INFORMATION TO USERS

This was produced from a copy of a document sent to us for microfilming. While the most advanced technological means to photograph and reproduce this document have been used, the quality is heavily dependent upon the quality of the material submitted.

The following explanation of techniques is provided to help you understand markings or notations which may appear on this reproduction.

1. The sign or “target” for pages apparently lacking from the document photographed is “Missing Page(s)”. If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting through an image and duplicating adjacent pages to assure you of complete continuity.

2. When an image on the film is obliterated with a round black mark it is an indication that the film inspector noticed either blurred copy because of movement during exposure, or duplicate copy. Unless we meant to delete copyrighted materials that should not have been filmed, you will find a good image of the page in the adjacent frame.

3. When a map, drawing or chart, etc., is part of the material being photographed the photographer has followed a definite method in “sectioning” the material. It is customary to begin filming at the upper left hand corner of a large sheet and to continue from left to right in equal sections with small overlaps. If necessary, sectioning is continued again—beginning below the first row and continuing on until complete.

4. For any illustrations that cannot be reproduced satisfactorily by xerography, photographic prints can be purchased at additional cost and tipped into your xerographic copy. Requests can be made to our Dissertations Customer Services Department.

5. Some pages in any document may have indistinct print. In all cases we have filmed the best available copy.

University Microfilms International
300 N. ZEEB ROAD, ANN ARBOR, MI 48106
18 BEDFORD ROW, LONDON WC1R 4EJ, ENGLAND
RICE UNIVERSITY

JUSTICE JOSEPH BRADLEY

AND THE RECONSTRUCTION AMENDMENTS

by

RUTH WHITESIDE

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE

DOCTOR OF PHILOSOPHY

APPROVED, THESIS COMMITTEE:

Dr. Thomas Haskell

Dr. S.W. Higginbotham

Dr. Harold M. Hyman

Dr. C.H. Hudspeth

Houston, Texas

April, 1981
ABSTRACT

In the decade after the Civil War, the task of defining the rights of state and national citizenship, in the context of the Reconstruction Amendments, fell to a relatively small number of federal judges. This dissertation focuses on one of the most influential judges in the initial stages of that process, Supreme Court Justice Joseph P. Bradley of New Jersey.

Bradley's was the most analytic and the most disciplined mind on the Court in the 1870s and 1880s. His tightly reasoned arguments were reflected in the more than 400 opinions he wrote over the twenty-two years of his tenure. An examination of relationships among the Court's members in this period suggests that Bradley's influence was considerably greater than that immediately apparent in his quiet, private demeanor. Bradley was the first federal judge to comment on the scope and meaning of the Reconstruction Amendments. The occasion was the Slaughterhouse Cases in 1870. That opinion underscored the Amendments' broad reach as well as the authority of the Congress to secure their aims in law.

This dissertation traces Bradley's civil rights jurisprudence from his circuit opinion in Slaughterhouse and his exchanges with Judge William Woods reflected in Woods' decision in U.S. v Hall in 1870, through his opinion in the Civil Rights Cases in 1883. Initially, Bradley had been a
powerful advocate of the supremacy of federal authority in protecting the rights of all citizens under the post-war Amendments. By the mid-1870s, Bradley had begun to vacillate on the value of congressional efforts to fulfill the Amendments' goals. After his experience on the Commission to settle the disputed election of 1876, in which Bradley cast the deciding vote for Hayes, Bradley sat in virtual silence while his Supreme Court colleagues chipped away at the civil rights enforcement program's constitutional underpinnings. By 1883, Bradley had joined the majority. The occasion was the Civil Rights Cases. The effect of Bradley's decision was to deny to Congress primary authority for protecting citizens in their fundamental rights and to return that responsibility to its pre-war locus -- the states.

For historians of the Reconstruction era, the Civil Rights decision is the symbolic culmination of the Compromise of 1877, the revolutionary "deracializing" of the post-war Amendments. For Bradley, it was also the end of an era, the terminus of the civil rights odyssey he had begun within months of his appointment to the Court in 1870.

This dissertation traces the evolution of Bradley's civil rights jurisprudence between 1870 and 1883. It is a biographical treatment. The beginning chapters examine Bradley's early life, his pre-Court career as an influential New Jersey lawyer, his several forays into elective politics
in the 1860s, and the politics of Bradley's appointment to the Court. Other chapters examine the decisions through which Bradley's jurisprudence evolved and detail his participation in the settlement of 1877.

This dissertation's central argument is that Bradley's political views and subsequently, much of his civil rights jurisprudence were shaped by his enduring passion for the Union, the goal he prized above all. By 1883, the enforcement program had become, in his view, a divisive tool rather than one of reconciliation. Bradley's Civil Rights decision in 1883 acknowledged what had become a fact of American political life twenty years after Appomattox. The civil rights issue had been substantially wiped from the nation's agenda until the "second Reconstruction" of the 1960s.
ACKNOWLEDGEMENTS

Each of us, to paraphrase Thomas Wolfe, is the sum of all we cannot count. In that sense, it is impossible to count all those whose assistance and encouragement have sustained this dissertation effort. So many colleagues, friends and family, librarians and research staff at various institutions deserve special mention that any effort to express my gratitude risks slighting those unnamed. Still, my task would not be complete without some special words of appreciation.

My comments must begin with my mentor and friend, Professor Harold M. Hyman. From the day I first expressed an interest in graduate work under his guidance to the conclusion of this paper, Professor Hyman has given my efforts his unfailing support. His own stimulating scholarship, his insights as this dissertation took shape, his encouragement and friendship have all been invaluable. I also want to express my collective thanks to the History faculty at Rice University, and especially to Professors Thomas Haskell, Martin Wiener and Albert Van Helden who in the process of my graduate study have become valued colleagues and friends. I am also indebted to the staff of the Fondren Library at Rice and to the research staff at the New Jersey Historical Society. I am especially grateful to the American Association of University Women, whose dissertation fellowship provided generous financial support for my research.
In the end, my greatest debts are to my friends and family. No words can express the depth of my gratitude to my friend and colleague Mary Ann James. From the beginning, she has shared her time, her tremendous intellectual gifts and her friendship without reserve. Indeed, my debt to the entire James family in incausable. Other friends contributed immeasurably. Elaine and Robert Furlow read the drafts, cheered me up and kept me moving when I thought this dissertation would never end. Jim Shelhamer was always there when I needed him. Finally, whatever is valuable in this dissertation is dedicated to my family and especially to my parents, J and Mildred Whiteside. Their love, encouragement and confidence have never failed me.
TABLE OF CONTENTS

Abstract. .................................. iii
Acknowledgements. ........................ vi

Chapter One: The Making of a Justice:  
The Formative Years ....................... page 9

Chapter Two: The Making of a Justice:  
The New Jersey Years .................... page 49

Chapter Three: Justice Bradley: The   
Politics of Appointment ................ page 105

Chapter Four: Circuit Justice: Slaughterhouse  
to Hall ................................ page 137

Chapter Five: The Waning Commitment:  
Slaughterhouse to Cruikshank ........ page 183

Chapter Six: Toward 1883: Sealing the  
Compromise ................................ page 228

Epilogue. ..................................... page 284
Endnotes. ..................................... page 288
Bibliography. ................................. page 333
CHAPTER ONE

THE MAKING OF A JUSTICE - THE FORMATIVE YEARS

Shortly after his appointment to the United States Supreme Court in 1870, Justice Joseph Bradley prepared an autobiographical sketch addressed to his children.¹ This brief memoir is the major source of information about the Justice's early life. In 1873, Bradley reworked the sketch into a polished family history, later published by his son Charles.² At first blush, the rough pages of the earlier manuscript offer a classic nineteenth century tale of success wrought from humble but happy beginnings. First the nurture of family and simple country life; then fate intervenes at fortuitous intervals, with an unanticipated education, then with a flourishing law practice and finally with an unsolicited call to the Supreme Court. "How perfectly unforeseen," Bradley concludes the memoir, "how very unlikely was almost every step of the journey."³

Reading backward from a knowledge of Bradley's influential career in American law, it is easy to dismiss his reminiscences as part of the nineteenth century penchant for teleological biography. In this sense they reveal little
more than the luck-and-pluck spirit of his times. From the perspective of modern judicial biography, however, Bradley's memoir has a larger value. Like other men and women, a judge's inborn qualities are deflected, disciplined, enriched or narrowed by his experiences. Associations, education, reading and profession shape the judicial personality. As Justice Frankfurter has written, judges may represent or resist their zeitgeist. Often they come to symbolize forces at work in society outside their particular personality. Still the fact that they were "there and others were not," Frankfurter concluded, can make a decisive difference.

How a judge sees himself can be especially important. The Bradley recollections, even as enlarged by time and success, offer insights into his values and habits of mind. In the tradition of his Calvinist ancestors, Bradley measured himself and those around him against an unattainable standard of personal morality. His impatience with anybody or anything that wasted his time was legend. Hard work, shrewdness, a deep if rigid intellectuality, and a capacity for self analysis are among the characteristics that most marked Bradley's life. He actively cultivated these qualities, worrying incessantly over his self-perceived inadequacies. In doing so, Bradley became a self-conscious product of the protestant ethic, and his career embodied many of its virtues and contradictions. Understanding Bradley's personal qualities is particularly useful in
evaluating his impact on the law. Because he was on the Court "and others were not," details of his background and pre-court career deserve attention.

I

Bending the Twig: Berne to Rutgers

Joseph Philo Bradley was born March 14, 1813 on a back-country family farm about a dozen miles southwest of Albany, New York. His father's family migrated to Albany County from Connecticut where other Bradleys had helped to found New Haven colony in the 1630s. Bradley's maternal grandparents, the Gardiners, had settled in New York from Rhode Island. The eldest of eleven children born to Philo and Mercy Gardiner, Joseph Bradley grew up in the close knit family circle encompassing three generations of Bradleys and Gardiners.

Difficult labor and the simple country life of rural New England colored Bradley's earliest memories. In the evenings his father read aloud from the Bible or from the books in his small library. Bradley's grandfathers often shared stories of ancestral heroics in the Continental army, the French and Indian wars and the War of 1812. Joseph spent a considerable part of his boyhood with his father's grandparents. "They claimed the right to have me domesticated with them," he wrote, "and though my mother often demurred, they generally succeeded in their wishes until I
got old enough to be of service to my father, and even then I often spend my winters with them, going to school during the day." Those were, he remembered, "indeed happy times."  

"The place of our own home was a high mountainland (the Helderberg hills in the Catskills) about three miles southeast of Bernville, then known as the Corporation," Bradley wrote. It was a "sterile piece of land . . . cleared of its natural forest after our purchase of it." He detailed the family routine - raising food and cattle, turning hides into harnesses and shoes (one of his grandfathers was a tanner), and wool and flax into flannel and linen. What the family did not need, young Joe peddled in Albany. Self-sufficiency, marked the economy and family life of the Bradley clan, and Bradley prized that trait throughout his life. "Very few men," he told his children, "can look back to such absolute independence."  

Two threads especially, enrich the Bradley memoir. The first is the fond account of his mother, Mercy Gardiner Bradley. She was the sum and source of what Bradley considered his most enduring values.

...If one lesson more than any other was stamped upon my early existence, it was the sanctity of home and affections, and absolute justice and charity to all. Anything mean, deceitful or dishonest was regarded with utmost abhorrence in our family circle, and received prompt and decided condemnation.
Mercy Bradley was a "methodist of the mild, not the ardent type." She was gifted with good sense, shrewdness, and a sweet temper. For her eldest son, she was the "jewel in the family crown." Bradley's remembrance is more than a son's simple paean to his mother. He recalled especially her gifts for logic and satire, her quick and agile mind, and "the still higher intellectual gift of keen and discriminating analysis." These were qualities Bradley sought to cultivate in himself.9

A second thread in Bradley's accounts is the pervasive intellectual atmosphere that tempered the rugged environment. In fact, the Bradleys interests were considered somewhat esoteric by the neighbors who thought of them as "rather exclusive."10 Joe Bradley's formal education was limited to winter terms at the local country school. By 15, he was the teacher. Though "doomed to hard toil," his father Philo Bradley, owned a small, generally practical library.11 The senior Bradley was especially fond of history and travel books. "I think he must have read nearly the whole Ancient Universal History...of twenty thick octavo volumes," Bradley wrote of his father. "Whenever he came to a passage that pleased him, he would read aloud; and I remember to have attained quite a minute knowledge of the exploits of Alexander the Great and of Julius Caesar in this way."12

Bradley's uncle, Job Gardiner maintained the circulating library three miles away in Berne. Job was an "ingenious
person, . . . a great thinker and reasoner on religious and metaphysical subjects." He started "inquiries in Bradley's mind which took many years to solve," if they were ever solved. Bradley "became an incessant devourer of every mental aliment that could possibly be obtained." His uncle's library was a mecca to which he returned again and again on "delicious Saturday afternoons and Sundays, arguing and talking with him . . . and rummaging and poring over the literary treasures." The treats included such "solid literature as Josephus, Bollin, Gibbon, Hume . . . Mavor's Collection of Voyages and Travels. . . together with solid books of Divinity." Uncle Job died in Bradley's youth, "as he had lived, in the firm and calm conviction that what could not be thought out and understood was not worth knowing or believing." This single-minded intellectuality would mark Bradley's own life and jurisprudence. Years later, puzzling with a friend over a biblical text, he demanded to know what "it does mean." It was no satisfaction to Bradley to be told that something "may mean this, or it may mean that. If that is all that can be said about it, it loses all charm and interest." Bradley was especially drawn to logic and mathematics. His gifts were considerable. He attributed them particularly to his mother "who had a marvelous facility for making calculations in her head and unravelling difficult questions." Bradley traced his mother's analytical bent to her father. His earliest memories included his grandfather
Gardiner's mathematical challenges. "With a piece of chalk he would rapidly draw a diagram on the hearth of a winter's evening, and explain to us the mysteries of angles and triangles. . . and show us their practical use."\(^{16}\)

Bradley once struggled with a math problem for more than a year, only to be startled by a friend's quick algebraic solution, a method of which Bradley knew nothing. He found a relative who had "purchased Bonnycastle's Algebra. . . walked five miles to borrow the book and hardly ate or slept until [he] knew the book from beginning to end." Throughout his life, Bradley would derive equations and challenge friends with complex problems in theoretical and applied mathematics. Such activity was a constant source of pleasure and relaxation.\(^{17}\) This youthful attraction to logical abstraction, combined with intellectual curiosity and a measure of snobbishness, were qualities which would distinguish the mind of the lawyer and judge.

". . . a more complete education"

In 1831, Bradley made the difficult but inevitable decision to leave his mountain home. The Bradley children, he wrote, had been taught to be "proud of poverty. . . content with our lot - except that, for myself. . . I had a burning thirst for a more complete education."\(^{18}\) This desire, had become so vehement that I broke out in a way I had never done before to my father. I told him my life was being wasted, that what I was doing amounted to nothing.
That I must have an education." Bradley had heard through a friend of a New York City grocer who needed a clerk. His plan was to seek the job, save his money and return to Albany Academy to prepare for college. Bradley's father gave him a small amount of money and agreed to let him make up at some later date the loss of "my service during my unexpired minority."

There is a certain apocryphal quality to the sequence of events through which Bradley moved from the farm to the university. If Bradley elaborated the events, he did so consistently. The story was recorded in Bradley's autobiographical notes and often was repeated by Bradley's friends and acquaintances. As he recalled, Bradley arrived in Albany in early January 1832. Unfortunately, he arrived at the wharf just after the last boat of the season pulled away from the dock and down the freezing Hudson. Disappointed, Bradley decided to stay in Albany, ostensibly to look for work. As he remembers, most of his time was "spent listening to debates of the Assembly and poring over coveted volumes in the State Library." An Assembly debate on the state's revised statutes provided his "first initiation into the mysteries of the law, and he later remembered this experience as his "first stimulus in the direction of legal studies."  

After some weeks, and with no prospects for work in Albany, Bradley left for home. Before he arrived, he was brought "directly to the object of [his] wishes in a provi-
dential way that now seems somewhat strange." Leaving the stage at Berne for the foot trip to the farm, Bradley met a former teacher, Abraham Myer, pastor of the local Dutch Reformed parish. He told Myer of his desire for an education and his thwarted plans to go to New York. Bradley later marveled at how convincing he must have sounded. The same afternoon, Myer offered to take him under his roof and wing and prepare him for college. For a year Bradley taught school in Berne and studied with Myer. Eventually, Myer arranged for Bradley to enter Rutgers where Myer had once studied theology. Church funds were made available for Bradley's expenses, provided he agreed to enter the Dutch Reformed ministry. Reluctantly, he was "persuaded to the notion" of a theological vocation.21 In the fall of 1833, "with the awkwardness of the country still clinging to him," Bradley joined the freshman class in New Brunswick.22

Most of the eighty students at Rutgers were sons of wealthy New Jersey families. Considerably poorer and older than most freshmen, Bradley made a quick and lasting impression. One of Bradley's more sophisticated classmates recalled the would-be scholar, fresh from the farm. Unable to afford closer accommodations, Bradley boarded with a country family several miles from New Brunswick. "His doting mother had made every garment he wore . . . Lincoln himself in his early youth was not much stranger."23

Since a ministerial vocation was a condition of his education, Bradley's curriculum emphasized history,
theology, classical languages and literature. His preparation had been uneven. He had studied Latin and Greek grammar with Myer, but had read little. On the other hand, Bradley's self-taught mathematics put him well ahead of his class. Here, he "stood the acknowledged head of the college." Soon after his arrival "rumors what a student he was" began to circulate. When he fell ill during the first term, work spread that it was "brain fever from overwork."24 In his own words, he "was a very hard student. I do not remember ever to have entered a professor's room without being ready to answer any question that could fairly be put on the lesson of the day." Bradley quickly moved by examination to the sophomore class and completed his work after two and a half years.25

Bradley's closest conferees in the class of 1836 were a distinctive group. Four of his colleagues became lifelong friends and occasional allies in law and politics. Frederick T. Frelinghuysen,26 scion of a prominent New Jersey family would become a United States Senator (1866-69, 1871-77) and Secretary of State (1881-85) in Chester Arthur's cabinet. With Bradley, Frelinghuysen was a member of the 1876 Commission appointed to arbitrate the Hayes-Tilden election. Cortlandt Parker,27 Bradley's college roommate, became a leader of the New Jersey bar and sixth president of the American Bar Association. Bradley's friend William Newell28 would become a power in New Jersey politics and governor of that state. George Harding29 would
be a leader of the Philadelphia bar, active in Pennsylvania Republican politics and publisher of the Philadelphia Inquirer. These men, Bradley wrote, "exercised a permanent influence over my subsequent life." Parker and Frelinghuysen eventually led Bradley to the legal profession. In the decade before the Civil War, Bradley, Parker, Frelinghuysen and Newell participated in the founding of the Republican party in New Jersey. Three decades later, Harding and Frelinghuysen were instrumental in obtaining Bradley's appointment to the Supreme Court.

"...the mysteries of the law"

In the year before his graduation, Bradley's plan took a dramatic turn. A life in the ministry had been the price of his education, and with that goal at last in sight, he had become "unsettled on the ministerial question." The catalyst for Bradley's decision not to graduate in theology involved a dispute between Rutgers faculty and students in which Bradley's took a leading role. Although the point of disagreement is no longer clear, Bradley's presentation of the students' case, in Parker's retelling, "convinced all his friends that the profession to which he looked was not the profession for him...." "Indecision," Bradley wrote that year in a copybook essay entitled 'Principles Should be Fixed,' "is the bane of a healthy conduct." If one "finds that he has adopted the wrong course, let him choose the right one." Midway through his final year, his course
work complete, Bradley resigned his church gratuity and left Rutgers. His only decision had been what not to do with his life.

. . . Having concluded to abandon the study of theology, I availed myself in March, 1836 of an offer to take the academy for boy at Millstone; (a nearby classics school) the faculty having promised, in consideration of my proficiency, to recommend me for a degree at the ensuing commencement with the rest of my class.32

Bradley graduated in the summer of 1836. Parker was the valedictorian but always insisted that Bradley would have been first had he not left early to support himself teaching.33

The Millstone position was a job but not a future. Bradley put his depression on paper - a cathartic ritual he followed throughout his life. "I cannot realize my actual situation," Bradley wrote in an essay he titled "Thoughts on Commencement."

I cannot form a just conclusion as to what views with respect to myself, my classmates, my prospects, and my anticipations I should entertain. I am only alive to the past. . . . I turn to the future . . . I see my companions, classmates, my competitors so long, - I see them far before me, distinguished in their professions, beloved for their virtues, respected for their talents, and honored with the confidence of their fellow citizens - I see myself far behind, toiling with both hands to keep a station and a name, but sinking under the task and dying young and forgotten in the middle of my course . . . .34

Bradley's despondency was brief. Parker and Frelinghuysen had moved to Newark to read law with the
latter's uncle Theodore Frelinghuysen, a former New Jersey attorney general and United States Senator. They were quick to urge that Bradley do the same. Parker heard that Archer Gifford, a local lawyer and Collector of the Port of Newark, needed a clerk to study law and assist in the Customs House. He and Frelinghuysen recommended Bradley. They urged him to abandon his teaching post and join them in Newark. "Tell the Millstones they can revolve without you," Frelinghuysen wrote in September 1836, "it is a grand situation . . . ." Bradley was ready to go, but felt obligated to the school at Millstone. Finally, he explained his wishes to the academy directors, agreed to find a substitute and left his teaching post. By November 1836, Bradley was in Gifford's office in Newark. For the next three years, Bradley read law, studied with his friends and supported himself in the Customs House.

Bradley applied himself to the study of law with the diligence that had distinguished his Rutgers career. His goals were high. "I want to feel myself qualified to be the Chief Justice of the United States," he is said to have confided to a friend. Bradley's recollections of his course of study provide a valuable insight into legal education in the nineteenth century. They also suggest something of Bradley's style.

... I adopted my own course of study and frequently had mutual examinations with Frelinghuysen. Of course we mastered Blackstone, and Kent. Sellon's Practice I
studied with the New Jersey Statute book and reports constantly in my hand, so as to know how the English practice and pleadings were modified by New Jersey legislation and usages. Stephen's first Edition of Pleading I had by heart. Mitford's Equity Pleading was also thoroughly mastered. Chitty's first two chapters on the parties to, and on the forms of actions were also carefully studied. Old Chief Baron Gilbert's little work on Evidence I not only studied and re-studied, but made a careful analysis and index of the work. Chitty on Bills and Contracts were largely read and many of the articles in Bacon's Abridgement. I never read any other work on real estate systematically through besides Blackstone; but in reading every chapter of Blackstone, I had constantly in hand either Cruise's Digest, Coke on Littleton, or the Statutes and Reports of New Jersey. The result was that when we examined for Attorney's license in November, 1839, I had no difficulty in answering all questions propounded on that occasion, so momentous to every student of law.  

In content, Bradley's self-prescribed study followed the course of normal legal training at mid-century. His papers suggest that he developed early the style and habits of mind that characterized his career at the bar and on the bench. The passion for broadening knowledge that had pulled Bradley from the farm continued to dominate his thinking. That passion is reflected in the series of notebooks Bradley began during his student days and continued until his death fifty years later. Self-improvement was a constant theme in Bradley's writing. This, Bradley wrote in a youthful essay, "was the duty and high privilege of every human being . . . . One of the best means of arriving at just conclusions, or truth, is to record our best thoughts. By clothing them in words, we make them more precise, determined and fixed." To this end, Bradley suggested keeping a journal at hand for
recording "the first rough form of our thoughts, including the reasons and conclusions which occur to our minds on any subject in which we take an interest ..."41

Bradley began two sets of memorandam books in these early years, one for legal subjects, the other a commonplace book he entitled "Memoranda for constant use, containing facts, principles and definitions ..." Bradley often used the books to draft personal letters. He filled them with lengthy quotes from books on religion, philosophy and history. He derived equations and theorems, explained and illustrated pendulums, sundials, the transit of Venus, solar parallax, machinery and tools of every kind. Bradley was particularly fond of criticizing sermons. "Dr. Canning is sometimes obscured," he wrote in 1838, of a local Dutch Reformed minister, then detailed the "fault of obscurity in his view of the life and writings of Fenslow." Bradley expounded on the sixteenth century German constitution and other historical events. He worried questions of ambition, love, politics, and whether or not to vote for a Roman Catholic. (He decided in the negative in 1840, but in 1876 he added a marginal vote that he had lived to learn "that Roman Catholics are as good a patriots as any ..."42

Bradley's papers also include several volumes of "Manuscript Notes on Legal Subjects, a Register of Notes and Remarks on Point of Law." The first is dated June 1, 1840, coinciding with the end of his clerkship and beginning of his professional career. Forty years later, in 1879,
Justice Bradley added this reflection on his legal studies to the title page of one of the volumes.

...This book was commenced after I commenced the practice of law, November 1839; but many of the articles especially in the first portion were copies from rough memorandum books kept during my clerkship (November 1836-November 1839)...On looking them over now, I think they show a careful study of the common law and practice as modified by the laws of New Jersey. Washington, March 17, 18
J.F.B. 43

If a desire for broadening knowledge was the passion of his life, precision in method and language was the leitmotif of Bradley's lawyerly style. For example, he read and re-read Gilbert's "little book on Evidence," analyzing abstracting and indexing it. But, he recalled later, it was not so much Gilbert's book as his own approach to it that "produced a beneficial result." Bradley later advised a group of law students that constant and repeated study of few good books trained one's mind not only in principles of law but in forms of expression. It was not enough to know the rule. The would-be lawyer must learn to express it in appropriate language. In law, "above all sciences," clarity and precision in definition was the sine qua non. "Possess it, one possessed the law;" Bradley wrote, "without it only the power of vainly beating the air with uncertain words which impress nobody, instruct nobody, convince nobody."44

Nurtured with his nineteenth century colleagues on Blackstone and Kent, Bradley approached the law as a science with fixed principles to be discovered. Since civil
society, Bradley believed, was "substantially the same in all countries," it followed for Bradley that "justice and right, like Truths," was the same among all the people. Law therefore, was nothing more than an expression of man's sense of justice in the regulation of society. It might differ in "mere form and detail" in different countries, "but it was essentially the same wherever "civilization prevailed."\(^{45}\)

In any discussion of the law's larger meaning, Bradley moved quickly from the ethereal to the real. (He had, it should be remembered, worked his way through Blackstone with the New Jersey statutes and reports at hand). The law did not lie silent in dead books, only to be discovered by eager students. For Bradley, the law was an active force, restraining, regulating, giving form to a particular society. It was the lawyer's task to understand the "spirit, tendencies, the pursuits and characteristics" of a particular society. The lawyer should know the reason for everything, Bradley wrote. "To put it in a homely manner, he should have 'an inquiring mind. " He should watch the human drama being acted in his presence. Most of all he should "not go dreaming around, with his head down, dwelling only and always on the metaphysical quiddities of the law." The "quiddities" had their place of course, but they should never divert the student's attention from the "fresh green views presented by the living law."\(^{46}\)
Later in his career, Bradley admonished young law students that the price of mastering the law was high. The rewards of perseverance might be sufficiently splendid to give one courage and hope; but they came only through years of living, hard work and patient expectation - "lucubrations vigenti annorum." Reflecting on his own path to mastery of the law, perhaps Bradley recalled a similar warning, that Joseph Story, one of the first American scholar-jurists, had given to Bradley's own generation. During Bradley's clerkship, Story published the first of a series of commentaries that were destined to become the lodestone for American law. So massive and definitive was his work, Perry Miller was to write of Story, that the world might have wondered how one head could hold so much. Story realized how awesome his work appeared to the neophyte. At the end of a huge two volume work published in 1839, Story cautioned young jurists who sought to "enlighten their own age or instruct posterity," not to lose heart. "The grandeur of the entire plan [in this case, the 'magnificent temple of equity jurisprudence'] could only be comprehended through the persevering researches of a lifetime." Equity Jurisprudence was published the year Bradley passed the bar, and it was in the spirit of Story's attitude toward the law that Bradley launched his own career.

"On Wednesday evening, November 13, 1839, I was examined at Trenton before the Justices of the Supreme Court, Bradley wrote," . . . and on the next day, licensed
and admitted to practice as an attorney at law and solicitor in chancery in said State." With Frelinghuysen and Parker, Bradley joined the Essex County Bar, whose members were among the most influential lawyers in New Jersey.50

II

Bradley at the Bar

For three decades before his court appointment in 1870, Bradley practiced law in New Jersey. He was the only New Jersey lawyer ever to cap his career by appointment to the highest federal bench. In that sense his professional life was exceptional. In other ways, however, he was a man of his times. His legal training had followed the classic nineteenth century pattern, and the general substance of Bradley's career was typical for an established eastern setting at mid-century.51 The scope of Bradley's practice varied widely. His clients included individuals whose legal needs were commonplace and whose impact in the marketplace was minimal, to growing corporations with complex problems and enormous influence over economic and political issues of regional and even national importance. Bradley handled civil, criminal and corporate cases. Like most nineteenth century lawyers, he practiced primarily in lower state courts. Occasionally Bradley appeared in New Jersey appellate courts and less frequently in the federal courts. On six occasions, he argues before the United States Supreme Court.52
The thirty years of Bradley's practice correspond with what historians have until recently defined as the "dark middle period" in American jurisprudence. In this view, the earlier decades of the new Republic had been the "golden age" of American law, characterized by the emergence of high professional standards and a self-regulating bar. In addition to increasing wealth and prestige for its members, the rise of the bar expressed itself through what Perry Miller has called a massive philosophical transformation. Culminating in the commentaries of David Hoffman, Chancellor Kent and Joseph Story, the development of early American law, was, in this classic analysis, a mental adventure of heroic proportions.53

Following the formative years, a second period, coincident with Bradley's career at the bar, marked the nadir of the legal profession. In the conventional interpretation, these years represent a period of professional demoralization and confusion. By 1830, the formative era had given way to Jacksonian excess. In a nation alive with democratic impulses, elitist professional organizations declined. Popular legislatures subverted the system of professional self-regulation. Scores of unfit men swelled professional ranks. Not until the rise of modern bar associations in the 1870s did an elite leadership emerge to challenge popular sentiments. Only then did the legal profession return to a self-defined and self confident fraternity of educated lawyers and judges.
Recently, a compelling alternative view of the ante-bellum bar has emerged in the work of Maxwell Bloomfield. Bloomfield argues that this middle period represents no sharp break with the past because Americans have always distrusted lawyers. Changes within the legal community after 1830 were more form than substance. What took place, Bloomfield suggests, in face of enlarged public regulation of the profession, was an altered self-image. At its heart was a shift in the criteria of professional self-evaluation. True, there was a move away from formal organization. This reflected less attention to earlier concerns about the relation of the profession to the larger needs of society. In its place, practitioners focused more singularly on lawyer-client relationships. Lawyers defined professional standards increasingly in terms of technical competence. The lawyer's responsibility to society became a routine professional function. If each lawyer gave his client his best effort, the results of the judicial process would move beyond the responsibility of the bar. When all sides were fairly heard neutral principles would dictate the results. The middle period, Bloomfield concludes, is part of the linear process that characterizes the professionalization of the American legal community, rather than any sharp break with the past.

Bradley's career does not fit precisely either the classic portrait or Bloomfield's more recent analysis. His career resolves most usefully into a variation of
Bloomfield's lawyer as "technocrat." The enlarged role of government at every level coupled with the expanding economy placed new demands on the law and lawyers in the middle decades. It took Bradley's constant effort to keep abreast in his own field. Bradley's professional life did not reflect any anti-organizational bias. His writings reflect his high regard for the bench and bar in New Jersey, and he was an active member of the Newark Lawyers Club. Bradley's interests were broader than Bloomfield's lawyer-technocrat, however. His extra-professional activity reflected his inquiring mind and Calvinist sense of duty rather than an erudite elitism inconsistent with his legal work.

In political terms, Bradley's career does not fit either the traditional image or Bloomfield's profile. In the traditional view, lawyers were excluded from politics in the middle years by the leveling tendencies of Jacksonian society. For Bloomfield, lawyers avoided politics as a conscious result of an altered self-image. Either way the technocrat maintained his neutrality. Bradley did not hold public office before his judicial appointment, nor was he especially active in local politics. He considered himself a Whig and was active in the 1844 presidential campaign in which Frederick Frelinghuysen's uncle, Theodore Frelinghuysen ran as a vice presidential candidate with Henry Clay. He did run for office twice, once for Congress, once as a Presidential elector. Both efforts were unsuccessful. Until the Civil War stirred his partisan
sentiments, Bradley was politically independent. For example, he frequently lobbied the New Jersey legislature on behalf of railroad interests closely tied to the Democratic party. At the same time he worked in a series of Whig and Republican causes. From the wards of Newark to the corridors of the capitol in Trenton, Bradley's best friends and advisors were leading political figures of both parties in New Jersey. Bloomfield captures the ambiance in which Bradley moved, recognizing that elitism and democratic sympathies alike characterized the antebellum bar.\textsuperscript{57} In the end, however, individual style is the distinguishing characteristic of Bradley's career. In mind and jurisprudence, he does not fit neatly into any general interpretive mold. After his bar exams, Bradley spent six months deciding where to establish his practice. He considered Albany and Washington, but his strongest ties were now in New Jersey. Newark was his first choice, but the lingering effects of the Panic of 1837 made it difficult for a young lawyer to make his own way. As Cortlandt Parker recalled, the Panic had left only a few in Newark worth suing.\textsuperscript{58}

In May 1840, John P. Jackson, a prominent Newark attorney, offered Bradley a junior partnership. The offer was exactly what Bradley had wanted. Jackson was secretary and counsel for the New Jersey Railroad and Transportation Company. In Bradley's view, he was "practically the Superintendent of the road." Railroad work left Jackson
little time to attend to his own business. He wanted an associate "who would do the professional work required by his law practice, and share with him the emoluments." Bradley opened his office on Market Street in Newark under his own name, but with Jackson's business as the initial work load. In the "Memorandum of Understanding" between them, Bradley agreed to attend to Jackson's practice, splitting the fees equally between himself, Jackson and Jackson's partner, Amzi Armstrong. Bradley would be free to solicit his own court work, with two-thirds of the proceeds for himself and one third for Jackson. Any other business not in the courts, Bradley could keep for himself. In the first year, Jackson guaranteed Bradley $350. This arrangement, excluding Armstrong after the first year, and with annual increases in the guarantee, continued through 1844. From 1845 until his appointment to the Supreme Court in 1870, Bradley practiced alone, aided by a string of clerks and assistants. Bradley's amicable relationship with Jackson lasted for more than a decade, until Jackson's death. Work for the New Jersey Railroad and related railroad interests continued to occupy a large part of Bradley's professional time.

In Bradley's first decade in Newark, he established himself in civil and social circles and in his profession. His papers refer scantily to these early years. The few references suggest he was active in religious and temperance groups, the Law Club of Newark and the Newark Colonization
Society. He collected books for and often read papers before the New Jersey Historical Society.

In October 1844, Bradley married Mary Hornblower, youngest daughter of Joseph C. Hornblower, Chief Justice of the New Jersey Supreme Court. In a letter to his sister, Bradley described his wife-to-be as "about three years younger than I am...a smart-good-girl; willing to live in as plain and humble a way as circumstances may at any time render necessary; but capable of filling with credit my position in society. She is industrious and managing and economic, but of course, knows nothing of what you would call 'work.'"61 His wife's brother, William Hornblower, a Presbyterian minister, became Bradley's close friend and confident.62 Mary and Joseph Bradley had seven children, three of whom died in infancy.63

"Straightened circumstances" marked the beginning of Bradleys' marriage. "When first we married," he later wrote to his children, "my income was small, not over $600 or $700 a year, but we always kept our expenses within it."64 During the three decades before Bradley's appointment to the Supreme Court, he would become a wealthy man. Yet it was not a glamorous life. "I worked incessantly," he recalled, "rarely taking relaxation, and never indulging in social enjoyments except in the company of our nearest friends. But our house was always open and often filled with friends and relatives...with all the drawbacks and interruptions to our happiness, we were a happy family..."65
Hard work was an article of faith with Bradley. It was not "abundance of life's goods that gives happiness," he wrote, but "so far as external things...employment mingled with hopefulness and encouragement; employment that constantly promises some advancement or improvement of one's condition..." Bradley's diaries, journals and ledgers suggest his peripatetic personality. He crisscrossed New Jersey often several times a week, by train, buggy and horseback. He argued cases of every description in courts at every level. By the 1860s, a local newspaper commented that Bradley's practice was "second to none in its scope and importance."  

After 1850, railroad corporation work dominated Bradley's time, but never to the exclusion of other cases and issues. In his first years, other than his work for Jackson's railroad, Bradley handled generally small suits in various county and state courts, particularly in Morris and Essex counties. On rare occasions he argued cases in the Third federal circuit. He handled a few criminal matters including several notorious murder trials. Generally, he dealt in the bread-and-butter tasks of a young lawyer: deed searches, foreclosures, wills, collections and opinions. ("Stern brought me a man who wished to break a contract to marry a woman and desired to know if he did so, whether she could hold him to bail.") Bradley was retained by a number of townships to handle legal affairs. His practice took him to the capitol at Trenton several times each week.
He often served as legal and political correspondent for the *Newark Daily Advertiser*, a paper with the widest circulation in New Jersey. Though his pieces were printed unsigned, he continued to contribute political pieces and editorials to the *Advertiser* throughout his career and published collections of them on several occasions.\(^6^9\)

As Bradley's practice grew, he developed a reputation in patent law. His interest in science and his knowledge of mechanical applications made him particularly adept at differentiating, in legal terms, questions of variation and priority in invention. His opinions to clients and trial briefs were frequently illustrated with drawings, charts and tables suggesting a technical understanding of the processes involved as well as the law.\(^7^0\) Through these years, his cases involved Morse, Goodyear and Edison patents in addition to litigation related to refining processes, iron smelting, ordinance and machinery. The Bradley account books indicate that his largest fees, other than from railroad cases, came from patent suits. In 1862, for example, he received $1000 from the New Jersey Zinc Company for his defense against patent infringements by a Boston company. Accompanying the fee was a Directors' resolution praising "the zeal, industry and distinguished ability which he devoted to the cause."\(^7^1\)

His interest in mathematics drew Bradley into the nascent insurance business in New Jersey. In 1851, he was appointed mathematician and actuary of the Mutual Benefit
Life Insurance Company of Newark. He served in this capacity until 1863. In 1864, he became president and actuary of the newly chartered New Jersey Mutual Life Insurance Company. He resigned in 1867, due to the press of his railroad activities.72

The autobiographical sketch mentions Bradley's "frequent employment" with the Camden and Amboy and associated railroad companies. Bradley's comment hardly suggests the magnitude of his relationship with the railroad interests in New Jersey. The state legislature had granted the railroad a monopoly on rail traffic across the state, and New Jersey was known in these years as the "State of Camden and Amboy." By the time of his appointment to the Supreme Court, Bradley was widely known as counsel, lobbyist and a director of the monopoly. Bradley's relationship with the Camden and Amboy is an important chapter in his pre-court career. However, to see Bradley only as an important corporation lawyer misses other aspects of his life that will be useful in evaluating his impact on the Supreme Court. Bradley's practice merits a more detailed examination in terms of the nineteenth century legal profession. The remainder of this chapter and the next look at three aspects of Bradley's career. Bradley's attitude toward slavery, his involvement with the railroad interests in New Jersey and his activity in Civil War and Reconstruction politics suggest the mind-set of the justice Bradley would become.
Slavery and Anti-Slavery in New Jersey

Among the most crucial issues to come before the Supreme Court during Bradley's tenure were those in which the constitutional rights of black Americans were at issue. Bradley's views on those issues would, in part, shape national civil rights policy for almost a century. By the 1860s, Bradley had become, albeit reluctantly, a supporter of emancipation. His position was political rather than philosophical. Its rationale was developed in a series of dispassionate statements related to Republican political campaigns in the decade of war and reconstruction and will be examined in the next chapter.

Bradley's attitudes toward slavery and racial issues before the war are more difficult to discern. By the time the first shots were fired at Fort Sumter, Bradley had become a firm Unionist. The integrity of the union was his idee fixe. Always outspoken in his support for Lincoln's administration, Bradley accepted the emancipation decision as one essential to wartime strategy and Republican political necessity. Ironically, Bradley -- a man to whom morality and the responsibilities of religion and citizenship were dominant themes in his personal reflections, -- left no specific record of his attitudes on
race before 1860. When Bradley referred to race in early writings and speeches, he was thinking of the Anglo-Saxon race.

One who reads through Bradley's papers for the pre-war years is struck especially by his lack of interest in the institution of slavery. He was usually quick to comment on topics and issues basic to the human condition and to use his copybook essays to work out his attitudes. The lack of reference to slavery in these pieces suggests that slavery, either as an institution or as an abstract moral and philosophical problem, was simply not of any particular concern to him. The only comment in his pre-war writings is a paragraph in an essay he wrote during his student days at Rutgers. In a piece entitled, "Principles Should Be Fixed," he encouraged every young man to examine one subject at a time and determine the stand he should take. One might examine for example,

...the subject of slavery and its influence upon our country, until by a careful comparison of the arguments that each sect and party on the subject of slavery bring forward, he is able to decide what is to be done in relation to slavery. Then having once satisfied himself, he will always be ready with a reason for the opinions...and if...ever called upon to act in relation to the subject he will know how to act and not act blindly.

In a postscript to the "Principles" piece, Bradley added a list of subjects on which a young man might do well to decide in the "present times." In addition to slavery, he included abolitionism, colonization, temperance and the
merits of education in his long list.\textsuperscript{73} If Bradley ever decided for himself what ought to be done in relation to slavery, he left no record. One can surmise that in his view, slavery was an issue with no innate moral dimension. Reasonable men could reasonably differ depending on the merits of the case.

The contours of Bradley's point of view in his early professional career can best be discerned by examining his relation to slavery and to the anti-slavery movement in New Jersey. In the decade before the Civil War, New Jersey was known as the northern state most sympathetic to slavery and to southern attitudes.\textsuperscript{74} The southern half of the state lay below the Mason-Dixon line. More important, New Jersey's nascent industrial economy was heavily dependent on southern agrarianism.\textsuperscript{75} Slavery had a long history within New Jersey. It had been an institution legally recognized in the state since the earliest colonization by Swedes and the Dutch in the mid-seventeenth century. By the 1690s Quakers were encouraging Friends to cease importation and to abandon slave-holding.\textsuperscript{76} In general, however, colonial law after the occupation by the British in the 1660s, encouraged importation of slaves and discouraged manumission.\textsuperscript{77} Throughout the eighteenth century, slavery was a recognized legal and social institution in the state.

The first organized anti-slavery activity in New Jersey appeared after the American Revolution. In 1786, in response to a number of petitions, the state Assembly passed
a law inflicting financial penalties on those importing slaves into New Jersey. The law's preamble included the first legal recognition in the state's code of the ethics of slavery, that the "principles of justice and humanity require that the barbarous custom of bringing the unoffending Africans from their native country and connections into a state of slavery" be discontinued. The act also noted that such a policy was "sound policy" for the protection of white labor. 78

In 1792, the Pennsylvania Society for Promoting Abolition appointed a committee to establish a similar society in New Jersey. The New Jersey society's activities were limited and abolitionist sentiment in the state was never strong. In 1798, New Jersey's first comprehensive slave code passed the Assembly. Abolitionists were unsuccessful in efforts to include a provision freeing, at age 28, children born to slaves. 79 While the code provided for protection of slaves against brutal treatment, its primary thrust was regulation of manumission. Free slaves already in New Jersey and all those entering the state were required to carry a certificate from their former owner verifying their freedom. New Jersey owners wishing to manumit slaves were required to post $500 bond with the state to provide for any potential welfare needs of the freed men. The 1798 law is considered the first step in establishing a legal policy that would prevail in New Jersey until the Civil War. That policy was designed in general to
reduce very gradually the number of slaves in the state, to
discourage immigration of blacks and to remove free blacks
already there.  

For reasons both ethical and practical, the various
anti-slavery efforts in the state culminated in the aboli-
tion law of 1804. At the time the law was passed, 12,500
slaves lived in New Jersey. When emancipation became
national policy sixty years later, eighteen or so elderly
slaves were the whole of the state's slave population.  

With the 1804 statute, New Jersey became the last
northern state to put an abolition law on its books. This
statute gradually freed children born to slaves,
apprenticing them to the mother's owner until age 25 (21, if
female) and compensating the owner financially for his loss.
The law, according to a recent scholar, allowed the state to
proceed with social reform with a minimum of social
reorganization, harmonizing neatly with the interests of
private property, social stability and the ideological
imperatives of the Declaration of Independence.  

An important, if not particularly effective element in
the antislavery movement were the activities of the New
Jersey Colonization Society. As a young lawyer, Bradley was
an active member in the Newark association and was closely
associated with most of the guiding lights of the state
movement. The American Colonization Society had been found-
ed in 1816 by a Jersey-man, Dr. Robert Finley.  
The New
Jersey auxiliary followed eight years later. Commodore
Robert F. Stockton was a principal founder of the states society. Stockton enjoyed a distinguished naval career and when he was not at sea, he was active in New Jersey politics. A chief financial backer of the Joint Companies, which included the Camden and Amboy Railroad interests, Stockton would later become a United States Senator and candidate for President (1850-53). In 1821, Stockton sailed to Africa under the auspices of the American Colonization Society and secured the territory of Liberia for the American Society.

The other principal founder of the New Jersey society was Theodore Frelinghuysen, the uncle of Bradley's Rutgers classmate and fellow law clerk. Organized principally to support the parent society, the New Jersey group languished in the early years. In 1838, the state association was revitalized and a number of local associations were organized. John P. Jackson and Amzi Armstrong, whose law practice Bradley would join two years later, were members, along with Theodore Frelinghuysen, of the state executive committee. Bradley's future father-in-law, Chief Justice Hornblower was President of the Newark auxiliary. Essentially conservative in their attitudes toward slavery as an institution, the New Jersey groups were active in publicizing the need for colonization and for Christianizing Africans. Occasional subscriptions raised funds for the national organization. In 1852, the New Jersey society bought a plot of land in Liberia and in 1856 established its only colony of thirteen New Jersey blacks.
Bradley's role in the colonization effort appears to have been related primarily to his work for Jackson. Jackson was secretary of the state colonization organization. There is some evidence that Bradley fulfilled Jackson's record keeping responsibilities and wrote a history of the state society. Bradley's journal of cases suggest that he did some legal work for the Newark colonization organization without fee. Again, this work was probably at the direction of Jackson. Although his journals included a few marginal notes on the nature of the work, Bradley left no clues about the colonization-related tasks he performed. It is reasonably certain that Bradley wrote the state society's pamphlet on the history of colonization activities in the United States and in New Jersey. He makes no mention of the pamphlet in his notes, nor is a copy included among his personal papers. Handwritten notes on the remaining copies however, suggest Bradley as the author. Bradley's participation in these organizations, in sum, would seem to have reflected the interests of his professional mentors rather than any particular conviction of his own about the issues involved.

The New Jersey Slave Cases

In 1845, shortly after Bradley had begun to practice on his own, he participated in two cases designed to challenge slavery laws in New Jersey. The cases, State v. Post and its companion State v. Van Beuren provide possible clues to Bradley's attitudes on slavery before those attitudes became
intertwined with his more familiar unionist political views in the years just before war. The cases were part of a series of efforts by northern abolitionist societies to challenge the status of slavery in the states. The New Jersey cases involved the Constitution of 1844. Two writs of habeas corpus were sued out and returned to the May 1845, Term of the New Jersey Supreme Court. One was directed to John A. Post, the other to Edward Van Beuren. The object of the writs was to present for adjudication the question whether the state constitution adopted in 1844 abolished slavery in New Jersey and the involuntary servitude of children of slaves as provided for in the 1804 act.

Bradley and A.O. Zabriskie, who would later become Chancellor of New Jersey's Court of Errors and Appeals, appeared for the defendants, Post and Van Beuren respectively. Alvan Stewart, a well-known abolitionist attorney from New York appeared for "the colored man William" and his wife (owned by Post), and an unnamed child apprenticed to Van Beuren. Stewart was a veteran in the anti-slavery movement. A successful Utica lawyer, he had founded the New York Abolition Society in 1835 and had run for governor of New York on the abolitionist ticket of the Liberty party. Stewart was bestknown for making plausible the argument that the federal government had the duty and power under the Constitution and the Declaration of Independence to move against slavery, not only in the District of Columbia and federal territories, but also in the states. The New
Jersey cases were argued before four judges of the New Jersey Supreme Court, including Chief Justice Hornblower. The briefs Bradley filed in the cases no longer exist. His arguments can be partially reconstructed from the case record and from Stewart's argument and rejoinder which he published separately. Both sides agreed that slavery had a legal status in New Jersey before the adoption of the 1844 constitution. The first article of the first section of the new charter declared that "all men are by nature free and independent and have certain inalienable rights, among which are those enjoying and defending life and liberty, acquiring possessions and protecting property and of pursuing and obtaining safety and happiness." This clause was the primary issue in the cases.

Stewart presented his case in terms of natural law, justice, morality and the United States Constitution. With the preamble provision of the New Jersey constitution, he argued, slavery in the state was immediately abolished. Stewart's brief amounted to a "barrage of radical anti-slavery legal theory." Petitioners, Stewart argued, violated the due process clause, the guarantee of a republican form of government clause and the priviledges and immunities clause of the federal Constitution. Moreover, Stewart continued, law alone required the court to free the bondsmen. In evaluating Stewart's argument, Judge Nevis complimented the counsel's "zeal and human spirit," and the "ingenuity, talent and research" reflected in his appeal.
Nonetheless, Nevis felt constrained to add that "much of the argument seemed rather addressed to feeling than to the legal intelligence of the court." 98

Bradley's defense treated the case primarily as one of interpreting a state constitutional provision. He expressed his own opposition to slavery in the abstract, while tracing its history back through its sanction by the law of Moses. From what can be reconstructed of Bradley's argument, it appears that he made a clear distinction between one's personal opposition to slavery and its legality as a social institution. Both Bradley and Zabriskie argued that the constitutional language in question was an abstract statement which its framers never meant to apply to man in his private, individual or domestic capacity. Stewart paraphrased Bradley's argument about the meaning of the preamble as a kind of "braggadocio" growing out of a need of the founding fathers to tell England that her former colonies were as good as England's Lords and Commons, kings and queens. 99 More concretely, Bradley referred the court to another clause in the state constitution that was clearer than the preamble. This section declared, in the form of enactment rather than abstract language, "that all writs, actions, claims and rights of individuals...shall continue as if no change had taken place. If Post's right of property in the colored man William was valid at the time the constitution was adopted, as Bradley argued that it was, then it could not be impaired or taken away under the
provision he quoted. Stewart's rejoinder rejected both the substance and form of Zabriskie's presentation, but complimented Bradley for the "energy and ingenuity" with which he framed his argument.

The Supreme Court upheld the Bradley-Zabriskie reasoning, voting three to one to deny the writs in question. The lone dissent, without opinion, was that of Chief Justice Hornblower. Bradley was probably on firm ground in his supposition that if the framers of the 1844 constitution had intended for the preamble to abolish slavery they would have stated that intention more explicitly. Since the Chief Justice was his father-in-law, Bradley surely knew that as a member of the drafting convention, Hornblower made several unsuccessful attempts to insert in the new charter a clause specifically abolishing slavery in the state.

New Jersey's Court of Errors and Appeals sustained the judgement of the state's Supreme Court. The next year, the state legislature settled the matter by abolishing the slavery statute and substituting an apprenticeship with the children of apprentices freed from birth.

Bradley's participation in colonization efforts and in the New Jersey slavery cases, together with an examination of his early essays and notes suggest that slavery was not, at least in his early career, an issue of major importance for him. Two decades later while campaigning for Congress, he would support the Emancipation Proclamation as a neces-
sary political gesture, tied to the war effort. Those views, which will be examined more fully in the next chapter, suggest that even though he had come, by the 1860s, to see slavery as an abstract moral evil, any effort to terminate it had to be meshed with the realities of American life. While he would come to oppose the expansion of slavery outside the South, he continued to oppose full emancipation as too disruptive of the nation's fundamental economic and social arrangements, until Lincoln made it a fait accompli.
CHAPTER TWO

THE MAKING OF A JUSTICE: THE NEW JERSEY YEARS

The nineteenth century political and economic history of New Jersey is in large part, the history of state-granted transportation monopolies. For much of the century, party politics and transportation politics were inseparable.¹ The most pervasive force in New Jersey political life was a network of business interests that grew from the "marriage" in 1831 of the Camden and Amboy Railroad and the Delaware and Raritan Canal Company. The result was the Joint Companies, known to the friendly and unfriendly in New Jersey and in much of the country, simply as "the Monopoly."²

In the pre-war decades, the Monopoly's efforts to expand and protect its interests were at the heart of political conflict in the state. Only in the late 1850s did the impact of the impending crisis of the Union begin to be felt by the state's fluid political alignments. Through the 1860s, national racial and sectional issues dominated state politics. Still, the Joint Companies' vigorous efforts to thwart all competition, even that justified by the exigencies of war and national survival, made its activities
a continuing source of controversy and a serious issue in state and national politics until the expiration of its exclusive privileges in 1869. The history of the Monopoly and the course of New Jersey politics before and during the war are fascinating in themselves. The subject is highlighted here primarily as background to Bradley's involvement with the New Jersey railroad empire and his several forays into elective politics in the middle decades.

For more than thirty years, Bradley served the Joint Companies as counsel and spokesman and as an effective lobbyist in Trenton and in Washington. For most of his professional career, the protection of the Monopoly's legal interests was the priority of Bradley's law practice. He was a director of the Companies' parent board and frequently an officer in the various enterprises that comprised its empire. Though Bradley's role in the Monopoly's wartime activities was often more surface than substantive, he was not able to escape the attendant controversies. As a result, his reputation as the Monopoly's lawyer would become the major stumbling block to Bradley's nomination to the Supreme Court in 1869 and 1870. In a large sense, Bradley's pre-court career traces controversies by which New Jersey became known, in the 1850s and 1860s, as "the state of Camden and Amboy." Although his legal work for the railroads was, at first glance, inseparable from the Monopoly's efforts to extend its political influence, Bradley was in fact always on the periphery of the
Companies' political machinations. His own political views, as they evolved through the 1860s, were surprisingly at variance with those of the Monopoly's leaders. By the late 1850s, as issues involving the salvation of the Union pushed Monopoly-related controversies from center stage in New Jersey, Bradley became more involved in the politics of union and disunion in the state. Work for the Joint Companies and wartime politics, the two primary themes in Bradley's pre-court career, are examined in the following sections.

I

Railroads in New Jersey

The geography of the New Jersey coast between Sandy Hook and Cape May, marked by narrow inlets and shallow bays, has always limited the coast's value to commerce and shipping. Thus, the need for an overland link across the Jersey peninsula had become apparent long before the American Revolution. Through the eighteenth century, nascent corporate structures, lack of capital and legislative reluctance to grant monopoly status or other legal guarantees to proposed transportation ventures thwarted
large scale undertakings. By the early nineteenth century, transportation problems in New Jersey had become severe. During the war of 1812, the federal government spent several million dollars carting military stores across the state. With the war's end, the need for direct communication and transportation through the New York-Philadelphia-Washington corridor had been "painfully impressed on the nation." The need for a cure was evident, and efforts to provide cheaper, faster transit across the state found a more receptive audience in Trenton.

Less than a month after the Battle of New Orleans, Colonel John Stevens of Hoboken, after several attempts, obtained a railroad charter from the New Jersey Assembly. Stevens was a pioneer in the application of steam to water and land transportation. His family had made navigation of the Delaware a commercial success and Stevens' New Jersey Railroad Company was to be the first railroad chartered in America. A mechanical wizard as well as a visionary, Stevens built the first locomotive in the United States in 1825. To demonstrate its feasibility, Stevens imported a steam engine from England to power his locomotive and built a circular track near Hoboken. In May 1826, the New York Evening Post recorded his success.

Mr. Stevens has at length put his steam carriage in motion. It traveled around the circle at the Hoboken Hotel yesterday at a rate of about six miles an hour.... His engine and carriage weigh less than a ton, whereas those now in use in England weigh from eight to ten tons.
Stevens proposed to build a road for passenger and freight service from Trenton to New Brunswick, but he died before he could solve the financial and technical problems involved. His had been a singular venture and his charter died with him. After Stevens' death, the state's burgeoning industrial interests increased the pressures on the New Jersey legislature to act on the need for a route across the Jersey peninsula from Camden to Amboy, effectively linking New York and Philadelphia. A variety of canal and railroad groups, confident now of their ability to raise the necessary capital and convinced of the rewards, vied for charters for the proposed route.  

Early in 1830, Stevens' sons, Robert and Edwin, obtained a state charter for the Camden and Amboy Railroad and Transportation Company. The Stevens brothers' charter contained a monopoly clause granting them exclusive rights to rail transport across Jersey between Philadelphia and New York. At the same time, the legislature granted a charter similar in scope, but covering water rather than land transit, to the Delaware and Raritan Canal Company. Stock in the Stevens' railroad venture sold quickly, with Robert Stevens taking more than half.

On the other hand, the canal venture languished for a number of months until Commodore Robert Stockton, an active New Jersey entrepreneur and politician, bought controlling interest. Stockton recognized the impact the steam locomotive would have on a declining canal industry. He
wasted no time in petitioning the legislature for an amendment to the canal charter allowing his Delaware and Raritan interests to build a railroad along the lines of the proposed canal route. Stockton was a prominent figure in New Jersey politics and his request was quickly granted in spite of strong opposition from the Camden and Amboy backers. To avoid conflict between the two companies and delays in providing needed transportation, Stockton and the Stevens brothers agreed to combine their interests. In February 1831, the legislature blessed the alliance in what became known as the "marriage act." The combination, afterward known as the Joint Companies, quickly became the dominant economic and political force in the state. The initial railroad was completed in 1833. By 1834, an English-built locomotive, the "John Bull" provided seven hour passenger and freight service over the 60 mile single track line between Camden and South Amboy for $3.00.

The 1831 "marriage" charter granted the Joint Companies a monopoly of rail and canal traffic along the north-south axis of the state for thirty years. The Companies paid no taxes. In return for the monopoly privileges, the state received 2,000 shares of stock plus the revenue from transit duties levied on interstate fares and freight. In the event dividends on stock and revenue from interstate tariffs did not exceed $30,000 per year, the charter guaranteed the companies an annual income of at least that figure. The arrangement proved a financial boon for New Jersey. After
1838, the state's financial return exceeded the guarantee and increased yearly.

The privileged status of the Joint Companies was controversial from the beginning. Transportation interests in New York and Pennsylvania were particularly hostile since they were barred from competition through the most lucrative commercial corridor in the eastern United States. Their frustration was fueled by the fact that the Monopoly's income was generated largely by tariffs on interstate traffic, usually originating in New York and Philadelphia. Although the situation raised modern questions of state regulation of interstate commerce, historians of the railroad generally concur that even after *Gibbons v Ogden* (1823), these questions were rarely raised in the early nineteenth century.\(^\text{16}\) Arguments against the Monopoly most often were framed in political and economic rather than legal terms. The challenges, whether in the courts, the legislature or the newspapers, rarely raised questions of public versus private interests.\(^\text{17}\) Rather, they represented other vested interests eager for a share of the Monopoly's business.\(^\text{18}\) The major legal challenge to the Monopoly would not come until the Civil War. Those arguments would be framed in terms of national military expediency and politics more than as questions of the unconstitutional state burden on interstate commerce.

Within the state, the Joint Companies' privileged status was not only acceptable (competing transportation
interests excepted) but generally protected by the dominant political interests in New Jersey. Though the Monopoly was a constant source of political conflict the pre-war decades, it was always a very lucrative venture for the state. No session of the legislature, from the granting of the Monopoly's charter in 1831 to its expiration in 1870, was willing to tamper with the fundamental arrangement. Revenues from the railroad so nearly matched state expenditures that New Jersey citizens enjoyed the lowest tax rates in the country during these years. In fact, the state did not levy a direct tax on its citizens between 1848 and 1860.19

The State of Camden and Amboy

To protect its interests, the Joint Companies became a dominant force in state politics. At the Companies' behest, the legislature blessed agreements to add the lines of the New Jersey Railroad and Transportation Company, the Morris and Essex line and other transport enterprises to the Camden and Amboy network. The Companies directed its growing wealth and political influence to preventing other railroad interests from establishing themselves in New Jersey.20 The mechanism from which these efforts flowed was a highly visible, well-controlled political machine established and nurtured by the Stockton and Stevens families. The Companies' headquarters in the capital, Number 10, Snowden's Hotel in Trenton, became the most famous address in New
Jersey.²¹ Here, the Companies' representatives dispensed free passes, support for local political campaigns and other favors to members of the state legislature and their friends. Interests aligned with the Companies bought two Trenton newspapers, the Emporium and the True-American to assure that the railroad's interests were appropriately supported in the state's capital. Though the Monopoly was most involved with the Democratic party in New Jersey, it did not confine its opposition to any one group.²² Over its forty year history, the Monopoly distributed its largess to candidates of every political persuasion, in return for an open attitude toward its interests.

Bradley, The Companies' Man

Bradley's relationship with the Joint Companies dated from the earliest years of his professional career. Bradley's mentor and first employer, John P. Jackson, was in Bradley's words, "practically the Superintendent" of the New Jersey Railroad which had become aligned early on with the Monopoly interests. Bradley's participation in Jackson's legal practice quickly involved him in Jackson's railroad work. In Bradley's understated recollection, "that partnership brought him to the notice of other institutions -the C and A, and the M and E Co from which [he] received frequent employment."²³

Bradley's law journals reflect his heavy involvement with the Companies. Other than handling the details of
Jackson's railroad business, Bradley's first substantial work came in 1848. In that year, a series of letters from an anonymous citizen appeared in the Burlington Gazette. The letters, offering a devastating critique of the Monopoly's practices, circulated widely as a pamphlet entitled "Letters to the People of New Jersey, on the Frauds, Extortions and Oppression of the Railroad Monopoly." The author, later identified as Henry C. Carey, a political economist of modest reputation, charged the Monopoly with gouging the public and concealing profits to deny the state its fair share of revenues. Other newspapers and interests hostile to the Monopoly echoed Carey's charges. After several months, the din had become loud enough to demand a response. The Companies answered with an "Address to the People of New Jersey." It ignored Carey's charges and denounced his criticisms as the work of "foreign interests" in New York and Pennsylvania.

The controversy was not dispelled as easily as the Monopoly hoped. With Carey and his followers increasing the attacks, the legislature established a committee to investigate the complaints. The state Assembly authorized the directors of the Joint Companies to select the members, an obvious indication of the relationship between the politicians and the Monopoly. The Companies' committee, headed by former Governor William Pennington, chose Jackson's young associate, Bradley, as its secretary. Bradley's role with this committee was largely
administrative. He arranged meetings, gathered information from stockholders, took notes and handled the committee's correspondence.²⁷

The committee's report to the legislature, expectably favorable to the Companies since they had selected its members, dismissed Carey's charges as groundless. This first investigation failed to mollify Carey or other critics.²⁸ Early in 1849, the Assembly named a second investigating committee from its own membership.²⁹ Acting as counsel, Bradley represented the Companies before the legislature's committee. Bradley's primary task was to prevent Carey's access to the Companies' records. He was so successful that an indignant Carey complained publicly that he was not only prevented from examining the books, but that Bradley interrogated him "in an accusing manner" before the committee.³⁰

In 1850, the committee reported to the legislature. It catalogued numerous bookkeeping discrepancies that might have reduced the state's share in the road's revenues, but in general, the committee accepted the Companies' contention that any mistakes were inadvertent. The Companies agreed to make up any lost funds; the legislature vindicated them of any major wrongdoing, and the controversy ended.³¹

Having successfully defended the Companies interests, Bradley was, from this point, permanently involved with the Monopoly's interest. He received $5,000 in company stock for his work during the controversy. The stock's value was
more than Bradley's income for any year of his practice to that point. Bradley reported in a note on his professional income, that after 1850, revenues from his regular practice diminished each year "by attention to rr business."³²

After his success with the investigating committees, Bradley became the chief counsel for the Joint Companies, handling their business and that of the several subsidiary railroads. Within a few years, he was a Director of the Companies and several subsidiary boards and often served the boards as secretary.

No formal agreements or contracts between Bradley and the Companies remain among his papers or in available company records.³³ His diaries however, are replete with references to meetings of the various railroads associated with the Monopoly. His correspondence includes frequent notes to members of the Stockton and Stevens families and other major shareholders. He handled a variety of administrative and political functions related to Board activities. His frequent trips to Trenton were often to the legislature or to meetings at Snowden's - the widely known command center of the Companies' lobbying effort.

Bradley was paid for his work as director and counsel primarily in Monopoly stock. In 1850, he received $5,000 in stock. In 1867, he received $42,000, noting that this sum was "received on settlement with C and A for 1850-1863." In 1870, shortly after his appointment to the Supreme Court, Bradley sold the remainder of his C and A stock to Fred
Frelinghuysen for $26,748.\textsuperscript{34} Judging from his figures, a reasonable estimate suggests that his income from the Monopoly between 1850 and 1870 was about equal to all his other professional income for this period.

In the late 1850s and through the 1860s, Bradley became a principal representative of the Companies' interests in Washington. In the same period, he became personally involved in New Jersey politics. The roots of the controversy over Bradley's nomination to the Supreme Court lie in these two aspects of Bradley's pre-court career. These events are best understood against the backdrop of the political climate in New Jersey in the middle decades.

II

The Political Climate

The pattern of political life in New Jersey in the first half of the nineteenth century was typical. Here, as throughout the northeast, the Jackson-Adams rivalry brought down the curtain on the "first party system." The demise of the Federalists and the subsequent fragmentation of the Republican party after 1816 brought a new mix to New Jersey politics. In 1824, the state's eight electoral votes had
gone to the Jackson-led Democratic ticket, then in 1828 to Adams and the National Republicans, suggesting the near equilibrium that would mark New Jersey's political character for at least two decades.\textsuperscript{35} By 1832, when the state returned to Jackson's fold, Jersey political life revolved around two generally stable parties - Democrats and Whigs - in a political structure that remained intact through 1850.\textsuperscript{36}

With few ideological differences to divide them, and with the political fruits distributed almost equally, elections in the state through the 1850s and 1860s turned primarily on local issues and candidates.\textsuperscript{37} Controversies over the Monopoly dominated local political conflict. Competition between Democrats and Whigs was intense, reflecting in number and strength, the highly organized and well-disciplined state and local organizations. Boisterous campaigning, elaborate conventions, and active political committees of every description were the givens of antebellum political life. In elections at every level, voter participation in this period rarely fell below two-thirds of the eligible male voters.\textsuperscript{38}

The political climate in New Jersey in these years amplified the regional loyalties that split the northern and southern halves of the state. Oriented toward New York in economic terms, northern Jersey was more urban and increasingly industrial. Even with the large immigrant population
in the northern cities, this half of the state was generally more prosperous. It was also the stronghold of the Jersey Democrats. Philadelphia drew the southern counties with its economic and political sphere. With fewer immigrants and blacks, this was a more "native" and more rural population. Southern Jersey was the heart, successively, of Whig-American and then of Republican party strength.

In attitude if not in geographic terms, New Jersey was perhaps the southernmost of the northern states. Its southern tip lay sixty miles below the Mason-Dixon line. The state's coastal communities, particularly the resort areas around Cape May, had long provided a summer haven for affluent southerners. Curiously, New Jersey's southern sympathies were strongest in the northern counties, particularly in Bergen just across the Hudson from New York. The area was known as a playground for New York copperheads, and anti-war feelings were rampant.

The urban focus of north Jersey was Newark, by mid-century one of the nation's largest manufacturing centers. Widely known as the "southern workshop," Newark's largely immigrant work force turned out leather goods, tools, stoves and farm equipment destined primarily for the southern market. New Jersey was one of the two free-soil states that officially sanctioned efforts to return runaway slaves. Although the state lay along the northward path of the underground railroad, its southern sympathies were so widely known that slaves seeking freedom seldom stopped therefore long.
Through the war years, New Jersey Democrats maintained their hold on most local offices and on the majority of the annually-elected state Assembly seats. The party's strength resulted from the state's deep-seated southern ties and a states-rights tradition that could be traced to New Jersey's role in the 1787 Constitutional Convention. Through the 1850s however, the Democrats' gains were rarely a result of their own program and candidates. Generally Democratic strength reflected an opposition in shambles. By mid-century, as state politics began to focus on national issues, the Whig party had virtually collapsed. In the decade before the war, former Whig voters were attracted to new alignments. Native Americans, True-Americans, Know-Nothings and a variety of movements specific to New Jersey carried an occasional day. Usually, these groups played on ideological themes -nativism, temperance, anti-catholicism - or assembled around local issues and personalities.45

Disparate opposition groups maintained a rather eclectic character, rooted in their ability in state elections to combine their interests in opposition to Democrats. The opposition coalition first came together in 1856 when the American parties and the Republican party nominated a single candidate for Governor. The "Opposition" as the coalition was widely known, elected William A. Newell, whose own politics were American, thus breaking the Democratic party's eleven year old hold on the
governorship. The coalition maintained its loose organization for several years, electing another governor, Charles Olden and a senator, John C. Ten Eyck in 1859. By 1861, most of the opposition's various elements had folded into the Republican party, although they were frequently known simply as the Opposition.

As secessions increased, Opposition members attacked Democrats for disrupting the nation's peace by forcing the repeal of the Missouri Compromise and for the outrages in Kansas. While few of the Opposition's adherents favored abolition, they argued heatedly against the extension of slavery in the territories. So broad was the Opposition banner, however, that they agreed on little else until the war had become a fact. Even when united, the Opposition was usually outnumbered. In January 1860, an Opposition-sponsored resolution in the state Assembly declaring New Jersey's devotion to the union and the Constitution died in committee at the hands of the Democratic majority. After the war had begun and the Opposition had become self-consciously Republican with the Union as its raison d'être, Democrats continued to dominate the state's political machinery.

The Reluctant Politico

Against this backdrop, Bradley's venture into politics comes into focus. He ran for election twice, both times unsuccessfully. Given what is known of his countenance, his
small stature and his quiet, high pitched voice, it is
difficult to visualize him in the rough and tumble
atmosphere of nineteenth century Jersey politics. His
scholarly attitude and his tendency to intellectualize every
issue left him impatient with arguments that were not
carefully, even tediously developed. The pattern of
Bradley's life through the 1850s suggests that he had
expressed no inclination for the political.

Bradley's career at the bar had begun in 1840. By
1850, he had settled in Newark, married, begun his family
and developed a flourishing law practice. After his work
for the Joint Companies in the legislative investigations in
1848 and 1849, Bradley had become the counsel for this most
influential business and political enterprise in the state.
Through the next decade, Bradley's life followed a
predictable course. His pocket diaries record the
exhausting schedule of his professional life. He traveled
the state on the Monopoly's business, attending board and
committee meetings, calling on legislators, fending off
legal challenges to the Companies' privileges.

In 1856, Bradley argued a case before the United States
Supreme Court, his first of six appearances there before he
took his place across the Bench. In the first case, Bradley
represented one of the Companies' subsidiaries, the Hoboken
Land and Improvement Company, in its efforts to dominate
the wharf business at Hoboken.
Bradley's railroad connections alone would have given him a busy and prosperous career. Broader interests in law and business, combined with his Calvinist penchant for hard work kept his schedule full and his conscience at bay. Though his family lived simply, and his income was relatively high, Bradley never felt financially secure. When he was not involved in company affairs, he filled his schedule with the workaday tasks of the successful attorney. His journal suggests a busy agenda, trial work -criminal and civil, deeds and wills, property settlements, legal opinions on every aspect of the law. Through these years, he continued to keep detailed notes on the fruits of his intellectual pasttimes - mathematical formulae, descriptions of engineering and mechanical principles, translations from Latin, Greek and German. Two of his younger children died in the 1850s and two more were born. He was active in the Rutgers alumni, the state's historical society, colonization and temperance groups and was a leading light in the local Dutch Reformed parish.

The 1850s were a particularly active decade in New Jersey political life - the collapse of the Whigs, the multiplicity of new parties, the impact of national sectional issues. Bradley's closest friends and colleagues were activists at the heart of the political scene. Given the politically charged circles in which Bradley moved, and the variety of his interests, it is surprising that he had so little political interest until the eve of the war. Yet,
Bradley exhibited a singular lack of interest in party organizations or political issues. The political reminiscences of the period rarely mention his name and then only in the context of his Monopoly connection.\textsuperscript{50}

Only as the middle decade drew to a close did Bradley begin to move into the political fold as an active participant. The explanation for his new found political bent emerges most pointedly in an examination of his activities and speeches in 1859 and through the early war years. His emergence as a politician is rooted in his closely guarded emotional nature rather than the intellect to which he had always given full reign.

By the winter of 1860, Bradley had developed an enduring passion for the Union. It was a passion that overshadowed and indeed conflicted with his major professional relationships. Most important, the evolution of Bradley's attitudes on the supremacy of the Union and, correspondingly, the rights of the states, would continue through his tenure on the Supreme Court. Understanding Bradley the politician is essential to understanding the Justice he would become.

With William Newell's election as governor in 1856, the Opposition party in New Jersey had begun to grow in strength and organization. Although the Opposition maintained its own identity until Lincoln's election, it was identified increasingly with the Republican party.\textsuperscript{51} In the campaign of 1859, the Opposition managed to elect another governor,
Charles Olden and to send its own candidate, John C. Ten Eyck to the United States Senate. In the fall and winter of that year, Bradley's name began to appear on the program of Opposition rallies around the state. He often shared the platform with his old friends, Frelinghuysen and Cortlandt Parker. Bradley was probably brought into these activities by Frelinghuysen, who had been outspoken in Opposition circles since 1859 and whose name appeared on almost every program of which Bradley was a part.

On October 27, barely a week after the raid at Harper's Ferry, Bradley told an Opposition rally that he had come before them "simply to declare which side" he was on. He attacked the Democrats from "the President to the tidewater" as "merely organized on political power." Identifying himself with the Opposition, Bradley told an enthusiastic audience that the Opposition was the only party organized on principles, the only conservative party and the party on which the salvation of the nation depended. The Opposition was heir to the Whig party, which had never succumbed to sectionalism, Bradley told his audience. Had the "old Whigs" been in power, he asked rhetorically, would the Compromise of 1820 have been dissolved and the present condition exist? His answer was an emphatic no. In December of 1859, Bradley drafted the resolutions for another Opposition rally, declaring that "New Jersey had no desire to interfere with the sovereignty, internal affairs
or domestic institutions in sister states" but would oppose the "interference contrary to the obligations of law, duty and patriotism.53

In the early months of 1860, Bradley's personal life seemed little affected by the awesome political events taking shape around him. His practice continued to flourish. In January, he made his second appearance before the United States Supreme Court, again in behalf of the Joint Companies.54 In early March, he helped organize the 28th Annual Meeting of the New Jersey Colonization Society in Princeton, chaired by his old mentor John P. Jackson. The agenda was a variation on old themes—efforts to raise money for the parent society and to recruit free blacks for resettlement on the New Jersey Society's tract in Liberia. In New Jersey, as elsewhere in the country, the colonization effort was one whose time was quickly passing. Attendance at the Princeton meeting was small. Jackson lamented to the gathering the opposition from free blacks and abolitionists to the Society's goals and noted that no recruits had come forward from the state.55

The next week, March 9, Bradley was present at the Opposition state convention in Trenton, but did not take a leading role. Opposition supporters were determined to carry the Republican banner in the 1860 Presidential election, but were still reluctant to abandon their state identity. The convention elected delegates to the Republican national meeting in Chicago, a delegation which
would include Frelinghuysen. It adopted a cautiously conservative platform, declaring opposition to any extension of slavery by the government, condemning assaults by citizens of one state on the "peace, rights and local institutions of any state or territory" and condemning specifically, the raid on Harper's Ferry.⁵⁶

After Lincoln's nomination in May, the Opposition rallied on his behalf throughout the state. Unity among the state's Democrats was strained by conflicting opinions over national issues, particularly the increasing likelihood of secession. A more radical group of "Peace" Democrats was obsessed with the southern point of view and would in time acquiesce in southern independence as a sine qua non of peace.⁵⁷

A larger and more moderate element pressed hard for compromise but would support the war effort when it finally came. In the 1860 election, New Jersey Democrats divided in support of Breckinridge and Douglas and united only in their overwhelming opposition to Lincoln. New Jersey remnants of the Whig and American parties who could not support the Opposition and Lincoln's candidacy organized behind John Bell and the Constitutional Unionists.⁵⁸

Through the spring and summer, Bradley shared the platform with various Opposition leaders on behalf of the Republican ticket, but rarely spoke himself. On July 4, Bradley gave the principal address to the Society of the Cincinnati in Princeton.⁵⁹ His speech was the standard
stuff of which such occasions were made. There was little
hint in it that he sensed the terrible irony of the moment.
In the thirty-plus pages of his notes for the speech,
Bradley made not a single reference to the growing national
crisis. His tour de force was on the "mission of the
nation - to establish the great doctrine of Human Rights -
the right of the people to govern themselves and to
establish those beneficent institutions by which their
material and moral advantage may be secured." Bradley's
oration included a long discourse on "race" meaning the
"race of men eminently and peculiarly fitted for
accomplishment of the great mission." He lavished praise on
the whole of the Anglo-Saxon stock, particularly as manifest
in the American republic. It was to the Anglo-Saxons that
the "mission of Human Freedom was committed."

It is impossible to know, but intriguing to wonder
whether Bradley was intentionally sounding a note of hope
for the Union or was simply oblivious to the national trauma
ahead. He spoke of the enduring character of "our race
where if any portion of the national unit be severed by
accident or otherwise from the parent, it does not divide
and die, but assumes fresh life, and puts forth with renewed
vigor all the manifestations of an independent social and
political organism." Bradley closed his celebration of the
national character by "hazarding the proposition that of all
races of people none has ever appeared better fitted and
calculated in all its essential characteristics for advancing the case of Human freedom and political liberty than the Anglo-Saxon, Anglo-American race."

On November 3, three days before the election, Bradley helped organize an "immense demonstration at the Wigwam," a meeting house in Newark. He shared the platform of the six hour meeting with Frelinghuysen and William Pennington, speaker of the United States House of Representatives and a candidate for reelection from New Jersey's Fifth Congressional district. Bradley was elected president of the gathering and according to newspaper accounts spoke at length on the principles of the Republican party, denouncing the charge that they were abolitionists as "an infamous lie." With "eloquent references to Mr. Lincoln and Mr. Pennington," Bradley told the crowd that Republicans would come to power because they were right, because they were opposed to corruption and because they were in favor of tariff protection for American labor.

The election in New Jersey was exceedingly close. The tally took a number of days to conclude. In the end, Democrats were unable to unite behind a single electoral slate to assure Lincoln's defeat. Lincoln took fifty percent of the popular vote, with the other half divided equally between Douglas and Breckinridge. Democrats had put forth a fusion slate of electors. In the final count, Douglasites voted for their own three electors but refused to vote for the four representatives of other parties to the
fusion. Thus, Lincoln took four of the state's seven electoral votes, to Douglas' three. New Jersey was the only free state to deny the Republican ticket its full electoral vote in 1860.

The Newark Mercury blamed Republican failure to win the full count on southern trade interests in New York and Philadelphia and on the failure of the Republicans to organize more effectively. In fact, the Opposition owed its small success in New Jersey to the badly divided state of the Democracy, whose Presidential electors had run under too many labels - Fusion Democrats, Straight-Outs, West Jersey Douglases - groups all pledged to Douglas, but unable to agree on local issues or candidates. To complicate matters further, "Original Democrats" were pledged to the Bell-Everett ticket. In the contest in the Fifth District, Pennington was beaten by the Democratic candidate, a Newark businessman Nehemiah Perry.

With Lincoln's election a fact and the secession gates about to open, the nation's attention turned to Washington. In both houses of Congress, committees sought the miracle that might avoid what the election had seemed to make inevitable. In New Jersey, Bradley took a deep interest in the national search for a compromise. Through his friend Pennington, whose term as speaker was rapidly drawing to a close, Bradley pressed his own set of compromise proposals - two draft amendments to the Constitution. Bradley's
drafts were similar in tone to the proposals pressed in the Senate Committee of thirteen by John J. Crittenden of Kentucky.

Bradley's proposed 13th amendment called for the prohibition of slavery only in those territories north of 36'30" with the provision that any states formed from territories on either side of the line should have the authority after twenty years to determine the question for themselves. Bradley's draft 14th amendment would have guaranteed federal enforcement of fugitive slave laws or indemnity by the counties in which fugitives were harbored. 66

Bradley argued his views more fully in an unsigned editorial published December 15, in the Daily Advertiser. The problem in the territories, he wrote, was that slave labor and free labor could not prosper in the same area. Since the territories were purchased from the common treasure, they should be evenly divided, half slave and half free. This would "prevent any unseemly collisions." The division would be made "fairly and for all time." Bradley was sure such a course would be acceptable to a majority throughout the country in spite of "noisy and blustering persons. . .north and south, who uttered many foolish and crazy speeches." 67

Bradley's editorial went on to defend the Republican party, which was, he thought, unjustly deemed a sectional party. The Republican party, he argued, vigorously
supported a move back to the Missouri Compromise. If the one great sectional issue could be settled, the party could move on to its larger mission. To the Republican party, Bradley wrote, "naturally falls the championship of the industrial interests of the country. In the pursuit of this object, which is purely a national one, the party will receive the cooperation of the conservative party of the south and the two will form one great national party of impregnable strength." 68

As the crisis deepened, Bradley's rhetoric sharpened. Three days after the South Carolina vote for secession, the December 28 edition of the Advertiser carried another unsigned Bradley editorial entitled "Party or Country." Bradley began to toughen his stand and to focus at last on slavery and secession as the heart of the nation's political quandary. 69 He denounced South Carolina's secession move as a treasonable act - "simple rebellion." If the secession response injured the south alone, he argued, it might be just retribution to let the states go. Bradley's vision of the Union however, could not contain such a thought. "The fatal act would bring disgrace on free institutions. . . and prove what the advocates of despotism are anxious to prove, the incapacity of mankind for self-government. . . it would involve ruinous consequences to the whole American community and to the cause of civil liberty. . . ." 70

The choices as Bradley laid them out, were "DISUNION, with probable civil war; or CONCESSION and peace." At this
point, he had no doubt that the concession required of the nation was an honorable one and well worth the price. The southerner's demand for "substantial security that their fugitive slaves shall be returned; was a just one," he argued. It was also just that the South be given a fair portion of the public domain - below 36'30".

Bradley closed the December 28 piece with an appeal to fellow Republicans. For the first time, he identified himself publicly with the party and attacked those within it who counseled against concession. Bradley's confidence could not match his fear for the future. Only "fools and madmen" were not afraid at such a time, he concluded. "Those who foresee the evils to come...fear for the country and for the fate of civil liberty in the world."

As the calendar turned on the new year, the denouement approached. By the end of January 1861, seven southern states had left the Union. Peace initiatives multiplied in desperate counterpoint to the growing clatter of war drums over horizons north and south. In Congress, peace proposals increased in inverse relation to the likelihood of a workable compromise.

In a final gesture, the legislature of Virginia sent out a call for a Peace Conference. On the 4th of February, 132 delegates from 21 states gathered at Willards Hotel, two blocks from the White House. The New Jersey delegation was among the most enthusiastic and the most outspoken. Appointed by the Democratic majority in the New Jersey
legislature, the group included the state's most prominent politicos. Led by the conservative Republican governor Charles Olden, the New Jersey group included Olden's defeated Democratic opponent from 1859, William C. Alexander, Robert Stockton, whose United Companies' loyalties had led him across the spectrum of political alignment in New Jersey, and Frelinghuysen, the group's most well-known Republican.\textsuperscript{72} Bradley was not an official delegate, but he accompanied his brethren to Washington to support the Convention's opening and probably to press his own draft amendments.\textsuperscript{73}

Frelinghuysen was among the most outspoken at the convention. Though an ardent Republican, his rhetoric was the essence of compromise. He explained New Jersey's split electoral vote in 1860 as the best evidence of his state's "unselfish spirit, which lead her to sacrifice her own preferences to her duty to the Union."\textsuperscript{74} In a hyperbolic sop to his new found Southern brethren, Frelinghuysen set out New Jersey's record on crucial matters of the moment. Only the narrow Delaware separated his state from a slave-holding state, he argued. Thus, the interests of the two states could not be beyond reconciliation. There had never been an underground railway in New Jersey, he continued with fervor, if not accuracy. Further, New Jersey had never rescued any fugitive slaves from the custody of the law. Most important "no personal liberty bill ever disgraced the pages of her statutes."\textsuperscript{75} In Frelinghuysen's opinion.
"19/20s of all the people of the North" favored giving to the south the guarantees it asked against all interferences with slavery in the territories. Frelinghuysen could not have been blind to the activity of the underground railroad in New Jersey, still the spirit of his remarks outlining the depth of southern sympathy in New Jersey, even among those who considered themselves staunch Republicans, was undoubtedly close to the mark.

Three weeks after it had assembled, and a week after the inauguration of Jefferson Davis, the "old gentlemen's convention," as the Conference was dubbed, adjourned. Its last gasp for peace was a seven-point proposal in the form of a constitutional amendment. The heart of the proposal called for the westward extension of the Missouri Compromise line. A variation on the Crittenden amendment, the conference amendment was in fact little more than a ceremonial gesture. Presented three days before its adjournment, Congress rejected this proposal in tandem with the Crittenden alternative.

While the peace delegates debated in Washington, Bradley continued to urge compromise at home through his Advertiser editorials. In the four months between Lincoln's election and inauguration, many Opposition leaders in New Jersey had become convinced that the South must be allowed to depart in peace. Other more staunchly Republican elements argued that secession should be given no quarter, even in the face of civil war. Bradley's attitudes in
this period fell between two stools. He never admitted secession as a viable alternative. Yet, the idea of war was equally unthinkable to him. If the politicians on both sides of the issue could be kept at bay, Bradley thought, then a logical compromise could emerge. Bradley sneered at the Democratic politicians who represented Republicans as enemies of the Constitution and who sought every opportunity, to turn the crisis to partisan advantage. He was hardly more patient with Republican politicians who "thought more of the Chicago platform than the Bible. . . They cared fifty times as much for their party and its program as they did for the country. . ." Bradley castigated Republicans who "refused to lift a finger to save the Constitution except in the impracticable way of coercion and civil war." For Bradley the choice was between "politicians and peacemakers." 79

Bradley continued his "country above party" theme before a Washington's birthday gathering in Newark the next February. As the rally's principal speaker, he read excerpts from letters Washington (his "beau ideal" of the true patriot) had written to Jay and Madison. Bradley exhorted the crowd to adhere to "Washington's spirit of compromise and conciliation over party loyalty." 80

Bradley's efforts in New Jersey were a small reflection of the national search for a workable compromise. Within a month after Washington's birthday, Lincoln had completed his long journey from Springfield to Washington and had taken
his place at the presidential helm. One after the other, Congress rejected the various proposals aimed at the compromise that would not be. The Confederacy, its provisional constitution and legislature in place, its President inaugurated, had become a fact. Within two months, Fort Sumter had fallen, the national restlessness had ended and the long nightmare had at last begun.

When the war became a fact, Bradley's tone changed completely. On the day following the surrender at Sumter, Bradley wrote to the Advertiser on the "Crisis and its Duties." It was now pointless, he wrote, "to indulge in useless regrets." The proper parties could be held responsible at the proper time, Bradley thought. For now, it was clear enough that the government in light of the law and the Constitution was right. Secession was treason. "The moment South Carolina interfered with the execution of the federal laws, the moment she laid the weight of her finger on a foot or a pound of government property, with intent to occupy and keep by force, that was the moment treason was committed."

For a man to whom principles were to be fixed upon and clung to with fervor, Bradley offered a surprising justification for his previous interest in compromise. He had not urged such a course, he told the Advertiser audience because it was constitutional or to be viewed "with a moment's patience, but only on the ground of expediency as the best way of restoring harmony and peace to the country."
With war only a threat, Bradley thought the best course would have been "conciliation to the extreme point of liberality." After Sumter, Bradley never looked back. Only force, he wrote, could "decide whether we have a country or not."

On April 22, Bradley spoke to a mass rally in Newark called to devise measures in support of the government. Bradley drafted resolutions for the meeting. He called for "united, strong and unwavering support for the President" and denounced the "leaders in this treason and rebellion as enemies of all good - false to their country, their oaths, their honor," and urged Newark to do its part in the war effort.

In September 1861, Bradley appeared again before a public meeting with a set of resolutions on the war effort. He called for a denunciation of those who would be partisan. The only loyalty at such a moment was to the Constitution and the government. Bradley urged the formation in Newark of a "country party - a union party," determined to see the government through and "stand by the Constitution which is the Constitution of the 33 states, and not of 17."³⁸

Through the spring of 1862, Bradley was busy with his law practice. Now in his late forties, he was too old to join the fighting and his children too young. Though he urged enlistments and support for families of combatants, the facts of war seemed to have touched his life very
little. His letters and diaries from the war years reflect nothing of the human tragedy or the Union's dismal fortunes in 1861 and 1862. In the spring of the war's second year, Bradley kept to his now familiar professional routine. As he had done in earlier years, Bradley maintained a firm division between his own political views and the interests of his major client - the Joint Companies. His ardor for the authority and supremacy of the Union, expressed to rallies and newspaper audiences was kept quite distinct from his defense of the Monopoly, even in face of war and the serious challenge to the Companies' privileged status mounted by the federal government. As the war of 1812 had proved the inadequacy of transportation through the Washington-New York corridor, so the Civil War quickly underscored the inadequacy of the existing rail linkage, the heart of which was still the Companies' single track across New Jersey. The Companies' monopoly had been scheduled to expire in 1859, but in 1854, the New Jersey legislature amended the original charter extending its life to 1869. 85

For more than thirty years, the Monopoly forces, often with Bradley's assistance, had fended off or absorbed every competitor. The result was very profitable for the state and the rail interests and costly and inconvenient to interstate passengers and freight haulers. Freight moving north through the corridor had to leave the line in Philadelphia, cross the Delaware by barge and reboard the lines of the Joint Companies in Trenton. The result was a
twelve to fourteen hour ride between New York and Washington with an unenviable record for safety and comfort. In addition to the rails, the Companies owned or controlled the connecting appurtenances - including the ferries across the Hudson, the ferries and wharves at Camden, all the waterline at Amboy, the Delaware Bridge and most of the lines connecting the main trunk. Only in 1862 was a car ferry added to take rolling stock directly across the river at Philadelphia.

With the war's commencement, the problems of transportation of men and material south from the northeast became apparent. Hostility to the Monopoly increased dramatically. In New York, the campaign was waged largely in the pages of Horace Greeley's Tribune. In Washington, the Monopoly's critics and its defenders tended to congregate in the halls of the capitol. The loyalty of the railroad to the war effort was not yet the issue. The Companies' leaders had been outspoken in their support for the Union cause and had made money available to Governor Olden to make it easier to fill New Jersey's first military quota. The problem lay in the fact that the Companies' facilities were simply not adequate for the demands made by the war. Even in face of their inability to meet the need, the Companies were stubbornly opposed to allowing competing interests to to participate in the effort.

In the fall of 1862, the War Department, frustrated by the slow movement of troops over the Companies' New Jersey
lines, authorized a small railroad, the Raritan and Delaware Bay, to transport soldiers and freight along its previously intrastate route through New Jersey, providing a longer but more practical connection. The Joint Companies sought an injunction. Before a decision could be reached in the state courts, the argument moved to the Congress. Regardless of the fervor with which the postroad bills were argued, no bill left committee before the war's end, due primarily to the effective lobbying effort the Companies mounted in Washington.

Bradley was prominent among the Monopoly's most effective spokesmen. The Companies' argument, and Bradley's, was essentially a state rights appeal. The Companies' briefs expressed serious doubts about whether Congress had the power to establish competing lines or interfere with existing lines. Only a state, they argued, could alter a state-granted charter. Moreover, the power of Congress to erect structures of any kind or to make local improvements within a state had traditionally been exercised only with consent of the state involved. The Companies did not question the government's right to build needed facilities under the war power, but its lawyers argued that those must be public works, not "works of a corporation fattened on franchises conceded by the Congress or invested with power to destroy the whole value of other franchises existing under the laws of the state." The "fattened corporation, "of course, was the tiny Delaware and Raritan.
As Bradley helped to frame the state rights arguments on behalf of his privileged client, he was ironically drawn, through his passion for the Union, more deeply into politics than at any time in his life.

Bradley on the Hustings

Through the spring and summer of 1862, Bradley was heavily involved in the Monopoly's efforts to fend off competing lines. He spent several days a month in Washington pressing the Companies' view. In May, he accompanied Edwin Stevens to see President Lincoln. While the meeting was apparently unrecorded, it would appear to have been a part of the Companies' continuing effort to scuttle pending "airline" legislation.

By late summer, Bradley was again becoming more politically visible. At the Union-Republican convention in Trenton in August, 1862, Bradley spoke in behalf of Marcus Ward, a Newark merchant and the group's nominee for governor. Ward had been active in war relief work and was a staunch Lincoln supporter. Support for the Union and the administration now defined the state's Union-Republicans, rather than simple opposition to New Jersey's Democrats.

In October, Bradley himself became a candidate, nominated by the Union Republicans for the Congressional seat in New Jersey's Fifth District. The incumbent was Nehemiah Perry, who two years earlier had defeated Bradley's friend and the former speaker, William Pennington.
Bradley was an unusual candidate and there are few clues to his decision to run. His interest in party politics had never been strong. As a local newspaper suggested, his mind was not accustomed to traveling "in the settled groove of partisan machinery. . . ." Bradley probably spoke the simple truth when he commented that had it not been for the "great principles at stake - he should greatly prefer the election of the opposing candidate to his own."94

In his acceptance speech before the district convention in Jersey City October 29, 1862, Bradley likened the present crisis to that of 1788. At that time, the question had been "should the Constitution be adopted." Now the question before the nation was should it be maintained. Bradley's great fear, he told the nominating audience, was for a divided Republic; the Union's salvation was his only issue. "Our love is fastened only on the Constitution and our free institutions. . . [if the country were separated] all loyalty would be crushed . . . the great experiment failed."95

Bradley's opening campaign salvo fixed the blame for the war. "Calhoun and his compeers" had produced the crisis, and it was the nation's loss, he sneered, that Jackson had not hung Calhoun.

For Bradley, the stakes were clear. If the Democratic party were to be a success and to control the next Congress, he argued, "the Republic is ended." For Bradley, the "secret councils of that party" were controlled by "deep men
who had not the interest of their country at heart." Bradley referred to himself as the candidate of the "administration party" whose great object was the restoration of the Constitution throughout the country. The Administration's authority to wage the war for the preservation of the Union was beyond question. There were no limits beyond the "laws of God and the law of nations." Certainly, the Constitution provided the broadest scope in which to work. Any assertion that the war was unconstitutional was for Bradley "puerile, incorrect, illogical and a solecism."96

Midway through his first campaign speech, Bradley turned briefly to the issue of slavery and denounced those who would call him an abolitionist. Defining himself as "a conservative of the conservatives," Bradley called for a return to the past. He wanted the Constitution to stay as it was. He did not want the relationships of the states to be altered in the slightest degree. He would have "all things remain as they were." Yet, while the war continued, it must be waged to the fullest, he wrote, "by taking the ships of the enemy without compensation, by taking the horses of the enemy without compensation; yea, by taking their lives without compensation."

Bradley concluded the Newark speech with a discussion of the "minor issues" raised by the enemies of the Constitution: habeas corpus, the confiscation acts and the Emancipation Proclamation. These were "miserable issues" compared
to the survival of the Union. Bradley believed in *habeas corpus*, he told the crowd and did not know whether or not he would have issued the Emancipation Proclamation had he been President, but he was willing to leave these matters to Lincoln, who "must know a great deal better than anyone" what was needed in the war effort.  

A few evenings later, Bradley recited the now familiar themes before a Hudson County audience. He told the gathering that only real issues were the preservation of the Union and the Constitution and a return to what had been. No people on earth had been so happy, so prosperous, enjoying to the utmost the blessings of a free community consistent with the good order of society. There had been no poverty and little pauperism. Everyone enjoyed the utmost freedom. Bradley abhorred the "intemperate language used by some Northern fanatics." He spoke instead "the sentiments of all conservative men. . . always willing to concede to the South all their just rights, the entire control and regulation of their own affairs." There was no authority in the Constitution, in Bradley's view, to meddle with the legitimate rights of the southern states. For Bradley, the blame was clear. For thirty years, a conspiracy had been growing among southern politicians - "with Calhoun and his compeers" at the bottom. They had planted the seed left to ripen "to such a fearful harvest."
Throughout the campaign, Bradley had almost nothing to say on the slavery issue or on the Emancipation Proclamation, certainly among the most controversial issues of the campaign. Only on one occasion did he speak directly to the issue and then to a very limited audience. In the middle of the campaign, he received a letter from the "German Committee" in Newark asking him where he stood on the slavery question.\(^{99}\) He answered the letter in the lengthy and detailed style that marked his legal work. He made no attempt to sidestep the issues the committee raised.\(^{100}\) The German vote in Newark was not large and thus his letter probably received little circulation. It provides, however, an invaluable insight into Bradley's thinking on the question of slavery as an abstract ethical issue and as an institution woven tightly into the fabric of American life at mid-century. Whether or not his letter swayed any votes, it provides a benchmark to his views that will be useful in measuring the development of his attitudes from the perspective of the Supreme Court bench.

The German Committee's letter set out four issues on which they wished to know Bradley's opinion:

What was his attitude on the slavery question?
If elected, would he favor legislation tending to abolish slavery?
Was he for or against the Confiscation acts?
Did he favor the President's Emancipation Proclamation?

Bradley's answer first addressed the slavery question. With a nod to his penchant for thoroughness, he wrote, to do
justice to the question would require a survey of the question in "all its relations." Lacking time or space for such an enterprise, he summarized his views. Bradley told the committee he had always considered slavery an evil - a great evil. This sentiment had led him to work for the Colonization Society, whose schemes, in his mind, provided the means best adapted to effect a gradual abolition. This was the course Bradley had always favored. The idea of a sudden emancipation in such a large area as the South was an idea "greatly to be deprecated and not in the interests of either slave or master." Thus, Bradley told the committee, he had never considered himself an abolitionist. He recalled New Jersey's experience, freeing all slaves born after a certain date. He offered this as a model for achieving the desired goal while avoiding any "severe shock to the body politic."

While not defending slavery per se, Bradley offered a spirited defense of its institutionalization in the South. Slavery was a fact "thrust upon the colonists by the authority of the mother country." It had become a fact "without the procurement of the present people of the southern states. Though slavery was, he acknowledged, the great problem of southern society, it must be left to them to solve within their own territory and in their own way.

Bradley developed his notion of the status of slavery under the Constitution. He had no doubts that there was no constitutional authority to interfere with the domestic
institutions or laws of the southern states. Bradley wrote that the presence of slavery in the South, or even in the southern share of new territories had always been beyond the reach of the Constitution or the Congress. It was only when "for the purpose of political ascendancy, they grasped for more than their share of the public domain" that Bradley had come to feel Southern constitutionalism must be resisted.

However, the rebellion had made a vast change in Bradley's view of mutual relations between north and south. By leveling war against its own country, the South had repudiated the Constitution. This action freed the Union from the constitutional restraints that had inhibited its action. The South had lost all right to appeal to the Constitution. The government now had every right to prosecute the war "with all vigor and power and in the use of all means not forbidden by international law." Hence, the legitimacy for Bradley of confiscation as a tool of war. By the same token, Bradley justified for himself and to the Committee, the Emancipation Proclamation. Proclaiming "amnesty or certain civil privileges to previous slaves," among the enemy was the sort of expedient to which all nations had the right to resort as a means of crippling the energies and resources of opponents. If the President as commander-in-chief determined that emancipation for slaves would aid in the merciful and speedy end to the war then, in Bradley's judgment, he had a right to do it.
Having conceded to Congress and the President these expedients in war, Bradley turned to his own judgment on the matter. As much as he tried to be a good soldier, Bradley clearly had problems with the proclamation. His willingness to grant Lincoln the benefit of his doubt was testament to the primacy he placed on restoring the Union. He had to trust that the President knew what was needed. "It may be that it was required by the delicate nature of our foreign relations; or by the peculiar situation of affairs in the border states or some other reason" beyond Bradley's knowledge. It was not for him, Bradley told the Germans, to question any legal measure which the commander-in-chief deemed necessary for the successful prosecution of the war.

As if trying to convince himself as much as the committee, Bradley listed the reasons that might have justified Lincoln's decision. The labor of the slaves was, after all, freely employed by southern armies, and slave labor in the fields freed every white man for battle. As for the results of emancipation, Bradley could only wonder. The proclamation was simply an announcement of the President's determination to deprive the southern states "of this great fountain of resource and support" if northern armies should penetrate the southern states. Whether it would have any practical effect, Bradley could not say, nor could he say whether "as a specific measure it will or will not be on the whole beneficial in its result."
Bradley ended with a four square statement in behalf of the Union cause. There could be no compromise now, but unconditional submission to the federal government. If slavery was extinguished in the process, the southern states could look only to themselves for cause. Bradley pledged himself to vote for any measure sanctioned by international law which would crush out the rebellion. The letter apparently met any objections the German Committee might have had, and Bradley subsequently received their unanimous endorsement. 101

Bradley fared less well however, with the general electorate. On November 5, the Daily Advertiser reported the results and the "unexpected Democratic sweep" in New Jersey. The Democrats took the governorship, a majority in both houses of the State Assembly and four of five New Jersey congressional seats. Bradley had run slightly ahead of the state Republican ticket but lost to Nehemiah Perry by 3,150 votes. Two years before, Perry had defeated Pennington, the Republican incumbent, by only 200 votes. 102 Bradley spent election day at home, but made no comment for the record on the election or his defeat. 103

After the 1862 election, Bradley returned to the familiar patterns of his professional life, especially to the task of protecting the interests of the Joint Companies and lobbying the Congress to prevent any endorsement of a competitive railroad through New Jersey. In the first two months of 1863, he made a half dozen trips to Washington.
The Companies' work was the heart but not the whole of his flourishing practice. The scope of his work was as varied as ever in 1863, including three appearances before the Supreme Court.\textsuperscript{103}

It had always been Bradley's style to keep his professional and his political worlds separate. Perhaps the press of his legal work circumscribed his time after the 1862 election, but in any case, his active pursuit of politics and his war rhetoric subsided after his defeat. One of his rare public appearances during the war was at a fourth of July rally the next summer. Even here, Bradley did not address his remarks to the war effort, but to the philosophy of nationalism that lay at the base of his political views. He told the Newark audience, that the government created by the Constitution was created by "that power acknowledged supreme over both the state and the federal government - the people." If this were true, he contended, then no state government representing only a portion of the people could go against it.\textsuperscript{105}

The Constitution, Bradley continued, granted Congress power to carry into execution its expressed powers - "that is to say, the legislative power of the general government extended to all the laws necessary to preserve and maintain its powers." Here was a government that was "in all respects national - invested with every branch of sovereignty that partakes of a national character." Nothing
but jurisdictions of a strictly local and domestic character belonged to the states. Everything general and national belonged to the federal government.

Having enumerated those powers, Bradley added that the power to pass all laws necessary to carry them out was "entirely unlimited." This was Bradley's strongest statement to date on what he believed to be the national character of the government. In his words, the Union meant "one people with one government and one destiny." The battle over the state rights men, he told his audience, had been first joined and won by the Patriots of '89. In Bradley's reasoning, the recent state rights heresies had sprung from "those cursed Virginia abstractionists and Virginia politicians and seized upon as a pretext by the fierce nullifiers and secessionists of the far south."

Bradley ended with an appeal to Americans to show the "despots and the absolutists of the old world" that there was virtue and strength in freedom and truth. All other issues, he pleaded, should be thrown to the winds, including "slavery, anti-slavery and party."

For all the feeling he could muster on such an occasion, Bradley seemed very detached from the war's reality. It is impossible to know what effect Union victories and disappointments on the battlefield might have had on him. Certainly, he was a committed patriot and felt the impact of the war deeply. Yet, if his diary entries, correspondence or copybook notes are any reflection, he
spent little time thinking about the vagaries of the fighting. Nor does he seem to have been particularly interested over the long term, in the politics of the war. Before his brief campaign effort in 1862, Bradley had not been especially interested or active in party politics. After his defeat, he turned his attentions again to his law practice and his family.

Under the best of circumstances, it is unlikely that Bradley would have taken a strong interest in organizational politics. After 1862, the party situation in New Jersey offered even less incentive. Union-Republicans were in such a minority in the state in these years, that he could have had little expectation that political activity on his part would have been of real value. Bradley apparently took little part in Lincoln's re-election campaign in 1864. The state government was in the hands of Democrats. While supporting the war, Democrats argued that the campaign for the Union was being increasingly perverted by Lincoln into a war for emancipation and the destruction of state rights. 106 Republican fortunes in New Jersey would have been dim enough in 1864, but the nomination of a native son and war hero George B. McClellan to head the Democratic ticket must have given pause to the most stout-hearted Jerseyman in Lincoln's fold. In the November balloting, New Jersey's seven electoral votes were among the twenty-one McClellan received. 107
For all Bradley's passion for Union at the war's commencement and in the midterm balloting in 1862, he made little comment on the war's end and the President's assassination. Similarly, there are few clues to Bradley's thoughts on the aftermath of war. Bradley met President Andrew Johnson at least once, in April 1866, when he called at the White House on railroad business. He visited the Senate on several occasions during the impeachment trial as Frelinghuysen's guest, but Bradley's thoughts on the matter are not recorded.

Although the details of Bradley's views on war-related issues in the post-war period are scarce, his manuscripts offer at least two insights into his initial reaction to the problems left in the war's wake. In October 1866, Bradley received an inquiry asking him to argue the suffrage question. The details of the request are not known, but Bradley's law notes on the subject suggest his thinking. The question was whether Negroes were entitled to participate in the privileges of citizenship, including voting. Bradley was asked to make the case that exclusion from that participation was inconsistent with the principles of republican government guaranteed to every state by Article IV of the Constitution.

Bradley's "objection to all this" was that a republican form of government was not inconsistent with the exclusion of Negroes from the right of suffrage because ever since the Constitution's adoption, Negroes, along with women and
minors had been excluded in states where they were undoubtedly citizens. Yet it had never been held that such states were any less republican governments. For Bradley, it was "too late now to question that."

A second indication of Bradley's reaction to the world the war had shaped is found in a letter written in April 1867 to his wife. On March 20, Bradley had sailed to Havana with his daughter Mary. His letters home were bright travelogues recounting sights and sounds quite new and strange to the staid New Jersey lawyer and his frail daughter. On the return trip, the Bradleys sailed first to New Orleans, then up the Mississippi to Memphis by steamer and from there to New Jersey by train. The stop in New Orleans provided Bradley with his first view of the South and elicited his singular comment on the impact of the war. Secession feeling was still quite strong, Bradley wrote to his wife, and he felt sure "more suffering" would be necessary before "cherished notions of a great Southern confederacy" would be abandoned in that part of the country. Bradley was especially impressed with the area's natural richness. It was no wonder, he mused, that the southern planters "in olden times, rolled in wealth." Now, however, Bradley thought the ex-slaves would refuse to stay and work the plantations. Without their labors, the plantations would become a desert waste. This was, for Bradley, a result of the general emancipation, the consequence of which had yet to be fully realized in the north.
The land and capital belonged to white persons, but the labor had all been performed by slaves. "Now the whole labor of the country is broken up at a blow." Broken up is the word," Bradley emphasized. The equilibrium of labor on the plantations had been broken and Bradley could see no prospects for its restoration.

Bradley understood the problem, but he had no answers. "Whether things will right themselves," he wrote, "no man can prophesy." Bradley's New Orleans friends told him that the Freedman's Bureau was an "engine of mischief;" teaching ex-slaves to be discontent with their lot and leaving them "utterly uncapacitated from labor." The great question he concluded was how to restore labor in the South to its normal condition.

In the spring of 1867, Bradley had no answers, but the next year, he found his political footing once again. In the presidential campaign of 1868, he ran as an elector pledged to Ulysses S. Grant. Bradley had met Grant briefly in 1864 when he visited the war lines near Washington. It is not known what brought him so definitely into Grant's camp. Most probably, he was encouraged by Frelinghuysen, who had been elected to the Senate from New Jersey in 1867, and who had become an active proponent of Congressional reconstruction.

Grant was not able to break the conservative Democratic hold on New Jersey in 1868, and Horatio Seymour carried the state. Bradley's role in the campaign is nonetheless
important. For his appearances on Grant's behalf, Bradley worked out a standard text. Entitled "1868: Grant or Seymour?" the speech is the most detailed statement of Bradley's political philosophy available. He wrote it only months before his friends began to lobby for his court nomination, and it is probable that his role and rhetoric in the campaign - of which this speech is an indication - was among the fundamental factors leading to his appointment.

Bradley began his speech with hyperbole so uncharacteristic of his lawyerly style and intellect: the election of 1868 would decide the character of government for generations to come. It would determine the nation's future as "great, strong, powerful and glorious... working out a mission of progressive civilization and advancement" or merely a conglomeration of many separate nationalities and sovereignties. This first alternative would command the respect and admiration of the world; the other would disgrace the notion of free and republican government, and "instead of progress in the art of advancing civilization, we should go backward in the road to barbarism."

The choice Bradley posed and the answer -- for him so obvious -- were implicit in the Constitution. The constitutional impulse was "to make us one nation, indivisible, inseparable... the general government was made the paramount sovereignty, the state governments so far as they were left sovereignties at all were made subordinate sovereignties."
Then, as he had done on so many earlier political occasions, Bradley traced the history of those "who from the very foundation of the government" had been "the party opposed to the Constitution." This party's abhorrence of the national sovereignty embodied in the Constitution had first appeared in 1798 in the Virginia and Kentucky resolutions. The state rights theory was next exhibited in New England during the War of 1812, Bradley continued, then it spread to the South Carolina nullifiers in 1830. In more recent years, the doctrine of state sovereignty had found its expression in the *Dred Scott* decision and finally in secession.

Implicit in this historical doctrine of state rights, Bradley wrote, was a deeply rooted hatred for the Union and the Constitution, manifested in 1868 in the Democratic party. The horror and sacrifice of war had taught the Democrats very little. Now they argued that the states were "just as perfect sovereignties" as they had been before 1860. They had forfeited nothing. Bradley then turned to President Johnson, whose actions were inspired by the "detestable heresy." The southern states, Johnson argued, "have never been out of the Union." The struggle between Johnson and the Congress over the nature of reconstruction suggested two different constitutional views, Bradley thought. On the one hand, Johnson argued that with the state of war ended, he as President had the right to "superintend the organization of state governments."
Congress, on the other hand, assessed the supremacy of the
general government and its paramount authority to govern and
control subdued territory.

In his wartime speeches, Bradley had always argued that
the war had little to do with slavery and everything to do
with the perpetuation of the Union. Now, in 1868, Bradley
denounced the notion that the "great question" was, as
Democrats claimed, Negro voting. The only question before
the nation, Bradley argued, was whether Congress should be
supreme over revolted territory and "shall or shall not be
allowed to express the national will in passing wholesome
laws for that revolted region, until it is again rehabilita-
ted with the powers of state government, and shall be
permitted to admit them as states or not when and under what
terms it pleases."

It was true, Bradley acknowledged, that the war had
begun only to subdue the revolt and return the wayward
states to the Union fold. However, southern recalcitrance
and hatred for the Union had compelled an increasingly
far-reaching response until at last "the Rebellion of the
states had presented a new case and the war had left our
hands untied by any constitutional, legal or moral
obligation.

For Bradley, all the issues of the 1868 canvas revolved
around the paramount issue of sovereignty. Bradley
catalogued the issues of the day: the financial question,
government banks and bonds, the national legal tender,
protection of American industry and finally "the admission
of the Southern negroes to the rights of citizenship and the
adoption and vindication of the 14th Amendment." All the
issues were subsumed under the great question of national
sovereignty.

The choice before the nation, Bradley concluded, lay
with the "wretched sophistries by which President Johnson
and his hopeful successor Seymour defended the whole notion
of sovereignty," or with Grant and the forces of Union. As
he took to the campaign circuit in the fall of 1868, Bradley
could not have known how fatefuly he had anticipated the
issues that within eighteen months would be set before him
in a far different context - as issues before the Supreme
Court.
CHAPTER THREE

JUSTICE BRADLEY: THE POLITICS OF APPOINTMENT

On February 7, 1870, President Grant nominated Bradley and William Strong of Pennsylvania to the Supreme Court. Strong was named to fill the new seat Congress created in 1869. Bradley's nomination was to the vacant seat created by the reluctant retirement of the ailing and virtually senile Robert Grier. On March 22, the Senate confirmed Bradley's appointment, characterized by the New York Times as the "very flattering vote of 46 to 7."\(^1\) The following day, according to the Court's minutes, Bradley appeared in the Court Room in the basement of the Senate wing of the Capitol, swore "to never have borne arms against the United States" and "to do equal justice to the poor and the rich" and took the seat he was to hold for the next 22 years. A few days later, Bradley wrote an introspective note to an old New Jersey colleague reflecting on the reasons for his appointment. "At 57," the new Justice wrote, "my principles are pretty well fixed and pretty generally known and probably that is the reason the President appointed and the Senate confirmed."\(^2\)
Bradley's simple summary of his path to the Court hardly reflected the effort that had gone into his nomination or anticipated the controversy that would follow. Within weeks of his appointment, critics, led by Henry Adams and the Democratic press, had begun to complain that Bradley's views had been too well-known indeed. The Bradley-Strong appointments, the critics contended, were part of a conscious effort, even conspiracy between the Republican President and his party's members on the Bench to overturn the Court's recent decision in *Hepburn v Griswold*.

In the *Hepburn* case, four of the seven Justices participating (Grier had retired by the time the final decision was taken) had struck down the legality of legal tender issued by the government before, and later validated by, the passage of the Legal Tender Acts of 1862 and 1863. The tender legislation had declared United States Treasury notes legal tender for debts public and private. The issue had been decidedly partisan. The tender question divided the Court along party lines, as it had the politicians and judges who had previously considered it. The Court's Republican minority, which included Justices Miller, Swayne and Davis, had dissented from the *Hepburn* decision in favor of the constitutionality of an issue many considered to be "the very essence of the warpower." Chief Justice Chase had been Lincoln's Secretary of the Treasury when the tender bill became law. Though he had privately expressed doubts about its constitutionality, Chase was overruled in Cabinet
discussions and, in the end, had supported the tender legislation as a measure adopted in extremis to prevent an impending collapse of the war effort.\textsuperscript{5} This time, the Chief was not to be overruled, at least for the moment. With Democrats Nelson, Clifford and Field in supporting roles, Chase wrote the Court's narrow majority opinion invalidating the government's position on legal tender.

The Hepburn decision surprised no one. It was probably leaked to Grant several weeks before its announcement, but in any case, those who followed the politics of the Chase Court could have predicted the 4-3 split. Grant recognized the need to bring the Court into line. With the new Court seat at his disposal and Grier's retirement imminent, it is not surprising that the President had in mind the need to tilt the Court's balance in the Administration's favor as he considered his nominations. Grant made several false starts. In December 1869, he sent forward the names of his Attorney General, Ebenezer Hoar of Massachusetts and Lincoln's Secretary of War Edwin Stanton of Pennsylvania. The Senate confirmed Stanton almost immediately, but he died within a few days of his appointment. Hoar, whose brother was Senator George Hoar of Massachusetts, was highly respected, but as Attorney General had made a number of powerful enemies in the Senate. His nomination was controversial from the beginning and Hoar was finally rejected in early February.
The Bradley-Strong nominations went to the Senate February 7. On the same day, the Court announced the Hepburn decision. The conjunction of these two events was too obvious to go unnoticed. At the end of April, just before the 1869 term expired and with the two new Justices in place, the Court set another tender case, Knox v. Lee for argument the following term. The Knox case was heard a year later in May 1870. Now, Bradley and Strong joined the three Hepburn dissenters, Swayne, Miller and Davis, in reversing the Court's earlier decision and effectively settling the legality of the tender issue.

Critics of the Knox turnabout were quick to charge that the two new Justices must have made their views on the constitutionality of the legal tender issue known to Grant before their nomination. The critics offered no evidence, and Bradley and Strong denied the charges. Certainly Grant was familiar with the political views of his nominees. Bradley was a well-known Republican and had been a Grant elector in the victory that put the General in the White House. Strong's Republican leanings were equally well-known. In any case, as Morton Keller has noted, broader considerations underlay the appointments, as Grant sought to counter what he perceived as a move by Chief Justice Chase to use his skillful leadership to render the Court a bastion of anti-Republican politics and attitudes. Keller summarized the strategy behind the Grant appointments in the words of Treasury Secretary Boutwell in 1873, that "a
court without political opinions is a myth. . . and as the Supreme Court must be political, let it be right politically rather than wrong." 

Bradley's explanation for his nomination was that his ideas on major issues likely to come before the Court were fixed and widely known. This, coupled with Boutwell's comment on the Court's political basis offer an appropriate rationale for Bradley's appointment. Neither comment suggests, however, the effort that in fact turned this staid pillar of the New Jersey bar into a Supreme Court Justice. For that, Bradley needed a little help from his friends.

Though reasonably well-known in Washington's legal circles, Bradley had not been close to the new Grant Administration. Late in May 1868, Frelinghuysen had invited Bradley to dinner in Washington to meet Grant, Colfax and a few others. Soon after the meeting, Bradley agreed to campaign as a Grant elector in the 1868 elections. Shortly after Grant's inauguration, Bradley's name began to be mentioned for one of the new circuit judgeships proposed in legislation introduced in January 1869, by Lyman Trumbull, Senator for Massachusetts and Chairman of the Judiciary Committee. The legislation was the culmination of what Stanley Kutler has called the "game of numbers and circuits" that the Congress and Supreme Court played in the years immediately following Lincoln's death. The goal of the Republican-ruled Congress, as Kutler ably illustrates, was less to intimidate a Court generally unsympathetic to
Republican reconstruction aims than to tailor the judicial system to more fully suit the needs of the dominant region and the dominant party. In addition, the additional seat was part of a package of reform measures designed to increase efficiency and streamline circuit responsibility within the federal system. Among other things, Trumbull's bill created a ninth Supreme Court seat and new circuit judgeships in each of the nine districts.9

The Trumbull proposals were brought to Bradley's attention by an old friend from Rutgers, George Harding. Scion of the family which published the Philadelphia Inquirer, Harding was a prominent Republican, a powerful figure in Pennsylvania politics, and a fixture in Washington political circles. The Trumbull bill, Harding wrote to Bradley, would provide for circuit judges "to hold all circuit courts just as the Supreme Justices do, but not sit in Washington."10 Harding wrote that he had been to see Grier - who presided over the third Circuit which included New Jersey - and had suggested Bradley for that circuit's judgeship. Grier, Harding reported, was delighted with the notion of a Bradley appointment. The Justice was less enthusiastic, however, when Harding queried him about his own retirement plans. "He says if he retires, he will die for want of something to do," Harding wrote. In any case, Grier agreed to see Grant on Bradley's behalf "as a personal favor" to Harding and also to get the "endorsement of the bench if need be." Harding and Grier agreed that if Bradley
would take the circuit post, Grier would resign "when he felt a little weaker" and then ask Grant to put Bradley in his place.\textsuperscript{11}

Harding began to work on the appointment in earnest in late January. His goals, he wrote Bradley on January 23, were to get the Trumbull bill passed and then to get Bradley the nomination. He was sure of the support of New Jersey's two Republican Senators, Frelinghuysen and Alexander Cattell. Harding also planned to enlist the support of Stanton and Grier's daughter in the effort.\textsuperscript{12}

The Trumbull bill passed both Houses in the last days of the 40th Congress, but President Johnson left office without signing it. The Massachusetts Senator reintroduced his proposals to the new Congress in March 1969. This time, Trumbull added a sweetener for aging, enfeebled judges - full pensions for any Justice retiring at seventy after ten years service. Armed with this new encouragement for Grier to step aside, Harding pressed forward in Bradley's behalf. On March 15, he reported that he now had the support of Justices Grier and Swayne. In addition, Grier's daughter and son-in-law, Mary and Aubrey Smith, whose social connections to the White House were well-known, were prepared to "go down and broach the matter to Grant and to Judge Hoar." Stanton, Harding continued, was now ready "to put in his oar." The only sour notes in Harding's careful orchestration came from the Pennsylvania Senators. Harding had had negative soundings from John Scott, he reported to
Bradley. Scott was the new Republican Senator and a carbon of the state's powerful senior Senator, Simon Cameron.\(^{13}\) Since Grier's circuit included their state in addition to New Jersey, the Pennsylvanians hoped to put forth their own candidate. Moreover, Cameron was intimately connected with the Pennsylvania Railroad, whose battles with the Camden and Amboy interests were legion. He was not inclined, in Harding's understatement, to support the Monopoly's prominent counsel for any federal judgeship.

The following week, Harding's letter to Bradley was particularly encouraging. Now his fruits included Adophue Borie, Secretary of the Navy and Hamilton Fish, Grant's Secretary of State. Justice Swayne had agreed to seek the support of the Secretary of the Interior, Jacob Cox and Harding himself would bring Treasury Secretary Boutwell into the fold. Harding had also enlisted the Court's reporter William Wallace in the fight. Wallace had agreed to see the Attorney General and assure him that Bradley was the "ablest man he had reported from the Circuit and the very first rank of the Bar." As for the Trumbull bill, Harding was ". . . in intimate confidence with the Court and the Committees of both Houses on the Judiciary bill - am commissioned by the Court to do the best I can; but get this bill thro.''

Harding's strategy was that Bradley's friends should make his case.
... if Frelinghuysen is wanted for a day as to character would he come? or would it be deemed agreeable by you to ask him. I do not think him necessary but it might be very well. ... if I think you had better come will notify you. ... Hardly think it will be now - you can do but little yourself consistent with your own dignity. ... 

Harding told Bradley he would continue to telegraph daily.\textsuperscript{14}

Bradley's nomination was being pushed also by John Stockton, his colleague from the Joint Companies and Frelinghuysen's successor in the Senate. Later in March, Stockton wrote to Bradley from the Senate Chamber to say that he was taking the lead with his Democratic colleagues in the Senate. In addition, he had been in touch with Swayne, Fish and Borie to press Bradley's case.\textsuperscript{15} On March 25, Harding sent Bradley an update, which suggested the flavor of the effort he was mounting.

... have concluded it best not to press for Penn RR influence with Scott, but to assert that it is New Jersey's time to have the appointment.

I saw Grier last night--He is full of it--Have arranged that Mrs. Smith, his daughter is to go down to Washington and to carry her father's personal wishes to Grant and advocate your claims while at his home where she is very intimate--I am to get Letters from the other Supreme Court Judges and Stanton. While I was with Judge Grier last night Attorney General Hoar came in and as I left I whispered to Grier to press on this matter then and there. He said he would--

I have written all this to Frelinghuysen and told him I was ready to go to Washington with him any moment and requested at once a letter from New Jersey Supreme Court and Chancellor endorsing you--.
Before signing off, Harding added a list of current assignments. Markley and Frelinghuysen would push Bradley's case with the President. Markley would also be seeing Hamilton Fish, Cresswell and the Postmaster General. Harding himself would be seeing Borie, Boutwell and Deputy Attorney General Ashton. A "friend" would urge Bradley's fitness on Cox.16

It is not clear what role Bradley played in his own behalf since so much of his own correspondence has been lost. His incoming mail related to the confirmation effort, however, took the form of reports from his friends rather than responses to queries or directives that Bradley himself might have been issuing. Bradley's mixed feelings about pressing his own cause are reflected in a letter he wrote to Hamilton Fish in March 1869, ten months before his nomination and while he was being considered primarily for the circuit seat. "I wish," he wrote Fish, "if deemed a fit person, to get the appointment of US Circuit Judge for the Third Circuit. I believe that I shall have the good wishes and countenance of the Judges of the Supreme Court."

Continuing, Bradley wrote:

. . . I do not wish to trouble you further than to let you know that I aspire to this position, desiring that you should act with entire freedom in reference to the matter.

Should you feel authorized to favor my success of course I should feel grateful. I feel depressed and humiliated to broach the subject—but as times go it seems to be necessary for a person to be guilty of some self assertion.17
If Bradley felt "depressed and humiliated" to trumpet his case, his friends felt no such reserve. The lobbying team moved quickly to smooth any potential rough spots. When a report surfaced that Bradley's Rutgers chum Cortlandt Parker might be interested in the seat for himself, Markley moved promptly and then dutifully reported the results. On March 27, he wrote to Bradley from Philadelphia:

I have just come from George's office where I saw your letter and one from C.P. in which he says he is no candidate, nor would he be one as against you, also a very pretty compliment to you by C.P. so you see that everything [sig]is lovely as far as New Jersey is concerned... In April, the Trumbull bill became law, to become effective the following December. From April to July, the Bradley guns were silent. By mid-summer however, the campaign reopened with full vigor. On July 19, Harding wrote to Bradley suggesting a change in strategy. He had decided to set his sights on the Supreme Court seat he hoped would soon be vacated by Grier rather than on the new circuit judgeship. Grier was of course still a problem.

...I saw Stanton on Saturday. ...He thought you might have been appointed to fill the 9th seat on the S.C. bench now vacant and thought it might be as well for us to press for that...The Attorney General still insists that the subject of these judgeships shall not be taken up until the fall--This suits me as the judges of the Supreme Court who are warmly in your favor will be there in October and they must personally have the strongest influence...

Grier got thro' his fishing and is now down at Deal. He is reported to be in good health. He cannot resign so as to obtain the benefit of the late Act
before December next. The other Judges would like him and Nelson to take advantage of it and resign immediately thereafter and they will bring all their influence to bear to that end.

A kind of pledge was made that he would resign if the bill was passed in its present form. On the other hand the human nature in Grier may tempt him to hold on--It is conceded that his mind is perfectly strong but that the infirmity in his limbs is increasing—

As winter approached, Grier continued to show no signs of resigning though his infirmities were increasingly vexing to his colleagues. Harding's November 17 letter described his most recent foray into nomination politics and caught the spirit of the moment.

...As the time draws nigh I get nervous. I ran down Tuesday night [from Philadelphia to Washington] to look the coast over. I sounded [Grier] out but he wouldn't respond to my touch. I saw Swayne--Nelson, and Davis--They are greatly exercised at his not resigning. They declared they were going to crowd him about December 1, '69. He sleeps on the bench, drops his head down and looks very badly.

Congress will also crowd him if he don't resign--In the Evg I went up to Robeson's and went over things with him. The President personally would like to appoint McKennan of Western Penna on the Circuit. Hoar has determined to take the Southern Judicial Seat if Grier don't resign before Dec 10. He would much prefer however that Grier should resign first and he take Grier's place and then give you the Southern Circuit--He is thoroughly unselfish you perceive.

Nelson, Swayne and Davis had all given Harding their assurances for Bradley, Harding continued, and joined him in despair over Grier. Harding usually spoke of Grier's daughters [Beck and Smith] as allies, but now his patience with them was running thin. "It is supposed," he wrote,
[that they] "support Grier in his wish to remain on the
bench with a view to maintain[ing] their social status
another winter in Washington."20

In December, events took still another turn. Rather
than the cabinet seat about which Harding had speculated for
the Administration's old friend William McKennan, Grant
named him to the Third circuit, thus putting an end to the
notion that Bradley might take the circuit and then succeed
Grier. "That don't hurt you at all," Robeson consoled
Bradley. "If Grier would only resign we could fix it all up
in a week." Harding's only fear now was that Stanton wanted
the "Sup[reme Court] Judgeship. . . . I don't think he can
get it. You are on the list as Grier's successor and only
Stanton can hurt you."21

Speculation over Stanton's aspirations would remain a
secondary matter until Grier actually made a move. For the
time being however, Grier kept his seat and his own counsel.
Nonetheless, pressure on the infirm Justice continued
unabated as Grier's daughter suggested to Harding on
December 9.

The Chief and Judge Nelson waited on Pa this morning to
ask him to resign saying that the politicians are
determined to oust him and if he don't, they will
repeal the law giving the retiring salaries. Pa told
them if they wished him to resign he would do so, to
take effect the 1st of February.22

Mrs. Beck ended with an appeal for Harding's advice and
not surprisingly, he moved quickly. With the news that
Grier had given assurances to Chase and Nelson, Harding had gone immediately to offer his own encouragement. Grier was indeed willing, Harding reported to Bradley, but Grier's desire to delay the effective date until February was bothersome since Harding was not sure if Grant could fill a vacancy until it actually occurred. There were other problems. George Robeson, according to Harding, "dreads a little that possibly Stanton might be pressed in certain quarters."23

By mid-December, Bradley's nomination seemed farther away than ever. On December 15, Harding wrote that Judge Strong's name was now being pressed "in the wildest way - unnecessarily wild."24 On the same day, Grant nominated Attorney General Hoar for the newly created ninth seat leaving only Grier's seat as the focus for the shifting list of contenders. Five days later, Stanton's name was submitted for the seat to be vacated eventually by Grier. The Bradley effort now appeared to be at an end. In fact, quite the reverse was true. Hoar's nomination met immediate opposition and although he was not formally rejected until after the new year, his chances were nil almost from the beginning. Apart from the fact that Senators from the recently readmitted southern states were pushing for their own representative on the Court, Hoar had made too many enemies among the Senators.25 Moreover, on Christmas eve, four days after his nomination, Stanton died. Once again, Grant had two seats to fill.
By January 1870, Bradley and Strong were back in the picture. The difficulties now shifted from personalities to regional politics, as the Southerners renewed their push for representation. Specifically, one of the arguments against Hoar's nomination was that the Justice whose circuit oversight would include the newly restructured Fifth Circuit encompassing the expanse from Texas to Florida, should have personal knowledge of the area, by residence if not be background.

The southern issue was important but not determining. On February 7, 1870, a year after his name had first been seriously mentioned, Bradley's name, along with that of William Strong, was finally submitted to the Senate. Bradley's diary entry noted the occasion and added that Frelinghuysen had gone to Washington to look after the nomination in the Senate. 26 Although the regional issue did not stop the nomination, it soon clouded the confirmation proceedings. It was assumed, though never formally stated, that Strong would take the Grier seat and the Third Circuit. Thus, his appointment was secured with a minimum of difficulty. Bradley was destined for the new seat and the southern circuit. While the southern Senators could not force a nominee from the South, they were determined to have their Justice work and hopefully, live among them. The day following his nomination, Frelinghuysen wrote Bradley from the Senate Chamber that at least three members of the
Judiciary Committee had opposed Hoar because he refused to reside in his circuit. Frelinghuysen continued:

. . .They will go for you if you will reside in the Circuit to which you may be assigned. . .I think there are those from the South who will not vote for you or for any other man out of the Circuit—but they will not affect the result, and when you become a resident they will be satisfied.

Frelinghuysen then described a bill currently before the Judiciary Committee that would require each Justice to live in his circuit. Although Frelinghuysen thought the residency bill had a good chance of becoming law, he did not think it would affect the timing of Bradley's confirmation. "I think you could be confirmed without any assurance as to residence," Frelinghuysen continued, . . ."but I am not certain of it by any means."

In order not to take chances, Frelinghuysen had told the southerners that Bradley thought he could best discharge his duties if he resided in the circuit and that he would, if confirmed, make the move. "They believe what I say," Frelinghuysen continued, "yet I can see they would like it in shape." To put it in shape, Frelinghuysen enclosed a second letter, a copy of which, along with Bradley's expected reply, he would use with the southerners. The second letter firmed up Bradley's commitment to the residency matter.

In conversation with you yesterday, I understood you to say that in order the better to discharge the duties of the Judgeship to which you have been nominated, you
thought it would be proper that you should make your
residence in the Circuit to which you might be assigned
and that you intended to reside in such Circuit. If I
understood you please telegraph me "that your purpose
is as I have stated in letter of this date. . . ." 29

Bradley's answer to Frelinghuysen is not available. He
obviously responded positively as the following exchange
suggests. A few days later, Bradley received a letter from
Matthew Carpenter, Senator from Wisconsin and an influential
member of the Judiciary Committee. Carpenter raised the
question of Bradley's intentions toward the southern
Circuit. 30 For the conservative Bradley, whose entire adult
life had been spent in urban New Jersey, his decision must
have pained him, but his quick response was practically a
brief on the issue.

Your letter of yesterday is received and in reply, I
have to say, that I regard it as a matter of duty and
honor for a Judge of the Supreme Court to reside in the
Circuit to which he is assigned—especially if desired
to do so by the bar of his Circuit. The same necessity
for this does not exist, of course, as before the law
was passed creating local Circuit Judges: and perhaps
it would be more convenient now for a judge to reside
in Washington City. But it is to be presumed that the
Circuit will desire that the Supreme Court Judge
assigned thereto, should reside in it. This
consideration as well as others would make it
imperative. If I should be appointed to the Bench I
should feel bound to be governed by these views, and
should expect to make my residence in the Circuit to
which I might be assigned, whether the Southern or any
other. 31

Carpenter was pleased. "It is a relief to those who want to
support you. . . ." he answered by return mail, "from an
embarrassment which we should otherwise feel; having
rejected Judge Hoar, because he did not reside in, and would not promise to go to, the Circuit to which he would probably be allotted.\textsuperscript{32}

Bradley's friends continued to meet the opposition wherever it showed itself. In early February, the \textit{New York Tribune} carried a front page dispatch from Washington forecasting defeat for both Bradley and Strong.\textsuperscript{33} The \textit{Tribune} correspondent questioned Strong's Republican credentials, citing, erroneously, Strong's lower court opinion on a similar case in Pennsylvania.\textsuperscript{34} Bradley's appointment had been unexpected since he lacked what the \textit{Tribune} dispatch described as a "national reputation." Even though Bradley's friends were representing him as "sufficiently radical for even the most radical Senators," his confirmation was doubtful since Southerners would not support any one not a resident of the Circuit. For differing reasons then, the Radicals and the Southerners were now demanding that the President appoint men "about whom there is not the shadow of a doubt."\textsuperscript{35}

The \textit{Tribune} article appeared on February 8th. The same day, former New Jersey Supreme Court Judge Martin Ryerson, a longtime friend of Bradley's, wrote to express his concern over the piece.\textsuperscript{36} Ryerson had written to the Vice President with whom he claimed an intimate acquaintance, endorsing Bradley's nomination and "begging" Colfax to aid in the confirmation fight. Ryerson urged Bradley to be certain that John Stockton used all his own influence with the
Democratic Senators who had voted against Hoar. In view of the **Tribune** story, Ryerson thought, Bradley's confirmation just might turn on a change in the Democratic vote.

George Shea, a Bradley associate in railroad affairs, also interceded with Horace Greeley about the **Tribune** story. The day the article appeared, Shea had dinner with the venerable editor and made Bradley's confirmation "the subject of earnest talk." He promptly reported to Bradley.

> . . . Mr. Greeley will be your friend -- as he regards your nomination as one so proper in personal fitness as to be commendable in the President and honorable to yourself. He is fearful that the professed desire on the part of senators to have a selection made from the Southern States may be allowed to operate prejudicially to your confirmation -- but I am rather sure that view of the question in Mr. Hoar's case was a pretense, and the real objection personal to him. . . I am promised that the **Tribune** tomorrow will be favorable to you.\(^37\)

As far as the record indicates, neither Shea, Ryerson or anyone else picked up on the **Tribune** correspondent's primary point that Strong and Bradley's views were not sufficiently known to assure the Administration a turn-around on the legal tender cases.

For his part, Bradley continued to maintain a low-profile throughout the confirmation skirmish. His letter to Grant following his nomination reflected his typical diffidence in such situations and the possibility that he might not be confirmed. "I feel the responsibility of the position," he told the President, "should your selection be approved by the Senate. . . . It is possible
that the Senate will fail to confirm the nomination; if so, I can only say that many persons can be found much better qualified than myself for the position."38

Bradley's attitude toward his role in the confirmation process was further reflected in a letter from a Philadelphia acquaintance, H.C. Townsend in mid-February.

Your favor of yesterday is at hand. Your position of personal 'non-interference' is the proper one and in my judgement the most politic. It is just what I supposed would be your course. But I think you will be stronger in the Senate if the work is left to the voluntary efforts of your friends. Acting on my own judgement I have already been at work with two or three judicious friends who are in intimate personal relations with Senators.

In Townsend's view, the only question in Bradley's confirmation was "one of locality."39

Not everyone with an objection to Bradley could be satisfied. In spite of his vaunted quiet demeanor, even Bradley had made some serious enemies over the course of his railroad career. One of the most vociferous was James M. Scovel, a New Jersey lawyer and politician whose career had been built largely on opposition to the Monopoly interests. Scovel however, was shameless in his desire to take no chances should Bradley be confirmed. In the midst of the controversy, Scovel wrote a note to Bradley to tell him of a conversation he had had with Charles Sumner in which Scovel supposedly pressed Bradley's case to the Massachusetts Senator. Scovel also reported that Sumner had talked at length "over the help you have rendered him in your letters
of some years ago on the reconstruction question."40 Bradley was not taken in by such flattery. Before filing Scovel's letter away, he appended a note with his own comment that it was a "...sheer lie. The fellow did and said all he could against me to Sumner." Bradley was on target. "As a man, Bradley will do," Scovel had written Sumner,

"also as a gentleman. As a Lawyer he will not do -- because he is heart, mind and soul Camden and Amboy and we can never tell whether he is for a Democratic or Republican candidate for Governor. No man whose business is buying members of legislatures and paying cash for them is fit for the Supreme Bench. That "Ring" in New Jersey ought to be smashed. 41

Sumner was not moved and eventually supported Bradley's confirmation. A few weeks after Bradley was confirmed, Scovel wrote again with an explanation. He had gone to Sumner to warn him that "unknown to Bradley" powerful forces were pushing his nomination for reasons of their own. After he discovered "how groundless my notion was, I went to Sumner, undid all I had done and said all the kind things I could about you..."42

Bradley's confirmation was favorably reported by the Judiciary Committee a week following its submission, along with Strong's. He was still not home free. His friend and Joint Companies compatriot John Stockton wrote on February 15, that he had no doubts about Bradley's eventual success.
The main problems were the "Carpet-Baggers and the Pennsylvania Senators," Stockton thought, and those were not insurmountable.

... The Committee are all for both nominations except Rice Carpet Bagger. But two of the Committee Conkling and Trumbull are in favour of passing the Bill requiring residence as a condition before acting on either. This, the C.B.s say will kill you, but in my opinion it will only drive you to the position of accepting at once and frankly the Southern Circuit. This of course your friends including myself would much regret, but it is to be remembered that your practical residence will be Washington, and Judge Field has just reminded me that the Assignment is only temporary, the Court having power to change districts when they please, would exercise that power on any vacancy or change.43

At this point, the Bradley effort began to center on the Pennsylvania Senators. Cameron and Scott were eager to protect the position of William Strong, their own nominee. Even if both men were successful, the Senators were adamant about keeping Strong for the Third Circuit and sending Bradley to travel and possibly live in the southern circuit. In addition, Simon Cameron, who was said to represent the "State of Pennsylvania Railroad," had his own problems with putting the counsel for the rival New Jersey transportation empire on the Bench.44 Frelinghuysen took the lead with the Pennsylvanians. On February 16, he reported to Bradley from Washington on a conversation he had just completed with Cameron and Scott. He had assured them that Bradley would not contest Strong for the circuits. If Bradley was not
himself convinced of that strategy, Frelinghuysen's letter set out the arguments.

. . .I told Scott you know that New Jersey had a cabinet officer[Robeson was the new Secretary of the Navy] and was a small Democratic State - While Pennsylvania had nothing and was a leading Republican State and that if the President: had only appointed one judge it would have been Strong - and that on questions as to Circuit you should defer to him -- I called attention to the fact that as Chase resided in the 3rd Circuit both you and Strong would be ruled out by the proposed law. [Rice's pending bill redrawing the circuits and requiring judges to live the circuit assigned.] . . .This made a great change and they and their friends were both anxious to go into Executive session - and I think conflict between you two is over. If you don't like the offer in this shape you can resign it, if you get it.

Frelinghuysen's letter also contained a cryptic reference to Bradley's potential judicial views. Jacob Howard, the Republican Senator from Michigan, had told Frelinghuysen that he would like to vote for Bradley but that he needed written evidence concerning Bradley's positions on "important questions." Frelinghuysen recalled that Bradley had given a letter along these lines to Harding. He had retrieved the letter, given it to Howard and was delighted to report to Bradley that "Howard is well satisfied and goes you strong, that is, in earnest."

Another Senator, Charles Drake a Republican from Missouri, also wanted evidence on Bradley's views, but Frelinghuysen had balked. "...as he had been a candidate and as the letter was a dangerous instrument to use with Democrats
around, I preferred that Howard should satisfy him which he
promised to do. . ." 45

On the 17th, Townsend wrote that he had been in touch
with Sumner, Cameron and Scott among others on Bradley's
behal. Townsend reiterated an old fear. Cameron, he had
heard from other quarters, might oppose Bradley on account
of his connection with the New Jersey railroad interests "as
he is an advocate of a national railroad from Washington to
New York." Townsend mentioned this in case Bradley thought
it necessary to have additional efforts made with Cameron.
Harding was not the man to do it, Townsend warned, "as he
belongs to another wing of the party or at least is
independent of the Cameron faction." 46

The Judiciary Committee was meeting daily in secret to
consider the various bills affecting the circuits and to
consider the nominations. A decision was near.
Frelinghuysen reported to Bradley on the 18th that the
Executive Session had been discussing

. . .the nomination of Judges. . . .When the Judi-
ciary Committee reported, they reported Strong's name
first and so the clerk in making a true record placed
his name first and it was considered first and he was
confirmed. Then, it being after five, someone said they
wanted to discuss your case and the session
adjourned. I have no doubt your friends all voted for
Strong. The subject will be talked over and over, but
when it comes to a vote I cannot come to any conclusion
but that you will be confirmed by a considerable
majority. I have just had a talk with one of Strong's
friends who says you will be confirmed.

Howard Howe, Edmunds and Lot Morrill are to look after
your case in Ex Session. Lot Morrill being by me placed
in special charge -.
Frelinghuysen added a "Strictly Private" postscript that after Strong was confirmed a motion to reconsider had been made so that Bradley's case would be considered before that motion "is disposed of. You will be all right I think," 47 Frelinghuysen concluded.

For over a month, the Judiciary Committee wrangled over its mix of business. Senator Rice introduced a motion to reconsider the vote recommending Strong's confirmation then withdrew it after several weeks. 48 On February 18, the Senate confirmed Strong in place of Grier. Various amendments to the judicial circuits bill were introduced. Proposals to redraw the circuits with more balance in favor of the southern states and to require judges to reside in specific circuits were argued, voted, reconsidered, postponed and reargued. Meanwhile Bradley's confirmation hung in the balance. March 1, the Committee turned to Bradley's nomination, but after extended discussion adjourned without a vote. The following day, the Committee voted to postpone further consideration until the 21st of March. Markley was furious at the delay. "Some Republicans, (particularly Cameron) relied on have cheated us," he wrote Bradley and Frelinghuysen. 49 Nonetheless, Markley was still confident that the votes would be there when the time came and even hoped to bring it up before the 21st if "strong enough."

Coinciding with the postponement, a story circulated that the President, having grown tired of the controversy
had "indicated his willingness to withdraw the nomination if
the Committee deemed it expedient. . . ." Grant was now
reportedly letting it be known that his views had changed
and that he was now willing to nominate a Southerner. When
the rumor surfaced in the Tribune, datelined March 9,
Markley wrote immediately to Frelinghuysen to assure him
that the President had not made such an agreement. To the
contrary, Markley wrote, "Senator Stockton had this from two
members of the Committee. Senator Edmunds said today Mr.
Bradley will be confirmed. We understand how tedious this
must be to Mr. Bradley. . . ." In fact, the delay
resulted in large measure from the efforts of Bradley's
friends on the Committee to prevent a full vote on his
confirmation until they were sure of their numbers.

Also on the 11th, A.B. Woodruff, a Bradley colleague in
the New Jersey bar wrote from Washington offering the
details of the moment. Woodruff reported a conference with
Cameron and proferred his own guess that the powerful
Pennsylvania Senator would go against Bradley. Cameron had
not been hesitant to name his price.

. . . He said that he told Mr. Markley that if you would
sign a letter to the effect that your opinion did not
coincide with the opinion by Chief Justice Chase on the
legal tender act lately delivered and that you did not
think the Constitution prohibited Congress from
chartering a railroad from here to New York there
would be no difficulty in your confirmation. That all
he required was to see the letter and that Mr. Markley
might do as he pleased with it afterwards.

He said if you would write such a one to me, or anyone
else, under the same conditions he would have no
difficulty in advocating your confirmation that he felt disposed to do all he conscientiously could for you etc. etc.

Woodruff had deflected Cameron's importune volley.

... I told him that asking a pledge from a candidate for a judicial office was a very delicate matter and suggested that your former whig principles, and your opinions generally known to your friends and acquaintances, as to the general construction that ought to be given to the Constitution, I thought ought to be satisfactory to the Senators.

Cameron had argued with Woodruff the concern that the Court might become so constituted as to nullify "practically all the results of the sacrifices of the Republicans in the late war." Woodruff told Bradley that he had offered the proper reassurances that "no one in the country entertained stronger opinions that yourself during the struggle as to the propriety of the energetic measures taken by the general government." Woodruff ended his letter on an anxious note. 

"... you will need all the strength that can be brought to bear. Suggest that Cattell come here next Monday and advocate an immediate vote, as well as your confirmation."

Judge Read also weighed in again in these final efforts. On the 16th, he wrote to Secretary Fish:

... The possession of the Supreme Court, by the appointment of a sound and able Republican Lawyer, for the Ninth Judge, is absolutely necessary for the success of the administration. With the Judiciary sound, the President will have the great departments of the government - the judicial, the legislative, and Executive entirely harmonious...
Almost by definition, Read thought, no southerner was fit for the Court just now. "No man in the south has been practicing or studying law since 1860, but everyone has been occupied in fighting the United States or his neighbours. From Virginia to Louisiana there is really no law now. . . ."
The man for the job, Read concluded, must be "a thoroughbred lawyer, living always in a loyal free state, who is entirely right, by education and principle. Such a man is Mr. Bradley, and every nerve should be strained to secure his confirmation."53

To Charles Sumner, Read was even more direct. Bradley was a "sound thoroughgoing Republican right on every constitutional question (as I know personally) an excellent lawyer and will make an admirable judge."54

The vote took place as scheduled March 21. After an hour's discussion, Bradley was confirmed by an "unexpectedly large majority."55 He lost Cameron vote and that of the eight southern Senators. Forty six others, including all the Democrats so carefully nurtured by Stockton, voted for confirmation.

The Bradley loyalists quickly cabled the new Justice their good wishes and relief. Harding reported that he had "drunk a little hot wine" to commemorate, "after so many fluctuations in our hopes and fears it is really delightful."56 Markley sent "hearty congratulations" and noted the large majority.57 Shea was moved to more lofty sentiment, noting the transition Bradley would be making
from New Jersey to the new South and ended with a wish that Bradley continue strong "in the faith that we have a common country and that the states are members one of another, each to move harmoniously in its own sphere, but to a common purpose."58 Perhaps the most relieved, John Stockton cabled simply "confirmed John."59

Other friends raised practical matters. Harding wrote to ask if Bradley had a gown ("a regular episcopal clergyman's preaching gown") as there were none to be had in Washington."60 John Stevens, whose family had been associated with New Jersey railroad interests for half a century, urged Bradley to continue some tie with the Joint Companies. "Don't break off fully," he pleaded, "stay as director and advisory man independent of legal matters, upon the general policy of the company." After all, Stevens concluded, after a year or two Bradley might get "satiated with the dignity" of the Court and want to "come back to the bosom of Mother Church."61

What is known of Bradley's own feelings of the moment reflects his characteristic reserve. In a letter to his son William on April 3, Bradley quoted a passage on humility and questioned his own merit.62 In an appreciative note to Hamilton Fish, written on the day of his confirmation, Bradley acknowledged the "great deficiencies for the responsible duties of the position," that he felt, but was encouraged by expressions of confidence from "men of calm judgment who have known me personally and who have the good
of the country at heart." In his diary, Bradley noted simply that he had been confirmed.

Bradley severed his formal ties with the Monopoly almost immediately and within a few weeks sold his stock in four of the Joint Companies' railroads to Frelinghuysen for $26,784. An era was coming to a close not only for Bradley personally, but in New Jersey politics. In 1869, the revised charter granting the Companies a monopoly over the route from Philadelphia to New York had expired and was not renewed. Negotiations with the Pennsylvania Railroad had begun with the charter's expiration and in December 1871, the Camden and Amboy lines and most connecting routes were leased to the Pennsylvania for ninety years. In a letter to Thomas Dudley marking that occasion, Bradley expressed his profound hope that "the C and A might at last get out of politics." Bradley seemed to take the appointment with characteristic calm and quiescence. Shortly after his confirmation, he told Dudley that "it had come at last most unexpectedly," and after he had given up any expectation of it. His diary entry for March 21 noted that he had been confirmed and that Robeson had cabled him to "come on down." He went to Washington on March 22 and received his commission "from the hands of Attorney General Hoar." The following day he wrote "sworn in and took my seat."
The criticism that Bradley and Strong had been appointed to create a majority for overturning the Legal Tender Cases would surface periodically throughout Bradley's tenure on the Court. Certainly it was true that Grant wanted the Hepburn case reheard. It is also apparent that Bradley and Strong's views were well enough known that Grant could anticipate their support for reversal. "We were simply not willing," Bradley told a friend, "to acquiesce in the former judgment," adding his view that the newspapers in the Chase and Cameron interests had been particularly unfair. There is no evidence, as Charles Fairman has carefully detailed, that the new Justices made any deals. Given their politics, none were needed.

After Bradley took his seat, the issue of his residency died a natural death. Several years later, he recalled that he had fully expected to make his residence in the southern circuit and had even spent some months looking for an "eligible and proper place." Gradually he had satisfied himself that such a move was unnecessary. Since "no judge of the Supreme Court could reside out of Washington without greatly interfering with his duties."

...I consequently purchased a home in Washington and all the other judges did the same except Clifford who lived altogether in hotels and Judge Davis, who also boarded at the National. Our duties in the Supreme Court required us to be here seven months of the year and this was the only place where our private liberties would be of any service to us. The three summer months, no one, not even the southern families themselves spent in the South, if they could get away.
The two remaining months of the year, Bradley wrote, were spent in the circuits. In May, six weeks after his appointment, Bradley left for the first of the many trips he would make through the Fifth Circuit.
CHAPTER FOUR

CIRCUIT JUSTICE: SLAUGHTERHOUSE TO HALL

In the decade after the war, the Congress set forth in three constitutional amendments and corresponding legislation, a new concept of the meaning of citizenship in the United States. Within this broad parametric, the task of defining the rights of citizenship, state and federal, and the limits of government in enforcing those rights fell essentially to a small number of federal judges. Justice Bradley was among the most influential in the initial stages of that process. Bradley's was the most analytical and the most disciplined mind on the Court in the 1870s and 1880s. His tightly reasoned arguments were reflected in the more than 400 opinions he wrote over twenty two years. The private notes circulated among his colleagues on the Bench, particularly those of Morrison Waite, his Chief for fourteen years, suggest an influence not immediately apparent in Bradley's quiet private demeanor. The weight of Bradley's civil rights jurisprudence in this crucial period would be a major factor in shaping the federal role in enforcing the rights of black Americans for a century, waning only with the 'second Reconstruction' of the 1960s.
The springboard for Bradley's understanding of the boundaries of civil rights and the limits on enforcement of those rights was litigation growing from the war's constitutional legacy: the 13th, 14th and 15th Amendments. His career initially intersected the wartime amendments during Bradley's first trip to the southern circuit in the early summer of 1870. For the next four years, primarily in relation to circuit litigation, Bradley worked out his initial understanding of the amendments, an understanding he would define and redefine over the course of the two decades he spent on the Bench. Bradley first formulated his civil rights jurisprudence in 1870 in his circuit opinion in the Slaughterhouse Cases and in an advisory opinion he prepared for Judge Woods, which was used almost verbatim by Woods in U.S. v Hall. Bradley's thinking culminated in 1883 in his landmark decision in the Civil Rights Cases. In the civil rights decision, which invalidated the Civil Rights Act of 1875, the role of the federal government actively to enforce the war's legacy in law became secondary, minimally corrective and, at least for the next three quarters of a century, virtually meaningless. An examination of the evaluation of Bradley's civil rights views over these thirteen years suggests that the Compromise of 1877, which effectively brought the reconstruction era to a close, began early in the decade of 1870s and ended in 1883. Bradley's role in this expanded definition of the compromise is at least as important as his more well-known role on the Elec-
toral Commission that sealed the Compromise and put Hayes in the White House.

The following chapters trace the evolution in Bradley's thinking. The goal of the current chapter is twofold. Part I offers a perspective on the task facing the nation's courts in the wake of national conflict and reunion. Part II examines Bradley's civil rights jurisprudence from 1870 to 1873, with emphasis on his circuit role and the cases through which his constitutional understanding of the wartime amendments would evolve.

I

Law is a fundamental instrument of social change and adjustment. In any period in the nation's life, the unfolding legal order, sometimes dramatic, often commonplace, illuminates emerging social values. This phenomenon was particularly evident in the Reconstruction decade. To meet the exigencies of the war and its aftermath, Congress had, on several occasions, expanded the statutory jurisdiction of the Federal court system. Competing ideological, political and economic forces, pent up and enlarged by the war or born in its wake, quickly worked their way through the nation's courts. The unprecedented volume and variety of federal litigation reflected the range and intensity of those forces. The Supreme Court docket doubled between 1860 and 1870. By 1880,
it had doubled again. The agendas of federal district and circuit courts expanded even more quickly.² It was a visible, even visceral process. William Evarts, a prominent lawyer who frequently appeared before the Supreme Court, noted "... a crowd of causes bred by the war pressed the court with novel embarrassments and loaded it with unprecedented labors."³ Judges, lawyers and legal writers appealed for relief. Proposals ranging from minor changes in jurisdiction and additions of personnel to complete revamping of the system were frequently debated in Congress.⁴ With the exception, however, of additional circuit judgeships created in 1869, no major changes were made in the structure of the federal courts until the end of the century.⁵ Although their structure had been designed at the beginning of the century for a vastly simpler society, judges transformed the role of the federal courts in American governance fundamentally in the decades following the war. In the process, they would become major instruments of national reconciliation and adjustment.

If the structure of the federal judicial system was little changed, the scope of the national court's authority increased dramatically. For any court, jurisdiction is power. At the heart of the legal legacy of Appomattox lay an expanded jurisdiction.⁶ Before the war, the federal courts had been generally subsidiary. The lower courts had been designed primarily to provide sanctuary for citizens litigating outside their own states, a protection against
possible bias of unfriendly local tribunals.\textsuperscript{7} During the Civil War and Reconstruction, Congress significantly broadened the authority of the federal courts. Not since 1789 had the courts enjoyed as great an expansion of their jurisdiction as took place between 1863 and 1876.\textsuperscript{8} The new jurisdiction included enlarged removal power, additional power to issue writs of habeas corpus, and new jurisdiction in admiralty and bankruptcy cases. Most important for the purposes of this paper, the federal courts were given primary jurisdiction in cases involving newly formulated constitutional guarantees to freedmen. In each area, writs of error substantially broadened the arena for Supreme Court review.\textsuperscript{9}

With substantially increased authority, the postwar federal courts faced a complex array of legal issues. Accelerating industrialization and technological development challenged traditional jurisprudence and raised a host of new questions in the law. More immediately important was the impact of the war experience on the delicate balance of the federal system. In the crucible of national conflict, the most sacrosanct tenets of prewar constitutionalism, those separating the power of states from the federal government, were being reformed. As the nation, distinct from the states, became a permeating concept, tensions between old and new attitudes toward government at every level were reflected in the federal docketsc.\textsuperscript{10}
In the states of the old Confederacy, the confusion challenged even the best legal minds. The task of sorting through the substantive tangle was compounded by the mechanics of restoring the federal judicial presence. Although the Confederacy had adopted much of the structure and jurisdiction of the federal system, federal courts had not functioned in the southern states since 1860. By 1865, these courts were in general disarray. In many instances, their records, libraries, furniture and physical facilities had been appropriated or destroyed. As district and circuit courts reassembled in piecemeal fashion, they faced serious personnel dilemmas. Only in Texas were federal judges from the antebellum United States system untainted by Confederate service. New judges had to be recruited from the ranks of loyalist southerners or imported from northern states. Supportive staffs, clerks, marshals, federal attorneys, assistants had to be found. It was not immediately clear who could practice or hold subordinate, nonjudicial offices in the federal courts since few southern lawyers or office seekers could take the congressional "iron clad" oath. Only in 1870, were federal district and circuit courts reasonably staffed and functioning throughout the South.

As the courts reopened in reconstructed states, federal judges had few precedents to guide them through the legal labyrinth unique to their regional situation. For example, there was no clear guidance on the status of contracts
entered into during the war, particularly those in support of the rebellion or involving slavery or Confederate money. The liability of individual southerners for personal acts during wartime was uncertain. Scores of confiscation, admiralty and bankruptcy cases offered new dimensions to old problems in the law. The viability of public commitments, such as state bonds dated before the war, was unclear. There was no common understanding about the status of proceedings and judgments of state and Confederate courts.\textsuperscript{15}

Simply as a collection of amorphous legal issues, these matters would have been a major challenge to the federal judiciary. In the postwar decade however, even the most innocuous litigation often became entangled in Reconstruction politics and frequently cloaked in constitutional language derived from the new amendments. It is not surprising that the initial judicial reaction to Reconstruction Amendments and legislation would come in the federal courts of the South.

In the most immediate sense, Congress had designed the 13th, 14th and 15th Amendments along with enforcing statutes to secure the war's outcome in law. Taken together, the constitutional package "created" four million freedmen, declared them citizens of the nation and of their respective states, established minimum criteria for the privileges and immunities inherent in citizenship and outlined a related program of enforcement.
Republican Reconstruction policy, evolving since the beginning of the war, did not seek to overturn state centered federalism in favor of a revolutionary centralization of national authority. Even the most radical Republicans functioned within a constitutional ambiance defined in terms of nation-state, state-state and intrastate relationships. The essence of Republican policy toward freedmen was not an enlarging of the rights of national citizenship, but rather a narrowing of states' options with respect to the rights of their own citizens. Thus, each states' citizen, because he was also a citizen of the United States, had the right to enjoy the same corpus of civil procedures, rights and responsibilities as any other citizen in that state. In this sense, each state was free to define the criteria of citizenship in its own way, as long as it made no distinctions between citizens based on race or color. The essence of Republican Reconstruction, in Professor Hyman's summary, lay in

. . . decreasing state options in dealing with state and national citizenship. . . adding common civil and political rights minima to all state law codes, without compelling the nation positively to intercede. Instead the state defined their own delinquencies, and triggered their own punishments.

The 15th Amendment, ratified in early February 1870, was the culmination of the state citizenship-protecting Republican program. The implementing legislation, the three so-called Force Acts of 1870-71, appeared at least on
the surface vastly to expand national authority over the states. Litigation flowing from them would be generally centered in this notion. The three acts were designed to assure compliance with the 14th and 15th Amendments.\textsuperscript{19} The 23 sections of the Enforcement Act of May 31, 1870\textsuperscript{20} reenacted the guarantees of the Civil Rights Act of 1866 under the 14th Amendment, rather than the 13th, and formed the basis for enforcing black voting rights at the federal level. Its provisions set out as federal crimes a long list of conspiratorial and intimidating practices already in use by intrasigent white southerners to keep blacks (and often white loyalists) from voting.\textsuperscript{21}

Congress directed the second act, the Federal Election law of February 1871,\textsuperscript{22} at election fraud in urban areas. Its genesis and focus were in election frauds involving the Tweed ring and the immigrant vote in New York City.\textsuperscript{23} The third act, the Ku Klux Act of April 1871, aimed particularly at Klan "outrages" conspiracy and terrorism against blacks throughout the South.\textsuperscript{24} This act was directed at private behavior as opposed to the actions of states.

The machinery and procedures for enforcing the statutes, taken together, gave direct implementing authority to officers of the newly organized Department of Justice.\textsuperscript{25} Exclusive jurisdiction over enforcement cases was given to federal district and circuit courts. In sum, Congress placed the enforcement program under the authority of federal courts and federal judges.
A compelling argument has been made that the enforcing legislation of 1870-71, like the Civil Rights Act of 1866, was designed to preserve rather than alter the arrangements of prewar federalism. What was new was the "threat" that the national government might assert its right to jurisdiction over civil rights issues as a prod to states to fulfill that role themselves. In concert with the intent of the 15th Amendment, the force acts did not grant freedmen the right to vote. Rather, they outlawed the use by the nation or a state of race as a test of eligibility. Congress and the states were left with full authority to restrict suffrage on any basis but race or color.

Procedures for enforcing the Republican civil rights package, like its substance, were rooted in the same essentially conservative constitutionalism. Taken as a whole, the laws' implementation involved three mechanisms, none of them novel. The first was wishful rather than procedural. Ideally, states would voluntarily assume jurisdiction over the elevation of blacks to equal citizenship within their borders. The incentive, as outlined earlier, was the threat that failure to assume such responsibility would transfer jurisdiction over these state functions to federal authorities. The second instrument was the use of federal troops to enforce the new laws. This was also a tool of limited utility since a primary goal of Republican policy was the restoration of the states to full
status in the Union. The continued presence of federal
troops forestalled that process. The major burden for
protection of blacks in their political and civil rights
fell on the third enforcement instrument: the federal
courts. In the end, the war's constitutional legacy would be
shaped in case by case litigation.

To an extraordinary degree, primary efforts to define
the rights of freedmen in light of the new Amendments fell
to a very small number of federal judges. Joseph Bradley was
among the most influential in the initial stages of that
process.

II

Bradley took the oath of office and an additional oath
of allegiance March 23, 1870. The following week, in accord
with the informal but fundamental condition of his
appointment, Chief Justice Chase assigned Bradley to the 5th
judicial circuit, encompassing the six states from Florida
to Texas.28

During the previous February, as the Senate Judiciary
Committee wrangled over Bradley's confirmation, the 15th
Amendment to the Constitution had been ratified. The last of
three wartime amendments, the 15th was considered by
contemporaries to be the culminating piece, the capstone
of Republican Reconstruction policy.29 As Bradley sat
through his first weeks on the Bench, the first of three
enforcing statutes of 1870-71, made its way through the Congress.

The coincidence of the beginning of Bradley's court tenure with the rounding out of Reconstruction policy deserves attention. Over the next two decades, Bradley would become intimately associated, in the law and in the public mind, with the scope and interpretation of the Amendments and complementary statutes. His most widely known pronouncements were made from the Supreme Court, beginning in 1873. In this first instance, he dissented from what he considered to be the majority's restrictive reading of the 14th Amendment in the Slaughterhouse Cases. 30

In fact, Bradley's involvement with the wartime Amendments and with the fundamental tenets of Reconstruction policy had begun within weeks of his appointment. From his first trip to the circuit in 1870, through his circuit decision in the Grant Parish Cases 31 in 1874, Bradley had several opportunities to comment on the rights of citizenship and the limits of government in enforcing those rights as encompassed in the Amendments. In this initial phase in the evolution of Bradley's reconstruction jurisprudence, his initial thinking was worked out in relation to issues first confronted in the 5th Circuit from 1870 to 1874.

Justice on Circuit, 1870-1873

Chief Justice Chase adjourned the Court for the December 1870 Term on April 30. Two days later, Bradley
left Washington for his first tour of the circuit. The law required that each state be visited by the presiding circuit Justice at least once each two years. It would be Bradley's practice, for the ten years in which he presided over the 5th Circuit, to visit Texas and Louisiana in one year and Florida, Georgia, Mississippi and Alabama the next.

In May and June, 1870, Bradley made his first trip to Texas and Louisiana. It was not a simple task. He traveled eight continuous days to reach Galveston, with four train connections to New Orleans and an overnight trip by steamer to Texas. 32 For the next six weeks, Bradley was exposed to the war's impact on southern society as reflected in the circuit dockets. He became acquainted with prominent members of the southern bar, he met the district judges for the first time, and began a long relationship with the newly appointed Circuit Judge William B. Woods. 33 Most of the cases Bradley heard during this first visit involved commercial and economic matters tangled by the confusion of war and the first years of peace. In New Orleans, however, Bradley became involved in a case whose ultimate outcome would have a shaping influence on the course of constitutional law. Here he sat in on a phase of the Slaughterhouse litigation and offered the first major commentary from a member of the Supreme Court on the scope and meaning of the 14th Amendment.

Bradley was a relative stranger to this part of his country. He had spent his entire adult life in the urban
northeast, most of it in Newark and had rarely traveled south of Washington. He had been to Europe on two occasions, but had been to the southern states only once before. Three years after his appointment to the Court, he and his daughter had taken a trip to Cuba. On the return trip, the Bradleys had stopped briefly in New Orleans. Bradley's letters home on that occasion offer the only available clue to his early attitudes toward the war's initial impact on race relations. "Everybody here, of the old residency, is secessionist in feeling," Bradley wrote to his daughter in April, 1867. "They look upon themselves as a conquered people and I fear will have to suffer still more before they will give up their cherished notions of a great Southern Confederacy." It was a country rich in resources, Bradley observed. "No wonder the Southern planters, in olden times, rolled in wealth." Bradley was quick to recognize the impact of emancipation on Southern economic life. He estimated that a crop of sugar might have netted $100,000 profit on a thousand acre plantation with 250 unemancipated "hands" to work it. To hire those hands at the current wage would not only have taken most of the profits, but Bradley feared "the Negroes would not stay on the plantations and will refuse to work them, and without them, the plantations will become a desert waste." Such was the result, Bradley concluded, of general emancipation, "the consequences of which have not been fully appreciated by the northern people. . . ." Whether things would "right
themselves or not, no man can prophecy." If Bradley had any thoughts on the condition of the emancipated or on the instances of racial violence that filled southern newspapers, they are not known.

During Bradley's 1870 circuit visit, he had no apparent involvement with matters involving race. Whether the situation appeared altered to him after three additional years of peace is not recorded. In Texas, he was immersed in general commercial legalities. He arrived in Galveston, his only stop in Texas on May 8. He had been accompanied on the trip by his wife and by the attorney, Jeremiah S. Black, a prominent Democrat and former Attorney General in the Buchanan Administration. In classic circuit tradition, Black accompanied Bradley through the circuit, sharing meals and conversations in the evening and trying cases before Bradley's court during the day.

For three weeks in Galveston, Bradley held court alone. District Judge John C. Watrous had suffered a stroke in early 1869. He has resigned his commission only a few weeks before Bradley's arrival and had not yet been replaced. William Woods, who in his capacity as Circuit Judge would normally have accompanied a visiting Justice, did not make the trip to Texas. Bradley opened court May 9. There had been no Circuit Justice or Judge in the state, other than Confederate judges, since the war began. Although there had been no forum for appeals in almost ten years, Bradley's presence seems to have caused little stir. The Galveston
News simply noted the "businesslike manner with which he commenced the term" and expected "a great many cases to be disposed of." On May 22, after Bradley had held Court for two weeks, the News commented on the large amount of business being transacted by the Circuit Court, but since the business included "no case of public interest," offered no specifics. 38 Much of Bradley's time appears to have been spent hearing motions for dismissal, thus clearing the docket of cases long rendered irrelevant by the war or the death or disappearance of litigants. Dozens of cases were either dismissed or granted continuances.

Much of the first Galveston circuit was taken up with motions related to the receivership of the Galveston, Houston, Henderson Railroad, under the title Cowdrey v the RR Co and others. 39 The case was on appeal involving bankruptcy issues before the Supreme Court. The case involved a number of local personalities and was the primary focus of local press coverage of Bradley's stay in Galveston. In these intermediate actions, Jeremiah Black and William Pitt Ballinger 40 (Justice Miller's brother-in-law) as counsel for the railroad presented a series of challenges to the receiver's management. Bradley dismissed their motions and those of the receiver pending a full hearing of the case before the Supreme Court. 41

In addition to Cowdrey, Bradley wrote three other reported opinions in Galveston. In two admiralty cases, the Tybee 42 and Miller v W.G. Hewes, 43 Bradley affirmed decrees
of the district court. Both cases involved local commercial incidents in 1868 and were unrelated to larger issues. In the fourth case, RR Co v Neal Bradley refused Neal's request for an injunction to stop proceedings in law in favor of a new trial. Neal had fallen off a local streetcar. With the sanction of the lower court, he had requested and received $50 from the company for his injuries. When his injuries proved to be more serious, he attempted to begin new proceedings for larger damages. Bradley rejected Neal's request with lengthy reliance on Justice Story and Chancellor Kent. "It [was] undoubtedly a case of hardship, but required on the part of the court a firm adherence to the principles there propounded in order not to be led astray."44

These cases are worthy of mention primarily as illustrations of the typical role of federal judicial authority at the local level. Bradley's private views on the value of sending a Supreme Court Justice 2,000 miles to hear such cases in the Texas heat are now known, but whatever his own feelings, his first circuit venture, (with the possible exception of the plaintiff Neal) met with general local enthusiasm. His "sojourn", the News commented, "left a very agreeable impression in the minds of all with whom he came in contact, either in his official capacity or in his social relations."45 The News also printed an open letter from Bradley to the Houston Bar, whose invitation to dinner he had declined.
My visit to your state and my intercourse thus far with its able and learned Bar have produced none other than the most able impression... You may well be proud of your state. It is destined to be an Empire State. ...Such a state with such a foundation, fostered by free institutions and wise laws, must have a glorious future.

Most institutions and laws, Bradley told the Bar, depended on the legal profession. "A pure, uncorrupt and learned Bar, more than any standing army is the bulwark of civil freedom." 46

It is tempting to read into Bradley's statements a lack of interest in the pressing issues of Reconstruction politics. Perhaps he thought a word of encouragement to the local bar, as the most likely source of renewed stability, would be his best contribution to the restoration process. In other eyes, state politics and reconstruction policies in Texas in 1870 were in the throes of confusion and controversy. 47 Bradley's reaction to the political climate contrasted dramatically with a report on conditions in Texas submitted by the Department of Justice the previous year by federal attorney D.J. Baldwin. Baldwin reported that more than 200 churches had been burned in the state, as well as schools and farms. Violent acts, aimed at ex-slaves and those sympathetic to them were the order of the day. Murder was commonplace Baldwin wrote, and witnesses were impossible to find. "The valley and slough of Reconstruction," he concluded, "must be passed, and the sooner the better for the people of the state... We must have restoration before
emigration [sic] will come, or schools open or improvements made. Every day postponed... the flood of ignorance and barbarism roll unchecked. 48

Little of the atmosphere Baldwin worried over seems to have impinged on Bradley's visit. Bradley's happy reaction to Texas, at least as reflected in his few comments were reciprocated. One of Galveston's prominent attorneys, William Ballinger appeared frequently before Bradley during his short stay in the state. Ballinger summarized the experience in a letter to Justice Miller.

. . . .Bradley held court here nearly three weeks. . . . He did a great deal of business, holding court several days until nearly dark. He was a new dispensation to us contrasting very strongly with our manner of judges for a long time past. I like him extremely and that was the sentiment of the Bar. . . . He is the most complete business man I have ever seen on the bench becomes the perfect master of the case, down to its minutiae, with a facility and dexterity very admirable. His anxiety to get through here rendered him a little impatient in some instances; but he seemed ready to admit any mistake into which he might fall and commanded the utmost confidence of the bar. We were unprepared didn't expect him to do anything and I was conscious that the Bar didn't show to good advantage, professionally before him; but still I think he was pleased with its deportment and judged favorably of its ability. 49

Bradley's second stop was New Orleans. On May 25, he left Galveston by steamer accompanied by his wife and daughter and Jeremiah Black. News of his warm reception in Galveston and his letter to the Houston bar, commending its "sage counsils" was carried in the New Orleans papers along with a welcome to the "distinguished visitors." 50
Bradley had had some prior warning concerning the situation he would find in New Orleans. Shortly after his confirmation the previous March, Cortlandt Parker had written him enclosing a letter from a former New Jersey associate of Parker, John de Gray. De Gray was practicing law in New Orleans and had written to Parker asking that he encourage his friend the new Justice to make an early visit to Louisiana. The legal business was enormous, he wrote, and there had been no circuit court to hear appeals for the past twelve years. "During the first few years before the war, Judge Campbell [a former Supreme Court Justice] did not come here at all," de Gray wrote. "During the war when the courts were open, Judge Wayne was assigned to the circuit, but he never came. After Wayne's death, Judge Swayne was next assigned, but was only once on the bench for about an hour long enough to have one motion entered, which has never been tried." The bar had been informed, de Gray continued, that Judge Woods had sent word that the size of his circuit and the great accumulation of business would keep him away from New Orleans for some time to come.

De Gray also wanted Bradley to know about the general demoralization of the Louisiana bar. He credited this to the federal District Judge, E.H. Durell. "Scarcely a day passes that someone is not insulted or abused from the bench," de Gray wrote. "The business are largely requests for continuances because of the lack of confidence in him. . . . It would take days to explain the outrages."
Judge Woods joined Bradley in New Orleans. They opened the Circuit Court on May 27 and sat through June 11. During the first two weeks they heard dozens of arguments and disposed of a variety of cases. As Bradley had done in Galveston, the main task appears to have been to cleanse the docket of issues long made irrelevant by the passage of time.

Bradley wrote six recorded opinions in New Orleans. The first involved a chapter in the case of Myra Clark Gaines v. Lizardi, v. de la Croix, v. the City of New Orleans and over the years, versus practically everyone else. The case involved Mrs. Gaines's legitimacy and a disputed will. It had been instituted in 1834 and the key points were not settled until 1891. Interim judgments were also rendered in the Confiscation Cases and in a similar case involving confiscation and bankruptcy, U.S. v. Rob Roy and Cargo.

Through these first weeks in New Orleans, Bradley, the Yankee Unionist Republican confined himself to the issues at hand and gained the general approbation of the primarily Democratic New Orleans bar and press. His was the sort of Yankee presence the southern states desired, wrote one editorialist, bringing a sense of the law rather than politics. The Bee found his manner "exceedingly urban," with "none of the boorishness of some of the other judges" Bradley had come with a "fine reputation as a jurist, and his promptitude in disposing of business shows that he
thoroughly understands his duties."^55 Bradley's final week in New Orleans was taken up with early phases of the Slaughterhouse litigation. In this connection, he would continue to confound the local image of Republican justice.

The Slaughterhouse Cases^56 reflect a variety of issues at the heart of American constitutional and legal history. The case marks the commencement of the judicial history of the 13th and 14th Amendments and related efforts to define in law the privileges and immunities of citizenship.^57 It is of course a grand irony of American law that this first text of the 14th Amendment's meaning should involve, not the rights of ex-slaves, but the question of who could be a butcher in New Orleans. Apart from the constitutional issues involved, Slaughterhouse exemplified the ambiguities in the law when government at any level moves into functional areas where it had not been before. In this instance, a state reached to the limits of its authority to invade property rights in attempting to exercise its policy function in the new region of public health.^58

In 1869, the Louisiana legislature passed a public health statute to restrict all stockdealers and butchers in New Orleans to a single abattoir, and granted a twenty five year monopoly over the slaughtering facilities to the Crescent City Company.^59 In response, the Butchers' Benevolent Association representing the interests of several hundred independent butchers displaced by the monopoly sought injunctive relief in the state courts. Through 1869,
in suit and countersuit, the parties battled in the various state courts of Louisiana. In December 1869, more than 200 suits were pending against or had been brought by the Crescent City interests. Ultimately, in an effort to sort through the confusion, each side agreed to select three cases to be appealed, staying all other proceedings in the interim. The six cases were taken to the Louisiana Supreme Court. In April 1870, that court sustained the original legislation granting the monopoly. The stage was now set for the historic confrontation in the federal courts, which would culminate in the landmark Supreme Court decision in 1873.

On May 13, John Quincy Adams Fellows, who with former Justice Campbell led the legal team representing the Benevolent Butchers, secured a writ of error from Justice Bradley, then in Galveston, allowing appeal of the Louisiana ruling to the United States Supreme Court. When Bradley and Woods opened the Court in New Orleans on May 27, both sides were ready for the initial skirmish in what would become one of the most historic constitutional battles in the history of American law. After several preliminary moves, Campbell filed a bill in the Circuit Court on June 6, seeking injunctive relief against the operation of the monopoly pending a decision from the Supreme Court, a process expected to take two years or more.

Bradley set the arguments on the injunction for June 9. Feelings in the city ran high, particularly in anticipation
of the new federal dimension to the issue. On June 8, the
Butchers' Association called a public meeting to rally
support. The meetings' resolution outlined the
"helplessness" of the people of Louisiana with their lives
and property at the mercy of "irresponsible speculators" and
appealed to the Supreme Court to "extend the sheltering
aegis of its protecting authority, to shield them from the
infamous outrage and at the same time vindicate its own self
respect."61

The paradox of an appeal from southern butchers to the
"sheltering aegis" of federal authority set the stage for
Campbell's opening statement before Bradley and Woods. The
state rights former Justice had left the federal bench ten
years before in support of secession. Now he framed his
arguments against the monopoly in terms of the Civil Rights
Act of 1866, enacted to enforce the 13th Amendment, and the
privileges and immunities clause of the 14th Amendment. The
mood was captured in the Picayune's lead editorial June 7.

Few of our people would have dreamed that it would have
been found necessary to appeal to the civil rights bill
to protect the rights of the people in this or any
other southern city from invasion. It was looked on as
one of the aggressive measures invented by the enemies
of this section in the exclusive interest of the
freedman, or carpet bagger. But this is an ERA OF
EXTRAORDINARY EVENTS and we find a law which was
regarded as odious and tyrannical, both in inception
and enactment now invoked to shelter the entire
population of the chief city of the south from being
trodden under foot by a monopoly, aided by the
executive and judiciary of the state ... who are
concerned that its accordance with the constitution of
the United States not be examined by the supreme
tribunal created for such cases.
What reasonable man would have thought ten years ago, that any of our citizens, whose rights were threatened under any pretence, could have gone before a federal court and solemnly sworn that he could not obtain justice in the state courts?

The *Picayune* writer did not want to prophesy the outcome, but he thought it "not too much to say that Bradley and Woods will need all their judicial firmness and courage. . . ." 62

The details of the butchers' case and its ultimate outcome however significant in other contexts, are not pertinent here. The present effort is rather to establish Bradley's views on broad issues of civil rights protections raised in the early phase of the Slaughterhouse litigation and coincident with Bradley's first trip to the 5th Circuit. Although the Court's majority overturned his Slaughterhouse decision two years later, Bradley's circuit decision in this case defined for the first time in the nation's courts, the parameters of a national responsibility for civil rights. Before a crowded court room on June 9, Bradley recorded in his own notes on the case, Campbell took the lead for the plaintiffs. 63 First, Campbell laid out the fundamental issue. Had Congress "established a civil right belonging to the citizens, which are violated by the actions complained of?" Campbell answered his own question in the affirmative, citing the Civil Rights Act of 1866 which "decided who shall be citizens and what shall be their rights." That act, Campbell continued, had not named any
class, section or color, but had addressed the civil rights of "all persons." The 14th Amendment's purpose, Campbell continued, was to "render this certain." Its object, he argued, was "to place every citizen under the protection of the [national] government." Bradley summarized Campbell's views in simple outline.

The act protects civil rights
the rights to labor
the rights to equality

The Louisiana law violates those rights and confers on 17 men the control of a whole calling for 25 years.

In sum, the "abominable and outrageous act" invaded rights now protected by the Civil Rights Act and the 14th Amendment.

Bradley's notes on the defense arguments focused on what the defense considered Campbell's "misuse" of the 1866 legislation. In a "lengthy and animted argument,"64 William H. Hunt contended that the Civil Rights law was now being invoked for "a purpose for which it was never intended." Hunt's colleague, Louisiana Attorney General Christian Roselius offered a differing view of the purpose of the 1866 act. Bradley summarized Roselius at some length. Roselius contended, according to Bradley's summary, that the civil rights law had simply been reiterated in the 14th Amendment. The purpose of both was "equality of capacity of acquiring and enjoying legal rights." These
efforts had been directed toward securing equality of rights for blacks rather than any extension of rights for citizens of whatever color. This all had nothing to do with police regulation as in the present case, Roselius argued, or with a suit like the one at issue, in which all parties were citizens of the same state.

Bradley's papers no longer include drafts of his circuit decision. The case was formally reported in Judge Woods' compilation of cases from the 5th Circuit. In the headnotes to the case, Woods acknowledged that Bradley's circuit decision had subsequently been overturned by the Supreme Court. Nonetheless, Woods thought the "importance of the questions, the want of unanimity in the Supreme Court, and the fact that this was the first case in which the subject [the 14th Amendment] was fully considered: all to be sufficient reason to report it."

According to local news accounts, Bradley first responded orally at the end of the hearing on the 9th of June. Briefly, his first decision was that there would be no injunctions since the Civil Rights Act did not apply to the case. The following day, Bradley changed his mind on both the purpose of the Act and on the injunction. In the course of the evening June 9, Bradley had wrestled with his initial understanding of the relationship of the Civil Rights Act to the Amendment and of both to the issue at
hand. The result was that he reversed himself on the applicability of the Act and on the issuance of an injunction.66

It is impossible to know with any certainty what prompted Bradley's change of view. He commented only that his first judgment had followed the arguments directly and that he had not given the matter his full consideration. Bradley had been on the Court for less than three months and had spent less than a month hearing cases in his circuit. It is not surprising that he had not yet worked out an operating style that would minimize even the appearance of disorganization or sloppy reasoning on his part. An important part of his reputation as a jurist would be his penchant for quick as well as thorough work. Indeed, his influence among his brethren was considerably enhanced by his ability to share a fully reasoned draft opinion with fellow Justices to whom opinions had been assigned but who lacked Bradley's interest in or ability to work through difficult issues quickly. Perhaps the process of working out his views in the New Orleans case were as important to Bradley's development as a Justice as his final opinion was to the adjudication of the 14th Amendment. In any case, Bradley made a decision, changed his mind, fully admitted his reversal and then wrote one of the most important decisions of his career.
In the written decision, Bradley opened with his opinion on the question of the Civil Rights bill and whether the 14th "is intended to secure the citizens of the United States of all classes merely equal rights; or whether it is intended to secure to them also absolute rights?" 67 In the first instance, Bradley declared that the Act did not apply to the case. Since he subsequently changed his mind on this point, Woods excised this portion from his report of the case. In the version of the opinion carried in the Chicago Legal News several weeks later, Bradley's initial interpretation was that the Act was "intended merely to secure to citizens of every race and color the same civil rights and privileges as are enjoyed by white citizens and not to enlarge or modify the rights or privileges of white citizens themselves." 68

Bradley followed his civil rights comment with a summary of the opposing arguments and then moved to what he considered the "main question arising upon the act of the legislature and the 14th Amendment." In this section, Bradley reviewed the constitutional protection of civil rights, liberties and privileges before the war. The new amendment he thought, embraced much more than these original guarantees. Article IV, he continued, entitled citizens of each state to the privileges and immunities of the citizens in the several states. The new Amendment's language, that
"no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, was in Bradley's view, substantially more comprehensive. Whether the framers were themselves aware of the far reaching character or the implications of this new statement of rights was not the issue for Bradley. If the amendment could

...bear a broader meaning and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their imprimatur understood what they were doing and meant to decree what has in fact been decreed."

The 14th Amendment, Bradley continued, not only required equality of privileges but demanded that the "privileges and immunities of all citizens shall be absolutely unabridged, unimpaired." In the case at hand, there was no more sacred right of citizenship than to pursue "unmolested, a lawful employment in a lawful manner." If the Louisiana law was as its defendants claimed, simply a police regulation of lawful enterprise, then there would be no issue. However, Bradley thought it was "a pretense too bald for a moment's consideration," to characterize the Louisiana law, as its defenders sought to do, simply as a police regulation.
Bradley admitted in his text to his difficulty in coming to terms with a proper understanding of the intent of the 14th Amendment. Bradley's agonizing is understandable considering the lack of precedents in dealing with the Amendment's potentially sweeping reach. Also, to Bradley's knowledge, Congress had not yet elaborated the Amendment's provisions in accompanying legislation. (It is surprising that he did not know more about the progress of civil rights legislation, as it was fully reported in newspapers and law journals.) It was not the expansion of federal authority that was so revolutionary here, but the possibility of setting limits on state options in dealing with the privileges and immunities of the state's own citizens. Bradley was breaking new ground as his caution and the uncharacteristic fits and starts in his opinion suggested. The more he reflected, Bradley wrote, the more satisfied he was that the "Fourteenth [Amendment] was intended to protect the citizen of the U.S. in some fundamental privileges and immunities of an absolute and not mere relative character and it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us."

Having determined the applicability of the 14th however, Bradley had to resolve the dilemma he had created for himself in first ruling that the Civil Rights bill did
not apply. Chronologically, although it was passed during the debate on the 14th Amendment, the rights bill was a part of the implementing legislation of the 13th Amendment which was not an issue in the Slaughterhouse case. Yet, if that law's enforcing mechanisms could not be applied to the present case, then Bradley's broadly interpreted 14th Amendment had no teeth. What Bradley did not know was that just prior to his arrival in New Orleans, Congress had taken the opportunity presented by the passage of the Enforcement Act of May 31, 1870, to reenact the Civil Rights Act of 1866, in hopes of solving questions of the act's applicability. Anticipating the Congressional response exactly, Bradley forged his own link between the 1866 act and the 14th Amendment. In the end, he conceptualized the three Amendments and their enabling legislation as a connecting chain whose meaning and strength could be understood fully only when the individual links were seen as a part of the whole.

While there is no record of the process through which Bradley worked his way toward a solution, it was his style to clarify his thinking on paper. His legal files include an undated piece entitled "As to the Civil Rights Bill Applying to the Case" that was probably written in New Orleans as Bradley weighed the Slaughterhouse decision. The
substance of the 1866 Act, Bradley wrote in this essay, when viewed in the context of the amendment, besides establishing national citizenship,

. . . appears to be this: that all citizens of the U.S. shall in regard to life, liberty, property and civil status have everywhere in the U.S., the same rights and the same protection of laws.

I repeat it, the Civil Rights bill establishes the fundamental principle that all citizens of the U.S., no matter what their race or color shall, in regard to life, liberty, property and civil status, have the same rights and the same protection of the laws, everywhere in the U.S.

Bradley also noted in this memorandum that cognizance existed in the act to the federal district and circuit courts "of all causes civil and criminal, affecting persons who are denied or who cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any rights secured to them by the act."

Here Bradley found the way out of the quandary created by his initial reaction to the case. Given what is known of his exacting legal mind and his certain knowledge that his discussion of the meaning of the new Amendment would break new legal ground, he was not willing to leave his broadly conceived interpretation of the Amendment with no more sure means of execution. He found that means by revising his view of the Civil Rights Act.

Bradley settled the issue formally in an addition to his opinion published as an afterword to the case.71 Here
Bradley acknowledged his reversal on the applicability of the Civil Rights Act. At the opening of court July 10, the morning following the hearing and the issuance of Bradley's initial opinion, Bradley made the following announcement:

In the Slaughterhouse case, yesterday, we expressed the opinion that the civil rights bill did not apply to the case; that it was intended merely to secure to all citizens of every race and color, the same privileges as whites enjoy, and not to modify or enlarge the latter. This portion of the opinion had not been put in writing at the time, and was somewhat hastily expressed. Our attention has been chiefly given to the main question the true construction of the 14th amendment. On a more careful examination, considering that the civil rights bill was enacted at the same session, and but shortly before the presentation of the 14th amendment was reported by the same committee, was in pari materia, and was probably intended to reach the same object, we are disposed to modify our opinion in this respect, and to hold, as the counsel on both sides seem to agree in holding, that the first section of the bill covers the same ground as the 14th amendment, at least so far as the matters involved in this case are concerned.

And whilst we still hold that the act is not intended to enlarge the privileges and immunities of white citizens, it must be construed as furnishing additional guarantees and remedies to secure their employment; and this is probably the reason why congress has neglected to pass an additional law for carrying the fourteenth amendment into effect, the civil rights bill being regarded as having already supplied the necessary provisions for that purpose.

Bradley did not know of course that Congress had solved the question of its own intent the week before he arrived in New Orleans. Woods added a footnote to the case to the
effect that the Force Act of May 31, 1870 had reenacted the civil rights bill to assure enforcement of the 14th and noting that this had not come to Bradley's attention at the time the Slaughterhouse opinion was delivered.

Bradley's sweeping conception of the 14th Amendment and its enforcement potential through this federal legal machinery would become the heart of his dissent from the views of a majority of his brethren when the Slaughterhouse Cases reached the Supreme Court in 1873, a dissent discussed more fully at the conclusion of this chapter. In that context, his circuit opinion and subsequent dissent are fundamental to understanding the early history of the 14th Amendment in two essential ways. First, Bradley envisioned a new role for the federal courts as monitors of state actions which might impair fundamental privileges and immunities of citizenship under the guise of misapplied state police power. In addition, he anticipated a federal concern for private actions aimed at impairing the fundamental rights of citizenship. Finally, in stressing the butchers' right to pursue their profession without "unreasonable regulation," Bradley developed a due process argument that anticipated the substantive economic notion of due process that captured the Courts' majority in the late nineteenth century. 72

In the present context, Bradley's opinion in this early litigation has a more specific meaning. He defined for the
first time a national responsibility for civil rights growing from a new understanding of citizenship. The citizen of any state because he is also a national citizen had the right, Bradley concluded in the 1870 opinion, to enjoy the same corpus of rights and privileges within the state and as defined by that state, as any other citizen. The 14th Amendment not only required intrastate equality, in Bradley's understanding, but demanded that those privileges and immunities be protected by the state.

**Enforcing the Law: U.S. v Hall**

As Woods noted in reporting the *Slaughterhouse* decision, Bradley had interpreted the 1866 Act and the 14th Amendment without benefit of precedents. Though he must have known enforcement legislation was pending in the Congress, he did not know that the first of three enabling statutes known collectively as the Enforcement Acts had become law. The first act, passed May 31, two months after the ratification of the 15th Amendment, was the most comprehensive element of the enforcement program. It focused on the franchise as the surest means of securing the war's outcome in law and was designed to "enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." The new law reenacted the Civil Rights Act, thus addressing the
problem Bradley had faced concerning the utility to the Amendment's enforcement of an act which predated ratification. The May 31 act defined the various unlawful means by which citizens might be kept from voting, established fines and penalties for those crimes and established a mechanism for enforcement, placing this responsibility primarily with local officials of the new Department of Justice. The law's twenty-three sections were directed at five goals. First, all cases arising under the act were to be pursued in the federal courts. Second, local and state election officials were proscribed from discriminatory performance of their duties. Third, the law made it a felony for persons to go in "disguise on the public highway or premises of another with intent to injure or intimidate." Fourth, federal marshals and commissioners were authorized to deputize bystanders, organize posses or call out militias or military forces as necessary to ensure enforcement of the new amendments. Finally, anyone seeking to influence black voters by threat or bribery, or seeking to deprive any black citizen of his political rights by threatening his employment or his accommodations could be prosecuted in the federal courts.

The second of the Enforcement Acts, designed to address voting frauds in urban areas, became law in February, 1871. This law was directed toward election abuses in northern
cities such as the Tweed scandals of 1868. The third in the enforcement series was the Ku Klux Act of April, 1871 directed at terrorist activities in the South. This law committed the federal government to put an end to "conspiracies" which sought to undo Reconstruction aims through organized harassment and intimidation of blacks. Its goal was to break the back of Klan organizations throughout the South. In the Congressional debates over the Klan bill, Republican Congressman George F. Hoar of Massachusetts quoted from Bradley's circuit opinion in Slaughterhouse in his vigorous defense of the appropriateness of the means by which Congress sought to enforce the 14th Amendment. Bradley had acknowledged the care that must be taken by the federal government not to interfere with the legitimate police power of the states. At the same time, Hoar paraphrased Bradley, states must not be allowed to interfere with the fundamental privileges and immunities of citizens of the United States and Congress had the power to assure that in law.

It is against this background that the next phase in Bradley's civil rights jurisprudence can be measured. The context was U.S. v Hall, a little known case which had come before Judge Woods in the circuit court of the Southern District of Alabama in the summer, 1870. Woods' decision was the earliest judicial reaction to the enforcement
Bradley was not directly involved in the case, but his views on the issues, solicited by Woods, were fundamental to the decision.

Under the act of May 31, two white Alabamans, John Hall, Jr. and William Pettigrew, had been indicted on two counts. The first charged the two had conspired "with intent to injure, oppress, threaten and intimidate . . . several U.S. citizens. . . with intent to hinder their free exercise and enjoyment of the right of freedom of speech." The second count charged the defendants with a similar conspiracy to hinder another group of citizens in their right to assemble peaceably. The case came before Woods on a demurrer to the indictment claiming that the charges were not in violation of any rights or privileges granted or secured by the U.S. Constitution, nor were they in violation of any act of Congress or federal statute since neither the 14th nor the Civil Rights acts could penalize what was essentially a private action.81

While Woods had the case under consideration, he corresponded with Bradley to seek the Justice's views on the issues. In January 1871, Bradley offered Woods his first comment on the issue.82

Your letter of December 24, 1870 was duly received. I answer it as soon as I can get the opportunity. You say that "a peaceable Republican meeting held in Eutaw, Green Co., Alabama for political discussion was broken up and dispersed by a number of men who, armed with revolvers fired
into the crowd, killing two and wounded over fifty, and you ask whether such conduct constitutes an offense against the 6th section of the enforcement act passed May 31, 1870, whether the breaking up of a peaceable political meeting by violence, is a preventing or hindering the free exercise or enjoyment of a right granted or secured by the constitution or laws of the U.S?

Next Bradley reviewed the relevant constitutional provisions. There were no provisions in the Constitution or in the statutes, he thought, that secured the right to assemble for political discussions or for any other purpose. "They only contain a prohibition against a state from interfering with such rights, included as one of the privileges and immunities belonging to all citizens. As he had done in the Slaughterhouse opinion, Bradley reiterated the caution with which one must approach any infringement on the state's traditional role in providing for the public safety. Ordinary crimes, Bradley continued, such as murder, robbery and riot could only be addressed by state governments. "Congress can only interfere where some offense is offered to the sovereign or justice of the United States." This was a key factor in the case Woods presented. The offense was not merely the firing into a political meeting, Bradley thought. That would be a private municipal offense for which any redress must come from the state. This offense was the firing into a political meeting for the purpose of preventing persons from exercising the right of
suffrage a right secured by the 15th Amendment. "The act done was evidently an attempt by force, threats and violence to prevent citizens of a certain class from voting, under the 4th section of the Enforcement Act. It was also evidently an attempt to prevent persons from exercising the right of suffrage, to whom it was guaranteed under the 15th Amendment, under the 5th section of the said act and if there was a banding of confederating together, it was a conspiracy under the sixth section."

Woods left the Hall case pending through the first of the year. Bradley's January letter had not fully addressed the issues, and Woods wrote a second letter asking for further guidance. Bradley's response of March 12, included a more detailed discussion of the Enforcement act. Woods had directed Bradley's attention to the 6th section particularly, which made it a felony for "two or more persons to conspire together, or to go in disguise, with intent to prevent a citizen from registering or voting, or to injure or intimidate him to prevent the free exercise and enjoyment of any right or privilege secured to him by the Constitution or the laws of the U.S."

Woods was particularly puzzled by just how obvious the link needed to be between the intimidating act and voting rights. Would it still be a felony he asked Bradley, if a peaceful political meeting had been broken up by riot and
murder simply for that purpose, with no specific intent to prevent the injured parties from voting? Woods wanted to know if this situation could be covered by the First Amendment guarantee that Congress could make no law abridging the right of peaceful assembly.

The First Amendment right, Bradley answered, is a right secured by the Constitution. "True, it is a right secured only as against the actions of Congress itself. But, still, it is a right that is secured." Where Congress is prohibited from interfering with such a right by legislation, Bradley asked, is Congress authorized to protect that right by legislation. Before the passage of the 14th Amendment, Bradley thought, this active role in protecting such rights was left to the discretion of the States or the people. The 14th had altered this arrangement. Its first section had secured the privileges and immunities of citizens against abridgement by the states, nor "shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

Now, Bradley continued, Congress has the right by appropriate legislation to enforce and protect fundamental rights of citizens against unfriendly or insufficient state legislation. For Bradley, the 14th was an active constitutional guarantee. It not only prohibited states
from making laws that would abridge the privileges of citizenship, but it prohibited them from denying the equal protection of the laws through appropriate state action. In other words, states were required to take positive action with necessary to assure equal protection. Denying equal protection included state inaction, Bradley wrote, "the omission to protect as well as the omission to pass laws for protection."

To secure the Amendment's intent against state invasion, to assure adequate protection against state inaction or incompetency, the Amendment had given Congress the power to put forth appropriate enabling legislation. This legislation could work directly on individuals. "Since it would be unseemly for Congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses to protect the rights the Amendment secures."

Bradley was aware that the Congressional role provided for in the 14th Amendment was taking the federal government into an area historically reserved to the states. Still, the goal was important enough to require redrawing traditional federal/state boundaries in the arena of citizens' rights. If Congressional action should seem to interfere with a state's domestic affairs, he wrote to
Woods, "it must be remembered that it is for the purpose of protecting federal rights: and these must be protected whether it interferes with the domestic laws or domestic administration of laws." The case at issue, Bradley concluded, was within the law, and the law was within the legislative power of Congress.

Bradley's only other comment on the case appears to have been an untitled piece outlining the provisions of the Enforcement act as related to the 15th Amendment. The piece is not dated but the final paragraph contained a summary of the facts in the Hall case. The facts are useful as an indication of the growing level of violence in the South in reaction to freedmen's efforts to collect the war's debt. They are also useful as an indication of Bradley's reaction.

Shortly prior to the late annual election in Alabama, a public meeting was held at Eutaw, Green Co in that state, to discuss political questions preparatory to the said elections which meeting was largely composed of colored persons, of African descent, and formerly slaves. Several white persons to the number of fifty or more at nearly the close of the meeting fired pistol shots very rapidly into the meeting and killed and wounded a large number, and causing those who were in attendance to fly for their lives. If this dastardly and savage act was the result of a conspiracy to intimidate the persons attending the meeting from voting at the coming election, it seems to me that it was a violation of the foregoing act, and punishable as a felony under the 8th section thereof.
Bradley may have sent a copy of this paper to Woods or he may simply have used the draft as a means of clarifying his thinking before he wrote the March 12 letter offering his guidance.

Bradley's correspondence set Woods' mind at ease on the Hall decision. Woods' opinion in the case overruled the demurrer to the indictment and repeated Bradley's rationale almost verbatim. Under the 14th Amendment, Woods wrote, the rights of freedom of speech, and the other rights enumerated in the first eight articles of the amendments to the Constitution and the privileges and immunities of citizens of the U.S. are now secured by the Constitution against action by the states or the federal government. Further, Congress has the power to protect them by appropriate legislation. The Enforcement act is appropriate legislation to the end in view the protection of the federal rights of citizens of the U.S. In suggesting that the specific guarantees of the Bill of Rights should be read into the broader generalities of the 14th Amendment, Bradley through Woods' opinion advanced a position on the "original understanding" of the Amendment and the intent of its framers that has been virtually ignored in the literature of "incorporation" theory.

The Hall case is an important element in the history of civil rights jurisprudence and in the evolution of Bradley's understanding of the Reconstruction Amendments, but
officially of course, it was credited to Judge Woods. Bradley's first statement on the origins and intent of the 14th Amendment had come in his 1870 circuit decision in the Slaughterhouse Cases. Bradley's dissent from the Supreme Court decision in those cases three years later marked his most thorough and far reaching discussion of the Amendment's reach. With that dissent, the first phase in Bradley's judicial reaction to the new Amendments' scope had come full circle. The initial effect of the majority decision in Slaughterhouse was to restrict the focus of the 14th Amendment's broad guarantees only to freedmen and only to state action. Ironically, that decision was counterpoint to the gradual erosion of the Amendment's guarantees of equality of citizenship that was increasingly evident by 1873. Bradley continued to figure prominently in both aspects of this process. The following chapter examines that decision and Bradley's dissent, and his role in a series of cases most fundamental to the judicial dismantling of the war's legacy of equality.
CHAPTER FIVE

THE WANING COMMITMENT: SLAUGHTERHOUSE TO CRUIKSHANK

Slaughterhouse II: Bradley Rebuffed

Bradley's circuit opinion in Slaughterhouse had effectively reversed the Louisiana court's decision validating the butchering monopoly. Before Bradley entered the New Orleans proceedings, the cases had been appealed to the United States Supreme Court by a group of butchers excluded from the monopoly's privileges. After the circuit hearing, the Crescent City interests, to whom the monopoly had been given, joined the appeal. Pending the high Court's consideration, Crescent City was permitted to implement its concession. In December 1870, the Supreme Court considered and rejected, with Bradley dissenting, the excluded butcher's appeal to have the monopoly privileges suspended pending the Court's full hearing on the issues. The case was set for argument in January 1872, with J.Q. A. Fellows and John Campbell appearing, as they had in New Orleans, for the plaintiffs, known collectively as the Benevolent Butchers' Association. Senator Matthew Carpenter and Thomas J. Durant represented the Crescent City Company. After the initial hearing, the cases were continued for another year, during
which time, three of the original five suits were settled out of court.²

Rearrangement on the remaining cases was scheduled for early February 1873. The Supreme Court's decision, announced two months later, overruled Bradley and affirmed the original decision of the Louisiana Supreme Court. By a vote of 5 to 4, the Court upheld the state's right to restrict animal slaughter in New Orleans to a single abattoir and to grant a single company monopoly privileges within the restricted area.

Justice Samuel Miller wrote the opinion for the majority, in sum rejecting the appeal of the Benevolent Butchers for relief under the 13th and 14th Amendments and upholding the state's action as a legitimate exercise of the state's authority to assure the health and safety of its citizens. Miller traced the history and contents of the last three Amendments. Their purpose, he wrote unequivocally, was:

. . . Freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Miller was not prepared to say that only freed slaves could share the Amendments' protections, but certainly the language and spirit of each would have to have their fair weight in any consideration. In Miller's rendering, this language and spirit led to the conclusion that the aggrieved
butcher's claims were not within the narrow scope of the
Amendments' reach.

Miller quickly dismissed the plaintiff's argument that
the Louisiana law had forced them into involuntary
servitude. The 13th Amendment was designed to prohibit any
form of slavery, he wrote, and had nothing whatever to do
with butchering laws in Louisiana. The heart of Miller's
opinion was a narrow construction of the 14th Amendment
based on the distinction he drew between rights derived from
state as opposed to national citizenship. State citizenship
was primary in Miller's hierarchy, and with the exception of
a few basic restrictions, the entire domain of privileges
and immunities of citizens of the states lay within the
constitutional and legislative power of the states and
outside the authority of the federal government. The 14th
Amendment was not designed, Miller continued, to transfer
the security and protection of these state-derived rights to
the federal government. Virtually ignoring the due process
and equal protection aspects of the plaintiff's argument
"since these had not been much pressed in these cases,"
Miller dismissed the plaintiff's appeals and affirmed the
monopoly legislation as an appropriate exercise of
Louisiana's police power.

Justices Field, Swayne and Bradley wrote separate
opinions in dissent. The ailing Chief Justice (Chase died
within a few weeks) simply concurred in Field's dissent.
Although the dissents, particularly Field's, are important
to the legal history of the 14th Amendment, Bradley's opinion is of primary interest in the present context. A majority of his brethren had rejected the views he put forth in the circuit case three years earlier. That earlier opinion had been hastily drawn and Bradley's reasoning somewhat circular, but he had not abandoned his basic understanding. Now in dissent, Bradley concentrated on his broad reading of the 14th and his statement was a model of his thorough and tightly reasoned style. This time he did not mention the 13th Amendment or the Civil Rights Act of 1866, which had been essential to the enforcement of the 14th Amendment in his circuit opinion. The 14th, he now believed, "would execute itself."

The "simple question" in the case, Bradley began, was whether the Louisiana statute abridged the privileges and immunities of citizens of the United States, in the persons of the plaintiffs. The answer to this question depended on two others. Was it a right of a citizen of the United States to pursue such civil employment as he may choose subject to reasonable regulations and second, is a monopoly such as the one granted in this case, a reasonable regulation of employment?

In answering, Bradley reversed the order in Miller's dual citizenship formula. The 14th Amendment underscored the primacy of national citizenship, he thought. State citizenship was secondary and derivative. Bradley then discussed the privileges and immunities of citizens of the
United States at some length, and as he had in the circuit, read the Bill of Rights guarantees into the broad language of the 14th. The new Amendment, he argued, protected these fundamental rights from abridgment by the states, as the original Constitution had protected them from action by the federal government. But even if the Constitution had been silent in enumerating the rights, they would be no less real. They could be traced through the English legal tradition to Magna Charta. The Constitutional guarantees were not grants of rights but rather protections. The effect of the 14th Amendment then was not to confer new rights, but simply to expand the protection of those rights to include prohibitions of state actions against them. In sum,

it was the intention of the people of this country in adopting that amendment to provide National security against violations by the states of the fundamental rights of the citizen.

Against this background, Bradley placed the primary question before the Court. Was the "right, liberty or privilege" of choosing one's own lawful employment among the rights of a citizen of the United States. Bradley was unwavering in his judgment that the "right of any citizen to follow whatever lawful employ he chooses to adopt, [subject to all lawful regulations] is one of his most valuable rights and one which the legislature of a state cannot invade, whether restrained by its own constitution or not."
The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and condition of things, in which American citizenship should be a sure guarantee of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to freemen, without fear of violence or molestation.  

Bradley's eloquence underscores the irony that the "strong National yearning" he envisioned would in fact point the way to the ideas and interests in substantive economic due process that would dominate the Court's thinking in the coming decades. His dissent is important in two ways. First, his understanding of the applicability of the 14th Amendment to situations not specifically related to the rights of freedmen embraced the broader ideas and issues that are the heart of any larger understanding of the Reconstruction experience and the energies released in its wake. Second, and more specific to Bradley's career, his 1873 dissent was symbolic of his most advanced understanding of the sweeping reach of the Reconstruction amendments and the supremacy of federal authority in enforcing their guarantees. Most important, Bradley's most far reaching statement of the amendments' purposes offers an important clue in seeking to understand why Bradley would begin, shortly after the Slaughterhouse decision to back away from
The monopoly granted to Crescent City by the Louisiana statute was an unreasonable abridgment of the aggrieved butchers' rights to pursue their professions.

Bradley's discussion of due process and equal protection was almost as brief as Miller's, but his conclusion, however simply stated was to become a watershed in the legal history of the Amendment.

...a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty and their occupation is their property.

It was a novel understanding, and in a way he could not have anticipated, Bradley's due process argument pointed the way to the theory of substantive economic due process that would justify the Court's hostility to state or federal regulation of business activity for a quarter of a century.

Finally, Bradley addressed Miller's restrictive reading of the reach of the wartime Amendments primarily to recently freed slaves. That may have been their immediate purpose, but the broader applicability, particularly of the 14th Amendment, was, in Bradley's mind, consistent with the framers' intent. Bradley thought the authors had purposely phrased the Amendment's guarantees in general terms, embracing all citizens. The framers had a larger goal in mind.
early commitment to securing the civil rights of freedmen. Bradley's devotion to the Union cause had not grown from any passionate concern over "slavery and its incidents and consequences." His opposition to slavery was real, but largely intellectual. What had moved him most profoundly in the decade before the war had been the "spirit of insubordination and disloyalty to the National government," culminating in secession, which was, for Bradley, the ultimate act of treason. In the ten years between Bradley's Slaughterhouse dissent and the Civil Rights Cases in 1883, that insubordination and disloyalty in its prewar form at least, would virtually disappear. Tragically, Bradley did not consider resistance to the Enforcement Acts as insubordinate or disloyal behavior. The terrible cost of reknitting the national fabric would be to deny the war's legacy to those whose freedom it had been fought to secure. Perhaps Bradley had a hint of the price that reunion would exact in his colleagues' rebuff of its initial understanding of the 14th Amendment. Whether or not he consciously put a judicial finger to the coming breezes, he gradually began to back away from his early commitments to civil rights guarantees and to the power of the national government to enforce those guarantees.

In re Bradwell and Bartemeyer

Bradley's minority opinion in Slaughterhouse was a model of the precise reasoning and thorough logic that
characterized his jurisprudence. Thus, it is tempting to use that dissent as the beginning point from which Bradley's 14th Amendment views can be traced, in a consistently linear fashion over the course of two decades. In fact, Bradley's response to the Amendment was considerably more fluid from the beginning, as two cases, Bradwell v. Illinois, decided immediately after Slaughterhouse in 1873, and Bartemeyer v. Iowa,11 which followed a year later, illustrate. Like Slaughterhouse, Bradwell and Bartemeyer grew from circumstances far removed from the exigencies of the war and its aftermath. For the present purpose, the cases deserve attention on two counts. First, they are representative of the variety of ways members of the legal community began to plumb the broad language of the 14th Amendment within months of its ratification. Second, Bradley's reaction in each case suggests that his perception of the rights and privileges of citizenship, argued so definitively in Slaughterhouse, was in fact very much in flux. From the beginning, Bradley was making exceptions and setting limits on the theoretical position he staked out in the New Orleans circuit decision and refined in the Slaughterhouse dissent. Before returning to Bradley's civil rights jurisprudence under the Amendments, a brief comment on these two cases is in order.

Bradwell had become a bellwether in the history of the legal rights of women.12 In 1868, Myra Colby Bradwell founded the Chicago Legal News and quickly established a
reputation as editor of the premier legal journal in the midwest. A woman of remarkable energy, political savvy and patience, Bradwell used the pages of the *News* to educate her audience in the need for reform in the law, for better education and higher standards for the bar and in legal issues relating to women. Shortly after founding the *News*, Bradwell applied for admission to the Illinois bar. She had read law with her husband James, a prominent Chicago lawyer and judge, and had passed the qualifying examination required for practice in Illinois. The Illinois Supreme Court, to whom her petition was addressed, acknowledged Mrs. Bradwell's superior qualifications but denied her application on the grounds that as a married woman she could not be held liable for contracts essential to any attorney-client relationship. For good measure, the state Court also noted that sex alone was sufficient reason to refuse Bradwell a license.

Bradwell appealed the Illinois ruling on a writ of error to the United States Supreme Court. It was her contention that the unequal treatment of married women in the Illinois law denied her the privileges and immunities of citizenship guaranteed by the 4th and the 14th Amendments. Bradwell's case was argued in January 1872, by her close friend, Senator Matthew Carpenter.

The previous month, Carpenter had participated in the *Slaughterhouse* arguments on behalf of the Crescent City monopoly interests. Although his own notes in that case
have not been preserved, his colleagues for the Crescent City defendants had urged a narrow construction of the 14th Amendment that would exclude protection for the aggrieved petitioners. Now on behalf of Mrs. Bradwell, Carpenter moved to the other side of the argument. The constitutional right of a married woman to practice law in the state of her residence, he began, was not a question of "taste, propriety or politeness." It was a constitutionally protected civil right.15 Carpenter was careful to separate the issue at hand from the right of women to vote. Though he personally favored the vote for women he told the Court, there were those who assumed it would "overthrow Christianity, defeat the ends of modern civilization and upturn the world." In any case, he acknowledged that legislative debate over the 14th and 15 Amendments and the adjudication under the "old constitution" had established that the right to vote was a political rather than a civil right and could not be construed as included among the national privileges and immunities of citizenship. Carpenter took pains to make the distinction in order to "quiet the fears of the timid and the conservative." Thus Carpenter placed the "narrower and more precise question" before the Court:

... can a female, duly qualified in respect of age, character and learning claim under the Fourteenth Amendment, the privileges of earning a living by practicing at the bar of a judicial court?16
In support of his argument, Carpenter turned to two recent decisions. In *Cummings v Missouri*,\(^{17}\) an 1867 case invalidating a provision of the Missouri Constitution requiring voters, professionals and office holders to swear they had not participated in the rebellion, the Court had written that "in the pursuit of happiness all avocations, all honors, all positions are alike, open to everyone and that in the protection of these rights all are equal before the law." In another 1867 case, *Ex parte Garland*,\(^{18}\) the Court had established that attorneys were officers of the Court, and as such were admitted to practice upon evidence of their possessing sufficient legal learning and fair private character. They hold their offices, the Court had held, during good behavior and can only be deprived of that office in the case of misconduct. As with medical or clerical professions, Carpenter argued, the practice of law was a vocation open to every citizen of the United States, the legislature might fix the qualifications for such vocations, but it could not exclude whole classes of citizens.

Next Carpenter attempted to link Bradwell's claim to the Reconstruction Amendments' more specific protections for blacks. If the legislature could bar women from the practice of law, Carpenter told the Court,

\[\ldots\text{it may as well declare that no colored citizen shall practice law, for the only provision of the Constitution which secures to colored male citizens the privilege of admission to the bar, or the pursuit of}\]
the other ordinary avocations of life, is the provision that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen.¹⁹

Would the Court not void a rule that only white citizens could practice law, Carpenter asked? The 14th Amendment spoke of the privileges and immunities of citizens. It did not distinguish between their colors, their profession or their sex. "The profession of the law, he concluded, "was an avocation open to every citizen of the United States." Women were citizens too, and Bradwell, if otherwise qualified could not be denied a license to practice law. Carpenter thought his conclusion "irresistible."

In fact, the Court found Carpenter's argument very resistable, and with the exception of Chief Justice Chase who dissented without opinion, voted unanimously to reject Bradwell's appeal.²⁰ The Court's lengthy opinion in Slaughterhouse, which immediately preceded the Bradwell ruling, had defined the privileges and immunities of citizenship in a relatively narrow, state centered context. That opinion, Justice Miller wrote for the Bradwell majority, rendered elaborate argument unnecessary. For Miller and the majority in the butchers' case, an extension of the Slaughterhouse logic brought them quickly to the conclusion that Mrs. Bradwell had no standing under the constitutional language she cited. "The right to control and regulate the granting of a license to practice law in the courts of a state is one of those powers which are not
transferred for its protection to the federal government,' "
Miller wrote.21

For Justices Bradley, Field and Swayne, who had
dissented from the Court's narrow reading of the 14th
Amendment in the Slaughterhouse Cases, and who now joined
the majority, the rejection of Mrs. Bradwell's 14th
Amendment claims required further justification. Bradley
wrote a separate opinion on behalf of the three, concurring
in Miller's rejection of Bradwell's claims, "but not for the
reasons specified in the opinion." Bradley did not dwell on
the common law contractual disabilities of married women or
the privileges and immunities of citizenship that had been
the basis of Miller's opinion. Rather, Bradley's concern
was the privileges and immunities of sex. "It cannot be
affirmed as an historical fact," he wrote, "that [the right
of females to pursue any lawful employment, including the
practice of law] has ever been established as one of the
fundamental privileges and immunities of sex." On the
contrary, Bradley continued,

. . . the civil law, as well as nature herself has
always recognized a wide difference in the respective
spheres and destinies of man and woman. Man is or
should be woman's protector and defender. The nature
and proper timidity and delicacy which belongs to the
female sex evidently unfits it for many of the
occupations of civil life. . . The paramount destiny
and mission of woman are to fulfill [sic] the noble and
benign offices of wife and other. This is the law of
the Creator. . . .22
Bradwell made no further attempt to gain admission to the bar, although her efforts in behalf of women and reform in the law continued until her death in 1894. Bradley was equally unbending in his views on the issue. By his opinion in the Bradwell case, he established himself as a prototype of wrongheadedness among partisans of women's rights. Bradley's 14th Amendment views evolved considerably over the course of the next two decades, but for the record, he would apply his broad reading of the 14th Amendment generally only to men.

The second case in this context, Bartemeyer v Iowa represented the efforts of Oscar Bartemeyer, an Iowa saloon keeper to overturn his prosecution under a state law forbidding the keeping and sale of intoxicating beverages. Bartemeyer's counsel based his circuit appeal on a range of constitutional provisions, but his appeal to the United States Supreme Court rested primarily on his claim that the Iowa prohibition statute was a violation of the privileges and immunities of citizens of the United States. Further, Bartemeyer's conviction under the state statute had deprived him of due process of law guaranteed by the 14th Amendment.23

The Court's rejection of Bartemeyer's appeal did not come until 1874, almost a year after the decisions in Slaughterhouse and Bradwell. It is clear, however, that the Court was cognizant of Bartemeyer's petition as it considered these earlier cases. The printed arguments in
Bartemeyer, (the case was never argued orally) had been submitted in February 1872, a month after the first oral arguments in the butcher's case. In this first round, Bartemeyer's writ of error was dismissed as improperly filed. Printed briefs were again submitted in December 1872, six weeks before the second round in the Slaughterhouse litigation. Finally, in March 1874, the Court rejected Bartemeyer's appeal out of hand, on grounds that Justice Miller agreed were "narrow and technical," without addressing the constitutional aspects of the case. The printed record, Miller wrote, gave the Court

. . .the strongest reason to believe that it had been prepared from the beginning for the purpose of obtaining the opinion of this Court on important constitutional questions without the actual existence of the facts on which such questions alone can arise.\textsuperscript{24}

The Justices were well aware of the import of their first pronouncements on the new amendments and they were not prepared to involve themselves in a case like Bartemeyer's with its slender record, generally specious arguments and a morally dubious claim involving the rights to keep a saloon. As Professor Fairman has written, "those Justice who were appalled by the magnitude of what was already before the Court, were anxious to prevent consideration being overwhelmed" by the inclusion of arguments involving prohibition.\textsuperscript{25}

As they had in Bradwell, the three Slaughterhouse dissenters concurred in Miller's decision in Bartemeyer.
Also, as they had in Mrs. Bradwell's case, the dissenters felt a need to add an additional justification. Again, Bradley wrote for Swayne and Field. It was his purpose, he began, to state briefly and explicitly the grounds on which he distinguished this present case from Slaughterhouse, so there would be "no misapprehension of the views entertained in regard to the application of the 14th Amendment."26

The 14th Amendment, Bradley wrote, had made it fundamental law that life, liberty and property were sacred rights, guaranteed by the Constitution to the humblist citizen against oppressive state or national legislation that might seek to deprive him of those rights without due process of law. The Louisiana monopoly had been legislation of just that sort, Bradley thought. The notion that the slaughterhouse legislation was a police regulation was in error, he continued. Under that guise, the state had created an unconscionable monopoly, deemed by the dissenters as an invasion of the rights of the citizens to pursue his lawful calling.

Having reaffirmed his broad interpretation of the 14th Amendment, Bradley was quite willing to join his brethren in dismissing the intemperate appeal of Oscar Bartemeyer. The claim of a right to sell a prohibited article, wrote this pillar of the New Jersey temperance movement, cannot be considered a privilege of citizenship, state or national. It is completely different from the right not to be deprived of property without due process of law, or the right to
pursue such lawful avocations as a man might choose, unrestricted by tyrannical or corrupt monopolies. This was a distinction that, in Bradley's view, the majority had lost sight of in the Slaughterhouse Cases. Though he joined them now in dismissing Bartemeyer's appeal, he wanted it clearly understood that he had not backed away from his belief that the 14th Amendment fully protected the right of a citizen [except for women, it might be added] to pursue a lawful calling. Against the backdrop of Bradley's understanding of fundamental privileges and immunities of all citizens, his evolving attitude toward civil rights guarantees for black citizens can be brought back into focus.

Civil Rights Rentree

The previous chapter concluded with Judge Woods' 1871 circuit opinion in U.S. v Hall. The Hall case challenged the constitutionality of legislation designed to secure primarily to southern blacks, the civil rights guarantees of the new Amendments. In a few brief paragraphs, Judge Woods had upheld the conviction of two white men who, with others, had broken up a peaceful meeting of black Republicans in Greene County, Alabama, killed two of them and injured several others. Woods' opinion gave the federal courts' imprimatur to the first of the Enforcement acts, underscored the right of Congress to secure the war's legacy in the law and most fundamentally, suggested that by the language of the 14th Amendment, a citizens' Bill of Rights guarantees
were now protected against state as well as national encroachment. Although *U.S. v Hall* is rarely cited as more than a footnote in the history of civil rights jurisprudence, it was, as suggested in the previous chapter, a watershed decision. *Hall* was in essence Bradley's decision, for he quite literally supplied to Woods both the substance and the language of the judgment.

*U.S. v Hall* represented a beginning in the development of Bradley's civil rights philosophy. He did not write another race-related civil rights opinion, even indirectly, until 1874. In the intervening years, Bradley concentrated his efforts on defining the fundamental rights of all citizens, as reflected in the *Slaughterhouse* dissent. He had not backed away from the sweeping notion of the Amendments' protections for black citizens stated in *Hall*, but by 1874, Bradley's enthusiasm for those issues had begun to mirror the national mood.

**The Waning Commitment**

It is not clear from the records of the Justice Department whether Hall and Pettigrew were ever convicted for their role in the Greene Country riot. Certainly, many of their counterparts in similar circumstances were fined and or imprisoned in the summer of 1871. Although southern juries were reluctant to send white men to prison for intimidating or even murdering ex-slaves, the federal effort at enforcement was generally vigorous though 1873. In the
first six months of 1870, three-fourths of the States ratified the last of the new Amendments. Also, Congress passed the first of the enforcement acts and established the new Department of Justice, giving the Department specific responsibilities for enforcing the Amendments' guarantees in the southern states, had come into being.

In his report to Congress for 1870, Attorney General Amos Akerman reported that 43 criminal cases had been brought under the enforcement acts and of these the Department's attorneys had won 32 convictions. In the 1871 report, Akerman told the Congress that special attention had been given to the enforcement program. The statistics he provided bore out his statement. Of the 879 cases brought under the enforcement acts, 128 had resulted in convictions, with 46 acquittals and 140 dismissals. The remaining cases had been continued. The Department's report for 1872 was equally positive. There had been 456 enforcement convictions, 40 acquittals and 351 dismissals. Dismissals and continuances did not worry Attorney General George Williams, Akerman's successor at Justice. Simply bringing the cases, Williams told the Congress, would be a deterrent, and he expressed the hope that it would not be necessary to try many of the 350 cases still pending since so many of those indicted were simply "young and ignorant." Overall, Williams continued, the passage of the acts and prompt and active prosecution had "had a most salutary effect."
Williams' cheerful report contrasts starkly with the Justice Department's records for those years. While the Department's enforcement program was initially vigorous, given the circumstances and the resources available, violations were commonplace. The Department's files for 1870-73 reflect the widespread activities of the Klan, the frequent "outrages" in every southern state and the overwhelming difficulties facing federal officials seeking to enforce the law.

By 1873 and 1874, prosecutions were dropping dramatically. The Department's statistics for these years provide the evidence. After 1874, convictions averaged less than 10 percent of the cases brought in the southern districts in any year. Most cases were continued at some length and then dismissed. The reasons were complex, beginning with the increasing lack of interest on the part of Congress and the Executive branch in the price that would have to be paid in order to continue a meaningful enforcement program. The price was to return federal troops to the South and to keep them there indefinitely. As dozens of impassioned letters from federal marshals, commissioners and district attorneys attested, the laws could not be enforced without the continuing presence of federal troops. Witnesses feared for their lives and in most cases could not be compelled to testify. Juries willing to hear enforcement cases fairly were almost impossible to assemble.29

Moreover, as one scholar has phrased it, the techniques of
southern resistance were changing. Klan outrages, which had given primary impetus to the enforcement legislation had begun to give way by 1874, to more subtle forms of intimidation and discrimination, as southerners gradually regained control of state and local governments.30

A major reason behind the demise of the enforcement program was a series of judicial interpretations that had begun to narrow the reach of the new Amendments. One of the crucial cases in this dismantling process was a 5th Circuit case, U.S. v Cruikshank31 that would reach the Supreme Court in 1876. It was the circuit decision, however, that was particularly influential in shaping federal enforcement policy. At the circuit level, the case was known as the Grant Parish Cases, and once again, Bradley sitting with Woods, figured prominently.32 The details of the case are worth attention, not only for the background they provide to the Court's landmark decision in Cruikshank, and for the effect the case had from its beginning on the implementation of the enforcement program. Although Bradley's opinion in the case continued the reasoning he had developed in his advice to Woods in U.S. v Hall, Bradley's part in the Hall decision was largely unknown to his contemporaries. His more prominent role in Grant Parish would in the end, cast doubts on the constitutionality of the legislation in question and give unwitting support to the enemies of enforcement.
The Grant Parish case arose from one of the bloodiest incidents in postwar Louisiana history. In 1869, the Republican-dominated state legislature created a new parish along the Red River in northwest Louisiana, about 350 miles from New Orleans. The parish was named for President Grant and the county seat, actually a number of outbuildings on the plantation of Republican loyalist William Calhoun, was named for Vice President Colfax. From the time of its founding, racial violence in the Grant Parish community, divided almost equally between blacks and whites, was commonplace. By March 1873, sparked by a dispute over the appointment of local officials, the two communities were virtually at war. In early April, a group of blacks organized as a posse by one of the contenders for sheriff, took control of the courthouse in Colfax. Opposition elements harassed the Colfax defenders for several days and then on Easter Sunday, April 13 several hundred armed men lay siege to the courthouse, eventually burned it and killed a number of escaping blacks. News of the incident was unusually widespread and the Justice Department commissioned an investigation. As a result, indictments were secured against seventy-two white men under the provisions of the May 1870 enforcement act. The indictments charged the accused "with murder in the commission of offenses punished by the 6th and 7th sections." To bring indictments in such a case was one thing, to serve them another, as District Attorney J.R. Beckwith reported to the Attorney
General. Writs for the arrest of the perpetrators had been in the hands of the U.S. Marshal for some time, Beckwith wrote in early June 1873. "It has never been my fortune to be connected with the prosecution of a case so revolting and horrible in the details of its perpetration and so burdened with atrocity and barbarity." To keep the tragedy from repeating itself, Beckwith continued, would require prompt and sure punishment of the guilty, which could only be accomplished with a mounted posse. Beckwith asked Williams to secure help from the War Department in making arrests.\textsuperscript{35}

In September, five months after the incident, Governor Kellogg agreed to supply the Marshal with a "detachment of mounted militia of sufficient force for purposes of pursuit."\textsuperscript{36} Of the original seventy-two indictments, nine arrests were made. One of those arrested was C.J. Cruikshank, whose name would be attached to the case. The nine were brought before Judge Woods and a jury in early 1874. The jury was unable to reach a verdict and the trial was rescheduled for May.\textsuperscript{37} Bradley was making his regular summer trip to the circuit and agreed to hear the case with Woods. The case was heard May 18, 19 and 20. Six of the indictments were dismissed and guilty verdicts were returned against three others. Bradley heard the trial and left New Orleans immediately for Texas. After his departure, the defense moved to arrest the judgment. Although he did not hear these motions, Bradley prepared the opinion. In mid-June, he recorded in his diary that he spent the better part
of two weeks "revamping, printing opinion in the Grant Parish case, preparatory to motion in arrest of judgment."
He returned to New Orleans June 27, delivered his opinion and left for Washington.38

From the beginning, Beckwith was unhappy with Bradley's decision to participate in the case. The Justice had been encouraged to participate by the defense, Beckwith thought, and that was an ill omen. "There is reason to believe," he wrote Williams on June 25, "that Justice Bradley will, to what end God only knows, decide the enforcement acts unconstitutional and cause a division of the Court. If he does, his action will cause 500 lives between now and November." Beckwith was not certain whether Bradley would send back an opinion or leave the case to Judge Woods. Either was a dismal prospect for the District Attorney.

If he does not participate in the decision, the effect will be just as serious. . . ., and I fear through is agency the import is here that his opinion is against the Constitutional authorization of Congress to adopt the act and his silence will be so construed. It was an ill starred hour for this state when he put in his appearance in this circuit in time to muddle with the trial. His presence in the district was to me a nightmare while he remained.39

Beckwith's complaint is fascinating. What evidence he had that Bradley might rule against the constitutionality of the enforcement acts is not known. Although he was probably not acquainted with Bradley, he surely spent time on circuit business with Judge Woods who knew Bradley's initially favorable disposition to the enforcement acts from his
correspondence with Bradley in the Hall case.40 There was additional evidence available on Bradley's enforcement views. Woods surely knew, and Beckwith probably knew of Bradley's dissent in Blyew v U.S.,41 the previous year. Blyew had been the first case to reach the Supreme Court under the Civil Rights Act of 1866.42 It had been argued in February 1871, just at the time Bradley and Woods were exchanging letters on Hall, and decided in April 1872, a year before the Colfax incident. In the Blyew case, two white men had been indicted in the circuit court in Kentucky for the murder of an elderly black woman. They had been tried in the state courts, but under Kentucky law, blacks were not permitted to testify against white persons and thus witness to the murder, all of whom were black, had been compelled to silence.

The Blyew case had been removed to the federal courts under section three of the Civil Rights act which gave federal courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts of the state...any rights given to them by the act." The rights in this case included giving evidence and having full benefit of all laws enjoyed by white persons.

Justice Strong delivered the opinion for the majority, construing the act in the narrowest terms and overturning the circuit decision granting federal jurisdiction. The witnesses, Strong reasoned, even though they were black and
were denied the right to testify, were not persons "affected" by the cause. Neither was the dead woman affected since "manifestly the act refers to persons in existence"[43]

Bradley's dissent construed the act in much broader terms. Its purpose, he wrote, was to give persons of African descent "equality of rights and privileges with other citizens." To do this effectively, it was necessary to declare their equality, impose penalties for violations of that equality and taken an active role if necessary to counteract unjust and discriminatory state laws.44 Bradley argued that both the murdered woman and the witnesses, some of whom had been murdered and some of whom had been denied the right to testify, were all affected by the cause by reason of race.

To deny a whole class of the community this right, to refuse their evidence and their sworn complaints is to brand them with a bade of slavery. . . . If mere violence offered to a colored person [who was denied the privilege of complaint in Kentucky] gives the U.S. court jurisdiction when such violence is short of being fatal, then jurisdiction cannot cease when death is the result. The reason for its existence is stronger than before. . . .In order to give full effect to the National will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery would hardly have been a boon to the colored race. . . .45

"The power to enforce the Amendments by appropriate legislation," Bradley had concluded in Blyew, "must include the power to do away with the incidents and consequences of
slavery and to instate the freedman in the full enjoyment of that civil liberty and equality which abolition of slavery meant."^{46} It is difficult to believe that Beckwith had reason to be as concerned about Bradley's role in the case as he was before it was heard. It is more likely that Beckwith's reaction had less to do with what he anticipated would be Bradley's understanding of the enforcement legislation and more to do with Bradley's judgment on the way the District Attorney had shaped the case.

Bradley's opinion in Grant Parish did uphold the constitutionality of the May 31 act, but it dismissed the indictments as too vaguely drawn. Without opinion, Woods disagreed on dismissal and the case was certified to the Supreme Court on division. A few months later, Woods wrote to Bradley what he did not intend to try enforcement cases which raised issues similar to those pending before the court until "the Supreme Court lets us have its opinion."^{47} The Court's opinion would not come until late 1876, and by then, as Beckwith had feared, the enforcement program had lost its momentum.

Bradley's role in the circuit case can be examined in two ways. His opinion of course, provided the formal statement of his views on enforcement. That opinion is crucial to understanding the evolution of Bradley's views on civil rights issues and will be examined in some detail below. It is also intriguing to look at Bradley's less formal role, at least as perceived by Beckwith in a series
of letters he wrote to Attorney General Williams in the two months following the trial.

Beckwith was furious that Bradley had dismissed the indictments against the Colfax defendants. A week after Bradley's decision on the motion to dismiss, Beckwith expressed his anger to Williams.

It is clear from the printed copy of his opinion that he never read the indictments, but had taken some persons statement of its substance. . . The serious trouble with his action is, that while he exhibited a determination to demolish the law where he feels equal to the task, and to demolish the indictment where he cannot wrestle successfully with the law, he has not shed upon us any light or disclosed any rule by which a good indictment can be formed. If the demolished indictment is not good, I am incompetent to form a good one and would like your advice and direction whether any further attempt to enforce the law in this District shall be made before the action of the Supreme Court.48

It is not clear from Justice Department's records whether Beckwith was ever given an official answer to his request for guidance in pressing enforcement cases. A few days later, Beckwith wrote for permission to take two month's leave since "the duties at last term of court were very arduous and confining and I feel the need of relaxation. . . ."49

Beckwith's vacation did not ease his mind on Bradley's role. He returned to duty as angry at the Justice as he had been at the trial's end. On October 5, he fired off another salvo to Williams, enclosing a printed copy of Bradley's opinion and asking Williams to compare Bradley's comments on the vagueness of the indictments to the indictments
themselves. "You will see," he wrote, "that the opinion was written without a knowledge of the contents or form of that document." Further, Bradley's opinion had led to "serious and lamentable consequences and is still accepted by those engaged in the massacre as conclusive against the jurisdiction of the federal courts." 50

Two days later, Beckwith sent the Justice Department the certificate of division in the case. "No question more seriously connected with the order and future welfare of a large portion of the Union has been presented to the Supreme Court since the war," he told Williams.

The armed white leagues organized in the South from which most grave and serious danger and consequences may be apprehended sprung into life or received their only vitality from the action of Justice Bradley. In this case and if his views of the legislation in question are correct, some new expedient must be resorted to maintain quiet and protect the helpless in the late slave states. 1

The following week, Beckwith wrote Williams to ask about the timing of the Supreme Court hearing. The questions must be settled early he wrote, if further prosecutions are to be carried out under the act. Again, Beckwith could not suppress his anger at the Justice. "I am very much embarrassed by Justice Bradley's actions," he wrote. "If unreversed, jurors will make it an excuse to acquit under the popular belief that jurors are judges of the law and fact. A belief so general that it is difficult to overcome, particularly where jurors apprehend personal
danger or inconvenience in the event of a verdict of guilty." 52

Williams responded that the timing of the Supreme Court hearing on Cruikshank was unknown but not likely to take place before the following year. 53 On October 27, Beckwith wrote again to press for an early decision and to escalate his charges. In Beckwith's mind, Bradley was now the sole cause for the increasing violence. "The white league as an armed organization never would have existed but for his action," he complained, "and the immunity supposed to be found in his opinion of the law in that case."

The extent of trouble yet to grow out of this cannot be overestimated. The most serious immediate effect is its direct action on the Administration of Justice. While Bradley's actions stand unreversed, that fact together with the terrorism resulting from repeated acts of barbarity perpetrated for purposes of intimidation will render it impossible to get a jury in this district. . . . 54

In spite of Beckwith's consternation at losing the case on vaguely drawn indictments, Bradley's understanding of the amendments was as broadly conceived as any Republican ideologue might have wished. Not only had Bradley labored over the opinion for two weeks, but he was obviously pleased with these results and made a special effort to make them known. In a move uncharacteristic for the usually reticent Justice, Bradley circulated copies of the Grant Parish decision to the members of the Court, to the Judges in the 5th Circuit, to a number of Congressmen and Senators, to
several members of the Cabinet, including Attorney General Williams and to several friends. 55

Bradley's opinion deserves careful attention. First he reviewed the chronology. After Cruikshank, and his counterparts had been convicted of conspiracy under the 6th section of the Enforcement act, they had moved to arrest judgment on the grounds that the act was unconstitutional and that the indictments did not charge any crimes under the act. The main objection, the defense argued, was that the act was municipal in character, operating directly on individuals. There was no constitutional authority for such an act since the state's laws provided an adequate remedy for the alleged crimes.

Bradley then elaborated on Justice Story's opinion in *Prigg v Pennsylvania* sustaining the Fugitive Slave Act. That case had firmly established the power of Congress to enforce, by appropriate legislation, every right and privilege given or guaranteed by the Constitution. The appropriate legislation, Bradley wrote, depended on the nature of the right in question. "One method of enforcement may be appropriate to one fundamental right and not appropriate to another." 56 As he had advised Judge Woods in the *Hall* case two years earlier, Bradley reviewed the rights secured by the first eight Amendments. These rights were part of the fundamental birthright of every citizen and had not been created or conferred by the Constitution. The only duty of the federal government was to assure that these
rights were not abridged by government at any level. The affirmative enforcement of these rights "belongs to the state governments as a part of its "residuary sovereignty." Further, it is the states' responsibility only to pass laws for the general preservation of social order within its own borders. The Congressional responsibility was to assure that in doing so, the state did not trespass on the fundamental rights of its citizens.

Having prepared his ground, Bradley then moved to the recent amendments and elaborated the theory he had first enunciated to Woods in 1871, that the amendments provided Congress with an active role in their enforcement that had not previously been a part of the Congressional prerogative. The 13th Amendment had been a positive declaration that slavery should not exist. Congress had the unquestioned authority to legislate for "the entire eradication of slavery in the U.S." It had exercised that authority in the Civil Rights Act of 1866. That act had extended the right of citizenship and equality before the law to persons of every race and color ("except Indians not taxed and of course, excepting the white race, whose privileges were adopted as the standard.") In sum, Congress had the right under the 13th to "place other races on the same plane of privileges as that occupied by the white race." The Congressional right, of course, did not extend to ordinary crimes such as murder, robbery, assault, and theft unless the state denied the offending party the equal protection of its own laws covering those crimes.
Bradley then moved to the 15th Amendment. This Amendment was framed in the negative and was thus more difficult to adjudicate, Bradley wrote. The Amendment commanded that the rights of citizens to vote not be denied by the United States or by any state on the basis of race or color, and thus it seemed to Bradley at first reading to be governed by the rule that Congress had no duty to perform unless the state violated provisions of its own laws. Nevertheless, it conferred a positive right that did not exist before. The right conferred was not the right to vote. That remained a prerogative of state laws. The right conferred was the right not to be excluded from voting by reason of race, and that was a right Congress could enforce actively. 59

The central question at hand was how equal access to the franchise could be ensured. It would be pointless for Congress to pass laws forbidding the states from denying the right to vote. The Amendment provides that remedy, but that is of little help to the person entitled to vote. "It is clear," Bradley continued, "that the only practical way Congress can enforce the amendment, is by itself giving a remedy and giving redress." The power of Congress to act in this way did not depend on hostile state laws, nor was it prohibited from acting even though the laws of the state be in harmony with the Amendment. The Congressional mandate under the Amendment was exceptionally broad. Since the
Amendment substantially guaranteed the equal right to vote to citizens of every race and color, Bradley wrote

I am inclined to the opinion that Congress has the power to secure that right not only as against the unfortunate operation of state laws, but against outrage, violence, and combination on the part of individuals, irrespective of the state laws.60

This sweeping view Bradley hastened to add, was limited to issues of discrimination based on race. "The state may establish any other conditions and discriminations it pleases, whether as to age, sex, property, education or anything else." Bradley generalized the law on the subject in the following proposition.

The war of race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerilla or predatory form, or by private combination, or even by private outrage or intimidation, is subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the states, unless, indeed, the state, by its laws, denies to any particular race equality of rights, in which case the government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner. Unless this distinction be made we are driven to one of two extremeseither that congress can never interfere where the state laws are unobjectionable, however remiss the state authorities may be in executing them, and however much a proscribed race may be oppressed; or that congress may pass an entire body of municipal law for the protection of person and property within the states, to operate concurrently with the state laws, for the protection
and benefit of a particular class of the community. This fundamental principle, I think, applies to both the XIIIth and XVth amendments.

Bradley next turned to the 14th Amendment. As with the 13th and 15th, the power of Congress to enforce provisions of the Amendment depended upon the character of the privilege or immunity violated. When rights in question are violated by the passage of an abnoxious law, the law was void and all acts done under it would be violations, Bradley wrote. Congress' responsibility in this case would be "to provide a preventive or compensatory remedy or due punishment for such trespasses and appeal from the state courts to the U.S. courts." Conversely, there was no constitutional authority for Congress to provide for directly enforcing the privileges and immunities of citizenship of the U.S. by original proceedings in the federal courts where the only constitutional guarantee was the prohibition on the states from abridging such rights, where the states had passed no such laws and had on the contrary, passed laws to sustain and enforce the guarantees.

Having laid out his understanding of each of the Amendments, Bradley turned to the indictments. His goal was to test each of the counts against the principles he had just set forth. The first count charged conspiracy to interfere with the right to assemble peaceably for a lawful purpose. The 1st and the 14th Amendments had prohibited the violation of this right by either the states or the United
States. Congress had been given power to enforce the Amendments. The enforcement mechanism could only come into force however if the right had been violated by government at the state or federal level which was not the case in this instance. Thus Bradley dismissed this count. The second count named a conspiracy against the right to bear arms and Bradley dismissed it on the same grounds as the first. The third count charged a conspiracy to "deprive certain citizens of African descent of life and property without due process of law, but Bradley could find no evidence that the state had not provided equal protection of the laws. The crucial test would be whether due process and equal protection of the state's laws had been denied on account of race. That had not been proven and thus Bradley dismissed the third count.

The problem throughout, Bradley suggested, was in the framing of the indictments. It was a criticism aimed directly at the work of the federal prosecutor and in part, explains Beckwith's angry reaction over the ultimate decision. Race as the key ingredient could be inferred throughout from the indictments, Bradley wrote, "but it ought not to have been left to inference; it should have been alleged." The charge was not only defective, but "vague. . .informal and . . .and insufficient." Bradley dismissed the remaining eighth counts for similar reasons.

The problem had not been with the laws but with the failure of the indictments to tie the offenses directly to
the laws and most importantly to make race the central element. Nothing in Bradley's opinion denied the right of the national government to guarantee or protect the rights of blacks through legislation aimed at the actions of the states or at the private actions of individuals. The key in Bradley's reasoning was proof that the offense was racially motivated.

In a subsequent letter to Woods, Bradley summarized the effect of the Grant Parish decision. "Offenses committed by individuals against colored persons," he wrote, "were to be left for punisment to state laws, unless committed against some valid law of the U.S. or committed for purpose of injuring the colored person or account of his race or color." Congress was entirely free to protect citizens from oppression on account of their race. "The new amendments have the effect," he told Woods, "to give universal liberty and entire equality before the laws to persons of every race, color and condition. . . . These things Congress can enforce."63 Beckwith's fears about the regional effect of the Grant Parish Cases was accurate. Racial violence throughout the south had become commonplace by 1874. The Colfax tragedy and its outcome in law did nothing to stem this pattern, and because of its magnitude and national publicity, it was increasingly clear that the wars' aims secured by the Amendments in law could not be secured in fact without a continuing military presence in the southern states. Lacking that presence, the wonder was not that
there was one Colfax massacre, but that there was not one in every parish. Further, in Bradley's own thinking, he had backed off minimally from his sweeping advice to Woods in the Hall case, but his view of national enforcement authority, at least on the record, was still very extensive. He was increasingly less certain about the constitutionality and probably the practicality of efforts to direct Congressional enforcement authority at the acts of private individuals. To meet Bradley's enforcement criteria in light of Grant Parish, intimidation of black citizens had to spring from an overt racial motivation and that motivation had to be explicitly stated in the indictments.

Bradley's circuit opinion had been delivered in July 1874. Immediately, Beckwith had begun to agitate through his correspondence with the Justice Department for an early hearing by the full Court. Bradley was eager also to have the issue discussed more fully. A few weeks after he circulated the Grant Parish opinion, he exchanged letters with Frederick Frelinghuysen on on the underlying issues in the case. Frelinghuysen's letter is unavailable, but his point of view is reflected in Bradley's draft reply.64

Frelinghuysen's proposition was that the 14th Amendment had conferred national citizenship on all persons born or naturalized in the U.S. and conferred state citizenship of the state in which a person resided. Congress, by virtue of its power to enforce the Amendment could enforce all the rights, privileges and immunities which attached to such
citizenship. The major question remaining for Frelinghuysen was how to define those rights. Once rights were defined, it was as much the prerogative of Congress as the states to enforce and protect them. Frelinghuysen's concern was understandable. He was participating at the same time in Congressional efforts to draft new enforcement legislation (the Civil Rights Act of 1875) and must have been alarmed over the narrowing of Bradley's views since the Hall decision in 1871.

There was much force in Frelinghuysen's opinions, Bradley wrote to him. Bradley was not certain that Frelinghuysen's was not the "true view," but his own mind had become unsettled on the issue. Bradley agreed that the crucial factor was the definition of privileges and immunities. However defined, he was sure that the Amendment could not protect private rights. The rights of the individual he wrote, and the rights of the citizen were not identical.

An individual may be entitled to demand a sum of money from another as a debt. This is a private right. As a citizen he has a right to judicial proceedings for its collection. As an individual, a person may be entitled to compensation for an injury...as a citizen...to a means of redress therefor...as an individual...to certain specific property which he calls his...as a citizen he has the right to be protected from government interference with that property except by due process of law.

An individual's private rights could vary from time to time depending on circumstances. A citizens' rights were
always the same, Bradley thought. The rights of citizenship were those enumerated in part in the Civil Rights Act of 1866, in the "old charter" and in the Amendments. Individual rights were to be secured by state laws, while the rights of a citizen should be protected by both the states and the national government. Bradley's draft ended abruptly, but it is clear that by the summer of 1874, he was increasingly less sure about the power of the federal government to protect the rights of black citizens against violence and intimidation. "My own mind," he told Frelinghuysen, "is rather of the condition of seeking the truth, than that of dogmatically laying down opinions, and I am very glad the Louisiana case is now in a position... to receive the deliberate and well-considered judgment of the whole Court."

U.S. v Cruikshank was argued before the full Court in March and November 1875. Attorney General George Williams and the Solicitor General, Samuel Phillips, argued the government's case. Their presence suggested the importance of the issues, but their briefs were short and undistinguished. They simply restated the issues as presented in the circuit and defended the indictments, which Bradley had ruled vague and defective, as technically correct. Former Supreme Court Justice John Campbell, former Attorney General and now Senator Reverdy Johnson and Justice Field's brother David Dudley Field were among the eight lawyers representing Cruikshank et al. The defense pressed Bradley's notion that the indictments had been
improperly drawn and were invalid. They directed the force of their argument against the constitutionality of the Enforcement statute of May 1870. The new Amendments, the defense contended, had been aimed at discriminatory state legislation. The remedies for such legislation were judicial, not congressional. Congress had no positive authority under the Amendments to legislate in areas where possible state discrimination might occur or to offer blacks federal protections that had not been available to citizens under the original Constitution.68

The Court considered Cruikshank in tandem with U.S. v Reese, which similarly questioned the constitutional validity of sections of the Enforcement 1870 act. Reese involved indictments against Kentucky election officials for excluding from the polls, an otherwise qualified "citizen of the U.S. of African descent." For the defense, former Attorney General Henry Stanford challenged the Enforcement legislation as exceeding the authority granted to Congress under the 15th Amendment to protect would be voters from discrimination based on race. Stanford reminded the Court that the 15th Amendment had not granted anyone the right to vote. States were free to set qualifications and determine access to the franchise so long as race was not a grounds for exclusion. The offending sections of the Enforcement Act did not spell out race as the defining criteria, Stanford told the Court, and thus were invalid.69
In March 1876, Chief Justice Waite delivered the opinions in Cruikshank and Reese for a nearly unanimous Court. (Justice Clifford dissented in the former and Justice Hunt in the latter.) According to Waite's biographer the Justices had decided that the opinions should not address constitutional questions, but rather should be focused on the validity of the indictments in the two cases. Waite asked Clifford, the Court's authority on criminal law, to prepare the opinions. However, Clifford's drafts were unacceptable to the majority and in the end, the Chief Justice spoke for the Court.70

In Cruikshank, Waite upheld Bradley's decision to dismiss the indictments on the grounds that they had not expressly alleged a racial motivation for the crimes. For whatever reasons, Waite did not feel compelled to review Bradley's circuit reasoning. Rather, he restated in a general and not particularly illuminating way, Miller's dual citizenship theory from Slaughterhouse, giving primacy as Miller had, to those rights derived from state citizenship.71 The Waite opinion did not reflect the lively discussion of the enforcement program that must have been a part of the Court's consideration. Bradley had been eager for a full airing of the issues. The legal luminaries participating in the oral arguments were undoubtedly provocative. The disagreement over Clifford's drafts would
have provided still another opportunity to debate the issues. Little of this is reflected in either of Waite's opinions.

Bradley's silence in *Cruikshank* is especially difficult to explain. His circuit decision had been supportive of enforcement aims while dismissing the indictments as technically incorrect. Waite had adopted Bradley's conclusion and ignored his reasoning, which must have pricked Bradley's judicial ego. Further, Waite's opinion harked back to Miller's divisible two-tiered citizenship, with national citizenship decidedly secondary. In *Slaughterhouse*, Bradwell and Bartemeyer, Bradley had specifically separated himself from such a concept of citizenship and from Miller's narrow rendering of the 14th Amendment's applicability. This time Bradley kept his peace. Perhaps it was enough that none of his brethren attacked his circuit reasoning, thus leaving its validity and potential usefulness intact. At the same time, if Bradley had been unhappy with Waite's failure to respond to the circuit opinion, he could have concurred in the decision and offered a separate opinion. It is most likely that Bradley was simply tiring of the fight.

Waite's *Reese* opinion was even more far reaching. As in *Cruikshank*, he dismissed the indictments for failing to specify a racial motivation. Moreover, he declared two sections of the Enforcement statute unconstitutional on the ground that Congress had overreached its authority under the
Amendment. The invalid sections, Waite wrote, had gone beyond outlawing voter discrimination based on race and had moved into any area of general voting rights where only states had legislative prerogative. In dissent, Justice Hunt argued that the intent of the Enforcement Act in toto was to assure blacks the right to vote without fear of intimidation or discrimination. Whether the two sections in question explicitly defined discrimination based on race as a crime was irrelevant. Hunt's views were almost identical to the circuit opinion in U.S. v Hall. Bradley, who had authored Hall for Judge Woods, was now silent.

This is in large measure, the tragedy of Cruikshank and Reese. Waite's opinions did not shut down the enforcement program. At the same time, nothing Waite wrote could be taken as encouragement for the already hard pressed federal prosecution of civil rights abuses. The tragic importance of these cases is that they reflected the Court's increasing lack of interest in engaging enforcement issues in any depth and with any favor. As much as any Justice, Bradley had taken a lead in developing judicial support for the enforcement program. His increasing reticence on this issue is a part of that larger tragedy.
CHAPTER SIX

TOWARD 1883: SEALING THE COMPROMISE

The Compromise of 1877 brought the curtain down on the nation's Reconstruction experience. The Compromise had begun early in the 1870s and did not end until 1883. Justice Bradley's evolving attitude toward civil rights, born in the wake of the war and Reconstruction is valuable counterpoint to this expanded view of the Compromise, i.e. to one that views the Compromise as extending beyond 1877. For Justice Bradley, for the Court and for the nation, the years 1876 to 1883 were a natural bridge between the experience of the war and Reconstruction, defined primarily in terms of racial antagonism and efforts at reconciliation on the one side, and the late nineteenth century emphasis on unleashing and exploiting the nation's economic energies on the other. The decisions in Cruikshank and Reese in 1876 had suggested that a decade after the war's end, an overwhelming majority of the Supreme Court's members were willing to let the rights of ex-slaves slip inexorably from the nation's agenda. It was still a suggestion, not a fact. In the legal arena, the denouement in the post-war civil rights drama would not come until the Court's decision in the Civil Rights Cases in 1883.
Cruikshank and Reese illustrated the transformation taking place in the nation's attitude. By the mid-1870s, signs and sounds of change were everywhere. Interest in national self-reflection had declined steadily in the ten years since Appomattox, and the nation's energies and attention increasingly turned to pursuits that looked forward and outward rather than inward. For most Americans, sectional bitterness had been engulfed in technical innovations, reforms and economic growth. By 1875, enforcement of civil rights laws passed in 1866 and in the early 1870s had given way to southern recalcitrance, and to disinterest among those persons not immediately affected by the violence and abuses to which the laws were directed.

By 1876, rights enforcement was virtually moribund. The Civil Rights Act of 1875, to be discussed below, was the culmination of the war's legacy in civil rights law. Many of its supporters considered the 1875 law to be a monument to the late Charles Sumner, the Massachusetts Senator who died in 1873, and whose fiery personality and passion for civil liberties had created much of that legacy. In reality, the 1875 act was more a gravestone than a monument, at least in retrospect. It was the last legislation of its kind for more than three-quarters of a century. Almost from the moment of its passage, it was all but impotent.

It is improbable that any individual Justice, or even a united Court, could have held back the tide of indifference
and resistance to civil rights guarantees in 1876. Still, Bradley's silence in *Cruikshank* and *Reese* was especially damaging to the rapidly deteriorating mechanisms of civil rights enforcement. Bradley had been the first Justice to comment on the meaning and scope of the wartime Amendments. Since 1870, his opinions, especially on the 14th Amendment, had underscored the Amendments' broad reach and the power of the Congress to secure their aims in law. Specifically, Bradley had committed himself to the enforcement legislation as an appropriate expression of the primary authority of the national government to safeguard the fundamental rights of every citizen, whatever his residence or color.

There is no single explanation for Bradley's increasing reticence. The key lay in the nature of Bradley's commitment to the Union and to the priority of national reconciliation that he discerned as the seventies advanced. Since 1870, he had supported efforts to use the new Amendments to protect the civil rights of ex-slaves, among other citizens, as a part of the reconciliation effort. By 1876, Bradley had begun to believe that any vigorous effort to use federal authority to assure full citizenship for blacks was, in fact, more likely to promote disharmony. He was not yet prepared to encourage the Court to deny that enforcement authority to Congress, but his silent acquiescence in *Cruikshank* and *Reese* was a portent of things to come.

On the eve of the Presidential election of 1876, in whose
outcome Bradley was to play a crucial role, his mind was still unsettled about the proper place of civil rights enforcement on the list of national priorities. Thus, the election experience was a critical one for Bradley and the nation. This chapter focuses on Bradley's role on the Electoral Commission and on his reaction to the Civil Rights Act of 1875, stated ultimately in the landmark decision in 1883. The 1883 decision brought Bradley's comments on civil rights enforcement under the Amendments, first stated in 1870, full circle. These two aspects of Bradley's part in this expanded view of the Compromise are best understood against the continuing narrative of his life as a Justice.

The Compleat Justice

In many ways, the seven years between 1876 and 1883 were the pinnacle of Bradley's career on the Court. Now in his sixties, he was physically healthy, modestly wealthy and increasingly influential in Court and legal circles. The pattern of his life was simple and unchanging. He kept his house and added to his property holdings in Newark, but increasingly his life centered around the Court in Washington.

In May and June of each year, Bradley traveled to the 5th Circuit. The law required that each Supreme Court Justice be present at at least one term in each district of his circuit every two years.² Like most of his brethren, Bradley met this obligation minimally, alternating between trips to Texas
and Louisiana one summer and to the southeastern states of the circuit the next. The circuit system was increasingly burdensome for the Justices and Circuit Judges and inconvenient and costly to litigants. Although reform of the federal court system was a frequent subject of debate in the law journals and in the Congress, meaningful reform would not come until the creation of the Circuit Court of Appeals in 1891. In the meantime, the situation grew increasingly untenable. Through the 1870s and 1880s, Congress continued to expand the jurisdiction and authority of the federal courts, adding voluminously to their business without equipping the judges with staff to discharge their growing responsibilities. The Supreme Court docket was often at least two years in arrears. Three years or more might be required to have a case heard in the Circuit courts. Of necessity, the district judge was often the court of last resort.  

Bradley spent the minimum time possible in the 5th Circuit. With notable exceptions like Slaughterhouse and Grant Parish, he seemed to have little interest in the general commercial litigation that came before him. He left for the circuit just after the end of the Supreme Court term each May, often accompanied by his wife or one of his children. When he traveled to Texas and Louisiana, he headed for New Orleans, held court there for a week or so, usually sitting with Circuit Judge Woods and one or more of the district judges. From New Orleans, he took a steamer to Galveston,
often traveling with Woods and several lawyers who practiced before the circuit courts. After another week in Galveston, Bradley went to Austin, seat of the Western District of Texas, for a few days before the return trip with stops again in Galveston and New Orleans. When he traveled without his family, Bradley often stayed with the judges or members of the local bar who appeared before him. 4

The southern route took Bradley to Savannah, Jackson-ville, Tallahassee, Montgomery, Mobile and Jackson. He heard cases for a few days in each place and delivered opinions, usually orally, as he went. The circuit business was mostly commercial and after the Grant Parish Cases in 1874, it appears that Bradley did not hear enforcement cases or comment on other issues arising under the Amendments while on rounds in the 5th Circuit. 5

After the circuit trip each summer, Bradley spent July and August with his family in Vermont, where he immersed himself in the esoteric intellectual pursuits that had fascinated him for a lifetime. He spent one summer fixing the exact meridian at Stowe, Vermont, for example, and another working out a perpetual calendar that among other wonders, fixed what Bradley judged to be the exact date of the Crucifixion. 6

Bradley's social life in these years was limited to members of the Court, to his family and to a small circle of friends, most of whom he had known since his earliest days in New Jersey. He was proud of his accomplishments, but striken
periodically with pangs of humility. His correspondence reflects a mix of intellectual elitism and genuine amaze-
ment at his rise from humble beginnings, a mix that had always marked his self-reflections. He had "little or no deference for the mere opinion of others," one of his friends later recalled. Yet, his success seemed to surprise him.
"How little I dreamed," he wrote to his wife from Georgia in 1873, "when I began the study of law at Newark or when you and I started together in life, that I should succeed as well as I have done."8

Bradley's children, most of whom now had families of their own, were of frequent concern to him. He recorded in his diary his efforts through Attorney General George Williams to get his son Willie a job at the Justice Department, and other efforts to place his son Charles in a position in Newark. His letters to all his children, like his notes to himself, were full of admonitions to work hard and live frugally. Bradley also despaired over the increasing number of relatives and acquaintances who sought to benefit from his position and influence. "Offices and money," he complained to his sister, "appear to be the great desiderata of the world. Everybody is asking something of me and I have nothing to give."9

Self-deprecations aside, Bradley gave the fruit of his powerful and disciplined intellect to the work of the Supreme Court. By the mid-1870s, Bradley's role was increasingly
that of a "senior partner" to the Chief Justice, Morrison R. Waite. Once a rather obscure Ohio lawyer, Waite had been appointed to succeed Chase in February 1874 by President Grant. The appointment followed a tragicomic search for a Chief described aptly by the New York Times as "humiliating and scandalous." Before settling on Waite, Grant had offered the position to a number of prominent Republicans, including Senator Roscoe Conkling of New York, Oliver Morton of Indiana and Timothy Howe of Wisconsin, and his Secretary of State, Hamilton Fish. All had refused. Then Grant nominated Attorney General Williams, but was forced to withdraw Williams' name when the Senate Judiciary Committee uncovered a number of improprieties in Williams' management of the Justice Department.

While it is probable that Bradley aspired to the Chief's position after Chase's death, he was offended by the more obvious efforts of other aspirants, including several of his brethren. In letters to his wife from the circuit in the summer of 1874, he described the "scramble for place."

How rife the speculations are in the New York and other papers about the successor to the Chief Justice. My opinion is that it will be Miller, and the vacancy of associate justice will be filled by someone in the South or South Western States who will take my circuit and give me the Chief Justice's -- which consists of Maryland, Virginia and North and South Carolina.

I see that Conkling is after the Chief Justiceship, and I should not wonder if he gets it. He appeared as Chief State Mourner after the President, escorting Mrs. Grant. . . but what. . .[is] Williams [the Attorney General] to do. Won't there be a conflict
there? I had thought that perhaps, if Miller was made Chief, Williams would be put in his place. . . . Though Williams may be satisfied to remain in the Cabinet at present, trusting Swayne or Clifford will resign or die before the President's term expires. Swayne is such a talker, can't keep anything to himself, that I don't doubt he has signified his intention to resign as soon as he gets to be 70 which will be next year. . . . What a scramble for place.\textsuperscript{12}

Bradley must have been attracted to the prospect of moving to the Chase circuit, which included the mid-Atlantic states and was much closer to home, but he had nothing positive to say about Miller's aspiration to be first among equals on the Court. Along with Justice Stephen Field, Miller and Bradley dominated the Court in the 1870s. A considerable rivalry existed among them. Edward White has called these three Justices the primary representatives of the American judicial tradition in the post-war decades. Each of them had the ability to reshape the Court, but each was prevented from doing so by the resistance of the other two and by Justice John Marshall Harlan, who joined the Court in 1877. These four Justices, in White's summary, "made the Court in the 1870s and 1880s, a singular collection of strong minded and contentious men."\textsuperscript{13}

Bradley's antagonism to Miller's efforts to have himself named Chief were obvious to Miller. A few months after Waite's appointment, Miller wrote to his brother-in-law, William Ballinger, a prominent Galveston attorney, who had argued before Bradley in the 5th Circuit, with his observations on Bradley's motives:
...I think I have endeavored to convey to you before this, a sense of antagonism on Bradley's part toward me ever since he came on the bench. It was perceptible rather in the fact that I never could get into confidential relations with him, or feel that I had established any relations with him whatever. I became satisfied during the term of the Court which preceded the death of Chase, that he had from the hour he entered the Court entertained the hope that he might succeed Chase as Chief Justice. ...and Bradley himself had both the learning in and out of his profession, and the native ability which justified his ambition. He knew that when a vacancy occurred I would be strongly urged for the place and hence his unwillingness to embarrass himself with any close relation with me.

After Bradley's own ambitions were thwarted, Miller continued, Bradley had conspired with Justice Swayne to have Waite named to the Chief Justiceship instead of Miller. After a few months with Waite in the Chief's seat, however, Miller thought that Bradley had seen the error of his ways.

...I am also convinced that Bradley had come to prefer that I should be appointed after he found the untoward results of his machinations with Swayne. I was glad of it, for with some allowances for eccentricity, he is a useful and valuable man on the bench.14

There is no evidence to suggest that Miller's suspicions about the Bradley-Swayne conspiracy had a basis in fact. It is true that the quiet, cerebral Bradley was never particularly close to the equally bright, but politically ambitious and pragmatic Miller in the twenty years they shared the Bench. Bradley was not particularly close to any of his colleagues. He was with them frequently on social occasions, but he shared little more than the pleasantries of the day and the essential business of the Court with them. It is also not likely that
Bradley regretted, as Miller had speculated to Ballinger, whatever efforts he had made in favor of Waite's appointment. Waite was not a brilliant judge, but he presided over the Court with equanimity and a sure hand. Bradley carefully cultivated his relationship with the Chief Justice. Over the decade they spent on the Bench together, Bradley's efforts were reflected in his considerable influence with Waite.

Of the three Chief Justices under whom Bradley served in his twenty years on the Court, Waite was the Chief with whom he worked the most closely. Their relationship was one of mutual support, made possible primarily by Waite's ability to make use of Bradley's intellectual gifts. For the first several years after his appointment, and perhaps for most of the sixteen years of his tenure, Waite was at least mildly intimidated by his associates. Of his seven colleagues in 1874, Nathan Clifford, David Davis, Noah Swayne and Ward Hunt were men of modest judicial ability over whom Waite could easily assert his personal charm and influence. On the other hand, Waite's relationship with Justice Miller, Field and Bradley suggested a more insecure and cautious approach. Bradley, who never lacked confidence in the depth of his own legal knowledge or the general superiority of his intellect, had been on the Court four years when Waite was appointed and was increasingly confident in his role. Sometimes impatient with Waite's management of the Court's schedule or the vagueness
of the assignments, Bradley nevertheless treated Waite cordially, if not with deference. Miller and Field, both Lincoln appointees, had each been on the Court for more than a decade when Waite arrived. Both Justices had felt themselves better qualified to be Chief and had campaigned for the job before Grant settled on Waite. Miller and Field did little to bolster the self-confidence of the new Chief Justice. 16

Waite's letters to his wife during his first months in Washington, offer a revealing portrait of the waxing and waning of his confidence as he took his seat. After his first conference, he wrote that he had been through his "... severest ordeal. ... but there was nothing to cause any uneasiness or discomfort. ... It was a pretty easy time and my nerves were as cool as it is possible to be for a wonder." A few days later, he told Mrs. Waite that it was "not an easy job," but he supposed "one of these days to get to feel that I am entitled to my place." 17 After a few weeks, Waite found himself "equal to taking everything as it comes and not being overcome," but his insecurities were large.

... If I had put on any airs, I think I know enough of human nature to know that there would have been many obstructions put in the way of my march. But I did not, and everybody seems to have stood aside to see what I can do. Therefore if I fail, the disgrace is all the more terrible. I hope I may not. Everything is "rose color" now, and while I cannot ask that shall continue always, I do hope I may be able to keep it about me until I feel at home where I am. 18
Waite's feeling of insecurity in the midst of his colleagues did not pass quickly. A year later he wrote to a relative that "...nothing but constant watchfulness will keep me from falling in. That I constantly have before me and it is something oppressive."\(^{19}\)

In fact, Waite's reception was not quite as cordial as he recorded. Miller wrote to his brother-in-law that the Chief had been in Washington for three weeks and had presided over the Conference twice. "He is pleasant," Miller wrote, "a good presiding officer, mediocre, with a fair amount of professional learning."\(^{20}\) Field was less gracious. After Waite's second week in Washington, Field described the new Chief to Matthew Deady, an Oregon federal district judge, with more than a touch of sour grapes.

He is a new man that would never have been thought of for the position by any person except President Grant. He is a short thick set person, with very plain -- indeed rough features. He is gentlemanly in his manner and possesses some considerable culture. But how much of a lawyer he is remains to be seen. He many turn out to be a Marshall or a Taney, though such a result is hardly to be expected. My objection to the appointment is that it is an experiment whether a man of fair but not great abilities may be a fit Chief Justice of the United States -- an experiment which no President has a right to make with our Court."\(^{21}\)

There is no record of Bradley's first impression of Waite. Waite had called on the Bradleys during his first weeks and recorded that he "liked them very much" and was inclined to think they liked him.\(^{22}\) Of Miller, Field and Bradley, Waite was most fond of Bradley and perhaps Waite
recognized and appreciated Bradley's tendency to keep his own counsel regarding personal relationships on the Court. Many years later, Waite wrote Bradley of his appreciation for Bradley's friendship and advice during the trying first years after the Chief's appointment. Bradley derived a great deal from the relationship as well, for it was more in keeping with Bradley's style to recognize the strengths and limitations in others and to bend them quietly to his own purposes. Unlike Field and Miller, Bradley was often embarrassed by recognition; what he sought was influence.

It was Bradley's habit with Waite to draft notes on cases for which Waite had taken the responsibility for preparing a decision. Bradley shared his notes freely, but quietly. Waite wrote occasionally to Bradley expressing appreciation for such assistance. In one of his notes to Bradley, Waite referred to a case the two Justices were considering. "I will take the credit," Waite wrote, "and you will do the work as usual, . . . I am sure if we put our shoulders to the wheel our work, which in this case will apparently be mine, cannot be successfully attacked." Several years later, Waite wrote on the back of a draft he had sent for Bradley's consideration, "There is no help in such matters that I value more than yours." For his part, Bradley was inclined to provide Waite with the substance of his thinking, but not to quibble with the Chief Justice's style, and/or lack of precision. "When I concur in the
doctrine," Bradley wrote on the back of a draft Waite had asked him to consider, "I am willing to trust the Chief Justice in the mode of expressing it." 26

Bradley's Influence: The Road from Munn

The most important example of Bradley's influence with Waite is the crucial role he played in Waite's landmark opinion in Munn v Illinois in 1877. 27 The Waite decision in Munn sustained an act of the Illinois legislature setting maximum rates for storage of grain. The decision acknowledged that rights to property "affected with a public interest" were subject to public regulation and accountability. The heart of Waite's opinion was an elaboration on the public interest doctrine developed two hundred years earlier by the English Chief Justice Matthew Hale.

Charles Fairman has meticulously documented Bradley's responsibility for bringing the Hale doctrine to Waite's attention. Historically, Bradley should be considered the architect of the public interest doctrine in American jurisprudence. 28 Waite's opinion in Munn was based largely on a twenty-three page memorandum Bradley had given him entitled "Outline of My Views in the Granger Cases." The note Bradley attached to the outline is characteristic of his interest in influence rather than credit. "I have reduced my notes in the Granger Cases into a sort of general Outline of Views on the questions involved," Bradley wrote to Waite a few days after the Conference vote on the Munn case.
...The authorities referred to, particularly in the 1st portion [the authority here was Hale] may be of service to you. Make just such use of it as you please. I wrote it out to steady my mind and judgment and to see how each proposal would appear on paper. I feel more than every sure that conclusion is right. And now, I dismiss the case from my mind. I expect to hear your opinion which I feel sure I shall approve, for I think we look at the subject much in the same point of view.

Waite did not use Bradley's outline in toto, and as a consequence, as Fairman has noted, Waite's "composition was loose at points where Bradley's was characteristically tight."30 The most crucial change Waite made in Bradley's draft, a change which would subsequently open the way for the unraveling of the public interest doctrine, was an addition which acknowledged in vague terms that "under some circumstances regulating legislation might violate the due process clause of the 14th Amendment."31 This argument had been the heart of the defense briefs seeking to protect railroad and warehouse interests against state regulation.

Regulation as a violation of due process was precisely the point Justice Field made in his powerful dissent in Munn. Field elaborated the point over the next fourteen years in dissents from decisions supporting state regulation of businesses. Field's view was that in due process terms, corporations were to be treated as individuals, and thus state regulation of corporations was a violation of 14th Amendment protections.32 In 1890, Field finally convinced the Court's majority on the issue. Field's opportunity came in Chicago, Milwaukee and St. Paul Railway v Minnesota, and
it gave the Court's formal imprimatur to a substantive
due process reading of the 14th Amendment and its blessing
to a national policy that for the next four decades, en-
couraged economic growth and expansion in a generally
unregulated atmosphere.\textsuperscript{33}

By 1890, Bradley had changed places with Field.
Now in the minority on the right of the state government to
regulate the conduct of business, Bradley's dissent in the
\textit{Chicago, Milwaukee, St. Paul} cases was a strong defense of
the public interest doctrine he had developed for Waite's
use in \textit{Munn}, pointedly omitting Waite's weakening additions.\textsuperscript{34}

\textbf{1877 - The Compromise Experience}

In 1876-77, seven months after the \textit{Reese} and \textit{Cruikshank}
decisions and immediately after \textit{Munn}, the nation was in
the midst of a political crisis that rivaled any since the
early days of the republic and that seriously challenged the
adequacy of the constitutional process. The crisis grew out
of the disputed could of electoral votes in the Presidential
contest between the Republican nominee Rutherford B. Hayes
and Samuel J. Tilden, the Democratic candidate.

The Electoral Commission designed to settle the
disputed contest was itself a product of intense negotiation
and compromise between the two parties in the Congress.
The most widely accepted description of the political bargaining
underlying the election settlement is that reflected in the
prodigious research of C. Vann Woodward.\textsuperscript{35} In Woodward's
analysis, the final bargaining gave the election to Hayes, in return for a Republican commitment to withdraw the remaining federal troops from the South and put an end to federal interference in the region's affairs. The agreement, according to Woodward's thesis, would allow the Congress to underwrite railroad bonds for the Texas and Pacific interests and to support federally-funded internal improvements in the South. In addition, the Democrats would designate the Postmaster-General, a bonanza for the patronage-hungry party, and as John Orth's recent research in support of Woodward's thesis has demonstrated, the agreement included implicit acquiescence by federal judges in the repudiation of state debts incurred by Reconstruction state governments in the South. Finally, the heart of the Compromise package was a tacit admission that a large share of the national responsibility for enforcing black rights in the South would be quietly abandoned.

Recent scholarship on the events surrounding the disputed election has questioned the notion that the election bargain took place as definitively as Woodward described. Michael Les Benedict for example, has offered compelling evidence of the ineffectiveness of Republican economic blandishments on Southern Democrats, whose votes on the Election Commission bill and on other economic elements of the "bargain" were indistinguishable from those of Northern Democrats. The challenges to Woodward's deterministic emphasis on the
economic elements of the compromise strengthen Woodward's more implicit acknowledgement that the basis of the 1877 settlement may also have been primarily a political bargain. Justice Bradley's role in subsequent events strengthens this more political emphasis.37

Bradley was a reluctant member of the Electoral Commission. He had sought an influential role on the Court, but he had always maintained a low profile. Unlike many of the Justices, Bradley had shunned partisan politics since his appointment in 1870. Although he maintained close friendships with a number of active and influential Republican politicians, including Frederick Frelinghuysen and Hamilton Fish, Bradley had never had the patience for political infighting and had steered clear of personal political involvement after he came to the Court. It was precisely this image of political disinterest that sparked his appointment to the Commission and set him squarely in the middle of the election controversy.

The election campaign of 1876 had been a relatively lackluster affair, in spite of Republican bloody shirt rhetoric and the Democrats' emphasis on the moral bankruptcy of the Grant years. Dull and unimaginative, Hayes and Tilden were ideal candidates for the times. Both promised fidelity to basic values and an end to the wearisome emphasis on national race equality policy. Moreover, they were models of probity that allowed them to stand out sharply against the excesses of the Johnson years and the scandals
of the Grant Administration.\textsuperscript{38}

"The issues involved in Reconstruction, if not disposed of, were clearly worn out," Charles Francis Adams wrote of the 1876 campaign, and the country turned impatiently from any significant discussion of them. Rather, Adams continued, ". . . the living debate was over material questions, the course of the prolonged business depression, and the causes for it."\textsuperscript{39}

Briefly to restate the familiar story, the Democrats were more hopeful of returning to the White House than at any time since Buchanan's ill-fated election in 1856. For a brief time, it looked as though their dreams had been realized. On the morning after the election, Tilden's forces thought they had won since it appeared that their candidate had carried all the southern states, four northern states and a plurality of 248,000 popular votes. The Democrats' euphoria was short-lived. When the electoral votes were counted, South Carolina, Louisiana and Florida each sent conflicting sets of returns reflecting local and unresolvable struggles between the parties. Another vote from Oregon also had been disputed. Together, twenty electoral votes were at stake. Only one of those disputed votes separated Tilden from the Presidency, while Hayes needed all twenty to be elected. Historians generally agreed that Democratic violence and Republican chicanery largely cancelled each other out, and that it is impossible to determine who would have won had the election been fair.\textsuperscript{40} The assumption
is that Louisiana and South Carolina probably would have gone to Hayes and that Florida and thus the Presidency should have gone to Tilden.

The Constitution provided only for returns to be certified by the President of the Senate in the presence of members of both houses. It did not provide a solution for settling disputed returns. Congressional agreement on certification was impossible since Republicans controlled the Senate and Democrats the House of Representatives. Finally, in January 1877, both parties agreed to a Democratic proposal creating a Joint Electoral Commission to arbitrate the disputed returns. The Commission's fifteen members included ten Congressmen, divided along party lines and two Supreme Court Justices from each party. The four Justices were to choose a fifth, supposedly independent Justice. The Democratic appointees from the Court were Clifford and Field; Miller and Strong the Republicans. It was assumed that these four would choose David Davis as the fifth judge. Davis was a nominal Democrat, but his reputation as a political independent was strong enough to encourage Congressional Republican thinking that Davis might be non-partisan.

Before the Electoral Commission could meet, the fragile structure had begun to collapse. The Illinois legislature, with the prodding of Tilden, elected Davis to the state's Senate seat. He was thus eliminated from the Commission. Of the remaining Justices, none was really apolitical.
Waite was an unabashed supporter of Hayes. Hunt and Swayne were closely identified with Republican interests. Bradley was the least political Justice remaining and the only real choice for the fifth seat, but his potential for partisan behavior was recognized from the beginning. Congressman James Garfield, a Republican member of the Commission, recorded the controversy among the four Justices over the selection of the fifth judge. "I learned from one of the judges that they had a long struggle to select the fifth," Garfield wrote on January 31. "At two sessions last night, they failed to agree, and only agreed late this morning. Judge Miller offered to vote for any of the four, except Davis, if it would be agreed unanimously. I suspect the choice was actually made by lot for the choice was at last unanimous."41

Bradley's Republican credentials were generally well known, and Republican press and politicians were clearly relieved at the news of his selection. One of Hayes' friends wrote reassuringly to the embattled candidate that Bradley was an "unflinching Republican." Hayes recorded in his diary that with Bradley's appointment, the odds were now five to one in his favor.42 Democrats, on the other hand, saw the partisan handwriting on the wall. William Ballinger summarized the Democratic concern that ". . .with no strict law - no precedent to guide. . .Judges are apt to be as partisan as other people."43 Democratic editors stressed Bradley's
appointment by Grant and his pre-court labors in Republican vineyards in New Jersey. The partisan New York Sun blamed congressional Democrats for acceding to Bradley's appointment.

... the result is that the Republicans are extricated from their immediate peril. The almost absolute decision of the Presidency is left to Judge Joseph Bradley of Newark, a partisan to whom his party has never looked in vain. Hayes being counted in, the frauds by which this result is established will be covered by the quasi-mantle of the Supreme Court. ... The Democratic house of Representatives had the decision of this great question in their own hands and now it is in the hands of Joseph P. Bradley. 44

The Commission met through February in the Supreme Court chambers in the basement of the Capitol. During the first week, Bradley voted with the Democrats on a number of procedural issues that were otherwise decided along strictly partisan lines. On February 8 however, whatever hopes the Democrats had that Bradley might vote with them on substantive issues were devastated. The crucial moment involved the decision on returns from Florida. The question was whether the Commission had the authority to go "behind the returns" to hear evidence on possible frauds in the election of electors. The Democrats argued that just such an examination was required to determine the true vote in each of the disputed states. The Republican position was that the Commission was obligated to respect the official judgment of state authorities in determining the winning electors. In the Republican view, going behind the returns would be an unwarranted usurpation of state authority by the national government.
Bradley was the center of attention since he was the only Commission member not to have voted his party. Bradley asked the Commission for additional time to study the Florida case, a request that further heightened Republican anxiety and Democratic hopes. He knew his vote would be determining not only for the Florida returns, but of the others for which Florida would set the precedent. Garfield captured the moment, describing how, in a room so still that the Commissioners could hear their watches ticking,

... Bradley arose at 2:13 to read his opinion. All were intent, because [Bradley] held the casting vote. It was a curious study to watch the faces as he read. All were making a manifest effort to appear unconcerned. It was ten minutes before it became evident that he was against the authority to hear extrinsic evidence.45

Bradley's vote gave the Florida returns to Hayes. After this precedent, all the other disputed votes - and the Presidency - were awarded to Hayes by a vote of 8 to 7, with Bradley casting the deciding vote in each case.

Whether or not it was unfair, as Bradley's son later wrote, to expect Bradley to "sink all political bias and act the judge merely," was beside the point.46 Against Bradley's bitter protests that he had made his decision on judicial grounds, Republicans and Democrats alike considered him a king-maker, and for a number of months, his passion for anonymity was severely challenged. Bradley was harshly attacked by ranking Democrats, including Tilden and Justice Field.
He was hung in effigy, castigated at Democratic rallies and scalded by the Democratic press.\(^47\)

Some Democrats charged that Bradley had offered to sell his vote to Tilden for $200,000 and failing that, had obligated himself to Republican railroad interests, led by Tom Scott and Bradley's old friend Cortlandt Parker. Justices Clifford and Field were the sources of a story that on the night before the Florida vote, Bradley had shown them an opinion favorable to Tilden, but that during the evening, he had been visited by Frelinghuysen and a number of Republican railroad moguls who had persuaded him to change his mind.

There was never any real evidence to support the contentions that Bradley's vote had been bought. Whether or not he could "sink all political bias," he developed a lengthy and compelling judicial argument on which to base his decision. Bradley admitted that he had written several opinions the night before the decision in the Florida case, but denied that he had shown a version favoring Tilden to Clifford and Field. He also denied that Frelinghuysen or any others called on him the night before the Florida vote or induced him to change his mind in favor of Hayes. "Whether I wrote one opinion or twenty, in my private examinations of the subject," he wrote to the Newark Advertiser, "is of little consequence, and of no concern to anybody, if the opinion which I finally gave was the fair result of my deliberations. . . ."\(^{11}\) Bradley
was particularly stung by the allegations attributed to
Field and Clifford and denounced them as,

... entirely untrue. ... I read no opinion
to either of them or otherwise expressed any
views. ... If I did, it could only have been
suggestive, or in a hypothetical manner, and
not intended as a committal of my final judg-
ment or action. ... In my private examination
of the principle question, (about going behind
the returns) I wrote and re-wrote the arguments
and considerations on both sides as they occurred
to me, sometimes being inclined to one view of
the subject, and sometimes to the other. ... but
finally, I threw aside these lucubration and
... wrote out the short opinion which I read
in the Florida case.

Bradley envied the other members of the Commission who all,
"seven on one side, and seven on the other, seemed to have
no difficulty in reaching a conclusion; whilst to me the
questions raised were perplexing and difficult in the highest
degree." In the end, Bradley contended, it was a "pure
judicial question" for him and his political views had
played no part.48

While Bradley's role in settling the election controversy
was determining, it is impossible to know to what extent he
had participated in shaping the larger compromise about which
Woodward and others have written. In spite of his protests,
it is likely that he voted with the Republicans because he
was a Republican member of a partisan commission and favored
extending Republican political domination as long as possible.
At the same time, he was increasingly reluctant to give the
federal courts' imprimatur to Republican efforts to enforce
civil rights legislation in the South, so he likely welcomed
the point of compromise on that issue. It would be inaccurate, however, to suggest that the Commission experience settled Bradley's mind on the need to abandon enforcement efforts in the South. In 1877, his opinion was still very much in flux. At most, the Commission experience encouraged the direction his thinking had already taken. 49

The Civil Rights Act of 1875: Bradley's Initial Response

Bradley's role in sealing the political compromise of 1877 was significant, but it was not as important as his role in the final validation of that compromise in 1883. In that year, his decision in the Civil Rights Cases would effectively close the gates on most of the war's legacy of civil rights for almost a century. The 1883 decision would end a journey Bradley had begun six years earlier, when he exchanged letters with Justice Woods on the constitutionality of the Civil Rights Act of 1875. The genesis of the Act and Bradley's initial response as related to Woods are particularly remarkable.

The Civil Rights Act of 1875 was the culmination of a progression of radical Republican legislation which had begun with the 13th Amendment and the Civil Rights Act of 1866. Its tortuous legislative history climaxed a decade of Republican efforts to elevate the idea of racial equality to a legal plane. 50 The Act was also a last gasp of the lame duck Republican majorities in both houses of the 43rd Congress. As John Hope Franklin has noted it was a "final triumph of
a Republican majority of doubtful motives that would, within a few days, be superceded by an anti-civil rights Democratic majority." In addition, the Act was a tribute of sorts to the late Charles Sumner, who had first introduced it in 1870, as a supplement to the Civil Rights Act of 1866 to provide citizens of every race with equal access to common schools and public transport, churches and cemeteries, to hotels and theaters, and to service on local, state and federal juries. The Sumner bill was debated, in various forms, over the next five years. It was killed on several occasions only to reappear each time in slightly altered guise. Sumner, his supporters in Congress and the remnants of the anti-slavery, abolitionist groups who lobbied for the bill, argued that it would simply guarantee fundamental rights of citizenship to all persons regardless of race. Discriminations based on race, and racial segregation generally, the Massachusetts Senator argued, had a "devastating effect on the minds of colored children, fostering the idea in them and others that they are not as good as other children. . . ." In the end, the bill was carried by a majority of Republicans in each house, more than a third of whom had been defeated in the Congressional elections of 1874. On March 1, 1875, shorn of its provisions for mixed schools and churches, the last civil rights bill for almost a century became law.

The Act's preamble recognized the quality of all persons
before the law and underscored the duty of just government to "mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political. . . ." Its first sections provided that all citizens within the jurisdiction of the U.S., and without regard to race or color are entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and places of public amusement. Nor could citizens be disqualified from jury duty in any court of the U.S. or any state on account of race alone. Individuals found guilty of violating the provisions of the act were to forfeit $500 to the aggrieved party and were subject to additional fines and imprisonment. The federal courts were given exclusive jurisdiction and court officers who willfully failed to institute proceedings under the law were also subject to fines.54

There was little expectation on behalf of the white public or its representatives in the Congress, that the law could or should be effectively enforced. The Grant Administration was not eager to push the issue. The Department of Justice, ignoring numerous pleas from the field for guidance and copies of the legislation, offered its marshals and district attorneys no special instructions even though they were subject to prosecution for not enforcing the new law.55

Although a number of cases were prosecuted under the Act in the first year or two after its passage, it was never
vigorously enforced. Resistance among Northern whites to this far-reaching effort to provide equal access to public facilities was strong. Southern defiance was overwhelming; black efforts to text the legislation were minimal. With few exceptions in the South, blacks who were frequently subjected to intimidation in seeking to exercise fundamental political rights, were not inclined to see integrated transportation or equal access to other public facilities as a priority. In addition, initial lower federal court opinions on the constitutionality of the Act sharply diverged. Within two years of its passage, persons involved in the already limited efforts to enforce the 1875 Act were mired in confusion over its meaning. It was assumed that the Supreme Court would provide an early clarification of the law's status under the Constitution. In fact, that clarification was eight years away.

It is not clear why the Court waited until 1883 to issue an opinion on the 1875 law. Within a few years after its enactment, a variety of cases were pending before the Court, any of which could have provided the basis for a decision. There is no evidence in the Court's records or in the papers of any of the Justices to suggest that anyone on the Court was eager to move quickly.

Bradley's hesitation is more easily explained. His once firm views on the appropriateness of earlier civil rights legislation under the aegis of the Amendments was
rapidly dissolving. It is not surprising that until his mind was clearer on the validity of the enforcement program he was not eager to break new interpretive ground or raise additional questions on civil rights issues. Bradley was as aware as anyone on the Court of the Southern resistance to the law. He had been in his circuit in the summer of 1874, as the bill moved through its final stages, shepherded through the Senate by Frelinghuysen after Sumner's death. Bradley had clipped two comments on the bill from local newspapers in Texas and Louisiana and marked them for Frelinghuysen. One was an editorial in the Galveston News remarking on the financial penalties the new law might impose and suggesting that, "...When the Act goes into force, about the best business one can follow will be to be a darky and have his civil rights violated, or a shyster and go halves with the complainant." A piece in the New Orleans Picayune commented on the motives of the bill's backers and suggested that its passage would in fact make the lives of blacks more difficult.

Republican politicians mean it as the culminating act of their reconstruction. They consider it as redeeming to the utmost extent all the promises which they have made to Negroes. They expect with its enactment to wash their hands of the whole business, and leave the negroes to work out their own destiny as best they may. It is the last gift of these politicians to their negro adherents, and it may prove to be as fatal as it is final. 58

Perhaps the best understanding of Bradley's early reaction to the new legislation is reflected in an exchange
of correspondence with Judge Woods. Woods wrote to Bradley in October 1876 asking for reaction to the new law's constitutionality. The exchange was reminiscent of letters they had exchanged in 1870 when Woods had written to ask Bradley's advice on the May 1870 enforcement legislation that Woods had under consideration in U.S. v Hall. On that occasion, Bradley sent Woods a draft opinion that underscored the authority of the federal government to move against individuals who deprived other citizens of civil rights guaranteed by the 14th Amendment, when the race of the injured party was the motive.

The Bradley-Woods exchange in 1876 reflected both the interest of lower court judges in an early Supreme Court decision on the Civil Rights Act of 1875, as well as Bradley's initial thoughts on the subject. Bradley wrote three pieces on this occasion. One was the letter he sent to Woods; another was a draft letter to Woods that he did not send. The third was a memorandum "On the Civil Rights Bill of 1875" that he also did not send. Woods had asked specifically whether the Supreme Court's decision in Slaughterhouse and Cruikshank, both of which had narrowed Bradley's far-reaching concept of the scope of federal authority in protecting the rights of citizenship, pointed to a negative ruling on the new legislation.

In the letter sent to Woods, Bradley wrote that he saw nothing in either the butchers' case or in the Grant Parish
ruling that would prevent Congress from passing a law to protect "colored persons from unjust discrimination in the enjoyment of the rights of citizenship." *Slaughterhouse,* he explained, had left to the states the regulation of all rights of citizenship except those given or guaranteed by the Constitution. Under the *Cruikshank* ruling, the states were responsible for punishing offenses of private individuals against black persons, unless those offenses violated federal laws, or were committed for the "purpose of injuring the colored person on account of their race or color." In sum, Bradley thought, Congress was free to pass laws enforcing privileges granted by the Constitution as well as laws that would prevent the oppression of one individual by another on account of race or color.

The question, Bradley continued, was whether the rights granted by the new legislation were part of the fundamental corpus of rights whose protection was guaranteed by the Constitution. It was debatable, Bradley told Woods, whether, . . . equality before the law, require that colored persons shall travel in the same cars, lodge in the same inns, and attend the same theaters and places of amusement as the whites do; or whether it is consistent with freedom, citizenship and legal equality to give them reasonable accommodations by themselves in public conveyances, and to allow them to have their own hotels and places of amusement; or if there are no hotels for colored people, to give them separate apartments. The question is whether, in these things, the negro is entitled as a matter of right to ride in the same cars, sit at the same table, and occupy the same rooms at the hotels as the whites: and whether Congress can make this law, if it is not so?
The issue for Bradley was not whether Congress could provide for the protection of "certain essential rights of citizenship" for black citizens, but just what those rights were. The Civil Rights Act of 1866, he continued, had enumerated some of those rights, particularly the right to hold, buy, sell or inherit property and to have the equal protection of the laws passed for the protection of person and property. "But whether the freedom of all hotels, railroad cars, theaters, and places of amusement, is one of these essential rights may be a question. And it is a question that must be settled by the Supreme Court."

In the meantime, Bradley advised Woods, courts of original jurisdiction out of respect for the judgment of Congress in passing the Civil Rights Act, should regard it as valid until the Supreme Court determines its status. "in this way," Bradley wrote, "the question may be sooner and better adjudicated." In closing, Bradley cautioned Woods that these thoughts had been jotted down spontaneously, but that he "reserved the right to view the whole subject, ab integro when it shall come before me, if it ever does, for adjudication."

In an additional draft to Woods, one that he did not send, Bradley commented more fully on the source of any Congressional authority for the 1875 legislation. Bradley wrote that the act was intended to protect persons within the jurisdiction of the United States against discrimination
based on race or color.

...in the enjoyment of certain enumerated privileges; and this protection extends to the acts of individuals without regard to what may be the laws of the state. It is in its nature, municipal legislation, and may be hostile to, or concurrent with the state law... The question is, whether this law is supported by any constitutional grant of power to Congress.

Whatever constitutional support existed for such legislation, Bradley continued, would have to be found in the recent amendments. He dismissed the 15th Amendment "as it related only to the privilege of voting." The 13th Amendment raised slaves to the condition of freedmen, but "does this act of enfranchisement, with incidental power to give it effect," Bradley asked, "confer upon Congress the right to give to all colors and all races in the community the freedom of all inns and hotels, public carriages and theaters and places of amusement?"

Bradley answered with another question. Was the privilege of access an incident of freedom before the Amendment's adoption? Obviously it was not, Bradley thought, since "free Negroes could always have been excluded from such places by the regulation of the proprietors. At least it was in the power of the state legislature so to direct..."

The right to demand admission to public accommodations was not necessarily an incident of freedom, Bradley concluded, therefore, "how does Congress acquire the power to confer it by the mere enfranchisement of the slaves?" Congress undoubtedly could secure in law the essential privileges
of freemen, as it had done in the Civil Rights Act of 1866, and reenacted in 1870, but could it do more? Bradley's draft ends on this note, having apparently dismissed the applicability of the 13th and 15th Amendments and offering no comment at this point on the 14th.

Bradley's easy dismissal of the 13th Amendment as a source of federal authority in racial discrimination litigation was portentous. In previous rights-related comments, Bradley tended to rely on the encompassing language of the 13th to justify federal protection legislation. In his 1872 dissent in Blyew, he had used the 13th to underscore federal responsibility for declaring equality, imposing penalties for violations of that equality and to mandate an active federal role in countering state laws that were unjust and discriminatory. "Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery," he had written on that occasion, "would hardly have been a boon to the colored race. . . ."62 In 1874, he had characterized Congress's unique authority, flowing from all the Amendments "to legislate for the entire eradication of slavery in the US," and its corresponding power to "place other races on the same plane of privilege as that occupied by the white race."63 Now, in his correspondence to Judge Woods in 1876, Bradley was, at least in his private thinking, abandoning the 13th Amendment as a primary weapon in the federal protection armory.
The most revealing insight into the evolution of Bradley's rights views in 1876, comes from a brief memorandum on the Civil Rights bill that Bradley wrote in his copy book, apparently as a part of the process of deciding what to say to Woods. "The law in question was passed to prevent discrimination of account of race and color," Bradley began. He approved of the goal, but its specific objects were a fundamental obstacle. He continued:

...What are the subjects in which it forbids such discrimination? Surely Congress cannot guarantee to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery. The civil rights bill had already guaranteed to the blacks the right of buying, selling and holding property, and of equal protection of the laws. Are not these the essentials of freedom? Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party.

...It never can be endured that the white shall be compelled to lodge and eat and sit with the negro. The latter can have his freedom and all legal and essential privileges without that. The antipathy of race cannot be crushed and annihilated by legal enactment. The Constitutional amendments were never intended to aim at such an impossibility.

The 13th Amendment, Bradley wrote, had given Congress the authority to enforce the enfranchisement of those released from bondage. But surely, the freedom of blacks could not require the slavery of white citizens, which is what enforced fellowship between the races would mean. Likewise, was it a privilege and immunity of citizenship guaranteed by the 14th Amendment to sit and ride by the side of a white person?
Are black citizens denied the equal protection of the laws,

...when they are required to eat and sit and ride by themselves and not with the whites. They may eat and sit and ride equally as whites are allowed to do, but surely it is no deprivation of civil rights to give each race the right to choose their own company.

These notes reflected a more extreme view than Bradley was prepared to offer as his own in 1876. His letter to Woods was a much milder statement that raised concerns about the applicability of the Amendments. The memorandum is important because it suggests the outer limits of Bradley's thinking on civil rights legislation in 1876. In 1883, these outer limits would become the heart of his decision in the Civil Rights Cases.

Toward 1883: Uneven Retreat

Immediately after the Presidential election, when Hayes thought he had been defeated, he mourned especially the meaning of a Republican defeat to freedmen. Southerners, he wrote, would "practically treat the constitutional amendments as nullities and then the colored man's fate will be worse than when he was in slavery, with a humane master to look after his interests." Once in the White House, Hayes continued to acknowledge the need to safeguard the rights of black citizens. This was the "one subject in our public affairs which all thoughtful and patriotic citizens regard as of supreme importance," he told his inaugural audience in March 1877.64 Increasingly however, Hayes'
"new departure" policies meant that sectional harmony replaced racial reconciliation on the nation's political agenda.

In political terms, the process of retrenchment had begun well before Hayes' inauguration, as the rocky legislative history of the Civil Rights Act of 1875 had illustrated. In terms of the law, Waite's opinions in Cruikshank and Reese had symbolized the Supreme Court's retreat from the broad reading of the new Amendments' civil rights guarantees first expounded in 1870 by Justice Bradley through Judge Woods in U.S. v Hall and in Bradley's circuit opinion in Slaughterhouse. It was a gradual retreat. An examination of civil rights issues that came before the Court between 1877 and 1883 in the context of the 14th Amendment and in other contexts, suggests a narrowing, consolidating trend rather than any sudden reversal of the Court's previous commitments.

A few months after Hayes' election the trend was pointedly underscored in Waite's opinion for a unanimous Court in Hall v deCuir. The Hall decision invalidated a statute passed by the Louisiana Republican legislature in 1869, which prohibited racial discrimination on public transportation. The defendant, a steamboat operator who refused passage to a black woman, argued that the Louisiana law was an unreasonable burden on interstate commerce and thus was a violation of Article I. Waite's brief opinion endorsed this view.
Logically, Waite's reasoning could have applied in reverse situations. If the Court could overturn local legislation prohibiting discrimination on interstate carriers, it could, by the same reasoning, overturn legislation requiring discrimination. However, the history of discriminatory state laws for most of the next century made it clear that until 1964, the Court considered the Hall reasoning a one-way street.66

The decision in Hall v. deCuir also raised the question of Congressional authority to outlaw discrimination on interstate carriers. Waite acknowledged the issue, but shed little light on it. "If the public good requires such legislation," he wrote, "it must come from Congress, not from the states." Congress of course, had already produced such legislation in the Civil Rights Act of 1875 which, among other provisions, outlawed discrimination on public transportation. The plaintiff's counsel, however, had not framed his brief in terms of the 1875 laws. Thus, Waite's decision was confined "to the [state] statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect."67

Most civil rights cases before the Court in the six years before 1883 were raised under the 14th Amendment. The trend in these cases was progressively to narrow Congressional authority to legislate federal protection of the rights of citizenship however defined, to violations flowing
only from state actions. Three cases, *Strauder v West Virginia*, *Virginia v Rives* and *Ex parte Virginia*, decided in tandem in 1880, symbolized the narrowing trend. At the same time, these decisions illustrate the danger in reading the Court's civil rights decisions as a straightforward dismantling process. Justice Strong wrote all three opinions, with Field and Clifford in dissent.

In *Strauder*, the Supreme Court granted a petition of a black man accused of murder who sought to remove his case from the state courts of West Virginia to the federal court. In granting the petition, the Court ruled that a state statute excluding blacks from juries was in conflict with the 14th Amendment and therefore invalid. The *Strauder* decision was a victory for the enforcement program in one sense, but Strong's opinion stressed the applicability of the equal protection clause primarily to state actions, thus emphasizing the narrowing of the Amendment's reach.

The second case, *Virginia v Rives*, deprived the *Strauder* decision of much of its effect. In *Rives*, a black Virginian charged with murder sought removal to the federal courts, not because state laws barred blacks from juries (in fact Virginia laws prohibited such discrimination,) but because no blacks had ever served on juries in the plaintiff's county. The Court denied Rives' petition. The 14th Amendment's equal protection guarantees, Strong wrote,
did not reach patterns of discrimination that were not sanctioned officially by state actions.

The last case in the Strong trilogy, Ex parte Virginia, was the first Supreme Court case to raise the 1875 law as a legitimate exercise of Congressional authority under the 14th Amendment. In this case, the Court upheld the indictment of a Virginia county judge under provisions of the Civil Rights Act that made it a crime to exclude citizens from state juries on account of race. Strong's opinion did not address the controversial public accommodations sections of the Act, but his statement was one of the most far-reaching ever to come from the federal bench in support of congressional authority to protect civil rights under the Amendments. The Amendment's purpose, Strong wrote, was "to raise the colored race from the condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with other persons within the jurisdiction of the states." Ex parte Virginia was also consistent with the Court's increasing emphasis on state action as the trigger for 14th Amendment guarantees. Its twist was a broadening of the definition of state action to include discriminatory actions of state officers operating in official capacities even when state laws themselves were not discriminatory.

Bradley silently concurred in the three Strong decisions. The only concrete evidence of his evolving civil rights views after his 1876 correspondence with Woods and before
the Civil Rights Cases in 1883, was a decision in another 1880 case, Ex parte Siebold. The Siebold opinion upheld a key provision of the Ku Klux Act of 1871, which imposed federal criminal penalties on state election officials presiding over federal elections who failed to carry out their responsibilities under state election laws. The petitioners were Baltimore election judges who were convicted for preventing federal supervisors, appointed under the Klan Act from performing their duties. The petitioners applied for writs of habeas corpus, contending that the 1871 law was an unconstitutional intrusion of federal authority on the state's right to conduct elections. Bradley rejected the petitions in language so far-reaching that it effectively settled the question of federal authority to regulate its own elections. "The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress," Bradley wrote. Congress was content to leave state laws as they were, he reasoned, but to demand their fulfillment. If the Congress was not satisfied with the state's enforcement of its own laws, and the Klan Act was a manifestation of just such dissatisfaction, the Congress could, without question, provide additional means of enforcement.

Bradley's opinion in Siebold received the approbation of friends on both sides of the issue. "Will it be any satisfaction to you to know that as hardened a states rights
Democrat as myself has been convinced by your opinion in the election cases," one friend wrote.73 Frederick Frelinghuysen, whose liberal views on civil rights enforcement had increasingly diverged from those of his old friend, offered an encomium. "I need not say it is right," he wrote Bradley in reference to Siebold,

...it is so plain and simple that a boy of 16 can comprehend it -- learning is the instrument with which a good builder produces the result, but he does not leave his trowel or his pick sticking in the walls -- it is a pity such opinions could not be more read by the people.74

The 1883 Cases -- The Compromise Fulfilled

By 1883, civil rights issues before the Supreme Court had begun to resolve themselves into two specific questions. In the broad sense, the Court had acknowledged the authority of Congress under the 13th, 14th and 15th Amendments to protect the fundamental rights of citizens of the states and of the United States from abuses based on race. What was lacking by 1883 was an operable definition of rights considered to be sufficiently fundamental to warrant protection by the federal government, as well as a clearer understanding of the abuses that could be reached by federal legislation under the Constitution.

These two questions were effectively settled for almost a century in two landmark decisions in 1883. For more than a decade, the Court had vacillated on the question of whether the Amendments' guarantees could be enforced against private
actions. In *U.S. v Harris* and the *Civil Rights Cases*, the Court unequivocally confined the reach of the equal protection guarantee to actions by states alone.

The *Harris* case grew out of an "outrage" in Tennessee in which a white mob had taken a group of black men from the custody of a deputy sheriff, lynched four of them and injured several others. Twenty men, including Harris were indicted in the incident under provisions of the 1871 Ku Klux Act which had made it a crime to deprive or conspire to deprive a person of the equal protection of the laws or to prevent local authorities from providing equal protection. The *Harris* opinion was written by Justice William Woods, Bradley's old conferee in the 5th Circuit, whom Hayes had appointed in place of Strong in 1880. The Klan Act, Woods wrote in *Harris*, constituted an unwarranted extension of Congressional authority to reach the private actions of individuals, whatever their crimes. Citing Bradley's circuit opinion in *Cruikshank*, Waite's Supreme Court opinion in the same case, and the Court's recent decision in *Virginia v Rives*, Woods wrote that the Court could look at the case only in terms of the state law. "The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there," Woods wrote. "The only obligation resting upon the United States is to see that the states do not deny the right." If the state laws
recognized and protected the rights of all persons, Congress had no authority under the Amendment. Thus, Woods concluded, the Klan Act, which had been a mainstay of the enforcement program, was a dead letter.77

Woods' opinion did not close the door on the authority of Congress to reach the actions of private individuals, but it added a burden of proof on those seeking redress, that the state had either officially sanctioned the private action or had been derelict in its duties to insure equal protection against private actions. Ironically, Woods had been the first federal judge to comment on the constitutionality of the 1870-71 enforcement package. In U.S. v Hall, decided in the 5th Circuit in 1871, Woods upheld indictments similar to those in Harris by defining state action under the 14th Amendment broadly enough to allow the enforcement legislation to reach actions of private individuals. Woods had written that state inaction, or its inability to protect freedmen in pursuit of their rights, was enough to justify federal enforcement. In other words, the 14th Amendment was not only corrective, but mandated positive state action to assure equal protection of the laws. Woods had taken this sweeping 14th Amendment dictum almost verbatim from a draft Bradley had provided him. Now, twelve years later, Bradley sat quietly while Woods reversed the Hall reasoning. The Harris decision narrowed the doorway through which federal authority could reach most civil rights abuses. A
few months later, Bradley's decision in the Civil Rights Cases would effectively close the door and seal the cracks.

**End of an Era**

"If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop," Bradley wrote of the beleaguered Civil Rights Act of 1875. The amendment was the 14th, the occasion, Bradley's decision for the majority in the Civil Rights Cases in 1883. For eight years after the election of Hayes, Bradley sat virtually in silence while his colleagues chipped away at the enforcement program's constitutional underpinnings. In 1883, he was prepared to make explicit what the Compromise of 1877 had implied.

The goal of all civil rights legislation from 1866 to 1875 had been to create a federal responsibility for protecting citizens in their fundamental rights. The effect of Bradley's decision was to deny Congress that authority and to return the responsibility for civil rights protections to its pre-war locus -- the states. Because he could not imagine "where it is to stop," Bradley chose the occasion of the Civil Rights decision to bring the "first Reconstruction" to a close from the standpoint of the law.

The decision in the Civil Rights Cases was based on the Court's consideration of six cases challenging the first and second sections of the Civil Rights Act of 1875. Two of the six cases, U.S. v Stanley and U.S. v Nichols, involved denial
of hotel accommodations to black citizens. Two others, *U.S. v Ryan* and *U.S. v Singleton*, had been prompted by the refusal of theater operators to admit black ticket holders on the same basis as their white counterparts. In *U.S. v Hamilton* and *Robinson and wife v Memphis and Charleston Railroad Co.*, the injured parties, both black women, had been refused first class seats in railroad cars on account of their race.

The Court dismissed the *Hamilton* case on a procedural point. Of the remaining five, four involved criminal prosecutions of individuals charged with discriminatory behavior. Each of these cases challenged the constitutionality of the 1875 Act. The case involving Robinson and his wife was a civil suit in which counsel for the railroad allowed the constitutionality of the law, but questioned its applicability in the case.

All six cases had been on the Supreme Court's docket for at least four years. Several had been filed within months of the passage of the 1875 law. Whatever suspense had once awaited the Court's decision on the law's constitutionality had evaporated in eight years. By the time the Court spoke, as Morton Keller has observed, the suits seemed weary and empty, an accurate reflection of the status of civil rights interests in 1883. The enforcement program was comatose. The political compromise had been sealed. Only the judicial shoe needed to be dropped to certify the
end of Reconstruction. The defendants' attorneys did not bother to file briefs on their clients' behalf. Solicitor-General Samuel F. Phillips' recitation of the history of the war Amendments and enforcement legislation was hollow and perfunctory. Bradley's decision, in which all the Justices but John Marshall Harlan concurred, was significant, but it was hardly a surprise.79

The essence of the 1875 law, Bradley began, was not to assure all persons access to public accommodations, transportation and theaters. Rather, the law's purpose was to assure that access to these facilities did not rest on distinctions between citizens of different races or between those who had been slaves and those who had not.

Its effect [was] to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether former slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances and places of amusement as are enjoyed by white citizens; and vice versa.80

Bradley faced the constitutional issue head on: did Congress have the authority to pass such a law? He answered with a resounding no. The law was based on the first section of the 14th Amendment,8 Bradley wrote, by which states were forbidden from making or enforcing laws which abridged the privileges and immunities of U.S. citizens; nor could states deprive citizens of life, liberty or property without due process, or deny citizens within their jurisdictions the equal protect of the laws. The language was prohibitory
and directed only at states. It did not address the invasion of individual rights by private acts of other individuals, Bradley continued, reversing thirteen years of his own thinking on the Amendment's meaning. The positive rights and privileges secured by the Amendment, Bradley wrote,

...[were] secured by way of prohibition against state laws and state proceedings affecting those rights...and by [congressional power] to legislate for the purpose of carrying such prohibitions into effect...until some state law has been passed, or some state action through its officers...has been taken...adverse to the rights of its citizens...no legislation of the United States...can be called into effect. 81

Congressional legislation other than that which is clearly corrective, Bradley wrote, would establish a municipal code regulating private relations between individuals. The 14th Amendment had not given Congress that authority.

Bradley distinguished the 1875 law from the Civil Rights Act of 1866, which had guaranteed to all citizens the right to make contracts, to sue, to give evidence and to enjoy the benefits of whatever laws or proceedings were necessary to assure the security of persons and property. The 1866 law met the "corrective" test, he thought, because the rights secured in that law could not be abridged by private individuals without the support of a state's laws, customs, judicial or executive proceedings. In this connection, Bradley exempted the prohibition on discrimination on state and local juries, since that one clause of the 1875 law met
the corrective test also.82

Having dismissed justification of the 1875 Act under the 14th Amendment, Bradley turned to the 13th. Enforcing legislation under the 13th Amendment could be direct, rather than simply corrective since the 13th was an absolute declaration that slavery could not exist in the United States. Thus, Congress could legislate under the Amendment's provisions, to abolish the badges and incidents of slavery. The Civil Rights Act of 1866 enforced rights guarantees so fundamental that their denial constituted a badge of slavery, but this was not true of the current law, in Bradley's view.

The question in the current case was whether refusal of public accommodations under the 1875 legislation, when the state had not sanctioned such discrimination, also constituted a badge of slavery. Bradley thought not, rather,

...such an act of refusal [had] nothing to do with slavery or involuntary servitude. ... It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person might see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.

The time had come, Bradley concluded, twenty years after emancipation, for former slaves to join the ranks of mere citizens and cease to be the law's special favorites.83

In abandoning the constitutional distinction between
ex-slaves and "mere citizens," Bradley was also abandoning his own earlier perception of the 13th Amendment as acting, where discrimination based on race was at issue, upon every person and official on all levels of the federal system. The implications in Bradley's view was that the 13th Amendment had been superceded by the 14th, where the national authority to act directly on individuals was more circumscribed. Bradley's role in shifting the constitutional burden almost entirely to the 14th Amendment in civil rights cases, was fundamental to the diminution of 13th Amendment potentialities in civil rights litigation.

On the day Bradley read the majority opinion, Justice Harlan simply noted his disagreement. Harlan then labored a month over a dissenting opinion he thought worthy of the moment. Harlan was the only southerner on the Court. He had been a slave-owner and had bitterly opposed Lincoln's election, but he was, like Bradley, a devoted Unionist. After Sumter, Harlan had joined the Union army and by 1870, had become not only a Republican, but a strong advocate of civil rights guarantees under the post-war amendments whose passage he had earlier opposed. Harlan's complex transformation on civil rights guarantees was largely the result of his first-hand experience with outrages and vigilantism against white Republicans and blacks that had characterized Kentucky political life in the late 1860s. His Civil Rights dissent was an act of personal repentance.
destined to become a much anthologized item in the
literature of American civil liberties. With a touch
of irony and inspiration, Harlan prepared his draft at
the ink stand with which Chief Justice Taney had written
the Dred Scott decision a quarter of a century earlier. 85

Harlan opened with a criticism of the "narrow and
artificial" scope of the majority opinion. Harlan was a
friend of Bradley's and an admirer of his intellect, and
he acknowledged the deftness with which Bradley had under-
scored the fundamental nature of the Amendments' guarantees
while cutting the heart from their enforcement. "The
substance and spirit of the recent Amendments," he wrote,
had been "sacrificed in the majority opinion by a subtle
and ingenious verbal criticism." 86

Harlan agreed with the majority that a new corpus
of rights now flowed from national citizenship under the
aegis of the post-war Amendments. He disagreed with Bradley
on two major points. First, Bradley had reasoned that the
1875 law could not be justified under the 13th Amendment
because access to public accommodations was simply an
ordinary social right. The denial of such rights in the
majority view, was not sufficiently fundamental to equality
to constitute a badge of slavery and thus trigger national
enforcement mechanisms. Second, although Bradley and
Harlan agreed that the 14th Amendment had created a set
of positive rights associated with national citizenship,
Bradley had written that the national government's responsibility for those rights was only secondary and corrective and could be brought into force only when those rights were abridged by state-sanctioned activity.

Harlan proceeded from a different premise. The Court had previously acknowledged that the "one great purpose of the Amendments...was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the states," Harlan wrote, quoting from recent decisions in *Ex parte Virginia* and *Strauder v West Virginia.* Therefore, Harlan argued, the Amendments had created a new right -- a right to be free from discrimination based on race.

"...If, then, exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States -- and I do not see how this can be questioned -- why may not the nation, by means of its own legislation of a primary direct character, guard, protect and enforce that right? It is a right and privilege which the nation conferred. It did not come from the States in which those colored citizens reside."

From this premise, Harlan attacked Bradley's reasoning that discrimination in access to public accommodations was not sufficiently fundamental to warrant federal protection. Harlan and Bradley had agreed that Congress had the authority under the 13th Amendment to legislate directly and primarily
to eradicate slavery's badges and incidents. Slavery, Harlan argued, rested wholly upon racial inferiority, thus the freedom of ex-slaves necessarily required that they be protected from discrimination against them based on race, "in respect of such civil rights as belong to freemen of other races."^89

Congressional legislation to achieve these ends, Harlan wrote, could not only be direct and primary, but could operate "upon states, their officers and agents and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state." To justify the national authority to reach individuals and corporations, Harlan used the "public interest" weapon fashioned by Bradley for Waite's use in *Munn v Illinois*. Harlan continued:

. . . In the Munn case. . . after quoting a remark attributed to Lord Chief Justice Hale, to the effect that when private property is 'affected with a public interest it ceases to be *juris privati* only,' the Court says:

Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . .^90

Harlan's conclusion was that racial discrimination practiced by corporations and individuals in the exercise of public or quasi-public functions was nothing less than a badge of servitude that Congress could move against under
its power to enforce the 13th Amendment. Surely, Harlan continued, drawing his ink from Justice Taney's stand, the national government could do for human liberty and the fundamental rights of American citizens what it had done with the sanction of the Supreme Court, for the protection of slavery and the rights of the masters of fugitive slaves.  

Harlan spoke to history, not to the times. Bradley's decision for the majority sparked hardly a murmur beyond the protests of a dwindling band of liberal Republicans and ex-abolitionists. Press comments were brief and generally supportive.  

For most Americans, black and white, the decision passed unnoticed. It was Bradley who spoke to the moment. His was a period piece, stunting for the present the 13th Amendment's potential and incorporating the realities of the day into the 14th Amendment. Bradley had been an agent, wittingly or not, of the complicated and not always conscious political bargain that made this moment inevitable. In 1883, the Civil Rights decision was simply the last in a series of events that had been set in train in the early 1870s.
EPILOGUE

For historians of the Reconstruction era, Bradley's decision in the Civil Rights Cases of 1883, is the benchmark, the symbolic culmination of the Compromise of 1877, the revolutionary "deracializing" of the post-war Amendments, particularly the 14th, until the "second Reconstruction" of the 1960s restored the original understanding.¹

For Bradley, it was also the end of an era, the terminus of his civil rights odyssey that had begun within months of his appointment to the Court in 1870. In those early years, Bradley had been a powerful advocate of the supremacy of federal authority in protecting the rights of all citizens, particularly newly enfranchised freedmen, under the post-war Amendments. By the mid 1870s, he had begun to vacillate on the value of congressional efforts to fulfill the Amendment's goals. Initially, he had seen the national effort to enforce civil rights legislation under the Amendments as essential to the process of restoring the Union, the goal he prized above all. By 1883, the enforcement program had become, in his view, a divisive tool rather than one of reconciliation. Bradley's
decision acknowledged what had become a fact of American political life by the 1880s. The civil rights issue, born in the blood and trauma of war and Reconstruction, had been substantially wiped from the nation's agenda.

The Civil Rights decision marked the effective end of Bradley's civil rights jurisprudence, but not, of course, the end of his career. He continued to serve with distinction and energy until his death in January 1892. For almost a decade after 1883, Bradley's major work, reflecting the nation's shifting priorities, was related to economic issues arising under the 14th Amendment. He would become the Court's strongest defender of state regulation of railroad rates, and more broadly of the authority of government to regulate private interests in the name of the public good. His altered views on civil rights enforcement did not dim his nationalist ideals in other areas, such as the need for a wider jurisdiction for the federal courts and the authority of Congress to encourage and regulate interstate commerce. His last written opinion, in dissent as he increasingly was in his last years on the Court, protested a state tax on a railway's gross receipts and thus on its interstate business.

In 1886, Bradley wrote one of the few civil liberties decisions of the nineteenth century in Boyd v. U.S. Here Bradley reversed the conviction of a defendant who had
been forced to produce private papers related to a charge of illegal importation of goods. The defendant, Bradley concluded, had been subjected to an unconstitutional search and seizure. He had, in essence, been forced to testify against himself in violation of the 4th and 5th Amendments. Bradley's decision in *Boyd* is a landmark in civil liberties jurisprudence.

Bradley was the best lawyer on the Court in the late nineteenth century. He was probably the most widely read and among the most technically competent. Had his civil rights jurisprudence been his only contribution to American constitutional law, Bradley would still be among the most important Justices in the Court's history. However, until other aspects of his career, particularly his non-civil rights 14th Amendment jurisprudence, receive the scrutiny this dissertation has attempted to give to his civil rights views, it is not especially useful to judge his rank among all the men who have served on the Supreme Court.

Bradley's overriding goal was to use the power and authority of the Constitution to re-knit the national fabric after Appomattox. In the end, he was willing to pay a terrible cost in the law, by denying the war's legacy to those whose freedom it had been fought to secure. However one might argue Bradley's relative "greatness," he did not fear history's judgements. "If I have the ill-fortune to be unjustly judged," Bradley wrote on one occasion,
"I am not the first who has been in that predicament. We must take the world as it is, and having done what we conceived to be our duty, trust the rest to a higher power than that [that] rules the ordinary affairs of men. . . ."
CHAPTER ONE

1. The rough notes of the Sketch are in one of several Memorandum Books in the Joseph Bradley Papers in the New Jersey Historical Society. The Bradley Papers, which include manuscript notes, law notes, law journals and ledgers and correspondence, were donated to the New Jersey Society by Charles Bradley, Jr., the grandson of the Justice. Although the Papers were culled by the family, they are considered complete enough to allow an accurate picture of the Justice's life and work to emerge. The correspondence in the collection is primarily "incoming," but fortunately for scholars interested in the collection, Bradley had a habit of making a first draft of much of his correspondence in his memoranda books.

The Autobiographical Sketch provides a major source for the biographical information presented here. The Papers will be cited through this manuscript as Bradley Papers, NJHS.


3. Autobiographical Sketch. The pages of the Memorandum books are variously numbered. The Sketch is brief enough that it will be referred to by this title.


7. Autobiographical Sketch; *Family Notes*, p. 41. Throughout his life, Bradley was an inveterate book collector. He was particularly fond of genealogies, "all of which," he told one of his regular book dealers, "cost me a heap of money." Bradley to Charles Burr Todd, April 4, 1889. Manuscript Collections, New York State Library.

8. Autobiographical Sketch; *Family Notes*, pp. 54-55.


10. Autobiographical Sketch

11. In his father's collections, Bradley found books on surveying and navigation. He taught himself to survey and was often hired by neighbors to settle boundary disputes and survey their farms. He charged $1.00 a day. "This brought me a little money." Autobiographical Sketch.
12. Family Notes, p. 56.

13. Ibid., p. 54.

14. Ibid. Bradley's comment that he spent Sundays reading and arguing with Job suggests that the Bradley family, though religious in a general sense, had no particular affiliation. Though his father read the Bible and his mother was a Methodist, his memoirs contain no other mention of organized religious activities. As an adult in Newark, Bradley was active in the Dutch Reformed Church. During his Court years in Washington, he was a member of the New York Avenue Presbyterian Church.

15. Bradley to William Hornblower, January 1, 1860, Bradley Papers, NJHS. Hornblower was Bradley's brother-in-law, and a Dutch Reformed minister. The two corresponded through the years on religious and philosophical topics. The text in question was Proverbs 27:19, "As in water face answereth face, so the heart of man to man."

16. Autobiographical Sketch, also Family Notes, pp. 53-54.

17. Bradley's most famous mathematical effort was probably his long effort to calculate the exact year and day of the Crucifixion. His notebooks are filled with calculations in this regard. He also participated in an effort by the National Academy of Science to reform the Gregorian calendar. His Perpetual Calendar was copyrighted in 1875 and widely circulated. He spent one summer fixing the meridian at Stowe, Vermont where the Bradleys vacationed. His correspondence is sprinkled with notes from friends, referring to problems he had posed to them. Many of his schemes are included in Joseph P. Bradley, Miscellaneous Writings of the Late Joseph P. Bradley, Charles Bradley, ed. (Newark: Hardham, 1902), hearafter cited as Miscellaneous Writings.

18. Family Notes, p. 56.

19. In the Autobiographical Sketch, Bradley indicated that his general plan was to attend Albany Academy and then Union College in Schenectady, New York. These were the closest institutions to his home. Bradley seemed not to have desired any particular career, simply a college education.

21. Bradley's manuscript notes suggested that he experience some difficulty over committing himself to the clergy. In the draft of this section of his Autobiographical Sketch, he wrote, "...only I must be a minister, being persuaded of the notion of becoming a minister, - I went to New Brunswick."


24. Ibid.

25. Autobiographical Sketch.


27. Biographical material on Parker is also available in the files of the New Jersey Historical Society. Again, there is no modern biography. See Edward Colie, "Cortlandt Parker," Proceedings of the New Jersey Historical Society 5: 21-23, and "John Cortlandt Parker," Dictionary of American Biography 14, p. 233. After passing the bar, Parker became Prosecutor of Essex County. He was active in Whig and Republican politics. He declined several appointive offices from Presidents Hayes and Arthur. He was the sixth President of the American Bar Association and was generally known in the last decades of the nineteenth century as the leader of the New Jersey bar.

28. After graduating from Rutgers, Newell completed an M.D. at the University of Pennsylvania. He practiced in New Jersey, and through the early 1850s was active in Whig politics. In 1856, he became governor of the state on the American party ticket. He served until 1861, and was active in the election of Lincoln. He served two terms in the U.S. Congress, 1847-1851, 1865. In 1880, President Hayes appointed him Governor of the Washington Territory. He served for four years. Dictionary of American Biography 14 pp. 459-60.

30. Autobiographical Sketch.

31. Ibid.

32. "Principles" in Memorandum book, October 17, 1835, Bradley Papers, NJHS.

33. "In the winter of 1835, the Society to which I belonged had a difficulty with the faculty and I was drawn farther into it than I desired and had some spirited interviews with the Rev. Dr. Milledolfer, the President and other Professors -- my mind became unsettled on the ministerial question." Autobiographical Sketch.

34. "Thoughts on Commencement," (1836) Bradley Papers, NJHS.

35. For the life of Theodore Frelinghuysen, see Dictionary of American Biography 7, pp. 16-17; also Cortlandt Parker, "A Sketch of the Life and Public Service of Theodore Frelinghuysen," (1844) in pamphlets collection, NJHS.

36. Frederick Frelinghuysen to Bradley, September 6, 1836, Bradley Papers, NJHS.


39. Autobiographical Sketch.


41. Miscellaneous Writings, p. 302. Although this essay has no date, it appears just before the essay on "Principles" in Bradley's copybook, which was written in 1835.
42. Ibid.

43. This note appears on the front page of "Manuscript Notes on Legal Subjects, Vol II, Register of Notes and Remarks (on Points of Law) by Joseph P. Bradley, June 1, 1840," Bradley Papers, NJHS.

44. "Law, its Nature and Offices as the Bond and Basis of Civil Society, Miscellaneous Writings, pp. 256-259.

45. Ibid., p. 246.

46. Ibid., p. 261.

47. Ibid., p. 254.

48. Miller, Life of the Mind in America, p. 139. One who reads Miller's own works is inclined to wonder of him as he wondered of Story, how one head could hold so much.


50. "Admission to the Bar," Miscellaneous Writings, p. 79.


52. The six cases Bradley argued before the Supreme Court were:
   Murray's Lessee v Hoboken Land and Improvement Co., 18 Howard 272 (1856)
   Milnor v Railroad Company (three cases unreported)
   Hager v Thompson 1 Black 80 (1861)
   Bridge Proprietors v Hoboken Land and Improvement Co. 1 Wall 116 (1863)
   Burr v Duryee 1 Wall 531 (1863)
   Croxall v Sherrard 5 Wall 258 (1867)


56. Bradley ran for Congress from New Jersey's Fifth district in 1863. In 1868, he ran as a Grant elector on the Republican-Unionist ticket. These campaigns are discussed more fully in Chapter Two.


59. Autobiographical Sketch.

60. "Memorandum of Understanding" between Bradley and John P. Jackson, signed May 1, 1849, renewed each year through May, 1844. Bradley Papers, NJHS. The memorandum lists a figure of $350 as Jackson's guarantee to Bradley. Bradley recorded the figure in his Autobiographical Sketch as $500.

61. Joseph Bradley to Mary Palmer, January 20, 1844, Bradley Papers, NJHS.

62. Bradley's correspondence contains a variety of letters between Bradley and William Hornblower. He was the Dutch Reformed minister at Paterson, New Jersey. Hornblower was Bradley's brother-in-law as well as a close friend.

63. In Family Notes, Bradley included the following notes on his children:
   Mary Burnet, b. 1845, married 1870 to H.V. Butler
   Caroline, b. 1847, married 1893 to J.C. Hornblower
   Joseph H., 1849-1854 (died at age 4)
   Harriette, 1851-1856 (died at age 5)
   William H. Married 1880 to Eliza Cameron
   Charles, Married 1882 to Julie Ballantine
   Joseph R., 1862-1864 (died at age 2)


65. Autobiographical Sketch.

66. Ibid.

68. See Bradley's Journal of Cases for 1850, Bradley Papers, NJHS.

69. When Bradley ran for Congress in 1863, he published several collections of his newspaper pieces on war-related topics. See especially, Political Expressions of Joseph P. Bradley (Newark: 1863) Bradley Papers, NJHS.

70. For example, see reference to the Rodman Patent Case, in Bradley's law notes., Bradley Papers, NJHS.

71. Bradley from [?] Ailkin, President of the New Jersey Zinc Co., December 16, 1862, Bradley Papers, NJHS.


73. Miscellaneous Writings, p. 303-304.


77. Knapp, New Jersey Politics, p. 3. See also, Helen T. Catterall, ed. Judicial Cases Concerning American Slavery and the Negro, Vol 4 (Washington: Carnegie Institute, 1936), p. 319. As early as 1714, according to Catterall, every person who wished to manumit a slave had to furnish the Queen a security of 200 pounds to insure support for ex-slaves up to 20 pounds a year.


85. See Samuel J. Bayard, A Sketch of the Life of Commodore Robert F. Stockton (New York: Derby and Jackson Co., 1856); See also, "Historical Notes," passim.


89. See fn 74 for an evaluation of the "Historical Notes" and Bradley's possible authorship.

90. 1 Spencer 368 (1845).
91. These are the only cases mentioned in Helen Catterall's summary of judicial cases concerning slavery. They are also the principal and in most cases only, citations listed in articles related to New Jersey slavery cited in fn 74.

92. 1 Spencer 368, at 368-69.

93. In 1835, Alvan Stewart formed the New York Anti-Slavery Society and served for years as its president. He helped organize the Liberty Party, advocated independent political action by abolitionists. His primary contribution to the anti-slavery movement was in the field of constitutional law. See Jacobus ten Broek, Equality Under Law (Berkeley: University of California Press, 1965), p. 281-282.

94. In the course of this paper, I made an extensive search for the briefs filed by Bradley and Zabriskie. They could not be located in the New Jersey Archives, which houses local court records for this period.

95. Luther R. Marsh, ed. Writings and Speeches of Alvan Stewart on Slavery (New York: A.B. Burdick, 1860)

96. 1 Spencer 368, at 372.


98. 1 Spencer 368, at 369.


100. 1 Spencer 368, at 372.


102. 1 Spencer 368, at 373.


CHAPTER TWO

1. Richard McCormick, The Second American Party System (Chapel Hill: University of North Carolina Press, 1966), p. 131. Although more dramatic in their political ramifications, the monopoly privileges granted through state charters in New Jersey were not unlike those granted in other states in this period. Turnpikes and railroads were often granted exclusive privileges for set periods in order to encourage capital investment. Because of the high costs of construction, many state legislatures assumed railroads would become natural monopolies and in the belief that there would be little competition, the setting of maximum rates in these early charters was commonplace. See George R. Taylor, The Transportation Revolution, 1815-1865 (New York: Reinhart and Co., 1960), and L.H. Haney, A Congressional History of Railways in the United States to 1850 (Madison: University of Wisconsin Press, 1908), p. 244.


3. The scholarly literature on New Jersey in the war and reconstruction period is not large. The standard treatment is Charles Merriman Knapp, New Jersey Politics in the Period of the Civil War and Reconstruction. Knapp's work is based on careful scrutiny of the state's newspapers in the decade of the 1860s. A more thorough analysis is Kent Peterson, "New Jersey Politics and National Policy Making."
4. Lane, *From Indian Trail to Iron Horse*, pp. 7-8.


6. The Stevens Family Papers are in the New Jersey Historical Society and in the collections of the Stevens Institute at Hoboken, New Jersey.


8. Clipping dated May 12, 1826 in the Stevens Papers, NJHS.


22. Lane, From Indian Trail to Iron Horse, p. 334.

23. Autobiographical Sketch.

24. Pamphlet of this title, printed at Philadelphia, 1848. Pamphlet Collection, NJHS.

25. Address of the Joint Board of Directors of the Delaware and Raritan Canal and Camden and Amboy Railroad Co to the People of New Jersey (Trenton: n.p., 1848), Pamphlet Collection, NJHs.

26. Ibid. In addition to former Governor William Pennington, the Committee included Charles Parker and James G. King.
27. Several dozen letters in Bradley's Correspondence files, dated October through December, 1848, relate to administrative functions of the investigating committee. Most of the details are included in brief notes between Bradley and Governor Pennington. Bradley Papers, NJHS.

28. [Henry C. Carey] Beauties of the Monopoly System in New Jersey (Philadelphia: n.p., 1848), Pamphlet Collection, Library of the Association of American Railroads. Carey's pamphlet was written after his refusal to meet with members of the first investigating committee. He used the pamphlet to point out the vested interests of the members of the committee in monopoly-related activities in the state. See also, Carey's An Investigation into the Affairs of the Delaware and Raritan Canal and the Camden and Amboy Railroad Companies in Reference to Certain Charges by 'A Citizen of Burlington' (Trenton: n.p. 1848), Pamphlet Collection, Library of the Association of American Railroads.

29. Lane, From Indian Trail to Iron Horse, p. 346. James S. Hulme, Aaron Robertson and Alexander Wurts were named to the second committee.

30. The Committee's papers were not saved. Some details of the Committee's relations with Carey and the conflict between Carey and Bradley can be found in a few files Bradley kept on the investigation. See "Papers Related to RR Monopoly Case," Bradley Papers, NJHS. For Carey's charges against Bradley, see Carey, Correspondence Between Commissioners for Investigating the Affairs of the Joint Companies and a Citizen of Burlington (Philadelphia: n.p. 1850), New Jersey Collection, Rutgers University Library.


32. In Bradley's note on "Professional Income Received," he indicated that he received "I suppose about $3,000 in 1848." In 1849, he listed $4,628.61, plus $5,000 "extra from Camden and Amboy Railroad business." In 1850, he reported a professional income of $4,554.32 "diminished by attention to railroad business." Thus, the $5,000 in stock more than matched his income for any one of these years. Memorandum Book, Bradley Papers, NJHS.
33. Many of the books of these early companies are now in the Archives of the Pennsylvania Railroad in Philadelphia. Bradley is listed in many of the annual reports for these years as secretary and director. The annual and monthly minutes often appear to be in his hand. These records are not complete and many are damaged beyond utility.

34. Bradley Diary for 1870, Bradley Papers, NJHS.


37. The newspaper collection of the New Jersey Historical Society is particularly rich in the details of these minor but interesting political skirmishes. The general flavor of the period is usefully illustrated in William Sackett's, Modern Battles of Trenton, and in Hermann Platt, Personal Reminiscences.


43. Cunningham, Main Road, p. 172; Knapp, New Jersey Politics, p. 2; Joseph Atkinson, The History of Newark (Newark: W. B. Guild, 1878), p. 239.


47. Cunningham, Main Road, p. 173.


49. Murray's Lessee v Hoboken Land and Improvement Co., 18 Howard 272 (1856).

50. Smith's Reminiscences does not mention Bradley. Knapp mentions him only peripherally and clearly from hindsight, always noting the fact that Bradley was to become a Supreme Court Justice.


52. True American, March 18, 1856; Daily Advertiser, March 20, 1856, p. 1.


54. Milnor v RR Co (three cases not reported, the so-called Bridge Cases, see Daily Advertiser, December 15, 1859, and January 4, 1860.


56. Ibid., March 10, 1860, p. 2.


59. Quotations here are from Bradley's manuscript, Bradley Papers, NJHS.


68. Ibid.


70. Ibid., p. 3.


73. Daily Advertiser, February 2, 1861; October 29, 1862.


75. Ibid., p. 180.

76. For final language, see Ibid., p. 182.


80. "V" in Political Expressions, p. 5.


84. Knapp, *New Jersey Politics*, p. 69. Knapp outlines the several plans put forward for a Union party to support the administration regardless of previous loyalties. In general, the idea was opposed by all sides.

85. Ibid., p. 109.


89. Trask, "Charles Sumner and the New Jersey Railroad Monopoly," p. 263.


91. Bradley Diary, May 7, 1862, "To DC with Mr. Stevens to Navy Department," also "To see President," Bradley Papers, NJHS.

92. The indexes to Lincoln's papers contain no reference to this meeting or correspondence related to it.

93. *Daily Advertiser*, August 22, 1862, p. 2

94. Ibid., October 23, 1862, p. 1.

95. Ibid., October 29, 1862, p. 2.

96. Ibid.

97. Ibid.

98. Speech of J.P. Bradley, Union Nominee at Jersey City (Newark: Advertiser Press, 1862) Bradley Papers, NJHS.
99. Greiner (of the German Committee) to Bradley, October 13, 1862, Bradley Papers, NJHS.

100. Bradley to the German Committee, October 24, 1862, Bradley Papers, NJHS.

101. Greiner to Bradley, October 28, 1862, Bradley Papers, NJHS.


103. Bradley Diary, November 4, 1862, Bradley Papers, NJHS.

104. Bradley's Supreme Court appearances in 1863 included: Bridge Proprietors v Hoboken Land and Improvement Co, 1 Wall 116, and Burr v Duryee, 1 Wall 531.

105. Manuscript of July 4, 1863 Speech, Bradley Papers, NJHS.


107. The other two states were Kentucky and Delaware, see Randall and Donald, Civil War and Reconstruction, p. 476.

108. Through the winter and early Spring, 1864, Bradley continued to make frequent trips to Washington on railroad business. His small son, Rochard, died in early February (see letter to his sister Mary Palmer, February 7, 1864). His diary contains no reference to Lincoln's assassination or to the war's end. Bradley Papers, NJHS.

109. Bradley Diary, April 25, 1866, Bradley Papers, NJHS. On April 24, Bradley wrote "went to DC about railroad affairs." On the 25th, he wrote simply "called on President Johnson."

110. Bradley Diary, April 10, 1868. Entry reads, "To Washington April 9, staying with FTF." On the 10th, he wrote "was at the trial. In the Gallery of the Senate until 5, dined with FTF." On the 11th, he wrote, "on the floor of the Senate." Bradley Papers, NJHS.

111. In Bradley's legal files, this piece is labeled, "Negro Suffrage," dated October 17, 1866. Bradley wrote at the head of the piece that he had been called on by "Calvin Pepper, Esq. of Virginia, formerly of Albany, and by John Whitehead, Esq. to employ me to argue the sufferage question." Bradley gave no details other than his comment that they proposed he argue the case and that he rejected it. Bradley Papers, NJHS.
112. Bradley Diary, entries for April 1867, Bradley Papers, NJHS.

113. Bradley to Mary Bradley, April 30, 1867, Bradley Papers, NJHS.

114. Manuscript in Bradley Papers, NJHS.
CHAPTER THREE

1. New York Times, March 22, 1820, p. 1. There are no authoritative biographies of either Grier or Strong. Their lives are best reflected in other judicial biographies, particularly Fairman's Mr. Justice Miller. See also treatment of Grier and Strong in Leon Friedman and Fred L. Israel, The Justices of the United States Supreme Court.

2. Bradley to Thomas Dudley, April 1, 1980, Dudley Papers, Henry E. Huntington Library, San Marino, California. Dudley was a leader in the New Jersey bar and active in Whig and then Republican politics. For his work for Lincoln in the Campaign of 1860, he was named U.S. Consul to Liverpool during the war years.

3. 6 Wall 603 (1870) The best account of the politics surrounding the Legal Tender Cases is Charles Fairman, "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," 54 Harvard Law Review 977 and 1128.


6. 11 Wall 682 (1871).


8. Frelinghuysen to Bradley, May 30, 1868, Bradley Papers, NJHS. Bradley's Diary entry for May 30 indicates that he dined with "FTF and General Grant, Conkling, Edmunds, Howe, Cattell, Halsey. . . ."


10. George Harding to Bradley, January 17, 1869, Bradley Papers, NJHS.

11. Ibid.

12. Harding to Bradley, January 23, 1869, Bradley Papers, NJHS.
13. Harding to Bradley, March 15, 1869, Bradley Papers, NJHS.

14. Undated letter from Harding to Bradley, written in late March or early April, 1869, Bradley Papers, Papers, NJHS.

15. John Stockton to Bradley, March 23, 1869, Bradley Papers, NJHS.

16. Harding to Bradley, March 25, 1869, Bradley Papers, NJHS.

17. Bradley to Hamilton Fish, March 25, 1869, Fish Papers, Manuscripts Collection, Library of Congress.

18. Albert Markley to Bradley, March 27, 1869, Bradley Papers, NJHS.

19. Harding to Bradley, July 19, 1869, Bradley Papers, NJHS.

20. Harding to Bradley, November 17, 1869, Bradley Papers, NJHS.

21. George Robeson (GMR) to Bradley, December 6, 1869, Bradley Papers, NJHS.

22. S.G. Beck (Grier's daughter) to Harding, December 9, 1869, Bradley Papers, NJHS.

23. Harding to Bradley, December 11, 1869, Bradley Papers, NJHS.

24. Harding to Bradley, December 15, 1869, Bradley Papers, NJHS.


26. Bradley Diary, 1870, note for February 7, Bradley Papers, NJHS.

27. Frelinghuysen to Bradley, February 8, 1870, Bradley Papers, NJHS.

28. Ibid.

29. Frelinghuysen to Bradley, February 8, 1870 (This note is enclosed in the February 8 letter cited in fn 28), Bradley Papers, NJHS.
30. Matt H. Carpenter to Bradley, February 10, 1870, Bradley Papers, NJHS (This is misdated, must have been written several days earlier.)

31. Bradley to Carpenter, February 9, 1870, Bradley Papers, NJHS.

32. Carpenter to Bradley, February 9, 1870, Bradley Papers, NJHS.


35. Tribune, February 8, 1870, p. 1.

36. Martin Ryerson to Bradley, February 8, 1870, Bradley Papers, NJHS.

37. George Shea to Bradley, February 8, 1870, Bradley Papers, NJHS.

38. Bradley to President Grant, February 11, 1870, Bradley Papers, NJHS.

39. H.C. Townsend to Bradley, February 12, 1870, Bradley Papers, NJHS.

40. James Scovel to Bradley, March 6, 1870, Bradley Papers, NJHS.

41. James Scovel to Charles Sumner, February 9, 1870, Sumner Papers, Houghton Library, Harvard University.

42. Scovel to Bradley, April 19, 1870, Bradley Papers, NJHS.

43. Stockton to Bradley, February 15, 1870, Bradley Papers, NJHS.

44. These negotiations were completed in 1871. See Reilly, "The Camden and Amboy Railroad," pp. 222-224.

45. Frelinghuysen to Bradley, February 16, 1870, Bradley Papers, NJHS.

46. Townsend to Bradley, February 17, 1870, Bradley Papers, NJHS.
47. Frelinghuysen to Bradley, February 18, 1870, Bradley Papers, NJHS.

48. Journal of the Executive Proceedings of the Senate, Vol. 17. The various entries regarding the nominations of Bradley and Strong are found in the Journal between pp. 359 and 402.

49. Markley to Frelinghuysen and Bradley, March 2, 1870, Bradley Papers, NJHS.


51. Markley to Frelinghuysen, March 11, 1870, Bradley Papers, NJHS.

52. Woodruff to Bradley, March 16, 1870, Bradley Papers, NJHS.

53. John M. Read to Hamilton Fish, March 15, 1870, Fish Papers, Manuscripts Collection, Library of Congress.


56. Harding to Bradley, March 21, 1870, Bradley Papers, NJHS.

57. Markley to Bradley, March 21, 1870 (telegram) Bradley Papers, NJHS.

58. Shea to Bradley, March 24, 1870, Bradley Papers, NJHS.

59. Stockton to Bradley, March 21, 1870, (telegram) Bradley Papers, NJHS.

60. Harding to Bradley, March 23, 1870, Bradley Papers, NJHS.

61. John G. Stevens to Bradley, March 22, 1870, Bradley Papers, NJHS.

62. Bradley to William Bradley, April 3, 1870, Bradley Papers, NJHS.

63. Bradley to Hamilton Fish, March 21, 1870, Fish Papers, Manuscripts Collection, Library of Congress.
64. Note at end of Bradley's diary for 1870, Bradley Papers, NJHS.

65. Bradley to Dudley, December 18, 1871, Dudley Papers, Huntington Library.


67. Diary entries for March, 1870.

68. Bradley to Dudley, April 1, 1870, Dudley Papers, Henry E. Huntington Library.

69. At the time of the Knox decision, Justice Miller prepared a statement countering charges that Grant had 'packed' the court to reverse Hepburn. The paper, signed by the Knox majority, was kept by Bradley until his death, and then was published by Bradley's son. See "The Legal Tender Cases in 1870," in Miscellaneous Writings, pp. 61-74.

70. Memorandum to the files, placed with Bradley's correspondence for 1877. A newspaper article in connection with the Election Commission noted that Bradley had not lived in the circuit. He attached this note for his own records. Bradley Papers, NJHS.
CHAPTER FOUR


2. Frankfurter and Landis, The Business of the Supreme Court, p. 60. See also the correspondence of Justice Field and Matthew Deady, 1865-93, Oregon Historical Society for comments on the burgeoning court load and various proposals for reform.


5. The best discussion of the creation of circuit judgeships and other congressional efforts to ease the case load without fundamentally changing the system is Stanley Kutler, Judicial Power and Reconstruction Politics (Chicago: University of Chicago Press, 1971), especially Chapter Four, "The Numbers Game."


7. Frankfurter and Landis, The Business of the Supreme Court, p. 64.

8. The work of Wiecek and Kutler is particularly important on the whole question of expanding jurisdiction of the federal courts.


12. The primary source here are the Records of the Department of Justice, Record Group 60, National Archives. The correspondence of the Attorney-General with his staff in the field about the difficulty of "restarting" the system after the war's disruption is especially relevant.

13. Judge Duval's diary and papers are in the Barker Center for Texas History, University of Texas. See also, the Texas collection in Record Group 60, and Robinson, *Justice in Grey*.

14. *Ex parte Garland* 4 Wall 333 (1868) was the definitive case on this issue.


20. Statutes at Large, XVI, 140-146.


22. Statutes as Large, XVI, 433-440.


30. 11 Wall 36 (1873).


32. Bradley Diary, entries for May and June, 1870, Bradley Papers, NJHS.


34. Bradley to "dear daughter," April 12, 1867, Bradley Papers, NJHS.
35. Bradley Diary, entries for May, 1870, Bradley Papers, NJHS.


37. Source-Chronological file for Texas, Department of Justice, Record Group 60, outlines in detail the problems with Watrous, who after suffering a stroke refused to relinquish his position for a year.


40. There is no biography of Ballinger. A fascinating diary and most of his legal papers are housed in the Archives of the Rosenberg Library, Galveston, Texas. Ballinger is also usefully portrayed in Fairman’s Mr. Justice Miller, and in Bloomfield’s Lawyers in a Changing Society.


42. The Tybee 1 Woods 358 (1870).

43. Miller v W.G. Hewes 1 Woods 360 (1870).

44. R.R. Co v Neal, 1 Woods 353, 355 (1870).


46. Ibid., May 21, 1870, p. 2. See also Bradley’s copy of the letter in his 1870 correspondence, Bradley Papers, NJHS.


48. Baldwin to Attorney-General Hoar, Record Group 60, Correspondence File, June 5, 1867, National Archives.


52. Myra Clark Gaines, *1 Wood 56* (1870); New Orleans *Picayune, June 10, 1870*, p. 10.

53. *1 Woods 87* (1870), 20 Wall 92 (1870).


56. The most useful factual summary of the events leading to the Slaughterhouse Cases is Mitchell Franklin, "The Foundation and Meaning of the Slaughterhouse Cases," *18 Tulane Law Review* 1, 218 (1943).


59. The details of the case are taken from Mitchell Franklin, "The Foundation and Meaning of the Slaughterhouse Cases."


61. *New Orleans Picayune, June 9, 1870*, p. 3.

62. Ibid., *June 7, 1870*, p. 2.

63. "Notes on Slaughterhouse Cases, 1870," Among the loose manuscripts, Bradley Papers, NJHS.

64. *Picayune, June 9, 1870*, p. 3.


67. 1 Woods 21, at 24-25.

68. 3 Chicago Legal News 7 (1870).

69. 1 Woods 21, at 28.

70. "As to the Civil Rights Bill Applying to the Case," Bradley Papers, NJHS.

71. 1 Woods 21, at 34; Picayune, June 12, 1870, p. 14.

72. On the issue of incorporation, see especially Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stanford Law Review 5 (1949); and Howard Jay Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism (Madison: State Historical Society of Wisconsin, 1968.).


74. Ibid., p. 27.


78. Congressional Globe, 42nd Congress, 1st session, pp. 334-35.

79. U.S. v Hall, 26 Federal Cases 79 (Number 15282) (1871).


81. See Justice Goldberg's discussion of the Woods-Bradley correspondence over Hall in Bell v Maryland, 84 S.C. 1814 (1964) at 81-82.

82. Bradley to Woods, January 3, 1871, Bradley Papers, NJHS.
83. Unfortunately Woods' letters to Bradley have not been found. (There are apparently no Woods papers). Fortunately however, Bradley's style in correspondence of this kind was to repeat the question, thus making his own record. Also, he wrote many of these drafts in his copybooks, preserving his thoughts if not his correspondence.

84. Bradley to Woods, March 12, 1870, Bradley Papers, NJHS.

85. Bradley did note on the back of the piece, "U.S. v Hall." There is no date on the paper, but one of its paragraphs repeats the facts of the Hall case.

86. U.S. v Hall, at 79.
CHAPTER FIVE

1. 10 Wall 273 (1870).


3. 16 Wall, at 71.

4. 16 Wall, at 78.

5. Field's dissent is 16 Wall, at 83, Swayne at 124 and Bradley at 111.

6. Ibid., at 123.

7. Ibid., at 122.

8. Ibid., at 114.

9. Ibid., at 122.

10. Ibid., at 123.


Bartemeyer v Iowa, 18 Wall 130 (1874).

12. The best accounts of early efforts of women to join the legal profession in America are contemporary accounts. See especially Ellen A. Martin, "Admission of Women to the Bar," Chicago Law Times 76 (1886); Lelia J. Robinson, "Women Lawyers in the United States," Green Bag, Volume II (1890). The Chicago Legal News, founded by Myra Bradwell in 1869, followed the progress of women throughout the 1860s and 1870s.


15. United States Supreme Court Briefs No. 67 (1871) "Brief of Carpenter of Plaintiff in Error, Filed February 10, 1872," p. 2.
16. Ibid., p. 5.
17. Cummings v Missouri, 4 Wall 321 (1867).
18. Ex Parte Garland, 4 Wall 333 (1867).
20. Ibid.
21. Ibid., at 139.
22. Ibid., at 140-42.
24. Ibid., at 133-34.
25. Fairman, Reconstruction and Reunion, p. 1418.
27. Justice Department, Records of the Attorney General, 1870-98. Microfilm of Reports to Congress. Record Group 60, National Archives.
29. Correspondence in the Source-Chronological files of the Justice Department in Record Group 60 of the collections of the National Archives is replete with letters from officers of the courts seeking assistance in enforcing the law in increasingly impossible circumstances and from citizens in the southern states asking for assistance.
32. U.S. v Cruikshank, Federal Cases #14,897, (1874) Cites here are from Judge Woods' report of the case, 1 Woods 308. Woods put the case in the first volume and noted that because of its importance he was publishing it out of its chronological order.
34. Beckwith to Williams, June 11, 1873, Source-Chronological for Louisiana, 1873, National Archives, RG 60.

35. Ibid, see also letter from Beckwith to Williams, September 11, 1873, introducing Secret Service investigator, J. J. Hoffman who had been investigated the case. Hoffman apparently was sent to Washington to brief Williams on the details.

36. See letter from Marshal S. B. Packard to Williams September 6, 1873, on the problems of organizing a posse, and providing for their food and pay. Source Chronological for Louisiana, 1873.


38. Bradley Diary, entries from May, June, 1874.

39. Beckwith to Williams, June 25, Source Chronological for Louisiana, 1874.

40. See Bradley's letters to Judge Woods, January 3 and March 12, 1871, Bradley Papers, NJHS.


42. Richard Watt and Richard Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 Illinois Law Review 1 (1949-50), p. 20. See also 5 American Law Review, 229, (1872). (Its comment: "rights of colored men so much in dispute quite a relief to have even one question relative to the subject decided by the highest court in the land.") See also A.H. Garland's comment on the defense argument of Jeremiah Black. "He not only became his client, but his client's cause; he was wrapped up and lost in it; he moved and acted in it. So great were his earnestness and power of assertion, I have fancied I could see the convictions of judges giving way reluctantly before him and surrendering to him as he spoke...the best phrasemaker I ever heard." C.F. Black, Jeremiah Black (New York: 1885), p. 26. .

43. Blyew, at 594.
44. Ibid., at 596.
45. Ibid., at 596, 599, 601.
46. Ibid., at 601.
47. Woods to Bradley, December 28, 1874, Bradley Papers, NJHS.

48. Beckwith to Williams, July 9, 1874, Source Chronological for Louisiana, 1874.

49. Ibid, July 18, 1874.

50. Ibid, October 5, 1874.

51. Ibid, October 7, 1874.

52. Beckwith to Williams, October 17, 1874.

53. Williams to Beckwith, October 24, 1874.

54. Beckwith to Williams October 27, 1874.

55. Bradley Diary, July 3, 1874, Bradley Papers, NJHS.

56. 1 Woods 308, at 315.

57. Ibid., at 316.

58. Ibid., at 318, 319.

59. Ibid., at 322.

60. Ibid., at 324.

61. Ibid., at 325326.

62. Ibid., at 327329.

63. Bradley to Woods, October 30, 1876. Bradley Papers, NJHS. Woods had written to Bradley to ask about the possible constitutionality of the Civil Rights Act of 1875, in light of decisions in Cruikshank. This will be discussed at some length in the next chapter.

64. Bradley to Frelinghuysen, July 19, 1874, Bradley Papers, NJHS.

65. Ibid.


68. U.S. v Reese, 92 U.S. 542 (1876).
69. **U.S. v Reese**, "Brief for the Defendants in Error".

70. Magrath, pp. 125-126.

71. **Cruikshank**, at 549.

72. **Reese**, at 217, passim.

73. Ibid., at 238.


4. Bradley often recorded his circuit itinerary in his pocket diaries. This itinerary is based on his entry for the summer of 1872.

5. The 5th Circuit reports for 1870-1880 are included in four volumes compiled by Judge William Woods, entitled Woods Reports.

6. Bradley's meridian and calendar studies are included in various versions in Miscellaneous Writings.

7. The friend was Cortlandt Parker, quoted in Fairman, "Mr. Justice Bradley," in Dunham and Kurland, Mr. Justice, p. 68.

8. Bradley to Mary Bradley, May 17, 1877, Bradley Papers, NJHS.

9. Bradley to "My dear sister," June 22, 1877, Bradley Papers, NJHS.


11. C. Peter Magrath, Morrison R. Waite, pp. 6-13, passim.

12. Bradley to Mary Bradley, May 11, 1873, Bradley Papers, NJHS.


15. In addition to G. Edward White's summary, (The American Judicial Tradition, pp. 84-107) the best portrait of the Waite Court is included in Magrath's biography of Waite.
16. This portrait of Waite's first weeks on the Court is based on Magrath, *Morrison R. Waite*, pp. 93-110.

17. Waite to Amelia Waite, March 3, 1874; March 8, 1874, Waite Papers, Library of Congress.


19. Waite to John Wait[e], October 24, 1875, quoted in Magrath, *Morrison R. Waite*, p. 108.

20. Miller to Ballinger, March 20, 1874, Ballinger Papers, Rosenberg Library, Galveston.

21. Field to Deady, March [?], 1874. Field-Deady Correspondence, Oregon Historical Society.


23. Ibid., p. 299.


26. The case was *Gilfilan v Canal Co.* The undated draft is in the Waite Papers, Library of Congress.


32. Ibid., at 136; see also Howard J. Graham, "Mr. Justice Field and the 14th Amendment," 52 *Yale Law Journal* 851 (1943).

34. Ibid., p. 461.


36. John V. Orth, "The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction," Tulane Lawyer, Fall, 1980, pp. 2-15. Orth's article traces a series of cases arising under the 11th Amendment and involving the state debt contracted by the Republican reconstruction government in Louisiana. Orth's impressive research suggests that a willingness to vary the Supreme Court's longstanding interpretation of the 11th Amendment was reconsidered in cases arising in 1870 to 1890, to permit southern states to renge on debts contracted by reconstruction state governments.


40. Peskin, "Was There a Compromise," p. 72.


43. Ballinger Diary, February 1, 1877. Ballinger Papers, Rosenberg Library, Galveston.

44. Galveston News, February 8, 1877, quoting the New York Sun, February 7, 1877.


49. Orth suggests that Bradley was more a witling than unwitting culprit in the reversals of the state debt decisions, and attributes this to Bradley's role on the Commission. Orth, "The Fair Name," p. 14.


55. See the Records of the Department of Justice, Records Group 60, National Archives. See particularly, Instruction Book E and Source-Chronological Files for individual southern states for 1875-1880.

56. The best review of the Act's enforcement is John Hope Franklin, "The Enforcement of the Civil Rights Act of 1875."


59. Bradley to Woods, October 30, 1876. Bradley's draft letter is included in the copybook entitled Memoranda on Legal Subjects. Woods letter to Bradley is not available, but Bradley's draft reply summarizes Woods' query. Bradley Papers, NJHS.

60. The memorandum on the Civil Rights act follows the draft letter to Woods in Memorandum on Legal Subjects, Bradley Papers, NJHS.

61. Incomplete draft to Woods, dated October 30, 1876. Bradley wrote on the draft, "not sent, but sent the letter on page 27," The "letter on page 27" is cited in fn 59.

62. 12 Wall 581 (1872) at 601.

63. see fn 58, Chapter 5.

64. For Hayes quotations, see Stanley Hirshon, Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro (Bloomington: Indiana University Press, 1926) pp. 24-25.


66. After the 1875 act, no major legislation in the field was enacted until the Civil Rights Act of 1957. followed by the Acts of 1960 and 1964. The major challenge in reference to public accommodations came in a challenge to Title II of the Civil Rights Act of 1964. The Court ruled that the authority for the law was found in the power to Congress to regulate interstate commerce. The case was Heart of Atlanta Motel 379 U.S. 241 (1964). For the Court, Justice Tom Clark did not choose to review Bradley's reasoning in the Civil Rights Cases of 1883 since the Atlanta case was not based on the 14th Amendment.

67. Hall v deCuir, at 489.

68. Strauder v West Virginia, 100 U.S. 303 (1880).


70. Ex parte Virginia, 100 U.S. 371 (1880).
71. Ex parte Siebold, 100 U.S. 371 (1880).

72. Ibid., at 388-389.

73. W. B. Hornblower to Bradley, March 27, 1880, Bradley Papers, NJHS.

74. Frelinghuysen to Bradley, March 17, 1880, Bradley Papers, NJHS.

75. U.S. v Harris, 106 U.S. 629 (1883).

76. One scholar in particular has argued that the "state action" requirements in the 1883 cases were not as tightly stated as is usually believed. See Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," 73 Yale Law Journal 1353 (1973).

77. U.S. v Harris, at 639.

78. Civil Rights Cases, at 14.


81. Ibid., at 11-13.

82. Ibid., at 16-17.

83. Ibid., at 24-25.


85. Ibid., p. 141.


87. Ibid., at 49.

88. Ibid., at 50.

89. Ibid., at 35-36.
90. Ibid., at 42.

91. Ibid., at 53.


5. Quoted in Friedman and Israel, Lives and Opinions of the Justices, p. 1193.
SELECTED BIBLIOGRAPHY

Public Documents

National Archives

Records of the Department of Justice, Records Group 60
Records of the US District Courts, Records Group 21
Records of the Supreme Court of the United States, Records Group 267

US Federal Cases

US Supreme Court Reports

Woods Reports

Newspapers

Galveston Daily News, 1870-1880
New Orleans Bee, 1870-1880
New Orleans Picayune, 1870-1880
Newark Daily Advertiser, 1850-1890
The New York Times, 1870-1890

Manuscripts Collections

The following collections are in the Library of Congress:

Jeremiah S. Black Papers
Simon Cameron Papers
J.C.B. Davis Papers
Frederick T. Frelinghuysen Papers
Hamilton Fish Papers
James Garfield Papers
Rutherford B. Hayes Papers
John Marshall Harlan Papers
Morrison R. Waite Papers
Supreme Court Collection

The following collections are in the New Jersey Historical Society, Newark, New Jersey:

Joseph P. Bradley Papers
H.N. Congar Papers
Frelinghuysen Family Papers
John P. Jackson Papers
Stevens Family Papers
Stockton Family Papers
New Jersey Pamphlets Collection
In addition, the following collections were used:

Archives of the Pennsylvania Railroad, Philadelphia, Pennsylvania
William Pitt Ballinger Papers, Rosenberg Library, Galveston, Texas
Simon Cameron Papers, Historical Society of Dauphin County, Harrisburg, Pennsylvania
Nathan Clifford Papers, Maine Historical Society, Portland, Maine
Collections of the Library of the Association of American Railroads, Washington, D.C.
David Demarest Papers, Alexander Library, Rutgers University, New Brunswick, New Jersey
Thomas Dudley Papers, Henry E. Huntington Library, San Marino, California
Stephen Field-Matthew Deady Correspondence, Oregon Historical Society, Portland, Oregon
John Marshall Harlan Papers, University of Kentucky Library, Louisville, Kentucky
New Jersey Pamphlet Collection, Alexander Library, Rutgers University, New Brunswick, New Jersey
Rodman M. Price Papers, Alexander Library, Rutgers University, New Brunswick, New Jersey
Charles Sumner Papers, Houghton Library, Harvard University, Cambridge, Massachusetts

Contemporary Books, Pamphlets, and Articles


The Political Expressions of Joseph P. Bradley, Compiled from Speeches and Articles Written By Him." Newark: Advertiser Press, 1862.


________. "Reconstruction," Speech in the Senate, August, 1876. n.p., 1876.


Garland, Augustus H. *Experience in the Supreme Court of the United States with some Reflections and Suggestions as to that Tribunal.* Washington, D.C.: John Byrne and Co., 1898.


Hoar, George F. "The Charges Against President Grant and Attorney General Hoar of Packing the Supreme Court of the United States to secure the reversal of the Legal Tender Decision by the Appointment of Justices Bradley and Strong." (reprint of letters to the *Boston Herald*) Worcester, n.p., 1896.

In Memorium: Joseph P. Bradley. Philadelphia: Allen, Lane and Scott, 1892.

"Monopolies and the Fourteenth Amendment." *Nation* 12 (1870): 1


Stewart, Alvan. A Legal Argument Before the Supreme Court of the State of New Jersey for the Deliverance of 4,000 Persons from Bondage. New York: Finch and Weed, 1845.


Taney, Roger B. The Opinion of Mr. Taney on the Validity of the Law of New Jersey under which the Camden and Amboy Railroad and the Delaware and Raritan Can Claim a Monopoly. New York: Snowden Printer, 1833.


Secondary Works: Books and Periodicals


Evans, Evan A. "Fifty Years of the U.S. Circuit Court of Appeals," 9 Missouri Law Review 189 (1944).


Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," 54 Harvard Law Review 977, 1128 (1941).


Social and Industrial Conditions in the North During the Civil War. New York: Peter Smith Co., 1930.


Maynard, Douglas H. "Dudley of New Jersey and the Nomination of Lincoln." Pennsylvania Magazine of History and Biography 82 (1958)


Lynch, James D. Bench and Bar of Texas. St. Louis, 1880.


Ratner, Sidney. "Was the Supreme Court Packed by President Grant?" Political Science Quarterly 50 (1935): 343-358.


Unpublished Theses


