the repulse of Lee at Gettysburg much the way modern Americans regard it – as a great triumph. Curtin, Pennsylvania's constitutional commander-in-chief, reaped corresponding political rewards, much as Lincoln would benefit politically from Sherman's capture of Atlanta in 1864. Looking back more than forty years later, Curtin's close political advisor Alexander McClure saw the Union's Gettysburg victory as politically decisive in 1863. "The issue of the memorable gubernatorial contest of 1863," McClure wrote in his 1905 memoirs, "was irrevocably decided by the repulse of Pickett's charge and the retreat of Lee's army from the battlefield of Gettysburg." McClure added that while this became clear in hindsight, it "was not fully understood at the time, or

indeed at any period during the [Curtin-Woodward] contest.”⁵⁸ For contemporaries, especially in Pennsylvania, the panic and ignominy occasioned by Lee’s invasion considerably offset the glory in repulsing the invasion. As far as Democrats were concerned, Curtin deserved as much blame for the former as credit for the latter. They trained their sights on Curtin’s perceived vulnerability for having allowed Lee to encroach so deeply and destructively into their state.

As Lee pressed his offensive push into the north, the Union’s Army of the Potomac frantically pursued him from the south. North of Lee, there was no organized force in Pennsylvania prepared to meet the oncoming confederates. As Pennsylvania’s commander-in-chief, that became a major concern for Governor Curtin. In May and June, Curtin and his representatives met with Secretary of War Edwin Stanton to develop a plan to mobilize a force of Pennsylvanians to resist Lee. They worked through issues that might hamper the recruitment effort: assuring men they would be paid, guaranteeing a limited term of service, and assuring the recruits that their service would be limited to the soil of Pennsylvania. The forces they finally assembled provided a limited but valuable service. They lacked the strength to impede Lee, but they gathered information about his movements, which helped the Army of the Potomac plot its ultimately successful moves.⁵⁹

In other words, Curtin and the makeshift troops he helped assemble operated at the margin of the real military action. By constitutional title, he was commander-in-chief

58. McClure, *Old Time Notes of Pennsylvania*, 2:52.

59. Edwin B. Coddington, *The Gettysburg Campaign: A Study in Command* (New York: Charles Scribner’s Sons, 1979), 134-140. Among the subjects discussed during these deliberations was the choice of a commander for the new military organization. Coddington asserts that one name, suggested by Curtin’s close confidant and advisor Alexander McClure, was George McClellan. Stanton rejected the idea. *Id.*

of the forces of Pennsylvania, but he had no operational control over any of the Union forces that engaged Lee in the battle of Gettysburg. His role at the fringe of the military action, however, did not deter political polemicists on both sides from treating him as a central player. Republicans painted him as an architect of the union's victory. Democrats treated him as the goat – the failed commander-in-chief who let Lee invade and wreak havoc in Pennsylvania. Lincoln would face similar treatment the following year, when Democrats tarred him as a bungling commander-in-chief.

Lee could not have gotten as far as Gettysburg had it not been for the “inefficiency of Gov. Curtin,” claimed at least two Democratic newspapers.⁶⁰ Another asserted that the invasion, and the resultant “robbery” of Pennsylvania's farmers by Lee's foragers, happened “because Governor Curtin had not the manliness and the ability to do his sworn duty.”⁶¹ James F. Shunk, a lowly private in the Pennsylvania home guard but a prominent attorney admitted to practice at the US Supreme Court, lashed out at Curtin in a speech before a mass rally for Woodward in Philadelphia a month before the election. He faulted Curtin for letting rebel armies enter the state, and he characterized Curtin's collaboration with Stanton as the dithering of a feeble leader. Shunk praised the direct response of Democratic governors in New York and New Jersey, who quickly sent troops to help defend Pennsylvania. Curtin, in contrast, went “begging and pleading with the powers at Washington for leave to call out his own militia,” and as Pennsylvania's peril

60. *The Franklin Repository* (Chambersburg, PA), August 19, 1863 and *Crawford Democrat* (Meadville, PA), September 22, 1863, both as quoted in Shankman, *The Pennsylvania Antiwar Movement*, 127.

61. *Republican Compiler* (Gettysburg, PA), September 21, 1863.

grew, Curtin “was trembling on his marrow bones before the throne at Washington.”⁶² One Democratic paper claimed that the very act of running for office showed that Curtin shirked his military duties. When he stumped, the paper claimed, Curtin “abandoned his duties at Harrisburg ... when a hand is needed at the helm.”⁶³

A facet of Curtin’s inadequacy as a commander-in-chief, and belying his claim to be “the soldiers’ friend,” according to Democrats, was his neglect of Pennsylvania troops. These attacks, too, presaged claims that Democrats would make against Lincoln the following year. One Democratic paper quoted a Pennsylvania soldier complaining in a letter home that he hadn’t “walked right since I got the rheumatism under one of his [Curtin’s] rotten blankets.” The same soldier told of a friend who complained mockingly “of shoes with paste-board soles which he had got from [Curtin,] ‘the soldiers’ friend.’”⁶⁴ A soldier in the 5th Pennsylvania Reserves complained in a letter to a Democratic paper that men in his camp lacked clothing and shoes and that their pay was in arrears, all thanks to the governor posing as the soldiers’ friend.⁶⁵

Another pro-Woodward paper claimed that it was Democrats, not Republicans, who championed “opposition to contractor frauds and to supplying soldiers with unwholesome food and shoddy clothing.”⁶⁶ In contrast, another paper said, Curtin received kickbacks from suppliers of shoddy uniforms, worthless shoes, and defective

62. *The Patriot and Union* (Harrisburg, PA), September 21, 1863.

63. *Democratic Watchman* (Bellefonte, PA), September 18, 1863. Unlike Woodward, who let others speak for him during the campaign, Curtin actively campaigned on his own behalf.

64. *Erie (PA) Observer*, November 28, 1863.

65. *The Patriot and Union* (Harrisburg, PA), October 6, 1863.

66. *Id.*, September 5, 1863.

blankets.⁶⁷ In sum, Democrats claimed, Curtin, far from being the true soldiers' friend, was simply "the shoddy candidate for Governor."⁶⁸

Republicans, of course, trotted out the voice of soldiers to dispute these attacks. A soldier in the 6th Pennsylvania Reserves called accusations about shoddy equipment a lie. "The clothes we got from the State," he claimed, "were fifty percent better than any we received from the United States." For that reason, he added, and because Curtin was indeed the soldiers' friend, almost all his comrades supported Curtin. To be sure, he conceded, some favored Woodward, "but there are mighty few of them, and [they] are even despised by their boon companions."⁶⁹

In the Democrats' rogue gallery of Curtin supporters, shoddy contractors stood side by side with detested abolitionists. Democrats' attacks on Curtin routinely associated him with both. His support of Lincoln's "Negro war," as they characterized it, was an implicit affront to white soldiers and an additional facet of Curtin's mistreatment of white troops. Lincoln in 1864 would face the same Democrats' attacks for purported hostility to white troops rooted in the emancipatory direction of the Union war effort starting in 1863.

A democratic paper in Erie claimed that Curtin and his Republican allies were making the war into a fight for abolition, thereby elevating "the colored man to an equality in the ranks and at the ballot box with the white man...."⁷⁰ The same paper printed a letter from a soldier to his mother, in which the son ridiculed Curtin's claim to

67. *Republican Compiler* (Gettysburg, PA), November 2, 1863.

68. *Democratic Watchman* (Bellefonte, PA), September 18, 1863.

69. *Evening Telegraph* (Harrisburg, PA), October 9, 1863. A "boon companion" is a close friend with whom one enjoys spending time.

70. *Erie (PA) Observer*, September 5, 1863.

be the soldiers' friend, then added, "We are sick and tired of hearing about 'the nigger,' and we want to see the abolitionists put *down* to *his* level instead of having him put up to *ours*."71

A Democratic paper in Lancaster accused Lincoln and Curtin of being anti-soldier because they subjected white soldiers to hazards on behalf of blacks. The paper categorized the voters who the editors claimed favored each candidate. Pro-Curtin categories included "Everyone who thinks that the nation can only be saved by the help of negro soldiers" and "Everyone who believes the negro race is superior to the white." The pro-Woodward group, in contrast, included "Everyone who believes this government was made by white men for white men," and "Everyone who condemns the negro war policy of the President and his advisors."72 By his support of Lincoln's war policies, including enlisting African-American soldiers into the Union army, another paper claimed, Curtin had proved that his goals were "negro suffrage and negro equality."73

The attack themes that Republican and Democrats deployed against each other in the 1863 gubernatorial race between Andrew Curtin and George Woodward foreshadowed attacks that partisans would hurl at the presidential candidates in the 1864 race. The parallel was imperfect, since Pennsylvania Democrats in 1863 nominated a member of the party's peace wing with a civilian resume, while the next year national Democrats ran with a pro-war candidate with a military resume. Part of the Republican

71. *Id.*, November 28, 1863 (italics in the original).

72. *Intelligencer* (Lancaster, PA), September 15, 1863 and September 29, 1863.

73. *Republican Compiler* (Gettysburg, PA), September 21, 1863.

attack strategy in 1864 was to tear down McClellan's stature as a soldier by accusing him, for example, of physical cowardice. Woodward, never offered to the electorate as a soldier, avoided that line of attacks. But in both cases, Democrats' division over the war opened the party's candidate to accusations of disloyalty, either because (in Woodward's case) he was himself a peace Democrat or because (in McClellan's case) he allied himself with peace Democrats.

The other attacks that Lincoln and McClellan would face in 1864 were also familiar to Curtin and Woodward in 1863: that the challenger was a traitor, that the incumbent was an incompetent war leader, and that the incumbent neglected and dishonored his white troops. For all these themes, soldiers spoke with special authority, so both parties enlisted soldiers as messengers of the themes. In both races, for both parties, the political voice of soldiers was ubiquitous. Underlying the effort to demonstrate affinity with soldiers was the parties' struggle to achieve status as "the soldiers' friend." Republicans won that struggle both years, in no small measure because they succeeded in painting Democrats as anti-soldier by virtue their real (in 1864) or purported (in 1863) opposition to soldier-voting laws.

Woodward's Judicial Activism in Chase

We close this chapter with a look back at the *Chase* opinion and an intriguing aspect of it suggesting that Woodward went out of his way to strike down the prewar soldier-voting law and may even have flirted with impropriety in the process. Research has uncovered no scholarship examining this aspect of the *Chase* decision for the light it

might shed on Woodward's role in the case. Indeed, that light may be quite dim, as evidence remains murky and ambiguous. Still, such evidence as does exist points to the irony that Woodward could have reached a sound result and avoided the political penalty he eventually (and perhaps unfairly) paid for his decision in *Chase* had he approached the case with his characteristic conservatism. He did not.

We have seen that Ezra Chase prevailed in the case because of the exclusion of the soldier votes cast for Jerome Miller, an exclusion that the high court ratified when it found that the prewar soldier-voting law was unconstitutional. But it is evident from a close reading of Woodward's decision, and particularly its discussion of the case's procedural history, that the court could have preserved Ezra Chase's election victory without reaching the constitutional issue. Most judges, and certainly most judges as conservative as Woodward, generally prefer to avoid making unnecessary findings and to decide cases on the narrowest possible grounds. It is worth pondering why Woodward and the rest of the court majority chose not to do so in *Chase*.

The court's opportunity to escape the broad constitutional issues arose from a defect in Jerome Miller's original petition for review of the election results. As Woodward explains in his description of the case's history, Miller's petition challenging Chase's win lacked essential statements of facts. Specifically, it did not provide the names of the soldiers whose pro-Miller votes the election judges excluded, or the places where the soldiers cast their ballots. Nor did the petition show that the soldiers who voted were constitutionally qualified electors, or that they cast their ballots the statutorily requisite distance from their usual voting place (not less than ten miles under the 1839

law). Absent those facts, Miller's petition provided no foundation for a court to find that the election judges rejected any votes that the 1839 law would have permitted, assuming it was constitutional.⁷⁴

The inadequacy of Miller's petition would have ended the case in Chase's favor at the lower court level, except that a remarkable thing happened. While the case was pending at the inferior court, the two parties solved Miller's evidentiary problem by entering into a written agreement – in legal parlance a “stipulation” – about the excluded votes. It essentially said that if the excluded votes were included in the vote count, Miller would win the election, and that Chase would be the proper winner only if the votes remained excluded. The lower court concluded that this stipulation was tantamount to filling in the pieces missing from Miller's petition. The stipulation did so not by providing any of the missing details – the names of the soldiers, the place where they voted, their eligibility to vote, etc. – but by presupposing that all the excluded votes indeed met the requirements of the 1839 law.⁷⁵ The lower court concluded that if the two parties had no disagreement about the factual details of the excluded votes, then there was nothing on that subject for the court to decide; courts exist to referee disagreements, and the stipulation reduced the disagreement between Miller and Chase to the question of the law's constitutionality.

In addressing the lower court's acceptance of the stipulation, Woodward at first seemed inclined to disagree. He found fault with the substance of the stipulation for its lack of detail about the who and where of the soldier votes; on all the discrete elements of

74. *Chase*, 41 Pa. at 414.

75. *Id.* at 415.

eligibility to vote under the 1839 law, Woodward noted, “the agreement is dumb.”⁷⁶ “If we limit ourselves strictly to the agreement,” Woodward wrote, “we should be obliged to say it was wholly insufficient to support the [lower court’s] decree....”⁷⁷

Woodward might have stopped there, found Miller’s challenge defective, and reversed the lower court on this procedural basis without venturing into the constitutional questions. But Woodward passed up that easy chance by giving the stipulation an assist. “[T]o help out the record,” Woodward wrote after observing all the deficiencies of the stipulation, “we choose to read the agreement in connection with [Miller’s] petition of complaint, and we have already seen that it [Miller’s petition] did set forth, not as fully as it ought, but with tolerable precision, the qualified character of the volunteers who cast the votes in question.”⁷⁸

In other words, while the stipulation left something to be desired, it was good enough when read in conjunction with Miller’s petition challenging the election results. The two documents together, though they left some holes, made it unnecessary for the court to concern itself about the “who and where” of the excluded soldier vote. On this basis, Woodward proceeded to address the constitutional issues.

This remarkable approach raises two questions that are unanswerable without speculation, but reasonable speculation points to interesting possibilities. The biggest question is why a conservative justice like Woodward would choose to “help out the record” in order to reach an avoidable constitutional issue? The answer, one may

⁷⁶. *Id.*

⁷⁷. *Id.*

⁷⁸. *Id.* at 416.

reasonably surmise, is that he wanted to reach the constitutional issue. Perhaps he and his colleagues recognized that they could not avoid the constitutional issue indefinitely. It would certainly arise in a subsequent case if they failed to address it in *Chase*, so why not get on with it sooner rather than later? They undoubtedly harbored lingering convictions about the 1839's law's invitation to fraud, which they had recognized unanimously and lamented in the *Hulseman and Brinkworth* case only six months earlier. One way or another, however, they showed eagerness in the *Chase* case to grapple with a constitutional question they might have ducked.

A second question is why Ezra Chase and his attorneys agreed with Miller and his lawyers to enter into the factual stipulation. It is easy to see why Miller agreed. He needed the stipulation to fill factual gaps in his challenge. Miller carried the burden of overturning the decision of the election judges, and the stipulation would help him meet that burden. But why would Chase agree? Why would Chase lift a finger to help Miller improve the factual record in his challenge to an election that Chase had won? Again, we are left to speculate.

An unremarked detail in the case points to a possible, though conjectural, solution to the riddle. It hinges on the identity of one of Ezra Chase's attorneys. The report of the case identifies two lawyers arguing for Ezra Chase. One was "L. Hakes" and the other "Stanly Woodward."⁷⁹ Hakes was undoubtedly Lyman Hakes, a prominent trial attorney of the era. He practiced mostly in Scranton, a city adjacent to Luzerne County. "Stanly Woodward," was also a trial lawyer of prominence. He practiced mostly in Wilkes-Barre,

79. *Id.* at 405.

the biggest city in Luzerne County. Remarkably, he was George Woodward's oldest son.⁸⁰ This means that Justice George Woodward decided the case of *Chase v. Miller* in favor of his son's client, Ezra Chase. Leaving aside the question of whether his son's role may have affected Justice Woodward's impartiality in the case,⁸¹ the possibility arises that Justice Woodward, in *ex parte* communications with his son or through winks and nods that are commonplace between judges and lawyers, signaled his and the court's desire to address the constitutional issue, which it could do only if the parties entered into a stipulation of the sort that Chase and Miller in fact agreed to. More specifically, if Chase's attorneys were confident that the high court would, if it could, decide the constitutional issue in favor of Chase, then they would have nothing to fear from a

80. The spelling of Stanly Woodward's first name sometimes appears as "Stanly," as it did in the Supreme Court's report of the *Chase* decision and also in a 1875 *New York Times* obituary following George Woodward's death. ("Obituary: Chief Justice Woodward," *New York Times*, May 11, 1875.) More frequently it appears as "Stanley," as it did when he spoke at a bar association event honoring Lyman Hakes after the latter's death in 1873 ("Death of Lyman Hakes," *Scranton Law Times*, December 12, 1873) and also in his own obituaries [Yale University, *Obituary Record of Graduates of Yale University Deceased From June, 1900 to June, 1910* (New Haven: The Tuttle, Morehouse & Taylor, Co., 1910), 563; Rev. Horace Edwin Hayden, ed., *Proceedings and Collections of the Wyoming Historical and Geological Society For the Years 1908-1909* (Wilkes-Barre: E.B. Yordy Co., 1909), 10:228]. In a published roster of Pennsylvania attorneys practicing during this era, the first name appears as "Stanley" [Frank Marshall Eastman, *Courts and Lawyers of Pennsylvania in History* (New York: The American Historical Society, 1922), 3:666.], as it does in published genealogical records [Horace Edwin Hayden, *Genealogical and Family History of the Wyoming and Lackawanna Valleys, Pennsylvania* (New York: The Lewis Publ. Comp, 1906) 1:17; William Richard Cutter, ed., *New England Families: Genealogical and Memorial* (New York: Lewis Historical Publishing Company, 1913), 2:604]. Whether as "Stanly" or "Stanley," most references to him identified him as George Woodward's eldest son. Research uncovered no record of any other attorney named Stanly or Stanley Woodward practicing law in Pennsylvania during this era. It appears incontrovertible that "Stanly Woodward" and "Stanley Woodward" was one and the same attorney, the son of Justice George Woodward.

81. While modern norms governing judicial conduct would require a judge in Woodward's position to recuse himself, no such rules applied until later in the nineteenth century. (Charles Gardner Geyh, "Why Judicial Disqualification Matters. Again," *The Review of Litigation* 30, no. 4 (2011), <http://www.repository.law.indiana.edu/facpub/826/>; *Disqualification of Judges for Prejudice or Bias – Common Law Evolution, Current Status, and the Oregon Experience* 48 OR. L. REV. 311 [1969]). The docket materials of the case have not survived, so we cannot determine whether Justice Woodward's relationship to Chase's lawyer was addressed before the court rendered its substantive decision. Of the countless political attacks on Woodward for the "anti-soldier" outcome of the *Chase* case, research for this project found none that raised the father-son relationship in the case.

stipulation that allowed the court to reach the issue. They may have gained that confidence based on the son's access to his father and the insights this may have provided about the inclinations of the father and his colleagues. Having learned which way the court was leaning, Chase's legal team may have concluded that there was no risk in entering into the stipulation that Miller needed. Instead of winning the case by refusing to stipulate and thereby leaving Miller with a factually deficient challenge, Chase would win on a court finding that the soldier-voting law was unconstitutional.

This hypothesis rests partly on facts not in evidence, as any critical observer would correctly note. It might very well be wrong. It seems worth offering as a possibility, however, because it has the virtue of knitting together and making sense of three important facts that are very much in evidence. First, the court majority, we know from the *Hulseman and Brinkworth* case, looked askance on the 1839 soldier-voting law before the *Chase* case arrived on its docket. Their eagerness for an opportunity to kill the law is easy to infer from that fact. Second, Chase entered into a factual stipulation that, but for the scenario hypothesized above, was clearly against his interests. Third, one of Chase's lawyers was Justice Woodward's son, a man well positioned to know firsthand of the court's inclination to strike down the law. The hypothesis connects those dots, albeit conjecturally.

What we can say without conjecture is that Justice George Woodward did reach the constitutional issue and decided it by striking down the 1839 soldier-voting law as a violation of Pennsylvania's 1838 constitution. He could have rendered justice to Ezra Chase without striking down that law; his opinion in the case as much as says so. Instead,

he made an avoidable finding of unconstitutionality. Michigan Supreme Court Justice Isaac Christiancy, in reviewing that state's soldier-voting law, faulted Woodward's opinion (with which Christiancy otherwise agreed) for evincing "hostility" to Pennsylvania's soldier-voting law.⁸² Christiancy saw the hostility in Woodward's having attached constitutional relevance to the law's susceptibility to fraud, a matter of mere "inexpediency" – constitutionally irrelevant – as far as Christiancy was concerned. Perhaps Christiancy had a point, but even greater hostility is arguably evident from Woodward's gratuitous consideration of the law's constitutionality.

Mark Neely has characterized this Pennsylvania Supreme Court as "aggressive," having in mind the results not only in *Chase*, but also in the *Kneedler* case temporarily striking down the federal Conscription Act of 1863.⁸³ The most noteworthy aggression in Woodward's *Chase* decision, however, was less in the outcome than in reaching an avoidable outcome. While Woodward could not have anticipated it at the time, his uncharacteristic indulgence in judicial activism doomed his later political ambitions by saddling him, however unfairly, with the label of the "soldiers' enemy." Had he avoided the constitutional issue in *Chase*, the notoriety of having authored the country's first court decision striking down a popular soldier-voting law probably would have fallen to a justice in some other state. As it happened, it fell to George Woodward, and it fell hard.

Woodward's defeat taught politicians nationwide a political lesson, and they applied that lesson in state legislative sessions in 1864. The timing of enactments of

82. *Twitchell*, 13 Mich. at 161.

83. Mark E. Neely, Jr., "Civil War Issues in Pennsylvania: A Review Essay," *The Pennsylvania Magazine of History and Biography*, 135:4 (October 2011), 414. As to the result in *Chase*, Neely praises Woodward for having "made a good case that the old [soldier-voting] law was unconstitutional." *Id.*

soldier-voting laws demonstrates that a turning point occurred at the end of 1863. Twelve of the twenty states that invented ways for absent soldiers to vote did so after January 1, 1864, often reversing positions taken in 1863. The Michigan and New Hampshire legislatures, for example, failed to pass soldier-voting bills in 1863. In early 1864, laws passed in both states.⁸⁴ The Connecticut, Kansas, Maryland, and Maine legislatures failed in 1863 to launch the process of amending their state constitutions to authorize soldier-voting legislation. The necessary legislation passed in all four states in early 1864, all without intervening elections.⁸⁵ New York's Governor Horatio Seymour vetoed a soldier-voting bill in 1863, partly for constitutional reasons but mostly on policy grounds. He signed the bill passed in 1864, though the features objectionable on policy grounds in 1863 persisted in the 1864 bill.⁸⁶ The legislatures in Rhode Island and California ignored the soldier-voting issue in 1863. Early in 1864, the former took steps to amend its constitution, and the latter passed a law, in both cases to permit absent soldiers to vote, and in both cases without an intervening election.⁸⁷

Concededly, the *post hoc* character of the 1864 activities in these states does not decisively establish the Pennsylvania gubernatorial race of 1863 as the *propter hoc*. Ohio's 1863 election results, with soldiers voting overwhelmingly for pro-war John Brough, surely played a part in sparking this national surge in enthusiasm (by Republicans) and muted opposition (by Democrats) for soldier-voting laws. But one

84. Benton, *Voting in the Field*, 95-100, 206. In the Michigan senate, more Republicans (15) than Democrats (14) voted to kill the bill in March 1863. Less than a year later, with no intervening elections, senate Republicans all voted for the bill over the unanimous opposition of Democrats. *Id.* at 95, 100.

85. *Id.* at 177-178 (Connecticut), 109 (Kansas), 234 (Maryland), and 119 (Maine).

86. *Id.* at 151. (Benton says of the 1864 bill, "It was open to the same objections as the Act of 1863 and yet Seymour signed it.")

87. *Id.* at 182 (Rhode Island), and 128 (California).

cannot dismiss the likelihood that the unwitting hand of George Woodward played a big part. His judicial exertions against Pennsylvania's law, and Republicans' masterful cultivation of Curtin's status of "the soldiers' friend" based largely on what Woodward had done on the bench, opened political eyes everywhere to the potency of soldier-voting laws in the political messaging wars taking shape in 1864.

Ironically, then, champions of absentee soldier voting had George Woodward to thank for advancing their cause, however unintentionally he performed that role.

CHAPTER 4

THE INDISPENSABLE VOICE OF SOLDIERS IN THE MESSAGING WARS OF 1864

Andrew Dickson White led a life of impressive accomplishment. Before the Civil War, he taught history and English at the University of Michigan, where among other things he organized a student project to plant elms on the campus “Diag,” which was barren when White first saw it and became handsomely tree lined thanks to him.¹ Shortly after the war, he co-founded Cornell University with his wealthy friend and fellow New York state senator, Ezra Cornell. White became Cornell’s first president, serving in that post from 1866 till 1885. He was popular with students there, as he has been at Michigan. In a tradition that long outlasted Dickson’s tenure as president, all Cornell students with the last name White, no matter what their given name, earned the nickname “Andy.” Post-Cornell, he added to the luster of his *curriculum vitae*. In 1884, White became the first president of the American Historical Association. He served as president of the U.S. delegation to The Hague Peace Conference (1889), minister to Russia (1892-94), and twice as US ambassador to Germany (1879-81 and 1897-1902).²

Having led such a distinguished life, perhaps it should not surprise us that White’s exertions as a Republican partisan in 1864 barely register in his lengthy 1904 autobiography, or that the pro-Lincoln pamphlet he wrote about soldier-voting laws fails to register at all. Was the pamphlet simply too trivial to merit mention in the memoirs of

1 .Margaret Buranen, “Tree’s Company,” *Michigan Today*, September 17, 2013, <http://michigantoday.umich.edu/a8696/>.

2 . “Legacy of Leadership: Cornell’s Presidents” *Cornell*, accessed October 19, 2013, http://rmc.library.cornell.edu/presidents/view_item.php?sec=3&sub=8; “In the Founders Footsteps: Builders of the Cornell University Library,” *Cornell*, accessed October 19, 2013, http://rmc.library.cornell.edu/footsteps/exhibition/buildingcollections/buildingcollections_8.html.

such an accomplished man? Or instead could the omission owe to sheepishness White may have felt in 1904 about his writings as a youthful political operative forty years earlier? His anti-McClellan pamphlet was a work of political propaganda, full of distortions and smears. To be sure, distortions and smears did not violate prevailing norms of political combat, which accepted a degree of mendacity as an inevitable part of partisan polemics.³ But they hardly comported with the norms of a distinguished historian and man of letters, and they fell short of the dignity and integrity a man of White's distinction would want associated with his name as he looked back on his life. That might explain his preference to sweep his 1864 project under the rug, or perhaps somehow to purge the pamphlet from his own recollections. But whether or not the pamphlet secured a place in White's memory, it deserves a place in ours.⁴

White entitled his pamphlet *Political Dialogues: Soldiers on Their Right to Vote, and the Men They Should Support*.⁵ He wrote it at age 32 while serving in the New York state senate. It is a fictional play, set in an encampment of Pennsylvania soldiers serving near Atlanta in 1864. The play has no action, just conversation. The cast members are all nameless soldiers, identified only by their rank and home state. Some are Republicans, some Democrats, but they all agree on the pamphlet's central message: traitorous "peace men" have captured the formerly honorable Democratic party, and their 1864 standard-

3. See generally, Martin Jay, *The Virtues of Mendacity: On Lying in Politics* (Charlottesville: University of Virginia Press, 2010).

4. Andrew Dickson White, *Autobiography of Andrew Dickson White*, (New York: The Century Company, 1904), 1:122. Of his role in the 1864 campaign, White wrote only that he "tried to do my duty in speaking through my own and adjacent [state senate] districts, but there was little need of speeches; the American people had made up their minds, and they reelected Mr. Lincoln handily." *Id.* He makes no mention of his pamphlet.

5. Andrew Dickson White, *Political Dialogues: Soldiers on Their Right to Vote, and the Men They Should Support*, (1864; The Cornell University Library Digital Collections) <http://ebooks.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery;idno=39923010;view=image;seq=1> (Hereafter cited as *Political Dialogues*.)

bearer George McClellan is now guilty of treason by his association with them. They have proved their treason by opposing soldier-voting laws. To the soldiers in White's play, that makes them *ipso facto* anti-soldier and pro-rebellion.

Over the course of White's play, soldiers from other states drift by and join the Pennsylvanians in their "dialogues." Ohioans arrive first, followed by Michiganders, Wisconsinites, Minnesotans, Illini, Hoosiers, and New Yorkers. One at a time, each group adds its own account of the Democratic Party's perfidious opposition to soldier-voting laws. All concur with the Pennsylvanians that by opposing military suffrage, Democrats in each state had revealed their hostility to soldiers and their affinity to the Confederacy. And they all agree that McClellan had thrown in with the traitors.

The Pennsylvanians are alone in the play's first scene, talking about soldier-voting rights in that state. Here White introduces George Woodward of the Keystone State's Supreme Court. Woodward is the key villain and the linchpin of White's thesis of Democratic sedition. A captain of the Pennsylvania regiment, leading the discussion, explains to the small gathering that the Pennsylvania Supreme Court had struck down the state's prewar soldier-voting law, ruling that soldiers "had no right to vote." An incredulous private asks the captain who could possibly have rendered such an opinion. "It couldn't have been any soldier's friend," observes the inquiring private. "It must have been some rebel sympathizer." The captain responds, "You are correct. It was George Woodward."⁶

George Woodward had indeed authored the Pennsylvania high court's decision striking down the only extant soldier-voting law in the country in 1862. White's play tars all "peace Democrats" as proven enemies of Union soldiers, but it gives Woodward top

6. White, *Political Dialogues*, 2.

billing as the prime saboteur of soldiers' voting rights. Woodward was the perfect foil for such polemics, tailor-made for the caricature of Democrats as anti-soldier traitors. Republican polemicists and newspaper editors had a field day portraying him as an enemy of Union soldiers and the Union cause.

Like much political polemics, it stood on a weak substantive foundation. As we saw in Chapter 3, Woodward was an outspoken peace Democrat, but he was hardly anti-soldier in any personal sense. Two of his sons served in the Union army, and Woodward himself paid the expenses of raising a company of volunteers for the 2nd Pennsylvania Reserves.⁷ His hostility to the administration's war effort was well within mainstream Democratic thought. Though he opposed secession, his opposition rested on standard, conservative Democratic orthodoxy.⁸

Other jurists who shared Woodward's political views and who, like Woodward, had found constitutional flaws in soldier-voting statutes, did not become whipping boys for Republican attacks quite the way Woodward did. Rufus Ranney of the Ohio Supreme Court and Chief Justice Joel Hinman of Connecticut's high court, for example, were Democrats who found constitutional infirmities in their respective state's soldier-voting laws. Both came under some fire from Republicans for doing so, but not on the national scale or with the vituperation that Woodward experienced.⁹ What made Woodward

7. *Erie (PA) Observer*, October 3, 1863, 2.

8. Letter from Woodward to Rufus E. Shapley, *Philadelphia Press*, October 12, 1863; Speech by Woodward in 1861, saying inter alia, "We hear it said, let the South go peaceably. I say LET HER go peaceably." *Globe* (Huntingdon, PA), September 9, 1863. Jonathan White offers the best analysis of Woodward's political thought. White, Woodward and Black, "A Pennsylvania Judge Views the Rebellion," 195-225.

9. A Connecticut newspaper slammed Hinman for concurring in the court's ruling that the soldier-voting law was unconstitutional, noting that Hinman was "a member of the Copperhead McClellan party." *Daily Palladium* (New Haven, Conn.), October 5, 1864. But even that paper devoted more space to attacking Woodward than Hinman.

special? Why did Andrew Dickson White make Woodward the first of the villains assailed as a traitor in his play about soldier-voting laws?

There are four elements to the answer, adding up to a perfect storm of political vulnerability for Woodward. First was his priority in time. Pennsylvania had the only soldier-voting law on the books at the outbreak of the war, so its law was the first to come under judicial scrutiny. In *Chase v. Miller*, Woodward authored the Supreme Court opinion striking down the law as unconstitutional. This brought national attention to him (though not to the two Republican justices who joined his opinion).¹⁰ Second, while many jurists came to the bench from backgrounds in elective politics, Woodward entered the political fray while still on the bench by running as the Democratic candidate for governor of Pennsylvania in 1863, at a time when his opinion in the soldier-voting case was still fresh. That move brought Woodward national attention, particularly because Pennsylvania's statewide elections occurred in what was an "off year" in most other states. In the election, Republicans used his decision against the soldier-voting law as "proof" that he was "anti-soldier," in contrast to the Republican incumbent, Andrew Curtin, who branded himself successfully as "the soldier's friend." After the 1863 election, Republicans attributed Woodward's views, or more accurately their caricature of his views, to the entire Democratic Party, because now Woodward was as conspicuous in Democratic politics as he was on the judiciary. Democrats became saddled with Woodward's opinion in the soldier-voting case, making them traitorous enemies of the soldier, according to Republican rhetoric.

Third, shortly after the gubernatorial election, Woodward became entangled in an additional hot potato case about soldiers and the war. In an eagerly awaited opinion, not

10. *Chase*, 41 Pa.at 418.

issued until after the election, he joined a 3-2 court majority in striking down the federal Conscription Act of 1863 as unconstitutional. The draft exceeded Congress's authority under Article I, the state court ruled. The opinion was short-lived, as a reconstituted court reconsidered and reversed itself before issues of federal supremacy boiled over. But Woodward remained on the court and stuck to his original view of the matter.¹¹ This gave Republicans in 1864 even more ammunition for attacking him and Democrats as hostile to the Union cause and "anti-soldier," on the logic that the union cause and incumbent soldiers needed the reinforcements that the Conscription Act promised.

Finally, Woodward unwittingly offered Republicans in 1864 an easy avenue for attacking their real target, George McClellan. In October 1863, in a blunder that haunted McClellan for the following twelve months, the politically ambitious general wrote a letter endorsing Woodward's candidacy for governor. The Philadelphia press had erroneously reported that McClellan supported the Republican candidate, Andrew Curtin. Knowing that the rumor would hurt his political aspirations as a Democrat, McClellan wrote to the chairman of the Democratic Party's State Central Committee in Philadelphia, Charles Biddle, to set the record straight. His letter first denied the rumor. Then it went the additional step of affirmatively supporting Woodward with the following regrettable passage: "I desire to state clearly and distinctly that, having some few days ago had a full

11. The case was *Kneedler v. Lane*, 45 Pa. 238 (1863). It was brought on behalf of Henry Kneedler and two other Pennsylvania men who had been drafted under the authority of the 1863 Conscription Act. The court's majority concluded that in fighting the Confederacy, Congress could act only in the way the U.S. Constitution specifically authorized to "suppress Insurrections." That was by "calling forth the Militia" of one or more states. (Article I, section 8). The Conscription Act did not "call forth" state militias, but instead drafted civilians directly into US military service. The case never got to the U.S. Supreme Court because the Pennsylvania court reversed itself in early 1864 after Chief Justice Lowry, who voted with Woodward to strike down the draft, lost his bid for re-election. Daniel Agnew, an avid Unionist, replaced Lowry, giving a 3-2 majority in favor of the Conscription Act's constitutionality. The second *Kneedler* decision, over Woodward's dissent, reasoned that Congress had unlimited power under section 8 of Article I "to raise and support Armies." For an analysis of the two *Kneedler* opinions, see J.L. Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A. J. 708 (1967).

conversation with Judge Woodward, I find that our views agree, and I regard his election as Governor of Pennsylvania, called for in the interests of the Nation.”¹²

Republicans pounced and never let up. They claimed that by agreeing with Woodward’s views after a “full conversation,” McClellan had confessed to holding all the traitorous, anti-soldier positions that Woodward (supposedly) held. Never mind that elsewhere in the letter McClellan asserted that he and Woodward were of the same mind in wanting to restore the Union and preserve the constitution, or that in context his statement that “our views agree” meant that they agreed on those points. Starting in 1863 and continuing through the 1864 election season, Republican newspapers and polemicists quoted only the damning passage, which taken alone was unqualified in its endorsement of Woodward’s “views.” His detractors said it proved that McClellan, like Woodward and other peace Democrats, was hostile to soldier voting, and hence to soldiers, and hence was disloyal. Democrats’ purported scruples about constitutionalism were mere “cover” for their antipathy toward soldiers and overall perfidy, according to the Republican line of attack.¹³

That was exactly how Andrew Dickson White used McClellan’s endorsement in his play. Let’s return to the scene of White’s Pennsylvania soldiers talking politics. The private asks if it was true that McClellan had endorsed Woodward. The corporal answers by reciting the fateful passage of McClellan’s letter, word for word. If McClellan said his “views agree” with Woodward’s, argues the captain, “I can’t see how to avoid the conclusion that what one has said the other approved, and that’s what I can’t do.” “It

12. George McClellan to Charles J. Biddle, October 12, 1863, in *The Civil War Papers of George B. McClellan: Selected Correspondence, 1860-1865*, ed. Stephen W. Sears (New York: Ticknor & Fields, 1989), 558-559.

13. “Who Refuse Justice to the Soldiers?” *Daily Palladium* (New Haven, Conn.), October 5, 1864.

comes to this,” the sergeant concludes, “Little Mac [i.e., McClellan] has given us up and gone over, either in whole or in part, and it don’t make much difference which, to the Chicago peace party.... When he was fighting with us for the Union and the old flag, I was for him. But I ain’t for any man who would give ‘his voice and vote to Woodward.’”¹⁴

And what specifically were the “views” of Woodward with which McClellan agreed, according to the soldiers in White’s play? The purported agreement was complete, extending even to Woodward’s supposed view that soldiers were unworthy of the vote. The captain cites language in Woodward’s opinion in *Miller v. Chase* stating that the soldier-voting law “opens a wide door for the most odious fraud.” In fact, as we saw in Chapter 2, Woodward made that point (which he premised on a judicial finding of such fraud in an earlier case) to support his conclusion that the law violated the anti-fraud spirit of the constitution’s suffrage provision. But White’s play omits that context. In complaining about the risk of fraud, says the captain in the dialog, Woodward reveals a belief that soldiers are prone to committing fraud. The captain paraphrases Woodward: “We can’t act as upright citizens, because we are soldiers!” The captain then cites Woodward’s reasoning that the constitutional requirement to vote in person in the election district was designed “to secure the purity of elections.” So, continues the captain, Woodward must believe “we are not as pure as those at home – can’t be trusted to do right abroad! Now my lads, I tell you that is infamous.”¹⁵

By embracing Woodward’s “views,” in other words, McClellan had proved both his hostility to soldier-voting laws and to soldiers generally, and hence his disloyalty to

14. White, *Political Dialogues*, 6. (Italics in the original.)

15. *Id.* at 2.

the Union. White expands on these themes as he brings soldiers from other states to join the Pennsylvanians. A lieutenant colonel from Michigan describes Democratic opposition to the soldier-voting bill in that state, including one legislator's view that soldier voting represented a "corrupting process." The Pennsylvania captain responds, "Why all that is Woodward over again." And because McClellan agrees with Woodward, McClellan must agree with the Michigan Democrats, too. McClellan can't duck or straddle the issue. "There is no half-way house for him or any man to stop at," says the captain. In the same vein, an adjutant from Wisconsin relates Democratic opposition to that state's law, describing the party's concern about the dangers and mischief attendant to soldier voting as nothing more than "the Woodward-McClellan objection over again."¹⁶

Woodward wasn't the only Democratic traitor whom McClellan cozied up to, in White's telling. Clement Vallandigham of Ohio, Horatio Seymour of New York, and George Pendleton of Ohio (McClellan's running mate) all qualified as rebel-loving, soldier-hating Copperheads in the eyes of the soldiers populating White's play. By his association with them, as with Woodward, McClellan had become guilty of those sins himself, as had the entire Democratic Party. The Pennsylvania captain lamented the Democracy's decline into sedition. "The old party was one of principle," he said. "The thing that takes its name is a humbug – worse, a nest of treason." And McClellan, "defiled by association" with so many Copperheads, "got an appetite for the food of traitors."¹⁷

Like Woodward, each of the other villains in White's play opposed soldier voting and therefore, in the words of the play's unnamed private from Pennsylvania, each, like

16. *Id.* at 9.

17. *Id.* at 11-12.

Woodward, “couldn’t have been any soldier’s friend.”¹⁸ In the Civil War, even more than in other wars, it behooved every politician to be seen as the soldiers’ friend, or at least not as their enemy. Soldiers were central not only to the core activity of the war – fighting – but also to the political combat that the war stirred. Their centrality went far beyond their potency as a voting bloc, although it certainly included that. More importantly, soldiers had expertise on the subjects at the heart of the parties’ main attacks on each other – treason, cowardice, military incompetence, and indifference to the troops. It was essential for the parties to enlist soldiers’ support for these themes. But a party could not plausibly enlist soldiers to endorse these messages without first gaining credibility as the soldiers’ friend. Likewise, if the party and its candidates could secure the mantle of the soldier’s friends, the opposing party’s attacks lost much of their steam. So if, as White argued in his pamphlet, only supporters of soldier voting qualified as the friend of soldiers, then Republicans had Democrats at a big disadvantage.

Democrats had learned the power of the “soldiers’ friend” meme in 1863 in the Pennsylvania gubernatorial race. Republicans cast incumbent Andrew Curtin, who supported soldier-voting legislation, as the soldier’s friend and Woodward as traitorously anti-soldier for striking down Pennsylvania’s prewar soldier-voting statute and ruling against the draft. The main purpose of this messaging was not to secure the votes of Pennsylvanian soldiers; the *Chase v. Miller* ruling meant that few soldiers could vote in the 1863 elections. The real purpose was to mobilize *civilian* indignation against Woodward as “anti-soldier” and *civilian* votes for Curtin. Alexander McClure, chairman of Pennsylvania’s Republican state committee, marveled at the effectiveness of the Pennsylvania Republicans’ “soldiers’ friend” strategy. It was, he said, “systematically

18. White, *Political Dialogues*, 2.

undertaken and carried out with a degree of perfection that has never been surpassed in political management.” A key element of the strategy was to organize soldiers in the field to write home to voting friends and relatives expressing support for Curtin as the “friend of the soldier.” It worked brilliantly. Curtin won in a predominantly Democratic state, and according to McClure the Republican effort to harness soldiers as pro-Curtin political messengers “turned the scales” of the election.¹⁹

Republicans repeated the successful 1863 Pennsylvania strategy on a national scale in 1864. They cast Lincoln as the soldier’s friend and savaged Democrats who opposed soldier-voting laws (and McClellan by association with them) as “enemies of the soldiers.” This was the thrust of White’s pamphlet. Another 1864 pamphlet, prepared for the Union Congressional Committee, made the same point, but without White’s fictional soldiers serving as the spokesmen. Written by a New Hampshire Republican, William E. Chandler, it carried the title *The Soldiers’ Right to Vote. Who Opposes It? Who Favors It?* Much as White had done, Chandler reviewed each state’s political struggles over soldier-voting bills, scornfully highlighting the pattern of Democratic Party opposition and praising Republican support. He treated the parties’ position on soldier-voting laws as a proxy for their position about soldiers themselves, and hence as a test of loyalty. The pamphlet’s two concluding sections are entitled “Abraham Lincoln and Andrew Johnson Are Friends of the Soldiers’ Right to Vote” and “George B. McClellan and George H. Pendleton Are Enemies of the Soldiers’ Right to Vote.”²⁰

The accusation of both White’s pamphlet and Chandler’s was that Democrats in general and McClellan in particular opposed soldier-voting laws because they were

19. McClure, *Old Time Notes*, 2:56-58.

20. Chandler, *The Soldiers’ Right to Vote*, 13-14.

traitors. This was part of a larger attack by Republicans on their rivals as disloyal. Other Republican attack themes, as we shall see, were that McClellan was inept as a military leader, and that he was a coward, both morally and physically. On each of these partisan themes, soldiers enjoyed unparalleled credibility as spokesmen. As paradigmatic patriots, soldiers spoke with unique authority on matters of treason and loyalty. Soldiers understood military competence better than civilians, so who better than soldiers to assail McClellan as an inept battlefield leader? And as the embodiment of courage, soldiers presumably knew a coward when they saw one, so Republicans enlisted the testimonials of soldiers to condemn McClellan on that score, too.

By the same token, Democrats enlisted the voice of soldiers in rebutting Republican claims of McClellan's treason, incompetence, and cowardice. Democrats had attack themes of their own, and soldiers were uniquely qualified as messengers of these, as well. Lincoln was a blundering commander-in-chief, they claimed. The war would have been over and won but for his incompetence. The voice of soldiers – expert as they were on military competence – obviously added special heft to that critique. Moreover, Democrats insisted, Lincoln neglected the troops, especially white troops. Their equipment was “shoddy” and their medical care poor. After Lincoln sacked McClellan, less skilled leaders than Little Mac subjected soldiers to butchery on the battlefield. Lincoln sacrificed them in a cause – emancipation – that they never signed up for and that subordinated them to the interest of black men. These were matters that soldiers could speak to with authority, and Democrats made sure they did. For the same reason, Republicans enlisted the voice of soldiers in defending Lincoln from the Democrats' charges.

Each of these Republican and Democratic attack themes was an inevitable outgrowth of the structure of the political contest of 1864 – of the way the political stage was set. As always in politics, each party suffered political vulnerabilities that the other party attacked. The main Republican vulnerability was that war had dragged on too long. The effort to put down the rebellion had not yet succeeded and, as the parties organized for the elections in 1864, the war was going poorly for the North. This set up the Democrats' charge that Lincoln was a blundering war leader. (That theme lost much of its punch late in the election season, when Union forces enjoyed a string of victories, highlighted by Sherman's capture of Atlanta in early September. But Democrats never abandoned the argument.) Lincoln's supposed indifference to the troops was an egregious facet of his overall incompetence, in the Democrats' messaging.

Democrats' vulnerabilities grew out of their intra-party division about the war. American wars always inspire at least some dissent, and the dissent is always met with at least some accusations of disloyalty. Federalists who opposed the War of 1812 faced accusations of disloyalty, as did Whigs who opposed the Mexican War. During World War I universities now thought of as bastions of liberalism fired faculty members for voicing opposition to that war.²¹ So the Civil War was hardly unique in sparking dissent and countercharges of disloyalty. When wartime dissent splits a major political party during an incumbent president's reelection campaign, as it did in 1864 (and also in 1972 and 2004), accusations of disloyalty inevitably become a campaign problem that the challenging party must manage. The party supporting the war predictably brands the entire opposition as disloyal. Democrats in 1864 tried to solve the disloyalty problem by

21. See Eric Foner, "Dare Call It Treason," *The Nation*, June 2, 2003. The university Foner identifies in this article is his own: Columbia.

choosing a pro-war standard bearer with a biography of military service, George B. McClellan. That choice prompted Republicans to seek ways to diminish McClellan's stature as a soldier. They did so by attacking him as a coward and as an incompetent commander. The voice of soldiers played a big role in carrying all these political attacks against McClellan.

So it was that the politics of 1864 became the politics of soldiers. Soldiers of all ranks were central to the messaging of both parties. Each party vied for the title "friend of the soldier" and disputed the rival party's claim to that status. The voice of the soldier became an indispensable weapon in the political combat between Republicans and Democrats, and particularly in the contest between Lincoln and McClellan.

History has not been kind to George McClellan. It has defined him mostly in juxtaposition to three iconic figures, with comparisons that inevitably doom McClellan to a second-class station in the national memory. Robert E. Lee, the great "Marble Man," outfoxed him militarily. Ulysses Grant, "Savior of the Union," persevered to success against Lee where the flashier but irresolute McClellan had failed. And worst of all, McClellan collided with Abraham Lincoln, the most beloved American of them all, whom the arrogant McClellan spurned as his commander-in-chief and then tried to unseat in 1864. It is small wonder that McClellan emerges today as a plodding, vainglorious, mediocre figure.

His star shone much brighter in 1864. He had his detractors, to be sure, particularly among Republicans. But he also had fervent admirers, and Democrats had good reason to think he would carry them to victory in the 1864 election. The resume was impressive. McClellan had graduated near the top of his class at West Point and had

served with distinction in the Mexican War. He then entered the private sector, rising to become president of a railroad, before returning to military service at the outbreak of the Civil War. He rose quickly to command the Union's principal field force, the Army of the Potomac. Applying formidable organizational skills, he built that army into a powerful fighting force. This army – McClellan's army – ultimately beat Lee and won the war.

But the Army of the Potomac would achieve its final success under Grant, not McClellan. McClellan could never quite bring himself to unleash it. He was more comfortable on defense than on offense – not a good quality for a commander charged with putting down a rebellion. His reluctance to send forces into battle, so mystifying even today, infuriated his contemporary critics and finally exhausted Lincoln's patience. Historians attribute McClellan's reticence to a cautious temperament, but radical Republicans attributed it to his politics. His loyalties, they claimed, were more to the Democratic Party than to his commander-in-chief.²²

McClellan suffered some celebrated defeats, most famously in the abortive Peninsula Campaign, a painstakingly planned assault on Richmond in the spring of 1862. But he later turned back Lee's invasion of Maryland in the battle of Antietam. This was enough of a victory to justify celebration in the North, even though his caution in that battle may have cost McClellan the opportunity to destroy Lee's army altogether. In any event, he remained the country's most famous military figure through the first half of the war. Even after Lincoln cashiered him late in 1862, McClellan was immensely popular

22. The authoritative biography of McClellan is Stephen W. Sears, *George B. McClellan: The Young Napoleon* (New York: Da Capo Press, 1988).

with Democrats. And Union soldiers, who made up a major voting block in the North, remained devoted to him.²³

Republican Messaging in the Politics of Soldiers: "McClellan is Disloyal"

To deflect charges like the ones Andrew Dickson White leveled against the party, Democrats hoped that putting McClellan at the head of the ticket would inoculate the party against the Republican charge that all Democrats were traitors. Their antebellum association with the Southern "slave power," which became the Confederacy's bulwark, made them easy targets on the charge. So did "old" Democratic Party orthodoxy, embraced by peace Democrats like George Woodward. It held that while any war threatened republicanism by spawning tyrannical central government, civil war in particular was "the worst of all society's disorders."²⁴ Keepers of this orthodoxy believed that forcible reunion of the North and South contradicted Lockean tenets of consensual government. These purists in the antiwar wing of the party, the "Peace Democrats" or "copperheads" as they were called, favored prompt recognition of the Confederacy. James Bayard of Delaware typified this faction. "Bodies tied together by so unnatural a bond of union as mutual hatred are only connected to their ruin," he said in urging an end to the war. "[A]nything is better than a fruitless, hopeless, unnatural civil war."²⁵ In some quarters, anti-war Democrats went even further, some urging men not to enlist or displaying the Confederate flag as a statement of protest. So, at least as to that extreme

23. McPherson, *Battle Cry of Freedom* offers a balanced portrait of McClellan; *Lehman*, 15 Ohio St. at 607-608, a court decision involving Ohio's soldier voting law, states that about a quarter of Ohio's eligible voters were absent soldiers.

24. Baker, *Affairs of Party*, 150.

25. *Id.* at 151

element of the party, Republican charges of treason had a ring of truth.²⁶ And beyond that fringe, Republicans could and did argue that Democrats were guilty by association.

To be sure, the Democratic Party also had a pro-war wing. It included prominent political figures like Ohio Governor John Brough, New York Attorney General John Dickinson, and a host of Union military leaders including McClellan. In fact, the North's war effort owed these men a great deal. Many Democratic leaders actively supported recruitment for the Union army, and between 40% and 45% of Union soldiers entered the war as Democrats.²⁷ Politically, however, this element of the Democratic Party found itself drowned out by the shrill voices of the antiwar faction. In contrast, Republicans enjoyed the advantage of far greater unity. They were virtually unanimous in favoring a resolute prosecution of the war, and in the election year of 1864 their polemicists made sure that war Democrats did not escape association with the party's putatively treacherous antiwar wing. In his study of Civil War politics, Joel Silbey observed that "[t]he articulation of traditional Democratic orthodoxy made it very easy for the Republicans, in response, to draw the lines between the parties sharply and distinctly."²⁸ Republicans drew the lines largely by the device of charging that Democrats were disloyal. Democrats had reason to hope that the nomination of McClellan, the country's most famous military man through the first half of the war, would undercut that charge, though surely not silence it.

One technique Republicans used to brand McClellan as disloyal was to build a mischievously flawed syllogism: 1) in political kinship with northern Democrats, the country's southern enemy hoped the Republican incumbent would lose the election to

26. Smith, *No Party Now: Politics in the Civil War North*, 43.

27. McPherson, *For Causes and Comrades*, 176-7.

28. Silbey, *A Respectable Minority*, 173.

McClellan; 2) Democrats' political fortunes brightened when the US suffered military setbacks; therefore 3) Democrats hoped for the enemy's success, which made them traitors. As an exercise in logic, this was complete rubbish. An incumbent's political prospects always suffer in proportion to the country's misfortunes. "The strength of the Peace Democrats," writes historian Jennifer Weber, "generally ran in inverse relation to the successes (or failures) of the armies."²⁹ And wartime antagonists of course welcome the demise – electoral or otherwise – of their enemy's leader. So of course Confederates hoped McClellan would beat Lincoln.³⁰ Those self-evident propositions say nothing about McClellan's attitude toward the Confederacy. Republican propagandists, operating in the realm of politics – not logic – made repeated use of this wobbly syllogism, which amounted to the outright assertion that McClellan was disloyal.

Pro-Republican organs, building the foundation of the disloyalty syllogism, first pointed to an identity of interests between the Confederates and McClellan. They claimed that when Union armies won, as they were doing in the fall of 1864, it was bad news for McClellan.

[T]he success of the Union arms, the triumphs of the United States flag, and of the Federal Government, are the ruin of [McClellan's] cause... [T]he feelings of a genuine Copperhead toward [Sherman and Sheridan] at this moment are very much such as Satan is believed in Catholic countries to entertain toward holy water.³¹

In the same vein, the *New York Times* quoted Southern newspapers, one saying, "Every defeat of Lincoln's forces inures to the advantage of McClellan," and another claiming, "The victory of the rebels 'insures the success of McClellan – their failure insures his

29. Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents*, 9.

30. Frank, *With Ballot and Bayonet*, 41, 107.

31. *New York Times*, Sept. 25, 1864, 4.

defeat.””³² A week before the presidential election, a pro-Lincoln newspaper in Pennsylvania exhorted voters to turn against McClellan using the same theme. “Jefferson Davis, were he permitted to participate in next Tuesday’s election, would certainly vote for McClellan and Pendleton.... Every ballot for McClellan and Pendleton is equivalent to a bullet sent through the heart of a brave Union soldier.””³³

Political cartoonists piled on with their own depictions of McClellan’s disloyalty. One, published in New York, is entitled, “UNION AND LIBERTY and UNION AND SLAVERY.” On its left panel, Lincoln amiably greets a man depicted as “Workman” while black and white school children frolic beneath an American flag in the background. On the contrasting right panel, McClellan shakes hands with Jefferson Davis while a slave auction proceeds in the background and a Confederate flag waves overhead.

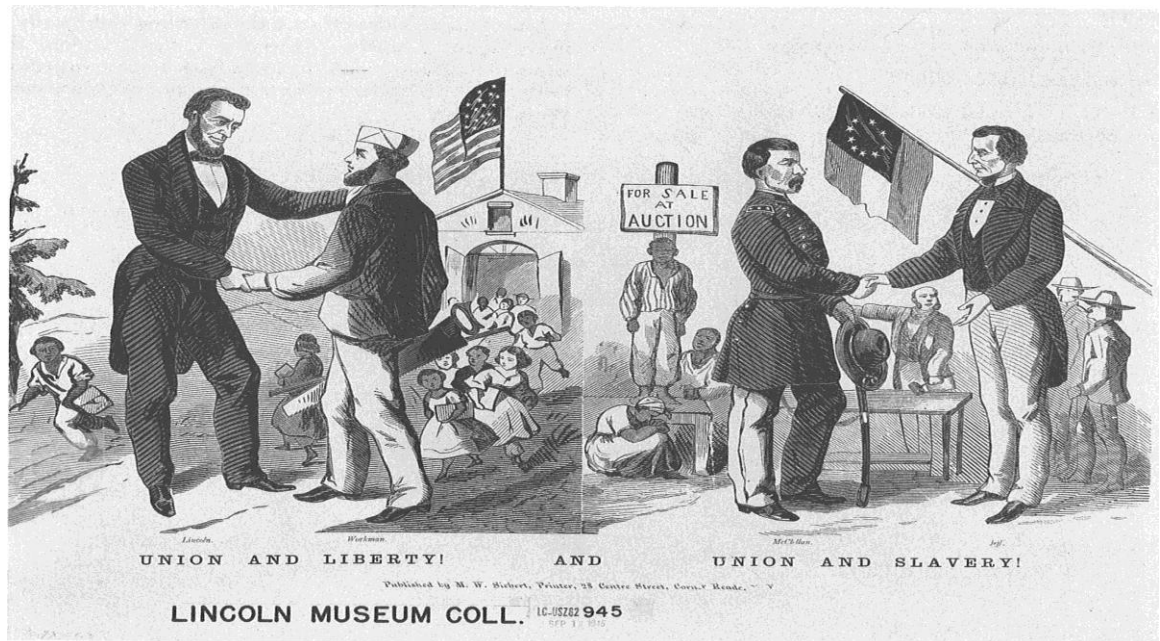


Illustration originally published by M.W. Siebert, *Union and liberty! And union and slavery!*, 1864. Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-945.

32. *Id.* Sept. 24, 1864, p. 4.

33. *The Agitator* (Wellsborough, PA), November 2, 1864, 5.

Another cartoon, this one published in Boston and entitled “Democracy,” uses contrasting left/right panels to argue that the Democratic Party had departed from its patriotic heritage (much as we have seen that the fictional soldiers in Andrew Dickson White’s claimed).

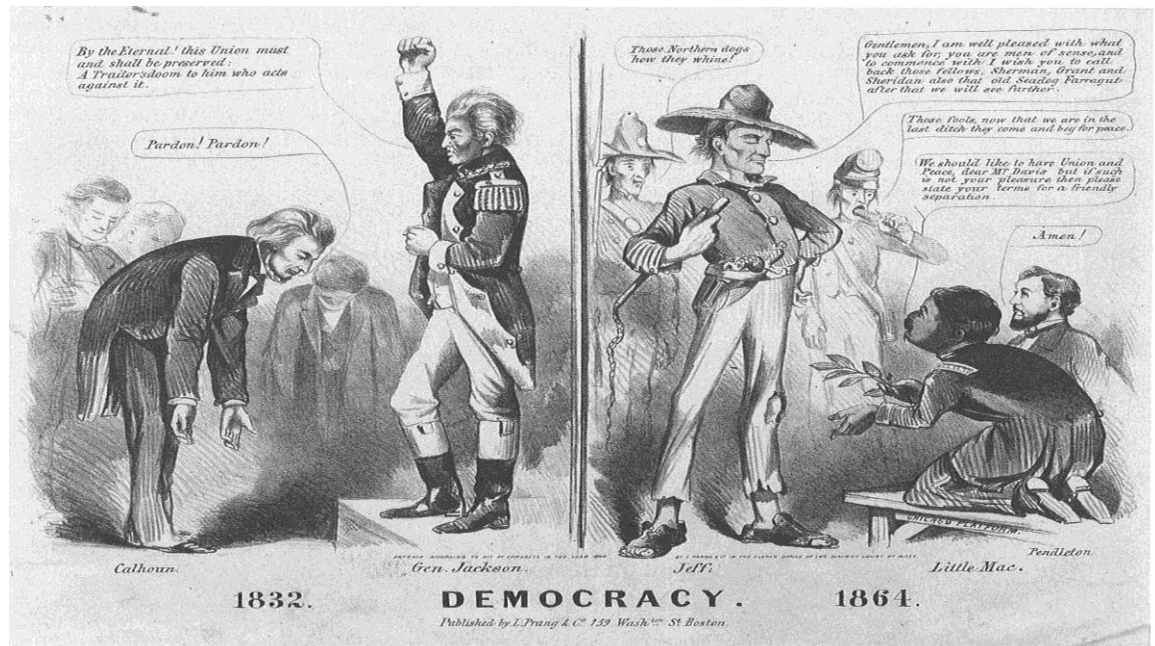


Illustration originally published by Louis Prang & Co., *Democracy. 1832-1864, 1864*. Library of Congress, Prints and Photographs Division; Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-13212.

On the left panel, labeled “1832,” an animated Andrew Jackson berates John C. Calhoun: “By the Eternal!” growls Jackson, “this Union must and shall be preserved. A Traitor’s doom to him who acts against it.” Calhoun bows humbly before Jackson, imploring “Pardon! Pardon!” On the right panel, labeled “1864,” McClellan and Pendleton bow even more humbly before Jefferson Davis. McClellan addresses Davis pathetically: “We should like to have Union and Peace, dear Mr. Davis, but if such is not your pleasure then please state your terms for a friendly separation.” Davis responds condescendingly. First he praises his kneeling supplicants as “men of sense.” Then he states his terms: “call back

those fellows Sherman, Grant and Sheridan, also that old seadog Farragut – after that we will see further.” A Confederate soldier in the background looks on, saying “Those Northern dogs how they whine!”

This cartoon conveys the theme of McClellan’s perfidy as the central message, but adds powerful secondary themes as well. One is that McClellan contrasts poorly with the northern military leaders Sherman, Grant, Sheridan, and Farragut, all of whom outshone him. McClellan, in other words, was not much of a general. The other is that he doesn’t command the respect of an ordinary soldier. Real soldiers don’t “whine,” but cowards do. The selection of a military man as the Democratic standard-bearer invited these two attack themes, both designed to undermine McClellan’s stature as a soldier.

An anti-Democrat cartoon published in Philadelphia also drew on the memory of the old “Party of Jackson” to portray the 1864 version of the party as treasonous. Entitled “A THRILLING INCIDENT DURING VOTING, -- 18th Ward, Philadelphia, Oct 11” (below), it depicts an old man (wearing a top hat and holding a cane) responding when a “Copperhead” offers him a ballot. The man with the ballot says of the old man, “Here is an old Jackson Democrat who always votes a straight ticket.” The old man responds furiously:

I despise you more than I hate the rebel who sent his bullet through my dead son’s heart! You miserable creature! Do you expect me to dishonor my poor boy’s memory, and vote for men who charge American soldiers, fighting for their country, with being hirelings and murderers?

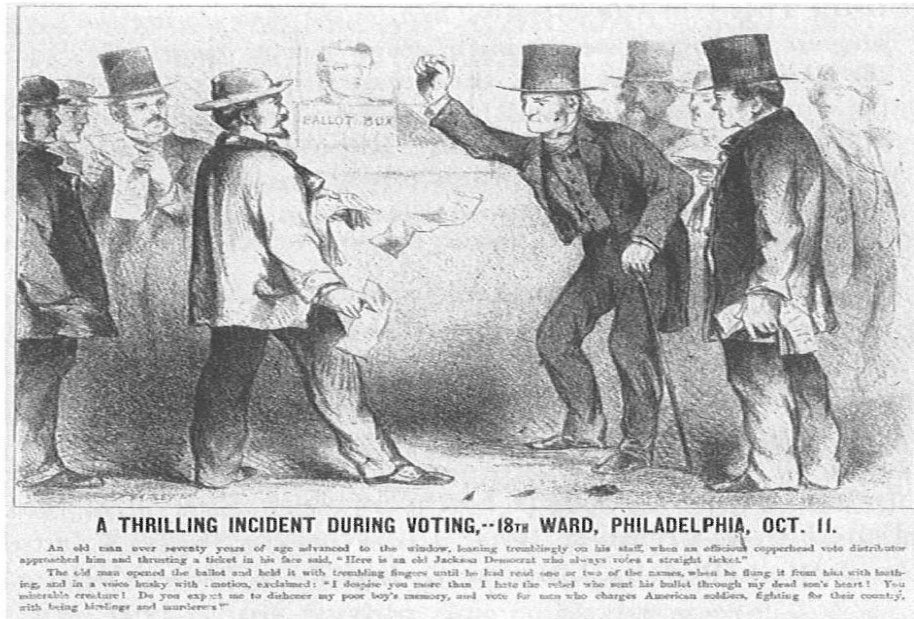


Illustration by Joseph Harley, *A thrilling incident during voting, --18th Ward, Philadelphia, Oct. 11* / Harley, del. 1864. Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-89566.

The Republican attack machine – politicians, songsters, pamphleteers, cartoonists, and newspaper editors – drew on the credibility of real life soldiers to help them carry the attacks on McClellan as a traitor. Examples abound. The *Chicago Tribune* quoted a New Jersey veteran saying to a friend as they watched a Democratic campaign procession in Trenton: "I say, Jim, this is the first rebel raid we've seen since we left Virginia."³⁴ The *Tribune* also quoted "another chronic McClellan officer," who said upon learning that Atlanta had fallen, "that knocks our stocks down 10%."³⁵ And the *Chicago Tribune* reported that a soldier, called on to speak at a mass meeting in Chicago a day or two after the Democrats had finished their convention, told his audience that "he saw more treason

34. *Tribune* (Chicago, IL), October 5, 1864.

35. *Tribune* (Chicago, IL), September 9, 1864.

during the present week in Chicago than he ever saw while marching through the South.”³⁶

Some soldiers lent their voices to assertions of McClellan’s traitorous kinship with rebels in the context of soldier voting. A pro-Lincoln paper in Ohio printed a soldier’s account of his unit’s experience voting in the field. He claimed that rebels along his regiment’s front, having learned when the Ohio troops would cast their ballots, timed an attack to disrupt the voting.

The election judges and clerks moved along our lines in ambulances. It was a day of constant marching and fighting. At every halt of a few minutes’ duration balloting progressed vigorously, votes being more than once sandwiched in between volleys of musketry scarcely fifteen minutes apart. The rebels at every charge advance with vociferous cheers for McClellan to which our boys reacted with cheers for Lincoln and solid arguments from their Enfields. It produced a marked effect upon our soldiers. What wonder that they voted almost unanimously for the Union ticket? How could they fight rebels one moment, hazarding life and limb for the dear old government, and the next undo all they were doing by voting for Treason’s cowardly allies at the rear?³⁷

A different Republican paper printed a maudlin poem assailing McClellan and other “traitors.” A voting soldier purportedly penned it under the pseudonym “E. Pluribus.” Written as a letter to his mother, it was entitled, “The Wounded Soldier on a Furlough:”

Dear Mother, I remember well,
The parting kiss you gave to me;
When merry rang the Union bell,
You bade me fight for liberty.
I did not dream that ‘Little Mac’
Would thus throw off his loyal coat.
O, Mother dear! I’m coming back,
Dear Mother – I’ve come home to vote.
Chorus:

36. *Id.* Sept. 2, 1864, 3.

37. Quoted in Young, “Soldier Voting in Ohio During the Civil War,” 70.

Call brother comrades to my side,
 While fawning traitors smile and dote,
 Old Abe and Andy [Andrew Johnson] suit me well;
 Dear Mother! I've come home to vote.
 Come, brother soldiers, one and all –
 Oh! I'll be with you by and by;
 My country calls me to my home,
 Those coward traitors to defy.
 I've met the foe upon the field,
 Mid cannon's roar and bugle note;
 Our loyalty's our only shield –
 Dear Mother! I've come home to vote.
 Chorus.³⁸

A pro-Lincoln paper in Ohio quoted a soldier making the same point that “E. Pluribus” made, but with more humor than sentimentality. When offered a Democratic ballot at a civilian election in Vermont, the returned veteran purportedly said, “What a fool I should be to go down and fight the rebels for three years with my musket, and come here to stab myself in the back with a piece of paper like this.”³⁹ A Connecticut veteran sounded almost exactly the same theme. Asked if he intended to vote the Democratic ticket, the veteran supposedly answered, “I have been shooting Democrats for three years, and I am not in the habit of voting for the game I kill.”⁴⁰

The theme of soldiers fighting rebels with their bullets and treason with their ballots also found expression in a bouncy partisan song composed by a woman and entitled “Uncle Abe and Andy”:

We'll fight the traitors down, my boys,
 No foe can stand before us;
 We'll vote the traitors down, my boys,
 While Freedom's Flag waves o'er us.
 To fight and vote, we'll have you note,
 We'll do it all so handy;
 We're heart with heart and hand with hand

38. *Chattanooga Daily Gazette*, November 8, 1864.

39. *Scioto Gazette* (Chillicothe, OH), October 18, 1864.

40. *Tribune* (Chicago, IL), October 18, 1864.

With Uncle Abe and Andy.⁴¹

General Joseph Hooker, appearing at a meeting of the Union Party in Brooklyn, assured the audience, “There are no Copperheads in the army. [The soldiers] will fight well, and they will vote well.”⁴² Often rank and file troops participated in the meetings to report on the political sentiments of their comrades. The Chicago *Tribune* reported that at a meeting in Springfield, Illinois, “[t]he soldiers took part with a great zest, and their denunciation of the Copperheads were terrible. They appear to be unanimous for Lincoln and Johnson.”⁴³

The pro-Lincoln press, applying the disloyalty syllogism to prove McClellan’s treason, always delighted in reports from soldiers in the field about the political preferences of *enemy* soldiers. A soldier speaking at a Union party rally in Bridgeport, Connecticut said he “heard rebel soldiers cheer the nomination of Gen. McClellan all along their lines.”⁴⁴ A Republican newspaper in Pittsburg reported an episode in Virginia about two weeks before the 1864 presidential election. “The rebels hung out a huge placard at a point in their outer works before Richmond, inscribed ‘Vote for McClellan.’ The Union troops responded by opening fire on both the placard and the ‘McClellan canvassers in the rebel lines.’”⁴⁵ A Wisconsin paper a week later described the same incident, elaborating that the union barrage “knocked placard, breastwork, McClellan canvassers and all into tinders. The Chicago platform and candidate will go up in just the same way on the blessed 8th [of November] proximo. – Speed the day!”⁴⁶

41. Anna Tellez, “Uncle Abe and Andy,” *The Republican Campaign Songster for 1864* (Cincinnati: J.R. Hawley & Co., 1864), 51. (Reprinted by the Cornell University Library Digital Collections.)

42. *New York Times*, Sept. 23, 1864, p. 1.

43. *Tribune* (Chicago, IL), September 9, 1864, p. 1.

44. *Id.*, Oct. 15, 1864, p.1.

45. *Pittsburg Daily Gazette*, October 21, 1864, p.2

46. *Wisconsin State Register*, October 29, 1864.

In September 1864, an Ohio newspaper quoted from “a letter written [to] us from the trenches near Petersburg.” The letter reported, “McClellan stock is not very brisk in the army. The rebels like his nomination too well to suit the men. On Monday evening the lines on the rebel side rang for miles, with traitor cheers for the nomination of ‘Little Mac.’”⁴⁷ The following month, the same paper printed a letter signed by eleven soldiers from the 79th Regiment of Pennsylvania Volunteers. As if to lend an extra measure of credibility to their account, the soldiers started by assuring readers that they “testify to the following facts as true to our knowledge.” The letter went on to say that during the battle of Resaca in Georgia “we distinctly and clearly heard the soldiers of the rebel army cheering for Jeff. David and George B. McClellan.... Besides, all the rebel prisoners with whom we conversed since the Presidential nominations agreed in assuring us that their only hope of establishing a Southern Confederacy rested on the election of Geo. B. McClellan for President of the United States.”⁴⁸ The *New York Times* printed similar accounts, reporting that “[t]he rebels cheered for McClellan in the trenches before Petersburg (sic)” and quoting a soldier speaking at a Union party rally in Bridgeport, Connecticut, who said he “heard rebel soldiers cheer the nomination of Gen. McClellan all along their lines.”⁴⁹

Republican media sometimes told their audiences that the Confederates went beyond merely hoping and cheering for McClellan; they actually worked for his election. In a story entitled “Rebel Electioneering for McClellan,” The *New York Times* related the experience of a wounded Union soldier captured by the Confederates. He was released from the Virginia hospital to return home upon his “promise to vote for George B.

47. *Daily Cleveland Herald*, September 15, 1864.

48. *Id.*, October 28, 1864.

49. *New York Times*, October 2, 1864 and October 15, 1864.

McClellan at the approaching election.... [But] all the prisoners of said hospital who promptly and positively said they would vote for Abraham Lincoln, were not paroled, but remained in said hospital.” The *Times*, perhaps grateful to the opportunistic soldier for supplying such powerfully anti-Democratic images, was inclined to forgive him, observing sympathetically that “it is hard on our gallant boys to have to choose between such a cruel alternative as McClellan or starvation.”⁵⁰

Another pro-Lincoln paper described the conversion experience of a soldier who at one time had favored McClellan. The Union soldier, a captain named Southerland, was captured near Atlanta and later exchanged. After his release, he explained his shift to Lincoln. His rebel guards in Charleston “electioneered with him for McClellan.” The paper continued, “Captain Southerland declares that he never could nor never would vote for any man AT THE REQUEST OF ARMED TRAITORS.” The story ends with this sneer at Democrats: “Let Peace men put that in their pipe and smoke it.”⁵¹

A story in a different Republican paper described the proud defiance of Union prisoners whose rebel captors dangled the promise of release in exchange for assurances that they would vote for McClellan when they got back to the Union lines. “It is asserted that [Confederate General Joseph] Wheeler, the rebel guerilla chief, offered recently to release a number of prisoners of the 115th Ohio, in his possession, if they would promise to vote for McClellan. Soldier-like, they said they would see him ‘d--d first.’”⁵²

For vitriolic excess, no characterization of McClellan and his fellow Democrats as traitors could match this Union soldier’s letter to the pro-Lincoln Chicago Tribune:

50. *Id.* at 4.

51. *Chattanooga Daily Gazette*, October 13, 1864.

52. *Mariettian* (Marietta, OH), October 29, 1864.

What an awful odor there is to the McClellan, Seymour [Horatio Seymour, New York's Governor], and Vallandigham party! It is enough to sicken the low-lived cannibals. After all our patriotic efforts, to see men stoop so low as to take into their mouths the dirty toes of rebel graybacks and suck away for a miserable, low down, degraded peace, peace, and then, to get ignorant votes, delude people by proclaiming aloud, war, war. What an open barefaced lie that white-livered party clings to! ... From a McClellan administration, my good Lord deliver us!⁵³

The voice of soldiers accusing McClellan of treason also found its way into the 1864 campaign debate less directly through the device known as the “straw.” A straw was a straw poll – a small sampling of voter preference, akin to modern-day pre-election opinion polling, without broad or statistically based sampling. Straws were most typically conducted among passengers on railroads or steamships, or among patients at hospitals. In his study of political culture in the Civil War, Mark E. Neely, Jr. describes straws as an invention of Civil War party enthusiasts, invariably used to prove that their candidate enjoyed public support.⁵⁴

Both parties regularly published straws (sometimes also called “canvasses”) showing their candidate doing splendidly with one group of citizens or another, and these informal tallies routinely included soldiers. Partisan operatives often conducted straws that combined civilian and soldier preferences on board passenger trains and steamboats. Sometimes partisan soldiers would send straws to their home newspapers from camps or hospitals at the front, and these had an exclusively military sampling.

For example, a pro-Lincoln paper in Cleveland reported, based on a letter from a lieutenant of the 60th Ohio Volunteers, on a straw conducted at breakfast in an officers’

53. *Tribune* (Chicago, IL), September 16, 1864. (Emphasis in the original.)

54. Mark E. Neely, Jr., *The Boundaries of American Political Culture in the Civil War Era* (Chapel Hill: University of North Carolina Press, 2005), 39-40. Neely argues that straws were one of many forms of political messaging carried on at grass roots levels of party activism.

hospital in Annapolis. Lincoln outpolled McClellan 332-32. “You can judge for yourself,” wrote the lieutenant, “McClellan does not stand the ghost a sight in the army.”⁵⁵ A pro-Lincoln paper in Philadelphia delighted in reporting, based again on a soldier’s letter, that Lincoln had outpolled McClellan 1087-193 in a straw among soldiers recuperating at “McClellan Hospital” in Philadelphia.⁵⁶

An editor’s note accompanying one straw acknowledged the obvious, that such tallies didn’t matter much: “Of course, these are of no account, but ‘straws’ show which way the wind blows.”⁵⁷ Straws of soldier preferences in the fall of 1864 showed the wind blowing in both directions, as Democrats and Republicans alike produced an avalanche of these tallies showing their respective man ahead. On a steamboat from Evansville, Indiana on September 16, 1864, McClellan won the straw among the soldiers, 22 votes to 3.⁵⁸ The next day, Lincoln won a straw at the Soldiers Hospital in Annapolis, Maryland, garnering 237 votes to just 37 for McClellan.⁵⁹ But the day after that, McClellan won a straw among recuperating soldiers in a hospital at City Point, Virginia, 78 to 21.⁶⁰ A straw mixing soldier and civilian tallies on board a train from Milwaukee to Detroit on September 20, 1864 favored McClellan over Lincoln, 53 to 39.⁶¹ But on a Chicago-bound train leaving Milwaukee the same day, Lincoln won the straw, 74 to 31.⁶² Newspaper editors on both sides often punctuated the straw’s tabulation with some partisan commentary, such as (in the case of a straw showing that soldiers favored

55. *Daily Cleveland Herald*, September 6, 1864.

56. *North American and United States Gazette* (Philadelphia, PA), September 27, 1864. There was in fact a hospital in Philadelphia named for McClellan.

57. *Detroit Free Press*, October 28, 1864.

58. *Cincinnati Daily Enquirer*, September 16, 1864.

59. *Tribune* (Chicago, IL), September 17, 1864.

60. *Cincinnati Daily Enquirer*, September 18, 1864.

61. *Detroit Free Press*, September 21, 1864, describing a train that left Milwaukee the day before.

62. *Tribune* (Chicago, IL), September 24, 1864, describing a train that left Milwaukee on September 20.

McClellan), “You can bet high that our boys, with a few exceptions, are for ‘Little Mac,’” or (in the case of a straw showing they favored Lincoln), “[This] is a fair expression of the army.... Little Mac and his friends had better be preparing their craft and taking in rations for a trip up Salt River, for they are bound to go up, sure.”⁶³

A reader can almost detect the twinkle in the eyes of the newspaper editors who sometimes used straws in their negative campaigning. The pro-McClellan *Detroit Free Press*, for example, showed Lincoln winning in a straw among the inmates at the Kalamazoo Insane Asylum.⁶⁴ Similarly, the pro-Lincoln *Chicago Tribune* published a straw from Chattanooga, Tennessee showing McClellan winning among “[b]ounty-jumpers used for policing hospitals as a penalty for their conduct.”⁶⁵

A particularly ubiquitous form of straw in pro-Lincoln papers conveyed the message of McClellan’s perfidy by reporting McClellan’s winning tallies among rebel soldiers. It was another form of the Republican disloyalty syllogism: preference for McClellan over Lincoln among rebels proved their common interest and hence McClellan’s disloyalty. A pro-Lincoln Ohio paper set up its report about a straw among rebel soldiers by first reporting a win by Lincoln over McClellan in a civilian straw on a train to Cincinnati. When the pollster announced the result to passengers, a pro-McClellan man claimed that on an earlier train he had ridden that day, McClellan had won such a straw by 300 votes to 30. A pro-Lincoln man – described as “a rousing big

63. *Cincinnati Daily Enquirer*, October 1, 1864; *Tribune* (Chicago, IL), September 25, 1864. In the contemporary political idiom, to “go up Salt River” meant to lose an election.

64. *Detroit Free Press*, September 5, 1864.

65. *Tribune* (Chicago, IL), September 29, 1864.

fellow” – answered the McClellan man loudly, “That’s so! I was on that train myself, and the 300 votes were rebel prisoners, and the 30 Lincoln votes were their guards.”⁶⁶

Another paper quoted a Union soldier guarding rebel prisoners at the prison camp in Elmira, New York. The guard described a straw conducted among the prisoners from a Confederate regiment. “When I was there,” said the guard, “there was a vote taken, and every man in the regiment voted for McClellan but one, and he was ridden round the camp till he said he would vote for Mac.”⁶⁷ In a slight variation on the straw of rebel soldiers, a Harrisburg paper reported that McClellan outpolled Lincoln 21-8 “among deserters and bounty jumpers” held in a guardhouse.⁶⁸

Republican Messaging in the Politics of Soldiers: “McClellan is Incompetent”

Republican claims of McClellan’s disloyalty were the most ubiquitous and conspicuous of the weapons in their arsenal for tearing down his stature as a soldier. Another, with the same purpose, was to claim he had been incompetent as a commander. Allegations of his incompetence sometimes relied on the same evidence as assertions of his disloyalty and of his cowardice. Republican attackers sometimes attributed his battlefield losses to his ineptitude (he didn’t know how to lead an army), sometimes to his disloyalty (his heart wasn’t in the fight because his loyalties lay with the South), and sometimes to his cowardice (he chickened out of engaging the enemy). But all three themes aimed to knock McClellan off the pedestal of military greatness that his supporters worked hard to construct.

66. *Daily Cleveland Herald*, October 8, 1864, quoting the *Dayton (OH) Journal*.

67. *Chattanooga Daily Gazette*, October 16, 1864.

68. *Daily Telegraph* (Harrisburg, PA), October 12, 1864.

McClellan was an easy target of charges of military incompetence, having led the Union armies to many more defeats than victories during his eighteen months of command. Rallies of the Union Party, as Republicans rebranded themselves to facilitate alliance with war Democrats, routinely featured speeches elaborately celebrating McClellan's string of military failures, preferably by a speaker who was a military figure. Former union general and now congressman John F. Farnsworth's appearance at a party meeting in Newark was typical. According to the Newark *Daily Advertiser*, Farnsworth, who had served under McClellan as a cavalry officer, gave an inspired speech detailing the many times McClellan had "completely failed," including a string of setbacks in the Peninsula Campaign. McClellan had failed, for example, to follow up on good positions gained against the Rebels, always choosing to wait or retreat. "Richmond might have been taken repeatedly by other Generals," said Farnsworth. A resolution at a "grand Union meeting" in Brooklyn proclaimed that in candidate McClellan, "we have a General whose history is an apology, and whose career is a failure." Such meetings were not deliberative gatherings, but the newspaper account dutifully reported that the resolution was "adopted unanimously."⁶⁹

Republicans delighted in reminding voters in clever ways about McClellan's numerous embarrassments as commanding general, most of them familiar to newspaper audiences that had followed the war's progress in detail. They recalled, for example, McClellan's having been duped at Yorktown into halting his already slow campaign because he believed a large artillery emplacement threatened his position. In fact, the poorly equipped Confederates had merely cut down trees, painted the big logs black to

69. *Tribune* (Chicago, IL), September 26, 1864, quoting a report from the *Newark Daily Advertiser*, Sept. 19, 1864; *New York Times*, Sept. 23, 1864, p. 8.

look like cannons, and pointed the harmless logs toward the Union lines. (“Quaker Guns,” McClellan’s detractors called the phony artillery.) And Republicans enjoyed ridiculing the famous verbal contortions McClellan had devised at the end of the Seven Days battles to avoid describing his army’s movement away from the victorious enemy as a retreat. (He had not retreated, but had merely “changed his base,” he reported euphemistically.) This was all the more mortifying because McClellan had promised at the outset of the conflict to “drive the rebels to the wall.” A Republican campaign poem wove together all these embarrassments, so familiar to Civil War audiences. Its refrain mocked McClellan’s answer “I do not remember” to a hostile question from Congress’ Joint Committee on the Conduct of the War. The song included these stanzas about his performance as a commander:

Was it your own mighty brain
Planned that wonderful campaign,
Where such myriads died in vain?
I don’t remember!

Did you, after Yorktown’s fall,
“Drive the rebels to the wall?”
Or at a snail’s pace did you crawl?
I don’t remember!

Did you run a seven day’s race,
While old “Stonewall” gave you chase?
Or was it a “change of base?”
I don’t remember!⁷⁰

Another device for diminishing his reputation as a good soldier was to draw comparisons between McClellan and other Union generals, always to the disadvantage of McClellan, of course. This became easier as summer turned to fall in 1864, but when McClellan was nominated in late August, his record did not stand out unfavorably in

70. *Tribune* (Chicago, IL), October 15, 1864.

comparisons with most other Union generals. At that time, the Union military effort indeed appeared to have failed, just as the Democratic platform said. In the east, Lee had locked Grant in a stalemate outside Petersburg, Virginia, after Grant's army had suffered ghastly casualties in the campaign to get there. Sherman in the west seemed similarly stalled in his slow push through northern Georgia toward Atlanta. The Confederate strategy of exhausting the Union's will to fight seemed to be working. In the context of the Union's overall military frustration, Democrats could plausibly blame anything lackluster in McClellan's record from 1861-62 on the overarching failings of the administration's conduct of the war.

That all changed abruptly in the late summer and early fall. Farragut took Mobile Bay, Sherman took Atlanta, and Sheridan swept the Shenandoah Valley. As the Union's military fortunes brightened, Republicans could point to an array of successful Union generals with whom McClellan suffered in comparison. And it was particularly easy to compare McClellan unfavorably to Lee. McClellan's 1862 campaign against Richmond, known now as the Peninsula Campaign but often referred to then as the Chickahominy Campaign (for the river on which much of the fighting occurred) was McClellan's first and probably most ignominious setback. Vastly outnumbered, Lee out-generated McClellan and sent the federals back north in frustration. Republicans in 1864 happily seized on the debacle as campaign ammunition. One newspaper called McClellan the "Chickahominy grave-digger."⁷¹ Another quoted General Joe Hooker's testimony before the Congressional Committee on the Conduct of the War. Hooker had served under McClellan in the Peninsula campaign. In late 1863, he gained celebrity status with his victory in the Battle of Lookout Mountain, redeeming the damage his reputation suffered

71. *Tribune* (Chicago, IL), September 1, 1864, p. 2.

earlier that year at the Battle of Chancellorsville. Speaking with the authority of an accomplished soldier, Hooker told the congressmen that the failure of the Peninsula campaign “was due to the incapacity of the General commanding.”⁷² The general commanding, of course, was McClellan.

Yet another Republican paper, lumping McClellan’s defeat with failures by other Union generals of Democratic pedigree, compared them all with more successful northern commanders:

McClellan’s Chickahominy campaign was a failure. [Failures by Generals Buell and Banks, also well known Democrats, were also cited.]...Almost all [these failures], without exception, have come from bad leadership---from the want of either the right moral earnestness, or of the right military ability in the men to whom the movements were committed...But under the Commanders which have been found equal to their responsibilities, Grant and Sherman, and Farragut ... and such men as Sheridan ... there has (sic) been no failures of any account – on the other hand, a wonderful series of successes.⁷³

When comparing him to other generals, his critics often played on McClellan’s famous ostentation, as when he paraded in front of his own troops, basking in their adoration (which was genuine), and his caution, as when he drilled his men endlessly but committed them to actual battles only grudgingly. Some of these criticisms, of course, were unfair. McClellan had taken over the Army of the Potomac at a time when organization, drilling, and a lift in morale were exactly what the army needed most. These he supplied, using his charisma and administrative talents to good effect. In his Pulitzer Prize-winning history of the Civil War, James McPherson said of McClellan, “He instilled discipline and pride in his men, who repaid him with an admiration they felt toward no other General. McClellan forged the Army of the Potomac into a fighting

⁷² *Milwaukee Daily Sentinel*, September 17, 1864.

⁷³ *Id.* October 3, 1864, p. 3.

machine second to none – this was his important contribution to ultimate Union victory....”⁷⁴

But that contribution was less important to the electorate, and therefore less valuable politically, than battlefield victories, of which McClellan could claim very few. A New York *Times* editorial drew the unfavorable contrast between McClellan and other generals effectively. It argued that early in the conflict, before the country had come to understand the character and scale of the war,

when a man with epaulets who could ride a horse on parade was likely to be hailed as great General, it was natural and excusable to mistake Gen. McClellan for a new Napoleon. But that day of early innocence has passed away. The glitter of regimentals has been tarnished. We have since then too much experience of the realities of war to be longer deceived by its shams and shows. [Now] we have had Generals who could fight the enemy as well as parade their own troops; who could hurl fifty regiments of valiant men, like so many winged thunderbolts, upon the enemy, as well as sit in camp and calculate the chances of defeat or ride to the rear to look out a safe resting place for a beaten army.⁷⁵

A Wisconsin paper ridiculed the notion that McClellan, who had cultivated the nickname Little Napoleon, deserved to be associated with the great Frenchman. McClellan, the paper sneered, is “this veteran of a thousand cheers and not a single charge, greeted by Napoleon’s huzzahs, though innocent of Napoleon’s battles, this calico hero, this knight in pantalets ... a military nobody.”⁷⁶

Given the galvanizing effect of the fall of Atlanta on the public spirit, Republican partisans were particularly eager to draw comparisons between McClellan and Sherman. They found good material for tearing down McClellan not just in Sherman’s better war record, but also in the contrasting styles of the two men. For this, Republicans made the most of McClellan’s image as a preening bureaucrat who never won battles. In this

74. McPherson, *Battle Cry of Freedom*, 349.

75. *New York Times*, Sept. 30, 1864, p. 4.

76. *Wisconsin State Register*, September 17, 1864.

telling, when first taking on his assignment at the head of the Union's western armies, Sherman, "[s]till diffident of himself," had quietly and modestly studied his assignment

instead of setting himself to the task of studying partisan politics and official impertinences.... He [Sherman] saw what was the scope of the duty. He got about doing it--not as an ape, but as a man; not as a General by prescriptive right, but as a plain, practical soldier.... Who shall be the exemplar for the soldiers of the Republic hereafter? This plain, practical man, who... wins? or this partisan hero in epaulets, who struts his brief hour as the martinet-in-chief of the camp, rushes to the field with neither counsel nor discretion to guide him, and comes back stripped of his feathers – a pretender among honest soldiers? The Georgia campaigner or the juvenile Napoleon – which?⁷⁷

Comparisons of the styles of the two men extended to their styles of writing. While this subject had no relevance to the relative military skills of the two men, Republican polemicists found it a useful way to revisit the fruitful subject of McClellan's infamous letter accepting the Democratic nomination (about which more is offered in the discussion of cowardice, below). The *Chicago Tribune*, addressing an audience already familiar with the newspaper's low opinion of McClellan's letter, described Sherman's writing style in terms they knew would imply favorable comparisons with McClellan, and make McClellan look less soldierly as well. Sherman's

letters are all to the point; he wastes no words, deals in no sophistry or concealments, employs no honeyed phrases, and holds out no false promises to friends or foe.... He writes as he would shoot a rifle – straight at the center of the mark, and drives the nail every shot.⁷⁸

When a pro-McClellan paper said of a speech the general gave at West Point that "it placed him in the highest ranks of literature and oratory, the pro-Lincoln *Daily Palladium* in New Haven ridiculed the claim. "We think he ranks about as near to Homer and

⁷⁷ *Id.*, Oct. 14, 1864, p. 4.

⁷⁸ *Tribune* (Chicago, IL), September 24, 1864, p. 3. This editorial was based on Sherman's famous letter of September 12, 1864, to the City Council of Atlanta. He was responding to the Council's protests about his army's treatment of the vanquished city. Sherman took the occasion to lecture the city fathers about war. "War is cruelty, and you cannot refine it; and those who brought war on our country deserve all the curses and maledictions a people can pour out." Sherman's letter is reprinted in its entirety in this Sept. 24 edition of the *Tribune*.

Shakespeare in literature, or Demosthenes and Cicero in oratory, as he does to Marlborough and Napoleon in generalship.”⁷⁹

The contrasts between Sherman’s correspondence and McClellan’s letter of acceptance gained currency in Republican’s political communications, again in terms that diminished McClellan’s stature as a soldier. One advertisement invited Republicans to “Compare the Soldier Sherman’s Letter and the Candidate McClellan’s Letter, then Attend the Union Mass Meeting.”⁸⁰

Republican outlets similarly drew comparisons between McClellan and Grant to elevate Grant and disparage McClellan. “[T]o compare the Chickahominy Campaign with any of [Grant’s] campaigns is at once pitiful and painful.”⁸¹ Grant, himself a Democrat before the war, helped the cause of diminishing McClellan with a letter to his friend, Congressman Elihu Washburne of Illinois. Washburne, who had sponsored Grant’s appointment to West Point, praised him regularly in House speeches, and Grant must have known Washburne would make his letter public. In it, Grant described the South’s dwindling resources and asserted that Northern resolve would assure Union success. He then sounded a theme that Republicans would repeat throughout the campaign to diminish McClellan. “I have no doubt but the enemy are exceedingly anxious to hold out until after the Presidential election. They have many hopes from its effects.... They hope the election of the peace candidate.”⁸²

79. *Daily Palladium* (New Haven, Conn.), June 28, 1864.

80. *New York Times*, Sept. 26, 1864, p. 5. The words “soldier” as applied here to Sherman and “candidate” as applied to McClellan appear here with underscoring added to draw attention to the contrast intended by the newspaper. It is likely that the Sherman letter referred to here is the letter of Sept. 12, described in note 78, *infra*.

81. *Id.*, Oct. 9, 1864, p. 4.

82. Letter from Grant to E. B. Washburne, Aug. 6, 1864, *New York Times*, Sept. 9, 1864, p. 4. Grant wrote the letter before McClellan’s nomination, but at a time when McClellan appeared likely to become the Democratic nominee.

The most comprehensive argument that McClellan was incompetent appeared as a thirty two-page pamphlet entitled “McClellan’s Military Career Reviewed and Exposed.”⁸³ A correspondent for the pro-Lincoln *New York Times*, William Swinton, wrote it, and the Union Congressional Committee distributed it for the campaign. It is an impressive piece of forensic history. Focusing mostly on the abortive Peninsula Campaign, and relying heavily on official communiqués McClellan sent and received, Swinton assails McClellan as a failed strategist and bungling field commander. He regularly exaggerated the strength of the forces he faced, Swinton showed, was easily duped by the enemy’s feints and deceptions, failed to oversee the actions of his subordinates during battles, and approached his role with both pomposity (staging “reviews, parades, and sham fights”⁸⁴) and timidity. Swinton spiced his attacks with personal insults: McClellan took on more of the nation’s command responsibilities than his “pigmy shoulders” could bear; his offensive efforts were “feeble;” he moved forward only by “elevating his mettle” and overcoming his own “hesitating and cautious spirit;” he “shirked his duty” to move forward pursuant to Lincoln’s commands; and he indulged a “wildly puerile ambition.”⁸⁵

Republican Messaging in the Politics of Soldiers: “McClellan Is A Coward”

Compounding the disqualifying effects of McClellan’s disloyalty and incompetence, in Republicans’ telling, was his cowardice, both moral and physical. Charges that McClellan was a moral coward grew mostly out of the essential

83. William Swinton, *McClellan’s Military Career Reviewed and Exposed* (Washington, D.C.: Lemuel Towers, 1864). The pamphlet is available in reprint form from the University of California Libraries.

84. *Id.* at 9.

85. *Id.* at 10, 11, 16, 18, and 20.

schizophrenia of the Democratic nominating convention in 1864. The party's internal divisions made a coherent outcome unlikely from the start, but the convention that nominated McClellan elevated incoherence to an art form. It was a gift to Republicans. The gathering showcased the party's profound internal differences over the war, once again exposing all Democrats to charges of disloyalty even as it opened their standard bearer to charges of cowardice.

By the time the party leaders gathered in Chicago in August, pro-war Democrat McClellan was the clear frontrunner for the nomination. But the party's most prominent opponent of the war, Clement Vallandigham, stood in McClellan's way. Earlier in the war, Vallandigham's antiwar zealotry had led to his prosecution in a military tribunal, which convicted him and sentenced him to confinement for the duration of the war. After the Supreme Court declined to set aside the conviction, Lincoln modified the sentence by ordering Vallandigham exiled to the South. He found his way to Canada and campaigned from there for Governor of Ohio in 1863.⁸⁶ His opponent, war Democrat John Brough, won that election in a landslide, but Vallandigham had become the darling of peace Democrats. He returned to the United States in 1864 to attend the Democrats' nominating convention in Chicago, where he expected (and hoped) to be arrested. Lincoln wisely chose to ignore him. Safely in Chicago, where he was introduced to the convention as "the Honorable Exile and Patriot," Vallandigham soon became George McClellan's problem.⁸⁷

86. *Id.*; Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham & The Civil War* (New York: Fordham University Press, 1998); Christopher Dell, *Lincoln and the War Democrats: The Grand Erosion of Conservative Freedom* (Cranbury, NJ: Associated University Press, 1975), 214.

87. Klement, *The Limits of Dissent*, 280.

The convention received Vallandigham as a celebrity, and his fellow antiwar Democrats – about half the total delegates – treated him as a hero.⁸⁸ He was in a strong position to advance his agenda, and he pushed the advantage. War Democrats faced a quandary. They knew that victory in November required party unity, and they could not afford to estrange the antiwar wing. But accommodating that wing posed dangers, too. Vallandigham's agenda jeopardized the party's chances by exposing Democrats to even more Republican charges of treason. Compromise of some sort seemed essential.

The compromises that emerged proved costly for McClellan, ultimately exposing him to charges that he lacked the courage of his convictions – in modern parlance that he was a “flip-flopper.” First, to balance his spot at the head of the ticket, the party nominated George Pendleton as his running mate. Pendleton was a southern-sympathizing, Vallandigham-style peace Democrat from Ohio.”⁸⁹ For Republican propagandists like Andrew Dickinson White, that alone tainted the entire ticket as traitorous. Second, the antiwar wing put its mark on the party platform with a “peace plank” that Vallandigham himself had drafted. It demanded an end to the war:

...after four years of failure to restore the Union by the experiment of war,... justice, humanity, liberty, and the public welfare demand that immediate efforts be made for a cessation of hostilities, with a view of an ultimate convention of the States, or other peaceable means, to the end that, at the earliest practical moment, peace may be restored on the basis of the Federal Union of the States.⁹⁰

These sentiments made Republican charges of Democratic defeatism and disloyalty seem credible. Objective observers could reasonably interpret the call for “a cessation of hostilities,” without preconditions, to mean that Democrats placed a higher

88. McPherson, *Battle Cry of Freedom*, 771-2; Dell, *Lincoln and the War Democrats*, 214.

89. Klement, *The Limits of Dissent*, 160.

90. Kirk H. Porter, comp., *National Party Platforms* (New York: The Macmillan Company, 1924), 59.

priority on peace than on union.⁹¹ Unconstrained by objectivity, Republican partisans gleefully characterized the platform as a total capitulation to the Confederacy. In an open letter to “the People of the United States,” the pro-Lincoln National Union Committee said of the Chicago convention that it “gives a silent approval of the rebellion itself.... In all essential respects the action that convention took accords with the results the rebels seek. Both desire a cessation of hostilities.”⁹² The *Chicago Tribune*, always vigorous in supporting Republicans, called the Democratic convention “a Richmond concern. It got its shape and animus from the Confederacy. It was directed beforehand how to proceed, and it obeyed.”⁹³

As the convention closed, the party’s pro-war leaders saw the platform’s glaring weakness. Anticipating the Republican attack, they set out to persuade McClellan to “clarify” the platform in his acceptance message.⁹⁴ They had about a week to do it. Unlike modern conventions, where the nominee attends as the headline attraction, nineteenth-century candidates practiced the charade of detaching themselves from the hurly-burly of partisan politics. They left the convention to their surrogates, received written notice of the nomination after the convention ended, and accepted in a letter that invariably feigned modest reluctance. McClellan’s acceptance letter, his pro-war advisors hoped, would serve as the vehicle for escaping the hazards of the platform’s antiwar theme.

McClellan needed little prodding. He saw the political danger clearly enough, and he certainly did not share Vallandigham’s loathing of the war. Whatever his other

91. McPherson, *Battle Cry of Freedom*, 772.

92. *New York Times*, Sept. 14, 1864, p. 5.

93. *Tribune* (Chicago, IL), September 28, 1864, p.2.

94. Silbey, *A Respectable Minority*, 135; Klement, *The Limits of Dissent*, 286-7.

failings, George McClellan was thoroughly devoted to the army and to the cause of restoring the Union. He wanted no association with implications that the war he had fought was a failed “experiment” or that the soldiers he had commanded were “failures,” which was precisely the gist of the platform’s message, according to Republicans.

Another problem with the platform became evident to McClellan as he pondered the wording of his acceptance letter. With timing that must have seemed diabolical to all Democrats, the Union’s military fortunes brightened dramatically almost the moment the Chicago convention closed on August 29. Sherman captured Atlanta on September 3, tremendously boosting the flagging war spirits of the North. Following shortly on the heels of David Farragut’s naval triumph at Mobile Bay, where the old admiral famously damned the torpedoes, the fall of Atlanta made the platform’s indictment of the war as a “failure” look premature, if not silly.

With all this, McClellan readily undertook a repositioning effort in his acceptance letter. Written ten days after the close of the convention, it waffled masterfully. In keeping with the bedrock principles of the faction of his party that supported the war but opposed turning it into a fight against slavery, McClellan argued that the war should be pursued only for “the preservation of our Union [which] was the sole avowed purpose for which the war was commenced.” Making no mention of the war’s “failure” or of a “cessation of hostilities,” he distanced himself from the peace platform without repudiating it directly. Instead, he spoke of the need for a “spirit of conciliation and compromise...in the hearts of the people.” He urged efforts to

...exhaust all the resources of statesmanship practiced by civilized nations, and taught by the traditions of the American people, consistent with honor and the interests of the country, to secure [the] peace, reestablish the

Union, and guarantee the future of the Constitutional rights of every state.
The Union is the one condition of peace. We ask no more.⁹⁵

It was fancy political footwork and an artful “clarification,” effectively shifting the party’s priority from peace to union. McClellan predicted shortly before sending his letter that it “would be acceptable to all true patriots, & will only drive off the real adherents of Jeff Davis this side of the line.”⁹⁶

As to Democrats, he was right. After some initial grumbling and threats to start a third party, even Vallandigham and the peace Democrats ended up supporting McClellan.⁹⁷ Republicans were having none of it. They saw in McClellan’s acceptance letter an opening to attack his fitness for office. They used it to build the case that McClellan was irresolute – essentially a coward. The first step in constructing that argument was to tether McClellan to the peace plank. He may not have drafted it, and he may have wished convention delegates had drafted it differently, but Republicans insisted that the Democratic candidate was stuck with both the party and its platform. The Chicago convention became “McClellan’s convention,” and the platform – peace plank and all – became “McClellan’s platform.”⁹⁸ At a Massachusetts rally, Republican Senator Sumner made the point humorously. Referring to the spectacle of a candidate retreating from his own party’s platform, Sumner started with a joke that became a staple of the campaign:

95. Sears, *The Civil War Papers of George B. McClellan*, 595-6.

96. Philip Shaw Paludan, *A People’s Contest*, 2nd ed. (Lawrence: University Press of Kansas, 1996), 248; Sears, *The Civil War Papers of George B. McClellan*, p. 594. In his fine book about Civil War politics, historian Mark E. Neely, Jr. asserts that McClellan’s acceptance letter “in fact denounced the platform.” (Neely, *The Boundaries of American Political Culture in the Civil War Era*, 60.) It is very hard to square Neely’s interpretation with the text of McClellan’s letter. McClellan certainly distanced himself from the platform, but he fell subject to criticism for waffling precisely because he did *not* denounce the platform.

97. Paludan, *A People’s Contest*, 248-9; Dell, *Lincoln and the War Democrats*, 287-8.

98. *Tribune* (Chicago, IL), September 28, 1864, p.2.

The cry of the railroad conductor is transferred to politics, -- "It is dangerous to stand on the platform." Nobody has made greater efforts to get away from it than the Presidential candidate of the Democracy, who forgets, that, as a candidate, he is born with the platform, and united to it, as the Siamese twins are united together, so that the two cannot be separated.⁹⁹

After tarring him as disloyal for his ties to the convention, Republicans argued that McClellan's acceptance letter showed the character failings of a coward. As Republicans constructed the argument, the letter proved that McClellan lacked precisely those qualities that nineteenth-century Americans associated with good soldiering: "manliness" and courage. Rooted in powerful currents of national culture, going to the heart of what it meant to be a man and a soldier, these arguments were forceful tools for discrediting McClellan. Civil War scholarship exploring the motivation of the troops on both sides has identified courage as the central value that soldiers were determined to express in battle. It was the most important of the soldierly virtues. In their correspondence and memoirs, soldiers used the terms "courage" and "manhood" interchangeably. They spoke of courage as the "manliest of virtues." Joshua Chamberlain, a hero of Gettysburg and winner of the Congressional Medal of Honor, addressed the question of how men could bring themselves to stand up to enemy fire in the horrifying way required by Civil War battlefield tactics. "Simple manhood" was the first of the motivations he identified.¹⁰⁰

To question one's "manhood," then, was to question his courage and by implication his adequacy as a soldier. Republican partisans seized on McClellan's waffling letter of acceptance to raise precisely that question. One pro-Lincoln editorial

99. Charles Sumner and George F. Hoar, *Charles Sumner: His Complete Works* (Boston: Lee & Shepard, 1900) 11: 421.

100. Linderman, *Embattled Courage*, 8; McPherson, *For Cause and Comrades*, 6.

suggested that McClellan, widely known as a war Democrat for whom the platform's peace plank must have been unpalatable, should have written a letter forthrightly rejecting both the peace platform and the nomination. "Had Gen. McClellan thus played the man," wrote the *New York Times*, "he would have won to himself every loyal heart in the land."¹⁰¹ Another editorial seized on this concept of manhood in chiding McClellan for failing either to agree or disagree with the platform's two most controversial statements: its characterization of the war as a "failure," and its call for an immediate "cessation to hostilities." "A candidate of thorough manhood would have met both with downright assent or dissent.... It is humiliating. What a pitiful exhibition this man, with the epaulettes of a Major-General still on his shoulders makes as a party posture-master."¹⁰²

An editorial in the pro-Lincoln Milwaukee *Daily Sentinel* tied McClellan's acceptance letter directly to his qualifications as a man and soldier:

Frankness has always been regarded as a prominent trait of the true soldier. Frankness, sincerity and courage go naturally together, for the brave man needs no disguise and will let all the world know his real sentiments whenever he attempts to publish them at all. Gen. McClellan, in his letter of acceptance, seems to have been deficient, temporarily at least, in these soldierly qualities.¹⁰³

Similarly, the Boston *Liberator* called the acceptance letter "indirect and unmanly" and an example of McClellan's "characteristic cowardly, roundabout way" of taking a position.¹⁰⁴ *Harpers Weekly* piled on, claiming that McClellan's letter was "confused and

101. *New York Times*, Sept. 13, 1864, p. 4.

102. *Id.*, Sept. 10, 1864, p. 4. McClellan at this point had not resigned his military commission.

103. *Milwaukee Daily Sentinel*, September 19, 1864.

104. *The Liberator* (Boston, MA), September 23, 1864.

verbose: wanting both the manly directness of the soldier and the earnest conviction of the patriot.”¹⁰⁵

Some critics described the waffling character of McClellan’s letter in terms suggesting that he was thereby taking cover in an un-soldierly way. The Civil War culture of courage and manliness demanded that military officers demonstrate their bravery by example to the troops under them. They did this by “conspicuous exposure to enemy fire.”¹⁰⁶ To demonstrate courage, officers were expected under this model of bravery to lead from the front, exposing themselves to the same perils as the men under their command. At Gettysburg, just before Pickett’s charge, Union General Winfield Scott Hancock cemented his place in American military lore by slowly and self-consciously riding his horse along the entrenched lines on the crest of Cemetery Hill, pretending to be indifferent to the explosion of Confederate artillery shells all around him. He believed it would inspire his men to behave courageously if they saw the “exemplary performance” of their General exposing himself so bravely.¹⁰⁷ A captain in the 47th Ohio, describing a lesser skirmish, said his “boys besought me to take cover, but I knew what must be done, ... therefore I set the example by taking the most exposed place.”¹⁰⁸

The unwillingness “to expose himself,” therefore, carried the meaning that the actor was a coward – the antithesis of a soldier. So, when a writer to the *New York Times* described the waffling attendant to McClellan’s letter of acceptance as the behavior of

105. *Harper’s Weekly*, September 24, 1864, as quoted in Weber, *Copperheads: The Rise and Fall of Lincoln’s Opponents in the North*, 180.

106. Linderman, *Embattled Courage*, 44.

107. Shelby Foote, *Fredericksburg to Meridian*, vol. 2, *The Civil War: A Narrative* (New York: Random House, 1963), 545.

108. McPherson, *For Cause and Comrades*, 61.

“[t]he General who does not like to expose himself by a personal expression of opinions,” the suggestion of cowardice was hardly veiled.¹⁰⁹ The intent was to diminish the stature of McClellan as a soldier by suggesting, with a value-laden phrase carrying strong meaning to readers, that he had failed the test of courage by which soldiers and officers were measured.

Pennsylvania congressman Thaddeus Stevens delighted in undercutting McClellan’s manhood and didn’t bother with subtlety to do it. Leaving to others the task of showing unmanliness in the acceptance letter, Stevens showed it by reference to McClellan’s body parts. He effectively feminized McClellan before a Union League audience in October 1864 by contrasting the physiques of Lincoln and McClellan. On dress parade, Stevens said scornfully, McClellan made

a great sensation among the ladies. They call him dear little band-box Mac. In these qualities, it must be confessed that Lincoln is no match for him. His [Lincoln’s] big fists were not made to wear kid gloves.... They were made to grasp the oaken helve and swing the tempered steel of the woodman. His arms, instead of being artistically rounded and tapered, are sinewy and long as Cyclops’s. Nor is he a graceful horseman. His legs, instead of being padded to fit a quilted saddle, are long, with joints like Hercules. Put him astride of McClellan’s prancing parade horse and you would think he was walking with a frisky pony between his legs.... If [McClellan and Lincoln] should encounter, either physically or mentally, the giant grip of the Rail Splitter will tear the polished dandy from the ground and hurl him farther than an Indian shoots his arrow. Which of these men will you choose to guide the rolling ship in the midst of a storm?¹¹⁰

Pro-Lincoln political cartoonists had fun with McClellan’s predicament over the platform, sometimes making Stevens’ point in picture form. The following lithograph, published in Boston, compares the Republicans’ platform with the Democrats’. In the left panel, Ulysses Grant, David Farragut, and local favorite Charles Sumner carry Lincoln

109. *New York Times*, Oct. 2, 1864, p. 5.

110. *Daily Evening Bulletin* (Philadelphia, Pa.), October 25, 1864.

and Lady Liberty atop the Republican platform. On the right panel, Clement Vallandigham shoves a reluctant and dwarfish McClellan up onto the Democratic platform, saying, “Don’t be afraid, little Mac. I’ll support you.” McClellan responds timorously, “No, Val; it is too much, such a frail, slippery box. I’ll certainly break my neck!” Snakes support the platform, which is made of cheese. New York Democrats Horatio Seymour and Fernando Wood look on, the latter saying, “All true friends of slaves and their masters should join our company.” John Bull, representing Great Britain, reads a pro-McClellan issue of the *London Times*.

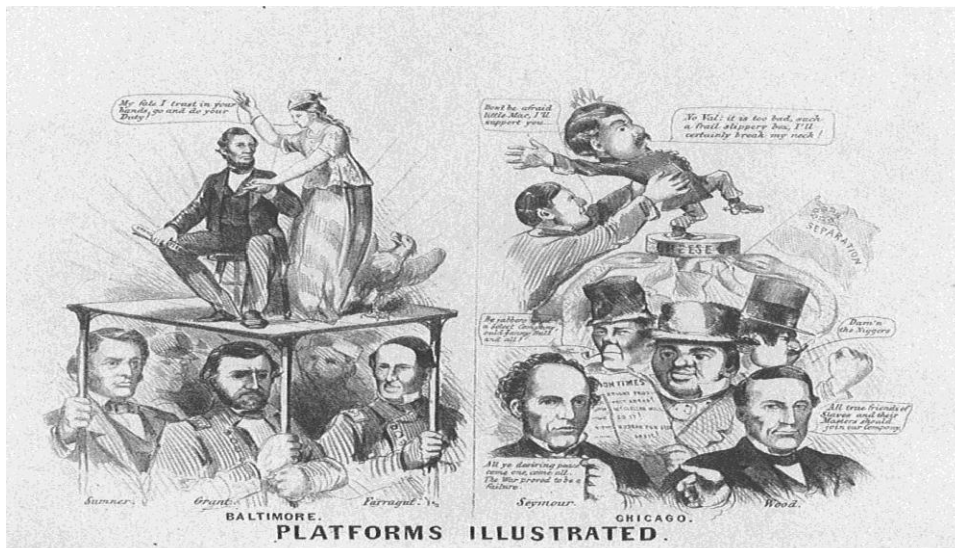


Illustration originally published by Louis Prang & Co., Boston, *Platforms Illustrated*, 1864. Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-7176 .

A cartoon published in New York is less playful. Entitled “How Columbia receives McClellan’s Salutation from the Chicago Platform,” it shows Pendleton preening, observing that if McClellan dies, “I will be President, and will make everything sweet for my Southern friends.” A host of peace Democrats, including George Woodward and Clement Vallandigham, support the platform with McClellan on it. McClellan stands on his letter of acceptance, “with which he fancies he has concealed the

Platform. He salutes Columbia, courting her smiles,” but to no avail. She spurns him, saying, “What a shame that a man who was educated at my expense [at West Point], and whom I have since honored and petted, should have allowed himself to be allured by ambition into such company, and upon such a Platform! His letter cannot conceal his real ambition, nor hide those odious ‘planks;’ neither can it reconcile him to his traitorous companions. I DISCARD BOTH HIM AND THEM FOREVER.”

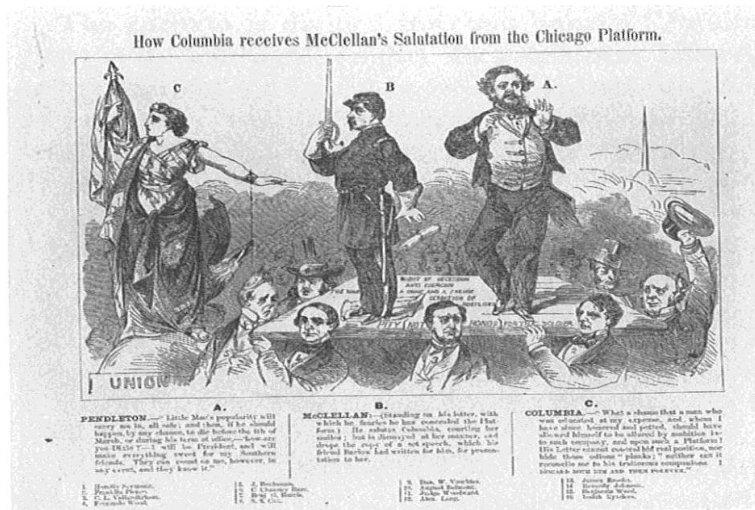


Illustration originally published in New York, *How Columbia receives McLellan's Salutation from the Chicago Platform*, 1864, Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-40791.

It is one thing for a candidate to lack the courage of his convictions, as Republicans asserted based on McClellan's acceptance letter. It is quite another to claim that he lacks physical courage. Republicans leveled that charge, too. We can think of it, almost literally, as McClellan's "swift boat" problem, a nineteenth-century variant of the accusations Republicans directed at Democrat John Kerry in the 2004 presidential campaign.

William Swinton's lengthy attack on McClellan for his failures on the Peninsula included assertions that McClellan himself was never personally present during the

several engagements with Lee's forces, while his own troops showed valor in his absence.¹¹¹ The clear implication was that McClellan lacked backbone. The most celebrated example of his supposed physical cowardice was an episode variously referred in political attacks as the "gunboat episode," the "ride to the rear," or the "Galena affair." It occurred at a place called Harrison's Landing toward the end of the Peninsula Campaign in 1862, just before the Union army's ignominious withdrawal. Not far from Harrison's Landing, the fierce battle of Malvern Hill was underway, the last big fight of the campaign. In the Republicans' telling, McClellan ran away to save his own skin, fleeing the battlefield for the safety of the gunboat Galena on the James River. William Swinton treats the episode as of a piece with McClellan's penchant for absenting himself from the scene of any fighting.¹¹² Other Republican partisans trumpeted the story in their pro-Lincoln papers as Election Day approached. The *Chicago Tribune*, for example, published an eyewitness report breathlessly attesting to McClellan's panicky escape from the fighting. The witness described McClellan scurrying to board a departing gunboat just as the battle of Malvern Hill began to rage.¹¹³ Describing the same incident, the *New York Times* expressed shock that at the height of the battle, McClellan would "...cower before the foe, and with his army deformed, demoralized and reduced to half its original number, fly to the protection of the gunboats at Harrison's Landing, strewing his circuitous route with the dead and mutilated bodies of his devoted soldiers."¹¹⁴

Campaigning for Lincoln, Thaddeus Stevens linked McClellan's military ineffectiveness to his physical cowardice; McClellan failed to press the enemy because he

111. Swinton, *McClellan's Military Career*, 23-24.

112. *Id.*

113. *Tribune* (Chicago, IL), September 29, 1864.

114. *New York Times*, Sept. 12, 1864, p. 4.

was frightened. In the Peninsula campaign, Stevens told a raucous pro-Lincoln audience, McClellan “never ventured to attack the enemy. When they got tired of waiting and attacked him, he was seven days fighting and running until, far in advance of his army, he found a safe place on board a gunboat.”¹¹⁵ In an editorial entitled “The Imbecility of McClellan,” a pro-Lincoln paper made the same linkage. Referring to a succession of battlefield setbacks during the Peninsula campaign, the paper said, “He was deficient at Yorktown, absent at Williamsburg, surprised at Fair Oaks, taken in the flank and rear at Gaines Mill, and frightened out of his wits at Malvern Hill.”¹¹⁶

Currier and Ives published this anti-McClellan political cartoon ridiculing the candidate for his gunboat escapade. Entitled “The Gunboat Candidate,” it depicts McClellan on a saddle mounted on the spar of the Galena. Peering through a telescope at the distant battle at Malvern Hill, McClellan intones, “Fight on my brave Soldiers and push the enemy to the wall, from this spanker boom your beloved General looks down upon you.”

115. *Daily Evening Bulletin* (Philadelphia, Pa.), October 25, 1864.

116. *North American and United States Gazette* (Philadelphia, PA), September 27, 1864.

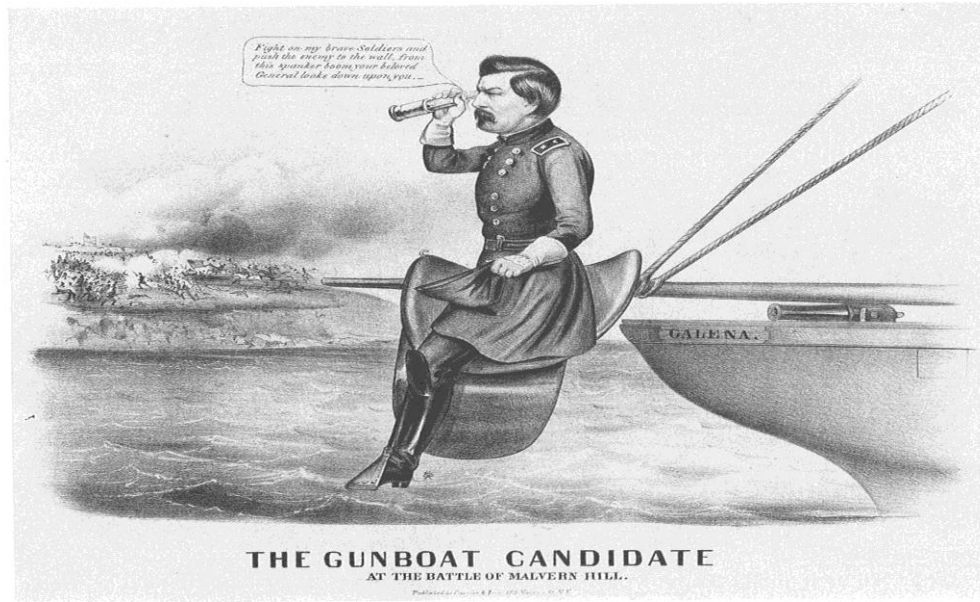


Illustration originally published by Currier and Ives, *The gunboat candidate at the Battle of Malvern Hill*, 1864. Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-92038.

A Massachusetts paper joked that the candidate's name, G.B. McClellan stood for "Gun Boat McClellan,"¹¹⁷ while a Republican paper in Wisconsin deployed humor in mocking McClellan with this poem:

Last, glorious Malvern taught the foe,
 What deeds the Northmen dared;
 Bold Mac, far off in gunboat lay, –
 Of course he was not scared!
 The hero scared? That could not be.
He heard no bullets whiz.
He always found in shooting times,
 He had some other 'biz.'¹¹⁸

This tale of cowardice rounded out the Republicans' portrait of McClellan the milksop posing as hero. Not only was he disloyal and inept, but he also lacked guts. Sometimes the message was cloaked in humor. The *New York Times* quipped that a

117. *Lowell (MA) Daily Citizen and News*, September 24, 1864.

118. *Milwaukee Daily Sentinel*, November 3, 1864.

portrait of McClellan displayed at a mass meeting of Democrats was probably exposed to more gunpowder from the fireworks at the gathering than the General himself had “ever smelt...in the whole course of his military career.”¹¹⁹ But fundamentally it was no laughing matter to suggest that a commander was unwilling to face enemy fire. It attacked his standing as a leader and soldier, and it was all part of the effort to topple McClellan from his perch as supposed heir to America’s tradition of military glory. And, just as with charges that he was disloyal and militarily inept, accusations that McClellan was a coward touched on subjects that soldiers could speak about with unique authority. So Republicans and Unionists brought soldiers’ voices to bear once again.

General John A Logan was one of those voices. Logan, for whom Logan Circle in Washington D.C. is named, had served as an Illinois state senator before the war and would serve in the U.S. House of Representatives after the war, was not shy about entering the political fray on Lincoln’s behalf even while serving as a commissioned officer. At a pro-Lincoln rally in Carbondale, Illinois, Logan seized on McClellan’s acceptance letter as evidence that McClellan was un-soldierly and a coward. Referring to the “peace plank” of the Democratic platform, Logan said that McClellan, “or any man, who ever drew a sword in his country’s cause, who would consent to take any position on a platform of that kind, is unworthy to be called an American soldier.” When Democrats at the Chicago convention adopted the platform, Logan added in a remark that elicited laughter from the audience, they knew “that McClellan would write a soft letter – sort of for war, saying that he knew the convention was for war, but they forgot to say so.”¹²⁰

119. *Id.*, Sept. 18, 1864, p. 8.

120. *Milwaukee Daily Sentinel*, October 7, 1864.

General Samuel Heintzelman was similarly outspoken against McClellan. A West Point graduate, he had served in the Mexican War and commanded a corps under McClellan in the Peninsula campaign. Now he lent his name and prestige to the thesis that his former commander was a coward. Newspapers carried an account of Heintzelman's injecting himself in a conversation between two men discussing McClellan's supposed lack of courage. "How do you know, sir, that he hasn't courage?" the general asked one of the men. "Never judge too hastily, sir, of a man's courage. Gen. McClellan has never been under fire, and you can't tell whether a man is brave or not until he passes that ordeal."¹²¹

The *Chicago Tribune* published an eyewitness report by an unnamed soldier attesting to McClellan's hurried and premature departure from the fighting at the Battle of Malvern Hill. Under the headline, "He Takes A Little Nap While the Fight Is Going On," the soldier described McClellan scurrying to board a gunboat at a landing near the battle and pushing off, just as the battle began to rage. In the witness's words, "A boat is manned, and, three cheers from officers and crew, off goes the man upon whom hangs the destiny of the American people."¹²²

Republicans used Democratic opposition to soldier-voting laws as part of its case that their standard bearer was a coward. One Republican pamphleteer claimed that "McClellan Democrats" cooked up their supposed concern about fraud as a pretext for opposing soldier voting. This was a "pretended" fear, said the Republican author. The real reason for opposing the law was that "McClellan Democrats" knew perfectly well that soldiers would never vote for McClellan or other Democratic traitors. Hiding behind

121. *Lowell (MA) Daily Citizen and News*, June 8, 1864.

122. *Tribune* (Chicago, IL), September 29, 1864.

this pretext about fraud, Democrats mounted “cowardly assaults in the rear upon the soldier” by opposing laws that would allow the troops to vote.¹²³

Democratic Messaging in the Politics of Soldiers: Defending McClellan and Attacking Lincoln

For their part, Democrats relied on voting soldiers to rebut the charge that their man was disloyal, inept, or a coward and to mount charges of their own against Lincoln. “Any man who says George B. McClellan is a traitor,” wrote a soldier defiantly, “is a liar. I shall vote for him, and the soldiers who have served their country, as I have served mine, will vote for him too.”¹²⁴ Another soldier, after telling a Democratic gathering in Springfield, Illinois, about losing one of his brothers in combat, said melodramatically, “I am for McClellan because I know he would say let me be buried wrapped in the Stars and Stripes, with not one star wrestled from it by the hand of treason.”¹²⁵ A soldier in Virginia wrote glowingly of McClellan to a New York newspaper. “I fought under him at Antietam,” he said, “and I love him. You need not ask any soldier but what he will say, ‘I go for Little Mac – you bet.’”¹²⁶ Another wrote, “If General McClellan was with the army again, you would see one of the happiest armies that ever was. Our boys will vote for him *to a man*.”¹²⁷ A soldier writing from Virginia said in heroic sounding tones, “if I am spared to live till the election comes off, and I get a chance to vote, I will give my voice for him as far as it will go.”¹²⁸ An Illinois private said colorfully, “The leaders

123. Chandler, *The Soldiers’ Right to Vote*, 4.

124. *Cincinnati Daily Enquirer*, September 16, 1864.

125. *Cincinnati Daily Enquirer*, September 14, 1864.

126. As quoted in the *Cincinnati Daily Enquirer*, September 18, 1864.

127. *Id.* (Emphasis in the original.)

128. *Cincinnati Daily Enquirer*, September 23, 1864.

of the Republican party have stolen the robes of Heaven to serve the Devil in, and if you don't look sharp they will succeed, for they are a sharp set of thieves. I thank you for your attention to a McClellan soldier, and bid you good night."¹²⁹

Fighting fire with fire, a Democratic campaign song took Republicans to task as the real, albeit disguised, traitors:

All Hail DEMOCRACY! All ye who would be free!
Its base is COMPROMISE and PEACE, its hope is LIBERTY!
But TRAITORS cry for BLOOD, reject all COMPROMISE,
And style themselves "THE UNIONISTS," tho' Traitors in disguise.¹³⁰

An outspoken antiwar Democrat from Baltimore, Severn Teakle Wallis, who had been arrested early in the war for suspicion of pro-secessionism, made a similar point in a public exchange of letters with Connecticut Senator John Sherman. "You have ... borrowed from the vocabulary of despotism the name 'disloyalty,' he wrote, arguing that heavy-handed unionists had abused the label of treason by applying it to those who "question ... the wisdom ... or, if need be, resist the corruption and usurpation of those who *temporarily* hold and prostitute power."¹³¹

Speaking in Nashville, General Thomas F. Meagher, an Irish immigrant who commanded New York's celebrated "Irish Brigade," stuck up for McClellan pugnaciously. "For my part," said Meagher, who favored Lincoln over McClellan, "if any man, in my presence, dare call General McClellan a traitor or a coward, I will not stop to argue with him. I will at once knock him down. I will answer such assertions only with a

129. *Cincinnati Daily Enquirer*, September 14, 1864.

130. Rev. William Potts, *Campaign Songs for Christian Patriots and True Democrats* (New York: William Potts, 1864), 9-10, as quoted in Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North*, 188.

131. Smith, *No Party Now: Politics in the Civil War North*, 71.

blow – and an Irishman’s blow at that.”¹³² One soldier even claimed, in a sentiment echoed by Democratic editorial writers, that Lincoln had disloyal, even murderous, motives for having fired McClellan from his army. “The removal of Gen. McClellan from the command of this army,” wrote the soldier from his camp near the battleground of Petersburg, “was a masterly stroke of policy on the part of the administration, inasmuch as it has consigned thousands of the General’s warmest friends and most ardent admirers to the tomb.”¹³³

Democrats used this line of argument not only in defending McClellan against charges of incompetence, but also in attacking Lincoln as an incompetent war leader. His having sacked McClellan, they claimed, was just one measure of his ineptitude. Another was that he was a bungling micromanager, meddling in the nuts and bolts of military affairs about which he knew nothing. At a rally for McClellan in Philadelphia, the featured speaker was a local attorney, Hiram Ketcham. Ketcham had served in the War of 1812, but as he lit into Lincoln, he modestly disclaimed any great military expertise. “I don’t know anything about military matters,” said the old veteran, “but I know as much as Abraham Lincoln.” The president “got it into his head that because he was commander-in-chief he should be a general... He was commander-in-chief of the navy; but he might as well tell Farragut how to sail his ships as to tell McClellan how to fight his army.”¹³⁴

A variation on Ketcham’s critique found expression in a political cartoon entitled “The SPORTSMAN upset by the RECOIL of his own GUN,” shown below. It mocks

132. *The Advocate* (Newark, OH), November 3, 1864. Interestingly, Meagher made these remarks at a pro-Lincoln event.

133. *Detroit Free Press*, September 30, 1864.

134. *The Press* (Philadelphia, PA), September 19, 1864.

Lincoln as a bumbling warrior, incapable of harming the enemy. Lincoln appears as an Irish sportsman, wearing knee breeches and looking feeble. The shot from his blunderbuss misses its target, a bird labeled “CSA,” and the gun’s recoil knocks the silly-looking Lincoln off his feet. The bird flaps its wings and thumbs its nose, and Lincoln is reduced to wishing the defiant bird had suffered the recoil. “Begorra,” he says to the unharmed prey, “if ye war at this end o’ th’ gun, ye wouldn’t flap yer wings that way, ye vill’in!” Edwin Stanton appears in the lower right as a useless hunting dog. The message is that Lincoln didn’t know what he was doing as a wartime commander.

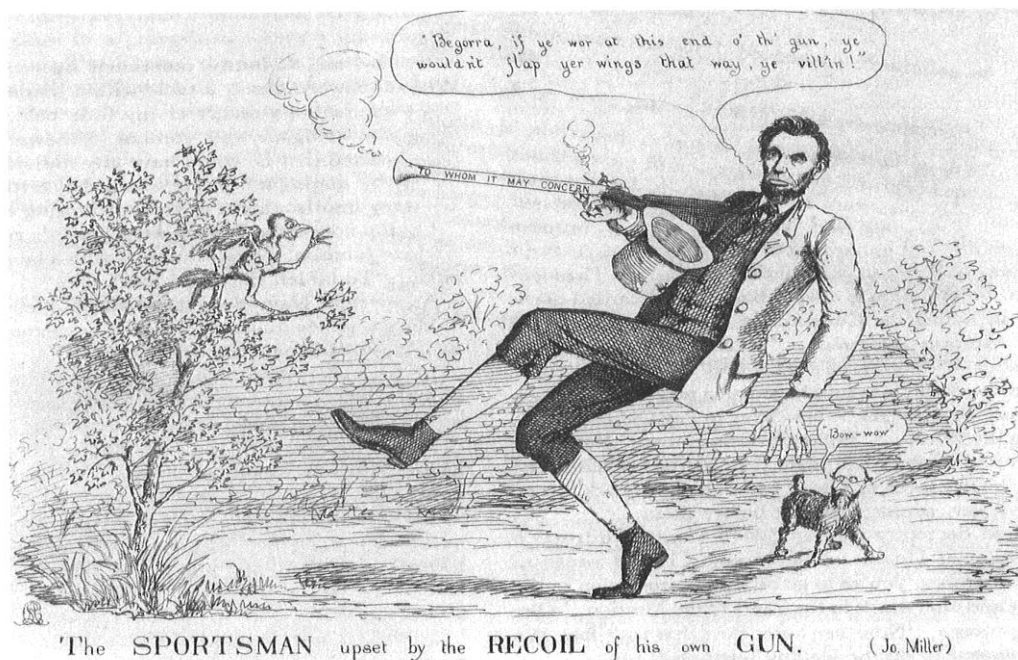


Illustration originally published in 1864, *The sportsman upset by the recoil of his own gun* (Jo. Miller,) Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-55785. The wording on Lincoln’s gun reads, “To Whom It May Concern,” a reference to the opening of a celebrated letter Lincoln wrote for Horace Greeley to use in meeting a Confederate peace delegation. Nothing came of Greeley’s project.

Democratic Messaging in the Politics of Soldiers: "Lincoln Neglects Soldiers"

Micromanaging and klutziness were only part of Lincoln's incompetence as a commander, Democrats claimed. He failed more profoundly, they said, when he made emancipation a war aim, since that blunder had the effect of hardening the resistance of the Confederacy and putting the Union's soldiers at unnecessary risk. Robert Winthrop, once a Whig congressman but now a pro-McClellan Democrat, made this point in a rousing speech before the party faithful in New York City late in the 1864 election season. By expanding the war effort to include an assault on slavery, Winthrop argued, Lincoln had backed Southerners into a corner and forced them to resist reunion more ferociously. This put the nation's troops at heightened risk. Lincoln's pro-Negro policy, said Winthrop, "by inspiring this spirit of desperation and hatred, has rendered the victories of our armies a hundred-fold harder to achieve.... For never, my friends, do victories cost so much, and come to so little, as when they are wrung from a foe who has been goaded and maddened to despair." A wise commander-in-chief, in the mold of Washington and Jackson, would have avoided that blunder, Winthrop claimed. Lincoln did not fit the mold, but McClellan did. "Let us rally, then, to the support of that great principle of unconditional Unionism which is common to Washington, Jackson, and McClellan."¹³⁵

Soldiers paid the steep price of Lincoln's misguided policy choices, Democrats insisted. The party adapted that message to song. One evoked the memory of Lincoln's martyred victims:

We are coming Abraham Lincoln,

135. Robert C. Winthrop, "Speech in support of the Democratic ticket at the New York Ratification Meeting," Sept. 19, 1864, in *Pamphlets in American History*, (Boston: J.E. Farwell and Company, 1864), No. CW 392, p. 13, microfiche.

From mountain, wood and glen,
 We are coming Abraham Lincoln,
 With the ghosts of murdered men.¹³⁶

Another made the same point as a reason to vote for McClellan:

The cruel war must have an end;
 I'll tell you what we'll do;
 We'll cast our votes for "Little Mac,"
 We're bound to put him through.
 The widow's wails and orphan's tears
 Prevailing o'er the land
 Pray heaven to send a rare relief--
 McClellan is the man.¹³⁷

A pro-McClellan campaign song claimed that Lincoln's war policy jeopardized not only the Constitution but also the lives of millions of white soldiers. Addressing itself to "Freemen of the Union," it posed rhetorical questions:

Would you have preserved *intact*
 The CONSTITUTION and be free?
 And secure in word and fact
 UNION, PEACE, and Liberty?
 Would [you] TWELVE MILLIONS WHITE MEN SLAY
 To make FOUR MILLIONS NEGROES FREE?"¹³⁸

As this song makes clear, when Democrats stuck up for soldiers in attacking Lincoln, it was *white* soldiers they had in mind. Democrats enlisted soldiers to communicate this anti-Lincoln message to Northern audiences, making explicit what Winthrop and these songsters had implied: that Lincoln's policy choices victimized not just soldiers generally, but *white* soldiers in particular. The Cincinnati *Daily Enquirer* published a letter from a Union private in Tennessee who complained, "We volunteered to put down the rebellion and preserve the Union under the Constitution.... We did not

136. Baker, *Affairs of Party*, 303.

137. William Shakespeare Hays, "McClellan is the Man"(song lyrics), accessed October 9, 2013, <http://www.civilwarpoetry.org/union/songs/mcclellan.html>.

138. Potts, *Campaign Songs for Christian Patriots and True Democrats*, 5.

hire ourselves to the Government to *free negroes*, and we do not wish to see thousands of our own race fall by disease and in battle to sustain that famous proclamation.”¹³⁹ The *Enquirer* also printed a letter from a soldier in the Army of the Cumberland to the same effect. “I could not be contented,” he said, “to remain in this *unholy war*. If things were as when I enlisted I could be contented, but since the Administration has declared the negroes free, and on equality with the white man, I will not support it in Abolition principles.”¹⁴⁰ One resentful soldier wrote to complain about the administration’s pampering of African Americans. “Around the soldier,” wrote the trooper from his post in Louisiana in an odd third person style,

every-where he beheld the negro feasting and banqueting at the expense of our Government. The negro could be paid regularly every week, he could be furnished with clothing when needed. But not so with the soldier; the wife and child of his home, who were dependent upon the husband for support, were pinched with hunger, penury and want.¹⁴¹

White supremacy was a unifying article of faith among nineteenth-century Democrats. It became a political rallying cry after Lincoln’s Emancipation Proclamation made abolition a Northern war aim in 1863. Prosecuting war on behalf of blacks squandered white blood, they insisted, and they argued that Lincoln the abolitionist was the enemy of the fighting man. As the election approached, Democrats developed three additional lines of attack based on that message. The first involved the draft, the second prisoner exchanges, and the third – almost surrealistically – a minstrel song.

The law authorizing a draft, enacted in 1863, applied to “able-bodied male *citizens* of the United States.” That limited its scope to white men. Democrats complained that Lincoln’s draft traded white lives for black freedom, a despicable

139. *Cincinnati Daily Enquirer*, February 21, 1863.

140. *Id.*, October 4, 1864 (emphasis in the original).

141. *Cincinnati Daily Enquirer*, February 27, 1863.

bargain by Democratic reckoning. And white men lucky enough to survive their forced military ordeal faced destitution on their return home, Democrats predicted, since blacks moving in from the South would fill their civilian jobs. Class injustice compounded the racial outrage for Democrats, because the law allowed men to avoid service by paying a commutation fee of \$300, a price beyond a poor man's reach. The issue stirred strong passions, particularly in urban centers where Democrats usually polled well. Lower class whites protested violently in the notorious New York City draft riots of July 1863, and white resentments remained strong enough in 1864 to give Democrats a good campaign issue. They seized it, adopting the theme that white soldiers were victims of Lincoln's pro-black, pro-rich draft.¹⁴² Democratic papers called Lincoln "the widow-maker" whose "abolition plan" would feed conscripts to enemy guns and leave them "scattered corpses over a thousand battlefields." A banner in a pro-McClellan torchlight parade in Cincinnati asked, "How are you, Conscript?" Then it answered its own question, showing the skull and crossbones. When the administration issued a supplemental draft call shortly before the 1864 election, a Democratic newspaper editor confidently predicted, "Lincoln is deadlier than dead."¹⁴³

Prisoner exchanges were routine through the first half of the war. But the enlistment of blacks into the Union army, totaling some 180,000 by the end of 1864, disrupted that routine. The Confederacy, refusing to recognize blacks as legitimate soldiers, excluded captured black troops from the POW swaps. The Lincoln administration responded by ending prisoner exchanges altogether, a costly decision for

142. McPherson, *Battle Cry of Freedom*, 600-611, 758; Iver Bernstein, *The New York City Draft Riots* (New York: Oxford University Press, 1990), 9.

143. *Cincinnati Daily Enquirer*, Aug. 30, 1864 (quoting the *La Crosse* (Wisconsin) *Democrat*; *Id.*, Sept. 19, 1864.

the thousands of men confined in ghastly POW camps like the notorious Andersonville in Georgia.¹⁴⁴ To Democrats, the gesture demeaned whites, and they lashed out at Lincoln in a drumbeat of campaign attacks. “Lincoln and [Secretary of War] Stanton refuse to effect an exchange of prisoners unless the Southerners will act on their notion, that a negro is just as good,” charged the anti-Lincoln *Detroit Free Press* in a typical Democratic attack. “Let soldiers everywhere remember that Lincoln and Stanton look upon them as no better than negroes, and that they allow white men to rot in prison rather than take the risk of having any disrespect offered to Sambo.”¹⁴⁵ Addressing its white, Democratic leadership, the *Free Press* at one point calculated that forty thousand white soldiers languished in confederate prison camps solely because of Lincoln’s policy. “Behold the costly sacrifice at the shrine of the negro,” mocked the editors, “and commend Lincoln for them, and support him if you can.”¹⁴⁶

Adding to the Democrats’ use of the draft and the prisoner exchange policy to portray Lincoln as indifferent to white soldiers were the attacks based on the tale of Lincoln’s “Negro song” at the Antietam battlefield. That episode arose out of the president’s visit to the Maryland battle site in October 1862, just weeks after the Union victory there in what remains the bloodiest single day in American military history. As Democrats related the event, Lincoln demonstrated his heartlessness while touring the battlegrounds. They claimed that Lincoln – as was his wont – called on his bodyguard and longtime friend, Ward Lamont, to strike up a tune on his banjo, apparently to take the president’s mind off the grisly facts of the battle. Lamont chose a comical song called

144. McPherson, *Battle Cry of Freedom*, 792.

145. *Detroit Free Press*, Sept. 10, 1864; *Id.*, September 15, 1864; *Cincinnati Daily Enquirer*, Sept. 26, 1864.

146. *Detroit Free Press*, September 20, 1864.

“Picayune Butler,” named for a black minstrel character. As Lincoln’s wagon carried the president past scenes of the recent carnage, the banjo-playing bodyguard bellowed out this jaunty show tune.¹⁴⁷

The Democrats’ spin masters turned the story into propaganda for assaulting Lincoln once again as pro-black and anti-soldier. He had affronted white troops and insulted the Union war dead, they claimed, by calling for “a negro song” at the site of (white) soldierly sacrifice. One speaker at the Democratic convention in Chicago used the episode as proof that Lincoln was a “cold blooded joker” who, unlike McClellan, did not “entertain a proper appreciation of [soldiers’] suffering.”¹⁴⁸ The episode became the theme of a poem entitled “Lincoln at Antietam,” which embellished the facts and ran repeatedly in Democratic papers:

Dead upon dead were huddled thick,
The very air with death was sick,
The wounded waited with ebbing life,
Their turn for the surgeon’s tired knife.
But carelessly rode old Abe along
And called in that scene for a negro song.

Youth and manhood lay weltering there,
With the sweat of agony matting their hair.
And the bravest in battle heard with awe
The crushing sound of the busy saw.
But carelessly rode old Abe along
And called in such scene for a negro song.¹⁴⁹

A political cartoon captured the anti-Lincoln indignation stirred up by the Antietam battlefield episode and tied it to soldier voting. Entitled, “The COMMANDER-

147. Harold Holzer, “Lincoln Takes the Heat,” *Civil War Times Illustrated* 39, no. 7 (February 2001): 53.

148. “Speech by Hon. William Allen of Ohio at the Chicago Convention”, *Republican Compiler* (Gettysburg, PA), September 13, 1864; *Democratic Banner* (Clearfield, PA), September 14, 1864.

149. *Detroit Free Press*, October 24, 1864; *Cincinnati Daily Enquirer*, Sept. 6, 8, and 17, 1864.

IN-CHIEF conciliating the SOLDIER'S VOTES on the Battle Field," the lithograph (below) shows Lincoln standing on the battlefield surrounded by dead and wounded Union soldiers. As a nearby fallen soldier looks on, sadly clutching an American flag, Lincoln directs Lamont (standing in the foreground, his back turned to the viewer) to "sing us 'Picayune Butler,' or something else that's funny."

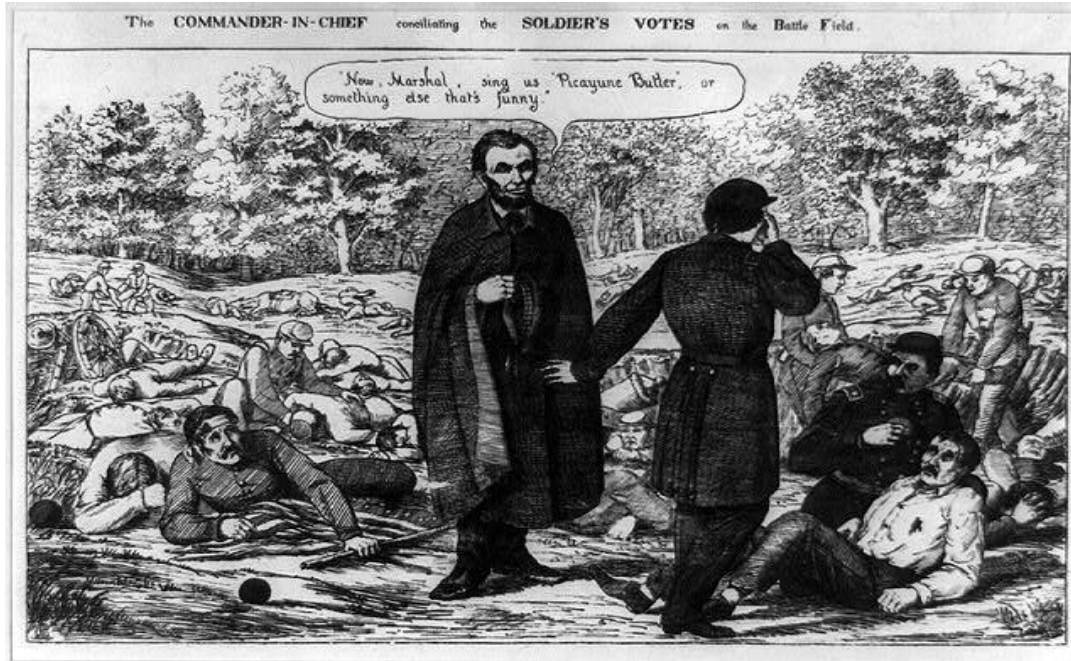


Illustration originally published in 1864, *The Commander-in-Chief conciliating the soldier's votes on the battle field*, Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-89731.

The message captured in this picture – that Lincoln was clueless about the sufferings of soldiers – became a rejoinder to Republican claims that Democrats in general and McClellan in particular were no “friends to the soldiers.” While Andrew Dickson White and William E. Chandler pointed to Democrats’ opposition to soldier-voting laws as proof of their antipathy to soldiers, this lithographer mocks the heartless Lincoln’s pretensions about soldier voting as rank hypocrisy. Both messages highlighted the urgency the parties attached to seizing the mantle of “the soldiers’ friend.”

Soldiers were indispensable messengers of the core campaign themes of both parties. For Republicans, those themes were that Democrats and McClellan were disloyal, that McClellan was inept as a military commander, and that he was a coward, both morally and physically. For Democrats, the core themes were that Lincoln bungled his role as commander-in-chief and that he mistreated white troops. Soldiers could speak to each of these themes with authority. They were experts on loyalty, courage, military effectiveness, and compassion for troops. So both parties enlisted soldiers in the messaging, either directly as spokesmen of the themes, or indirectly as the central characters of the same themes spoken by politicians, newspaper editors, pamphleteers, songsters, and cartoonists. Civil War politics in this sense was a politics of soldiers.

To prevail in the politics of soldiers, both parties had to position themselves as the friend of the soldier. Deploying the voices of fictional soldiers, Andrew Dickson White argued in his 1864 pamphlet that Democrats had forfeited any claim to that status by their opposition to soldier-voting laws. That opposition proved not only that Democrats favored “disfranchising” soldiers, as White would have readers believe, but also that Democrats traitorously aligned themselves with the enemy. It was potent stuff, and it was an allegation that put Democrats in a bind.

As we shall see in the next chapter, soldier-voting laws were a lose-lose proposition for Democrats. They lost if they supported the laws, because they were sure that the Republican administration would manipulate voting in the field. And they lost if they opposed the laws, because then Republicans would paint them as anti-soldier.

CHAPTER 5

THE DEMOCRATS' PREDICAMENT

The pattern of Republican support and Democratic opposition to soldier voting took shape gradually and did not coalesce before 1863.¹ When it did coalesce, Democrats found themselves in a box – associated with opposition to soldier-voting laws even in states where they had supported the laws, damned as anti-soldier for their opposition in states without soldier-voting laws, and damned by the results of soldier voting in states wherever such laws passed.

An election in November 1862 for a congressional seat in Minnesota illustrated the emerging problem Democrats faced. Earlier that year, well before the partisan lines over soldier voting had taken shape, Minnesota enacted its soldier-voting law. Democrats deserved as much credit as Republicans; the bill passed with bipartisan support in the state legislature, including unanimous support in the state senate. In the November election for a congressional seat Democrat William Cullen lost to Republican Ignatius Donnelly. Cullen believed that the soldier votes for Donnelly cost him the election, so he took steps to mount a challenge to the law's constitutionality. (Proofs in an election contest would have been difficult, since Minnesota's mail-in version of absentee voting did not permit separate tallies of soldiers' ballots.) Almost before his challenge got off the ground, the Republican press came after him, one mocking Cullen under the headline, "Who Now Is the Friend of the Soldier"? Fearing the loss of future political viability,

1. White, "Citizens and Soldiers," 47, 50; Williams, "Voters in Blue," 192, 201.

Cullen abandoned his challenge, and the law stood.² While there is no evidence that concerns about the law's unconstitutionality were any more prevalent among Democrats than Republicans at that early stage, and neither party had a greater claim than the other for the law's existence, Cullen's experience was a toe in the water for Democrats everywhere. On the one hand, winning the soldier vote was improbable for Democrats, notwithstanding their early support for soldier-voting laws. On the other hand, fighting the laws, or the laws' electoral effects, was politically expensive.

As the war progressed and Republicans increasingly asserted ever more control over the military command structure, Democrats grew increasingly pessimistic about their chances of winning the soldier vote. They frequently invoked the voice of the soldier in trying to cope with the problem, claiming that through its surrogates in the military command, the Lincoln administration bullied soldiers by coercing pro-Lincoln votes in the field or by interfering with the voting rights of soldiers showing pro-McClellan proclivities. But that tactic never gained great traction, and Democrats never really escaped the box that the soldier-voting issue put them in.

The Democrats' lose-lose dilemma became particularly evident in the contrasting experiences of Pennsylvania and Ohio. As we have seen, there was no clear partisan divide about soldier voting in Pennsylvania's 1861 elections, in which absent soldiers participated under the state's prewar soldier-voting law. In the early stages of the war, there was bipartisan ambivalence in Pennsylvania about soldiers' exercising their rights

2. The newspaper was the *St Paul Daily Union*, December 14, 1862, as quoted in. Downs, "The Soldier Vote," 187, 198-199.

under that law. In various election contests, candidates of both parties challenged the participation of absent soldiers, influenced in doing so only by short-term electoral expediency, not by ideological or partisan positions about the legitimacy of absentee voting. When the prewar law came before the Pennsylvania Supreme Court in 1862, a bipartisan majority of justices voted to strike it down, with both of the court's Republican justices joining two of its three Democrats in finding the law unconstitutional. Objectively, then, Pennsylvania Democrats were no more hostile to the law when it was in force, and no more responsible for the law's demise, than were the state's Republicans. But in the politics of 1863 and 1864 – the politics of the soldier – Democrats took the blame for killing the law, and Republicans managed to use the issue to brand their candidates as “the soldiers' friend.” After the court's decision, even without a way to vote “in the field,” Pennsylvania soldiers made their voices heard loudly for Republican gubernatorial candidate Andrew Curtin, either as voters home on furlough or as distant spokesmen for Curtin in the political messaging war for civilian votes.

If 1863 Pennsylvania demonstrated the danger of the soldier-voting issue in a state where soldiers could not vote in the field, Ohio demonstrated that danger in a state where they could. Early on, Ohio Democrats supported soldier-voting legislation over Republican objections. Not long after their efforts bore legislative fruit in 1863, those same Democrats came to regret their supportive role. The reason for Democratic support and Republican opposition early in the war was the mirror image of the circumstances that explained the reversal of the parties' positions later in the war: suspicion of what the other party might do to cheat. Just as Democrats by late-1863 doubted that their

candidates could compete fairly for soldier votes given the administration's firm control over the army, so Republicans before 1863 doubted the fairness of soldier voting in an army dominated in the early going by Democrats – men like George McClellan, Henry Halleck, Don Carlos Buell, and William Rosecrans. In addition to suspecting most Democratic generals of harboring Confederate sympathies and plotting to overthrow the Republican administration, Republicans believed that these “West Point Democrats” actively prevented the circulation of Republican newspapers in the military camps.³ Those suspicions led the Republican controlled legislature in Ohio to defeat a proposed soldier-voting law in 1862. Democrats seized on that vote to criticize Republicans in the 1862 elections, paving the way for bi-partisan passage of Ohio's soldier-voting law the following year.⁴

Objectively, then, Democrats deserved more credit than Republicans for the Ohio's law's existence, but that didn't protect them in the politics of soldiers that emerged in late 1863. Unlike Pennsylvania's prewar law, Ohio's statute survived its court challenge, and Ohio's absent soldiers used the law to vote in the state's 1863 gubernatorial contest between Union Party candidate John Brough and Democrat Clement Vallandigham. Far from rewarding Democrats for their support of the soldier-voting law, soldiers voted overwhelmingly (and in some cases fraudulently) for the Union Party candidate.

So, from the 1862 election in Minnesota and the 1863 elections in Ohio and Pennsylvania, both parties had learned the political danger of opposing, or appearing to

3. Williams, *Voters in Blue*, 201.

4. Young, “Soldier Voting in Ohio During the Civil War”, 7.

oppose, soldier voting. But Democrats were also coming to understand that there was no political safe harbor for them in supporting the laws, as they became convinced that their candidates could not compete on a level playing field for the soldier vote. Democrats saw specific evidence that appeared to validate their pessimism. As the war progressed, Democrats became alarmed about what they saw as a clear and growing pattern of electoral abuses by military officers for Republican partisan benefit. It included military interference with civilian political gatherings and elections, denial of soldiers' access to Democratic newspapers, and coercion of soldiers to cast pro-Republican votes. This pattern deeply troubled Democrats and shaped their growing but necessarily muted antipathy to soldier voting.

Adam I.P. Smith documents the ubiquity of intimidation of Democrats by soldiers taking it upon themselves to enforce the wartime political culture of no-partyism. In just one of many examples Smith cites, a group of soldiers in St. Louis stoned the platform where pro-Democratic speakers criticized the Lincoln administration and destroyed anti-Lincoln campaign paraphernalia.⁵ Military influence – abuse, in the eyes of Democrats – in civilian elections was also common. In the Border States, Union military commanders had issued orders barring “disloyal” men from the polls and requiring loyalty oaths as a condition to voting. In Kentucky, the commanding general ordered the judges of local elections to “allow no one to vote ...unless he is known to them to be an undoubtedly loyal citizen.” In Maryland, the military commanders required prospective voters each to swear “that I will in all things deport myself as a good and loyal citizen of the United

5. Smith, *No Party Now: Politics in the Civil War North*, 99.

States.”⁶ A letter to the Cincinnati *Enquirer*, a fervently Democratic newspaper, reported that “inoffensive citizens” in Delaware appearing at the polls to vote had been “stabbed with bayonets” and that “peaceful, patriotic men, whose fidelity to the Union no man may gainsay [were] charged by the military and through fear of bodily injury, deterred from voting.”⁷

A contested election for Missouri’s 5th Congressional District in 1862 elicited evidence of similar military highhandedness at the expense of Democrats. Republican Joseph W. McClurg won the seat over Democrat Thomas L. Price, and Price challenged the outcome. At the hearing ordered by the House of Representatives, witnesses for Price testified to a long trail of abuses that tilted the outcome in McClurg’s favor. Several witnesses claimed that soldiers had gathered at polling sites to menace Price voters. One witness, a man named Henry “Speed” Guyer, claimed that after he voted for Price, the provost marshal ordered him into military service. Others claimed that they were arrested for voting for Price. H.H. Hudson, another Price voter, testified that soldiers had gathered around his voting site in Linn Township with Price ballots speared on their bayonets. Yet another Price man, Henry Bradley, said that the captain of the militia had threatened to order his militia unit to forage off Bradley’s land if he persisted in supporting Price. And Joseph Eads claimed that soldiers stoned prospective Price voters as they approached the polls.⁸ (Price lost his challenge.)

6. CONG. GLOBE APPENDIX, 38th Cong., 1st sess., 70-71 (1864).

7. *Cincinnati Daily Enquirer*, April 2, 1863.

8. THOMAS L. PRICE VS. JOSEPH W. MCCLURG, MEMORIAL CONTESTING THE SEAT OF THE HONORABLE JOSEPH W. MCCLURG, H.R. MISC, DOC. NO. 16, 38th Congress, 1st Sess. 10, 71, 89, 92, and 151 (1863).

In his account of mid-nineteenth century voting practices, Richard Bense1 details similar election abuses in Missouri's 6th and 7th Congressional Districts. State militia forces worked as virtual guarantors of Republican victory. Suspected Democratic voters were intimidated and sometimes arrested, their lands used for foraging, and their candidates silenced. Bense1 describes one particularly egregious example in which the militia commander for Carroll County interrupted a speech by James Birch, the Democratic candidate for the seat in the 6th Congressional District. The commander proclaimed that Birch was giving a "secession speech ... calculated to fan afresh the flames of rebellion and bushwhacking." He ordered Birch to stop his speech and never to speak publically again in Carroll County. Recognizing discretion as the better part of valor, Birch complied. Unsurprisingly, he lost the election.⁹

The clash over loyalty oaths grew out of intractable differences between the parties about the meaning of loyalty. On this question, Republicans and Democrats were like ships passing in the night. Democrats who opposed the war sincerely believed they were just as loyal as Republicans, and Republicans believed just as sincerely that to oppose the Republican administration was proof of disloyalty. Bense1 argues persuasively that because the Republican Party provided the only organized support for the war in many border regions, Republicans there came to see support for the party as tantamount to support for the Union. Bense1 calls it a "conflation of party and national loyalty."¹⁰

That conflation was on vivid display in an election contest for the seat representing Missouri's third congressional district. The contest hinged in part on the

9. Bense1, *The American Ballot Box*, 242-243.

10. *Id.* at 218.

sincerity of voters giving the loyalty oath required as a condition of voting under an ordinance of Missouri's provisional government. The contested seat had become vacant on the death of incumbent John Noell, a former Democrat who won the seat running as an "Unconditional Unionist." Losing Republican candidate James Lindsay challenged many of the votes cast for the putative winner, John Scott, a Democrat. Some of Scott's voters, according to the challenge, had falsely sworn the loyalty oath. The provost marshal of St. Genevieve County was the face of the military in the county. Called to testify in support of Lindsay's challenge, he claimed that he knew for certain that some of Scott's voters were in fact disloyal. Among them were voters whose disloyalty, according to the witness, consisted of personally opposing the Emancipation Proclamation. Cross-examined by Scott's attorney, the witness elaborated on his definition of loyalty:

Q: Cannot a person be opposed to the measures of the administration and yet be loyal to the government of the United States?

A: Not at this time, when such measures are the means of enforcing the laws and suppressing rebellion and treason...

Q: Cannot a person differ with the President as to what measures are necessary to put down the rebellion, and yet be loyal?

A: Not if such differing would give any encouragement to rebels and traitors.

Q: How would it be if such differing did not encourage rebels and traitors?

A: I consider all such differings as calculated to embarrass the government, and will always more or less give encouragement to rebels.¹¹

Another witness for Lindsay, also attached to the provost marshal, was asked, "What is the reputation of the voters of this county for loyalty, who voted for John G. Scott?" He

11. H.R. MISC. DOC. NO. 43, 38th Cong., 1st Sess. 120-121 (1864). (I acknowledge Smith, *No Party Now: Politics in the Civil War North* at 38-39 for highlighting the quoted passage from the record of this election contest. Smith's work prompted further examination of the proceeding for this chapter.)

answered, “The undoubted loyal men of the county look upon all those who voted for Scott as being, to some extent, disloyal...”¹²

This attitude of course maddened Democrats. Jean Baker aptly describes Democrats’ self identification during the war as the “loyal opposition.”¹³ Joel Silbey makes the same point in describing the essential continuity in parties’ oppositional attitudes and habits from 1838 through 1893, with no disruption during the Civil War.¹⁴ Democrats had always seen themselves as loyal Americans, and they still did. So they naturally bristled at Republican wartime assertions that they were traitors. Their idea of loyalty was devotion to the “Union as it was” before the war, under an unchanging constitution. To their mind, Lincoln and Republicans, having embraced transformative war aims after the Emancipation Proclamation, had no legitimate claim to their support.¹⁵

That made Democrats traitors, as far as Republicans were concerned. Adam I.P. Smith argues in his study of Northern politics in the Civil War that the Republican organization, having enlisted war Democrats under the Union Party label, believed that “antipartyism” was the key to national survival.¹⁶ By that logic, opposition to Republican candidates was tantamount to opposition to the Union’s existence. This presented Border

12. *Id.* at 124. On the recommendation of the investigating committee, the House decided the election contest in Scott’s favor. HOUSE COMM ON ELECTIONS, JAMES LINDSAY VS. JOHN G. SCOTT, H.R. REP. NO. 117, 38th Cong., 1st Sess., (1864).

13. Baker, *Affairs of Party*, 132-140.

14. Silbey, *The American Political Nation*, 139.

15. Bense, *The American Ballot Box*, 225.

16. Smith, *No Party Now: Politics in the Civil War North*, 160-162. In his discussion of antipartyism, Smith provides a useful historiography on the debate about whether partisan conflict helped or hurt the Northern war effort. Smith himself carves out a hybrid position, embracing some but not all of the competing arguments of Eric McKittrick (who argues that two-party conflict helped the war effort) and Mark E. Neely, Jr. (who argues that it was a hindrance). *Id.* at 158-162.

State Democrats with a Hobson's choice: fall in line with Republicanism or accept the label "traitor." Naturally they resisted.

The problem extended beyond the Border States. In Ohio, a Union soldier purportedly threatened to hang a Democrat returning from a party rally unless he took a loyalty oath and promised not to vote for the Democratic candidate.¹⁷ In an election in Indianapolis early in 1863, Democrats claimed that soldiers who appeared at the polls gave license to Republican thugs intimidating Democratic voters.

The appearance of the soldiers was the signal for loud talk and bluster on the part of the bullies who always frequent such places.... Men who held Democratic tickets...were compelled to leave. If they hesitated, it would be proclaimed that they had uttered a disloyal sentiment and the mob would run howling after them. The soldiers were used by the cowardly political tricksters for this purpose.¹⁸

The takeaway for Democrats was that where voters were subject to military oversight Democrats faced disfranchisement by virtue of being Democrats. How could absentee soldier voting possibly be fair in such an atmosphere, they surely wondered. If military authorities abused their power in civilian elections, Democrats reasoned, they would surely cheat with soldier voting as well. Democrats saw evidence of that inclination, first, in illegal voting by soldiers stationed or furloughed in Northern states. In a story headed "Election Carried by Palpable Fraud," The *Detroit Free Press*, a vigorously pro-Democratic paper, described voting irregularities at a local election in Detroit's 10th Ward in November 1863. Soldiers from the local provost guard had voted in large numbers, and Democrats alleged fraud. At a hearing called to investigate the allegations, a lieutenant testified that he led the troops to the polls and that before leaving

17. Shankman, "Soldier Votes and Clement L. Vallandigham," 97.

18. Cincinnati *Daily Enquirer*, April 9, 1863.

the barracks, “I distributed the republican ticket to all that marched out of the gate; I did so in obedience to orders.” The lieutenant added, “My own politics are democratic and always have been.”¹⁹ A few days later, still covering the story, the *Free Press* published a copy of an order from the captain commanding the provost guard unit to his troops. It said, in part, “While your commander would not attempt to dictate the manner in which the members of the Provost Guard shall vote, I may, perhaps, say, that it is very desirable, in fact, our duty, to sustain the *administration*, both by *word and deeds*.”²⁰

Democrats made similar complaints about local elections in New Hampshire and Harrisburg, Pennsylvania, in 1863. The Detroit *Free Press* and the like minded Cincinnati *Enquirer* both published at various times a copy of a damning 1862 military order stating, “By order of the President, the following officers are hereby dismissed [from] the service of the United States: ... Lieut. A.G. Edgerly, 4th New Hampshire Volunteers, for circulating copperhead tickets.”²¹ Republican troops from New Hampshire, they claimed, received preferential furloughs to travel home to vote. (New Hampshire’s absentee soldier voting law was not yet in effect.) Meanwhile, Democrats asserted, Democratic troops stationed in Harrisburg who enjoyed voting rights as local residents, were ordered away from town the night before the election so that they could not vote. “When it suits their purposes,” the Cincinnati *Enquirer* complained, “as in the case of the late New Hampshire election, an entire regiment are sent home to vote the

19. Detroit *Free Press*, January 27, 1864.

20. Detroit *Free Press*, February 3, 1864, (emphasis in the original).

21. Detroit *Free Press*, September 3, 1864; Cincinnati *Daily Enquirer*, April 15, 1863, November 11, 1864.

Abolition ticket, and an entire company are sent away from Harrisburg because they desire to vote at her municipal election for the Democratic Union.”²²

Democrats took their outrage over this military heavy handedness to Congress, where in 1864 Democratic senators introduced a bill to require federal troops on election days to stay at least a mile from the polls and prohibiting them “by force or threat or intimidation” from interfering with civilian voting.²³ Democratic Senator Saulsbury of Delaware, a strong advocate of the legislation, described his own voting experience. “And at the previous election in my State, I, sir, had to vote under crossed bayonets; soldiers were stationed at the polls, and at some of the voting places peaceable citizens were assaulted by your soldiery.”²⁴ He added that by interfering with free civilian elections, “Mr. Lincoln is but following in the footsteps of Caesar.”²⁵ Senator Powell, a Democrat from Kentucky, added that he had seen an officer “arrest two citizens for exercising the right of suffrage and put them in prison.” He added that other military officers “went and took their pens and struck from the poll-book every Democratic candidate.”²⁶ Democrats added to the record a litany of specific allegations of this sort from a lengthy report a Delaware legislative committee had prepared.

Unmoved, Republicans defended the need for loyalty oaths in Border State elections. It was a staple of Republican dogma, in the words of historian Mark Neely, “that large and dangerous groups of disloyal citizens lurked in the North during the war,”

22. *Cincinnati Daily Enquirer*, March 26, 1863.

23. Denominated “S 37” as introduced in the Senate, the bill was entitled, “A Bill to Prevent Officers of the Army and Navy, and other persons engaged in the military and naval services of the United States, from interfering in elections in the States.” CONG. GLOBE, 38th Cong., 1st Sess. 101 (1864).

24. *Id.* at 102.

25. CONG. GLOBE, 38th Cong., 1st Sess. 1282 (1864).

26. CONG. GLOBE, 38th Cong., 1st Sess. 101 (1864).

and Republicans perceived an even stronger peril in the Border States.²⁷ Senator Wilson of Massachusetts saw loyalty oaths as a matter of simple necessity for elections in Border States, where so many citizens had confederate sympathies. Senator Howard of Michigan argued that soldiers had the duty to prevent disloyal people from voting as a safeguard against “the pollution of the ballot box.”²⁸ Republican newspapers supported this view. The *Chicago Tribune* argued that loyalty oaths were needed to keep Confederate soldiers from entering the Border States to vote. “The rebels would be glad to vote for McClellan against Lincoln, if they could do so without taking the oath of allegiance.”²⁹ Besides, Republicans noted gleefully, McClellan himself, as a general earlier in the war, had deployed troops to state election sites in Maryland to prevent, in the words of his order, “an attempt at interference with ... rights of suffrage by disunion citizens.” McClellan had even authorized his troops carrying out the order to “suspend the *habeas corpus*.”³⁰

While they had no great appetite for the bill, most Republicans found it hard to defend military “intimidation” and “coercion” of civilian voters, which the bill proposed to forbid. So they watered the bill down with an exception that permitted the presence of troops “when necessary to keep the peace at the polls.” The Senate then passed the bill on June 28, 1864. House Republicans helpfully avoided voting on the bill before the fall

27. Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), xii.

28. CONG. GLOBE, 38th Cong., 1st Sess. 3159 (1864).

29. *Tribune* (Chicago, IL), September 14, 1864.

30. CONG. GLOBE APPENDIX, 38th Cong., 1st Sess. 71 (1864).

elections, then passed it quietly on February 1865, probably aware and contented that it no longer mattered.³¹

Increasingly, these experiences with pro-administration bias in the military taught Democrats to doubt that their candidates had a fair shot at garnering soldier votes in the field. Their misgivings colored their reaction to proposed soldier-voting laws. Mindful of the need to project an unambiguously pro-soldier sentiment, Democrats had to temper their attacks on proposals to let absent soldiers vote. We can see the absorption of this lesson by New York's Governor Horatio Seymour, a Democrat. In response to the soldier-voting bill presented to him for signature in 1863, which he vetoed, Seymour argued that soldier voting, apart from its unconstitutionality, was antithetical to republicanism and to military effectiveness:

The great danger is that if the soldier is allowed to vote upon matters of governmental policy, he will be rendered corrupt and licentious, and instead of lending strength to the Government to suppress the rebellion, he would be the means of increasing disorder and confusion.... The moment that the door is thrown open to political influences in the army, that moment there is danger that the troops would be rendered worthless as soldiers, and corrupted and depraved as citizens.³²

The 1863 election in Pennsylvania showed how, in the hands of Republican propagandists, that argument was risky to articulate in public, too easily characterized as denigrating the character of soldiers. Absorbing that lesson, Seymour signed the soldier-voting bill passed in the New York legislature in 1864, following a constitutional

31. CONG. GLOBE APPENDIX, 38th Cong., 1st Sess. 3158 (1864); CONG. GLOBE, 38th Cong., 2nd Sess. 1007 (1865).

32. *The New York Times*, April 19, 1863.

amendment, even though the policy objections he made in the above-quoted passage in 1863 should have applied with equal force to the 1864 bill.

Democrats persisting in their opposition adopted two tactics more nuanced than outspoken resistance, both designed to weaken the appeal of the proposed laws. First, they publicized the legal battles in other states over the constitutional issues raised by the laws' opponents and suggested whenever they could, without clearly saying, that soldier voting was generally illegal. Second, they published accounts of military electoral abuses, hoping their readers would conclude that new soldier voting laws would inevitably lead to more abuse.

In February 1863, with a proposed soldier bill under consideration in Columbus, the pro-Democratic Cincinnati *Daily Enquirer* reported that the supreme courts in Pennsylvania and Connecticut had found their respective soldier voting laws unconstitutional, adding that "experience has shown in Iowa, Wisconsin and Illinois how the party in power can commit gross frauds upon the soldiers' elective franchise by threatening with with (sic) bad treatment if he does not vote the Abolition ticket, and promising the officer promotion if he would exert his influence for it...."³³ Later the same month, the paper published an account of soldier voting irregularities in a St. Louis election, punctuating its report with the reminder that "In Iowa and Wisconsin similar frauds were perpetrated, by which Abolitionists were elected to office."³⁴ In March, the paper reported that a legislative committee in Michigan had tabled a proposed soldier voting law there, finding it was unconstitutional. As if to encourage readers to see that

33. *Cincinnati Daily Enquirer*, February 6, 1863.

34. *Id.*, February 22, 1863.

Ohio would be in good company if it too rejected the proposed soldier voting law, the paper added that Ohio law (without soldier voting) “is not materially different from what it is in Michigan.”³⁵ In April, two days before Ohio enacted its law, the *Daily Enquirer* reprinted a story from a pro-Democratic paper in Connecticut about bias in granting furloughs to troops from that state. Military authorities in Virginia, the Connecticut paper claimed, “will not permit [even] one of the Democratic soldiers to come back to vote; but they send a couple thousand of Republican soldiers back here for that purpose. The War Department has agreed to aid this scheme.”³⁶

The next day, the Cincinnati *Daily Enquirer* reported that an Iowa court had ruled that state’s soldier voting law unconstitutional. In the same edition, the paper bristled defensively when a rival, the Sandusky *Register*, accused it of merely pretending to favor soldier voting. The paper answered its critic by begging the question in a way that failed to disguise its antipathy to soldier voting laws. “The *Enquirer*,” said the paper about itself, “is in favor of legal voting and opposed to illegal voting. Where a soldier has a right under the law of the State to vote, we are in favor of his voting; when he has no right to vote, we are opposed to it. Can the *Register* understand this distinction?”³⁷

The pro-Democratic Detroit *Free Press* behaved much the same way during the special legislative session in January and February 1864, when that state’s soldier voting law was under consideration in Lansing. The paper ran a succession of stories detailing alleged election fraud in Detroit’s 10th Ward (discussed above). On January 16, 1864 the

35. *Id.*, March 19, 1863. Michigan finally enacted its soldier voting law the following year, on February 5, 1864.

36. *Id.*, April 11, 1863.

37. *Id.*, April 12, 1863. The Iowa Supreme Court upheld that state’s soldier voting law later that year. *Morrison*, 15 Iowa at 304.

paper responded to criticism from the pro-Lincoln Chicago *Tribune*, which stated, “The democrats take a very queer position in this thing of voting by soldiers. It does not seem to occur to them that they are belying the very name by which they seek to be known.... Could they control the case as they wish, not a soldier would be allowed to cast his vote for any candidate to office, State or national.” The *Free Press* responded defensively in an editorial,

the party in power not only can but has made use of the army for furthering its own partisan schemes.... [O]nly such newspapers are allowed to circulate as may be favorable to the Washington authorities.... Could there be an elimination of all undue influences to control the soldiers’ vote for any particular party, there would be no more vigorous supporters of extending the fullest possible voting privileges to every soldier in the army than the democracy.³⁸

The paper could barely conceal its antipathy toward soldier voting in an editorial a few days later. “If the right of suffrage can be *constitutionally* extended to our soldiers in the field,” the editorial said defensively, “we have no objection to its being done....”³⁹ When Democrats’ complaints about the unconstitutionality of soldier-voting laws rang hollow, as they did in states where Republicans proposed to amend constitutions to accommodate absentee voting, Democrats shifted the rationale for their opposition. In Connecticut, for example, Democrats who had opposed that the state’s first soldier-voting law on grounds of unconstitutionality persisted in their opposition even after Republicans launched a successful drive to amend the constitution. Now the problem was that voting soldiers would do the bidding of their despotic commander-in-chief. They would become “the armed cohort of despotism,” they claimed, and “the effect of their voting was like the

38. *Detroit Free Press*, January 16, 1864.

39. *Detroit Free Press*, January 20, 1864 (emphasis in the original).

disgraceful sale of the imperial purple by the praetorian guard in the latter days of the Roman Empire.”⁴⁰

As 1863 wore on, Democrats saw more and more hard evidence vindicating their misgivings about soldier voting. The severity of the problems they faced became unmistakably clear in the 1863 election for governor of Ohio, the first election in which Ohio’s soldiers could vote in the field. The Democratic candidate was Clement Vallandigham, from the extreme anti-war wing of the party and an outspoken critic of the war. To anti-war Democrats, Vallandigham was a genuine martyr, a victim of a bullying central government that the misguided war had so predictably spawned. But to many Ohio soldiers, allowed to vote in the field by Ohio’s 1863 law, he was a detestable traitor. He won 42% of the home votes and 39% of the overall votes, but only 5% of the soldier votes.⁴¹ The victorious candidate, John Brough, had been a pro-war Democrat before the Republicans (who renamed themselves the Union Party during the war) nominated him in preference to an incumbent who was unpopular with the troops. Still, Vallandigham supporters and conservative Democratic organs blamed the disproportion of the soldier votes on actions they claimed federal officials had taken to keep Democratic newspapers out of the soldiers’ hands and on coercion and intimidation of the troops. The Cincinnati *Enquirer* printed a soldier’s letter claiming that officers had cancelled furloughs of soldiers favoring Vallandigham and threatened to charge them with disloyalty.⁴² In a letter to an Akron newspaper, a Union captain admitted that he would have destroyed

40. As quoted in Benton, *Voting in the Field*, 177.

41. Shankman, “Soldier Votes and Clement L. Vallandigham,” 88, 104.

42. *Id.* at 98.

Democratic tickets if they had been sent to his camp. “I would have thrown them into the fire; ... I never would be caught peddling tickets for a traitor.”⁴³ Indeed, evidence suggests that while Unionists had no trouble distributing their campaign materials, Democratic tickets and Democratic newspapers often failed to find their way to the troops. “There are about one-half the troops in this department who would vote the Democratic ticket,” wrote one Ohio soldier, “if they could only get a Democratic newspaper occasionally.” A Cincinnati newspaper reported that army officials stopped Democratic operatives trying to supply Democratic tickets to Ohio regiments, viewing them as “Vallandigham missionaries.”⁴⁴

Democrats could not complain that fraud in the soldier vote tipped the balance in the 1863 Ohio elections. The returns showed that Vallandigham would have lost by six percentage points (instead of twenty two) even if all the soldiers who voted had cast their ballots for him.⁴⁵ Nevertheless, there were stunning disparities between civilian support for Vallandigham – 42% overall – and his far lower support among absent soldiers. As Arnold Shankman shows in his county-by-county analysis of the returns, Vallandigham won, in Williams County, Vallandigham garnered 40% of the civilian vote and less than 1% of the soldier vote. In Mahoning County, the numbers were even more unlikely: 43% of the civilian vote and 0.2% of the soldier vote. In two counties, Lake and Paulding, Vallandigham did not garner even a single soldier vote.⁴⁶ These outcomes heightened

43. *Id.* at 99.

44. *Id.* at 95.

45. The total vote for Brough was 288,761, of which 41,467 were soldier votes. Vallandigham had 186,672 total votes, of which 2,298 were soldier votes. Shankman, “Soldier Votes and Clement L. Vallandigham,” 104.

46. Shankman, “Soldier Votes and Clement L. Vallandigham,” 103-104.

Democrats' growing fears that their candidates faced substantial and corrupt disadvantages trying to win the soldier vote. They worried that even with a well-liked military figure like McClellan heading the ticket, Democrats might be unable to overcome these disadvantages.

Democrats increasingly relied on the military's electoral abuse as a campaign theme in itself, hoping to rouse enough indignation to overcome the campaign's more fundamental difficulties. A plank of the party's campaign platform condemned military interference with civilian elections as a "shameful violation of the Constitution."⁴⁷ And party newspapers complained more and more stridently about cheating in the soldier vote. "All those who have served in the army," asserted the pro-Democratic *Detroit Free Press* in an editorial, "know how easily men who are independent in their views can be put out of the way, on detached service, on picket duty, as sentries."⁴⁸ They found ample evidence to support their complaints, and they enlisted the voice of soldiers to present the evidence. In October 1864, a soldier reported in a letter to the *Detroit Free Press* about abuse meted out to Democratic troops. "Two soldiers hurraed for McClellan," he wrote, "and they put them under arrest, a barrel was hung on their shoulders all day, and at night they were sent to the front...."⁴⁹ A colonel in a Michigan unit reportedly told his men,

If, after [the] election, I discover that a single non-commissioned officer of my regiment has voted for McClellan, I will reduce him to the ranks. Every private in this regiment that votes for McClellan shall hereafter in every fight be sent as near the front as I can send him, that he may receive the compliments of his friends, the rebels.⁵⁰

47. Porter, *National Party Platforms*, 59.

48. *Detroit Free Press*, October 25, 1864.

49. *Detroit Free Press*, October 14, 1864.

50. *Detroit Free Press*, November 7, 1864.

How routinely Democrats actually suffered these alleged abuses is unclear, but modern scholarship backs up the Democrats' grievances anecdotally. Richard Bense, Joseph Allen Frank, and William Frank Zornow marshal substantial evidence that Democratic soldiers indeed suffered systemic discrimination. "Soldiers cared passionately about the outcome of an election," Bense observes, "knew exactly how their comrades voted, and carried guns (regularly using them to kill other men). In such a situation, it is not at all surprising that few votes cast in the army opposed the Republican Party."⁵¹ In his study of the intensity of radical political sentiment within the army, Frank confirms Bense's assessment, describing episode after episode in which soldiers were prosecuted or punished for speaking disrespectfully about Republican political leaders. Officers often took it as their duty to monitor the political attitudes of their subordinates and to induce soldiers to exercise their new absentee voting rights in favor of the administration, Frank demonstrates. Not only did Republican commanders routinely block distribution to the troops of Democratic newspapers and Democratic ballots, but they also imposed career penalties on Democratic officers who dared speak out publicly against the administration, according to Frank. Enough were arrested and dismissed for doing so to chill dissent within the officer ranks generally.⁵² In his study of Lincoln's reelection effort, Zornow confirms Frank's point, arguing that by 1864, Union officers had come to understand that allowing their names to be linked with McClellan's "was to lose all chance of advancement."⁵³

51. Bense, *The American Ballot Box*, 219.

52. Frank, *With Ballots and Bayonets*, 102, 120, 133, 137-140.

53. William Frank Zornow, *Lincoln & the Party Divided* (Norman, OK: University of Oklahoma Press, 1954), 200.

While Democrats continued publishing stories about these abuses throughout the election season, coverage on both sides increasingly took cognizance of actual voting results as the November elections approached. In September and October 1864, with the national election just around the corner, Ohio, Pennsylvania, and Vermont, held elections for Congressional seats or state office under new state laws permitting their absent soldiers to vote. New York and Vermont soldiers began voting in the field for president and vice president over a period of several weeks before the November 8 general election. The results trickling in from this early voting provided hard evidence that Republicans would handily win the soldier vote in November.

During the final few weeks of the campaign, papers for both parties gave these state elections extensive coverage. Republican papers covered them with a tone of triumph. Day after day, they reported pro-Republican returns from soldier voting in the field. Reporting that Republican candidates had outpolled Democrats 285 to 9 in one Vermont brigade, the *Chicago Tribune* gloated, “Our brave soldiers evidently know what they are voting for.”⁵⁴ Democrats, in contrast, pointed to the early results to harden their theme that Republicans were stealing the soldier vote. Lincoln operatives in the post offices, they claimed, intercepted McClellan ballots sent home from the front under New York’s law and replaced them with Lincoln ballots. They reported that one Pennsylvania soldier, after casting his McClellan ballot in the field and sending it home to his proxy, as Pennsylvania’s new law provided, returned home on unexpected furlough in time for the actual election. Canceling his proxy so he could vote locally, he discovered that someone

54. *Tribune* (Chicago, IL), September 18, 1864.

had switched his ballot to a vote for Lincoln.⁵⁵ A wounded New York soldier, similarly home on furlough after forwarding his McClellan proxy from the field, made the same discovery.⁵⁶ Speaking of in-the-field voting by Ohio and Pennsylvania troops, a Democrat on the scene complained, “It is a notorious fact that any soldier or teamster could have voted at the polls here yesterday, if he intended to vote the so-called Union ticket, without any question being asked with regard to his right to vote at all.”⁵⁷

Democrats reported abuses in the navy, as well. A New York sailor on blockade duty claimed that on the day appointed for voting on the ship, naval officers told the assembled sailors, “That if they wanted to vote for the present administration they might vote, but if they wished to vote to the contrary they could not be allowed the privilege.”⁵⁸ Occasionally Democrats couched their objections to these purported abuses in threatening language. In a Philadelphia speech in which he lamented the fiscal damage Lincoln’s policies were inflicting on the country, John Van Buren turned his attention ominously to the issue of soldier voting:

The Republicans intend to defeat General McClellan, they say, by the soldiers, and they do not conceal the fact that they will do it by fraud. But you cannot cheat the soldiers. If they are not heard, and if their votes don’t reach Washington, it is probable their muskets will.⁵⁹

Everywhere Democrats reiterated their complaints that military authorities denied Union soldiers access to Democratic newspapers or election tickets. An Ohio soldier

55. *Cincinnati Daily Enquirer*, November 3, 1864.

56. *Id.*, November 7, 1864.

57. *Detroit Free Press*, October 16, 1864.

58. *Detroit Free Press*, October 31, 1864. Joseph Allan Frank compiles additional evidence from the field substantiating the proposition, in his words, that officers “made sure that Democratic ballots never reached the troops.” *With Ballot and Bayonet*, 140.

59. *The Press* (Philadelphia, PA), October 8, 1864.

voting in Vicksburg wrote to complain, “Notwithstanding that one-half of the voters of the battery were Democrats, ‘Union’ tickets were produced in abundance, and runners employed to distribute them, whilst not a single Democratic ticket could be seen anywhere.”⁶⁰ Another complained, “We get nothing to read here but abolition papers; please send me something sound to read, and oblige a friend.”⁶¹ A Democratic reporter from New York wrote with a tone of authority from Washington, “We charge, and it can be proved, that letters from democrats here to soldiers in the army, containing McClellan electoral tickets, have been opened, the McClellan tickets taken out and Lincoln tickets put in.”⁶² A pro-McClellan soldier from New York echoed this theme with a particular note of desperation. “Send me more tickets. Terrorism is attempted in my company and throughout the regiment.”⁶³

Much of the attention of the press in the last month of the 1864 campaign focused on celebrated cases in Indiana and New York, in which hard evidence substantiated allegations of systematic fraud, though not all of it by Republicans. Indiana had no soldier-voting law. In the governor’s race, Republican incumbent Governor Oliver Morton, a pro-Lincoln stalwart, stood for reelection. The election took place in October, and both parties viewed the battle as an early opportunity to influence the outcome of November’s presidential contest by proving Lincoln’s strength or weakness. Morton won handily, and Democrats cried foul. They cited two forms of Republican mischief. One, which Democrats believed their rivals used in all states lacking provision for soldier

60. *Cincinnati Daily Enquirer*, November 6, 1864.

61. *Id.*, October 4, 1864.

62. *Detroit Free Press* November 1, 1864.

63. *Cincinnati Daily Enquirer*, November 1, 1864.

voting, was to discriminate in the granting of furloughs, arranging for Republican soldiers to return home to vote and leaving Democratic soldiers in the field, disfranchised. The other was to use soldiers to stuff ballot boxes. Secretary of War Stanton issued a furlough order neutral on its face, directing that “all sick and wounded soldiers of Indiana” receive furloughs and transportation home “to enable them to exercise the elective franchise at the State election.” But Democrats saw skullduggery in the implementation. “What a frightful wrong was done to the Democracy,” howled the Cincinnati *Daily Enquirer*, “and to fair play, and to free institutions, in furloughing the sick and wounded Indiana soldiers! ... The complaint is, that it was so carried out, that *no soldier was allowed to go home to vote who would pledge himself to vote for Morton*.”⁶⁴ The *Detroit Free Press* echoed the complaint. “Republican soldiers have been furloughed by thousands and sent home to vote, while democratic soldiers have been kept in the field on duty and refused furloughs.”⁶⁵

Arriving at the Indiana polls, Democrats asserted, the soldiers stuffed the ballot boxes. According to the Cincinnati *Daily Enquirer*,

On election day a train of three cars filled with soldiers – not one of whom probably was entitled to vote – passed over the railroad from Toledo to Kendallville, and the men voted at four different places. The three cars would contain at least 175 men, each of whom voting four times would make 700 votes.... It is by such means that the Democrats have been beat, not in this District alone, but throughout the state.... Morton and his whole state ticket were partakers in the fraud.⁶⁶

64. *Cincinnati Daily Enquirer*, October 20, 1864 (emphasis in the original).

65. *Detroit Free Press*, October 23, 1864.

66. *Cincinnati Daily Enquirer*, October 22, 1864.

The *Detroit Free Press* joined in the complaint. “In one place a whole regiment of Massachusetts soldiers voted, and in other places soldiers voted several times round, without disguising it.”⁶⁷ In his study of soldier voting, Oscar Winther published soldier letters corroborating the Democratic charge. One soldier writing to his brother asked,

Did you ever attend an election out west? It is a big thing! The people are more enlightened, of course; it is a natural consequence that there is more liberty and freedom than in Massachusetts and benighted lands; so much so that people vote as many times as they please, and allow their friends to do the same, provided they are “sound on the goose.” It is estimated that the Sixtieth Massachusetts Regiment cast about 6,000 votes for Governor Morton last Tuesday. And I know that some boys in Company I voted ten and twelve times each one.⁶⁸

Another Massachusetts soldier claiming to have voted in Indiana bragged, “Some of the boys voted twenty-five times each....”⁶⁹

A pro-McClellan political cartoon (shown below) tapped into racial resentments in depicting fraud in soldier voting. Entitled, “HOW FREE BALLOT IS PROTECTED,” it depicts a clownish African-American soldier, a flask of whiskey on his hip, pointing his bayonet in the direction of a crippled veteran who wants to vote for McClellan. The black soldier addresses the veteran, “Hallo, dar! you cant put in dat you copperhead traitor, nor any oder ‘cept Massa Lincoln.” The veteran retorts, “I am an American citizen and did not think I had fought and bled for this. Alas my country!” In the background, two election workers look on. One says, “I’m afraid we shall have trouble if that soldier is not allowed to vote.” The other responds, “Gammon, Hem just turn around. You just pretend you see nothing of the kind going on, and keep on counting your votes.”

67. *Detroit Free Press*, October 22, 1864.

68. Winther, “The Soldier Vote in the Election of 1864,” 453.

69. *Id.*

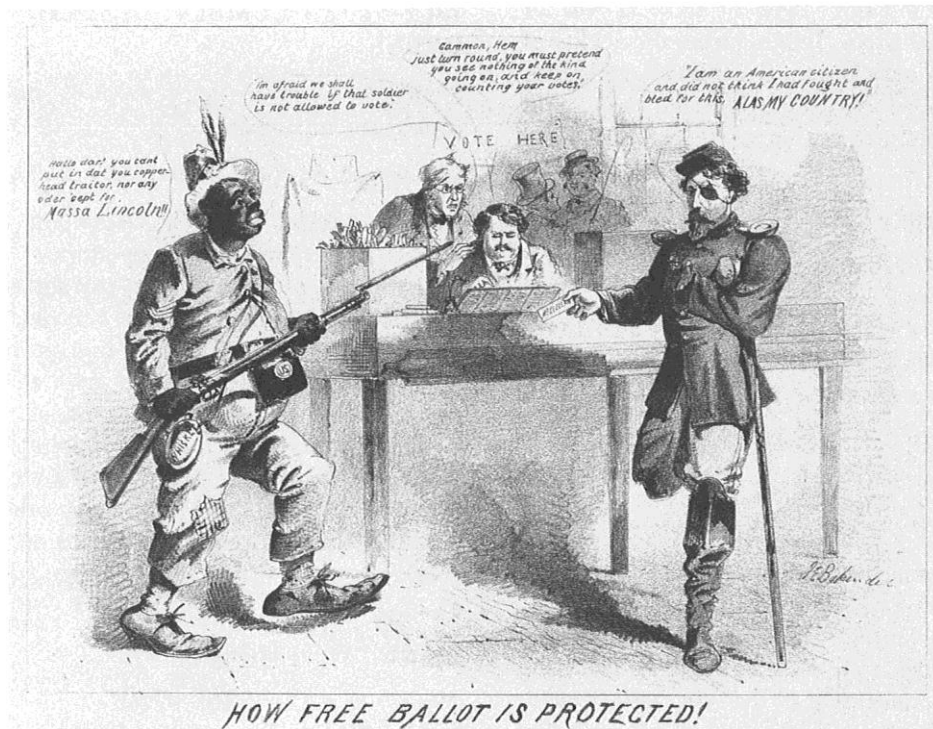


Illustration by J.E. Baker, *How free ballot is protected!*, 1864, Library of Congress, Prints and Photographs Division, Collection: Cartoon Prints, American, Reproduction Number: LC-USZ62-89606.

Republicans had the upper hand in the blizzard of fraud charges and countercharges growing out of the New York soldier vote in the weeks shortly before the November 1864 election. That state's law provided for shipping sealed soldier ballots from the field to the soldier's home district, there to be cast by a proxy designated by the soldier. In two separate cases, federal authorities arrested agents stationed (one in Baltimore, another in Washington) to receive and forward soldier ballots from the Army of the Potomac. In one case the defendant, Moses Ferry, an appointee of New York's Democratic Governor Seymour (himself a candidate for reelection), confessed to forging the names and ballots of soldiers, some of them dead. He was convicted and served a prison term. The other case resulted in acquittal. Republicans pounced on both cases as

proof of endemic Democratic cheating. Reminding readers that Seymour had used his veto to tailor the New York law to his liking, Republicans charged that he had designed the law to facilitate exactly the kind of cheating that occurred. After summarizing the law's complicated procedures and claiming that its complexity "opens the widest door to fraud," the pro-Lincoln *New York Times*, in an editorial just five days before the election, pinned the responsibility on Seymour. "The Union men in the New York Legislature passed the bill because they could not get a better [one], as it was openly declared that Gov. Seymour would veto any bill unless it accorded in all respects with his own views."⁷⁰ A few days later, directing its scorn at Seymour, the *Times* asked its readers rhetorically, "What security have honest men under an administration [i.e., Seymour's] elected by forging the votes of dead soldiers, swindling the living of their suffrage, and importing Butternuts from Canada and Missouri to carry the elections by force and fraud?"⁷¹

Democratic papers defensively claimed that Republicans had trumped up the charges in New York and that administration lackeys had coerced the confessions. They went so far as to assert that federal agents intercepted the shipped ballots in order to substitute phony Lincoln ballots for genuine McClellan votes. "Of course they have been seized by Lincoln's agents," wrote the Cincinnati *Daily Enquirer* in a tone suggesting that only the naïve could expect otherwise. "Lincoln ballots will be put in the place of McClellan ballots, and the soldiers will be cheated of their votes."⁷² But the Republicans

70. *New York Times*, November 3, 1864.

71. *New York Times*, November 8, 1864.

72. *Cincinnati Daily Enquirer*, November 3, 1864. The *Detroit Free Press* published several stories to the same effect. See, for example, November 1, 2, and 6, 1864.

had the better of the debate on the New York soldier vote. To the extent that fraud and cheating by the military had become a centerpiece of the Democrats' campaign by September and October, the New York case severely weakened their argument as well as their prospects in November.⁷³

When Republicans weren't bragging about winning the early soldier vote in September and October 1864 or about Democratic fraud in the early New York soldier vote, they accused Democrats of standing in the way of soldier voting laws wherever they could. Indeed, of the six Northern states without laws for soldier voting in 1864, four had Democratic legislatures. In particular, Delaware, New Jersey (McClellan's home state), Illinois, and Indiana each had Democratic legislatures and no soldier voting law.⁷⁴ The pro-Lincoln Chicago *Tribune* made much of this fact in its effort to undermine the Democrats' appeal to soldiers and to associate Democrats with the rebellion. In an editorial, the *Tribune* vilified the legislatures of Illinois and Indiana for not having provided for soldier voting. Referring to the legislators, the paper proclaimed, "These bodies of men set themselves at work to aid their Southern partners in every way their

73. In other states, too, Republicans tried to steal the Democrats' thunder about fraud in soldier voting. The pro-Lincoln *Tribune*, citing "trustworthy sources," described an elaborate Democratic cheating scheme in Ohio. "Their plan is to vote early in the day in citizen's dress, and then at a later hour don a soldier's uniform, and smuggle into the ballot box another vote, either at the same or some adjoining poll, under the control of their friends." *Tribune* (Chicago, IL), November 3, 1864. Republicans also alleged Democratic fraud in Indiana. While they cited no instances of pro-Democratic fraud by soldiers, they did cite enough cases of fraud in the civilian vote to feel justified in brushing aside the Democratic allegations about fraudulent soldier voting there. After one recital of various frauds committed by Democrats, the pro-Lincoln *Tribune* concluded scornfully, "In the face of these unblushing frauds, the Copperhead press have the audacity to coin stories of Republican frauds in Indiana." *Tribune* (Chicago, IL), November 1, 1864.

74. As elaborated in Chapter 1 and in the Appendix, Illinois would eventually enact such a law, but not until 1865. Oregon had no soldier voting law, but also had almost no soldiers serving. (Winther, "The Soldier Vote," 448.) Massachusetts was the exception that proved the rule, having failed to enact a soldier-voting law notwithstanding Republican control of state government. According to Benton, state Republicans inexplicably neglected to mobilize efforts to amend the state constitution to authorize absentee voting. (Benton, *Voting in the Field*, 293-294.)

ingenuity could invent, and their courage dare undertake. They spent half of their sessions in plotting to carry these States out of the Union.”⁷⁵ The paper later published a letter from an Illinois soldier stationed in Memphis, who claimed that he and his colleagues “would like to show our friends at home that we are for ‘Uncle Abe,’ first, last and *all* the time. Although we have not the privilege of casting our votes at the November election for any candidate. For which our Legislature will please accept our *everlasting* contempt.”⁷⁶ The *Tribune* blasted the Indiana legislature in another editorial that chided Democrats for complaining about the votes of furloughed soldiers and claimed that Republicans, not Democrats, were cheated in the Indiana vote.

In order still more effectively to bind the slaves hand and foot at the feet of Jeff Davis, [Democrats] disfranchised so far as they could [the] 150,000 soldiers of Indiana, by preventing them from voting at the post of duty, and compelling them to turn their backs to the rebels in order to face the copperheads.... Many thousands of brave Indiana boys were actually disfranchised by these professed advocates of ‘free elections’”⁷⁷

While no available measure of public opinion reveals how much damage Democrats suffered in the debate about soldier voting, the party clearly never found a way out of the box the issue put it in. On the one hand, Democrats lost when soldiers voted, because Republicans undoubtedly cheated at least some of the time and because most voting soldiers genuinely preferred Republican candidates, who favored fighting the

75. *Tribune* (Chicago, IL), September 16, 1864.

76. *Tribune* (Chicago, IL), October 2, 1864 (emphasis in the original). In the same vein, the *Tribune* later published a “resolution” adopted by a unit of Illinois soldiers stationed in Missouri who wanted the Illinois governor to grant them furloughs to return home to vote. The “whereas” clause of their resolution stated, “WHEREAS, The Legislature of the State of Illinois, at its last session, failing to make any provision for soldiers in the field to exercise their right of suffrage....” *Tribune* (Chicago, IL), October 22, 1864.

77. *Tribune* (Chicago, IL), October 13, 1864.

war until the Confederacy surrendered. On the other hand, Democrats also lost when they opposed soldier voting, however muted their opposition, because Republicans then painted them as anti-soldier or even pro-rebel, an image Democrats desperately sought to avoid. So Democrats equivocated about soldier voting laws and hoped their incessant charges of Republican cheating would anger voters enough to overcome the Republican advantages. It was a futile hope.

Finally, it is worth reflecting on whether Democrats' assertions of administration cheating in the soldier voting find anything more than anecdotal support. Some interesting evidence deserves more attention than it has received. In his examination of voting data, James McPherson concluded that half the soldiers who entered the Civil War as Democrats ended up voting for Lincoln in 1864.⁷⁸ He reached his conclusion by juxtaposing two pieces of fairly hard data. First, 40% to 45% of Civil War soldiers entered the war as Democrats, leaving 55% to 60% who entered as Republicans. Second, Lincoln won 78% of the total soldier votes. Assuming that Lincoln must have won virtually all the 55% to 60% cohort who were Republicans, McPherson reasons that Lincoln must have won about half the Democratic soldier votes in order to have reached the 78% total.

This demonstrates sound arithmetic, but dubious logic. McPherson's calculation holds water only if we also assume that soldiers of both parties participated in the turnout in proportions equal to their representation in the army. If, in other words, 40% - 45% of soldier who voted were Democrats (equal to their percentage of the army population),

78. McPherson, *For Cause and Comrades*, 176-7.

then indeed Lincoln could not have won 78% of the total soldier vote without winning the votes of half the voting Democratic soldiers. What if relatively fewer Democratic soldiers voted, either because they had no enthusiasm for either candidate or because, as so many alleged, their Republican officers and fellow soldiers interfered with their voting rights? In that case, with Republican soldiers overrepresented in pool of the absentee voters, Lincoln's 78% of the total looks less impressive. This possibility, which McPherson left unexplored, finds some support in the fact that turnout among soldiers was indeed low.⁷⁹ In the Army of the Potomac, for example, out of about 120,000 soldiers, only about 19,000 voted (13,500 of them for Lincoln).⁸⁰ The exigencies of war explain this in part; we know that implementation of absentee for widely dispersed and mobile military units faced logistical challenges that voting precincts back home never encountered. This undoubtedly held down turnout. Moreover, some of the 120,000 soldiers were ineligible to vote, including African-Americans, soldiers younger than twenty-one, and those from states that lacked soldier-voting laws. But coercion and interference surely played at least some part in the low turnout and therefore at least some part in Lincoln's lopsided victory among voting soldiers.

McPherson is not alone in slighting evidence supporting Democrats' complaints of injustice in the soldier vote. Oscar Winther, whose article remains an essential resource for any examination of soldier voting, similarly gives short shrift to evidence of fraud. While describing the New York cases and episodes of Republican fraud in

79. In a separate examination of the soldier vote, McPherson states, without elaboration, that the soldier vote in 1864 "was about as fair and honest as 19th-century elections generally were, and Lincoln's majority was probably an accurate reflection of soldier sentiment." McPherson, *Battle Cry of Freedom*, 805, note 69.

80. Winther, "Soldier Voting," 454.

Indiana, he ignores the countless newspaper accounts of Republican fraud elsewhere, stating without explanation or citation that evidence of abuse “is very meager.”⁸¹

In fact, it is far from meager. It abounds. We see it in the countless lamentations of frustrated Democratic soldiers describing their personal experiences in letters to newspapers back home. We see it in the boasting of Republican soldiers who saw nothing particularly wrong in cheating at the expense of disloyal “Copperhead” candidates. We see it in the unanimous and bipartisan opinion of the Pennsylvania Supreme Court finding rampant fraud in absentee soldier voting in the case of *Hulseman and Brinkworth v. Rems and Siner*.⁸² And, where county-by-county voting data are available, as in Ohio and Michigan, we see it in the implausibly lopsided disparities between the low Democratic share of votes in the field – as low as 0% in some Ohio counties – compared to their far higher share of the home vote in those same counties.⁸³

This not to say that Democrats lost a great many contests they would have won but for fraud in the soldier vote. It is hardly debatable that substantial majorities of Union soldiers genuinely preferred Lincoln to McClellan, but Lincoln would have beaten McClellan even if “Little Mac” had won all the soldier votes. Still, we have seen that the soldier vote was decisive in some down-ballot elections, as shown in the court decisions reviewed in Chapter 2. Soldier-voting fraud in those and similar cases very likely turned some Democratic wins into losses. And in the larger messaging war, in which

81. *Id.*

82. *Hulseman*, 41 Pa. 396 (1861). The case is discussed more fully in chapter 1.

83. Shankman, “Soldier Votes and Clement L. Vallandigham,” 88, 104. Similarly, a Democrat newspaper in Clearfield, Pennsylvania reported after the 1864 election that McClellan won the county’s civilian vote by better than two to one (2762-1371) while losing the soldier vote by more than four to one (135-30). Clearfield *Democratic Banner*, Nov. 30, 1864.

propagandists used the ostensible preference of soldiers to influence civilian votes, the indirect cost of losing the soldier vote was even bigger.

More importantly, the reality of corruption in at least some of the soldier vote illuminates the dilemma Democrats faced. The issue of soldier voting handicapped Democrats in the “politics of soldiers” of 1863-1864, cornering them in a predicament they could not escape. They could afford neither to support nor to oppose soldier-voting laws. Starting in the 1863 Curtin-Woodward gubernatorial contest in Pennsylvania, Democrats learned that Republicans would tar them as anti-soldier when they even appeared to oppose soldier-voting laws. That was a heavy burden to bear in the politics of soldiers of 1863-1864. On the flip side of the lose-lose coin, Democrats learned that when such laws took effect, their candidates would not win among voting soldiers. They believed that their candidates’ poor showing in the soldier vote resulted from successful and corrupt efforts by the military command structure to tilt the playing field. This was undoubtedly less true than Democrats imagined; at least a majority of soldiers truly favored republican candidates, as scholars from James McPherson to Joseph Allan Frank amply document. But Democrats were not entirely wrong about the fraud committed at their expense.

And right or wrong about the fraud, the loss in the soldier-vote count inflicted a double whammy on Democrats. The direct cost meant, of course, fewer Democratic votes in the tally of total votes that determined winners and losers. The indirect cost meant that Republicans, pointing to the ostensible preference of soldiers for Republican candidates, could present those candidates to *civilian* voters as the “friend of the

soldiers.” In the politics of soldiers, this advantage may have had greater importance in electoral outcomes than the relatively meager number of direct soldier votes. It weakened Democrats’ efforts to rebut Republican claims that McClellan (and Democrats generally) were traitors; that McClellan was unsoldierly and inept; and that McClellan was a coward. And it weakened their attack themes against Lincoln: that he was an incompetent commander-in-chief; that he neglected his troops; and that he subordinated the well being of white soldiers to his pro-Negro policies.

Soldier voting, in short, served as a political trap for Democrats. They found no way to escape.

CONCLUSION

War has always been a crucible for suffrage reforms in American history. The Revolutionary War ushered in a liberalization of suffrage rights in favor of otherwise unqualified men who provided military service either in the continental army or in state militias.¹ The War of 1812 sparked a surge in popular demands for suffrage expansion, accelerating erosion of the property qualification in many states.² All three of the U.S. Constitution's suffrage amendments occurred against the backdrop of a major war: the 15th amendment (African-American men) followed the Civil War, the 19th (women) followed World War I, and the 26th (eighteen year-olds) was adopted during the Vietnam War. The Soldier Voting Act of 1942 gave absent soldiers limited voting rights during World War II.³ The Voting Rights Act of 1965 was propelled in part by World War II, the Korean War, and the Cold War.⁴

In each case, war mattered in catalyzing the suffrage change. In surveying the development of political rights from the colonial period through the Reagan era, Marc Kruman notes the importance of war. "War has shaped legislative decision-making regarding political rights," Kruman writes. "The Revolution, the Civil War, World War I, and the Vietnam War all sparked dramatic changes in suffrage qualifications."⁵ Alexander Keyssar, picking up on Kruman's observation, makes much the same point about the striking correlation between war and expanded suffrage in American history.

1. Williamson, *American Suffrage from Property to Democracy*, 82-83.

2. J.R. Pole, "Representation and Authority in Virginia from the Revolution to Reform," *The Journal of Southern History* 24, no.1 (February 1958): 33; Keyssar, *The Right to Vote*, 35.

3. Katznelson, *Fear Itself: The New Deal and the Origins of Our Time*, 195-222.

4. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61-120 (1988).

5. Kruman, "Legislatures and Political Rights," 1235.

Indeed, in Keysaar's view war played a greater role in shaping American democracy than other, more celebrated factors, such as the dynamics of the frontier.⁶

The invention of absentee voting opportunities during the Civil War fits the pattern, though uneasily. Keyssar suggests, in agreement with Chilton Williamson, that the needs of national security have sometimes motivated suffrage expansions benefiting soldiers or veterans, on the theory that rewarding soldiers in this way would facilitate military recruiting for the next war.⁷ That is not a satisfactory explanation of the soldier-voting phenomenon in the Civil War. If facilitating future recruiting had been a significant motivator for these laws, one might expect that at least some of the constitutional amendments authorizing absentee voting for soldiers to have extended voting rights to some disfranchised soldiers, including non-citizens, men under 21, and African-Americans. None did. And one would expect states to have preserved the soldier-voting laws after the Civil War. Most did not. Moreover, recruiting goals find little or no expression in the evidence.⁸

An alternative to Williamson's and Keysaar's theory fits the soldier-voting phenomenon better. It roots the connection between war and suffrage in an enduring political culture with ancient antecedents. That culture treats citizen-soldiers as special, holding a uniquely powerful claim on national affection and accommodation. In her study of women's efforts to gain access to positions in the armed forces, Linda Kerber quotes a

6. Keyssar, *The Right to Vote*, xxi. See also, Krebs, *Fighting for Rights*.

7. Keyssar, *The Right to Vote*, 37, 137; Williamson, *American Suffrage from Property to Democracy*, 82-83.

8. Josiah Benton, whose book examined the legislative history of every soldier-voting law in every state, cites no mention of it in his study, and no evidence of it surfaced in the contemporary newspaper accounts reviewed for this project.

toast offered during a celebration of the first anniversary of the Declaration of Independence. “May only those Americans enjoy freedom who are ready to die for its defense.” In a similar spirit and a similar setting, John Jay’s wife, Sarah Livingston Jay, offered this toast at a ball celebrating the conclusion of the Revolutionary War: “May all our Citizens be Soldiers, and all our Soldier Citizens.”⁹ Another scholar aptly characterizes the battlefield as “the proving ground of national belonging.”¹⁰ Again and again America has confirmed the priority of soldiers’ claims on the rights of citizenship by elevating its military heroes – from Washington to Eisenhower – to the presidency. Democrats in 1864 hoped to tap into that heritage when they nominated George McClellan for president.

The symbiosis between citizenship rights and military service in American political culture and political theory may help account for the country’s strong appetite for permitting absent Civil War soldiers to vote, even when doing so meant abandoning or diluting the tradition that had always connected elections physically to a place in a community. Yet in at least three ways the Civil War soldier-voting phenomenon fits at best awkwardly within this broader pattern. First, unlike every other example in the pattern, this one involved no enlargement of the circle of qualified voters. Without exception, soldier-voting laws gave a new right – the right to vote away from home – only to men who already qualified as voters under their prewar state constitutions. Soldiers constitutionally excluded from suffrage, by race, citizenship, or age, for

9. Kerber, *No Constitutional Right to Be A Lady*, 236, 240.

10. Matthew Frye Jacobson, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917* (New York: Hull and Wang, 2000), 248.

example, remained excluded under the new laws. Even the eight states that amended their constitutions to eliminate obstacles to absentee voting preserved prewar exclusions that left intact the prewar disfranchisement of many soldiers.

A second area of difference, related to the first, is that unlike propertyless men, African-Americans, women, and young people who pushed to break down barriers to their voting rights, Civil War soldiers did not provide the main impetus for soldier-voting legislation. To be sure, soldiers spoke out harshly against politicians who opposed the new laws. But, for understandable reasons, there is a notable dearth of evidence of soldiers' clamoring for the right to cast absentee ballots. While arguably disfranchised by their (often involuntary) absence from home, these men enjoyed voting rights at home. They were not outside the community of full citizenship in the same way as African-Americans and women were, for example, so they had correspondingly less to fight for in the way of suffrage rights. Moreover, the enactment of absentee voting rights was a mixed blessing for soldiers. The alternative to absentee voting under a soldier-voting law was something even better from their perspective: returning home to vote on furlough. Soldiers cherished furloughs, which thousands of them received precisely because their states had not enacted soldier-voting laws allowing them to vote in the field.¹¹ The enactment of such laws must have disappointed a good number of servicemen who would have preferred a furlough's respite from the hazards and drudgery of military life. No wonder, then, that grass roots support for the laws among absent soldiers was muted.

11 . McSeveney, "Re-electing Lincoln: The Union Party Campaign and the Military Vote in Connecticut," 147.

A third area of dissonance between the Civil War soldier-voting phenomenon and the broader pattern of linkage between war and suffrage was in the duration of the change. The 15th, 19th, and 26th Amendments, as well as the Voting Rights Act of 1965, brought permanent expansion of voting rights within the federal sphere of law they occupied. States found ways to frustrate the spirit of the federal initiative in the case of the 15th Amendment, but there were no post-war retreats from the initiatives within federal law.¹² The change wrought by the soldier-voting laws, in contrast, was more fleeting. Only five of the twenty soldier-voting arrangements that came into existence during the Civil War survived very long past the war. The relatively short life span of most of these laws calls into question whether the soldier-voting phenomenon qualified as a reform at all. Why would states endure the legal and constitutional upheavals associated with enactment only to erase the laws from the books shortly after the war?

Putting aside for the moment the parties' obvious political appetite for the votes of absent soldiers, and taking contemporary proponents at their word, an important object of the laws was simple justice. In state after state, as we have seen, a rallying cry for enactment was that justice to soldiers (albeit only soldiers who already qualified for suffrage) demanded it. Some advocates cited the requirements of justice directly. Others did so indirectly by decrying the "disfranchising" effect of not passing such a law; as applied to white males, the very word "disfranchise" spoke for itself as a synonym for injustice. But if simple justice demanded a loosening of election rules to accommodate the absence of the states' best citizens, why cancel the accommodation at this war's end?

12. Keyssar, *The Right to Vote*, 106-107, 267.

Future wars with future absent soldiers would demand the same accommodation. While the Civil War era laws (including those that expired after the war) set precedents for soldier-voting laws enacted during subsequent wars and in that way laid the groundwork for future justice, in the short term the innovation did not survive in most states.¹³ It fizzled out with the end of hostilities, calling into question the degree to which the pursuit of justice explains the phenomenon.

The demands of justice were certainly part of the picture, as was the immediate political appetite for the votes of absent soldiers. But the picture becomes more complete only when it takes account of the role played by the unique circumstances of national politics in 1863-1864, dubbed here the “politics of soldiers.” Quite apart from their importance as voters, soldiers enjoyed unequalled credibility in communicating the core messages of both parties to civilian voters, which is why both parties enlisted the voice of soldiers in their messaging wars. For Republicans, the core messages were that Democrats were disloyal and that McClellan was both incompetent and a coward. For Democrats, the themes were Lincoln’s ineptitude as a commander-in-chief and his neglect of white soldiers. Servicemen spoke with authority on all these subjects, making them ideal spokesmen for the parties’ messaging.

The parties learned in 1863, particularly from Pennsylvania’s gubernatorial contest between George Woodward and Andrew Curtin, that the politics of soldiers required the parties to project affinity with servicemen and to stake a claim as “the soldiers’ friend.” Support for soldier-voting laws served that end, while opposition risked

13. Miller, *Absentee Voter and Suffrage Laws*, 35.

being labeled the soldiers' enemy. By late 1863, both parties recognized that reality, but only Republicans could act on it with unalloyed support for the laws. Experience showed both parties that Republicans would garner the lion's share of soldier votes, either (as Republicans would have it) because soldiers genuinely favored Republican candidates or (as Democrats would have it) because Republicans used the army's command structure to cheat. Either way, the issue was a winner for Republicans. Democrats lost the soldier vote in states that enacted soldier-voting laws, and they appeared hostile to soldiers when they opposed enactment, costing them civilian votes. With Republicans wielding greater power than Democrats in state governments, and with Democrats boxed in defensively on the issue, soldier-voting laws swept the country in 1864. Even more important than the votes this yielded for Lincoln and Republicans from soldiers in the field, it helped cement Republicans' status as the soldiers' friend, to the party's great advantage among civilian voters in the politics of soldiers.

The politics of soldiers ended with the war. In most states, the novel legal arrangements for absentee voting by soldiers collapsed at about the same time, with no allowance for reactivation in future wars, notwithstanding the abstract demands of justice for soldiers of those wars. This underscores not only the power of the politics of soldiers briefly to effect radical change, but also the atavistic pull of the prewar communal habit of elections. Absent the imperatives of the politics of soldiers, postwar election forms moved not in new directions hinted at by the short-lived novelty of absentee voting for soldiers – toward portable, individualized voting rights so familiar to modern Americans – but back to where they started before the novelty. Communities were back in charge for

all voters, with all voters expected in time-honored fashion to appear in person before local election supervisors and in the presence of their neighbors. It would take the better part of another century, and more wars, for absentee voting to take hold as a routine part of American elections.

The modern perspective of “rights consciousness” may color current perspectives on the soldier-voting phenomenon, inviting the conclusion that it was a generally modest and conservative shift, or even a missed opportunity for genuine reform. It did not enlarge the electoral franchise beyond prewar limits, and it did not effect lasting change in the direction of making suffrage a portable and personal right. The late constitutional scholar Ronald Dworkin observed about modern political thought that the “language of rights now dominates political debate in the United States.”¹⁴ A student of that phenomenon, Hendrik Hartog traces rights consciousness to “an American emancipatory tradition of constitutional meaning” that began with passage of the Civil War constitutional amendments and has become in modern times “the most salient and interesting feature of American public culture.”¹⁵ Rights consciousness has left its mark on the historiography of American election law, as well. The closest thing to a comprehensive survey of that subject, Alexander Keyssaar’s *The Right to Vote*, brings this perspective to the subject, treating the general (though unsteady) shrinking of disfranchisement over time as the essential fact of voting rights.

14. As quoted in Thomas L. Haskell, “The Curious Persistence of Rights Talk in the ‘Age of Interpretation,’” *Journal of American History* 74, no. 3 (December 3, 1987): 988.

15. Hendrik Hartog, “The Constitution of Aspiration and ‘The Rights That Belong to Us All,’” in *The Constitution and American Life*, ed. David Thelen (Ithaca: Cornell University Press, 1988), 357-359.

Measured by the standards of rights consciousness and Hartog's "emancipatory tradition," the Civil War soldier-voting phenomenon indeed emerges as a halting, mostly conservative step in the evolution of election law. For groups disfranchised before the war, there was nothing "emancipatory" about it, since all those groups remained disfranchised even with the laws' enactments. To the extent that it enlarged voting opportunities for some (already enfranchised) citizens, that enlargement was short-lived. By this reckoning, the soldier-voting phenomenon was small potatoes, a footnote in the legal history of voting.

But that perspective blinds us to the contemporary radicalism of the legal and constitutional phenomenon. Rights consciousness presupposes personal autonomy in voting, so a "reform" that leaves intact prior exclusions from the franchise and merely enlarges the geography within which an enfranchised elector may exercise his electoral autonomy may seem to change the "right to vote" hardly at all. Soldier-voting laws, however, did not take the personal autonomy of enfranchised voters as a point of departure. To the contrary, we may properly view the laws as inventing the notion of voters as fully autonomous actors, transforming (albeit only temporarily) an earlier and very different idea of the role of the individual voter in the election process.

Ohio Supreme Court Justice Rufus Ranney captured the before and after contrast in his dissenting opinion in *Lehman v. McBride*. The picture of voting after the law, to Ranney's chagrin, was as a "personal privilege, carried by the elector wherever he may go and properly exercised wherever he may be." (Ranney qualified "personal privilege" in this passage with the adjective "mere," signaling his sense that this effect of the law

was self-evidently unsatisfactory.) The contrasting pre-legislation picture of voting, which Ranney saw as constitutionally required, was “the *joint* performance of a high public duty” at a public gathering of electors in their place of residence. Far from being a personal and individual power, Ranney said, the constitutional right to vote is “a *public franchise*, belonging to the whole community, conferred upon about one fifth of its members, to be exercised for the common benefit of the whole, and under such proper safeguards against abuse and perversion, as the fundamental laws of the community have provided.”¹⁶

This view of the nature of voting, which Ranney believed the Ohio law unconstitutionally altered, is antithetical to a rights conscious claim on the franchise by individual, autonomous actors. It is also ubiquitous in the arguments mounted against absentee voting. The new laws’ supporters did not disagree with the opponents’ characterization of prewar elections; they simply saw nothing constitutionally compelling about that prewar reality. If legislators wanted to alter the relationship between community and voter, even risking greater fraud by doing so, that was their prerogative unless constitutional text expressly and unambiguously tied their hands, which in most states they believed it did not.

One need not agree with Ranney’s conclusion that Ohio’s soldier-voting law’s departure from prewar election legal norms was unconstitutional to agree with him that it was radical. Its radicalism, however, lay not in any change it wrought in *who* could enjoy the franchise. Instead its radicalism lay in the law’s transformation of what an election

16. *Lehman*, 15 Ohio St. 631, 649 (italics in the original).

was. The law upended the prewar notion of the right to vote as a collective possession controlled by the community where it took place, replacing it – temporarily and for a limited few – with the very different notion that voting rights were personal, to be wielded individually and portably. It was a change that the yardstick of rights consciousness is ill equipped to measure, making it correspondingly easy for modern observers to overlook.

Even allowing for a weakening of migratory Americans' attachment to communities in the first half of the nineteenth century, it took a force of considerable power to displace the longstanding identification of an election as a communitarian process with a fixed location in the voter's hometown.¹⁷ The politics of soldiers from 1863-1864 carried sufficient power to accomplish the displacement, but not enough to accomplish it permanently. When the politics of soldiers ended, the prewar communitarian sense of elections reasserted itself, and arguments about the demands of justice for future soldiers in future wars were too remote to resist its reassertion.

Rights consciousness also helps obscure the role local residency requirements played in the prewar way of voting. All sides of the debate agreed that a soldier's temporary absence from home did nothing to weaken his status as a resident of his hometown for suffrage purposes. Proponents of the laws viewed the residency qualification as bearing only on *who* could vote, such that a soldier meeting the qualification could vote anywhere the legislature allowed. That view corresponds to the

17. Joel Silbey, Alexander Keyssar, and Kenneth Winkle all attribute political effects to the ubiquity of migration over the course of the nineteenth century. Silbey, *The American Political Nation*, 148-149; Keyssar, *The Right to Vote*, 300; Winkle, *The Politics of Community*, 48-70.

modern rights conscious way of thinking: the important fact about residency is that it reflects the autonomous elector's choice about where to participate as a citizen; once earned the qualification travels with him. Opponents viewed it very differently. They agreed that the voter's choice of residency was critical to identifying the place where election judges applied the yardstick of the durational minimum set by law as a precondition to voting. But they also saw the residency qualification as serving a communal purpose. As the cases evaluating the constitutionality of soldier-voting laws demonstrate, these men saw residency requirements as having come into existence not to provide individuals with a choice of where they could "belong" as citizens, but to help communities preserve electoral "purity." The residency qualification provided a policing mechanism to assure, in the words of Justice James Campbell of Michigan, that each individual elector participate "at his own place of abode, [where] his neighbors will know his person, and will be likely to know his qualifications."¹⁸ Of course, that policing mechanism presupposed that the voter would appear personally to cast his ballot at the local voting site. Separating the locus of balloting from the place of residence arguably disabled the policing mechanism. That either violated the constitution by rendering suffrage qualifications unenforceable – "eviscerating" them, as Rufus Ranney, Isaac Christiancy, and like-minded justices would have it – or it was a matter of mere "policy and expediency," for legislators to adjust in light of exigencies that wise constitutional

18. *Twitchell*, 13 Mich. at 123, 144.

construction should accommodate, as Michigan's Chief Justice George Martin and the laws' other judicial supporters would have it.¹⁹

Neither view supports a modern interpretation that soldier-voting laws relaxed residency qualifications. They did no such thing. The laws' legal significance was their departure from the communal tradition of voting embedded in prewar law and generally restored in post-war law. The brief but irresistible pull of Civil War politics, and particularly the politics of soldiers, explains the temporary legal upheaval.

19. *Id.* at 185.

APPENDIX

This appendix describes the Civil War soldier-voting laws, state by state. It divides the states that allowed absent soldiers to vote into four groups. Iowa and Minnesota constitute the first group. They established the two prevailing models of absentee voting: opening election sites in the field (Iowa), and sending soldiers' sealed ballots home from the field (Minnesota). All other states adopted forms of one or the other model (except Pennsylvania, which adopted both). The second group consists of the nine states that enacted soldier-voting laws and that achieved statehood before 1800. They are labeled here the "Senior States." The novelty of absentee voting faced higher constitutional hurdles in these older, mostly eastern states than it did in the eleven newer, generally more westerly states that achieved statehood between 1800 and 1864. All nine had to either amend their constitutions to accommodate absentee voting (in four instances after a court found the statute unconstitutional, and once after a governor's veto), or limit absentee voting to elections for federal offices (twice in response to court rulings against laws with a broader scope), or both. Not a single high court in this group sustained a soldier-voting law against constitutional challenge. Moreover, three of the eleven Northern states organized before 1800 never enacted a soldier-voting law at all (Massachusetts, New Jersey, and Delaware). And only one of the soldier-voting laws enacted in these senior states survived long after the war (New Hampshire).

The post-1800 states that provided for soldier voting (other than Iowa and Minnesota) comprise the third group, called here the "Junior States." Only two Northern states organized after 1800 never provided for absent-soldier voting at all during the Civil

War (Indiana and Oregon). The enacted laws when challenged in these younger states were sustained by three of the five high courts that reviewed them. And four of the country's five soldier-voting laws that lasted well past the war are from these junior states (Kansas, Maine, Michigan, and Nevada).

The tougher constitutional sledding for soldier-voting laws in the pre-1800 states compared to the younger group likely owes to the longer habits in the older states of traditional, communal ways of voting. Traditional elections had deeper roots in these mostly eastern states, and that older tradition collided more joltingly with the novel concept of absentee voting. Judges in the older states were correspondingly more likely than their counterparts in the post-1800 states to give constitutional weight to historical experience. They were more likely to search history for definitions of words that framers used in state constitutions, words like "election" and "vote." History was shorter in newcomer states, of course, so the weight of tradition interfered less with legislative innovations.

Grouping the states this way risks overstating the differences between them. The line demarking one group from the other is hazier than the categorization may suggest. The invention of absentee voting was a legal innovation in the junior states, even if the innovation there collided with constitutions less frequently than in the more senior group. And a degree of contingency accounts for some of the difference. For example, we cannot know whether the Wisconsin Supreme Court's unanimous decision upholding that state's soldier-voting law resulted from legislative intimidation, as one scholar suggests. By amending the law to permit absent soldiers to vote in judicial elections, historian

Frank Klement argues, the legislature put a finger on the scale of justice, pressuring the jurists into supporting the new law out of political self-interest. And perhaps the Minnesota statute would have faced fatal judicial scrutiny if the losing Democratic candidate for the state's congressional seat had pursued an election contest. Instead, he backed off when the Republican press threatened to ruin him politically by branding him anti-soldier. That law never faced a test in the high court. Moreover, the California high court, in striking down that state's law, blurred the boundary between old and young by looking to the history of eastern states in defining words in California's 1849 constitution. California settlers imported their legal understandings from the states of their origins, ruled Chief Justice Lorenzo Sawyer, and in those eastern states, an elector could "vote" only by being personally present in his local residence. Sawyer concluded that California's framers had in mind that definition of "vote" when they drafted the state constitution.

So, while the senior-junior taxonomy is not problem free, it remains true as a general proposition that the novelty of soldier voting survived the gauntlet of constitutional challenge more successfully in the junior states than in the senior states to east, a distinction that the differing weight of election-law history at least partly explains.

A subset of the junior group are three "outlier" states: Missouri, where the soldier-voting provision arguably lacked legitimacy because it came into existence non-legislatively during an internecine war that destroyed civil government; Nevada, which entered the union barely a week before the 1864 elections and did so with a jerry-rigged

soldier-voting provision of debatable legitimacy; and Illinois, which enacted a soldier-voting law only in 1865, when it no longer mattered politically.

THE MODEL STATES

Iowa and Minnesota

All soldier-voting laws adopted one of two models, designated here as the Iowa and Minnesota models. (Pennsylvania adopted a hybrid of both models). Laws following the Iowa model provided for election sites to be set up in military encampments where soldiers served. Laws following the Minnesota model allowed absent soldiers to complete their ballots and forward them back to their voting precincts to be counted with civilian ballots.

The choice of Iowa as a model for its form of absentee voting is debatable. Pennsylvania had enacted a soldier-voting law in 1813 that called for establishing voting sites “in the field” for absent Pennsylvania soldiers. So, while the state supreme court set that law aside early in 1862 before any other state had acted, the 1813 law arguably deserves the honor of designation as a model. Missouri provided for absentee voting before Iowa did, following a similar model, but Missouri acted non-legislatively and arguably illegitimately in doing so.

As the first state to adopt this model legislatively during the Civil War, Iowa gets the nod as the model for purposes of this survey.

Iowa

The Hawkeye State enacted its soldier-voting law on September 11, 1862, the first state legislature to do so during the war.¹ Voting under the law occurred at election sites created “at every place where a Regiment, Battalion, Battery or Company of Iowa soldiers may be found or stationed.”² That formulation effectively excluded sailors in the navy, since naval organization included none of the listed designations. But all other servicemen were covered, including not just volunteers, but also every “soldier in the military service of this state or the United States.” That included draftees and army regulars. This coverage provision also specified surgeons and chaplains.³ By an 1864 amendment, the state added hospitals to the locations where absentee voting locations were to be set up.⁴

Setting the template for many military suffrage laws, this one dictated that the provisions of the general election law would apply to voting in the field, “so far as applicable, and not qualified by the provisions of this Act.”⁵ The law specified the elections in which Iowa’s absent soldiers were eligible to vote. With the exception of a few county-level offices (constables, county and township supervisors, and justices of the peace), the law’s absentee-voting mechanism applied to elections for all state, federal, and local offices.⁶ This included elections for presidential and vice-presidential electors.

1. An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service, to Vote at Certain Elections, ch. 29, 1862 Iowa Acts 28.

2. *Id.* at § 8.

3. *Id.* at § 2.

4. An Act to Amend Chapter 29 of the Laws of the Extra Session of the Ninth General Assembly, ch. 28, § 2, 1864 Iowa Acts 26, 27.

5. *Id.* at § 6.

6. *Id.* at § 5.

Polling sites were to be opened for each Iowa regiment. If that failed to make it “practicable for all to vote together,” as when part of the regiment was on “detached service,” then the detached unit could open its own polling site.⁷ The eligible Iowa soldiers at each site elected three election judges, who in turn appointed election clerks. The only qualification was that the judges (though not necessarily the clerks) had to be eligible Iowa voters.⁸ That meant they had to be white males, at least 21 years old, U.S. citizens, with at least six months of residence in Iowa and 60 days of county residency.⁹

As in elections back home, judges and clerks swore oaths, promising among other things to “studiously endeavor to prevent fraud, deceit and abuse” in the election.¹⁰ To assist the election judges and clerks, the law provided for commissioners to travel from Iowa with necessary election paraphernalia: copies of the law, forms of poll lists and returns, and the text of oaths to administer to judges, clerks, and challenged voters. Commissioners also carried the election returns back home to Iowa.¹¹ The commissioners, appointed by the state census board, had to be qualified electors. They were assigned one per regiment, although the law authorized the governor to supplement that allocation with more commissioners if he thought it necessary. Commissioners had to swear an oath that included the promise to perform their responsibilities “without

7. *Id.* at § 9.

8. *Id.*

9. *Id.* at § 1.

10. *Id.* at § 11.

11. *Id.* at §§ 25, 26.

reference to political preferences,” and, like election judges and clerks, to “studiously endeavor to prevent fraud, deceit and abuse.”¹²

The statute specified the information that each ballot had to include, starting with the voter’s home county and followed by the preferred candidate’s name for each office. The ballot had to be on a single piece of paper, though it could cover a long list of offices. The offices up for election, and the preferred candidates names, could be printed in advance on the ballot (assuming that the party organization found a way to deliver such prepared ballots to the military camps) or written by hand by the voter.¹³

Soldiers announced themselves to the judges and clerks, by name, county of residence, and military attachment. The clerks entered all this information in the poll books.¹⁴ If no one challenged the voter, the soldier placed his ballot in the ballot box.¹⁵ If there was a challenge, the judges administered an oath to the soldier testing all elements of eligibility – U.S. citizenship, state and county residency, and age. (As to age, the oath read, “Do you solemnly swear ... that you are twenty one years of age, as you verily believe?”) If the soldier swore the oath, his vote was accepted.¹⁶

At the close of voting, the judges tallied the votes, the clerks double-checked the tally, and the judges entered the final result on the return form. Then the returns, together with the poll books and ballots, were given to a commissioner (or if no commissioner was

12. *Id.* at §§ 29, 30; An Act to Amend Chapter 29 of the Laws of the Extra Session of the Ninth General Assembly, ch. 28, § 1, 1864 Iowa Acts 26, 26.

13. An Act to Amend Title IV of the Revision of 1860 so as to Enable the Qualified Electors of this State in the Military Service, to Vote at Certain Elections, §15. In two states, Minnesota and Connecticut, the soldier-voting laws expressly allowed commissioners to carry ballots to the states’ military encampments, but only if the political parties provided the ballots. (See discussion of those states, *infra*.) Iowa’s statute did not so state.

14. *Id.* at § 16.

15. *Id.*

16. *Id.*

on hand, placed in the mail “or other safe mode”) for delivery to the Board of Canvassers in Iowa. There the results of the soldier voting were added to the civilian results to determine election winners.

In the elections of October 1862, shortly after enactment of Iowa’s law, a losing candidate for clerk of the district court in Iowa County challenged the statute’s constitutionality. He relied on the way the state’s constitution articulated the requirement of county residence. Eligibility, the 1857 constitution said, required that the citizen have been for at least 60 days a resident “of the county in which he claims his vote.”¹⁷ This, argued the challenger’s counsel, fixed the required location of the voting. To “claim” his vote, according to the lawyer’s argument, a citizen had to be physically present at the voting site in the county.

The case went to the Iowa Supreme Court, which ruled in 1863 that the law was constitutional.¹⁸ Justice George Wright, a Republican, wrote the court’s unanimous opinion.¹⁹ Justice Wright turned away the challenger’s argument, ruling that the disputed constitutional language defined *who* could not, but did not fix *where* he could vote. The word “claim” meant that a voter could not claim to be an elector of a county other than the county where he resided, but it did not mean that he had to be physically present in the county when he voted. The legislature was free to set the “time, place, and manner” of voting, including out-of-state locations, Wright concluded. With some modesty,

17. IOWA CONST. of 1857, art. II, § 1.

18. *Morrison*, 15 Iowa at 304.

19. “George Grover Wright.” Biographical Directory of the United States Congress. Accessed May 29, 2013. <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000759>.

Wright allowed that the issue was a close call, but the court's duty was to call close questions in favor of a law's constitutionality.²⁰

Two other states' high courts, in reviewing the constitutionality of soldier-voting laws, commented on the Iowa Supreme Court decision. Both found Wright's decision unpersuasive. Vermont's Supreme Court, concluding that the constitution of that state barred absentee voting laws covering state (but not federal) elections, expressly declined to adopt the Iowa court's reasoning, declaring "we are not prepared to say it is sound."²¹ California's high court, in striking down that state's law, said in somewhat harsher language that adopting the reasoning of their Iowa brethren would "throw the whole law relating to the construction of written instruments into hopeless confusion."²²

The Iowa law did not expire by its terms at the end of the war, but soldier-voting provisions were omitted from the state's first post-war codification of its laws in 1880. In fact, the general election law of 1880 stated, "no person is entitled to vote at any other place than in the township in which he resides at the time he offers to vote."²³

Minnesota

Minnesota enacted its soldier-voting law on September 27, 1862. Unlike Iowa, Minnesota did not try to open election sites "in the field," opting instead for a system that

20. *Morrison* 15 Iowa at 348.

21. Opinion of the Judges of the Supreme Court on the Constitutionality of "An Act Providing for Soldier Voting," 37 Vt. 665, 674(1864).

22. *Bourland*, 26 Cal. 161, 206 (1864).

23. IOWA CODE, Ch. 32, § 492 (1880).

allowed soldiers to send completed ballots from their military encampment back home to their election districts in Minnesota. It was the first state to do so.²⁴

Perhaps to preempt anticipated legal challenges, the act's title indulged a legal fiction, pronouncing that the law enabled absent servicemen "to vote in the Election District in which they reside," as if saying it that way made it so. This was a clear effort to conform to the language of the state constitution. In its suffrage provision, the constitution of 1857 stated the local residence requirement in terms that certainly could be construed as requiring the voter's physical presence in his Minnesota election district. It granted the right to vote "in the election district in which he [the voter] shall at the time have been for ten days a resident."²⁵

In Minnesota and the states following its model of military suffrage legislation, soldiers filled out their ballots at the site of their military attachment and forwarded the completed ballot back to their voting district in Minnesota. The law covered military personnel comprehensively, allowing absentee voting by "all persons ... in the military or naval service," provided they were eligible electors "when they mustered into the service."²⁶ This included volunteers, draftees, regulars, and sailors in the navy. The law went a step further, authorizing voting by servicemen who turned 21 during their military service, provided they qualified as residents before enrolling. The law applied

24. An Act to Enable Citizens of this State, who are or may be Engaged in the Military or Naval Service of the United States, to Vote in the Election Districts where they Reside, at the General Election to be held in the Month of November, 1862 and all Subsequent General Elections, during the Continuance of the Present War, ch. 1, 1862 (extra session) Minn. Laws 13. (Hereafter referred to as "Minnesota Soldier-Voting Law of 1862.")

25. MINN. CONST. of 1857, art. VII, § 1.

26. Minnesota Soldier-Voting Law of 1862, § 1.

comprehensively to elections, as well, authorizing absent soldiers to vote in “all” annual elections, starting in 1862, but only “during the continuance of the present war.”²⁷

Commissioners were key to the law’s functioning. The governor, with the advice and consent of the state senate, appointed the commissioners. They were stretched thin, a total of eight commissioners being assigned for all the states where Minnesota servicemen were stationed. By the terms of the law, four commissioners were Democrats and four Republicans.²⁸

The law allowed the two political parties to supply their pre-printed ballots to the commissioners, who then provided the ballots to the voting soldiers. The soldier’s completed ballot would get forwarded home to Minnesota only after he first swore an oath, which a commissioner administered in person. The oath touched on the elements of voting eligibility other than race and gender. It covered age (21), residence (four months in Minnesota and ten days in the election district), and U.S. citizenship. Minnesota was unusually generous in its citizenship qualification for suffrage, enfranchising not only then-current United States citizens, but also foreigners who had declared their “intention to become such citizen, conformably to the laws of the United States on the subject of naturalization.”²⁹ The oath covered both citizenship categories.³⁰

27. *Id.*

28. *Id.* at § 6.

29. MINN. CONST. of 1857, art. VII, § 1. The constitutions of Michigan, Wisconsin, and Kansas similarly allowed prospective citizens to vote. (See discussion of those states, *infra*.) The Minnesota oath did not address the two categories of Native Americans allowed to vote under this section of the constitution. One was “Persons of mixed white and indian blood who have adopted the customs and habits of civilization.” The other was those Indians found by a court to be “capable of enjoying the rights of citizenship within this State.”

30. Minnesota Soldier-Voting Law of 1862, § 3.

The soldier would complete his ballot, place it in an envelope supplied by the commissioner, “seal the same with sealing wax” (also provided by the commissioner), and swear the above oath. The commissioner then signed a form in the nature of a notarization on the back of the sealed envelope. It attested to the name of the soldier, the name of the commissioner, the soldier’s military attachment, the fact that soldier had taken the oath, and the commissioner’s assurance that the soldier’s vote was “free and voluntary.”³¹

The commissioner then mailed the envelope to the soldier’s voting district in Minnesota. The election judges there, after confirming that the soldier named on the envelope was on the district’s voting registry, opened the envelope and added the enclosed ballot to the civilian votes in the ballot box. This meant that there could be no separate tally of the soldier votes.³²

Minnesota’s statute never came under review by the state’s supreme court. According to the leading scholar on this law, a likely court challenge was forestalled when the losing candidate for Minnesota’s congressional seat backed away from his initial intention to contest the election. The candidate, Democrat William Cullen, believed he would have won the election if the soldier vote had been excluded. Cullen started the process of mounting a challenge, then reconsidered when the Republican press had a field day claiming he was anti-soldier.³³ Cullen’s retreat meant Minnesota was one of only five states to have enacted a soldier-voting law without either amending its

31. *Id.*

32. *Id.* § 4.

33. Downs, “The Soldier Vote and Minnesota Politics,” 198-199. Because soldier votes were not tallied separately from civilian votes, Cullen would likely have faced a difficult problem of proving his case if he had proceeded to contest the election.

constitution or experiencing a high court review, or both. The other three states were Kentucky (which forestalled a constitutional challenge by limiting soldier-voting rights to federal elections, an approach which high courts in Vermont and New Hampshire had sanctioned), Missouri (where the soldier-voting law lacked clear legitimacy and courts were unavailable for election contests), Nevada (which became a state only days before the election of 1864), and Illinois (which enacted its soldier-voting law in 1865, when it no longer mattered politically).

Minnesota removed its soldier-voting law in the revision of its statutes in 1868.³⁴

SENIOR STATES

Pennsylvania, Connecticut, Vermont, New Hampshire, Rhode Island,

Kentucky, Maryland, and New York

These eight states became part of the United States before 1800, and all remained in the Union during the Civil War. Between 1862 and 1864, all enacted provisions allowing absent soldiers to vote. All nine had to clear difficult constitutional hurdles to do so. Six of the eight (Connecticut, Maine, Maryland, New York, Pennsylvania, and Rhode Island) did so only after amending their constitutions. The other three (Vermont, New Hampshire, and Kentucky), following a path suggested by the Vermont Supreme Court, avoided constitutional obstacles by limiting absentee voting rights to elections for federal offices. The four state supreme courts in this group that reviewed absentee voting laws

34. MINN. STAT. Ch. 1 (1868).

(Pennsylvania, Connecticut, Vermont, and New Hampshire), all struck down the laws, in whole or in part. (Pennsylvania's and Connecticut's constitutional amendments followed their courts' adverse court rulings.) And in only one state of this senior group did a soldier-voting law survive much past the end of the war. (New Hampshire).

Pennsylvania

The first state to confront the legality of soldier-voting laws was Pennsylvania, the only state in the Union with a soldier-voting law on the books at the outset of the war. That law was first enacted in 1813 and was retained, in a slightly revised form, as a brief section in a comprehensive election law passed in 1839. It allowed absent soldiers "to exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop, or company, to which they shall respectively belong, as fully as if they were present at the usual place of election."³⁵ A precursor to Civil War soldier-voting laws on the Iowa model, it called for election sites to open at the encampments where soldiers served, overseen by officers of each company.³⁶ Before the Civil War, the law never received judicial attention, if indeed it was ever used at all.³⁷ But it was used in elections in 1861, and in some of those elections it was decisive.

35. An Act Relating to the Elections of this Commonwealth, P. L. No. 192, § 43, 1839 Pa. Laws 519, 528 (hereafter cited as "Pennsylvania Soldier-Voting Law of 1839").

36. *Id.* at § 44.

37. In attacking Democrats in general, and Democrat George Woodward in particular, for opposing soldier voting, Republicans in 1864 charged in an election pamphlet that Pennsylvania soldiers had voted under the law during the Mexican War. Chandler, *The Soldiers' Right To Vote*, 8. Neither Josiah Benton nor Jonathan White, in writing about the Pennsylvania soldier-voting law of 1864, corroborate that assertion.

The first challenge to the law that found its way to the state Supreme Court did not call into question the law's constitutionality. In the case of *Hulseman and Brinkworth v. Rems and Siner*, two losing candidates for the Common Council of Philadelphia asked the high court to enjoin the two winning candidates from taking their seats. Election returns from a Pennsylvania regiment stationed in Virginia were decisive in the winners' victory, and the challengers claimed that those returns were entirely bogus. No election had actually occurred at the regiment, the losing candidates asserted, and the returns purporting to show the tally of soldier votes were forgeries.³⁸

The unanimous Supreme Court agreed that forged returns tarnished the election, but it declined to set aside the results. Chief Justice Walter Lowrie, a Democrat, wrote the opinion. He lamented the forgeries as a "gross fraud" and deplored the sorry state of partisan strife, in which "opposing parties treat each other as enemies" who "come to think that tricks and lies, fraud, forgery and perjury are legitimate strategies." But it was not the Supreme Court's job to remedy election fraud, said Lowrie. That job belonged in this case to the Philadelphia Common Council, and the challengers erred in failing to take their challenge to that body before seeking relief from the high court.³⁹

The *Hulseman and Brinkworth* decision did not address the constitutionality of the 1839 soldier-voting law. That issue first came before Pennsylvania's high court in the case of *Chase v. Miller*, discussed in Chapters 2 and 3. In the 1861 race for district attorney of Luzerne County, Democrat Ezra Chase outpolled Republican Jerome Miller among the voters casting their ballots in the county. But Miller handily beat Chase in the

38. *Hulseman*, 41 Pa. at 397.

39. *Id.* at 400-402.

votes of absent soldiers, more than making up his deficit in the home vote. The return judges in Luzerne County, however, excluded the soldier votes and declared Chase the winner.⁴⁰

Miller supporters contested the results, claiming that the return judges should have counted soldier votes as provided in the soldier-voting law of 1839. The lower court judge, a Democrat named John Conyngham, agreed. The exclusion of the pro-Miller military vote, which “disfranchised” soldiers, in Conyngham’s opinion, also flew in the face of the legislature’s decision. Upholding the exclusion “would be a denial of sovereignty,” Conyngham ruled.⁴¹ The decision made Republican Miller the winner. Chase appealed to the state Supreme Court.

Democrat George Woodward authored the high court’s 4-1 decision in May 1862 overruling the lower court and reinstalling Chase as Luzerne County’s district attorney. The court ruled that the 1839 soldier-voting law violated Pennsylvania’s constitution. The decision hinged on the meaning of the suffrage provision of Pennsylvania’s 1838 constitution. Article III, section 1 of that instrument granted voting rights to “every white freeman of the age of twenty-one years, having resided in the State one year, and *in the election district where he offers to vote*, ten days immediately preceding such election....”⁴² The central question was whether the language italicized here imposed a constitutional requirement that voters cast their ballots in person within their

40. *Chase*, 41 Pa. at 414. A fair assumption is that the election officials acted based on their interpretation of the Pennsylvania constitution, but no record of their reasoning has survived.

41. *Philadelphia Inquirer*, January 16, 1862.

42. PA. CONST. of 1838, art. III, § 1, italics added. The same section also conditioned the suffrage on the payment of a tax. Specifically, the prospective voter must have “within two years paid a State or county tax, which shall have been assessed at least ten days before the election....”

Pennsylvania election districts. If so, the legislature acted beyond its authority in authorizing absentee voting. If not – if, in other words, the italicized words merely established *who* could vote, leaving the legislature to establish *where* – then the absentee voting law was a legitimate exercise of legislative power.

Jerome Miller’s lawyers, seeking to have the law upheld, argued that the constitution required only that the ballot ultimately be “polled” (i.e., counted) in the election district where the voter meets the residency requirement. In this interpretation, no matter where a soldier physically cast his ballot, he “offered” his vote in his home election district if his vote was polled there. The legislature could fix the time and place of the soldier’s voting as it pleased. Any other interpretation, Miller’s counsel argued, would frustrate “the great cardinal principle” that the constitution was meant to advance: the right to vote, which “is the corner-stone of the political edifice.”⁴³

Chase’s lawyers, challenging the law’s constitutionality, argued for a different “cardinal principle”: the need to prevent voting fraud. They cited court precedents defining the constitution’s reference to “election district” to mean the place established by law where “citizens assemble to vote.” Each district came into existence by statute as a subdivision of the state, and the legislature could not constitutionally establish a “district” outside Pennsylvania. Nor could a voter qualify to vote in more than one district, Chase’s lawyers argued. The soldier-voting law in effect attempted – unconstitutionally, counsel insisted – to establish, for each eligible soldier, a second location where he could cast his ballot, namely the indeterminate place “appointed by the

43. *Chase*, 41 Pa. at 408.

commanding officer,” in the words of the old statute. Moreover, they asserted, absentee voting would create the very risk of fraud that Pennsylvania election districts existed to prevent. Unlike election judges and inspectors in districts within the state, officers supervising elections in the field were not subject to sanctions of Pennsylvania law and had no way to test the qualifications of voters; they might not themselves even be residents of Pennsylvania or citizens of the United States. In short, Chase’s attorneys insisted, the law invited fraud, in violation of the constitution’s design for assuring “purity” in elections.⁴⁴

Woodward’s decision embraced the constitutional interpretation urged by Chase’s lawyers. He approached the matter as a subject of historical inquiry, an effort to answer the central question based on the meaning the framers of the constitution attached to the text of the instrument. In this he had the advantage of having been one of the framers himself, although his authority on questions of original intent was presumably no greater than James Thompson’s, a fellow Democrat on Pennsylvania’s high court. Thompson too was a delegate to the 1838 convention that drafted the constitution.⁴⁵ He dissented from Woodward’s opinion for the 4-1 *Chase* majority, although, because he did not file an explanatory dissenting opinion, we are left to guess at his reasons.

The framers of the 1838 constitution, Woodward ruled, went beyond deciding *who* could vote (white, 21-year old men meeting residency and taxpaying requirements)

44. *Chase*, 41 Pa. at 406.

45. Woodward participated actively at the convention. On the suffrage provision of the new instrument, Woodward supported the addition of “white” as a qualification for voting. Giving Negroes the vote, he was reported to have said in a convention speech, would “offend against nature.” *Democratic Banner* (Clearfield, PA), August 26, 1863, p. 2; For Thompson’s position as a delegate, see “James Thompson,” *Biographical Directory of the United States Congress*, accessed November 26, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000204> .

and purposely made the precise *place* of elections a constitutional element of suffrage, thereby putting the subject beyond the reach of legislation to alter. The framers did this in Article III, § 1 by linking voting to the election “district” in which the voter met the 10-day residency requirement. It was in that district, and only in that district, that the voter could “offer” his vote by appearing there in person to cast his ballot.

The constitution did not define the word “district,” but by 1838 that word had taken on a clear meaning from the state’s long history of election laws. Year after year, starting long before the 1838 constitution, legislation had specified the places of voting and called those places – always within Pennsylvania, of course – “election districts.” By law, the word had come to mean the location where voters convened to cast their ballots. The framers had that definition in mind when they used the word “district” in Article III, § 1, according to Woodward.⁴⁶

Why did the 1838 framers decide to tie voting rights to election districts for the first time, according to Woodward? It was just the most recent step of a consistent trend in the state’s constitutional history, he wrote. Tracing the evolution of suffrage under the state’s three constitutions – 1776, 1790, and 1838 – Woodward identified a consistent policy of tightening voting practices to guard against fraud. The purpose of fixing voting in election districts in 1838, he said, was to accomplish statewide what Philadelphia had accomplished by creating a voter registry in 1836: a way “to exclude disqualified pretenders and fraudulent voters of all kinds.” Tethering voting to local districts served as

46. *Chase*, 41 Pa. at 421. The constitution did not limit the legislature’s authority to create new districts, Woodward wrote, including a district defined as a specific military encampment within the state, if they wished. But the 1839 soldier-voting law did no such thing. It simply ignored the constitution’s requirement of voting in a district, saying instead that absent soldiers could vote “at such place” as the soldier’s commanding officer shall appoint. This violated Article III, § 1. *Id.*

a mechanism to provide notice of where to vote and, through the presence of “magistrates and constables,” provide a way for the process of voting “to be guarded.” The soldier-voting law offered none of these protections. It “opens a wide door for most odious frauds,” Woodward wrote, by allowing soldiers to vote “where the evidence of their qualifications is not at hand and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast.” All this collided with what Woodward called “the labour of the constitution,” which was to assure that suffrage rights “be preserved from abuse and perversion.”⁴⁷

Woodward treated the fraud attendant on soldier voting not as a hypothetical risk, but as a documented certainty. With the record of the recently decided *Hulseman* case apparently in mind (though he did not cite that case in his *Chase* opinion), Woodward said, “the cases of fraud that have been before us” proved that soldier voting was subject to cheating and manipulation. He was careful to absolve the soldiers themselves from culpability for the fraud, noting – again undoubtedly from the *Hulseman* record – that the actual culprits “were political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law.”⁴⁸

The virtual certainty of fraud in soldier voting, coupled with the framers’ overarching goal to guard against fraud through the device of a local residency requirement tied to election districts, made it clear to Woodward that any law granting

47. *Id.* at 425 - 427.

48. *Id.*

soldiers absentee voting rights was decidedly out of step with the constitution. “We cannot be persuaded that the constitution ever contemplated any such mode of voting,” he wrote in concluding that the law could not stand.⁴⁹

How did Woodward square that statement with the fact that by 1838, when the constitution was drafted, a voting law for absent Pennsylvania soldiers had been on the books for a quarter of a century? The 1813 soldier-voting law, he explained, had been enacted under an earlier constitution. The suffrage provision of the constitution of 1790 required two years of residence in the state, but it had no local residency requirement and made no mention of election districts.⁵⁰ It therefore created no bar to legislation permitting absent soldiers to vote. But Woodward treated that law as having been a dead letter for a long time. Its reenactment, with modest revisions, as one section in the comprehensive election law of 1839, lost sight of the newly ratified constitution of 1838 and was simply the product of sloppiness and haste, according to Woodward. A legislative committee in 1834 had recommended slight revisions to the 1813 law, but those recommendations had remained dormant until 1839, when the legislature mindlessly dropped them into the new comprehensive election law without regard to the fact that a revised constitution now controlled; it was “careless legislation,” Woodward concluded.⁵¹

As proof that legislators had made a hash of the 1839 law, Woodward pointed to other sections of the statute that were at odds with the soldier-voting provision, including

49. *Id.* at 418-419, 424-425.

50. PA. CONST. of 1790, art. III, § 1. The 1790 suffrage provision also differed from the 1838 version in not excluding African-Americans from the suffrage. The qualification of whiteness was added in 1838.

51. *Chase*, 41 Pa. at 417.

a section prohibiting “any body of troops ... either armed or unarmed” from being present “at any place of election.”⁵² That effectively prohibited the very style of election that the soldier-voting provision of the same law authorized. To permit soldier voting in one section of a statute that elsewhere prohibited it not only collided with the constitution, but also bespoke statutory incoherence. Legislation ordinarily enjoyed a presumption of constitutionality, as Woodward conceded, but this self-contradictory law was such a mess and ran so clearly afoul of constitutional limits that the court could not be expected to give it effect, Woodward ruled, in reversing the lower court and pronouncing Chase the winner.⁵³

The *Chase* decision sparked a successful initiative to amend the constitution so as to permit soldier voting. Acting under its now clear authority, the Pennsylvania legislature enacted a soldier-voting law in time for the 1864 elections.⁵⁴ The law applied to all servicemen, including sailors in the navy, with no exclusion for regulars and with bounty men expressly included.⁵⁵ Unique among the twenty states that changed their laws to permit absent soldiers to vote, Pennsylvania adopted a hybrid combination of the Iowa and Minnesota models, with the Minnesota system of mail-in balloting available for soldiers unable to avail themselves of voting at in-the-field election sites set up under the Iowa model. Under the law, polls opened at the headquarters of each company “composed in whole or in part” of Pennsylvania men. All qualified voters belonging to the company and within one mile of the polling site had to vote there. Others could vote

52. Pennsylvania Soldier-Voting Law of 1839, § 95; *Chase*, 41 Pa. at 424.

53. *Chase*, 41 Pa. at 421.

54. An Act to Regulate Elections by Soldiers in Actual Military Service, P.L. No. 871, 1864 Pa. Laws 990. (hereafter cited as “Pennsylvania Soldier-Voting Law of 1864”).

55. *Id.* at §§ 1, 2.

at any “convenient” polling site, including officers not attached to a company, soldiers detached and absent from their companies, men in hospitals, and men on vessels or in navy yards. Or, a group of ten or more servicemen gathered anywhere else could open their own polling site.⁵⁶

Gathered at the polling site, the men chose three election judges, who in turn appointed two election clerks. Election judges and clerks had to be qualified Pennsylvania voters.⁵⁷ As in most states, the election judges and clerks had to take an oath swearing to “studiously endeavor to prevent fraud, deceit, or abuse” in the voting.⁵⁸ In the event of a challenge to a voter’s eligibility, an election judge could question the applicant about his qualifications and could accept his ballot only if the judge “be satisfied” that the applicant was qualified.⁵⁹

Pennsylvania’s election judges and clerks faced logistical challenges similar to those their Ohio counterparts faced, as described in Chapter 1. They had to keep separate (and duplicate) poll books and voter lists for each Pennsylvania city or county represented by a voter at the polling site.⁶⁰ The soldier prepared his written ballot identifying all the candidates voted for and presented that ballot to an election judge. The judge announced the soldier’s name, which the clerks entered in the duplicate poll books for each city and county.⁶¹ Critics of the law pointed out how cumbersome this process could be. One newspaper, claiming that some regiments had men from every county in

56. *Id.* at § 2.

57. *Id.* at § 4.

58. *Id.* at § 5.

59. *Id.* at § 6.

60. *Id.* at § 7.

61. *Id.* at § 9.

Pennsylvania, complained that elections would require from 150 to 200 different poll books, each of which was “ponderous.”⁶²

When the polls closed, the judges and clerks signed the poll books, opened the ballot box, and began tallying the results. Ballot by ballot, each of the three judges in turn announced the names of the candidates voted for on each ballot while the clerks kept count on tally sheets, keeping separate tallies for each city and county. The third judge to handle each ballot strung it on a thread, separating the ballots from different cities and counties on separate threads.⁶³

The statute included the form for poll books and tally sheets, which the Secretary of the Commonwealth provided for each company and military hospital, delivering them through commissioners whom the governor appointed, one per regiment.⁶⁴ At the conclusion of the voting, the judges packed one of the duplicate poll books and tally sheets for each city and county to that jurisdiction’s court of common pleas. They delivered the duplicate copies to the commissioner, or if the commissioner was unavailable, mailed them to the Secretary of the Commonwealth.⁶⁵

The fallback process of mail-in balloting was available for men in four circumstances that would leave them out of the voting above process, namely men gathered away from company headquarters in groups of less than 10, individuals separated from their companies, Pennsylvania soldiers attached to units of other states,

62. *Daily Evening Bulletin* (Philadelphia, Pa.), November 26, 1864.

63. Pennsylvania Soldier-Voting Law of 1864, §§ 10, 11, 13.

64. *Id.* at §§ 15, 16, 23, 24, 25.

65. *Id.* at § 17.

and men on recruiting or provost duty.⁶⁶ Each man in these circumstances sent his completed ballot to a proxy in his hometown. The proxy had to be a qualified voter. In the same envelope containing his ballot, the soldier had to include 1) a statement (signed by an officer) identifying the soldier and his military unit, 2) a document authorizing his proxy, and 3) an affidavit attesting to his qualifications and promising that he had not and would not vote in any other fashion.⁶⁷ The Secretary of the Commonwealth prepared forms of these documents and, “furnish the same for the use of” the soldiers who needed them, though the statute did not specify the means of distributing them to soldiers.⁶⁸ The proxy’s job was to deliver the envelope containing the ballot and all these documents, unopened, to the hometown election site, where election officials added the ballot to the civilian ballot box if the soldier’s name appeared on the voting list.⁶⁹

The law also addressed a loose end created by the constitution’s requirement that voters pay a tax assessed 10 days before the election.⁷⁰ (In 1864, the tax was ten cents.) The soldier-voting law obligated the tax collector to accept payment of the tax from other people acting on the soldiers’ behalf.⁷¹ Both political parties exhorted the party faithful to pay soldiers’ assessments, and evidence is that the faithful responded.⁷²

The susceptibility of fraud in soldier voting was predicted, not only by George Woodward in his opinion about the 1839 law in the *Chase* case, but also by people most

66. *Id.* at § 32.

67. *Id.* at § 33.

68. *Id.* at § 38.

69. *Id.* at § 34.

70. PA. CONST. of 1838, art. III, § 1.

71. Pennsylvania Soldier-Voting Law of 1864, § 40.

72. *Daily Telegraph* (Harrisburg, PA), October 15, 1864; *Daily Gazette and Advertiser*, (Pittsburgh, PA) October 21, 1864.

closely associated with the 1864 law, including Governor Andrew Curtin. According to Alexander McClure, Curtin's advisor and close confidant, the governor agreed with McClure's assessment that the law "bristled with invitations to fraud and opened the widest doors to its perpetration." Disapproving of the bill's weaknesses in this regard, Curtin tried to persuade legislators to revise the bill. After they rebuffed him, he signed the bill into law anyway.⁷³

Connecticut

Connecticut is one of several states that found a "do-over" necessary in trying to secure voting rights for its absent Civil War soldiers. It enacted one military suffrage law in December 1862 and another in July 1864 after the state supreme court found the first law constitutionally defective. In the interim, Connecticut amended its state constitution to remove the legal obstacle that the first law had encountered.

The legislature understood that its 1862 effort was constitutionally problematic even before the state supreme court said so. It passed a supplemental bill instructing the governor to seek an advisory opinion about the law from the state supreme court before taking steps to implement it.⁷⁴ The lawmakers were right to be concerned. The court found the 1862 law defective.⁷⁵ The law followed the Iowa model of calling for election sites to open at out-of-state encampments where Connecticut soldiers served.⁷⁶

73. McClure, *Old Time Notes of Pennsylvania*, 2: 129.

74. An Act in Relation to an Act Herein Named, ch.18, 1862 Conn. Pub. Acts 22.

75. Opinion of the Judges of the Supreme Court, 30 Conn. 591 (1862) (hereafter cited "Connecticut Supreme Court 1863 Advisory Opinion").

76. An act in Addition to an Act Entitled "An act relating to Electors and Elections," ch. 17, 1862 Conn. Pub. Acts 15. (hereafter cited as "Connecticut Soldier-Voting Law of 1862").

The problem, the court held, was that the state's constitution quite clearly fixed the place for holding elections in "electors' meetings" held in town. The court reached this conclusion by an analysis of the state's history. Dating from its colonial charter, and continuing through its most recent amendment to the state's constitution in 1836, "elections" were virtually synonymous with town meetings, such that an election held elsewhere than in a town meeting, let alone out of state, was a constitutional impossibility.⁷⁷

To skirt that problem, the 1862 statute attempted a creative legal fiction. It simply declared that soldiers' out-of-state voting under the law was to "be considered, taken and held to have been given by them in the respective towns of which they are residents."⁷⁸ This effort did not persuade the court. Voting under the 1862 act, the court found, clearly meant voting away from Connecticut, and the legislature's effort to call it something else was the equivalent of "legislative alchemy." In short, the court concluded that the 1862 law violated Connecticut's constitution.⁷⁹

This triggered an immediate effort to amend the constitution. Doing so required that the state house of representatives propose an amendment in identical form in two successive legislative sessions, with two-thirds approval by both houses in the second session, whereupon the proposed amendment went to the people for ratification in their town meetings.⁸⁰ The legislature did its part in 1863 and 1864 sessions, and ratification followed promptly. The amendment provided that eligible electors serving in the military

77. Connecticut Supreme Court 1863 Advisory Opinion, 30 Conn. at 596-600.

78. Connecticut Soldier-Voting Law of 1862, § 8.

79. Connecticut Supreme Court 1863 Advisory Opinion, 30 Conn at 602.

80. CONN. CONST. of 1818, art. XI.

outside the state (other than regulars) had the same right to vote as he would if he were present for the election in the town where he resided. It authorized the legislature to prescribe how and when soldier voting would occur.⁸¹

The legislature enacted the new soldier voting law even before the constitutional amendment was ratified, stating at the outset of the statute that it would take effect “in case of the adoption by the people of the proposed amendment to the Constitution of this State.”⁸² It took effect in time for the 1864 elections. Unlike the failed 1862 law, which followed the Iowa model of setting up election sites in the military encampments, the new act followed the Minnesota model of providing for the forwarding of soldier ballots from the out-of-state encampments back to Connecticut.

The act covered both volunteers and draftees, but not “persons in the regular army of the United States.”⁸³ Navy personnel seem not to have been included either, as the law called for balloting only where “Connecticut regiments, batteries, or battalions are stationed....”⁸⁴ The act applied to both state and federal elections.⁸⁵ Like the laws in Minnesota, Iowa, and Michigan, the Connecticut law provided for commissioners to travel to the military encampments to implement the law. Their job was to provide the

81. Proposed Amendment to the Constitution dated November 3, 1863, 1864 Conn. Acts 15 (Spec. Sess.); An Act Relating to the Proposed Amendment to the Constitution, ch. 11, 1864 Conn. Pub. Acts 24. Ratification was secured in August 1864. Benton, *Voting in the Field*, 179.

82. An Act to Secure the Elective Franchise to Soldiers in the Field, ch. 37, § 1, 1864 Conn. Pub. Acts 51, 51.

83. *Id.*

84. *Id.* at § 2.

85. *Id.* at § 1.

encampments with copies of the act, envelopes for returning ballots, and, if the political parties or someone else furnished them, the ballots themselves.⁸⁶

The governor appointed the commissioners, with no requirement that he do so with an equal balance of Republicans and Democrats, as the Minnesota governor had to do. Also unlike Minnesota, the law capped the number of commissioners who could visit “the same camp, post, or fortress” at two.⁸⁷

As with the Minnesota law, the soldier sealed his completed ballot in an envelope (there is no mention of sealing wax) and turned it over to the commissioner. On the back of the envelope, the commissioner wrote the soldier’s name, military attachment, and home town, then signed his own name as commissioner. The commissioners then carried all the sealed envelopes back to Connecticut for delivery to the respective towns, with a certification that the commissioner had not tried to influence any soldier’s vote. There the soldier named on the back of the envelope was checked against the voter registry and, if the name appeared there, the soldier’s ticket was placed added to civilian ballots in the town’s ballot box.⁸⁸

The Connecticut law took less care than Minnesota’s in trying to assure that only eligible Connecticut soldiers voted. There was no requirement in the Connecticut law for the soldier to swear an oath that he was indeed a qualified voter, and nowhere did the commissioner certify that the soldier named on the envelope was the man who completed

86. *Id.* at § 3.

87. *Id.* at §§ 2, 3.

88. *Id.* at §§ 4 - 7.

the ballot. The commissioners had to receive sealed envelopes from any soldier “claiming to vote,” with no provision for confirming the voter’s identity.⁸⁹

By its terms, the Connecticut law remained in effect only “during the present rebellion.”⁹⁰

Vermont

Vermont’s experience with military suffrage legislation was similar to Connecticut’s. The legislature wanted to give its absent soldiers a way to vote, but the state constitution posed apparent obstacles. Lawmakers tried to work around the obstacles with a statute they enacted in November 1863, but they hedged their bet by pronouncing in the statute itself that its provisions would take effect only after the governor posed a specific question to the state supreme court -- “Are the provisions of this act constitutional?” – and got back an affirmative answer. The statute provided that if the court approved some portions of the law but rejected others, then only those portions of the law found to be constitutional could go into effect.⁹¹

The governor dutifully asked the required question, and the Supreme Court answered with an advisory opinion in April 1864. The court concluded that Vermont’s constitution barred absentee voting for state officials, but that the bar did not apply to voting in federal elections.⁹² The upshot was absentee voting by Vermont soldiers in

89. *Id.* at § 3.

90. *Id.* at § 1.

91. An Act Providing for Soldier Voting, P. L. No. 5, § 12, 1863 Vt. Laws 7, 10 (hereafter cited as “Vermont Soldier-Voting Law of 1863.”)

92. Opinion of the Judges of the Supreme Court on the Constitutionality of “An Act Providing for Soldier Voting,” 37 Vt. 665(1864) (hereafter cited as Vermont Advisory Opinion).

1864, but only for their representatives to Congress and for electors for U.S. president and vice-president. It was a novel but legally sound way around a thorny issue of state constitutional law, and other states took note in fashioning their own military suffrage law.

The state constitutional problem was created by a provision that the “freemen” of each Vermont town must “hold elections therein” for their representatives in the state House of Representatives.⁹³ That left no room for absentee voting in elections for the state house, and the legislature did not even try to get through that tightly shut door. Instead, they wrote the 1863 military suffrage law to apply only to elections for Vermont’s executive branch officials – governor, lieutenant governor, and treasurer – plus congressmen and federal electors.⁹⁴ As the legislature knew full well, the constitutional underpinning for even such a limited law was shaky, but arguably the constitution left the door ever so slightly ajar for absentee voting for state executive officers and in federal elections.

For elected positions in the state’s executive branch, including the governor, lieutenant governor, and treasurer, the constitution directed the freemen in each town to “bring in their votes ... to the Constable....”⁹⁵ This happened on the same day as the meeting in town at which the freemen elected their state representatives, but the constitution did not expressly say that it had to happen at the same meeting. Perhaps, the legislators reasoned, they could “bring in” their votes to election meetings elsewhere,

93. VT. CONST. of 1793, ch. II, § 7.

94. Vermont Soldier-Voting Law of 1863, § 3.

95. VT. CONST. of 1793, ch. II, § 10.

including out of state, as long as they did so on the same day that civilians in Vermont's town meetings were electing their state representatives.

With evident uncertainty, reflected in the requirement for the Supreme Court to weigh in before the law could take effect, the legislature fashioned a military suffrage law on the Iowa model, with voting sites set up at the military posts where Vermont soldiers were stationed. To protect the argument that soldiers were “bringing in” their votes “to the constable,” as the constitution demanded, the law designated the presiding officials at the military voting sites as “special constables.” And the voting had to occur on the same day as civilian elections in Vermont.⁹⁶

The Vermont Supreme Court rejected the legislature's approach. The only fair reading of the constitution, the court ruled, was that the place for freemen to “bring in” their votes for executive officers was the same town meeting where state legislative representatives were elected. As the Connecticut court had done, the Vermont justices looked to history for answers to the constitutional issues. Throughout Vermont history, “constables” presided at town meetings, the court noted, and they had no authority other than as town officials. So, in requiring freemen to “bring in” their votes to the constable, the constitution meant they had to deliver their votes to the constable presiding at the same freemen's meeting where they elected their state legislators. This interpretation also made sense of the constitution's otherwise inexplicable demand that freemen deliver their

96. Vermont Soldier-Voting Law of 1863, § 3.

executive office ballots to the constable on the same day as the election meeting for state representatives.⁹⁷

The Vermont justices made it clear that this requirement of physical presence by the voter in his town of residence was different from the residency qualification for voting. While soldiers could lawfully cast their votes only in their home towns, the

absence of such persons from the state, in such service, is not a removal, or change of residence, by which the right of voting is lost, but like a absence from the state upon a journey, or business, is of a temporary character, and the domicil, or residence, continues within the state, while the person is actually without the state.⁹⁸

The court reviewed the opinions of other state supreme courts on the constitutionality of military suffrage laws in their states and found Connecticut's (where the state's high court had found that state's law unconstitutional) most helpful. Vermont's election traditions, and particularly the centrality of freemen's meetings to the voting process, borrowed from Connecticut's similar traditions, and the two state constitutions approached suffrage similarly, the Vermont justices said. Both required physical presence by the voters at election meetings, which occurred in town.⁹⁹

The Vermont court seemed doubtful that any state's constitution permitted absentee voting for state offices. Its opinion took Iowa's court to task for approving that state's soldier-voting law in the face of a constitutional provision requiring 60 days residence in "the county in which [the voter] claims his vote." The Iowa court had opined that "to claim" one's vote did not require physical presence in Iowa. That was

97. Vermont Advisory Opinion at 670-671.

98. *Id.* at 667.

99. *Id.* at 670-671.

unpersuasive to the Vermont jurists. The Iowa court's opinion, said the Vermonters dismissively, was "exceedingly subtle and ingenious, and we are not prepared to say it is sound ..." ¹⁰⁰

In answer to the question posed in the Vermont statute – "Are the provisions of this act constitutional?" – the court concluded that no, Vermont's constitution barred the act's provisions for absentee voting for state officials. But it arrived at a different answer as to absentee voting for members of Congress and electors for U.S. president and vice-president. The federal constitution governed election procedures for those federal positions, the court noted, and that instrument gave state legislatures sufficient authority to opt for absentee voting if they so wished. The "time, place, and manner" of electing U.S. senators and House members, the federal constitution provides, "shall be prescribed in each State by the Legislature thereof." ¹⁰¹ Similarly, each state "shall appoint" electors for the president and vice-president "in such Manner as the Legislature thereof may direct." ¹⁰²

The state constitution was the wrong place to look for an answer to the statute's question about constitutionality on these federal election matters, the Vermont jurists ruled. The federal constitution controlled entirely, and it assigned the matter entirely to the state legislature. Vermont's legislature acted within that broad constitutional authority when it prescribed absentee voting for federal elections. So, with the court's blessing, the 1863 "Act providing for soldier voting" went into effect in 1864, limited to elections for

100. *Id.* at 675.

101. U.S. CONST. art. II, § 4.

102. U.S. CONST. art. III, § 1. The constitution's verb here is "appoint," not "elect."

Vermont's representatives to the U.S. congress and electors for U.S. president and vice-president.

The law excluded soldiers "in the regular or standing army of the United States" as well as those "in any regiment, battery or company organized and officered out of this State."¹⁰³ By limiting the out-of-state election sites to "posts" or "camps" where Vermonters served in a "regiment or battery of artillery, or part of a company under separate command," the act implicitly excluded servicemen in the navy.¹⁰⁴ While nothing in the 1863 statute either expressly or implicitly barred draftees, an 1864 amendment effectively excluded them by limiting absentee voting rights to "volunteers."¹⁰⁵

Voting was by company, with the three ranking officers serving as election judges, or "special constables," as the act put it. The highest ranking of the three served as "chairman of the board of constables."¹⁰⁶ The special constables appointed clerks to assist with the voting and to prepare "poll lists" showing the soldiers' names and places of residence. Each constable and clerk swore an oath. The oath read the same as those of election laws in most states, including the promise to "studiously endeavor to prevent all fraud, deceit or abuse in conducting" the election.¹⁰⁷

Each soldier's ballot had to show his county of residence and the name of the preferred candidate for each office. Before the soldier could deposit his ballot in the ballot box, the constable had to "be satisfied that the person offering to vote is a legal

103. Vermont Soldier-Voting Law of 1863, § 1.

104. *Id.*

105. An Act in Amendment of an Act Providing for Soldiers Voting, P.L. No. 8, § 1, 1864, Vt. Laws 27, 27.

106. Vermont Soldier-Voting Law of 1863, § 4.

107. *Id.* at § 6.

voter of the county shown at the top of the ballot.” If there were suspicions, or if anyone challenged the soldier’s eligibility, the special constables questioned the soldier under oath about his qualifications. Challenges were decided “by a majority of the constables.”¹⁰⁸

The constables tallied the votes and prepared written statements showing the results by county, “so far as practicable.” Then they “sealed up” the ballots and sent them to the Vermont Secretary of State, together with their statements of results and the poll lists. The Secretary of State forwarded the returns to the General Assembly, where they were added to the results of in-state voting.

The 1863 law did not provide for commissioners from Vermont to assist in its implementation, and it offered sparse guidance for the soldiers at the voting sites. They were on their own in preparing poll lists and the statements of voting results, for example. And the act made no provision for anyone to send the soldiers the text of the required oaths or even copies of the law itself.

Post-war changes in Vermont’s general election law eclipsed the soldier-voting laws of 1863 and 1864. By 1870, the required location for voting for congressional representatives was “any town in the congressional district in which he [the voter] resides.” For electors for U.S. president and vice-president, it was “in any town in this state.” There were no exceptions for absent soldiers.¹⁰⁹

108. *Id.* at § 8.

109. VT. COMP LAWS, Title I, §37, (1870).

New Hampshire

Of all the Northern states that enacted military suffrage laws during the Civil War, New Hampshire seems to have worked hardest to get the job done. By the time they finished the task in 1864, the legislature had acted on three different bills and the state supreme court had issued three different advisory opinions. The final product was a law on the Iowa model, but (as in Vermont) limited to federal elections.

The legislature first drafted a bill in 1863, but before voting on it the state House of Representatives asked the state supreme court for an advisory opinion about the bill's constitutionality.¹¹⁰ That bill was patterned on the Minnesota model, allowing absent soldiers to complete their ballots "in the field," then send the votes back to their home state. The bill would have the soldier execute a power of attorney appointing a qualified elector, in the town of the soldier's residence, to receive the soldier's completed ballot and cast it for him. When he delivered the soldier's ballot, the designated voter back home had to submit his own affidavit attesting that he had received the ballot from the soldier named on the envelope and that the soldier was indeed a qualified voter.¹¹¹

The New Hampshire Supreme Court issued the requested advisory opinion in June 1863, concluding that the bill would be unconstitutional if enacted. The court began with a statement of the common law principle that in all elections, "every vote must be personally given."¹¹² New Hampshire's constitution incorporated that principle, the court

110. The bill was named, "*An Act to secure the right of suffrage to the qualified voters of this State engaged in the military or naval service of their country.*" Though it was never enacted, its provisions are described in the New Hampshire Supreme Court advisory opinion that found it to be unconstitutional. Opinion of Justices, 44 N.H. 633 (1863).

111. Opinion of Justices, 44 N.H. 633-634 (1863).

112. *Id.* at 634-635.

ruled. The opinion cites numerous provisions of the constitution of 1793 to the effect that voting had to happen in the town of the voters' residence. In choosing state representatives and senators, for example, the constitution provided that eligible voters "shall be entitled to vote within the district wherein they dwell." Elections for other offices, including governor, were to be "in the same manner" as elections for state representatives. Overall, the court opined, the "provisions of our Constitution ... require that the right of voting shall be exercised by the voter in person at the meetings duly held for the purpose in the places of the State pointed out by the Constitution."¹¹³ That left no room for the absentee balloting contemplated by the proposed law.

This took the legislature back to the drawing boards. In August 1864, they produced a new military suffrage law clearly showing the influence of the recent experience in neighboring Vermont. That state had struggled to harmonize absentee voting for soldiers with a state constitution that, like New Hampshire's, quite clearly allowed for only in-state balloting. The upshot of that struggle, produced with the guiding hand of Vermont's Supreme Court, was a law allowing absentee voting for Vermont soldiers, but only in elections for representatives to the U.S. congress and for electors for U.S. president and vice-president. The state constitution did not govern the manner of conducting these federal elections, the Vermont court had concluded. The federal constitution controlled, and that instrument gave state legislatures sufficient authority to enact absentee voting if they chose to.

113. *Id.* at 636.

The drafters of New Hampshire's 1864 military suffrage law clearly had the Vermont outcome in mind. In fact, no two military suffrage laws are more alike than New Hampshire's and Vermont's. Like Vermont's, the New Hampshire law granted absentee voting rights only in federal elections.¹¹⁴ Like Vermont's law (but unlike New Hampshire's own 1863 bill) this law followed the Iowa model by calling for election sites to be opened at the military encampments where New Hampshire's soldiers were stationed. Also unlike the 1863 version, this law did not include navy personnel, limiting its provisions to "regiments," "batteries of artillery," and "companies," just as Vermont's law had done. Also in common with Vermont, New Hampshire's 1864 law excluded soldiers "in the regular, or standing army of the United States," as well as soldiers in military units "organized or officered out of this State."¹¹⁵ The three ranking officers of each New Hampshire company presided over the voting, appointed clerks, administered oaths (to "studiously endeavor to prevent all fraud, deceit and abuse"), resolved challenges by a majority vote, and prepared returns, all in language nearly identical to the wording of Vermont's law.¹¹⁶

To resolve doubts about the law's constitutionality, the New Hampshire legislators did exactly what Vermont lawmakers had done – they added a proviso to their

114. An Act to Enable the Qualified Voters of this State Engaged in the Military Service of the Country to Vote for Electors of President and Vice President of the United States, and for Representatives in Congress, ch. 4030, 1864 N.H. Laws 3061(hereafter cited as "New Hampshire Soldier-Voting Law of 1864").

115. *Id.* at § 1.

116. *Id.* at §§ 2, 3, 5, 6.

soldier-voting law stipulating that the statute would take effect only if the New Hampshire Supreme Court confirmed its constitutionality.¹¹⁷

On September 9, 1864, the court issued its ruling.¹¹⁸ It concluded that the bill (it had not been signed by the governor when their opinion was sought) was constitutional. The justices based their ruling largely on the logic of the Vermont court's opinion, from which it quoted extensively. That state's supreme court ruled that the constitutionality of an election law applying only to federal elections had to be tested by exclusive reference to the federal constitution; the state constitution had no bearing on the question. In two separate provisions the U.S. Constitution grants broad power to state legislatures to decide the procedures for electing congressional representatives and "appointing" presidential and vice-presidential electors.¹¹⁹ It was within that authority for a legislature to permit absentee voting for federal offices, the Vermont court had ruled.

To this analysis, the New Hampshire justices added consideration of a federal constitutional question that the Vermont jurists had not addressed. The New Hampshire court had ruled in its 1863 advisory opinion that the state constitution required that ballots in elections for *state* offices be cast in person in the voter's town of residence. Now the court addressed a different question: did this requirement constitute a "qualification" for voting? If it did, then the U.S. Constitution posed an obstacle to absentee voting for federal congressional representatives. This was so because, to be

117. *Id.* at § 8.

118. Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldier's Voting Bill, 45 N.H. 595 (1864). The opinion, in the form of a letter from the justices to the state senate, is undated. The date of September 9, given above, is based on the estimate given by Josiah Benton in his indispensable book, *Voting in the Field* at 215.

119. U.S. CONST., art. I, § 4 (for electing congressional representatives) and art. II, § 1 (for appointing federal electors).

eligible to vote in elections for the U.S. House of Representatives, one had to “have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”¹²⁰ If casting his vote in the town of his residence, as New Hampshire’s constitution required, constituted a “qualification” for voting, then according to the U.S. Constitution the absent soldier was ineligible to vote for his congressman.¹²¹

After an extended analysis, the court concluded that a voter’s “qualifications” meant something different from “the time when or the place where” he could vote. Rules about the latter constitute “a mere regulation for the exercise of his right,” not a “qualification of the elector within the meaning of the term as used in the [U.S.] Constitution.” When the U.S. Constitution referred to an elector’s qualification, it meant such matters as his “age, fixed residence, [and] property,” not where or when he could cast his ballot.¹²² The court found support in the history of New Hampshire’s election laws for viewing voters’ qualifications and the place of voting as two different subjects. The court’s historical analysis included an observation that New Hampshire’s early colonial election laws had permitted voting outside of New Hampshire for absent township proprietors, and voting in town by non-resident landowners was legally permissible until adoption of the state’s constitution of 1783.¹²³

Having concluded that soldiers did not lose their “qualification” as voters by virtue of their absence from New Hampshire election sites, the court wound up exactly where the Vermont court had: the U.S. Constitution authorized the state legislature to

120. U.S. CONST, art. I, § 2.

121. *Opinion of the Justices of the Supreme Judicial Court*, 45 New Hampshire Reports at 602.

122. *Id.* at 602, 605.

123. *Id.* at 597-598.

permit absentee voting for congressmen and federal electors. That meant the 1864 legislation was constitutional. This was the court's second advisory opinion on the subject of military suffrage legislation, but almost amazingly, there would be a third.

The court had deliberated the constitutionality of absentee voting after the legislation was drafted and voted on, but before it became law. In an almost farcical sequence of events after submission of the question to the court, a question arose about whether it had become law at all. The bill had passed both houses along party lines, with Republicans in favor and Democrats opposed. It was then sent to Governor Joseph Gilmore, a Republican. Gilmore had backed the 1863 law, and he favored soldier voting as a general proposition. But when the state's high court struck down the 1863 law, and after New York's Democratic governor, Horatio Seymour, had vetoed as unconstitutional a bill similar to New Hampshire's 1863 law, Gilmore came to believe that a military suffrage statute would require a constitutional amendment. So, departing from the general partisan division on the issue, this Republican governor vetoed the bill. Or at least he tried to. It was not clear whether the bill had been properly delivered to him for consideration, and through administrative sloppiness, he was slow to draft his veto message and send it to the legislature. When he finally did, the Republican leadership, obviously reluctant to receive the veto, was slow to acknowledge it.¹²⁴

All this to and fro raised a technical dispute, heavily clouded by partisanship, about whether the governor's message was timely under the state constitution's five-day

124. The disputed facts about the attempted veto are set forth in the state Supreme Court's advisory opinion on the matter, *Opinion of the Supreme Judicial Court*, 45 N. H. at 607. For the legislative history of the New Hampshire soldier-voting law, and for the political backdrop, Benton's *Voting in the Field* is a valuable source.

deadline for issuing a veto.¹²⁵ To resolve the dispute, on August 31, both legislative branches joined in a concurrent resolution submitting the matter for yet another advisory opinion, asking the justices whether the bill had become law. On September 22, the court answered with its third advisory opinion, concluding that the bill had indeed become law. The issue boiled down to when the constitution's five-day veto clock started running. Was it on the day the bill was dropped off at the governor's office, or the next day when the governor first saw it? The court ruled that delivery to the office started the clock, and that the veto message arrived at the legislature one day too late. The bill thereby became "a valid and binding statute," the court declared.¹²⁶

Two acts supplementing the 1864 law are noteworthy. One exempted absent soldiers from the state's poll tax.¹²⁷ The second instructed the governor and secretary of state to take additional steps to protect against fraud in the soldier voting. If any vote should "clearly appear" to have been cast by an unqualified voter, the governor was to reject it, drawing on "such evidence as they [the governor and secretary of state] may deem sufficient." Moreover, the names of voting soldiers were to be sent to each of their townships, where the town clerks had to compare their names against voter lists and inform the secretary of state of any discrepancies. Finally, because a soldier's absence during war "shall not affect his right of suffrage," this act required that the names of absent soldiers be maintained on township voter lists."¹²⁸

125. N.H. CONST. of 1792, art. 49.

126. *Opinion of the Supreme Judicial Court*, 45 N.H. at 607, 610.

127. An Act to Exempt Volunteers and Conscripts from the Poll Tax, ch. 2863, 1864 N.H. Laws 2816.

128. An Act in Relation to Counting the Votes for Electors of President and Vice President and for Representatives in Congress, ch. 4031, §§ 1, 2, 4, 1864 N.H. Laws 3064-3065.

A curiosity about New Hampshire's soldier-voting experience is that commissioners from New Hampshire traveled to the military posts to assist with implementation, although the act of 1864 did not provide for such commissioners. It is conjectural, but perhaps commissioners were appointed under the 1863 law, which did provide for them, before that law was struck down as unconstitutional. The 1864 law did not prohibit commissioners, and it is possible that the holdovers from the 1863 were put to use in 1864.

We learn not only that there were commissioners, but a good deal more about how voting "in the field" may have actually worked, from this New Hampshire soldier's positive account:

The two commissioners, one representing the Republican, and one the Democratic, party, came to the 13th New Hampshire bringing with them a list of the legal voters in each regiment procured from the different towns, and permitted only those to vote whose names were on that list. There were quite a number who had come of age during their service whose names had not been added to the list of voters, and therefore they were not permitted to vote. On a certain day at dress parade the regiment was notified that between certain hours on a fixed day and election would be held for President of the United States and Representatives in Congress, at which they would be permitted to vote. I was present and voted on that day. There was no speechmaking and no gathering of the regiment as a whole. Each man came up to the polling place and voted by himself. He was given two ballots, one representing the Democratic, and one the Republican, candidates, and secretly, without knowledge of any one, he deposited whichever vote he saw fit. There had been no campaign literature circulated and no speechmaking. There probably never was a purer election held in the world than that which was held under the two commissioners from New Hampshire. Both expressed their opinion to the effect that no influence was exercised on the part of anybody to vote one way or the other.¹²⁹

129. As quoted in Benton, *Voting in the Field*, at 222.

New Hampshire repealed its soldier-voting law in 1897 when the state amended various aspects of its election law.¹³⁰

Rhode Island

Rhode Island, like Nevada, Maryland, and Missouri, implemented absentee voting for Civil War soldiers without enacting soldier-voting legislation. Instead, the state adopted a constitutional amendment that not only enabled the legislature to enact a military suffrage law, but also by its own terms provided for absent soldiers to vote even if the legislature took no action at all. As it happened, the legislature did not pass a military suffrage law during the war, perhaps because none was needed under this peculiar constitutional amendment.

The prewar constitution clearly blocked absentee voting except perhaps for federal elections, if Rhode Island had chosen to go the route that Vermont and New Hampshire had traveled. Adopted in 1842, Rhode Island's suffrage provisions were conservative and convoluted compared to other northern states, with one set of requirements for "native citizens of the United States" and a different set for naturalized citizens. Voting by both groups, however, had to happen "in town or ward meetings."¹³¹

The discrimination between native-born and naturalized citizens merits some elaboration, if only because of the relevance of military service to the suffrage qualification of the former group. Naturalized citizens, assuming they were twenty-one

130. An Act in Amendment of the Public Statutes, Relating to the Manner of Conducting Caucuses and Elections, ch. 78, § 21, 1897 N.H. Laws 68, 77.

131. R. I. CONST. of 1842, art. II, §§ 1, 2.

year old males who met the constitution's residence requirements,¹³² had only one avenue to the voting franchise. They had to own \$134 worth of real property.¹³³ A native-born American, in contrast, could qualify with a lower level of property ownership, or no property ownership at all. His options were either 1) to pay a one-dollar tax on whatever property he owned (or a one-dollar voluntary contribution for the support of public schools), or 2) to enroll for duty in the state militia during the year preceding the election.¹³⁴ Military service also relieved voters of liability for a one-dollar "registry tax."¹³⁵ The constitution limited its favorable treatment for military service to militiamen only; those stationed in Rhode Island in the regular army got no similar break. Moreover, as in several states, service in Rhode Island by regulars did not count toward the constitution's residency qualifications.¹³⁶

Rhode Island politicians favoring absentee voting for soldiers saw more than one difficulty with the suffrage hodgepodge of the prewar constitution. First and foremost, of course, was the requirement of voting "in town or ward meetings." That ruled out absentee voting for any soldiers. In addition, even if that hurdle could be cleared, the imposition of a property qualification on the cohort of Rhode Island immigrant soldiers who had returned home after serving in the war, but not on their native-born neighbors who sat out the war without serving at all, created an embarrassing injustice.

132. One year residence in the state and six months "in the town or city in which [the elector] may claim a right to vote." R. I. CONST. of 1842, art. II, § 1.

133. R. I. CONST. of 1842, art. II, § 1. It was not necessary for the voter to own the property in the town or city where he resided. He could vote there as long as he proved he owned property of the requisite value somewhere in Rhode Island. *Id.*

134. R. I. CONST. of 1842, art. II, § 2. The state residence requirement for native-born citizens without \$134 of property was two years, compared to one year for citizens meeting the property qualification.

135. R. I. CONST. of 1842, art. II, § 3.

136. R. I. CONST. of 1842, art. II, § 4.

So, in May 1864, with time running short before the 1864 elections, the legislature approved three constitutional amendments and submitted them to Rhode Island voters for ratification.¹³⁷ One, a precursor to the modern Dream Act, would have granted suffrage rights to naturalized citizens who had been honorably discharged after service in the war, on the same terms that native-born citizens already enjoyed. Effectively, this would have eliminated the property qualification for immigrant veterans.¹³⁸ The second would have thrown out the “registry tax” and substituted a poll tax that all citizens would pay, native-born and naturalized alike, without exception for enrollment in the militia.¹³⁹ These two together, had they been ratified, would have eliminated suffrage discrimination against those naturalized citizens who had served in the war. But both suffered defeat in the ratification voting.¹⁴⁰ Nevertheless, Rhode Island stands as the only state that even attempted to enlarge the voting franchise in connection with its effort to grant absent soldiers the right to vote away from home.

The only amendment that voters did ratify was one giving absentee voting rights to already qualified electors “in the actual military service of the United States.”¹⁴¹ Standing alone as it did, this amendment left landless immigrant soldiers out of the franchise, even if they were naturalized citizens who met the residency requirements. While it granted the legislature “full power to provide by law for carrying this article into effect,” the amendment eliminated the urgency for such legislation by describing how

137. An Act to Approve and Publish and Submit to the Electors a Certain Proposition of Amendment to the Constitution of the State, ch. 529, 1864 R.I. Acts & Resolves 3.

138. *Id.* at § 1 (proposed Article V).

139. *Id.* (proposed Article VI).

140. Benton, *Voting in the Field*, 186. According to Benton, no record remains of the tally of the popular votes for and against ratification of any of the three amendments.

141. An Act to Approve and Publish and Submit to the Electors, § 1.

absentee voting would occur “until such provision shall be made by law.”¹⁴² This description was far less detailed than any state’s military suffrage law, but more detailed than other states’ constitutional provisions enabling such laws. For the elections in 1864, there was no military suffrage legislation in Rhode Island, and this constitutional amendment set forth the only rules that would govern that state’s soldier voting in the war.

The constitution adopted the Minnesota model, with absent soldiers’ ballots being forwarded from their military encampment to the Rhode Island Secretary of State. It applied to electors “in the actual military service of the United States,” without stated exceptions. This meant not only that draftees were included, but also that naval personnel were. So were regulars. Given the constitution’s longstanding bar against letting regulars gain their residence qualification on the strength of service in Rhode Island, this created a potential anomaly. A Rhode Island elector serving, say, two years in Virginia as a member of the regular army could qualify as an absentee voter under the 1864 amendment, while a different regular having served two years in Rhode Island would remain unqualified for want of the required term of residency.

The soldier completed his ballot, writing his name and place of Rhode Island residence on the back, then delivered it to the “officer commanding the regiment or company to which [the elector] belongs.” This formulation implies an exclusion of navy personnel, since sailors did not serve in regiments or companies. It might similarly have excluded artillerymen, who served in battalions. The commanding officer then “certified”

142. *Id.*

that the ballot had indeed been given to him by the man whose name appeared on it. Finally, he forwarded the completed ballots to the Rhode Island Secretary of State, who compared the names on the ballots with voter lists provided to him by all the clerks of the state's towns and cities.¹⁴³

The potential for fraud abounded in this barebones arrangements. There was no requirement that the commanding officer (who need not have been a Rhode Islander elector himself) had to give this certification under oath. And the constitutional provision said nothing at all about the form the certification should take. The constitutional amendment included no requirement for the soldier to swear to his own identity and qualifications. It assigned no commissioners to help explain the law to the soldiers or their commanding officers, or carry the ballots back to the state. Presumably, the legislature would have fleshed out all these details in a full-fledged soldier-voting law, but without that legislation, these gaps riddled Rhode Island's soldier-voting "system," as set forth only in the barebones constitutional amendment.

The soldier-voting provision of Rhode Island's constitution survived the Civil War, but the state enacted no soldier-voting legislation until the Spanish-American War, in 1898. That law lifts the language from the constitution almost verbatim, without elaboration and without filling in the gaps left in the constitutional language itself.¹⁴⁴

143. *Id.*

144. R. I. GEN LAWS, tit. II, ch. 11, § 58 (1909).

New York

New York got a soldier-voting law just in time for the 1864 election after an earlier effort ran afoul of the governor's veto pen. The governor, Horatio Seymour, rejected a soldier-voting bill in 1863 notwithstanding the attorney general's opinion that it was constitutional, and he stated his reasons why. This debate, with the governor holding the trump card of veto power, provided an executive branch equivalent of a judicial majority striking down a law over a minority's dissent. Clarity about the nature of the legal dislocation emerges from the veto message and its counterpoint in the attorney general's opinion.

Governor Seymour, a Democrat, won his office in 1862 as part of the nationwide Democratic resurgence. The following year, he vetoed a bill that would have given absent soldiers the right to vote on the Minnesota model. His veto message gave two reasons. First, Seymour said, the bill violated the constitution's suffrage provision, which entitled each eligible elector to vote "in the election district of which he shall at the time [of the election] be a resident, and not elsewhere...."¹⁴⁵ Seymour's view on that score contradicted the opinion of the state's attorney general, Daniel Dickinson, a pro-Lincoln war Democrat. Dickinson had defended the bill in response to a request from the state senate for his view. Aware of Seymour's misgivings about the risk of fraud in soldier voting, Dickinson opined that it was constitutionally irrelevant that the proposed law "may be inconvenient, cumbrous, and liable to fraud and abuse." All that mattered was whether the constitution expressly forbade absentee voting, which Dickinson said it did

145. N.Y. CONST. of 1846, art. II, § 1.

not. Just because the constitution required the elector to “offer his vote” in his home district, Dickinson wrote, didn’t mean that he had to do so in person. The legislature was free to “prescribe the form for depositing votes” so as to avoid allowing soldiers to “be disfranchised” by their unavoidable absence, according to the Attorney General.¹⁴⁶

Seymour completely ignored Dickinson’s argument. In fact, he very nearly ignored the constitutional issue altogether. The constitutional violation was so clear, Seymour wrote, that it was “needless to dwell upon that objection to the bill.”¹⁴⁷ Far from dwelling on the constitutional issue, Seymour devoted only one sentence to it, quickly moving on to his second, and apparently larger, objection. The bill “is in conflict with the vital principles of electoral purity and independence,” Seymour asserted after rattling off all the ways that the absentee balloting called for in the bill was subject to fraud and military interference. He cited a treatise proclaiming that elections “must be superintended by election judges and officers, independent of the Executive,” a condition obviously missing when absent soldiers vote.¹⁴⁸

The Lincoln administration had already shown its propensity for abusing soldier suffrage, as far as Seymour was concerned. As proof, he quoted from a published order from the Secretary of War cashiering a New Hampshire lieutenant “for circulating

146. The senate had asked Dickinson whether the constitution meant that the voter must cast his ballot “with his own hand.” In what reads today almost as a parody of strict construction, Dickinson answered no, and as proof he observed that a qualified voter who had lost both his hands to injury could nevertheless vote, even though obviously not “by his own hand.” *New York Times*, April 17, 1863.

147. “Governor Seymour’s Veto of the Soldiers’ Voting Bill,” *New York Times*, April 26, 1863.

148. *Id.* The treatise was Francis Lieber, *On Civil Liberty and Self-Government*, ed. Theodore D. Woolsey, 3rd ed. (Philadelphia: J.B. Lippincott and Company, 1874), 179. Lieber was a prominent political scientist and historian at Columbia University. He enjoyed stature, among other things, for having edited the *Encyclopedia Americana* in 1833. During the Civil War, he authored the *Lieber Code*, laying out legal guidelines for the Union army. Roger K. Newman, ed., *Yale Dictionary of American Legal Biography* (New Haven: Yale University Press, 2009), 335.

Copperhead tickets” before an election.¹⁴⁹ The administration demonstrably sought to block soldiers’ access to Democratic political views, Seymour charged, and without that access, the right to vote meant nothing. “It would be worse than a mockery to allow those secluded in camps or upon ships to vote if they are not permitted to receive letters or papers from their friends [or if they] have not the same freedom in reading public journals” as the voters back home, Seymour wrote.¹⁵⁰

Seymour’s burden in justifying an executive veto was different from the burden judges bore when striking down a law as unconstitutional. The executive need not frame his objections in constitutional terms. George Woodward attached constitutional significance to the high risk of fraud in soldier voting under Pennsylvania’s prewar law, as did Rufus Ranney with respect to Ohio’s 1863 law. Seymour might have done so as well, but instead he pointed to the fraud risk as a prudential problem. Yes, the bill was unconstitutional, he said, irrespective of the fraud risk. And yes, fraud prevention was a “vital principle” that the bill violated, a view that inched Seymour close to the Woodward/Ranney position that the high risk of fraud carried constitutional weight. Seymour did not quite get there, as one can imagine that a “Justice Seymour” would have, because he didn’t need to. It was enough for him that the bill would be bad law if

149. *New York Times*, April 26, 1863. The dismissed soldier was Andrew J. Edgerly of the Fourth New Hampshire Volunteers, whose offense was campaigning for the Democratic candidate for Congress while on furlough. Long after the event, Edgerly won exoneration from a congressional committee. (49th Congress, Second Session, House of Representatives, Report No. 3756, January 26, 1887.) Throughout the 1864 election season, Democratic newspapers used Edgerly’s case as an example of the Lincoln administration’s propensity for abusing soldier voting.

150. “The Soldiers and the Right of Suffrage – Message of Gov. Seymour,” *New York Times*, April 16, 1863. Seymour directed this message to the state senate before their vote on the bill, signaling his intention to veto the bill if it passed.

enacted. It would be bad law, Seymour said, because it would invite fraud and because the Lincoln administration could not be trusted to implement it evenhandedly.

The legislature tried unsuccessfully to override Seymour's veto, then launched a successful effort, with the governor's support, to amend the constitution. The amendment was ratified in time for passage in 1864 of a new soldier-voting bill, which Seymour signed.¹⁵¹ The new law, while constitutional by virtue of the constitutional amendment, contained all the other infirmities that prompted Seymour's veto in 1863. That he nevertheless signed it is testament to the greater political potency of the soldier-voting issue by 1864.

Like the vetoed 1863 bill, the 1864 law instituted absentee voting on the Minnesota model, though without commissioners to assist implementation. The law applied "in time of war," not expressly limited to the instant war. It covered servicemen in the army and navy, without exclusion of regulars or draftees, and it applied to all general and special elections held in New York.¹⁵²

Voting operated through a proxy system. The serviceman first authorized a qualified voter in his hometown to cast his ballot for him. The authorization was a written document signed by the serviceman and a witness, and sworn to before an officer, all of who signed the document.¹⁵³ The soldier then sealed that document, together with his folded ballots, in an envelope. On the outside of the envelope was a printed affidavit by which the serviceman swore to his age, citizenship, and residence, and stated that he had

151. An Act to Enable the Qualified Electors of this State, Absent therefrom in the Military Service of the United States, in the Army or Navy thereof, to Vote, ch. 253, 1864 N.Y. Laws 549 (hereafter cited as "New York Soldier-Voting Law of 1864").

152. *Id.* at § 1.

153. *Id.* at § 2.

not wagered on the election. The affidavit also identified his military unit and its approximate location.¹⁵⁴

Next the serviceman put this sealed envelope inside a second envelope, also sealed. He marked this outer envelope “soldier’s vote” and mailed it to his proxy.¹⁵⁵ The proxy, after signing a receipt for the mailing at the post office, opened the outside envelope. He delivered the unopened inside envelope to the inspectors of election at the polling place on Election Day. If the envelope was not sealed when delivered to the inspectors, they had to reject it. If it was sealed, they compared the serviceman’s name on the outside of the envelope to the voting list. If the serviceman’s name appeared on the list, they opened the envelope and deposited the still-folded ballots in the ballot boxes at the polling place, comingling them with civilian ballots.¹⁵⁶

If the serviceman’s name did not appear on the voter lists, the inspectors could still accept the ballots if “a householder of the district” submitted an affidavit swearing that the absent serviceman was a resident of the voting district.¹⁵⁷ This provision allowed voting by men who turned twenty-one while in the service to cast ballots in their hometown districts.

The law required the Secretary State to provide all the forms and envelopes called for in this voting process, “in sufficient quantity” to furnish one of each to every eligible New York serviceman.¹⁵⁸ Among the law’s penalty provisions was imprisonment for up to a year, plus a fine of up to \$1000, for any officer who influenced or tried to influence

154. *Id.* at § 3.

155. *Id.* at § 4.

156. *Id.* at §§ 5, 7.

157. *Id.* at § 5.

158. *Id.* at § 12.

the serviceman's voting "by menace, bribery, fear of punishment, hope of reward, or any other corrupt or arbitrary measure or resort whatever...."¹⁵⁹

The Civil War's most celebrated instances of actual fraud in soldier voting arose out of voting under the New York Law. In two separate cases, federal authorities arrested agents stationed (one in Baltimore, another in Washington) to receive and forward soldier ballots from the Army of the Potomac. In one case the defendant, Moses, an appointee of Governor Seymour (himself a candidate for reelection), confessed to forging the names and ballots of soldiers, some of them dead. He was convicted and served a prison term. The other case resulted in acquittal. Republicans pounced on both cases as proof of endemic Democratic cheating. Reminding readers that Seymour had used his veto to tailor the New York law to his liking, Republicans charged that he had designed the law to facilitate exactly the kind of cheating that occurred. After summarizing the law's complicated procedures and claiming that its complexity "opens the widest door to fraud," the pro-Lincoln *New York Times*, in an editorial just five days before the election, pinned the responsibility on Seymour. "The Union men in the New York Legislature passed the bill because they could not get a better [one], as it was openly declared that Gov. Seymour would veto any bill unless it accorded in all respects with his own views."¹⁶⁰ A few days later, directing its scorn at Seymour, the *Times* asked its readers rhetorically, "What security have honest men under an administration [i.e., Seymour's] elected by forging the votes of dead soldiers, swindling the living of their suffrage, and

159. *Id.* at § 13.

160. *New York Times*, November 3, 1864.

importing Butternuts from Canada and Missouri to carry the elections by force and fraud?”¹⁶¹

Democratic papers defensively claimed that Republicans had trumped up the charges in New York and coerced the confession. They went so far as to assert that federal agents intercepted the shipped ballots in order to substitute phony Lincoln ballots for genuine McClellan votes. “Of course they have been seized by Lincoln’s agents,” wrote the Cincinnati *Daily Enquirer* in a tone suggesting that only the naïve could expect otherwise. “Lincoln ballots will be put in the place of McClellan ballots, and the soldiers will be cheated of their votes.”¹⁶² But Republicans had the better of the debate on the New York soldier vote. To the extent that fraud and cheating by the military had become a centerpiece of the Democrats’ campaign, the New York case severely weakened their argument as well as their prospects in November.

In late April 1865, well after Appomattox, New York amended its soldier-voting law, adopting the Iowa model.¹⁶³ No soldier voting occurred under this revised law. The following year, the state repealed its law permitting absent soldiers to vote.¹⁶⁴

161. *New York Times*, November 8, 1864.

162. *Cincinnati Daily Enquirer*, November 3, 1864. *The Detroit Free Press* published several stories to the same effect. See, for example, November 1, 2, and 6, 1864.

163. An Act to Provide the Manner in which and the Time and Places at which the Electors of this State, Absent therefrom in the Actual Military Service of the United States, may Vote, and for a Canvass and Return of their Votes, ch. 570, 1865 N.Y. 1151.

164. An Act to Repeal an Act Entitled “An Act to Provide the Manner in which and the Time and Place at which the Electors of this State, Absent therefrom in the Actual Military Service of the United States, may Vote, and for a Canvass and Return of their Votes,” Passed April Twenty-Fourth, Eighteen Hundred and Sixty Five, ch. 524, 1866 N.Y. Laws 1132.

Kentucky

Kentucky's experience with soldier voting was unique in two ways. First, to conform to its constitution, it required elections "in the field" to be held by voice vote of the soldiers. (Missouri permitted soldiers to vote either by voice or by ballot. All other states required ballots.) Second, it was the only state that gave a majority of its soldier votes to George McClellan in the 1864 presidential election.

Kentucky's 1850 constitution slammed the door tightly shut against absentee voting. It's suffrage provision, after stating that a voter needed 60 days of residence in "the precinct in which he offers to vote," added this unambiguous requirement: "and he shall vote in said precinct, and not elsewhere."¹⁶⁵ Kentucky therefore fell back to a military suffrage law limited to voting for electors of the U.S. president and vice-president, relying on the independent authority the federal constitution gave states to appoint their federal electors "in such manner as the legislature [of the state] may direct."¹⁶⁶ Kentucky enacted its limited military suffrage law in February 1864, making it applicable only to that year's election.¹⁶⁷

Kentucky followed the Iowa model of opening voting sites at the places where Kentucky servicemen were stationed. The act covered "all qualified voters of this State who shall be in the actual military service of the United States."¹⁶⁸ By these terms, the law covered both draftees and regulars. While there was no express exclusion of sailors

165. KY. CONST. of 1850, art. II, § 8.

166. U.S. CONST. art. II, § 1.

167. An Act Regulating the Manner of Soldiers Voting for Electors of President and Vice President of the United States, within and without this States (sic), ch. 572, § 1, 1864 Ky. Acts 122, 122 (hereafter cited as "Kentucky Soldier-Voting Law of 1864").

168. *Id.* at § 1.

in the navy, the act implied such an exclusion, as a practical matter, by directing the opening of election sites where army and artillery servicemen, but not sailors, were stationed: “posts, camps, or places where the regiment, or battery of artillery, or part of a regiment, not less than one company, under a separate command....”¹⁶⁹

Voting was by regiment, when “practicable,” and otherwise by company. Regimental and staff officers could vote at any of the regiment’s companies that opened a voting site. Whether the voting site was at the regiment or the company, the three ranking officers at the site served as election judges, with the highest-ranking officer among them designated as “chairman of the board of judges.”¹⁷⁰ There was no requirement that election judges had to be qualified Kentucky voters, but they did have to swear an oath that they would “support the constitution of the United States, and of the State of Kentucky.” The oaths also included the promise, common to most such laws, that the judges would “earnestly endeavor to prevent all fraud, deceit, or abuse.”¹⁷¹

Kentucky’s law makes no mention of ballots; the soldier voting was by *viva voce*. Kentucky’s constitution called for such voice voting “in all elections by the people.”¹⁷² By requiring that soldier voting be conducted, “as far as practicable” consistently with the provisions of Kentucky’s election laws, the military suffrage act incorporated this requirement of voice voting.¹⁷³ (This requirement also effectively ruled out the option of implementing absentee voting using the Minnesota model, in which written ballots were forwarded to election precincts back home. With *viva voce* voting, that mode of voting

169. *Id.*

170. *Id.* at § 3.

171. *Id.* at § 5.

172. KY. CONST. of 1850, art. VIII, § 15.

173. Kentucky Soldier-Voting Law of 1864, § 2.

was by definition impossible.) Election clerks recorded soldiers' names and their Kentucky residences, as well as their voting decisions, on poll lists as they "offered" their votes.¹⁷⁴

Each election judge had the "duty," and each voter the "privilege," of challenging a vote when he knew or had "any reason to suspect" a soldier was unqualified. When a challenge occurred, the judges interrogated the soldier about the challenged element of his qualification, using detailed inquiries set forth in Kentucky's general election law.¹⁷⁵ (The Secretary of State supplied the commanding officer of each company with copies of the relevant portions of the general election law for this purpose, as well as blank poll lists and copies of the soldier-voting law itself.¹⁷⁶)

When the polls closed, the election judges tallied the results on the poll lists, which they and the clerks then signed and forwarded to the governor, secretary of state, and attorney general. This was not necessarily the final word on the outcome, however. The board of examiners back in Kentucky, upon receiving the returns, could "correct" them, or reject them "in whole or in part," as they "shall deem just."¹⁷⁷ They based this assessment of justice on written "certificates" provided by the election judges. These were written statement in which the judges had to "certify whether or not the election was free, and the voters permitted to vote without illegal constraint, or force." If the judges

174. *Id.* at § 9.

175. *Id.* at § 7.

176. *Id.* at § 13.

177. *Id.* at § 10.

perceived any improper “influence or constraint,” they had to “state the facts fully in the certificate.”¹⁷⁸

Whether that authority to “correct” the returns influenced the outcome of voting for Kentucky’s electors is unclear, but Kentucky is the only state whose soldiers are recorded as having preferred McClellan to Lincoln, 2823 to 1194.¹⁷⁹

Kentucky repealed its military suffrage law in 1866, an arguably redundant exercise, since by its terms the soldier-voting law applied only to the election of 1864.¹⁸⁰

Maryland

Like Rhode Island, Kentucky, and nine other states, Maryland faced a time crunch for implementing soldier voting. Military suffrage legislation depended on first building a constitutional foundation, but there wasn’t time for that before the 1864 elections. The bootstrap solution, as in Rhode Island, was to incorporate soldier-voting mechanisms into the proposed constitution itself, such that soldiers could cast absentee ballots in the 1864 elections at the same time they voted to ratify the constitutional authority for such voting, all without the need for any action by the legislature.

Maryland’s prewar constitution clearly barred absentee voting. It said that a qualified elector “shall be entitled to vote in the ward or election district in which he resides.”¹⁸¹ That unambiguous language meant that military suffrage would depend on

178. *Id.*

179. Benton, *Voting in the Field*, 107.

180. An Act to Repeal an Act, entitled “An Act Regulating the Manner of Soldiers Voting for Electors for President and Vice President of the United States within and without this State, ch. 370, 1866 Ky. Acts 25.

181. MD. CONST. of 1851, art. I, § 1.

changing the constitution. In 1864, a constitutional convention drafted, and submitted for public ratification, new suffrage provisions deleting the restrictive wording of the existing constitution and authorizing the legislature to “provide by law for taking the votes of soldiers in the army of the United States serving in the field.”¹⁸² In recognition that ratification would not happen in time for the legislature to act on military suffrage before November, the convention’s proposal included an ingenious shortcut. In an article entitled “Schedule,” it permitted absent soldiers to participate both in the ratification process and, while they were at it, in the elections for state and federal offices.¹⁸³ That way, soldier-voting legislation was unnecessary for 1864’s elections, assuming the constitutional changes were ratified. Absent soldiers could cast ballots in the annual election at the same time they voted on the underlying question of whether the constitution should permit absentee voting at all.

The ratification vote was tight, with the votes of absent soldiers providing the very slim margin of victory.¹⁸⁴ The soldier-voting provisions of the proposed amendments were not the only source of controversy. Probably the bigger sticking points grew out of changes meant to block “disloyal” voting. The 1864 constitutional convention addressed the problem with two proposals. The first would disqualify from voting anyone who had given “aid, comfort, countenance or support to those engaged in armed hostility to the United States,” or who had declared his “desire for the triumph of said enemies over the arms of the United states.”¹⁸⁵ The second required *all* voters to give

182. MD. CONST. of 1864, art. I, §§ 1, 2.

183. MD. CONST. of 1864, art. XII (“Schedule”), § 11.

184. Benton, *Voting in the Field*, 246.

185. MD. CONST. of 1864, art. I, § 4.

a lengthy loyalty oath, which included the promise, “I have never expressed a desire for the triumph of said enemies over the arms of the United States,” and “I will in all respects demean myself as a loyal citizen of the United States.”¹⁸⁶ These provisions generated more political heat than did the soldier-voting provisions and probably accounted for the closeness of the ratification vote.

The absentee balloting provisions in the “Schedule” adopted a sparse version of the Iowa model. It covered all qualified voters “absent by reason of being in the military service of the United States.”¹⁸⁷ There was no exclusion for draftees or regulars. The description of the polling sites implicitly excluded navy personnel, as so many military suffrage laws did; polls were to open “in each Company of every Maryland regiment.”¹⁸⁸ Soldiers stationed more than ten miles from their own company’s headquarters, or quartered in a hospital, could vote at any company’s polling site.¹⁸⁹

Commissioned officers of the company were designated as election judges, with no maximum number of judges and a minimum of just one. There was no requirement that the election judges be qualified Maryland voters. If there were no officers present, the voters at the site would elect two of their own to act as judges. There was no provision for election clerks or for commissioners to assist with the voting. The judges swore an oath to follow the law and to “prevent fraud.”¹⁹⁰ The provisions very briefly described the ballot to be used in the ratification vote (stating either “for the Constitution”

186. MD. CONST. of 1864, art. I, § 4.

187. MD. CONST. of 1864, art. XII, § 12.

188. MD. CONST. of 1864, art. XII, § 11.

189. MD. CONST. of 1864, art. XII, § 12.

190. MD. CONST. of 1864, art. XII, § 11.

or “against the Constitution”), but said nothing at all about the ballot to be used in voting for state and federal offices.¹⁹¹

Election judges could, in their discretion, require a prospective voter to swear “to his being a legal voter of this State,” but that was the extent of the guidance for judges. The Schedule was silent about the handling of voting challenges. The judges recorded the names of the voting soldiers in a “poll book” and watched over the ballot boxes. After the polls closed, the ballots were counted and “strung on a thread.”¹⁹² The judges forwarded the returns, showing totals for and against the new constitution, to the governor, along with the threaded ballots. The Schedule said nothing about the form of the returns of the voting for state and federal offices, but these too were to be forwarded to the governor.¹⁹³

The governor had authority to “judge of the genuineness and correctness of the returns, and may recount the threaded tickets” before aggregating the soldier vote with the civilian results.¹⁹⁴ According to Benton, the governor indeed exercised that authority, throwing out 290 soldier votes on the constitution, 285 of them favoring ratification. It was not enough to change the outcome.¹⁹⁵ It is not clear whether he took any similar action in reviewing the results from the field in the voting for state and federal offices. We know from Benton, however, that such voting did occur. He cites a telegraph message Lincoln wrote to an acquaintance in Baltimore claiming, based on what Generals Meade and Grant had reported to him, that Maryland soldiers in the Army of the Potomac had supported Republicans in the November elections, 1294 to 134. The pro-

191. MD. CONST. of 1864, art XII, § 11.

192. MD. CONST. of 1864, art XII, § 13.

193. MD. CONST. of 1864, art XII, § 13.

194. MD. CONST. of 1864, art XII, § 14.

195. Benton, *Voting in the Field*, 249.

Lincoln soldier ballots contributed modestly to Lincoln's victory margin of nearly 7500 in the overall vote in Maryland.¹⁹⁶

On March 23, 1865, the legislature acted on its new constitutional authority by enacting a soldier-voting law on the Iowa model. It was the last such law enacted, and it was never used.¹⁹⁷ The narrowly approved constitution of 1864 had a very short lifespan. A new constitution replaced it in 1867. It deleted the 1864 soldier-voting provisions and restored the prewar suffrage rules, once again entitling each elector "to vote in the ward or election district in which he resides."¹⁹⁸

JUNIOR STATES

**Iowa*, Wisconsin, Minnesota*, Ohio*, West Virginia, Michigan, Kansas,
Maine, California, Missouri, Nevada, and Illinois**

These twelve states were organized after 1800, remained in the Union, and enacted soldier-voting laws during the Civil War. (*Ohio is discussed in Chapter 1. Iowa and Minnesota are discussed earlier in this appendix under the heading "Model States.") Compared to the experience of their senior, generally more easterly counterparts, the laws in these junior states fared better constitutionally. Three of the five statutes that faced high court challenges were upheld as constitutional, compared to zero for four in the senior group. Only two out of the Union's fourteen post-1800 states never enacted a

196. *Id.* at 247.

197. An Act to Enable the Qualified Voters of this State, in the Military Service of the United States or this State to Exercise the Right of Suffrage, and to add the following Sections providing therefor to the Thirty-Fifth Article of the Code of Public General Laws, ch. 124, 1865 Md. Laws 187.

198. MD. CONST. of 1867, art I, § 1.

soldier-voting law at all (Indiana and Oregon) compared to three out of the Union's eleven pre-1800 states (Massachusetts, New Jersey, and Delaware). And four of the country's five soldier-voting laws that endured well past the Civil War are from this younger group.

Wisconsin

The Badger State enacted its version of a military suffrage law two weeks after Iowa acted, on September 26, 1862.¹⁹⁹ It followed the Iowa model. As with most states adopting that model, the law stated that its elections “shall be conducted so far as practical, and not inconsistent with the provisions of this act, in the manner prescribed by the general election laws of this state.”²⁰⁰

The Wisconsin law excluded “any person in the regular or standing army of the United States, nor any person in any regiment, battery, or company organized and officered out of this state.”²⁰¹ By implication, the law also excluded Wisconsin men in the Navy; the only election sites the law authorized were at places where eligible Wisconsin soldiers served in a “regiment or battery of artillery,” which sailors never did.²⁰² There was no express exclusion of draftees in the text of the statute, although the title of the law referred to enabling “militia and volunteers” to vote in the field, suggesting that draftees

199. An Act to Enable the Militia and Volunteers of this State, when in the Military Service of the United States or of this State, to Exercise the Right of Suffrage, ch. 11, 1862 (extra Session) Wis. Laws 17 (hereafter cited as “Wisconsin Soldier-Voting Law of 1862”).

200. *Id.* at § 2.

201. *Id.* at § 1.

202. *Id.*

were ineligible. Indeed, in describing the law, the state Supreme Court treated it as applying only to volunteers.²⁰³

Elections in the field were to be held by company. The company's three highest-ranking officers served as election inspectors, with the highest ranking among the three serving as "chairman of the board of inspectors." The law did not specify that clerks or inspectors had to be qualified Wisconsin electors, although it did require each to swear to "support the constitution of the United States and of the state of Wisconsin." Regimental officers and staff could vote at any company's election site.²⁰⁴

Wisconsin's law made no provision for commissioners to assist with implementing the statute. The inspectors ran the election and had several responsibilities: They appointed clerks to help receive and tally ballots; they administered oaths to themselves and to the clerks (as in Iowa, swearing "to studiously endeavor to prevent all fraud, deceit or abuse in conducting" the election); they examined ("canvassed") the ballots, making sure that the soldier's home county was shown at the top of each ballot; they challenged any voter they knew or had "any reason to know or suspect" was ineligible, then they questioned the challenged voter under oath about "his residence and qualifications as an elector," asking the same specific questions relating to age and residence that the general election law specified for civilian elections; they certified the accuracy of the poll lists prepared by the clerks showing the names and home towns of each voter; they tallied the voting results, county by county; and finally they forwarded

203. *Chandler*, 16 Wis. 398. In its opinion upholding the constitutionality of the law, the state supreme court described the law as applying to "volunteer soldiers." *Id.* at 411.

204. Wisconsin Soldier-Voting Law of 1862, §§ 2, 3, 4, 5.

the tallies, together with the poll lists, to the Wisconsin Secretary of State for inclusion with the in-state voting results.²⁰⁵

The law purported to impose severe penalties on soldiers caught voting fraudulently. Enforceable or not, the penalty language was indeed tough: six months to a year in prison for ineligible voting, and one to two years in prison “at hard labor” for voting in more than one election.²⁰⁶

The contested result of an 1862 election for a county sheriff led in 1863 to a state Supreme Court review of the statute’s constitutionality. Justice Byron Paine, a radical Republican, authored the opinion upholding the law.²⁰⁷ The challenger relied on two provisions of the state constitution. One (Article VIII, section 5) provided that “no person shall vote for county officers out of the county in which he resides.” This, according to Paine, meant only that a voter could not vote for officers of a county other than his own county of residence.²⁰⁸ Second, the challenger relied on the constitution’s requirement that criminal offenses be tried in the county or district “in which the offense shall have been committed.” (Article I, section 7) This, the challenger asserted, rendered unconstitutional the legislature’s effort to punish voting fraud committed by soldiers outside of Wisconsin. Justice Paine turned away that argument, too, ruling that this constitutional provision applied only to crimes committed in Wisconsin and that the

205. *Id.* at §§ 7, 8.

206. *Id.* at § 17.

207. *Chandler*, 16 Wis. at 433. As an attorney before the war, Paine had defended an abolitionist accused of impeding enforcement of the fugitive slave act. See biographical information compiled by the Wisconsin Court System. “Byron Paine,” Wisconsin Court System, accessed May 19, 2014. <http://www.wicourts.gov/courts/supreme/justices/retired/paine.htm>. The enforcement episode that drew Paine into his role is described in H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Columbus: Ohio University Press, 2006).

208. *Chandler*, 16 Wis. at 439-441.

legislature was free to criminalize acts Wisconsin citizens might commit outside the state. He cited treason as an example of such a crime.²⁰⁹

According to the leading scholar of the Wisconsin law, the state legislature tried to tip the scales of justice to influence the court's decision. The device for doing so was an amendment to the soldier-voting law to permit soldier voting in elections for state judges.²¹⁰ The intention, according to historian Frank Klement, was to pressure the justices to favor soldier voting so as not to antagonize soldiers whose votes they needed for their own elections.²¹¹ Klement argues that the legislature's gambit succeeded in influencing the outcome of the court case.

The year after the court's ruling, Wisconsin amended its military suffrage act to address an issue the legislature could not have anticipated in 1862. Starting in 1863, to meet ever more demanding draft quotas, communities sometimes offered financial bounties to entice men from other (usually poorer) communities to sign up. The "bounty men" who accepted were counted toward the draft quota of the community paying the bounty and not the community where they lived. For voting purposes, did this affect the residence of the soldier receiving the bounty? No, the legislature decided. "[E]very such soldier shall be deemed to be a resident of the town, ward or city in which he had a legal residence at the time of volunteering."²¹²

209. *Id.* at 444-445.

210. An Act to Amend Chapter 11 of the General Law of the Extra Session of 1862, entitled "An Act to Enable the Militia and Volunteers of this State, when in the Military Service of the United States or of this State, to Exercise the Right of Suffrage," ch. 59, 1863 Wis. Laws 77.

211. Klement, "The Soldier Vote in Wisconsin During the Civil War."

212. An Act to Define the Residencies of Certain Soldiers from this State, in the Military Service of the United States, ch. 471, §1, 1864 Wis. Laws 526, 526.

Wisconsin omitted soldier-voting provisions from its revised election law in 1871.²¹³

West Virginia

West Virginia came into existence during, and because of, the Civil War. But unlike newcomer Nevada, which approached suffrage on a *tabula rasa* compared to older states, West Virginia carried some of the legal and constitutional baggage of its much older and estranged parent, Virginia. In setting suffrage qualifications, the new state's 1863 constitution tracked Virginia's constitution of 1851. In addition to being a white, male, twenty-one year old citizen, a qualified voter needed residence in the state (one year for West Virginia, two years for Virginia) plus a briefer period (thirty days for West Virginia, one year for Virginia) in the locality "in which" (West Virginia) or "where" (Virginia) "he offers to vote."²¹⁴

If absentee voting were foremost in the thinking of the new state's framers, they might have chosen more propitious wording. Constitutionally linking an elector's "offer" to vote with his local residence had proved fatal to the military suffrage law in Pennsylvania; that state's high court had construed the wording to mean that a voter had to cast his ballot in person in his place of residence. (Michigan's court would rule the same way, but not until January 1865.) But West Virginia's legislators darted right past that constitutional obstacle and enacted soldier voting in the state's very first legislative session, almost before the ink on the new constitution was dry.

213. Of Elections Other Than for Town Officers, WIS. STAT. tit. II, chs. 7, 8, p.207, et seq. (1871).

214. W. VA. CONST. of 1863, art. III, § 1; VA. CONST. of 1851, art. III, § 1.

Uniquely among the states enacting military suffrage laws during the war, West Virginia incorporated soldier-voting provisions into its comprehensive election law.²¹⁵ Adopting the theory that a soldier “offers” his vote in the place of his residence as long as his ballot ends up in a ballot box there, no matter where the soldier physically makes out his ballot, West Virginia adopted the Minnesota model. The statute applied to any qualified voter “who is necessarily absent [from his election district] on the day of any election, in the service of the United States or of this State....”²¹⁶ That covered servicemen of all sorts: army, navy, conscripts, enlistees, regulars, surgeons, chaplains, and musicians. And it expressly applied to “any” election, which meant that state, local, and federal elections all fell within its scope.

The soldier-voting provision was extraordinarily brief. In a single section of a long statute (65 sections in all), it required only that the soldier fill out his ballot, seal it in an envelope, and sign the envelope “in his own proper hand,” adding a description of his military unit. If he couldn’t sign, then his commanding officer attested to his “mark.” The soldier then sent the envelope (“by mail or otherwise”) to the election supervisor and two inspectors in his election district back home, or to any one of them. The supervisor and inspectors accepted the ballot if they were “satisfied that the signature is genuine and the person is entitled to vote.”²¹⁷

The law added what was the law in many states – that no soldier could gain a residence on the strength of being stationed in the state, and that no qualified elector

215. An Act to Regulate Elections by the People, ch. 100, § 26, 1863 W. Va. Acts 114, 119-120.

216. *Id.*

217. *Id.*

could lose his residence by his absence during military service.²¹⁸ Each local assessor had to include absent soldiers on lists of qualified electors “so far as he is able to ascertain n the same.”²¹⁹ Election supervisors and inspectors who accepted a soldier ballot knowing it was ineligible were subject to a financial penalty (not less than \$30 or more than \$100).²²⁰ But the statute made no provision for notifying absent soldiers about the opportunity to vote, or for commissioners to assist soldiers with the voting, or for copies of the law to be distributed to military units.

West Virginia’s military suffrage law did not long outlast the war. It was eliminated from the state’s election law by the time of the first post-war statutory codification, in 1870.²²¹

Michigan

Michigan patterned its military suffrage law, enacted on February 5, 1864, on Iowa’s law. Voting under the law occurred at election sites created “at every place, whether within or without the State, where a regiment, battalion, battery or company of Michigan soldiers may be found or stationed.”²²² Because naval organization did not include these designations, this statutory formulation, like Iowa’s, effectively excluded sailors in the navy. All other servicemen were covered; there was no exclusion for

218. *Id.* at § 27.

219. *Id.* at § 52.

220. *Id.* at § 60.

221. Elections by the People for State, District, County, and Township Officers, W. VA. CODE, Ch. III (1870).

222. An Act to Enable the Qualified Electors of this State, in the Military Service, to Vote at Certain Elections, and to Amend Sections Forty-Five and Sixty-One, of chapter six, of the compiled laws, No. 21, § 7, 1864 (extra session) Mich. Pub. Acts 40,41 (hereafter cited as “Michigan Soldier-Voting Law of 1864”).

draftees or soldiers in the regular army. As in Iowa, eligible soldiers specifically included surgeons and chaplains.²²³

Michigan's law included language that had become boilerplate in many statutes, optimistically providing that the general election law was to apply to soldier voting "so far as applicable, and not qualified by the provisions of this act."²²⁴ The law purported to allow soldiers to vote "in all the elections authorized by law."²²⁵ But its administrative provisions effectively left out elections for township and ward officials, since nothing in the law called for communicating returns to either townships or wards. As the Michigan Supreme Court observed in reviewing the law's constitutionality, this meant that the law could not, and did not, apply to township or ward elections.²²⁶ But it did cover elections for federal, state, county, and district offices.²²⁷ This included elections for presidential and vice-presidential electors.

Polling sites were to be opened for each company of Michigan troops. If it was "not practicable for all [members of the company] to vote together," as when part of a regiment or company was on "detached service," then the detached unit could open its own polling site.²²⁸ The eligible soldiers at each site elected three election inspectors, who in turn appointed election clerks. Election inspectors need not be officers; the only qualification was that each inspector (though not necessarily the clerks) had to be an

223. *Id.* at § 2.

224. *Id.* at § 5.

225. *Id.* at § 1.

226. *Twitchell*, 13 Mich. at 171.

227. Michigan Soldier-Voting Law of 1864, § 1.

228. *Id.* at § 8.

eligible Michigan voter.²²⁹ That meant, first, that he had to be at least 21 years old, a U.S. citizen (or a foreigner who “has declared his intention” to become a U.S. citizen), or a “civilized” Native Americans who did not belong to a tribe. Second, he had to have resided six months in Michigan and 20 days “in the township or ward in which he offers to vote.”²³⁰

Inspectors and clerks swore oaths, as their counterparts did back home. As with oaths in most states, the Michigan soldiers serving as inspectors and clerks promised among other things to “studiously endeavor to prevent fraud, deceit and abuse” in the election.²³¹ As in Iowa, the law provided for commissioners to travel from Michigan with necessary election paraphernalia: copies of the law, forms of poll lists and returns, and the text of oaths to administer to judges, clerks, and challenged voters. Commissioners also carried the election returns back home to Michigan.²³²

The governor appointed the commissioners, assigning one for each division containing at least one Michigan regiment.²³³ Commissioners had to be eligible Michigan voters and had to swear an oath that included the promise to perform their responsibilities “without reference to political preferences.” Like election judges and clerks, they had to swear to “studiously endeavor to prevent fraud, deceit and abuse.”²³⁴

The statute specified that each ballot had to show the soldier’s home county and town or city. The ballot had to be on a single piece of paper, though it could cover a long

229. *Id.*

230. MICH. CONST. of 1851, art. VII, § 1.

231. Michigan Soldier-Voting Law of 1864, § 10.

232. *Id.* at §§11, 24.

233. *Id.* at § 29.

234. *Id.*

list of offices. The offices to be chosen, and the preferred candidates names, could be printed in advance on the ballot or written by hand by the voter.²³⁵

Soldiers announced themselves to the inspectors and clerks, by name, county of residence, and military attachment. The clerks entered all this information in the poll books.²³⁶ If no one challenged the voter, the soldier placed his ballot in the ballot box.²³⁷ If there was a challenge, the judges administered one or more of five different oaths to the soldier testing all elements of eligibility – U.S. citizenship, state and township residency, and age. The statute stated the exact wording of each oath.²³⁸

At the close of voting, the inspectors tallied the votes and the clerks double-checked the tally.²³⁹ The final results were entered on the return form, and the returns, together with the poll books and ballots, were given to a commissioner (or placed in the mail “or other safe mode”) for delivery to the Michigan Secretary of State.²⁴⁰ The results of the soldier voting were added to the civilian results to determine election winners.

By its terms, Michigan’s statute was to remain in force only “during the present war, and no longer....”²⁴¹ As events unfolded, however, the law died slightly earlier than that. In late January 1865, as the Confederacy took its last gasps, but before the war’s conclusion, Michigan’s Supreme Court struck down the law as unconstitutional.²⁴² Washtenaw county canvassers had excluded the soldier vote in the 1864 election for

235. *Id.* at § 14.

236. *Id.* at § 15.

237. *Id.* at § 16.

238. *Id.*

239. *Id.* at §§ 18, 22.

240. *Id.* at §§ 24, 25.

241. *Id.* at § 38.

242. *Twitchell*, 13 Mich. at 127.

county prosecutor, finding that the soldier-voting law was unconstitutional. That decision cost candidate Daniel Twitchell the job he would have won if the votes of absent soldiers had counted. He appealed. The case ended up at Michigan's high court, which ruled that the canvassers were correct to exclude the soldiers' ballots. The prosecuting attorney post that Twitchell had sought went instead to Amos Blodgett, who had the higher number of votes cast within the county.

At issue was the 1850 constitution's provision that "no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he has resided in the township or ward in which he offers to vote, ten days next preceding the election."²⁴³ Twitchell's counsel, state Attorney General Albert Williams, contended that a vote is "offered" in the township if the township ultimately receives it. The provision of the constitution, he urged, pertained only to the qualifications of the voter – he had to be a resident of the township where his vote is received – and not to where the elector cast his ballot. In speaking only of who qualified to vote, not where he had to vote, the constitution left the legislature free to establish voting sites for qualified electors outside the Michigan township, and outside the state entirely.

When the bill had been under consideration in 1863, Williams had opined to the state senate that the bill was indeed constitutional. It was inconceivable, Williams had written then in response to the senate's request for his opinion, that the framers could have intended to force absent soldiers into the Hobson's choice of either losing their opportunity to vote or, "at the risk of the national or State existence, [finding a way] to

243. MICH. CONST. of 1851, art. VII, § 1.

come home to vote.” If they had had any inkling that the constitution might be construed to achieve such “palpable injustice,” he argued, neither the convention nor the people would have adopted it. Likening the objectionable interpretation to a snake, he asked rhetorically, “Would [the framers] have aided in warming such a viper into life and vigor, to turn and bite them?”²⁴⁴

By a 3-1 vote, the justices disagreed with Williams, concluding that an elector met the constitutional requirement only by personally casting his ballot in the township where he resides. Each of the three justices reaching this conclusion issued a separate opinion. Justice James Valentine Campbell compared the 1851 constitution’s language to the corresponding provision of the 1835 constitution. The earlier version entitled an elector to cast his ballot only in the “district, county, or township in which he shall actually reside....”²⁴⁵ Justice Campbell focused on the conjunction “or.” It gave the voter the choice of voting anywhere in the county, including polling sites far from his own township. This invited voting fraud, since no one at the polling site might be in a position to challenge the credentials of the stranger arriving there to vote from some faraway corner of the county. The constitution was amended in 1839 to tighten the voting requirement, now insisting that the voter cast his ballot in his own “township or ward.” The 1851 constitution preserved that requirement, Justice Campbell concluded, and did indeed prescribe the *where* of voting, not just the qualifications of who could vote. He explained the framer’s intent in requiring that voters be personally present in their township or ward when they cast their ballots:

244. 1863 *Mich. Senate Journal* 424, 426.

245. MICH. CONST. of 1835, art. II, § 1.

If the voter is required to present himself personally at his own place of abode, his neighbors will know his person, and will be likely to know his qualifications. If he can vote elsewhere, and have his vote transmitted or counted in the township, he may or may not be known personally to those who are where he is found, but they are by no means likely to know his actual residence, nor, if he violates the law, can his crime be as readily identified or proven. That other means of protection may be devised is possible; but the test by neighboring eyewitnesses has always been the favorite resort of the law, and it is the best.²⁴⁶

Justice Isaac Christiancy, who had helped organize the Republican Party in 1854 before joining the court, reached the same conclusion, but for somewhat different reasons. Relying on history, he concluded that the term “offers his vote” in a township or ward, as the 1850 framers must have understood the term, meant “personal presentation of the vote at that place to the inspectors or officers presiding at such election.” This had been the “uniform mode in all the American states from their first organization,” with the single exception of Pennsylvania’s 1813 law, which Christiancy brushed aside, observing that Michigan had certainly known no other mode in her history.²⁴⁷

Justice Thomas Cooley issued the third opinion that Michigan’s 1864 law was unconstitutional. He agreed with Campbell’s reasoning that, given the historical background of the 1851 constitution, there was no ambiguity in the term “offers his vote” in the township or ward where the elector resided. It required the voter’s personal presence in the township. But Cooley added an insight born of a particularly tight reading of the statute’s text. Twitchell must lose, Cooley wrote, even if his argument were correct about the meaning of the constitution’s requirement that an elector “offer his vote” in his township or ward. According to Twitchell’s counsel, an elector met this

246. *Twitchell*, 13 Mich. at 144.

247. *Id.* at 155.

requirement as long as his vote was ultimately received in the township or ward, even if he cast the ballot elsewhere. But, as Cooley observed, Michigan's military suffrage law made no provision for returning soldier voting results or ballots to townships or wards, only to counties and districts. An absent soldier could not be said to "offer his vote" in a township or ward that, by this law, never received it. Whether through drafting oversight or otherwise, the law did not apply to township or ward elections.²⁴⁸

Campbell, Christiancy, and Cooley, three of the four Michigan Supreme Courts justice who would soon become known as the "Big Four" for their national renown, all agreed on the bottom line – the 1864 law was constitutional – even if they could not agree on a single opinion stating why.²⁴⁹ Opposing them in this case was Chief Justice George Martin. Like the three justices in the majority, Martin was a Republican. But his dissenting opinion, the final opinion in the final case on Civil War soldier-voting laws, echoed the first, the trial court opinion in the Pennsylvania case of *Chase v. Miller* by Democrat John Conyngham. Like Conyngham, Martin believed that striking down the soldier-voting law amounted to "disfranchising" soldiers and intruded on legislative prerogatives. Absent "a *direct* collision between [a statute] and the constitution," the court's duty was to defer to "legislative discretion," wrote Martin.²⁵⁰ By "direct" collision, Martin meant an express and unambiguous prohibition in the constitution against the legislative action; implied prohibitions did not suffice. "I cannot put my finger

248. *Id.* at 170.

249. The fourth of the "Big Four" was Justice Benjamin Graves, who did not participate in the case. For more on the Big Four, see also, "History Overview," Michigan Supreme Court Historical Society, accessed January 17, 2014, <http://www.micourthistory.org/history-overview/> (accessed January 17, 2014).

250. *Twitchell*, 13 Mich. at 175, 177.

upon any word or clause of the constitution from which I can conclude that they [i.e., the people of Michigan] have surrendered [their] will” on the subject of setting the place for voting.²⁵¹ To the contrary, he read the constitution as leaving it to the legislature to determine where voting could occur. It mattered not at all to Martin that the framers could not have contemplated absentee voting. The “impressions and intention” of the framers, considered apart from “the language of the instrument,” counted for nothing.²⁵² Courts should not superimpose past understandings of the meanings of words of the constitution. “The constitution was framed for the very purpose of adaptation to the progress of the times,” Martin wrote, sounding very much like modern proponents of “living constitutionalism.”²⁵³

Remarkably, all three justices who voted to strike down the statute were Republicans.²⁵⁴ They certainly understood the party passions surrounding the issue. Justice Christiancy lamented the law’s “unfortunate connection with the party politics of the day.” Indeed, the statute was bitterly contested and enacted along party line votes, with Republicans favoring passage and Democrats opposed.²⁵⁵ On the other hand, perhaps party loyalties over the issue spilled over to the bench but tugged at the justices less forcefully in January 1865, when they ruled, than might have been the case in mid-

251. *Id.* at 185.

252. *Id.* at 181.

253. *Id.* at 179.

254. Regarding Campbell, see C.A. Kent, *James Vincent Campbell*, 5 MICH. L. REV. 161, 164 (1907); regarding Christiancy, see “Isaac Peckham Christiancy,” Biographical Directory of the United States Congress, accessed June 10, 2013, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000379> ; for Cooley, see the website of the University of Michigan Law School, where he taught for many years, even while on the Michigan high court: “Thomas Cooley,” University of Michigan Law, accessed June 10, 2013, www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/Cooley_ThomasM.aspx .

255. *Twitchell*, 13 Mich. at 148; Benton, *Voting in the Field*, at 93-97.

1864. Michigan Republicans had already enjoyed the benefits of the law in the 1864 elections, and the justices might have supposed that the war would end – and the statute with it – long before the next election.

After the war, in 1866, Michigan amended its constitution to authorize the legislature, during wartime, to “provide the manner in which, and the time and place at which” absent servicemen could vote. That provision was incorporated in the state’s revised constitution in 1908, but was subsumed in the 1963 constitution’s more general grant of legislative authority for all classes of absent voters, not just soldiers.²⁵⁶

Kansas

Kansas was the youngest state in the union at the outbreak of the Civil War, having been admitted in January 1861. The new state granted suffrage rights to 21-year old white men who met the constitution’s residency requirements and were either U.S. citizens or had “declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization.”²⁵⁷ The state constitution articulated residency requirements in words that elsewhere had proved fatal to absentee voting laws for soldiers. But those same words proved not to be an insuperable problem in Kansas.

As with both Pennsylvania and Michigan, Kansas’s constitution said that men wishing to vote had to reside for a specific durational period (for Kansas it was thirty

256. Benton, *Voting in the Field*, 103; MICH. CONST. of 1908, art. III, § 1; MICH. CONST. of 1963, art. II, § 4.

257. KAN. CONST. of 1861, art. V, § 1. Minnesota, Wisconsin, and Michigan similarly granted suffrage rights to non-citizens with a demonstrable intent to become naturalized citizens.

days) “in the township or ward in which [the elector] offers to vote....”²⁵⁸ The high court in both the Keystone and Wolverine states struck down absentee voting laws for soldiers, concluding that one could “offer to vote” in a township or ward only by a physical presence there when he cast his ballot. Both courts looked to the history of voting practices in their respective states for a sense of what their constitutions’ framers meant when they used the verb “offer” (as in “offer his vote”) in provisions governing suffrage. That history showed, in both Pennsylvania and Michigan (at least to the satisfaction of their high courts) that “offering” a vote meant personally presenting a ballot in the township, which ruled out absentee voting for soldiers or anyone else. The Kansas constitution used the same verb, and a handful of opponents to military suffrage in the Kansas legislature argued that it stood in the way of absentee voting as much in Kansas as it had in her sister states. But the state attorney general disagreed, as did the vast majority of Kansas legislators.²⁵⁹ And after enactment, the state’s absentee voting law for soldiers prompted no judicial intervention. Perhaps Kansas, unlike Pennsylvania and Michigan, was too young to have developed long, pre-constitution election traditions that imparted fixed meanings to undefined words like “offer” in its constitution.²⁶⁰

A constitutional hurdle that loomed higher than the requirement to “offer his vote” in a township or ward was a provision barring soldiers, seamen, and marines from gaining residence by being stationed in Kansas. The provision added this prohibition in a separate clause: “nor shall any soldier, seaman, or marine have the right to vote.” The

258. KAN. CONST. of 1861, art. V, § 1.

259. Benton, *Voting in the Field*, 113-117.

260. The ill-fated Lecompton Constitution also used the verb “offer” in stating its residency requirement: A prospective voter had to have resided three months “in the county, city, or town in which he may offer to vote....” KAN. CONST. of 1857, art. VIII, § 1 (Lecompton).

entire text of this provision merits a close look. Here is the full sentence: “No soldier, seaman, or marine, in the army or navy of the United States, or their allies, shall be deemed to have acquired a residence in the State in consequence of being stationed within the same; nor shall any soldier, seaman or marine have the right to vote.”²⁶¹

A reader encountering this 1859 text and looking for harmony with the text of a 1864 law allowing absent soldiers to vote, could conclude that the prohibition in the final clause applied only to the those servicemen identified in the preceding clause: soldiers and sailors in the regular army or navy of the United States and stationed in Kansas. Read that way, which is how the state attorney general read it, the final clause stood not as a flat prohibition of a military suffrage statute, but as a bar to voting by career servicemen stationed in Kansas.²⁶² Harmony could exist between that bar and a soldier-voting law conferring suffrage rights only on Kansas’s militia and volunteers. Kansas passed exactly such a soldier-voting law. Just to make sure, however, the legislature submitted a constitutional amendment, which was ratified at the 1864 election, stating “the legislature may make provision for taking the votes of electors who may be absent from their townships or wards, in the volunteer military service of the United States, or the militia service of this state.”²⁶³

Kansas enacted its soldier-voting act in March 1864, after the legislature recommended the constitutional amendment, but before it was ratified. Its constitutional

261. KAN. CONST. of 1859, art. V, § 3.

262. The attorney general, Republican Warren Guthrie, provided the state senate with a written opinion stating that before 1861 (the state constitution was drafted in 1859), the term “soldier” never applied to volunteers and militiamen, but only to “that branch of the national military service known as ‘regulars.’” Kansas Senate Journal, 4th Cong., reg. sess., February 25, 1864, 413-414.

263. Joint Resolution, to Amend Section Three of Article Five of the Constitution of the State of Kansas, ch. 45, 1864 Kan Sess. Laws 81.

foundation, then, was the existing constitution, interpreted as presenting no obstacle. The law followed the Iowa model, calling for opening election sites at the posts where Kansas's soldiers served. It covered only qualified electors "in the militia or volunteer military service."²⁶⁴ This effectively excluded draftees and regulars. In calling for election sites where "regiments, battalions, companies or squads" were located, the act also left out any Kansans servicing in the navy.²⁶⁵ The act applied to all county, district, state, and federal elections, but not to elections for township offices.²⁶⁶

Voting was by regiment, but the law allowed two regiments stationed together to vote at a single site, as long as the combined regiments totaled no more than 12 companies. To assist the voting process, the state sent pre-printed poll books and tally sheets, delivered by "a suitable person" whom the governor appointed. Unlike the "commissioners" sent to help implement absentee voting under several of the state laws, this "suitable person" apparently had no duties beyond delivery of the election paraphernalia.²⁶⁷

Kansas soldiers selected (by *viva voce* election) three judges and two clerks to administer the voting process. The Kansas statute omitted any requirement that judges and clerks be qualified Kansas voters. That created the possibility that non-Kansans, non-whites, or soldiers younger than 21 could serve as election judges or clerks. Judges and clerks swore an oath promising among other things not to accept anyone's vote without

264. An Act Supplemental to an Act Entitled 'An Act to Regulate Elections and to Prescribe the Qualifications of Electors, and to Prevent Illegal Voting,' Approved June 3, 1861, ch. 59, § 1, 1864 Kan. Sess. Laws 101, 101 (Hereafter cited as Kansas Soldier-Voting Law of 1864).

265. *Id.* at § 2.

266. *Id.* at § 1.

267. *Id.* at § 3.

first being “satisfied” that the soldier was a qualified voter “of the township or ward *of which* he offers his vote.”²⁶⁸ This somewhat clumsily reframed the constitution’s requirement that an elector be a resident of the township or ward “in which” he offers his vote.

In assessing the qualifications of electors, the judges applied the standards of the general election law, many of the provisions of which this soldier-voting law incorporated by reference. The rule for testing a voter’s residence, for example, was that “the place shall be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.”²⁶⁹ When someone challenged a soldier offering his vote, the judges administered any of several oaths spelled out verbatim in the general election law. Sometimes the statutory oath made no literal sense when applied outside of Kansas. Such was the case in a challenge for lack of township or ward residency, for example. The judges asked the soldier, “When did you come into this township (or ward)?” Or, “When you came into this township (or ward), did you come for a temporary purpose merely, or for the purpose of making it your home?”²⁷⁰ An oath’s reference to “this township” or “this ward” hardly fit the circumstances of soldiers altogether absent from Kansas. This problem typified a breakdown in anti-fraud protections in soldier-voting laws generally. Many, like the Kansas law, imported anti-fraud protections that may have worked well in

268. *Id.* at § 5. (Italics added.)

269. An Act to Regulate Elections and to Prescribe the Qualifications of Voters, and to Prevent Illegal Voting, ch. 28, § 9, 1861 Kan. Sess. Laws (legisl. 1st session)133, 134. (The Kansas Soldier-Voting Law of 1864, in § 6, incorporated this provision by reference.)

270. An Act to regulate Elections and to prescribe the qualifications of Voters, and to prevent illegal voting, ch. 28, § 9, 1861 Kan. Sess. Laws Statutes 133, 134.

civilian elections back home but that offered much shakier protections “in the field,” where they barely made sense.

Even if a challenged voter swore to the required oaths, the judges could still reject his ballot “if they shall be satisfied, from record, evidence, or other legal testimony adduced before them, that he is not a legal voter.”²⁷¹ Unchallenged ballots, and those that survived the gauntlet of oaths and investigation, were placed in a ballot box. Each was marked with the soldier’s county, township (or ward), and district. The name of the soldier offering the vote, each of whom was announced “in an audible voice” by a judge before accepting the ballot, was entered in the poll books along with the identity of his military attachment and his residence information.²⁷²

At the close of the voting, judges opened the ballot boxes and went through the ballots, one by one, and reading out loud the choices appearing on each ticket. The clerks recorded the results on the tally sheets provided by the governor’s representative. Poll books, tally sheets, and ballots were then bundled up and forwarded to the Kansas Secretary of State in Topeka. The soldier vote was then made part of the overall voting results.²⁷³

The Kansas soldier-voting law survived the Civil War and remained in effect until at least 1947.²⁷⁴

271. *Id.* at § 13.

272. Kansas Soldier-Voting Law of 1864, § 7.

273. *Id.* at §§ 7-12.

274. Elections, KAN. STAT. ANN. Ch. 25, art. XII, §§ 25-1201 et. seq. (1947).

Maine

Maine's prewar constitution posed clear obstacles to absentee voting. It granted every twenty-one year old male, having three months residence in the state, voting rights "in the town or plantation where his residence is so established."²⁷⁵ Elections for both legislative branches and for the governorship were to be held in each town in an "open town meeting" where local leaders (town "selectmen") presided.²⁷⁶ Politicians favoring a military suffrage law, mostly Republicans, saw the futility of pushing for a soldier-voting bill in the face of the constitution's clear insistence on the voter's physical presence in his town of residence on Election Day. They needed to amend the constitution.

Republican governor Abner Coburn urged the legislature to propose an amendment for popular ratification in 1863, but that effort fizzled. Coburn's successor Samuel Cony, also a Republican, was more persuasive the next year. In March 1864, at Governor Cony's urging, the legislature passed a joint resolution recommending a constitutional amendment allowing absent soldiers to vote.²⁷⁷ This came quite late in the election year, and timing became a problem. Republicans wanted to implement soldier voting in time for the general election in November, but the constitutional amendment authorizing the needed legislation would not happen until very shortly before that, in September. Lawmakers could not wait for the people's verdict on the proposed

275. ME CONST. of 1820, art. II, § 1.

276. ME CONST. of 1820, art. IV, Part First, § 5 (for state house members); art. IV, Part Second, §. 3 (for senators); and art. V, Part First, § 3 (for Governor).

277. Resolves Providing for an Amendment of the Constitution so as to Allow Soldiers Absent from the State to Vote for Governor, Senators, Representatives and County Officers ch. 344, 1864 Me. Acts 334. The legislative history of the constitutional amendment, and of the soldier-voting law it authorized, is comprehensively described in Benton, *Voting in the Field*, 118, et seq.

amendment if they wanted to have a soldier-voting system up and running for the November elections.

The solution was a soldier-voting law that tackled the subject with a two-pronged approach.²⁷⁸ First, the law authorized soldier voting in purely federal elections – for representatives to Congress and for electors of president and vice-president.²⁷⁹ For this, Maine’s lawmakers had the benefit of the pioneering efforts of their counterparts in Vermont, guided by its Supreme Court. The Vermont justices had ruled that the state legislature had plenary authority under the U.S. Constitution to regulate the time, place, and manner of voting for these federal offices, regardless of what the state constitution said about elections for state and local offices. New Hampshire’s high court had agreed. Both states implemented soldier voting only for federal elections. Maine lawmakers could be reasonably confident that by copying this approach, the first prong of their statute would similarly survive any constitutional scrutiny it might receive.

The statute’s second prong was to permit the same absent soldiers at the same time to vote in the election for Maine’s governor and state legislature, contingent on ratification of the state constitution in September.²⁸⁰ As it happened, the contingent event occurred with ratification of the amendment in September. It was a characteristically partisan affair, with yes votes predominating in Republican towns and no votes in

278. An Act Authorizing Soldiers Absent from the State in the Military Service to Vote for Electors of President and Vice President, and for Representatives to Congress; also Regulating the Manner of Electing Registers of Deeds, County Treasurers and County Commissioners, so that such Soldiers may be Allowed to Vote therefor, ch. 278, 1864 Me. Acts 209 (hereafter cited as “Maine’s Soldier-Voting Law of 1864.”)

279. *Id.* at § 1 (for electors of president and vice president), and § 9 (for representatives to congress).

280. *Id.* at § 10. Absent soldiers were not, however, voters in the constitutional ratification process.

Democratic towns.²⁸¹ Notwithstanding partisan divisions, however, the amendment was ratified, so Maine's absent soldiers were able to vote in 1864's November elections for federal, state, and local offices. The law provided that each voting soldier "shall be considered as voting in the city, town, plantation and representative district where he resided when he entered" his military service.²⁸²

Maine's law followed the Iowa model of setting up election sites at locations where Maine servicemen served in the war. The constitutional amendment excluded soldiers "in the regular army of the United States," and so did the statute.²⁸³ There was no exclusion for draftees. As with so many other such laws, Maine's described the locations for erecting voting sites in terms that effectively excluded sailors in the navy. Elections sites were to be opened where Maine "soldiers" served in a "regiment, battalion, battery, company, or detachment of not less than twenty" men.²⁸⁴ No provision was made to accommodate detached units smaller than twenty men, but general and staff officers were allowed to vote at any of the election sites, as were surgeons and chaplains.²⁸⁵

The three ranking officers of the military unit where an election site was opened served as election "supervisors," who presided over the voting. Like Wisconsin's law, Maine's law had no requirement that the supervisor himself be a qualified Maine elector. Theoretically, non-Maine officers could preside as supervisors of voting by Maine soldiers, although lawmakers may have believed that they had protected against this risk with the law's requirement that election supervisors swear "to support the constitution of

281 Benton, *Voting in the Field*, 121.

282 Maine's Soldier-Voting Law of 1864, § 9.

283 *Id.* at § 1.

284 *Id.* at § 2.

285 *Id.* at §§ 2, 3.

the United states and of this state.”²⁸⁶ The law was also unusual in making no allowance for clerks to assist the supervisors. Supervisors had to keep the poll lists of soldiers who voted and prepare the returns, without clerical assistance. Less uniquely, Maine appointed no commissioners to help implement the law. Supervisors, in other words, were on their own in managing the election sites, although the law called for Maine’s secretary of State to supply them with blank poll lists and forms for preparing returns.²⁸⁷

The soldier’s county and town of residence had to appear on his ballot, as was the case in all such laws.²⁸⁸ Before accepting the ballot, the supervisors “must be satisfied” that the soldier’s age and citizenship qualified him to vote and that his residence was in the location identified on his ballot.²⁸⁹ If a supervisor or anyone else challenged a soldier’s eligibility, it was the job of the supervisor to interrogate the soldier, under oath, and take evidence from the challenger. The law did not include the text of oaths or interrogatories the supervisor should administer to test the various categories of eligibility.²⁹⁰ Final say on the voter’s eligibility rested with the supervisors.

The supervisors forwarded the poll lists and returns (but, unlike most other states, not the ballots) to the Secretary of State in Maine, where the results from the field were incorporated with the civilian vote in final election outcomes.²⁹¹

286. *Id.* at § 2.

287. *Id.* at § 17.

288. *Id.* at § 4.

289. *Id.*

290. *Id.* at § 5.

291. *Id.* at § 6.

Maine election law preserved the right of absent soldiers to vote through World War II. In 1944, the state extended absentee voting rights more generally to citizens away from their homes on Election Day.²⁹²

California

California enacted three soldier-voting laws, the first in 1863 then two more in 1864. All three were virtually identical in their basic structure – applying the Iowa model of opening election sites in locations where California soldiers served – and in most of their wording. The first applied by its terms only to elections held in a single year, 1863.²⁹³ The following year, that statute having lapsed by its terms, the state filled the void with two new laws. One applied to elections of members of the state legislature, representatives to Congress, and electors for President and Vice President, beginning with the elections in 1864 and then continuing with elections for those offices "every year thereafter during the continuance of our National War."²⁹⁴ The other, enacted three days later, applied to elections for statewide executive officers, judges, and county officers

292. Elections, ME. REV. STAT. tit. I, ch. 8, §§ 83, 84, (1930); Absent Voting, ME. REV. STAT. ch. 6, (1944).

293. An Act in Addition to an Act Entitled an Act to Regulate Elections, approved March Twenty-Third, Eighteen Hundred and Fifty, and all Acts Amendatory thereof and Supplemental thereto, ch. 355, § 4, 1863 Cal. Stat. 549, 550 (hereafter cited as "California Soldier-Voting Law of 1863").

294. An Act to Provide for the Support of the Privilege of Free Suffrage during the Continuance of the War, ch. CCLXXII, § 1, 1864 Cal. Stat. 279, 279.

beginning in 1865 and then "every year thereafter."²⁹⁵ All three military suffrage laws were repealed in 1866, before the elections of that year.²⁹⁶

The laws covered all categories of qualified electors "in the military service of the United States," with no exclusions of regulars or draftees. By requiring election sites to open not only for service units of the army and artillery ("regiments," "batteries," and "battalions"), but also for "squadrons," the laws extended absentee voting opportunities to naval and cavalry personnel as well. Coverage extended even to musicians.²⁹⁷

To limit voting to qualified electors (21-year old white men meeting state and local residency requirements), the laws relied heavily on an elaborate process of list making. First, California's Adjutant General compiled a single list of all qualified electors "in the military service," identifying for each the county of residence and the military unit to which he was assigned. The Secretary of State then used this list to compile separate lists for each regiment, battalion, squadron, and battery, adding for each serviceman on the list his congressional, senatorial, and assembly district. These separate lists were then sent to the commanding officers of each unit. Working from these lists, the officers in turn created separate lists for each "detached unit" under his command and sent those shorter lists to the appropriate commanders.²⁹⁸

295. An Act Amendatory of and Supplemental to an Act Entitled an Act to Regulate Elections, approved March Twenty-Third, Eighteen Hundred and Fifty, and all Acts Amendatory thereof and Supplemental thereto, Approved April Twenty-fifth, Eighteen Hundred and Sixty Three, ch. CCCLXXXIII, §§ 1, 2, 1864 Cal Stat. 431, 432.

296. A Bill for an Act to Repeal Certain Acts Providing for Soldiers to Vote out of their Election Districts during the Rebellion, ch. CCLI, § 1, 1866 Cal. Stat. 277, 277.

297. California Soldier-Voting Law of 1863, § 1. Section 1 of all three laws stated the coverage in the same inclusive terms.

298. California Soldier-Voting Law of 1863, §§ 1, 2, 3. (Each of the three laws describes this list-making process, in identical language, in sections 1, 2, and 3.)

The three most senior officers present oversaw the actual balloting process. The laws did not require that they be eligible California electors. They opened the polling place (at 9:00 AM, "if practicable"), watched over the ballot boxes, and "received" the ballots, checking the names of the soldiers casting ballots against the names on the list. The laws made no provision for clerks or commissioners to help them or for copies of the law to be forwarded to them. The laws were similarly silent about how they were to handle challenges of a soldier's eligibility, or even about whether challenges could be made at all. The laws enjoined the responsible officers to "exercise due care and diligence to prevent any soldier voting by mistake for any officer except such as he is eligible to vote for," and they had to swear to "discharge the duties of _____ of this election to the best of your ability, so help you God." The blank line appears in the statutes' provision about the oath, but the laws give no idea what the speaker was to say at that point in the oath. They assign no title to the officers' election role (Election judge? Supervisor?), leaving the officer to figure out for himself what word to utter in filling in the blank space.²⁹⁹

The laws provided no penalty for soldiers who cheated in the voting process, but did penalize misconduct by the supervising officers. If they neglected their duties, or tried to influence a vote "by command, threats, or promises of any advantage or preferment," they faced forfeiture of two hundred dollars in a civil action (with half the proceeds going to the state treasury) and criminal prosecution "for such offense."³⁰⁰ What if the offense

299. California Soldier-Voting Law of 1863, §§ 4, 5, 6. (Each of the three laws assigned the officers' these roles in sections 4, 5, and 6.)

300. California Soldier-Voting Law of 1863, § 7. (Each of the three laws provided for these penalties in section 7.)

occurred outside of California? The laws tried to overcome that hurdle with a "deeming" provision: the misconduct "shall be considered, taken, and held to have been committed by such officer within the jurisdiction of this State...." As if conceding the difficulty of making the deeming provision stick in court, the laws also called on the Governor to forward evidence of the misconduct to the President, "with the most urgent solicitations that the commission of such officer be revoked and his name stricken from the army roll."³⁰¹

This was not the only deeming provision in the California laws. Another applied to the voting itself. The laws provided that the absent soldiers' votes "shall be considered, taken, and held to have been given by them in the respective counties of which they are residents."³⁰² By the legal fiction created by this deeming provision, the legislature undoubtedly hoped to finesse a potential constitutional impediment to absentee voting. As in so many other states, the problem arose from the wording of the constitution's residency qualification for voting. The suffrage provision of California's 1849 constitution conditioned suffrage on two residency requirements: six months in the state and, more problematically, thirty days in the "county or district in which [the voter] claims his vote...."³⁰³ As elsewhere, the question boiled down to this: did the constitution's articulation of the local residency requirement establish not only *who* could vote, but also *where* the eligible voter must cast his ballot? In other words, in restricting the franchise to men having thirty days of residence in a given "county or district," did

301. *Id.*

302. *Id.* at § 4.

303. CAL. CONST. of 1849, art. II, § 1.

the constitution also require that those men cast their votes only in person within that county or district? If so, then absentee balloting was barred. If not, then the legislature was free to permit voting elsewhere, including military encampments where California servicemen were stationed.

If California's legislators calculated that they could overcome a constitutional bar by statutorily deeming each absentee ballot, no matter where actually cast, to have been cast in the soldier's home county or district, they calculated wrong. The legal fiction worked no better in salvaging California's law than a similar fiction had worked to save Connecticut's. In October 1864, the California Supreme Court struck down the 1863 law as unconstitutional, concluding that the constitution's local residency requirement did indeed fix the place where voting must occur, the deeming provision notwithstanding. The court reached this conclusion based on reasoning that applied equally to the two laws passed in 1864, so the ruling effectively nullified all three of the state's soldier-voting laws.

The case was *Bourland v. Hildreth*.³⁰⁴ It arose out of eight contested elections for various county offices in Tuolumne County. The county board of supervisors counted the absent-soldier votes cast under the 1863 soldier-voting law, giving election wins to the eight defendants. On challenge by the eight plaintiffs, who would have won their elections if soldier votes had been excluded, the lower court overturned that result, agreeing with the plaintiffs that the constitution barred absentee voting. The cases were consolidated on appeal to the state Supreme Court, which in a 3-2 vote affirmed the lower

304. *Bourland*, 26 Cal. 161.

court's exclusion of the soldier votes. Four of the five justices wrote opinions, covering 84 pages in the California reports.

Perhaps the easiest question the court faced was whether the statute's deeming provision transformed absentee voting into local voting by declaring as a legal fiction that votes cast outside the soldier's home county would nevertheless "be considered, taken and held to have been given by them [i.e., the soldiers] in the respective counties of which they are residents."³⁰⁵ The court's majority opinion ridiculed this attempted end run. If the legislature can deem an absentee vote to have been cast locally, it could just as easily deem a minor's vote to have been cast by an adult, or an alien's vote to have been cast by a citizen, or a colored man's vote to have been cast by a white man. Not only did this provision "efface" the constitution, it actually backfired, serving as a legislative admission that the constitution created the very limitation that the act attempted, by creating a fiction, to circumvent.³⁰⁶

Justice Oscar Shafter, whose pre-court ties were to the abolitionist Liberty Party, wrote the court's majority opinion. Shafter indulged a lengthy examination of the sentence structure and syntax of the constitution's Article II, section 1. He concluded that the phrase "in which he claims his vote," as used in the constitution's statement of a 30-day county residency qualification, made no sense other than as an expression of the framers' intent to fix the location of voting in the elector's home county. To this syntactic analysis, Justice Shafter added what he saw as the instruction of history. Plaintiffs' counsel had argued that one could "claim" his vote in his home county if that was where

305. California Soldier-Voting Law of 1863, § 4.

306. *Bourland*, 16 Cal. at 201.

his vote ended up being counted, even if he physically cast his ballot elsewhere. Shafter disagreed. To the framers of the 1849 constitution, the meaning of the word “vote” was “imparted by traditions that became historical” and by “habits of thought that became chronic, and habits of action that became muscular almost, both in England and this country, ages before 1849.” Under those traditions and habits, a vote was the physical act of casting a ballot (or giving a voice vote) in person, not just the result of that physical act in the subsequent tally. When they used the phrase “claim his vote” in the county in the county of the voter’s residence, the constitution’s framers could only have meant that the voter must physically cast his ballot in that county.³⁰⁷

In a concurring opinion, Justice Lorenzo Sawyer leaned even harder on the lessons of history in lending meaning to the constitution’s wording. Settlers from all over the country had populated California by the time of statehood, and they brought with them a universal understanding of what an election was, Sawyer reasoned. In all states,

the personal presence of the elector was required at the place established by law for receiving votes.... The very idea of an election embraced the idea of a place appointed within the district for the meeting of the voters ... and the presence of the elector in person to offer or claim his vote.... Men had no other conception of the process of voting, or of offering to vote, or of claiming their votes. This conception and these ideas were necessarily in the minds of the men who framed our constitution and the people when they adopted it.³⁰⁸

The two dissenting justices, Silas Sanderson (a Republican) and John Currey (an anti-Lecompton Democrat and member of the Union Party) did not even try to dispute the historical novelty of absentee voting, but they attached no dispositive constitutional significance to that novelty. Instead, in separate opinions, Sanderson and Currey argued

³⁰⁷. *Id.* at 197.

³⁰⁸. *Id.* at 216.

that the constitution's wording created no indisputable bar to absentee voting; there was at least some ambiguity in the language. For them the controlling principle was that, absent a clear constitutional prohibition, the legislature should be free to work its will. They saw no clear prohibition against absentee voting in California's constitution.

Sanderson, the court's Chief Justice, observed that if the framers had intended to fix the location of balloting in the elector's home county or district, they could have said so in much clearer language than they chose. Other states had done so, the chief noted, with wording available to the California framers to borrow if they had wanted the same result. New York's constitution, for example, entitled each elector to participate in elections "in the election district of which he shall at the time be a resident, and not elsewhere." Kentucky's similarly said that each elector "shall vote in said precinct, and not elsewhere." California's framers could have chosen similarly direct wording if they had meant to fix the location of voting in the elector's home county or district. Sanderson was unwilling to infer a clear intent about the *where* of voting from the prepositional phrase "in which he claims his vote" appearing in Article II, section 1. Currey, too, found the constitution's meaning debatable enough to sustain the legislation. Only when the constitutional bar exists "beyond a reasonable doubt" may the court strike down a statute. For Currey, there was too much doubt here.³⁰⁹

The majority agreed with the dissenters that legislation is presumptively constitutional. Sounding very much like dissenter Currey, Justice Shafter said in his majority opinion, "In a doubtful case the benefit of the doubt is to be given to the

309. *Id.* at 244.

Legislature.”³¹⁰ They disagreed not about the presumption, but about the source of evidence that might overcome the presumption. The dissenters in *Bourland v. Hildreth*, like the majority in Ohio’s *Lehman v. McBride* (upholding that state’s soldier-voting law), stood on respectable jurisprudential footing in confining their analysis to the constitution’s text as they found it in 1864 and wherein they found no indubitable prohibition against absentee voting laws. The majority in *Bourland v. Hildreth*, like the dissent in *Lehman v. McBride*, adopted a different, and also respectable, interpretative approach. They looked to history to ascertain the meaning framers probably attached to the words they used in drafting constitutional text. Those jurists found, in that historically derived meaning, an original intention that left no room for absentee voting legislation, and they gave effect to that intention by voting to strike down soldier-voting laws.

Junior State Outliers

Missouri, Nevada, and Illinois

The soldier-voting arrangements in these three states stand as a subset of the junior states because each comes freighted with problems of legitimacy (Missouri) or relevance (Nevada and Illinois). Missouri made provision for voting by absent soldiers earlier than any other state (Pennsylvania’s prewar law aside), but it did so with dubious legitimacy. Nevada became a state only days before the 1864 election and implemented soldier voting through questionable jerry rigging. And Illinois enacted its soldier-voting law in 1865, too late to matter politically.

310. *Id.* at 262.

Missouri

A system allowing absent soldiers to vote took hold in Missouri early in the war, having been adopted before any other state had enacted soldier-voting legislation (Pennsylvania's prewar statute excepted). It was installed neither legislatively nor by constitutional amendment, as were the soldier-voting arrangements in all other states. Those routes were unavailable in Missouri, where an intrastate civil war, within the broader national Civil War, had resulted in 1861 in the collapse of civil government. So, instead of legislation or constitutional amendment, Missouri created its soldier-voting system by a so-called "ordinance" issued by an essentially rump legislative body, the remnants of a convention originally elected to consider whether the state should secede from the union and join the Confederacy.

Early in 1861, even before Lincoln's inauguration and months before Sumter, Governor Claiborne Fox Jackson had called for a secession convention in hopes that Missouri would join the seceding states of the south. Jackson had made a name for himself leading the invasion of pro-slavery Missourians into Kansas in hopes of securing a pro-slavery constitution for that incoming state. The Democratic-controlled legislature authorized the formation of such a convention by popular vote, without anticipating that the populace would choose predominantly pro-union delegates. The convention spurned Jackson and the legislature by rejecting secession.

That did nothing to dampen Jackson's enthusiasm for the Southern cause. Fearing that Jackson would allow a federal arsenal to fall into Confederate hands and take

the state out of the Union notwithstanding the unionist sentiments of the convention, Federal forces under Nathaniel Lyon moved against Jackson and the legislature in Jefferson City. Jackson and the legislature fled, leaving the state without a functioning government. The convention, which had adjourned after rejecting secession, reconvened, named a new governor, and set itself up as the state's legislative body. Dubbed the "Long Convention," it retained governing control of the state throughout the war, all without constitutional authority.³¹¹ Its claim to sovereign authority, such as it was, rested on a provision of the convention's enabling statute, passed by the legislature in January. That law granted the convention authority "to adopt such measures for vindicating the sovereignty of the State, and the protection of its institutions, as shall appear to them to be demanded."³¹² Whether the legislature intended by this language to delegate plenary legislative authority to the convention is uncertain, and the constitutionality of such a delegation, assuming it was intended, is also uncertain. This casts doubt on the legitimacy of the convention to take quasi-legislative action.³¹³

311. McPherson, *Battle Cry of Freedom*, 290-293.

312. An Act to Provide for Calling a State Convention, § 5, 1861 Mo. Laws 20, 21.

313. One proponent of legitimacy concedes that the law-making activities of the convention were "extra-constitutional." Dennis K. Bowman, *Lincoln and Citizens' Rights in Civil War Missouri* (Baton Rouge: Louisiana State University Press, 2011), 113. Another likened the Missouri convention to American revolutionary conventions. The context of internal strife and potential revolution "to a certain extent justified [the Missouri convention] in acting outside of what was their more proper field." [Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitations* (Boston: Little, Brown, and Company, 1917), 430-431.] Taking the other side of the scholarly debate, William E. Parrish asserted that the convention acted illegitimately in its quasi-legislative role. William E. Parrish, *Turbulent Partnership: Missouri and the Union, 1861-1865* (Columbia: University of Missouri Press), 42. The parallel to revolutionary conventions is imperfect, according to one skeptical view, since the American revolutionary conventions derived their authority from Congress, whereas the Missouri convention lacked any congressional imprimatur. John A. Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* (Chicago: Callaghan and Company, 1887), 54. Moreover, the conventions of the former colonies functioned on behalf of a revolution, while in Missouri the convention stood in resistance to a rebellion.

In the convention's fourth session, in June 1862, it enacted an "ordinance" to allow absentee voting by soldiers.³¹⁴ By its terms, the ordinance lasted only "during the present war."³¹⁵ It covered only militia and volunteers, not regulars. This comported with the state's 1820 constitution, which excluded from the voting franchise every "soldier, seaman, or mariner in the regular army or navy of the United States."³¹⁶ As limited to volunteers and militia, the ordinance also excluded draftees.

The ordinance adopted the Iowa model by calling for election sites to open in locations where Missouri soldiers served.³¹⁷ The process called for voting by "company," which effectively excluded naval personnel. The ordinance provided no direct support for creating the voting site, as for example by having officials in Missouri send the field commanders necessary election paraphernalia such as poll books and ballot boxes. To the contrary, it left the commanding officers entirely on their own, instructing them to "cause ... poll books to be made out for each company...."³¹⁸ The process called for separate poll books for each Missouri county where voting soldiers resided.³¹⁹ This

314. Missouri Convention. "An ordinance to enable citizens of this state, in the military service of the United States or the State of Missouri, to vote, June 12, 1862." *Journal and proceedings of the Missouri State Convention: Held at Jefferson City, June, 1862*. St. Louis: G. Knapp & Co., 1862 (hereafter cited as "Missouri Ordinance.")

315. *Id.* at § 1. In April 1865, the state adopted a new constitution. It included absentee voting rights for qualified electors absent in the volunteer military service of the United States or the militia service of Missouri. MO. CONST. of 1865, art. II, § XXI. The replacement constitution of 1875 included no such provision.

316. MO. CONST. of 1820, art. III, § 10.

317. Enactment of the Missouri ordinance predated enactment of Iowa's law by three months, so absentee-voting laws of this type, including Iowa's, arguably adopted the "Missouri model." Iowa, however, was the first state to legislate an absentee-voting system in the Civil War through the mechanism of an elected legislative body of indubitable legitimacy.

318. Missouri Ordinance, §§ 1, 2.

319. *Id.* at § 5.

could have created daunting logistical challenges for company commanders, depending on how many of the state's 113 counties were represented among his cohort of troops.³²⁰

The company's commanding officer appointed "three good, discreet and disinterested persons" as election judges. Each had to be a qualified Missouri voter and had to swear an oath to "impartially discharge the duties of judge." The judges in turn appointed two clerks.³²¹ Uniquely among all absentee voting systems, the Missouri ordinance allowed soldier voting by voice or written ballot. (Kentucky required voice vote, pursuant to its constitution. All other states provided for voting by written ballot. See discussion of Kentucky, *infra*.)

The ordinance required all voters to take an oath of loyalty.³²² In addition, it authorized the election judges "to administer oaths and to test the qualifications of voters, and to prevent frauds."³²³ But it provided no guidance on how to test a voter's qualifications or what oath to administer. Unlike legislation in many states, Missouri's ordinance made no provision for commissioners to assist with the voting or for copies of the law to be provided to the company commanders or the election judges. The ordinance presupposed that the election officials knew the qualifications for suffrage in Missouri, which the ordinance did not repeat.³²⁴ The ordinance purported to subject soldiers to criminal penalties – up to three months in prison, plus a fine of twenty to fifty

320 Missouri Counties, accessed October 3, 2013 www.mo.gov/government/city-county-government/counties/counties.

321. Missouri Ordinance, §§ 3, 4.

322. *Id.* at § 13.

323. *Id.* at § 8.

324. The 1820 constitution granted the suffrage to "every free white male citizen of the United States" who was 21-years old, and who had resided one year in Missouri and three months in the county or district "in which he offers to vote." MO. CONST. of 1820, art. III, § 10. Similar formulations in Pennsylvania and Michigan led the high courts in those states to strike down soldier-voting laws. In the absence of functioning civil government, Missouri lacked an orderly mechanism for a similar test of its ordinance.

dollars – for voting fraudulently, although, as in all other states, such extra-territorial penalties would have been difficult to enforce.³²⁵ At the close of the elections, the judges had to forward the election returns, plus a poll book, to each Missouri county represented by a voting soldier. The judge could do so either by mail or by assigning one of the clerks to carry the materials personally.³²⁶

In July 1865, a new constitution went into effect in Missouri. It's ratification process allowed absent soldiers to participate, and its suffrage provision granted absentee voting rights to members in "the volunteer army of the United States, or in the militia force of this state...."³²⁷ On revision in 1875, the state constitution omitted this provision.³²⁸

Nevada

Nevada is the outlier among the twenty states that allowed absentee soldier voting during the Civil War in that the novelty of absentee voting collided with no established voting tradition there. The state was too young to have had any traditions at all. As of Election Day in November 1864, Nevada was barely a week into statehood and had no peacetime experience as an American polity. The first session of its territorial legislature convened in October 1861, nearly six months after Sumter, and the former territory became a state five months before Appomattox.³²⁹ The backdrop of war shaped all its early political and legal development; among its nicknames is "the Battle-Born State."

325. Missouri Ordinance, § 12.

326. *Id.* at § 5.

327. MO. CONST. of 1865, art. II, § XXI.

328. MO. CONST. of 1875, art. VIII.

329. 1861 Terr. of Nev. Laws 1.

During those formative wartime years, as the state's leaders most surely knew, absentee soldier voting was becoming a reality all over the Union that Nevada sought to join. Unsurprisingly, it joined that Union with absentee soldier voting engrafted into its legal foundation.

More surprising is the role the federal government played in securing voting rights for Nevada's absent soldiers. (In no other state did Congress play any formal role at all.) The federal enabling act authorizing Nevada Territory to organize a state government required that absent Nevada soldiers be permitted to vote in the elections for delegates to the constitutional convention, as long as the absent soldiers were qualified electors under territorial laws.³³⁰ Unsurprisingly, the convention proposed a constitution that explicitly gave absent soldiers "the right of suffrage," provided they were qualified electors.³³¹

The same federal enabling act called for Nevada to pass an "ordinance" submitting the proposed constitution to a ratification vote, this time without a requirement that absent soldiers participate.³³² Nevada's constitutional convention obliged with an "Election Ordinance" that allowed absent soldiers to vote for or against

330. Act of Congress to enable the people of Nevada to form a constitution and state government and for the admission of such state into the Union on an equal footing with the original states, ch. 36, § 3, 13 Stat. 30, 35 (1864) (The federal statute is set forth at page 35 of the "Statutes of the State of Nevada Passed at the First Session of the Legislature, 1864-1865.") (The federal law is hereafter cited as the "Federal Enabling Act")

331. NEV. CONST. of 1864, art. II, § 3. The residence qualification was set at six months in the state and thirty days in the district or county. NEV. CONST. of 1864, art. II, § 1. The proposed constitution also made clear that a person's presence or absence "while employed in the service of the United States" had no bearing on his qualification as a resident. NEV. CONST. of 1864, art. II, § 2.

332. Federal Enabling Act, § 5.

the proposed constitution in the ratification election in September 1864.³³³ Then the Election Ordinance went a big step further. It allowed soldiers to vote for the state and federal offices at stake in the November elections. The Election Ordinance set both votes – the one on ratification and the one for state and federal offices – for the same date in September.³³⁴

It was a creative move by the constitutional convention. It purported to regulate voting for federal electors before statehood became a reality and therefore before a state legislature existed. This was problematic under the U.S. Constitution, which assigned to state legislatures the job of deciding the “manner” of appointing electors for president and vice-president.³³⁵ But, given the pace of the statehood timetable, it was the only way to achieve military suffrage in time for the November elections. It worked. Absent Nevada soldiers not only joined in the vote that ratified the proposed constitution, but they also voted in the 1864 elections, doing so before Nevada even existed as a state.

Nevada’s military suffrage act, set forth in sections 7 through 14 of the Election Ordinance, loosely followed the Iowa model. It applied to all soldiers who were qualified Nevada electors, with no exception for draftees or regulars. It contemplated voting sites not only where ground troops were stationed – regiments, battalions, and batteries – but also naval squadrons. It called for the governor to send the commanding officer of each unit where a Nevada elector served a list of the Nevada men in his command who was

333. Election Ordinance of 1864, § 2, 1 Nev. Comp. Laws; Embracing Statutes of 1861 to 1873, (Bonnifield & Healy) cxxxvii (1873) (Hereafter cited as Election Ordinance.”) The constitutional convention adopted the Election Ordinance and published it with the proposed constitution. The Election Ordinance was not an enactment of the regular territorial legislature of 1864.

334. *Id.* at § 3.

335. U.S. CONST. art. II, § 1.

eligible to vote.³³⁶ The three highest-ranking officers presided over the voting, checking off the name of each soldier on his list as the soldier placed his ballot in the ballot box. A single ballot stated not only the soldier's vote for or against the proposed constitution, but also his preference for each of the state and federal offices up for grabs in November: Supreme Court and district court judges, members of the state legislature, congressional representative, and electors for president and vice-president.³³⁷

At the conclusion of the balloting, the presiding officers prepared a return of the results, both on the question of ratification and for each contested office, using blank forms provided by the governor.³³⁸ The commanding officer "sealed up" the ballots, voting lists, and returns, then mailed the bundle to the governor in Carson City.³³⁹ Separately, he sent a copy of the returns to the county clerks.

The arrangement was riddled with gaps that invited fraud. There was no requirement that the presiding officers themselves be qualified Nevada electors. The law prescribed no oaths for the officers or for the voters. It made no provisions for hearing or deciding challenges of a soldier's eligibility. It prescribed no procedure for confirming that the soldier casting a ballot was the same man whose name appeared on the list of eligible voters. It made no provision for supplying the officers with copies of the ordinance. And it did not provide for commissioners to assist with implementing the voting process. It was, in short, the barest of a barebones soldier-voting law.

336. Election Ordinance, §§ 7, 8. The territorial "Adjunct General" compiled the list for the governor.

337. *Id.* at § 10.

338. *Id.* at §§ 12, 13.

339. *Id.* at §11.

Soldier voting in Nevada survived the Civil War. In 1866, the legislature incorporated military suffrage provisions into the general elections law.³⁴⁰ Such provisions remained a part of Nevada law into the twentieth century.³⁴¹

Illinois

Two obstacles stood in the way of a soldier-voting law in Illinois: the state constitution and Democratic majorities in the legislature. Section 1 of the constitution's suffrage provision stated that no elector "shall be entitled to vote, except in the district or county in which he shall actually reside at the time of such election."³⁴² A very similar provision in New York's constitution had prompted that state's Democratic Governor Horatio Seymour to veto a soldier-voting bill passed by the Republican-controlled legislature. But political roles in Illinois were New York's polar opposite. Illinois Republican Governor Richard Yates, far from finding the constitution an impediment, proposed in 1863 to the Democratically controlled legislature that they pass a soldier-voting law. Democrats declined.

Yates's based his argument on a different provision of the constitution. Section 5 of the suffrage article said, "No elector shall be deemed to have lost his residence in this

340. An Act Relating to Elections, NEV. REV. STAT. Ch. CVII, § 23 (1866).

341. An Act to Provide for Taking the Votes of Electors of the State of Nevada, who may be in the Military Service of the United States, NEV. REV. STAT. § 1887, *et seq.* (1912). By 1921, the right to vote by absentee ballot had been extended to all qualified voters. An Act to Provide a Method for Voting at any General, Special, or Primary Election by Qualified Voters who ... are Unavoidably Absent ... on the Day of Election, NEV. REV. STAT. §§ 2553, *et seq.*, (1929).

342. ILL. CONST. of 1848, art. VI, § 1. Illinois proposed a revised constitution in 1862, but the state's voters rejected it. It did not propose to change the language of Article VI, § 1 with respect to the place of voting, and therefore would not have permitted absent soldiers to vote. Curiously, absent soldiers were allowed to vote in the ratification process. Unsurprisingly, the soldier-vote was lopsidedly against ratification. Benton, *Voting in the Field*, 252-253.

state by reason of his absence on the business of the United States, or of this state.”³⁴³ Yates reasoned that the framers would not have included this provision if they believed that the legislature lacked authority to provide absentee voting opportunities for the troops.³⁴⁴ Democrats were unmoved.

When the legislature reconvened in 1865, Republicans controlled both chambers. Yates again urged adoption of a soldier-voting law, and this time the legislature agreed. It passed a law adopting the Minnesota model, and very nearly duplicating the law New York had enacted after amending its constitution.³⁴⁵ By this time, however, the election was past and the war was winding down. Governor and legislators alike may have sensed that Illinois troops would derive little benefit from the law. But it went on the books nevertheless. Only Maryland enacted soldier-voting legislation later than this enactment in Illinois, and in Maryland soldiers had voted in the 1864 elections under the provisions of an 1864 constitutional amendment. (See discussion of Maryland, *supra*.)

The law covered military personnel comprehensively, applying to “every elector ... in the actual military service of the United States, in the army or navy thereof...”³⁴⁶ This included regulars, volunteers, and draftees. The law applied to elections for state and county offices, but not to federal elections.³⁴⁷ It called for each qualified soldier to forward his sealed ballot or ballots to a qualified voter in his hometown, who then

343. ILL. CONST. of 1848, art. VI, § 5.

344. Benton, *Voting in the Field*, 262. California’s constitution of 1849 had a similar provision. In the California Supreme Court case of *Bourland*, counsel for the parties seeking to uphold the state’s soldier-voting law went a step further than Yates. He argued that this language not only authorized a soldier-voting law, but actually mandated it. The court disagreed. *Bourland*, 26 Cal. at 161.

345. An Act to Enable the Qualified Electors of this State, Absent therefrom in the Military Service of the United States, in the Army or Navy thereof, to Vote, 1865 Ill. Laws 59 (hereafter cited as “Illinois Soldier-Voting Law of 1865”).

346. Illinois Soldier-Voting Law of 1865, § 1.

347. *Id.*

delivered the ballot(s) at the election site. Two sworn statements accompanied the ballots. The first, sealed in the same envelope as the ballot, was a document appointing the soldier's designee back home. It had to be signed by a witness and an officer. The second, printed on the back of the envelope, was an affidavit attesting to the serviceman's qualifications as a voter (other than his race and gender): that he was over 21, that he was a citizen of Illinois and had resided there for at least a year and in his city, ward or precinct for at least 60 days. It also identified the military unit in which he served.³⁴⁸

The soldier then sealed this envelope inside a second envelope, marked the outer envelope "soldier's vote," and sent it to his designee back home. That man signed a receipt for it at the post office³⁴⁹ and delivered the interior envelope, unopened, to the voting site. If the inner envelope arrived at the election site unsealed, election officials had to reject it. Those officials had to confirm that the soldier's name appeared on the voting lists. If it did, they opened the envelope and deposited the ballot in the ballot box. If it did not, the envelope remained sealed and the ballot uncounted, unless "a householder of the district" swore in writing that the absent soldier was indeed a resident of the district.³⁵⁰

To help absent soldiers cope with all the red tape and legalese, the law called on the Secretary of State to prepare blank affidavits and envelopes and to ship them to

348. *Id.* at §§ 2, 3.

349. The law, anticipating that multiple soldiers might designate the same elector back home for delivery of their ballots, required each designee to state, on the receipt he gave at the post office, how many such letters he had received. *Id.* at § 7.

350. *Id.* at §§ 4, 5.

military locations where Illinois men served, providing “sufficient quantity” to assure that there was one of everything – envelopes and affidavits – for every serviceman.³⁵¹

The law set harsh penalties for cheating: four months in jail and \$250 for election judges and soldiers’ designees who “willfully” broke the law; one to five years in prison for false statements in an affidavit; and one to three years in prison for forging or altering ballots.³⁵²

The Illinois law never came before the state’s high court for review, probably because the troops all returned home before the next election. In light of the results in the nine states where supreme courts did review such laws, this one may have stood little chance of surviving. No high court upheld a soldier-voting law in the face of constitutional language as restrictive as Illinois’s.

The Illinois law did not long outlast the war. No soldier-voting provisions appear in the election law section of the state’s 1874 revised laws.³⁵³

351. *Id.* at § 12.

352. *Id.* at §§ 8, 9, 10.

353. Elections, ch. 46, ILL. REV. STAT. (1874).

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ABSTRACT**ABSENTEE SOLDIER VOTING IN
CIVIL WAR LAW AND POLITICS**

by

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During the Civil War, twenty northern states changed their laws to permit absent soldiers to vote. Before enactment of these statutes, state laws had tethered balloting to the voter's community and required in-person participation by voters. Under the new laws, eligible voters – as long as they were soldiers – could cast ballots in distant military encampments, far from their neighbors and community leaders. This dissertation examines the legal conflicts that arose from this phenomenon and the political causes underlying it.

Legally, the laws represented an abrupt change, contrary to earlier scholarship viewing them as culminating a gradual process of relaxing residency rules in the antebellum period. In fact, the laws left intact all prewar suffrage qualifications, including residency requirements. Their radicalism lay not in changing rules about who could vote, but in departing from the prewar legal blueprint of what elections were and how voters participated in them. The changes were constitutionally problematic, generating court challenges in some states and constitutional amendments in others. Ohio's experience

offers a case study demonstrating the radicalism of the legal change and the constitutional tension it created.

In political history, prior scholarship has largely overlooked the role the issue of soldier voting played in competition for *civilian* votes. The politics of 1863-1864 drew soldiers into partisan messaging, since servicemen spoke with authority on the themes the parties used to attack their opponents: the candidates' military incompetence, Lincoln's neglect of the troops, and McClellan's cowardice and disloyalty. Soldiers participated politically not only as voters, but also as spokesmen for these messages to civilian voters. In this setting, the soldier-voting issue became a battleground in partisan efforts to show kinship with soldiers. The issue's potency became evident nationally after the 1863 Pennsylvania gubernatorial race, presaging the 1864 presidential contest. The Republican incumbent ran as "the soldiers' friend" and attacked his Democratic rival as the enemy of soldiers for opposing that state's soldier-voting law. The issue was decisive in securing civilian votes for the victorious Republican. That experience launched a nationwide push by Republicans to enact soldier-voting laws in time for the 1864 elections.

AUTOBIOGRAPHICAL STATEMENT

David A. Collins was born in 1945 in Lima, Peru. He received his B.A. (Political Science) from Amherst College in 1967 and his J.D. in 1972 from Washington University where he served as an editor of the law review. He received his M.A. in History from Wayne State University in 2003. He practiced law from 1972 to 2010. His practice included a term as Corporate Secretary for General Motors Corporation and as General Counsel of Saturn Corporation. He served Of Counsel at the national law firm of Dykema Gossett, where he headed the firm's corporate compliance practice until his retirement in 2010. He is vice president and, effective September 1, 2014, becomes president of the American Bar Foundation.

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