

An Evening  
with  
Justice Holmes  
Act 3

*A Play by Paul R. Baier*

LOUISIANA BAR FOUNDATION



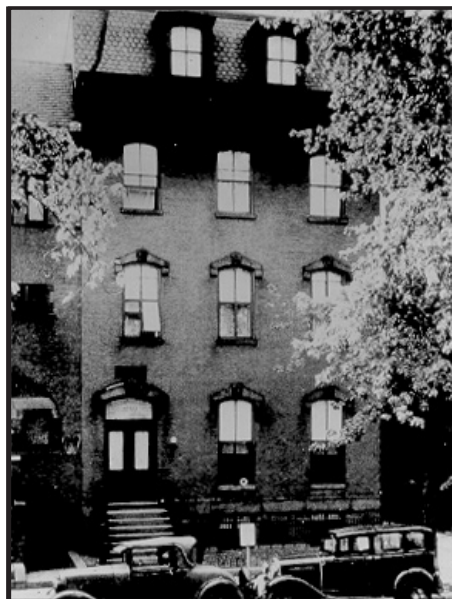


*Photograph by Harris & Ewing, Collection Supreme Court of the United States*

MR. JUSTICE HOLMES, ca. 1910

AN EVENING  
WITH  
JUSTICE HOLMES  
ACT 3





# AN EVENING WITH JUSTICE HOLMES

Justices from the Supreme Judicial Court  
perform a dramatic reading from the play

## *Father Chief Justice*

*Edward Douglass White and the Constitution*

The Boston premier of *Father Chief Justice* follows  
performances at the Library of Congress and the  
Louisiana Supreme Court.

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November 9, 2012

6:00 P.M.

Social Law Library

John Adams Courthouse, Boston MA

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# AN EVENING WITH JUSTICE HOLMES

A dramatic reading from the play

## *Father Chief Justice*

*Edward Douglass White and the Constitution*

by Paul R. Baier

### Performed by

Hon. Margot Botsford as Fanny Holmes

Hon. Robert J. Cordy as Justice Oliver Wendell Holmes, Jr.

Hon. Ralph D. Gants as Chief Justice Edward Douglass White

Hon. Francis X. Spina as Justice Louis D. Brandeis  
with

Professor Paul R. Baier as Professor Richard Henry Jesse



Holmes

**W**elcome to the Washington D.C. home of Justice Oliver Wendell Holmes, Jr. It is September 17<sup>th</sup>, which is both Constitution Day and the anniversary of the Battle of Antietam.



White

Holmes and his wife, Fanny, are entertaining Justice Brandeis and waiting for an annual visit from U.S. Supreme Court Chief Justice E. D. White. September 17<sup>th</sup> is bittersweet for both Holmes and White. While they can both celebrate Constitution Day as friends and colleagues on the United States Supreme Court (they served together from 1902 to 1921), the anniversary of the Battle of Antietam also reminds them that they were once sworn enemies. One wore blue, the other wore gray on the battlefields of the Civil War.

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**Friday, November 9, 2012 / 6:00 p.m.**

Performance to be followed by a post-production reception

Social Law Library, John Adams Courthouse, 4<sup>th</sup> Floor, Boston, Massachusetts

**Limited Seating / R.S.V.P. by November 6, 2012**

at [www.sociallaw.com/holmes](http://www.sociallaw.com/holmes)

Questions? 617-226-1361

Cover Photo: The Holmes residence  
at 1720 Eye St., Washington D.C.  
— U. S. Supreme Court  
Photos of Holmes and White  
— Library of Congress

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Funded by the **William M. Wood Foundation**, Bank of America Trustee.

# **AN EVENING WITH JUSTICE HOLMES**

**Justices from the Supreme Judicial Court  
perform a dramatic reading from the play**

***Father Chief Justice***

***Edward Douglass White and the Constitution***

**A Play by Paul R. Baier**

## **SCRIPTS**

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**PREVIEW**

**JOHN ADAMS COURTHOUSE**

**Pemberton Square**

**Boston, Massachusetts**

**November 9, 2012**

**6 p.m.**

***Sponsored by***

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THE CAST

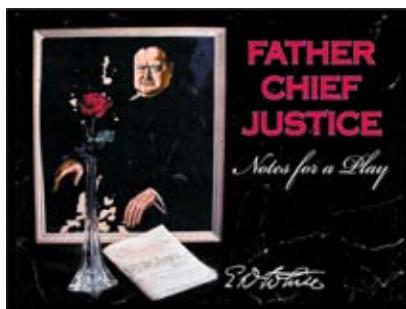
Justice Francis Spina, Justice Robert Cordy, Justice Margot Botsford, Justice Ralph Gants



MR. ROBERT BRINK: "Welcome to *An Evening with Justice Holmes*."

## PROLOGUE—"JOYOUS SEND OFF."

LIGHTS DOWN.



**SOUNDOVER # 1. "Joyous Send Off"** (Second Line) from the *Magnificent Seventh's Brass Band, Authentic New Orleans Jazz Funeral*, Mardi Gras Records, Inc., Milton Batiste Producer.

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LIGHTS UP.

**ROBERT BRINK** [*Comes on. Up center*]: Good Evening, my name is Robert Brink, the Executive Director of the Social Law Library. Welcome, to *An Evening with Justice Holmes*.

Almost a year ago, I received a call from the Law Librarian of Congress, Roberta Shaffer, who told me of a play recently staged by Library of Congress and the U.S. Supreme Court Historical Society. She suggested that the Social Law Library would be suitable venue for a Boston production. The play she was promoting is entitled "Father Chief Justice: E. D. White and the Constitution" by Paul R. Baier, a professor at the Louisiana State University Law Center.

So why a Boston performance for a play whose main protagonist is a U.S. Supreme Court Chief Justice from Louisiana?

The reason is Chief Justice White had a special relationship with one of Boston's legal icons, Oliver Wendell Holmes, Jr., who is a central character in the play. They fought as enemies in the civil war, yet served as true friends on the U.S. Supreme Court.

Holmes not only had a well-known relationship with the Supreme Judicial Court, but also a special relationship with the Social Law Library.

According to his diary, Holmes spent his first day in practice—October 18th, 1866—at the Library immersed for hours making endless abstracts of cases on precatory trusts. Throughout his years in practice, he was a regular at the Library, researching cases by day for clients, and returning most evenings to pursue his own intellectual passions.

Let me read a paragraph from Mark Howe's biography of Holmes:

George Upham found himself in 1879 working for many evenings in the Social Law Library. Another lawyer worked regularly at a nearby desk and ultimately identified himself as Holmes. The two men picked up the habit of walking together through the Boston Common after the closing of the Library. Upham asked what Holmes was working on and what he most wished to do. Holmes replied that he was trying to write a book that he hoped would supplant Blackstone and Kent's *Commentaries*.

Pressing him to tell of further ambitions Holmes told Upham that he wished to become Chief Justice of the Supreme Court of Massachusetts, and eventually, impossible as it might seem, a Justice of the Supreme Court of the United States.

The book Holmes was writing during his evenings at the Social Law Library turned out to be his seminal work, *The Common Law*. "As he read his cases in the Social Law Library," his biographer speculated, "did he perhaps see that the practical efforts to which his working day was dedicated was not unrelated to the speculative problems to which his evenings were given?"

Holmes's ambition and ascendancy to our state's high court and then to the U.S. Supreme Court are well known.

So with the close connection between Oliver Wendell Holmes, Jr., and Social Law Library, how could I say "No" to a play in which the great justice has a starring role?

My next call was to the playwright, producer, and director of *Father Chief Justice*, Paul R. Baier. Mr. Justice Holmes said that "Life is action and passion." Paul certainly fits that description. Swept up by his passion, there was no turning back. We decided to focus on one act of the play, which takes place in Holmes' Washington DC Townhouse on September 17th, which is both Constitution Day and the anniversary of the civil war Battle of Antietam. Hence the title of tonight's presentation, "*An Evening with Justice Holmes*."

The next step was to recruit the actors for tonight's staged reading. The justices of the Supreme Judicial Court are thankfully friendly and approachable.

Justice Robert Cordy, who knows a thing or two about Holmes and is a student of the history of the SJC, immediately signed on as Holmes.

To me, Justice Francis Spina looks like Brandeis. When I called he said that it would be a "hoot" and that he actually shared a birthday with Brandeis.

Justice Ralph Gants seemed game for this kind of thing, and, he, too, signed-on without a second thought. He has the gravitas to be Chief Justice White.

Justice Margo Botsford signed on to play Fanny Holmes, perhaps because her role has a few wifely zingers directed at the sage of the Supreme Court, the Yankee from Olympus

And of course, Professor Baier plays Professor Richard Henry Jesse, the omniscient narrator who provides the audience the big picture. Less well known to our local audience than the other actors, Paul is the George M. Armstrong, Jr. professor of law at Louisiana State University Law Center.

He is not only the playwright for tonight's performance, but also the editor of the memoirs of Justice Hugo Black and of *Lions Under the Throne: The Edward Douglass White Lectures of Chief Justices Warren E. Burger and William H. Rehnquist*.

I thank you all for all of your efforts. I also want to thank the audience for coming and for taking a moment now to silence your cell phones.

I'm grateful for the support of the William M. Wood Foundation, Bank of America Trustee. William Wood was a dedicated member of the Social Law Library who remembered us in his will. Like Holmes, William Wood spent many, many evenings here. So we can thank him for this performance and the reception that follows.

Finally, I also want thank Georgia Chadwick of the Louisiana Supreme Court for sending roses, which you will soon see, along with the best wishes of that esteemed Court for a wonderful performance.

So now let's turn the lights up and visit Professor Jesse in his office.

## LIGHTS UP.

### ACT I. PORTRAIT AND HEARTH.

#### SCENE I.—PROFESSOR JESSE'S OFFICE.

PROFESSOR JESSE *is at his desk. It is cluttered with books and a small lighted candle. JESSE teaches the Court and the Constitution long after WHITE's death. An oil portrait of CHIEF JUSTICE WHITE, tattered by time, rests on an easel. JESSE knew E. D. WHITE during his twenty-seven years on the Supreme Court. But, alas, his friend is gone, and well near forgotten.*

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JESSE: [*Rising from his desk, with Carlyle's Essays, walking to the portrait.*] Carlyle, in his *Essay on Portraiture*, says he would give more for a single picture of a man, whatever it was, than for all the books that might be written of him. [*Reading*]:

"Often I have found a Portrait superior in real instruction to half a dozen written 'Biographies,' as Biographies are written;—or rather, let me say, I have found that the portrait is a small lighted *candle* by which Biographies could for the first time be *read*, and some human interpretation be made of them."

[*Addressing WHITE's portrait.*] Well, Father Chief Justice: What do you think of the fix I'm in? And what is that, you ask?



"I ask my Louisiana students to identify your portrait and—by Jove, they flunk!"



"They remember Mr. Justice Holmes of Massachusetts all right!"

“Oh well, I ask my Louisiana students to identify your portrait and—by Jove, they flunk!” Nobody remembers any more that Louisiana put a Confederate soldier boy on the Supreme Court of the United States.

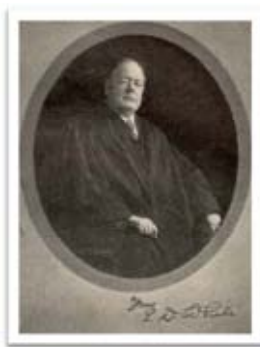
[*Exasperated.*]: Oh, they remember Oliver Wendell Holmes, Jr., well enough—Union Blue Coat of Boston!

They remember Mr. Justice Holmes of Massachusetts all right! [*Doubly exasperated.*] Even made a play about him, can you imagine, —called it “*The Magnificent Yankee.*”

But they forget the Confederate Gray of Bayou Lafourche—I mean you, Ned,—Louisiana’s Great Chief Justice [*with emphasis, pointing to portrait*] E. D. White!

**LIGHTS DOWN.**

**PORTAL PORTRAIT signed “Yours E.D. White.”**



**JESSE:** Notice White's signature: "Yours E.D. White." He was everybody's Chief Justice.

**LIGHTS UP.**

**PAUL R. BAIER:** [*Up center.*] Ladies and Gentlemen of Boston, let me step out of my role as Professor Richard Henry Jesse in the play and take you behind the scenes of "Father Chief Justice." Why did I write this play? In life, I am a law teacher in Louisiana. I proposed putting on a play about White to the Board of the Edward Douglass White Historic Site, in Thibodaux, Louisiana, Chief Justice White's birthplace. The Chairman of the Board's eyes grew as large as saucer plates and he asked: "Who will write the play?" I said I would. It took a summer. I wrote a prologue and five acts. What is good enough for Shakespeare's plays is good enough for mine. The drama carries you through White's life—a veritable family tale of home—with guest appearances by his side judges of Boston fame, Holmes and Brandeis. I am sure you will enjoy Fanny Holmes's part in the play. Mrs. Holmes pushes her husband Wendell around pretty good in Act III. I wrote the play from history. Believe me, in bringing the production to Boston I am living a dream.

Now, we're on our way back, back to Royal Street, New Orleans, April, 1926.

**LIGHTS DOWN.**



**BRYANT BAKER STATUE of E.D. White**

**SOUNDOVER # 2. “*Ashokan Farewell*”—Ken Burns,  
*The Civil War.***

**PROFESSOR JESSE:** [*From his desk, corner left, small lighted candle.*] Royal Street fluttered with flags, we are told, when they unveiled the statue of Edward Douglass White, in the heart of old New Orleans, in 1926. Confederate Veterans, still wearing the gray of ‘61, stood about the scaffolding. Above them rose Mr. Baker’s great bronze statue of Chief Justice White, heroic in size, and draped in the national flag. Somewhere in the crowd a band played old Southern airs, soft and sweet in the April sunshine. It was an impressive occasion reported *The Times-Picayune*, notable because so many venerable men and women had gathered to pay tribute to a man whose career brings honor to Louisiana and to the Nation.

Eighty-five years separate us from that occasion, ninety from White’s death. Louisiana’s Great Chief Justice is only an ember on the hearth. We meet anew to rekindle the flame.

**SCENE ii.— WHITE FAMILY HOME,  
La. 1, Thibodaux.**

**LIGHTS DOWN.**



7 [Voiceover.] **JESSE:** The Edward Douglass White Family Home on Bayou Lafourche near Thibodaux, La. Chief Justice White was born in this home in 1844. He returned to Thibodaux several times while he was Chief Justice to visit his boyhood home and to see the South's sugar cane fields come back to life after the Civil War. The photograph shows the home in 1924, three years after White's death.



**VIEW FROM LA. 1**

[Voiceover.] **JESSE:** The current structure shows quite an improvement over the primitive appearance of the house eighty years ago. The large live oaks on the grounds are older than the United States of America.

**LIGHTS DOWN.**

**FRONT PORCH, JUSTICE SCALIA.**



[Voiceover.] **JESSE:** [Pointing to the porch.] Justice Antonin Scalia of the current Supreme Court of the United States stood on the front porch of White’s boyhood home on March 12th, 1994. This was the 100th anniversary of Edward Douglass White’s taking his seat as an Associate Justice. “Our history is what makes us who we are,” Justice Scalia told his Thibodaux audience. “And if we forget our history we’ve lost a part of ourselves.” I want to thank Mr. Justice Scalia—Muse of “Father Chief Justice”—for his Centennial throw off the porch of White’s boyhood home.

## ACT II. SOLDIER BOYS.

LIGHTS DOWN.

### SCENE i.—CAPTAIN OLIVER WENDELL HOLMES



#### SOUNDOVER # 3. *“Drums of War”*; *Oliver Wendell Holmes—Ken Burns, The Civil War.*

[Voiceover.] **JESSE:** *[At desk, small lighted candle, corner left]*

In the Valley of Antietam, September 17, 1862, 3 A.M. Captain Holmes, a twenty-year old soldier boy, is keyed up for battle and the charge ahead. He writes home to his parents:

[Voiceover.] **JESSE:** *[Reading letter]* “It would be easy after a comfortable breakfast to come down the steps of one’s home putting on one’s gloves and smoking a cigar, to get on a horse and charge a battery up Beacon Street, while the ladies waved handkerchiefs from a balcony—but the reality was to face a night on the ground in the rain and your bowels out of order and then after no particular breakfast to wade a stream and attack the enemy.”

**LIGHTS DOWN.**

**JESSE:** Antietam broke the Twentieth's proud boast that Massachusetts troops had never been hit in the back:—

[*Reading letter*] “We have stood side by side in a line.

[*Proudly.*] We have charged and swept the enemy! . . . And, honestly, we have run away like jack rabbits!—which is all right—, but [*confessedly*] . . . not so good for the newspapers.”

**LIGHTS UP.**

**JESSE:** [*Walking up center.*] Captain Holmes served through the siege of Vicksburg and the Wilderness Campaign. Then, exhausted and telling himself that his duty lay in pursuing his philosophy, he left the Army when his three-year term of enlistment was up.

Whatever romance war held for him, had by this time gone up in the smoke of realities.

SCENE ii.—PRISONER AT PORT HUDSON.

LIGHTS DOWN.

HARPER'S WEEKLY.



[Voiceover.] **JESSE** [*At desk, corner left.*]: Union naval forces bombard the last Confederate holdout, Port Hudson, Louisiana, overlooking the mighty Mississippi. Port Hudson falls July 6, 1863. Nineteen-year-old Ned White, a strapping Confederate soldier boy, is taken prisoner. He is later paroled upon the plea of his anxious Mother. Fifty years later, in 1912, Princeton University conferred upon White a Doctor of Laws degree, *Honoris Causa*. The audience heard the details of White's capture as a Confederate Soldier Boy from the lips of [with emphasis] THE CHIEF JUSTICE OF THE UNITED STATES:—



CHIEF JUSTICE WHITE AT PRINCETON.

### **LIGHTS DOWN.**

[Voiceover]: “Like everybody else in my environment, as a little boy I went into the army on the side that didn’t win. I know I did myself more harm than I did to anybody else. I was taken prisoner, and my mother went to the officer in charge of the prison and asked permission to come in and see me.

“I had a prison number, and my number was called out, and I was marched along the dead line, where if a man tries to cross, he is shot. It was a cold February day. The Union Officer said to me, ‘My boy, you have no coat on!’ I had nothing on but a thin gray flannel shirt. ‘Go back and get your coat!’ I said ‘I cannot go back and get what I have not got.’ [White’s logic was always flawless!]

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### **LIGHTS UP.**

**JESSE:** “‘Oh,’ said the Union Officer, and putting his hand on the heavy braided blue coat which kept the cold from his vitals, he unbuttoned it, [*with emotion, slowly*] button by button, took it off his own shoulders and said [*pause, with great poignancy*], ‘My boy, I am more warmly clad than you are! Put on my coat!’”

**LIGHTS UP.**

**JESSE:** Chief Justice White told his Princeton audience this simple act of kindness on the part of the Union officer was the spark of reconciliation and reunion in his heart—of the blue and the gray as one.

**LIGHTS DOWN.**

**SCENE iii.—*SELECTIVE DRAFT LAW CASES.***



**SUPREME COURT, 1918.**

[Voiceover.] **JESSE:** The Supreme Court, 1918: CHIEF JUSTICE WHITE occupies the center chair, robe draped languidly over large, rounded shoulders; “HOLMES, J.” sits at his side, at attention, hands neatly coupled; “BRANDEIS, J.” is corner left, rear row—hair cropped close, comparative youth.

## **LIGHTS DOWN.**

**JESSE:** [*Up center.*] Well, Ladies and Gentlemen, . . . you can see for yourself: These two soldier boys later served side by side on the Supreme Court of the United States.

“The C.J. and I had been enemies,” Holmes liked to quip. But on the Supreme Court they sat as Brothers seeing eye to eye in what I teach my students are *The Selective Draft Law Cases* [*holding up volume 245 U.S.*]. This is vintage law, written by Chief Justice White for Captain Holmes and Court in 1918 when the Nation was at war.

It will not surprise you to learn that Congress may conscript young men, make soldiers of them, and ship the boys overseas to face death.

## **LIGHTS UP.**

The Court rejected claims that Congress is without power to conscript men to fight for their Country and that the draft violates the Thirteenth Amendment, which outlaws slavery and involuntary servitude. Chief Justice White and Captain Holmes knew better.

Chief Justice White’s deep patriotism displayed itself during the argument of the lawyers attacking the draft. The Chief Justice burst out that it was [*sternly*]: “Improper and unpatriotic!” to say the draft was unconstitutional.

**LIGHTS DOWN.**

**ACT III. AT HOME.**

**SCENE i.—1720 I. STREET.**



[*Voiceover.*] **JESSE:** Holmes's home: 1720 I. St., N.W.,

Washington, D.C. Four-story brick, framed in tree branches. Notice the second-story windows propped open in pursuit of fresh air. Holmes likes fresh air! It is Constitution Day, September 17th, Anniversary of the Battle of Antietam. Mr. Justice Holmes [*comes on*] and Mrs. Holmes [*comes on*] are "at home." They expect Chief Justice White to come calling for what is a yearly exchange of red roses between Captain Holmes and his Confederate enemy in Arms, Ned White.



[*Voiceover.*] **JESSE:** Mr. Justice Brandeis [*comes on*] joins the domestic scene, greeting Fanny Holmes and his judicial Brother Wendell.

**LIGHTS DOWN.**



Justice Holmes and Justice Brandeis retire to Holmes's study on the second floor, while Fanny Holmes exits, stage left.

**HOLMES'S STUDY.**



[Voiceover.] **JESSE:** Holmes's desk: his reading lamp and vase of fresh flowers. Book cases packed floor to ceiling—not an empty slot on the shelf! Notice the family military sword hanging above the hearth—a sword in its scabbard, a sword of oblivion and peace. A cozy setting in which to read, write, and talk the Law.

**LIGHTS DOWN.**

**O. W. HOLMES in horse-hair armchair.**



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[Voiceover.] **JESSE:** Mr. Justice Holmes is sitting in his favorite horse-hair arm chair, holding a copy of his book *SPEECHES*, Little, Brown, and Co., open in his lap.

[Voiceover.] **JESSE:** This is the fifth edition, which dates the scene sometime after 1913. Holmes is reciting to Brandeis, from his speech “The Soldier’s Faith,” a Memorial Day address, which takes Holmes back to Antietam, September 17th—Constitution Day—, 1862.



Holding a copy of his book *SPEECHES*, Little, Brown, and Co., open in his lap.

**LIGHTS UP.**

**HOLMES:** Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war. . . . War, when you are at it, is horrible and dull. But some teacher of the kind we all need. Out of heroism grows faith in the worth of heroism.

*HOLMES snaps SPEECHES shut, rises from his armchair, and approaches BRANDEIS, standing right, at desk.*

**HOLMES:** Now there, Louie, is a faith for the ages! Yesterday my belly kissed the ground at Antietam and Ned White was a prisoner at Port Hudson. [*With gusto*]: “The C. J. and I had been enemies,” I like to say to friends. Now look at us! C.J. WHITE and CO. want to put [*with double gusto*]: “PUNY ANONYMITIES” in jail for uttering a few doubts about Woodrow Wilson and the War . . . —and you and I, Louie, must fight ‘em off.

## LIGHTS UP.

**BRANDEIS:** The First Amendment is a dull sword these days, I am sorry to say! . . . Our faith is different. Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.

Those who won our independence knew it is hazardous to discourage thought, hope, and imagination. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form!

**HOLMES:** That's our *Abrams* dissent, Louie!

HOLMES, *really roused, charges his desk, picks up a page of manuscript opinion, and recites from his dissent in* *Abrams v. United States*, 250 U.S. 616 (1919):

**HOLMES:** [*Up center, addressing audience.*] Ladies and Gentlemen, *Abrams v. United States*: “MR. JUSTICE HOLMES, dissenting”:—

“Congress certainly cannot forbid all effort to change the mind of the country!

“Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger.”

**HOLMES:** “Why, I believe the defendant has as much right to publish these two leaflets as the Government has to publish the Constitution of the United States now vainly invoked by them.”

HOLMES, *still on his steed, returns to his desk, addressing* BRANDEIS.

**HOLMES:** [*A bugler blowing the charge.*] —Why, it’s battle, I tell you, Louie—the Campaign of the Constitution!—; the JOUST OF THE FIRST AMENDMENT! And we’ve got to fight like hell to win the banner back!—never mind C.J. White and MRS. Holmes want me to shut up!

*Enter FANNY, carrying a red rose. She places it on Holmes’s desk.*

**FANNIE:** Captain Holmes! . . . calm yourself. [*Putting her foot down.*] Chief Justice White is expected and it is MRS. [*with her own gusto*] . . . it is MRS. JUSTICE HOLMES’ opinion that you should fight your War on the Bench, not at home.

**BRANDEIS:** [*With wit, aimed at* WENDELL.] MRS. JUSTICE HOLMES is authorized to say that MR. JUSTICE BRANDEIS joins HER opinion!

**FANNIE:** It’s Constitution Day, Wendell, and there will be peace and quiet on the Holmes’ domestic front. You will not charge the enemy all over again at 1720 I. St.

FANNIE *presents the red rose to her husband.* WENDELL *melts.*

**HOLMES:** My sincere apology, LADY HOLMES, and to you, Louie. [*Sweetly, purring like a kitten.*]: Not a bad thing a rose [*placing it on his desk*] . . . and romance! [*Kisses FANNIE on the hand, bows to her as though a Knight to a Fairy Tale Princess.*]

**A DOORBELL SOUNDS OFF STAGE.** FANNY *exits left.*

HOLMES *expects it is the CHIEF JUSTICE. He thinks out loud on his Confederate friend.*

**HOLMES:** [*Up center, with BRANDEIS.*] Before you came on the Court, Louie, White was my most constant associate among our judges. But there are profound differences in the interests of my friend the C. J. and myself—so profound that I never talk about my half. Our Chief has Irish blood—he is naturally a politician and a speaker.

**BRANDEIS:** I assure you, Wendell, Chief Justice White talks about your half!—on our walks home from Court. “Captain Holmes has fallen out of line!” he exclaims. Then he threatens to put his big arm around you and apply what he calls “THE PHYSICAL APPLICATION OF THE LAW!”

**HOLMES:** I would run away like a Union jack rabbit!



"Not a bad thing, a rose . . . and romance!"



"The physical application of the law!"

**BRANDEIS:** White is an immense man physically, but his step is as light as a boy's. He is quick and agile and his walk is a trot! He is like Howard Taft in that—the object of admiration by many a fair ballroom partner!

**HOLMES:** White is a great pal of mine, but he is always thinking what will be the practical effect of a decision—which of course is the ultimate justification for condemnation of the principle adopted!

I think of its relation to the theory and philosophy of the law—if that isn't too pretentious a way of putting it.

I like to read a little philosophy into the law, Louie,—like an olive after lunch purifies the palate. Of course, my notion of the philosophic movement is simply to see the universal in the particular. I abhor speculation *in vacuo*—what I call “churning the void to make cheese!” Kant and Hegel's systems seem to me to have gone into the wastepaper basket!

**BRANDEIS:** I should rather stick to facts, Wendell. “*Ex facto jus oritur.*” —“From the facts arises the law.” That ancient rule must prevail in order that we may have a system of living law.

**HOLMES:** Louie!—You sound like Chief Justice White—with his big Latin *Digest*!

Chief *Justinianus* and I generally come out the same way by very different paths. But we sometimes come together head on [*driving his fists together*] with a whack!

**BRANDEIS:** As in the *Abrams* case! . . . But White has the grand manner and is of the 18th Century: “*Ley est resoun.*” —“Law is reason.”

**HOLMES:** That’s White exactly: “Law is reason.” . . . “By the light of reason” this! . . . “By the light of reason” that! He is a great Jesuit all right!

I believe in reason with all my heart, but I think its control over the actions of men when it comes against what they want is not very great.

But our Chief has secular insights! His thinking is profound! He is a big high-minded man, worthy of the place. His qualities always appeal to one’s affections.

**BRANDEIS:** White has a warm hug, with a big right arm and heart! [*Looking at his pocket watch.*] I wonder what is keeping our BROTHER THE CHIEF JUSTICE?

**HOLMES:** Probably kiddies on the street. He escorts them across Pennsylvania Ave against busy traffic. They love him for it! They like pocket candy from the Chief Justice of the United States! White rides a bicycle, you know—not a pretty picture on a wheel. But I do admire his regimen of daily exercise.

*FANNY's voice is heard off stage, left. She is coming up the stairs with the C.J.*

**FANNIE:** [*As though a Bugler at Antietam*] “THE CHIEF JUSTICE OF THE UNITED STATES AND MRS. JUSTICE HOLMES!”

*Enter FANNIE and CHIEF JUSTICE WHITE, arm in arm, in peace and quiet. WHITE is carrying two red roses; he has not forgotten MR. JUSTICE BRANDEIS and, in turn, Mrs. Brandeis.*

**WHITE:** Ah, my Boston Boys! I assume you were talking behind my back. What was it, Law or Fact?

**HOLMES:** [*With gusto.*] Your blessed “Domain of Theory!” —“Celestial Reason!”



"But when we enter the domain of absolute and unchallengeable fact . . ."

**WHITE:** Ah, swell Boys! It shows how great minds lift themselves up, above the mist and pettiness of things low, into the region of things supernal! I suppose you were in joint dissent!

[*To HOLMES.*] In the domain of theory, minds may differ. The moment we advance an abstraction, one mind takes one view, and the other takes another, and the union of the two minds becomes impossible because of the divergent premises or the contradictory deductions which the minds make.

**HOLMES:** Louie, are you taking notes!

**WHITE:** [*To BRANDEIS.*] But when we enter the domain of absolute and unchallengeable fact, then the only question which remains is first to ascertain the truth and then follow it!

**BRANDEIS:** [*To WHITE.*] MR. JUSTICE BRANDEIS concurs separately. Sometimes, if we would guide [*with emphasis, aimed at WHITE*] “BY THE LIGHT OF REASON,” we must let our minds be bold.

**WHITE:** The Court will take the matter under advisement! —God help us! . . . [*Presenting a rose to BRANDEIS.*] My Brother Brandeis of Boston, I give you [*as though proposing a toast*]: “The Constitution—all wrapped up in a rose.” [BRANDEIS takes rose.]

**HOLMES:** [*With gusto, up center.*] By Jove! . . . That's poetry! I told you, Louie, our Chief has insights. Now he shows himself a Goethe come round on Constitution Day!

**BRANDEIS:** [*To WHITE, with emphasis.*] "FATHER CHIEF JUSTICE"— . . . I concur!

**HOLMES:** Whoa! [*Riding at Antietam again.*] What's that?—"FATHER CHIEF JUSTICE"? I dissent:—"Congress shall make no law respecting an establishment of religion" [*he is quoting the First Amendment*], why Louie . . . —

**FANNY:** [*Breaking in.*] Wendell, be still! Aren't you the one always advising the world to "Think things, not words!" There is such a thing, my dear MR. JUSTICE, as a hearth and a home . . .—even at the Supreme Court!

**HOLMES:** By DICKENS! Fanny, you got me! [*HOLMES is tickled pink with his literary retort.*] I plum forgot *Cricket on the Hearth*.

**HOLMES:** Let's see: [*Mockingly.*] Do we have it on the shelf? [*Looking over the bookcases.*] . . .

**HOLMES:** The glory of a library, Louie, is an empty slot on the shelf! [*Not finding it, addressing the audience up center with gusto.*] I shall call our Brother White . . . "CHIEF OF THE CRICKET TRIBE!"

HOLMES is doubly tickled with himself. He turns from the audience and addresses BRANDEIS and the CHIEF JUSTICE.

**HOLMES:** And, by Jove!, have I heard Chirps in the Conference Room! . . . Except for my [*loudly*] LIONHEARTED FRIEND, BROTHER HARLAN. . . . He doesn't chirp. . . . He only roars!

**FANNY:** [*Sternly.*] Wendell, will you please dismount your STEED! Remember . . . It's Constitution Day.

HOLMES picks up the rose from his desk, holds it high in the air, and says as though proposing a toast:

**HOLMES:** [*Peacefully, with reverence.*] "FATHER CHIEF JUSTICE" [HOLMES has yielded!]: I give you: "THE UNITED STATES OF AMERICA." [HOLMES keeps the rose.]

**WHITE:** [*Holding rose high in air, but keeping it in hand*]: My BROTHER HOLMES of the TWENTIETH MASSACHUSETTS— "THE BLUE AND THE GRAY ARE ONE." [WHITE keeps the rose.]

**HOLMES:** [*Up center, with red rose, addressing audience.*] It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet its red is our life-blood, its stars our world, its blue our heaven.



"It is all a symbol, if you like, but so is the flag."

**WHITE:** [*Aside his BROTHER HOLMES, up center, with red rose, to audience.*] I can recollect the day when to me Old Glory was but the emblem of darkness, of misery, of suffering, of despair and despotism.

But ah! in the clarified vision in which it is now given to me to see it, [*with reverence*] although the stars and bars have faded away forever, the fundamental aspirations which they symbolize find their imperishable existence [*with loyalty*] in the stars and stripes!

HOLMES *returns to his arm chair and bows to his BROTHERS WHITE and BRANDEIS. Like a Prince to his Princess, HOLMES gives the red rose he is holding to FANNY. She places rose on desk. HOLMES picks up SPEECHES, eases in, and resumes reading from "The Soldier's Faith":*

**HOLMES:** Perhaps it is not vain for us to tell the new generation what we learned in our day, and what we still believe. That the joy of life is living, to ride boldly at what is in front of you, be it a fence . . . or the enemy!

We learned also, and we still believe, that love of country is not yet an idle name.

**HOLMES:** As for us, our days of combat are over. Our swords are rust. Our guns will thunder no more. We have shared the incommunicable experience of war; we have felt, we still feel, the passion of life to its top. In our youths, our hearts were touched with fire.

*HOLMES rises from his armchair, comes up center, and recites from SPEECHES with a hushed voice.*

**HOLMES:** Three years ago died the old colonel of my regiment, the Twentieth Massachusetts. He gave our regiment its soul. No man could falter who heard his "Forward, Twentieth!"

I went to his funeral. The church was empty. No one remembered the old man whom we were burying, no one save those next to him, and us. And I said to myself, The Twentieth has shrunk to a skeleton, a ghost, a memory, a forgotten name which we older men alone keep in our hearts.

And then I thought: It is right. It is as the colonel would have it. This is also a part of the soldier's faith: Having known great things, to be content with silence.

*FANNY approaches WENDELL, up center, with her own copy of SPEECHES in hand. She has her part in a moment. It is evident that they have recited "The Soldier's Faith" together many times before.*

**HOLMES:** Just then there fell into my hands a little song sung by a warlike people on the Danube, which seemed to me fit for a soldier's last work, another song of the sword—, but a song of the sword in its scabbard, a song of oblivion and peace. . . . —

*HOLMES breaks off. It is FANNY's turn.*



FANNY approaches WENDELL with her own copy of SPEECHES in hand.

**FANNY:** [*Reciting, at HOLMES's side.*]

A soldier has been buried on the battle field.  
 And when the wind in the tree-tops roared,  
 The soldier asked from the deep dark grave:

**HOLMES:** "Did the banner flutter then?"

**FANNY:** "Not so, my hero," the wind replied,  
 "The fight is done, but the banner won,  
 Thy comrades of old have borne it hence,  
 Have borne it in triumph hence."

**HOLMES:** Then the soldier spake from the deep dark grave:  
 "I am content."

**FANNY:** Then he heareth the lovers laughing pass,  
 And the soldier asks once more:

**HOLMES:** "Are these not the voices of them that love,  
 That love—and remember me?"

**FANNY:** "Not so, my hero, the lovers say,  
 "We are those that remember not;  
 For the spring has come and the earth has smiled,  
 And the dead must be forgot."

**HOLMES:** Then the soldier spake from the deep dark grave:

[*Sotto voce*] "I am content."

[All players exit stage; return to their seats.]

**LIGHTS DOWN.**

**ACT IV. “BY THE LIGHT OF REASON.”**

**SCENE i.—POLLOCK AND PRECEDENT.**

**THE SUPREME COURT, 1894.**



[Voiceover.] **JESSE:** The Supreme Court at the turn of the century. Edward Douglass White takes his seat March 12, 1894. He stands far right, in the rear corner. White’s youth of only fifty years fuels what is an old Court, headed by Chief Justice Fuller, dominated by Justice John Marshall Harlan and Justice Stephen Field. A foot-cushion fastens Fuller’s feet to the floor. Field’s cane cuts his aged knees apart.

**LIGHTS UP.**

**JESSE:** [Coming up center from his desk.] Ladies and Gentlemen, this is the legal part of the play. We call Act IV “By the Light of Reason”—a favorite legal locution of Justice White.

**JESSE:** Now, please don't be alarmed. I have cut out all the dull details of the law and have selected only the choicest of White's legal portraits . . .—these canvasses [*holding up volume 158*] we call the *United States Reports*.

You have already heard Chief Justice White on War and the Draft. Next, you will hear him on that other immortal question—. . . the Federal Income Tax!

**LIGHTS DOWN.**

**ATTORNEY GENERAL OLNEY ADDRESSES THE SUPREME COURT ON THE INCOME TAX,**

New York Herald, May 12, 1895.



[Voiceover.] **JESSE:** Attorney General Olney argued *The Income Tax Case* in May, 1895. The Courtroom was packed with spectators . . . concerned over their pocketbooks!

## LIGHTS DOWN.

[Voiceover.] **JESSE:** The majority, can you imagine, declared the Federal Income Tax Act of 1894 unconstitutional as a direct tax void for want of apportionment—GLORY BE! This was a dream decision—“destined to destroy itself,” exclaimed Justice White in his dissent. The majority cast aside a century of controlling precedent and left the United States . . . a eunuch!

**ALBERT ROSENTHAL ETCHING,**  
signed “E. D. White,” 1894.



[Voiceover.] **JESSE:** E. D. White’s *Income Tax* dissent was not only his first dissenting opinion, but also his first important opinion upon any grave constitutional question. This was 1895, quite bold and loud coming from the Court’s junior justice.

## **LIGHTS UP.**

**JESSE:** To Edward Douglass White's credit, his dissenting opinion in the old *Pollock Income Tax Case* was vindicated by "We the People" in the Sixteenth Amendment, which gives Congress the power to lay and collect the federal income tax—free from constitutional difficulties.

Now, whether you are a fiscal conservative, or a tax-and-spend liberal, believe me when I say White's vindication by the constitutional amendment is a rare achievement in the annals of the Supreme Court.

## LIGHTS DOWN.

### SCENE ii.—*STANDARD OIL OCTOPUS.*

[Voiceover.] **JESSE:** [*From his desk*] Act IV, Sc. ii, features another burning question of the day:— Presidents Theodore Roosevelt and William Howard Taft’s—

### PRESIDENTS ROOSEVELT, TAFT—



antitrust prosecution of John D. Rockefeller’s Standard Oil Octopus.

### STANDARD OIL OCTOPUS

*Cartoon by Emil Keppler,  
Puck Magazine, Sept. 7, 1904*



[Voiceover.] **JESSE:** The tentacles of the Standard Oil Octopus entwine the U.S. Capitol—eyes popping out of its fuel-tank head, suction cups lashing out at the White House.

This from *Puck Magazine*’s caricature.

**LIGHTS DOWN.**



[Voiceover.] **JESSE:** CHIEF JUSTICE WHITE, *center chair, ornately carved*; HARLAN *looking glum at his side*; HOLMES *front row left, fists clenched on knees*; *Thunderclouds roll in rear.*

**LIGHTS DOWN.**

**JESSE:** [*Up center, from desk.*] Chief Justice White condemned the Standard Oil Octopus in 1911, applying what he called the “Rule of Reason” under the Sherman Anti-trust Act. The Act outlaws: “*Every contract . . . in restraint of trade.*” But White declared that only *unreasonable* restraints of trade violate the law. This got him into trouble with Brother Harlan:—

**LIGHTS DOWN.**



**JUSTICE JOHN MARSHALL HARLAN**

[Voiceover.] **JESSE:** Mr. Justice Harlan exploded in anger over Chief Justice White's *Standard Oil* opinion. He launched out into a bitter invective going far beyond his written dissent—an outburst unmatched in the annals of the Supreme Court. Mr. Justice Holmes always referred to his Brother Harlan as “MY LIONHEARTED FRIEND”! Justice Holmes, take note, joined Chief Justice White’s opinion of the Court, not Harlan’s dissent, in the *Standard Oil* case.

## LIGHTS DOWN.

### SCENE iii.—FIFTEENTH AMENDMENT.



CHIEF JUSTICE WHITE, JUSTICES HOLMES *and* HUGHES dominate the front row, right.

**JESSE:** One more case and our short course on E. D. White and the Constitution is complete. This is a civil liberties case arising under the Fifteenth Amendment, which outlaws race discrimination in voting.

Chief Justice White's Court was the first to breathe life into the post-Civil War Amendments. This news may surprise the untutored. True, Justice White joined the majority opinion in *Plessy v. Ferguson* in 1896. But as Chief Justice of the United States he saw things clearly.

### **LIGHTS DOWN.**

**JESSE:** In the *Grandfather Clause Cases* in 1915, Chief Justice White announced opinions condemning Oklahoma and Maryland literacy laws that made a farce of the Fifteenth Amendment. Illiterate whites were grandfathered in, as of the very date of the Fifteenth Amendment.

Chief Justice White would have none of it. He wrote an opinion for the Court that condemned this end-run around the Amendment—a civil rights victory, may I say, long before the Warren Court.

**LIGHTS DOWN.**

**ACT V.  
CRICKET ON THE HEARTH.**

ACT V. CRICKET ON THE HEARTH.



THE CRICKET ON THE HEARTH: A FAIRY TALE OF HOME, by Charles Dickens, London, Bradbury and Evans, 35, Fleet Street and Whitechapel (1846). Illustration: "CHIEF OF THE SECOND," by R. Doyle. Engraver E. Dalziel.

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[Voiceover.] **JESSE:** Do you know Dickens's *Cricket on the Hearth*? It tells a fairy tale of home, of Caleb Plummer, a loving father and his blind daughter. They lived all alone. Chief Justice White referred to the book, you will hear, when he told of his change of heart towards "Old Glory" at the Willard Hotel, in Washington, at the start of the October Term 1914.

Act V of our play portrays the Cricket Spirit in Chief Justice White. He too had a Cricket on his Hearth and spoke the Voice in which the Spirits of the Fireside and the Hearth address themselves to all human kind.

**LIGHTS DOWN.**

**SCENE I.—DANCE WITH THE MUSIC.**

**May 1921. CHIEF JUSTICE WHITE** *nears the end.*



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[Voiceover.] **JESSE:** *The CHIEF JUSTICE and LEITA WHITE are at home: 1717 Rhode Island Ave., North West, Washington, D.C. Rising from his desk, CHIEF JUSTICE WHITE comes up center and recites a letter home to New Orleans, to his lawyer friend, HENRY DART—as death plucks WHITE's ear.*

There are whisperings that the end is near. *The New York Times* says I will resign in favor of Taft, who queried me—a veritable doctor of physic—as to my health. I told him I can still read and write! I said nothing of quitting. I warned him instead of the dangers that arise from wrong decisions!

As to the statue you propose, should one ever be erected in my memory, I would prefer my bronze bones to rest on Royal Street, in the Vieux Carré, rather than in Statuary Hall, in the Capitol.

## LIGHTS DOWN.

To Captain Holmes of the Twentieth Massachusetts I confessed my surgery—tomorrow, 11:30 A.M.—in a letter carried by messenger to 1720 I Street this morning. I told my Brother Holmes that I am ready to face the music.

It may be my last farewell, as God wishes, should I . . . [*falters momentarily, then a flash of Tennyson*—should I see my Pilot face to face, when I have crossed the bar.

[*Voiceover.*] **JESSE:** WHITE now stands at attention, soldier-like, his head held back, forehead facing Heaven. Cataracts squeeze his eyes shut. His mind drifts back to the BLUE at Fredericksburg and the GRAY at Port Hudson. He recites the closing part of his letter to HOLMES.

It is not dance music of any ordinary sort. But all the same I am going to try to step out with hope and confidence in the outcome, which I know I will do if I can only fix my mind on the young fellow lying face down in the lines of Fredericksburg and fearful of only one thing—that he might be hit in the back.

**JESSE:** White did not survive the surgery.

**LIGHTS DOWN.**

**SOUNDOVER # 4. SCENE II.—TAPS (15 notes).**



**SOUNDOVER # 4. TAPS (6 notes).**



**SOUNDOVER # 4. TAPS (3 notes).**



**END TAPS.**

[Voiceover.] **JESSE:** *Burial in Oak Hill Cemetery, high atop  
Georgetown.*

**LIGHTS DOWN.**

**SCENE iv.—THE KIND VOICE OF FRIENDS.**



[Voiceover.] Ten years later, Spring 1931. Beverly Farms, Massachusetts. Justice Holmes is seated on a bench, hat in hand. At 90 he is as handsome as ever. His mind drifts back to Antietam, to his survival of a shot through the back of the neck, to his service on the Supreme Court with his Confederate confrere Ned White—miracle that it was. HOLMES's voice is heard, over the scene, a muse as the final curtain nears.

**SOUNDOVER # 5. HOLMES'S VOICE**, mellow at 90.

In this symposium, my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task.

**LIGHTS DOWN.**



But I may mention one thought that comes to me as a listener-in.

The riders in a race do not stop short when they reach the goal.

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There is a little finishing canter before coming to a standstill.

There is time to hear the kind voice of friends and to say to one's self,

"The work is done."

But just as one says that, the answer comes, "The race is over,  
but the work never is done while the power to work remains."

## LIGHTS DOWN.



The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.



And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago: "Death plucks my ear and says, 'Live, I am coming.'"

## LIGHTS UP.

HOLMES *comes on, sits on bench.*

[Voiceover]: Holmes rises stiffly from his bench. He steps forward toward the audience, still lost in reverie, as though to greet his old Chief E. D. White one last time. He is dangerously near the edge of the stage. A cry off stage, “Mr. Justice! Mr. Justice!” breaks Holmes’s reverie. It is Jesse.

*Enter PROFESSOR JESSE, up center, hurriedly.*

**JESSE:** [*Excitedly.*] MR. JUSTICE! MR. JUSTICE HOLMES! I’m Professor Richard Henry Jesse, an old friend of Chief Justice White.

47        We’re honored to have you here in Thibodaux, Louisiana, White’s birthplace.

**HOLMES:** [*Astounded.*] Thibodaux? I thought the scene was Beverly Farms, Massachusetts?

      You mean we’re actually in Ned White’s land of sugar cane and Spanish moss?

**JESSE:** Yes, Mr. Justice.

**HOLMES:** Well, I’ll be damned. I should like to see White’s sugar cane fields in full regalia, if you please. You should have heard White roar about the economic ruin left by the Civil War.

**HOLMES:** I liked White, you know. He was a great friend of mine, a big, high-minded man. His writing was too long-winded, just as he used to criticize my opinions as being too cryptic. But his thinking was profound. Reason was his major premise, “By the light of reason,” he was fond of saying.

I prefer my sledgehammer blows: “The Constitution does not enact Mr. Herbert Spencer’s *Social Statics*.” [*Proudly*.] Now there’s a sledgehammer, Jesse!

[*Realizing JESSE’s youth*.] While we’re at it . . . I want to sit at the hearth of White’s boyhood home . . . only Confederate Soldier Boy I know of who was [*proudly*] **MY CHIEF JUSTICE OF THE UNITED STATES!**

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**JESSE:** Thibodaux’s citizens, I’m sure, Mr. Justice, will open their hearts and homes to you. They are honored to have you here.

**HOLMES:** [*With great bravado*.] Considering the circumstances, Jesse, I should rather say the fascination is completely mine!

**JESSE:** But first we have to finish our play.

**HOLMES:** Play? What play? I thought I was sitting in silence at Beverly Farms?

**JESSE:** This is the last act of a play about Edward Douglass White and the Constitution.



HOLMES pulls a Baccarat Rothschild cigar from his lapel pocket and flaunts it airily.

**HOLMES:** And I suppose next . . . you'll tell me I'm in it, what?

**JESSE:** Oh indeed you are, Mr. Justice.

**HOLMES:** [*Gladly, reflectively.*] Good thing a play—like a molded bronze, or a painted portrait . . . helps to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.

*HOLMES pulls a Baccarat Rothschild cigar from his lapel pocket and flaunts it airily. It is evident he is enjoying his new role.*

**HOLMES:** [*Puffing up.*] Made a play about me, you know. Called it "*The Magnificent Yankee.*" Reminded me of what I said when I saw the great Hopkinson portrait of [*puffing again*] YOURS TRULY, unveiled at the Court.

**LIGHTS DOWN.**



**HOPKINSON PORTRAIT OF HOLMES**

**HOLMES:** [*Roaring like a lion.*] “IT’S NOT ME, BUT IT’S A DAMN GOOD THING THE AMERICAN PEOPLE . . . THINK IT’S ME!”

How do you like that Jesse! . . .

**LIGHTS UP.**

**HOLMES:** [*Quizzically.*] What do you call your play?

**JESSE:** “Father Chief Justice.”

**HOLMES:** By Jove, that fits White fine. Louie:—I mean [*with great dignity.*]—Mr. JUSTICE BRANDEIS—used to address him that way, formally, at Conference.

“Father Chief Justice,” is it? What would you have me say in this play of yours?

**JESSE:** Just tell our audience what you remember most about White.

**HOLMES:** Remember most? That’s easy. I should say simply that [*proudly concise*] he lived,—he lived fully. . . . He breathed the actions and passions of his time. . . . He gave us a sample of his best. More than that, you cannot ask of any man, Jesse.

**JESSE:** Is there one scene that sticks in your mind?

**HOLMES:** Oh, well . . . now you’re sneaking me into script-writing [*flicking his cigar, glowingly*], are you, my dear Jesse?

**HOLMES:** Oh yes, there's a scene all right—what White said about his change of heart towards "Old Glory." Fanny and I were in black-tie at the Willard Hotel that night. Always enjoyed getting suited up . . . trotting out to dine . . . with Fanny on my arm, you know.

Now there was a speech by which to remember Thibodaux's Soldier Boy . . . [*with childish glee*];— Our **FATHER CHIEF JUSTICE . . . E. D. WHITE!**

*Lights fade as O.W.H., JR., and JESSE exit stage.*

## LIGHTS DOWN.

### SCENE V.—THE BLUE AND GRAY ARE ONE.



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### WILLARD HOTEL.

**JESSE:** [*Voiceover.*] A view of the Capitol from the Treasury down Pennsylvania Ave. Thursday evening, October 22, 1914, the Willard Hotel, Washington, D. C.—a dinner banquet of the American Bar Association honoring Chief Justice White’s twentieth anniversary on the Court.

The traditional toast, “The Supreme Court of the United States,” is presented to CHIEF JUSTICE WHITE. He responds by embracing his entire audience—“not alone of judges of last resort, but of all, however limited their jurisdiction; not alone of lawyers engaged in great affairs, but of all, however narrow may be the sphere in which they move”:—

**LIGHTS UP.**

*Enter* CHIEF JUSTICE WHITE [RALPH GANTS] to podium.

**LIGHTS DOWN.**



**CHIEF JUSTICE WHITE:** To respond to a toast has always seemed to me submitting oneself to a roast . . . because of the discomfort by anticipation . . . the misery in performance . . . and the dissatisfaction on account of things unsaid since only afterwards thought of!

*Long pause, as though thinking back to* Port Hudson.

## LIGHTS DOWN.



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**CHIEF JUSTICE WHITE:** I take it, it may not be at this day doubted that the underlying controversies which brought about the Civil War existed prior to the Constitution as the result of divergent institutions and conflicting opinions which were not harmonized when that instrument was adopted, and which therefore were fanned into the flames which caused that great conflagration. But neither side to that mighty controversy struggled to destroy constitutional government!

And this affords a ready explanation of how when the smoke of battle had passed away and the storm had subsided, the supremacy of our constitutional system by natural operation resumed its sway, and peace and brotherhood reigned where warfare and enmity had hitherto prevailed.

**LIGHTS DOWN.**

**CHIEF JUSTICE WHITE:** Let me illustrate.



Do you recall the toymaker and his blind daughter, created by the genius of Dickens in “*Cricket on the Hearth*”—where with a tenderness which may not be described, mistaken though it may have been, in order to conceal the poverty and misery of his surroundings the father pictured to the blind one whom he so much loved his environment as one of prosperity and affluence.

Let us listen to her as she places her hand upon his threadbare gray coat, which she deemed from his description to be one of some rich fabric, and hear her question, “What color is it, father?”

“What color? my child. Oh, blue [WHITE’s voice is trembling; he is back at Port Hudson’s dead line]—yes—yes, invisible blue!”

*Another pause; WHITE regains himself, starts up again.*

**LIGHTS DOWN.**



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**CHIEF JUSTICE WHITE:** And now, with the mists of the conflict of the Civil War cleared from my vision, as my eyes fall with tender reverence upon that thin gray line, lo, [*with great emotion*] the invisible has become the visible, and THE BLUE AND THE GRAY [*pause, nearly unmanned*], THANK GOD, are one!

**LIGHTS UP.**

CHIEF JUSTICE WHITE *leaves the podium and returns to his seat.*  
As White leaves the stage, JUSTICE HOLMES stands erect and salutes his FATHER CHIEF JUSTICE E. D. WHITE.

\* \* \*



"THE BLUE and THE GRAY, thank God, are one!"

*Enter* PROFESSOR JESSE, to podium.

**JESSE:** The play's last image is Albert Rosenthal's portrait of Chief Justice White, which hangs in the West Conference Room of the Supreme Court:—

**LIGHTS DOWN FULL** [5 seconds].



**ROSENTHAL PORTRAIT OF E. D. WHITE**

**LIGHTS UP FULL.**

**JESSE:** [At podium.] Ladies and Gentlemen of Boston:—Our “Evening with Justice Holmes” is over. We leave you with the final cut of The Magnificent Sevenths Brass Band’s Authentic New Orleans Jazz funeral entitled: “Feel So Good”—

**LIGHTS DOWN, DIM** [5 seconds].

**SOUNDOVER # 6** [*Softy.*] **“FEEL SO GOOD.”**

**LIGHTS UP FULL.**

**CURTAIN CALL.**

**CENTER, THEN TO YOUR RIGHT:—**

**Justice Spina; Justice Botsford;**

**CENTER, THEN TO YOUR LEFT:—**

**Justice Cordy; Justice Gants**

**PROFESSOR JESSE JOINS LINE BETWEEN  
Justice Botsford and Justice Gants**

**CAST JOINS HANDS, FINAL BOW TOGETHER**

**FADE MUSIC OUT.**

**JESSE:** May the Spirit of the Fireside and of the Hearth be with you always.

***EXEUNT.***



CURTAIN CALL, roses in hand.





**“Father Chief Justice”: E.D. White and the Constitution** is a portrait of Edward Douglass White, born of Bayou Lafourche, Thibodaux, Louisiana, 1844, Confederate soldier boy captured at Port Hudson in the Civil War, United States Senator, Associate Justice, 1894, and Chief Justice of the United States, 1910-1921. His life is magically portrayed through scenes that invite you into his boyhood home to climb its “staircase to the Supreme Court,” place you in the Valley of Antietam facing death with Captain Oliver Wendell Holmes, Jr., and seat you at Holmes’s elbow with Fanny Holmes and Justice Brandeis at 1720 I Street, N.W., during World War I, when freedom of speech was at risk in the “Campaign of the Constitution.”

Holmes and White—*“The Blue and the Gray as One”*—sit together side by side as Brothers on the Supreme Court in the Selective Draft Law Cases and Chief Justice White voices his immortal “Rule of Reason” under the Sherman Antitrust Act, while Harlan, J., erupts like a volcano. White’s Court anticipated the rule of *Miranda v. Arizona* long before the Warren Court and it was the first to breathe life into the post-Civil War Amendments, protecting the voting rights of blacks. You share the joy of life lived to the top, a veritable family tale of home.

*“Father Chief Justice”* premiered in the Theater of the Jean Lafitte National Historic Park, Thibodaux, Louisiana, March 8, 1997—Holmes’s birthday. It played at Louisiana’s Old State Capitol, Baton Rouge, April 29, 2000; in the restored chamber of the Louisiana Supreme Court, 400 Royal Street, New Orleans, May 22, 2008; Nunemaker Auditorium, Loyola University New Orleans, February 4, 2009; and, most recently, the Coolidge Auditorium, Jefferson Building, Library of Congress, Washington, D.C., to an overflow crowd of over 400 on Mardi Gras day, March 8, 2010.

“We hear the story of Chief Justice White and his enemy in arms, Oliver Wendell Holmes, Jr., exchanging red roses every Constitution Day, September 17th, anniversary of the Battle of Antietam, where Holmes took a Confederate ball through the back of the neck and, by God’s grace, lived. With Mr. Baier’s play, *“Father Chief Justice,”* the magic continues.

—**John A. Dixon, Jr.**, Chief Justice of Louisiana, Retired

“I think you know that I support you in all your endeavors, but none more so than when you are illuminating the history of a great institution to which I have devoted 40 years of my life.”

—**Justice William J. Brennan, Jr.**

“Playwright are you!”

—**Justice Sandra Day O’Connor**

“I don’t think you ought to change your name to Professor Jesse—how about Shakespeare? I especially appreciated your *Note on Sources*. And I was especially delighted to see that you used the rose exchange on the anniversary of Antietam so effectively.

—**Gerald Gunther**, William Nelson Cromwell Professor of Law  
Emeritus, Stanford Law School