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Benjamin R. Curtis: Maverick Lawyer and Independent Jurist

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Articles

Benjamin R. Curtis:

Maverick Lawyer and Independent Jurist

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I. INTRODUCTION

Justice Benjamin Robbins Curtis, though generally obscure, has been held in high repute by today's legal scholars. Numerous surveys and tests tend to show that Curtis is regarded as a great or near-great Supreme Court justice.[1] His independent mind and meticulous decisions made him one of this nation's greatest jurists, despite the fact that he served only six terms as a justice

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1. R. Owen Williams, *Benjamin Curtis: Top of the List*, 82 CHI.-KENT L. REV. 277, 277-78 (2007).

of the United States Supreme Court. He was the first justice of the Supreme Court to hold a formal law degree.

Justice Curtis's obscurity is largely due to his short tenure on the high Court's bench[2] before resigning in 1857 on the heels of the Supreme Court's controversial decision in *Dred Scott v. Sandford*,[3] which upheld the legitimacy of slavery. The reason for his untimely resignation is unknown, although it was widely speculated that it was due to the *Dred Scott* decision, which he abhorred and believed was a result of extra-judicial considerations.[4]

II. LAW PRACTICE

Curtis was born in Watertown, Massachusetts on November 4, 1809, to Benjamin Curtis, the captain of a merchant vessel, and his wife, Lois Robbins.[5] Curtis was schooled in nearby Newton, Massachusetts and later attended Harvard University and Harvard Law School before becoming a Massachusetts lawyer.[6] Justice Curtis had practiced law for twenty-two years before his appointment to the Supreme Court, having begun his career as a country lawyer in Northfield, Massachusetts and later practicing as a partner in the Boston law office of a distant relative, Charles Pelham Curtis.[7]

As a lawyer, Curtis defended slavery—or at least the interests of slave owners—through his representation of a Bostonian against whom a writ of habeas corpus was sought seeking the

2. For an excellent article on obscure justices, see Ken Gormley, "The Forgotten Supreme Court Justices," 68 Albany L. Rev. 295. *See also* WILLIAM D. BADER & FRANK J. WILLIAMS, UNKNOWN JUSTICES OF THE UNITED STATES SUPREME COURT 41, 50, 55 (2011).

3. 60 U.S. (19 How.) 393 (1857).

4. *New Publications*, N.Y. TIMES 10 (Oct. 19, 1879) (highlighting a two-volume book titled *A Memoir of Benjamin Robbins Curtis, LL. D. With Some of His Professional and Miscellaneous Writings*, a two-volume memoir, the first volume of which is written by Justice Curtis's brother George Ticknor Curtis, and the second of which is a collection of Justice Curtis' writings; both volumes were edited by Justice Curtis's son, Benjamin R. Curtis).

5. GEORGE TICKNOR CURTIS, 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL. D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS 5 (Benjamin R. Curtis ed., 1879) [hereinafter A MEMOIR (VOLUME I)].

6. *Id.* at 26-27, 41.

7. TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 124 (2001).

return of a child slave named Med in the case *Commonwealth v. Aves*.[8] In 1836, Mary Slater of New Orleans traveled to Boston to visit her father, Thomas Aves.[9] Slater brought with her a six-year-old girl named Med, who Slater's husband, Samuel Slater, had purchased in 1833 and kept as a slave while in the slave-recognizing state of Louisiana.[10] During Slater's stay in Boston, she became ill and asked her father, Aves, to care for Med until Slater recovered and could return to Louisiana where her husband was still residing.[11] In the interim, the Boston Female Anti-Slavery Society, antislavery sympathizer Levin H. Harris, and others petitioned the Massachusetts courts for a writ of habeas corpus against Aves for having unlawfully restrained Med's liberty and seeking her release.[12] Aves, represented by Curtis and his law partner, Charles Pelham Curtis, responded that he was acting as his daughter's agent and, therefore, had the right to temporarily hold Med in Boston until her return to Louisiana.[13] While it was well accepted that a slave became free when his or her master moved him or her permanently to a free state,[14] the courts had not addressed the effect of a slave's temporary placement in a free state. Curtis argued on behalf of his client that a slave owner who brought a slave into the Commonwealth of Massachusetts may restrain the slave while in that state for the limited purpose of returning that slave to his or her domicile.[15] Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court rejected Curtis's view and explained that although the slave's presence in the state did not change his or her status per se, the slave was entitled to his freedom because Massachusetts law would not enforce restraint of the slave:

> [I]f such persons have been slaves, they become free, not so much because any alteration is made in their *status*, or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of

8. 35 Mass. (18 Pick.) 193, 193 (1836).
9. *Id.* at 194.
10. *Id.* at 193-94.
11. *Id.* at 194.
12. *Id.* at 193.
13. *Id.* at 194.
14. *Id.* at 207-08.
15. *Id.* at 195.

them, which prohibit, their forcible detention or forcible removal.[16]

For this reason, the court granted the petition for writ of habeas corpus, and ordered that Med be released into the care of a guardian.[17]

III. JUSTICE OF THE SUPREME COURT

In 1851, at the urging of Massachusetts Senator Daniel Webster, President Millard Fillmore appointed Curtis to the United States Supreme Court to fill the vacancy left by Justice Levi Woodbury's death. There was an uncanny similarity between Curtis and his immediate predecessor, Woodbury. Both were moderate conservatives from New England who personally opposed slavery, favored legal positivism, and served on the Supreme Court for approximately six years.[18] Despite his short tenure, Curtis wrote fifty-three majority opinions and dissented thirteen times.[19] His opinions were regarded as "singularly free from error, fallacy, ambiguity, and irrelevant matter, [and as] models of judicial reasoning and statements . . . ."[20]

In his first year on the high Court bench, he authored the majority opinion in *Cooley v. Board of Wardens*, a closely contested interstate commerce case that upheld the Pennsylvania statute requiring all ships entering or leaving the port of Philadelphia to hire a local pilot.[21] Justice Curtis's decision, following the reasoning of Justice Woodbury's concurrence in the License Cases,[22] was the first majority opinion to recognize that the Commerce Clause did not prohibit the state from regulating interstate commerce altogether. The decision, which found a middle ground between federal and local authority, was a significant contribution to Commerce Clause jurisprudence.

The decision in *Cooley* was only the beginning of the

16. *Id.* at 217.
17. *Id.* at 225.
18. WILLIAM D. BADER & FRANK J. WILLIAMS, UNKNOWN JUSTICES OF THE UNITED STATES SUPREME COURT 41, 50, 55 (2011).
19. *Id.* at 55.
20. *New Publications*, *supra* note 3.
21. 53 U.S. (12 How.) 299, 320 (1851).
22. Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 618, 624 (1847) (Woodbury, J. concurring).

contributions Justice Curtis would make while on the Court. His opinions enlarged the scope of federal admiralty jurisdiction,[23] recognized that corporations are citizens of their states of incorporation,[24] and limited the reach of due process by upholding the Solicitor of the Treasury's authority to collect debts without first obtaining a court order.[25]

All of these decisions pale, however, in comparison to the impact of his dissenting opinion in the infamous pro-slavery *Dred Scott v. Sandford* decision.[26] Scott, an African-American slave, had filed suit in federal court against the executor of his owner's estate seeking freedom for himself, his wife and their two daughters. Scott, who was represented by George Tickner Curtis, Justice Curtis's brother, believed that his and his family's presence and residence in certain free territories required his emancipation.

Chief Justice Roger B. Taney delivered the opinion of the Court, which carried concurring and dissenting opinions, including a powerful dissent by Curtis. The majority opinion grounded its decision on Article III, Section 2, Clause 1 of the United States Constitution, which provides, in relevant part, that "the judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ." The Court held that Scott was not a "citizen of a state" and, therefore, could not bring suit in federal court.[27] The Court also held that Scott did not gain his freedom by being transferred into a free territory of the United States because Congress's power to make rules and regulations for territories applied only to those territories that were recognized at the time the Constitution was drafted.[28] Therefore, the law that made the territories free was unconstitutional.

Although Justice Curtis disapproved of slavery, he also believed that helping free slaves and refusing comity to Southern slave owners could lead to civil war.[29] His support for the return

23. *See, e.g.*, Steamboat New World v. King, 57 U.S. 469 (1853).
24. *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. 404 (1855).
25. *See, e.g.*, Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855).
26. 60 U.S. (19 How.) 393, 564 (1857) (Curtis, J., dissenting).
27. *Id.* at 404-06.
28. *Id.* at 406-413.
29. ROBERT AITKEN & MARILYN AITKEN, LAW MAKERS, LAW BREAKERS AND UNCOMMON TRIALS 60 (2007).

of runaway slaves to the South had led to his unpopularity in Massachusetts, where his stance on slavery was widely questioned.[30] On April 9, 1855, the *New York Tribune* denounced Curtis as "a slave-catching Judge, appointed to office as a reward for his professional support given the Fugitive Slave bill."[31]

Curtis's dissent in *Dred Scott*, only two years later, came as a surprise to his critics. Although Justice Curtis did not abandon his position on the unpopular Fugitive Slave Law, he believed that states could confer citizenship on African Americans. His dissent challenged Taney and the majority, which concluded that the Scotts, who were black, were slaves and for that reason, never could be citizens of the United States.[32] Curtis maintained that states could confer citizenship on African Americans and that black citizens of a state were automatically citizens of the United States:

> To what citizens the elective franchise shall be confined, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.[33]

Curtis noted that five states had recognized free blacks as citizens by 1787 and concluded that under the Articles of Confederation and the United States Constitution, United States citizenship derived from state citizenship. According to Curtis:

> Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of

30. STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM 38-39 (2005).

31. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 546 (1922).

32. 60 U.S. at 569-583 (Curtis, J., dissenting).

33. *Id.* at 583 (Curtis, J., dissenting).

> electors, on equal terms with other citizens.[34]

Therefore, Curtis reasoned, Scott was a citizen, and as a citizen, he was entitled to sue in federal courts.[35]

Abraham Lincoln was among those who identified with the principles announced in Curtis's powerful dissent. In his speech at Springfield, Illinois later that year, Lincoln noted:

> J[ustice] Curtis, in his dissenting opinion, shows that in five of the then thirteen states, to wit, New Hampshire, Massachusetts, New York, New Jersey and North Carolina, free negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had. He shows this with so much particularity as to leave no doubt of its truth; and, as a sort of conclusion on that point, holds the following language:
>
> "The Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of the State. In some of the States, as we have seen, colored persons were among those qualified by law to act on the subject. These colored persons were not only included in the body of 'the people of the United States,' by whom the Constitution was ordained and established; but in at least five of the States they had the power to act, and, doubtless, did act, by their suffrages, upon the question of its adoption."[36]

Lincoln explained that he could do nothing to improve on Curtis's dissent.[37]

Acutely aware of the power of the press, Curtis gave a copy of his dissent to the press in advance of its publishing. *The New York Times* later noted that "[t]hroughout the Northern States

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34. *Id.* at 572-73 (Curtis, J., dissenting).

35. *Id.* at 573, 588 (Curtis, J., dissenting).

36. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 403 (Roy P. Basler ed., 1953), *available at* http://quod.lib.umich.edu/l/lincoln/lincoln2/1:438.1?rgn=div2;view=fulltext.

37. *Id.* at 400.

[Curtis's dissenting] opinion was the subject of the highest praise, which did not cease with the excitement of the times. It will always stand as a masterpiece of judicial interpretation."[38]

Some, including Taney, accused Curtis of releasing his dissent to the press for political and partisan purposes. To this, Curtis responded: "[i]t is a sufficient reply for me to declare that I have no connection whatever with any political party, and have no political or partisan purpose in view, and no purpose whatever, save a determination to avoid misconstruction and misapprehension, from which I have suffered enough in times past."[39]

Commenting on his brother's stance, George Curtis remarked:

> when the demands of the slave interest . . . extended beyond that stipulation, and claimed for slavery a position which [Curtis] believed neither the Constitution nor the system of the Union had given to it, his mind was . . . just as capable of an unbiased and impartial examination of those demands as if he had never contended for a Southern right, or counselled his fellow-citizens to obey a stipulation in favor of the Southern section of the Union.[40]

Curtis's dissent was heralded as a victory for slaves, but his opinion as a whole was racially conservative. It emphasized that citizenship under the Constitution did not equate to equal political or civil rights.[41] In Curtis's opinion, it was best left to the states to define the rights of their citizens.[42]

Only months after the decision's release, Justice Curtis tendered his resignation. *The New York Times* later reported:

> He was led to take this step chiefly because his salary was too small to make that provision for his family which he now felt it his imperative duty to secure. But he was also influenced by the fact that that his confidence in the Supreme Court had been greatly shaken by its course in

38. *New Publications*, *supra* note 4.
39. A MEMOIR (VOLUME I), *supra* note 5, at 228.
40. *Id.* at 151-52.
41. Dred Scott v. Sandford, 60 U.S. 393, 583 (1856) (Curtis, J., dissenting).
42. *See supra* note 33 and accompanying text.

> the Dred Scott case. Not only did he condemn the law as expounded by the majority, but it was too evident that the Judges had been moved by extra-judicial considerations, a weakness which Judge Curtis could not overlook in a judicial magistrate.[43]

Curtis himself attributed his departure to a lack of "confidence in the [C]ourt, and [a] willingness to co-operate with them, which [were] essential to the satisfactory discharge of [his] duties as a member of that body; and [he] d[id] not expect its condition to be improved."[44]

IV. RETURN TO THE PRACTICE OF LAW

Justice Curtis's resignation did not end his career, however. He returned to the practice of law, opening a law office in Boston.[45] In the early days of the Civil War, Curtis supported the government and agreed to support President Abraham Lincoln "so long and so far, and by all ways and means possible to a good citizen."[46] However, by the end of 1862, his criticism of Lincoln began to mount as he believed that Lincoln had exceeded his constitutional authority by suspending the writ of habeas corpus and issuing the preliminary Emancipation Proclamation. On January 1, 1863, Lincoln issued the second Executive Order—listing the states in which the Emancipation Proclamation would apply—prompting Curtis to write: "I have seen a good many eminent men today, . . . & I have not seen one who does not say the country is ruined & that its ruin is attributable largely to the utter incompetence of the Prest. & to the radicals, *who have subdued him utterly*."[47] In a published pamphlet, Curtis denounced Lincoln's use of the Executive Power to justify his issuance of the Emancipation Proclamation. Curtis wrote:

> It has never been doubted that the power to abolish

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43. *New Publications*, *supra* note 4.

44. A MEMOIR (VOLUME I), *supra* note 5, at 247.

45. Alfred L. Brophy, *Curtis, Benjamin R.*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 138, 139 (Roger K. Newman ed., 2009); Margaret M. Russell, *Benjamin Robbins Curtis*, *in* THE SUPREME COURT JUSTICES A BIOGRAPHICAL DICTIONARY 125, 126 (Melvin I. Urofsky ed., 1994).

46. AITKEN & AITKEN, *supra* note 29, at 71.

47. Robert C. Morris, *Benjamin Robbins* Curtis, *in* 5 AMERICAN NATIONAL BIOGRAPHY 886 (John Arthur Garraty & Mark C. Carnes eds., 1999).

> slavery within the States was not delegated to the United States by the Constitution, but was reserved to the States. If the President, as commander-in-chief of the army and navy in time of war, may, by an executive decree, exercise this power to abolish slavery in the States, because he is of the opinion that he may thus 'best subdue the enemy,' what other power, reserved to the States or to the people, may not be exercised by the President, for the same reason, that he is of the opinion he may thus 'best subdue the enemy.'[48]

By the end of 1862, Curtis's respect for Lincoln had waned, and in the 1864 election he supported Lincoln's Democratic opponent, General George B. McClellan.[49]

Curtis's criticism of the administration attracted the attention of many who opposed the Emancipation Proclamation, including Senator Orville Browning, a moderate Republican. When Chief Justice Taney died on October 12, 1864, Browning contemplated backing Curtis for the position but this thought was short lived, as Browning was astute enough to know that Lincoln would never appoint Curtis back to the bench.[50] Ultimately, however, the notoriety that Curtis gained from his tenure with the high Court and his powerful dissent in *Dred Scott* enhanced his legal career: he returned to the Supreme Court only to argue twenty-two cases before it.[51]

V. IMPEACHMENT

In March of 1868 Andrew Johnson, who had succeeded to the Presidency upon the assassination of Abraham Lincoln, was facing an imminent trial in the Senate on Articles of Impeachment passed by the House.[52] The impeachment was primarily based on President Johnson's dismissal of his disloyal Secretary of War, Edwin Stanton, in violation of the Tenure of Office Act of 1867.[53]

The heavily Republican Congress was angry that Johnson

48. B.R. CURTIS, EXECUTIVE POWER 10-34 (1862).
49. STREICHLER, *supra* note 30, at 151.
50. Morris, *supra* note 47, at 886.
51. AITKEN & AITKEN, *supra* note 29, at 71.
52. A MEMOIR (VOLUME I), *supra* note 5, at 407.
53. *Id.* at 405-07.

tried to obstruct Reconstruction using vetoes.[54] Congress then attempted to rein in his power with the Tenure of Office Act by prohibiting the President from firing without permission of the Senate any executive employee who was appointed during his term and who was confirmed by the Senate.[55]

Johnson, with the strong asset of his loyal Cabinet members, turned to Benjamin Curtis, Esq., of the Boston bar to be his lead defense counsel.[56] Johnson had never met Curtis but was singularly impressed by his reputation as a judge and an advocate.[57] Curtis, as a matter of civic duty, accepted the President's request and temporarily left his lucrative law practice for this new appointment in Washington.[58]

The former justice took a room in Willard's Hotel upon his arrival and proceeded to draft an answer on behalf of the President to the Articles of Impeachment.[59] No other members of the defense team were available for critical input, so Benjamin Curtis invited his brother George Ticknor Curtis, a lawyer and a noted scholar, to assist with the answer.[60]

On March 30, 1868, President Johnson's Senate impeachment trial began.[61] Benjamin Curtis knew that Johnson was impeached because of political and personal hostility.[62] Furthermore, he was acutely aware of the disadvantage he labored under because of the Republican majority in the Senate.[63] His strategy was therefore to lay out a calm, thorough, scholarly argument as if addressing an appellate court, in the hope that some of the Republican senators would temporarily abandon political and personal hostilities and be compelled by the cold logic of his legal argument.[64]

Most of Benjamin Curtis's focus was on those Articles relating

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54. *Id.* at 401.
55. *Id.* at 402-03.
56. *Id.* at 408.
57. *See id.*
58. *Id.*
59. *Id.* at 409.
60. *Id.* at 409-10.
61. *Id.* at 410.
62. *Id.* at 410-11.
63. *Id.*
64. *Id.* at 410-11.

to the Tenure of Office Act.[65] He argued that the Act as properly construed did not apply to President Johnson's removal of Secretary Stanton. Specifically, Stanton was appointed not by President Johnson as required for violation of the Act but by President Lincoln.[66] Furthermore, Stanton was not dismissed during the term of the president who appointed him as required for violation of the Act because Lincoln's term, as properly construed, ended with his death.[67] Curtis then stated, for the sake of argument and without conceding the point, that whether the Tenure of Office Act did ultimately apply to the Stanton removal, as the Articles of Impeachment maintained, posed a reasonable legal question. Curtis concluded it would not be an impeachable "high misdemeanor," a willful disregard for the law, for a President to execute his interpretation of an ambiguous law and leave it to the Supreme Court to be the ultimate arbiter, as Johnson had done.[68]

Benjamin Curtis also made a very interesting constitutional argument as to why the Tenure of Office Act did not apply to the presidential firing of a member of his Cabinet. He ingeniously resorted to precedent and originalism. He stated that when the Framers' generation statutorily formed the War Department in 1789, they impliedly recognized, by not requiring Senate assent for dismissal, that the Constitution under Article II inherently granted the President the unilateral power to remove his War Secretary.[69] Furthermore, this acknowledgement of the President's constitutional power to unilaterally fire his Cabinet members had been followed in political and legislative practice without exception until the present aberration.[70]

After Benjamin Curtis's lead, other defense counsel followed, but Curtis had successfully completed the intended job of influencing enough of Johnson's political enemies by calm and

65. *Id.* at 411-12; BENJAMIN ROBBINS CURTIS, 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL. D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS 343-422 (Benjamin R. Curtis ed., 1879) [hereinafter PROFESSIONAL AND MISCELLANEOUS WRITINGS (VOLUME II)].

66. PROFESSIONAL AND MISCELLANEOUS WRITINGS (VOLUME II), *supra* note 65, at 351.

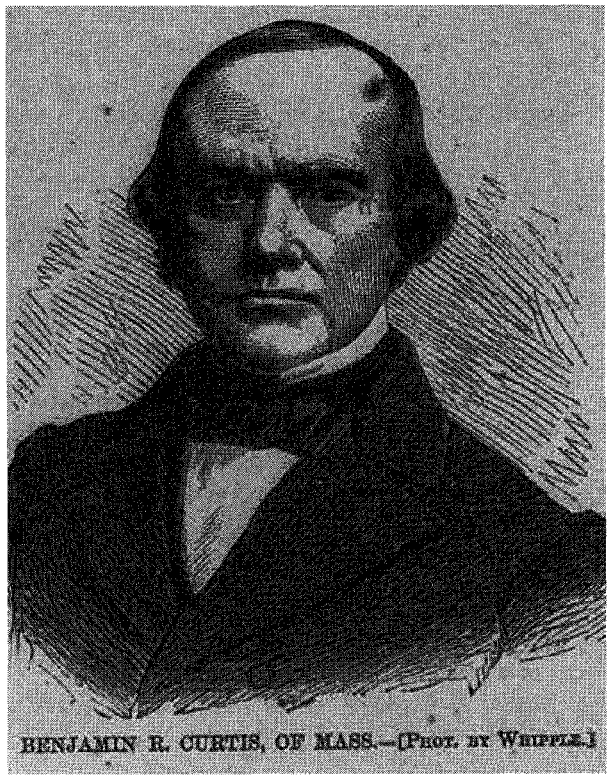
67. *Id.* at 347-49.

68. *Id.* at 365-66.

69. *Id.* at 359-60.

70. *Id.*

meticulous legal argument. The President was acquitted with the needed votes of seven Republican senators who bolted from their party's line.[71] Senator Fessenden apparently spoke for them later when he stated "Judge Curtis gave us the law, and we followed it."[72]



VI. REPUTATION

As William D. Bader and Frank J. Williams demonstrated in *Unknown Justices of the United States Supreme Court*, today's legal scholars tend to ignore a justice's contemporary import in its contemporary legal context and, instead, evaluate a justice based on the current "political correctness" of his substantive holdings.[73] Often it takes merely one holding or action to elevate or bury a

71. A MEMOIR (VOLUME I), *supra* note 5, at 417 n.1.
72. *See id.*; STREICHLER, *supra* note 30, at 173.
73. BADER & WILLIAMS, *supra* note 18, at 50-53; *see generally* WILLIAM D. BADER & ROY M. MERSKEY, FIRST ONE HUNDRED EIGHT JUSTICES (2004).

judge in today's scholarly-legal culture. In this respect, Carl Swisher wrote of a reputational phenomenon pertinent to Curtis:

> The favorable or unfavorable verdict which history renders with respect to a member of the Supreme Court, or perchance its complete neglect of him, may depend upon his possession of, and his instinctive surrender to, an intuitive perception of trends in the law which will receive majority approval in the years to come. History, in other words, rewards and punishes judges like men in other walks of life not only for their brilliance, their industry, and their integrity but for being right or wrong—with right and wrong being determined by the code of the age of the historian. Here, as in other fields furthermore, a single act of 'sinfulness' may cloak with obscurity a thick catalog of good deeds.[74]

The single act that accounts for Curtis's popularity among our politically correct legal culture is his dissenting opinion in *Dred Scott*.[75] Interestingly, this one act has eclipsed Curtis's subsequent opposition to President Lincoln in favor of his less-capable, conservative challenger, George McClellan, and his opposition to the Emancipation Proclamation on legal grounds.[76]

Although Benjamin Curtis personally opposed slavery, he was always more concerned with maintaining the Union by placating the South. For example, prior to his elevation to the Supreme Court, he strongly supported obedience in Massachusetts to the Fugitive Slave Act of 1850 and he maintained that the positive law trumped the natural rights of slaves.[77] Largely because of Curtis's aforementioned views, President Millard Fillmore, who was also solicitous of the Southern interests, appointed him to the United States Supreme Court in 1851.[78] This led the singularly perceptive Charles Francis Adams to later observe, with some indignation, that Curtis was viewed by "posterity as a champion of

74. Carl B. Swisher, *The Judge in Historical Perspective*, 24 IND. L.J. 381, 382 (1948).

75. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 564 (1857) (Curtis, J. dissenting).

76. BADER & WILLIAMS, *supra* note 18, at 58.

77. *See* A MEMOIR (VOLUME I), *supra* note 5, at 121-36.

78. Williams, *supra* note 1, at 279.

principles, for his opposition to which he obtained his seat on the bench."[79]

A very brief, but interesting law review piece by Earl Maltz and an equally short but provocative critique of the Maltz article by R. Owen Williams are exceptional in posing skeptical views about part of Justice Curtis's *Dred Scott* dissent.[80] They suggest that Curtis, rather than evidencing his reputed cold reason and neutral legal principles, actually was motivated by anger and political concerns in his treatment of the Missouri Compromise.[81] These lonely doubts, in a scholarly sea of approbation, deserve further study.

Justice Benjamin Curtis was surely a great justice. Only five years after his death, *The New York Times* commented that "there is no exaggeration in the claim that [Curtis] was the greatest of American Judges."[82] And, in recognition of the power of his dissent in *Dred Scott*, Massachusetts lawyer and politician Benjamin F. Butler remarked, "[t]here is one contribution of Judge Curtis . . . which shall live long and be reckoned in the judgments of Lord Mansfield on kindred subjects. The *Dred Scott* opinion was the opening of a legal thought which has since been embodied in the constitutions of the country."[83] Despite his conservative record and the limited scope of his opinion, Curtis is largely remembered as its center in *Dred Scott*.[84]

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79. *Id.* at 288 (citation omitted).

80. *See* Earl M. Maltz, *The Last Angry Man: Benjamin Robbins Curtis and the* Dred Scott *Case*, 82 CHI.-KENT L. REV. 265 *passim* (2007); Williams, *supra* note 1 *passim*.

81. Maltz, *supra* note 80, at 265; Williams, *supra* note 1, at 284-88.

82. *New Publications*, *supra* note 4.

83. Morris, *supra* note 47, at 887.

84. *See* A MEMOIR (VOLUME I), *supra* note 5, at 230-41.