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Bradwell v. Illinois: Chief Justice Chase’s Dissent and the “Sphere of Women’s Work”

Richard L. Aynes*

... I have always favored the enlargement of the sphere of women’s work and the payment of just compensation for it.

Salmon P. Chase, 1872

Salmon P. Chase is remembered today, if at all, as a Secretary of the Treasury and as a Chief Judge of the United States Supreme Court. In his own time Chase was considered one of the nation’s political giants. Abraham Lincoln described Chase as “one and a half times bigger than any other man” he had ever known.1 Carl Schurz’s summary still echoes today:

More than anyone else he looked the great man. Tall, broad-shouldered, and proudly erect, ... he was a picture of intelligence, strength, courage and dignity. He looked as you would wish a statesman to look.2

Throughout his political career Chase sought ways to better the position of African-Americans. A man of deep convictions, he publicly and consistently advocated voting rights for African Americans as early as 1845.3 While his political affiliations often shifted, to the end of his life he was consistent in his advocacy of universal male suffrage for African Americans.4 At a time when his lieutenants were negotiating for his election by the legislature to the United States Senate, Chase insisted that part of the “deal” would be the repeal of Ohio’s “Black Laws” that discriminated against African Americans.5

Chase devoted much of his legal talent to creating a nation-wide legal strategy by which slavery would be divorced from the national government and be solely dependent upon local government.6 His policy was summed up in the

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* Dean, Professor of Law, and Constitutional Law Center Research Fellow, The University of Akron School of Law. I want to thank Michael Les Benedict, Rosemary Cannon, and Michael Kent Curtis for their comments upon a prior draft.


3. Sokoloff, supra note 2, at 26 (“True democracy makes no inquiry about the color of the skin . . . . the exclusion of the colored people from the election franchise [is] incompatible with true democratic principles.”).


6. At the time, he was known as “the Attorney General of runaway slaves . . . .” Chase was counsel in a variety of runaway slave cases, including Jones v. Van Zandt, 13 F. Cas. 1047 (C.C.D.
anti-slavery slogan he coined: "Freedom National, Slavery Local." As Professor Harold Hyman noted, "[f]or a tumultuous one-third of a century [Chase] was the antislavery crusaders' premier legal strategist." 7

It was Chase's formal inquiry that prompted conservative United States Attorney General Edward Bates to issue an opinion concluding that, notwithstanding the Supreme Court's opinion in Dred Scott, free born African-Americans were citizens of the United States. 8 It was Chase who, as Chief Justice, helped orchestrate the admission of the first African-American to the United States Supreme Court. 9

In spite of these egalitarian sentiments that our stereotypes suggest would be a hindrance to Chase's political career, he was twice elected Governor of the State of Ohio, 10 twice elected to the United States Senate, 11 and served as Secretary of the Treasury under President Lincoln. As Les Benedict has observed, Chase was a serious and important contender for the nomination of President of the United States in every election from 1856 through and including 1872. 12

As Chief Justice of the United States Supreme Court, Chase is chiefly remembered for his nationalistic opinion in Texas v. White 13 and his dissent in the Legal Tender Cases. 14 His judicial reputation no doubt suffered from Felix Frankfurter's conclusion that his commerce clause opinions were of no value to the modern era 15 and the negative assessment of Chase's Chief Justiceship by Frankfurter student and protégé Charles Fairman. 16 Modern biographers have offered a significantly more balanced assessment of Chase. 17

Ohio 1843) (No. 7502)); 46 U.S. 215 (1847); 13 F. Cas. 1054, 4 McLean 599 (C.C.D. Ohio 1849) (No. 7503); 13 F. Cas. 1056, 4 McLean 604 (C.C.D. Ohio 1849) (No. 7504); 13 F. Cas. 1056, 5 McLean 214 (C.C.D. Ohio 1851) (No. 7505); Birney v. Ohio, 8 Ohio 230 (1837) (involving Matilda); State v. Hoppess, 2 West L.J. 279; Driskill v. Parrish, 7 F. Cas. 1100 (C.C.D. Ohio 1845) (No. 4088); 7 F. Cas. 1093 (C.C.D. Ohio 1847) (No. 4087); 7 F. Cas. 1095 (C.C.D. Ohio 1849) (No. 4088); 7 F. Cas. 1068 (C.C.D. Ohio 1851) (No. 4075); Towne, supra note 4, at 162 n.34.


9. This was Dr. John Swett of Massachusetts. Towne, supra note 4, at 519 and 521.

10. Chase was the first Republican Governor of a major state.

11. Niven, supra note 4, at xxvii and Stewart Sifakis, Who was Who in the Civil War 117 (1988).


13. 74 U.S. (7 Wall.) 700 (1869).


17. Hyman, supra note 7; Frederick Blue, Salmon P. Chase, A Life in Politics (1987); Niven, supra note 5; and biographical essays by a variety of important legal historians and scholars in a symposium sponsored by Northern Kentucky's Salmon P. Chase College of Law, 21 N. Ky. L. Rev. 1 (1993).
Chase participated in some of the most important constitutional cases of his times, including authoring majority opinions in seven of the court’s major reconstruction cases. These include his quasi-judicial activities in the impeachment trial of Andrew Johnson and his role as a dissenter in the first Fourteenth Amendment case to reach the United States Supreme Court, the *Slaughter-House Cases.* This essay explores the intersection between many of Chase’s values in his dissent without opinion in the Fourteenth Amendment case of *Bradwell v. Illinois.*

I. CONTEXT: THE *SLAUGHTER-HOUSE CASES*

Chief Justice Chase came to the Supreme Court in 1864 without any judicial experience. Lincoln’s selection of Chase for Chief Justice has puzzled many. After all, Chase had been Lincoln’s political rival in 1860 and again in 1864. Because of his political ambition, Chase had been a politically faithless member of the Cabinet as Secretary of Treasury. Further, Lincoln was not without choices. Two of his own appointees, Justice Samuel Miller and Justice Noah Swayne were aspirants for the Chief Justiceship.

But Lincoln was concerned with results, not politics. In spite of Chase’s lack of judicial experience, his view on a variety of issues concerning slavery, nationalism, states rights, and use of the President’s war powers were already a matter of public record. Lincoln’s reflection upon how to pick a Chief Justice led to his well known conclusion: “We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known.” Lincoln told New York Congressman Augustus Frank that Chase was “sound” on the “general issues of the war” that might come before the Court.

As Professor Hyman has suggested, “[m]ore than any other [Justice] Chase . . . had long wrestled with both theoretical and practical aspects of race-driven labor law and with legal and constitutional theories of state-based federalism.” Indeed, Chase’s contemporary, Justice William Strong, believed that it was in constitutional law cases that developed from “legislation during or following the war,” that Chase showed “great power.” Thus, Chase was chosen by Lincoln over Miller and Swayne for such an occasion as the *Slaughter-House Cases.*

20. 83 U.S. (16 Wall.) 130 (1873).
At the time of Chase's dissent in Bradwell, sitting members of the Court included James Buchanan's appointee, Nathan Clifford, the Court's senior Justice. Clifford's Democratic principles and his relationship with Chase were congenial, but Chase's anti-slavery and nationalistic views must have been an anathema to the "dough face" Clifford.26

Also on the Court was Justice Samuel Miller, a strong-willed appointee of Abraham Lincoln who viewed himself as the embodiment of reasonableness and proper judicial decision making.27 Though Miller at one time had great respect for Chase's ability,28 by the time of the Legal Tender Cases he considered him a "domineering Chief . . . ."29 Also on the Court was Abraham Lincoln's former campaign manager, the conservative David Davis, and California unionist and War Democrat Stephen Field. Justice Noah Swayne was perhaps the only "true" Lincoln Republican on the Court. Justice Ward Hunt had served on the New York Court of Appeals prior to his appointment to the Supreme Court. Finally the Court included Justices Joseph Bradley and Justice William Strong, both Republicans of Democratic antecedents whom President Grant had appointed in hopes of sustaining the government's use of paper currency.

The story of the Slaughter-House Cases is an often told one.30 Ultimately a five member majority composed of Justice Miller, Justice Clifford, Justice Hunt, Justice Davis, and Justice Strong, refused to recognize a right under the privileges and immunities clause of the Fourteenth Amendment for butchers to pursue their trade in New Orleans without going through a state created monopoly slaughter house. A four member minority composed of Justice Field, Chief Justice Chase, Justice Bradley, and Justice Swayne, dissented.

One way of analyzing this decision is to note that all of the dissenters had explicitly endorsed and embraced the Fourteenth Amendment (Justice Field, Chief Justice Chase), had the type of political background to make it likely they endorsed the Fourteenth Amendment (Justice Swayne), or demonstrated the familiarity with the anti-slavery theories which underlay the Fourteenth Amendment (Justice Bradley). On the other hand, key members of the majority had either explicitly rejected the Fourteenth Amendment (Justice Miller), or had a political background making it likely that they rejected the amendment (Justices

26. For an account of Clifford's background and his opposition to the Fourteenth Amendment, see id. at 664-67.
27. For a summary of Miller's background, see Aynes, supra note 4, at 655-65. Miller had only rudimentary apprentice education in law which may explain his seeming contempt for the use of legal authorities and his reliance upon what he considered to be "justice."
28. G. Edward White, Reconstructing the Constitutional Jurisprudence of Salmon P. Chase, 21 N. Ky. L. Rev. 41 (quoting Miller as saying of Chase that there was "no one against whom I would attempt to measure myself with more diffidence.").
29. Charles Fairman, Mr. Justice Miller and the Supreme Court 1862-1890, at 110-71 (1939).
30. E.g., Aynes, supra note 4 and articles cited at 628 n.7; Michael Curtis, Resurrecting the Privileges or Immunities Clause and Revising the Slaughter House Case Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment, 38 B.C. L. Rev. 1 (1996).
Clifford and Davis).\textsuperscript{31} While there is no evidence indicating that majority Justices Hunt and Strong opposed the adoption of the Fourteenth Amendment, there is also no evidence they supported it.

When the Slaughter-House decision was announced on April 14, 1873, Chase was seriously ill. Rather than writing a separate opinion, Chase joined the opinion of Justice Field. Little is known about Chase's independent views of the case, except that his must have overlapped much of what Justice Field said in his dissent.

\section*{II. BRADWELL V. ILLINOIS}

The Slaughter-House Cases set the stage for the Supreme Court's decision the next day in Bradwell v. Illinois. Myra Bradwell edited a nationwide law and business publication, the Chicago Legal News, and had studied law in her husband's office. As Professor Jane Friedman has documented, Bradwell was an extraordinary woman whose newspaper columns reported cases, who wrote editorials advocating legal reform, and who often wrote legislation which was adopted into law.\textsuperscript{32}

On August 2, 1869, at the age of thirty-eight, Myra Bradwell passed the Illinois bar examination with "high honors."\textsuperscript{33} However, Mrs. Bradwell was denied admission to the Bar by the Supreme Court of Illinois because of her gender, even though there was no provision in the applicable statute limiting legal practice to men. She sought review in the United States Supreme Court upon a theory which paralleled that of the butchers in the Slaughter-House Cases: because she was a citizen of the United States, the privileges and immunities clause protected her legal right to pursue the lawful profession of the law.\textsuperscript{34} Her counsel in the Supreme Court, United States Senator Matthew Carpenter, was a noted member of the Supreme Court bar who had also represented one of the parties in the Slaughter-House cases.

The Court denied Mrs. Bradwell's claim in an eight to one decision. For the Slaughter-House majority, speaking through Justice Miller, this was a simple matter. If the Privileges and Immunities Clause did not protect the rights of male butchers to pursue their occupation without interference by a monopoly, then they could be logically consistent in concluding it did not protect Mrs. Bradwell's right to pursue the occupation of an attorney.\textsuperscript{35}

\begin{itemize}
  \item \textsuperscript{31} Ayres, \textit{supra} note 4, at 655-78.
  \item \textsuperscript{32} See Jane M. Friedman, America's First Woman Lawyer, The Biography of Myra Bradwell (1993).
  \item \textsuperscript{33} Id. at 18.
  \item \textsuperscript{34} The brief submitted to the United States Supreme Court on Mrs. Bradwell's behalf defined the "precise question" before the Court as follows: "Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the XIVth amendment, the privilege of earning a livelihood by practicing on the bar of a judicial court?" Argument for Plaintiff in Error, at 5.
  \item \textsuperscript{35} There is, of course, a way to distinguish those opinions. The majority might have argued
Three of the *Slaughter-House* dissenters, Justice Field, Justice Bradley, and Justice Swayne, apparently felt they had to explain how they could vote to uphold the right of the male butchers but deny Mrs. Bradwell's claim under the Privileges and Immunities Clause. Justice Swayne and Justice Bradley both wrote concurring opinions. But it is Justice Bradley's concurrence that has attracted historical attention. Justice Bradley justified the difference in his vote upon the gender of the plaintiff. In lines that have now become infamous, Justice Bradley wrote:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . [t]he domestic sphere . . . properly belongs to [women]. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.36

The lone vote dissenting from the denial of Mrs. Bradwell's claim came from the dying Chief Justice.

Chase had an active interest in the *Bradwell* case and is said to have "hoped" to be able to write a dissenting opinion.37 But during Chase's last days his strength had "manifestly diminished."38 Indeed, on the last day the Supreme Court was in session that term, Chase did something he had never done before: he turned the role of presiding Justice over to Senior Justice Clifford.39 Though Chase sat upon the bench, he rested his head upon his hands the entire day:

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that the butchers were not precluded from pursuing their occupation, they were only regulated through the monopoly. Hence, the majority could have logically voted to deny the claim of the butchers in the *Slaughter House* case and still support the claim of Ms. Bradwell.

So, it may be the difference of gender, the difference of different occupations, or some other reason rather than consistency which motivated the majority's opinion.


In the subsequent opinion of Chief Justice Ryan, the Wisconsin Supreme Court reached a similar conclusion:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature; and, when voluntary, treason against it.

*In re Goodell*, 39 Wis. 232, 245 (1875).


39. *Id.* at 622.
III. THE SIGNIFICANCE OF CHASE'S DISSENT

It is not unusual for a Justice, particularly the Chief Justice, to "trim" his sails in order to maintain the authority of the court or to facilitate inner court relationships. Chief Justice Marshall is known to have sacrificed his own individual judgments in order to make opinions of the court appear unanimous.41

Whether influenced by Marshall's example or simply the duties of the office, Chase apparently followed the same pattern. In his diary he indicated that "except in very important cases dissent [is] inexpedient."42 These recorded views appear to be consistent with Chase's actions on the bench. Of the 237 opinions which he authored, there are only eleven dissents. These tend to occur in only critical cases which Chase thought of great importance.

Thus, the fact that Chase publicly dissented in the Bradwell case is a matter of some significance. The fact that he dissented alone may indicate he considered Bradwell an especially important case. Given the state of his health, the fact that he did not write an opinion takes nothing away from this analysis. The question for consideration is why did Chase dissent and what would he have written if he could?

IV. CHASE'S VALUES

While known among historians and legal scholars as a champion of slaves and African-Americans, Chase is not necessarily thought of in connection with women's rights. Our view of Chase's views on the Fourteenth Amendment are based largely upon his anti-slavery background and the litigation in which he engaged.

By careful selection one could make a case that Chase was a strong supporter of women's rights in the modern sense. As Governor of Ohio, Chase had supported the reform of the property law to give married women control over their own property.43 He was a pioneer in the employment of women in government. Prior to 1862, only seven women had been employed by the United States government.44 But under his leadership the Treasury Department was the

40. Id.
42. Niven, supra note 4, at 517 (Chase's diary entry of Jan. 16, 1865) (emphasis added).
43. Niven, supra note 5, at 192.
"first government office to hire a large number of women. . ." In 1865, 447 women were employed by the Treasury Department in the roles of copyists, currency counters, and clerks. In 1872, Chase wrote that he had "always favored the enlargement of the sphere of women’s work and the payment of just compensation for it." When asked why he hired large numbers of African-Americans and women Chase replied: "I gave them employment to be able to provide for themselves and their families."

Harold Hyman’s book, The Reconstruction Justice of Salmon P. Chase, takes a familiar case, In re Turner, and calls our attention to a fact not often noticed. That fact is the name and person of the plaintiff, Elizabeth Turner, a "young person of color . . ." In the words of Hyman, "[t]o Chase’s credit, free labor was color-blind and gender-neutral."

Professor Hyman suggests that Chase believed that many of the “wartime degradations resulted from customs and laws that sanctioned inferior rewards from labor for women and blacks” and that he used Elizabeth Turner’s case as a way to apply the “nobler standards” of the Thirteenth Amendment and the Civil Rights acts to correct the wrong. Indeed, Professor Hyman suggests that in Chase’s vision of the future of the Union after the war there would be equal rights for all people, without respect to race or gender. Chase’s opinion in In re Turner was the first case to shield women under the war amendments and the 1866 Civil Rights Act, and his dissent in Bradwell was the first Fourteenth Amendment case to seek to offer protection to women.

But a searching look into Chase’s life also shows values concerning women more consistent with Justice Bradley’s concurring opinion. Professor Hyman

45. Id. The manpower needs of the war caused the rebellious states to adopt the same policy and employ a large number of women. Janet Kaufman, Treasury Girls, XXV Civil War Times Illustrated 32 (May 1986). I am indebted to Jennifer E. Aynes for calling this article to my attention.

46. Donna M. DeBlasio, Down from the Pedestal: Kate Chase, A Subtle Feminist, 34 (M.A. History, Youngstown State University 1976). The terms of the employment are not clear. Citing 13 Stat. 22 (1864), Cathryn L. Claussen, supra note 44, at 230 indicates that women were paid less than men. However, Professor Hyman indicates that Chase’s policy was “equal-pay-for-equal-work.” Hyman, supra note 7, at 78.


48. Hyman, supra note 7, at 79.

49. 24 F. Cas. 337 (C.C. Md. 1867) (No. 14,247).

50. Hyman suggests that Chase may have held some special empathy for Elizabeth Turner because he too had served an apprenticeship and/or because she was from Maryland like one of the run-away slaves, Matilda, Chase had unsuccessfully represented many years before. Hyman, supra note 7, at 124.

51. Hyman, supra note 7, at 119.

52. Id. at 80.

53. Id. at 73.

54. Id. at 163.
notes that while Chase employed large numbers of women as clerks in the Treasury Department, no women were employed in the more important and lucrative positions as revenue agents.\textsuperscript{55} Further, one of Chase’s key assistants indicated that Chase had “an inflexible rule . . . never to transact business with ladies.”\textsuperscript{56}

An illustration of the paradoxical nature of Chase’s views is found in his stand on adopting a right to vote for women. Less than a month after the January 18, 1873 argument of \textit{Bradwell}, the rights of women were the subject of Chase’s thoughts. In a letter to his old anti-slavery ally, Gerrit Smith, Chase indicated that:

\begin{quote}
My opinions & feelings are in favor of Woman suffrage, but I would make haste slowly.\textsuperscript{57}
\end{quote}

Though votes for women were at least consistent with his motto of universal suffrage and universal amnesty, Chase nevertheless indicated that Susan B. Anthony wanted change “a little too fast.”\textsuperscript{58}

In an undated letter to Smith’s daughter, Elizabeth Smith Miller, Chase wrote that he was in favor of “all things which will really improve the condition of women.”\textsuperscript{59} Among these Chase included “access to, and peaceful security in, \textit{all employments for which she is qualified} by strength, capacity, and integrity.”\textsuperscript{60} With respect to suffrage, Chase favored testing women voting in a few states and indicated that he would vote to have Ohio try the experiment.\textsuperscript{61}

So Chase appears to provide us with a paradox: a man who opened up government employment to women, but refused to conduct business with women; a man who supported women’s right to vote privately, but did not want to pursue it “too fast”; and a man who, as will be discussed below, saw a traditional role for his own daughters, and yet, at least with Kate, put his daughter in unconventional roles.

Chase’s ambiguous views were consistent with the ambiguous Republican Party National Platform in 1872. Acknowledging an “obligation” to loyal women of America, it promised only “respectful consideration” of their “honest demand” for “additional rights.” At the same time, the Republican Party declared that it viewed women’s “admission to wider fields of usefulness” with “satisfaction.”\textsuperscript{62}

\textsuperscript{55} Id. at 81.
\textsuperscript{56} Schuckers, supra note 38, at 602.
\textsuperscript{57} S. P. Chase to G. Smith, Feb. 13, 1873, Library of Congress. I am grateful to James P. McClure, Senior Associate Editor of the Salmon P. Chase Papers, for calling this letter to my attention and providing a typescript of the letter.
\textsuperscript{58} Id.
\textsuperscript{59} Salmon P. Chase to Elizabeth Miller, n.d., \textit{quoted in} DeBlasio, supra note 46, at 88 (quoting Ishbel Ross, \textit{Proud Kate}, Portrait of an Ambitious Woman 221-22 (1953)).
\textsuperscript{60} Id. (emphasis added).
\textsuperscript{61} Id.
\textsuperscript{62} \textit{National Party Platforms 1840-1956}, at 47 (Donald Bruce Johnson 1978). I want to
While the paradox may never be resolved, I want to suggest that the keys to understanding Chase’s views lies with two women, Kate Chase and Myra Bradwell. Kate Chase may be the key to explaining Chase’s advanced views on women, and Myra Bradwell may explain how Chase could, consistently, hold views similar to those of Justice Bradley and still vote to admit Mrs. Bradwell to the bar.63

A. Catherine (Kate) Chase

It may be particularly important to note the tragedy of Chase’s life, that he survived the death of three wives and five children. He was a single parent of two daughters he raised to adulthood, Kate and her half sister Janet (Nettie) Chase.

Chase’s unique relationship with his oldest daughter Kate is revealing. Born Catherine Jane Chase in 1840, she was a treasure reminding him of earlier losses. Though her mother was Chase’s second wife, Kate was named after Chase’s first wife, Catherine Jane Garniss Chase. This was also the name of his first child who died in infancy.64

During her first few years of life Chase read the Bible to Kate and taught her to read and to recite poems.65 Her favorite childhood story was about her father’s efforts to save the African-American Matilda from being returned to slavery.66 As she grew, Chase played games of strategy with Kate such as chess and backgammon.67 Early in her life her father treated her “as his equal in years and understanding. . . .”68

Sent to an all girls schools in New York at the age of eight, her curriculum included French, German, history, literature, grammar, Greek and Latin.69 Less

It has recently been suggested that there were significant differences in the way in which the Democratic and Republican parties of the Nineteenth Century viewed women. The Democrats presented their candidates as “manly” and independent of women. By contrast, the Republican Party claimed its candidates had become virtuous men because they had “good mothers” and “virtuous” and “intelligent” wives. Jeffrey R. Young, The Historical Coattails of Family Values, the Chronical of Higher Education A14 (November 6, 1998) (reviewing Rebecca Edwards, Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era (1997)).

Chase’s general views on equality could be logically applied to women as well as African-Americans. It is therefore possible that his general views on equality naturally led to his views with respect to women. Yet this application was not inevitable as is shown from the fact that many anti-slavery advocates did not embrace women’s rights. It seems likely that Chase’s relationship with his daughter Kate helped Chase take a further step in the application of his views that others were unable to take.

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64. Mary Merwin Phelps, Kate Chase, Dominant Daughter 18, 23 (1935).
67. Peacock, supra note 65, at 211. See Belden and Belden, supra note 21, at 22 and Ross, supra note 59, at 37.
68. Peacock, supra note 65, at 209.
69. Niven, supra note 5, at 200; Peacock, supra note 65, at 212; and Phelps, supra note 64,
"serious" studies included piano, elocution, dancing, and horseback riding. There is much in the literature to suggest that women educated in all girls schools, as Kate was, develop more leadership qualities than those in a coeducational setting.

Intelligent, witty, dedicated to her father and his career, she impressed and charmed even staid men of power like Massachusetts' stuffy Senator Charles Sumner and former United States Attorney General Willard Wirt. In conversation and in letters, Chase and his daughter dwelt on politics as the topics of the day. Chase often sent his daughter copies of speeches of senators, and made sure she read the newspapers. While his correspondence contained paternal and paternalistic admonitions on the role of a young woman in society, they also shared with her news of battle, political speculation, and his hopes for the future.

Chase was said to "go over his cases with" his oldest daughter as she was growing up and "he delighted in her understanding" of the cases. It was suggested that eventually "she had become genuinely helpful to him" in his analysis of the cases.

In his later career Kate was his constant companion, often walking him from their home to his office, to the Senate where she sat in the galleries, or to the Supreme Court where she witnessed the arguments. She was also his horseriding companion.

Relationships between fathers and daughters have always had the potential for a unique closeness. If Chase was devoted to his daughter, she was likewise devoted to him. "Rarely have the lives of father and daughter been so closely bound together. . . . Each played a major role in the life of the other. . . ." She became "the pride and blessing" of his existence. This "solitary," "austere" and "reserved" man felt at ease with Kate, "as with no other human being."
At a time when even letters to one’s spouse often used a formal salutation, the normally formal, stiff, and awkward Chase addressed his twenty-two year old daughter as “My darling Katie.” Even after she was married Kate responded in kind, signing letters as “Lovingly your child” and “Your devoted Katie.”

Chase’s official stations as Governor, Senator, and then Secretary of the Treasury involved a number of social obligations with a customary female figure as a hostess. Close as he and Kate were, the political obligations of his career caused him to call upon her to play public roles that gave her responsibility in a public light at an earlier age than she might otherwise have played. In the words of Professor John Niven, Kate’s “growing maturity matched his maturing political career” and her beauty, poise, and intelligence “made her a most useful if not indispensable adjunct to Chase’s career plans.”

Thus, at the age of approximately fifteen, Kate became the female head of her father’s house in the Governor’s Mansion in Columbus, Ohio. As Governor of Ohio, Chase sent his oldest daughter to represent him on public occasions like delivering a pardon to a former Polish revolutionary. Like other strong women of that era who worked through their male relatives, Kate Chase eventually became a social and political force in her own right. Indeed, Kate “knew intimately the strong men who formed the nucleus” of the Republican party: “She knew its aims and purposes, and was in possession of its secret history contained in her father’s letters and journals and in her own memory of its inception and progress.” By the time she left the Governor’s mansion she had earned her own reputation as “an astute politician.”

When Kate went to Washington with her Secretary of the Treasury father in 1861, she was his official hostess. With Secretary of State Sewart’s wife being ill and withdrawn from society, Kate was “the first lady of the Cabinet.” Her “fame” surpassed “that of every woman of her generation in America,” and she obtained a “social prestige never before enjoyed by so young a woman.” Yet her role went beyond the social role allotted to women of the era. Chase valued his daughter’s ability and frequently put her in positions of discussing subjects normally reserved for men. For example, after the battle of Antietam

83. Niven, supra note 4, Vol. 3, at 226 (Salmon Chase to Kate Chase, July 13, 1862). See also Phelps, supra note 64, at 226 reproducing a “My darling Katie” letter from her father dated May 4, 1869.
84. Ross, supra note 59, at 203, 207.
85. Niven, supra note 5, at 202.
86. Peacock, supra note 65, at 212.
88. I am thinking particularly of the role Jessie Benton Fremont played in her husband’s career and the role which Elizabeth Bacon Custer played in orchestrating the preservation of her husband’s memory.
89. Peacock, supra note 65, at 214.
90. Phelps, supra note 64, at 90.
91. Id. at 104. The Treasury Department was considered second only to the State Department.
92. Peacock, supra note 65, at 216-17.
in 1862 when he went to visit General Joseph Hooker to discuss army politics and military strategy, Chase took with him Colonel James Garfield and Kate.\footnote{Niven, supra note 5, at 307.}

In assessing Kate's life two years after her death, it was suggested that Kate enjoyed "a political power which no woman before or since her day has ever possessed."\footnote{Peacock, supra note 65, at 216 (emphasis added). See also Belden and Belden, supra note 21, at 349.} By the 1950s biographers would refer to her as "the most powerful woman in the United States. . . ."\footnote{Belden and Belden, supra note 21, at 203 (emphasis added).}

That political power came not from her unquestioned beauty, but from her intelligence, political ability, and charisma. Kate Chase had the reputation of being "one of the most beautiful women," and, at the same time, "the most brilliant woman of her day."\footnote{Sokoloff, supra note 2, at 13 and Ross, supra note 59, at 289 (emphasis added).} In 1901 she was characterized as having had "one of the most astute and brilliant minds with which a woman was ever gifted."\footnote{Peacock, supra note 65, at 210.} Indeed, she had "a scientific knowledge of politics that no woman, and few men, have ever surpassed."\footnote{DeBlasio, supra note 46, at 52 (quoting 1 Henry Villard, Memories of Henry Villard, Journalist and Financier 175 (1904)).} When journalist Henry Villard recalled her at the turn of the century, he referred to her as not only "beautiful" but also "gifted."\footnote{Id. at 214.}

In 1868 Chase was a leading candidate for the Republican nomination until Ulysses S. Grant became a contender for the nomination.\footnote{Sokoloff, supra note 2, at 39. See also id. at 133 ("Her magnetism pervaded the room.") and Ross, supra note 59, at 289 (quoting the New York Tribune ("rare personal magnetism")).} Chase's national prominence, his hard money stand, and his historical affinity for principles of the
Democratic Party, allowed him to then become a leading candidate for the 1868 Democratic nomination for President.

In 1868 Kate went to New York to coordinate efforts to nominate her father at the Democratic National Convention. She was consistently referred to as her father’s “campaign manager” at the 1868 convention. The press found Kate “active and visibly in charge” of the Chase headquarters. Never before had a woman played such a prominent role in the attempt to select a presidential candidate. Though unsuccessful, John Niven has concluded that Kate “played the hand dealt her with skill.

Like Myra Bradwell, Kate Chase had crashed gender barriers of her own. During her prime in public life Kate was said to have had “a dominant influence over public men and the course of public events.” At a time when women were known by their husband’s name, Mrs. Sprague was widely referred to as “Kate Chase.” Evidence of her crossing of gender lines may be seen in the suggestion that her “intellect” was “naturally endowed with many masculine qualities…” and that her father treated her “in all respects more as if she were a son than a daughter…” To at least one modern observer, Kate was a “subtle feminist.”

The story of Kate Chase and her father allows speculation about four ways in which Kate may have influenced her father’s views of the case. First, whatever his devotion to the conventional roles of women, Chase may have seen his daughter as an extraordinary person who could defy convention. It is not too much to speculate that Chase, like many another father, may have thought that his daughter Kate deserved the right to function up to her abilities and not be rigidly constrained by gender roles, whether it be in politics, business or even law had she so desired. If so, he may have been empathetic with someone, like Myra Bradwell, who had done likewise.

104. Niven, supra note 5, at 431.
106. Yet “there were boundaries even” for Kate Chase—as a woman she was not allowed to go on the floor of the convention and work among the delegates while the convention was in session. Belden and Belden, supra note 21, at 214.
107. Niven, supra note 5, at 431. Such was the father/daughter relationship, that when Chase learned he would not be nominated his first question was: “Does Mrs. Sprague know and how does she bear it?” Id. at 432.
108. Phelps, supra note 64, at 286 (quoting the Philadelphia Record at the time of Kate’s death in 1899).
109. Peacock, supra note 65, at 215 (emphasis added). See also Sokoloff, supra note 2, at 42 (“she had an intelligence which was essentially more masculine than feminine”); Belden and Belden, supra note 21, at 6 (“with a masculine regard for hard logic”); Ross, supra note 59, at 202 (“’brains of almost masculine fibre’”).
110. DeBlasio, supra note 46, at 2. While never identified publicly with the women’s suffrage movement, Kate had hosted a “parlor lecture” for suffrage advocate Julie Ward Howe. Id. at 63. In an 1886 newspaper interview Kate indicated she was sympathetic with the movement for women to vote and that she believed “they [women] will do whatever they want to do; whenever they want to vote they will vote, and no power on earth will stop them.” Sokoloff, supra note 2, at 267.
Second, Kate’s life may have helped him develop a political and philosophical view that, as he wrote in a private letter in 1872, led him to support “the enlargement of the sphere of women’s work . . . .” One has a sense of this in Chase’s letter to Kate on women’s rights where he wrote about placing the government in the hands of women. He concluded: “Certainly I don’t see but you [Kate] and Nettie are as qualified to take part in [public] affairs as I was at your age.” Third, his discussions with Kate about the law, about his cases as a lawyer and as a Justice, may well have convinced him that women could successfully deal with the role of a lawyer.

Finally, there is the possibility that the father and daughter actually discussed the case together. Chase’s letter to Justice Field indicating that he would dissent from the majority opinion in Bradwell was written from his daughter’s home rather than his own. After so many long discussions about Chase’s life work and ambition, it might not be too much to expect that in the discussion of his day’s work the father might have discussed Mrs. Bradwell’s case with his daughter who counseled her father-lawyer on legal strategy, who influenced her father-governor’s decisions on pardons, and who counseled him on matters of the Treasury Department. Whatever the impact, human nature suggests that Chase’s view of Bradwell v. Illinois could not help but be informed by his love for and his experience with his extraordinary daughter Kate.

B. Myra Bradwell and the True Woman

In spite of his relationship with Kate, one may still be puzzled that Chase could support Myra Bradwell’s case, given statements in Chase’s diaries and letters which reflect stereotypical, traditional, and restrictive stereotypes of gender. He was protective, referring to Kate as “naturally delicate” and worrying that coffee or tea might “derange” her nerves. Chase sought for his daughter marriage to “a Christian gentleman who would be to you the affectionate protector you need.”

After receiving a letter from his daughter about difficulties with her husband, Chase’s response included the following:

Trust God, have faith in Christ, accuse no one but yourself, cherish every wifely sentiment whether now reciprocated or not, . . . .

111. Ross, supra note 59, at 186.
112. John Niven to Richard L. Aynes, Nov. 14, 1995 (letter on file with author). Dr. Niven doubted that any such discussion took place.
113. Phelps, supra note 64, at 90.
114. Peacock, supra note 65, at 220.
115. Sokoloff, supra note 2, at 31.
116. Id. at 76.
Don't rebel, or let impatience be suffered in your thoughts. Make all happy around you.\textsuperscript{117}

Similarly, in 1868 Kate had left Washington, apparently angry at her husband. Her father wrote that she had “sometimes forgotten that the happiness of a wife is most certainly secured by loving submission. . . .”\textsuperscript{118} On another occasion Chase wrote: “[Y]ou must reflect, my darling, that there can be but one head to a family, and . . . that it is the wife’s part after the husband chooses to act in any matter upon his own judgment without asking hers, to acquiesce cheerfully and affectionately.”\textsuperscript{119} Sentiments like these make one wonder how Chase could have simultaneously advocated an expansion of the sphere of women’s work.

But the work of Professor Friedman on Myra Bradwell provides a way to resolve what at first might have appeared to be an inconsistency between Chase’s adherence to gender stereotypes and his dissent in \textit{Bradwell}. Professor Friedman, in examining Myra Bradwell’s life, outlines the 19th century ideal of a “true woman.”\textsuperscript{120}

The view of “True Womanhood” embodied “four cardinal virtues—piety, purity, submissiveness and domesticity.”\textsuperscript{121} Professor Friedman indicates that while the modern reader might suppose Myra Bradwell had repudiated the cult of true womanhood, “in fact the contrary seems to be true.”\textsuperscript{122} Indeed Bradwell herself wrote of “the sweetness of true womanhood.”\textsuperscript{123} By 1869 when Mrs. Bradwell sought admission to the bar, her children were thirteen and eleven, no longer needing close daily attention from their mother.\textsuperscript{124} Myra Bradwell did not pursue law as an opportunity to gain her financial and social independence from her husband. To the contrary, she wanted to work \textit{with} him:

I acquired the idea [of studying law] from helping my husband in his office. I was always with him, helping in whatever way I could. . . . I believed that married people should share the same toil and the same interests and be separated in no way. . . . If they worked side by side and thought side by side we would need no divorce courts.\textsuperscript{125}

In spite of her business, political and social accomplishments, Myra Bradwell still viewed herself as fulfilling the traditional role of a 19th century woman whose main province was that of dealing with the family.

\textsuperscript{117} Phelps, \textit{supra} note 64, at 226 (quoting S. P. Chase to Kate Chase Sprague, May 4, 1869).
\textsuperscript{118} Niven, \textit{supra} note 5, at 424 (quoting S. P. Chase to Kate Chase Sprague, May 10, 1868).
\textsuperscript{119} Sokoloff, \textit{supra} note 2, at 156 (quoting S. P. Chase to Kate Chase Sprague, Aug. 9, 1868).
\textsuperscript{120} Friedman, \textit{supra} note 32, at 37.
\textsuperscript{121} Friedman, \textit{supra} note 32, at 37 (quoting Barbara Welter, The Cult of True Womanhood: 1820-1860, 18 Am. Q. 151, 152 (1966)).
\textsuperscript{122} Friedman, \textit{supra} note 32, at 37.
\textsuperscript{123} \textit{Id.} at 40 (emphasis by Professor Friedman eliminated).
\textsuperscript{124} \textit{Id.} at 18.
\textsuperscript{125} \textit{Id.} at 38-39.
This image of a “true woman” who could also engage in work activities which would break gender barriers both informs our judgment about how Chase may have seen his own daughter and also about how he may have viewed Mrs. Bradwell’s claim. If this hypothesis is correct then Chase could, consistently with his opinion in the *Slaughter-House* case, vote to uphold Mrs. Bradwell’s claim without believing he was in any way compromising his “traditional,” more limiting values. Equally as important, he could view his own daughter’s life, which included marriage and the birth of three children, as consistent with the “cult of true womanhood.”

Given his illness, which resulted in not only a lack of a written opinion, but also a lack of diary entries and letters during this time, we cannot reconstruct Chase’s actual thinking or logic. But it may nevertheless be useful to draw upon his other papers and opinions to create a hypothetical opinion.

Professor Hyman suggests that Chase was “disappointed” that Bradley, Swayne, and Field—the other *Slaughter-House* dissenters—had concurred in the majority decision in *Bradwell*. This was so because the majority opinion was “antithetical to Chase’s understanding of Christian doctrine and America’s history and constitutional law.” While Chase was too ill, “in body and spirit” to write an opinion, he made it clear he broke ranks not only with the majority, but also with his fellow dissenters in *Slaughter-House*: “The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions.” What follows is my own explanation of what Chase could have written to support the dissent.

V. HYPOTHETICAL OPINION

C.J. Chase dissenting.

Yesterday, in the *Slaughter-House Cases*, I voted with the dissenters to protect the right of men who were butchers to engage in that occupation without working through a state created monopoly slaughter-house. The violation in this case is more serious than that in the *Slaughter-House Cases*. At least the butchers were allowed to pursue their avocation upon the payment of the fees demanded by the monopoly. Here Myra Bradwell is absolutely prohibited from pursuing the profession of lawyer.

For present purposes, I will not repeat the arguments of my brothers Field, Swayne, and Bradley in their separate dissents in *Slaughter-House* that explain

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126. By 1873, when Bradwell’s case was decided, Kate was 33 years old and the mother of two children.

127. *Hyman, supra* note 7, at 164.

128. *Id.*

129. *Id.*

130. Hyman reads much into the simple words. “In effect, Chase stipulated by his dissent in *Bradwell v. Illinois* that he still stood on the far broader ground of race-free and gender-free access to life’s opportunities, benefits, and hazards.” *Id.* at 165.
why the Fourteenth Amendment Privileges or Immunities Clause protects the right to pursue a lawful occupation. What I will do is to outline the reasons why the separate concurring opinions of Justice Bradley and Justice Swayne are not controlling in this case.

At the outset, I note the high standing of Mrs. Bradwell in her own community. Her service as publisher of the Chicago Legal News has found favor with the entire profession. She not only produces timely reproductions of court opinions, but provides court forms for the Illinois Bar and ably expresses her own opinions on a variety of topics of legal issues in the Chicago Legal News. One need not agree with her opinions in order to recognize their quality and value. Further, Mrs. Bradwell is a devoted mother who has already brought children into the world. She and her husband have raised children who are a credit to their family.

Mrs. Bradwell has made a commercial success of her newspaper without compromising her dignity as a woman or turning her back on her duties to help preserve our species as articulated by Justice Bradley. I have no doubt that she has the ability to do equally well in the practice of law.

It is certainly true that there are unsavory matters to which a lawyer may be exposed and to which gentleman would not readily allow women of good society to be exposed. Yet, just as a gentleman of high virtue may select parts of practice to avoid these unsavory contexts, so may a woman. Our high regard for the person of a woman should not result in her being barred from the pursuit of her profession.

Nor should tradition of this profession as one for men alone control. We live in an age of progress. We have seen the twin relicts of barbarianism, slavery and polygamy, banished from our borders. Regard for the age in which we live should open our minds to spirit of the age.

Finally, Justice Bradley's noble vision of avoiding the exposure of women to obligations outside the home is misplaced. This country was settled and built with the work of women who not only tended children and domestic affairs, but who have joined with husbands or acted in their widowhood to the difficult task of earning a living. On our frontiers women are even pressed into arms to defend themselves. To imagine a world in which women do not toil, and toil mightily, outside of the home is to imagine what never was and what will never be.

If our society, notwithstanding women's station in life, can bear the blush of women working in more physically demanding jobs, it can surely bear the honor of having Mrs. Bradwell called to the bar.

VI. AFTERWORD

After an initial heart attack in 1870, Chase's health had been in decline. By 1873 he had suffered from a heart attack, a stroke, chronic malaria, and diabe-
Just eighteen days after the court’s opinion was issued, on May 3, 1873, Chase died of a stroke at the New York home of his youngest daughter, Nettie. Both Kate and Nettie were at his side.

Chase’s daughter Kate continued in an unhappy marriage to the former Rhode Island Governor and Senator William Sprague, until 1882 when they were divorced. The court returned to her the name “Chase” by which the public had known her all along. Over the years she was an advisor on political strategy to such notables as James Garfield, Ulysses Grant, Chester A. Arthur, and John Hay. She was a behind-the-scenes strategist for Roscoe Conkling in the election of 1884. But never again was Kate to exercise the prominent role in American politics which she did while her father was alive. It was suggested that Kate “never recovered from the death of her father.” Kate Chase, the “most brilliant woman of her day,” died impoverished in 1899. She was buried in Cincinnati, Ohio, fittingly, next to her father.

Myra Bradwell went on to even greater successes. Even before the Supreme Court issued its decision in Bradwell, Myra had helped convince the legislature of Illinois to pass a statute that provided:

No person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex.

By 1873, with the encouragement of Myra Bradwell, nineteen year old Altan Hulett became the first woman admitted to practice in the State of Illinois. Mrs. Bradwell continued to follow the progress of women across the nation in gaining

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131. Niven, supra note 5, at 440.
132. Belden and Belden, supra note 21, at 273.
133. The traditional account is that Kate married Sprague “to use his influence and money to make her father President.” Belden and Belden, supra note 21, at 122. But one of Chase’s biographers concluded that Sprague was an “unworthy” and “dissolute” man.

In accepting her father’s apology for missing her birthday, Kate revealed much about herself: “I fear I am a good deal of a child about such things yet, though yearning for love is hardly one of the childish things one would wish to put away.” Id. at 165-66 (emphasis added).

Indeed, the most modern biographer of Kate Chase, with access to new original documents, concluded that while Kate loved her father and wanted him to be successful, her “tragedy was not ambition, but love.” Sokoloff, supra note 2, at 7. See also id. at 91-92 (quoting from Kate Chase’s diary) and at 95 (quote from a letter to William Sprague). Indeed, in a diary entry on March 29, 1868 Kate Chase refers to love as “the great treasure my soul craves.” Id. at 139-40. Alice Sokoloff concluded that Kate was “an incurable romantic . . .,” id. at 161, with “an overpowering need to love and be loved.” Id. at 163.

134. Peacock, supra note 65, at 225.
135. Phelps, supra note 64, at 213 and 262; Belden and Belden, supra note 21, at 169. (Hay consulted Kate before turning down a position as Secretary of State Seward’s secretary.)

137. Belden and Belden, supra note 21, at 275.
138. Obituary from the Washington Evening Star, quoted in Phelps, supra note 64, at 286.
139. Friedman, supra note 32, at 28. This undoubtedly means that the case before the Supreme Court was moot. But it appears that the Court was unaware of the Illinois statute.
admission to law school and the bar, trumpeting their triumphs in the columns of the *Chicago Legal News*. Mrs. Bradwell never took advantage of that statute, indicating that by the time the Supreme Court rendered its decision:

My business had acquired such dimensions by the time the barriers to my admittance to the bar were removed that I had no time to give to law practice, and I didn't care to be admitted just for the privilege of putting "Attorney" after my name.141

As soon as the *Slaughter-House* opinion was issued, Bradwell took "great pleasure" in praising Justice Miller's opinion as being "confined strictly to the points at issue" and condemned Justice Bradley for the conflict between his dissenting opinion in the *Slaughter-House Cases* and his concurring opinion in *Bradwell v. Illinois*. Mrs. Bradwell served as the publisher, business manager and editor-in-chief of the *Chicago Legal News* that "for at least two decades was the most widely circulated legal newspaper in the nation."142 She served in that capacity for 25 years and edited 1,300 issues of the newspaper.143

James Bradwell went on to become a member of the legislature, where he successfully advocated many of the reforms initiated by his wife in her newspaper columns. Their two children, Bessie and Thomas, both became lawyers. Apparently as a result of the behind the scenes prompting of her husband, the Supreme Court of Illinois and the Supreme Court of the United States, *sua sponte* granted Myra Bradwell admission to their bars in 1890 and 1892 respectively.144 She died of cancer in 1894.145

Justice Miller lived until 1890, removed from the Court only by death. His memory is preserved in a eulogistic biography by Charles Fairman.146 Held in high regard by Felix Frankfurter, Fairman and their associates, Miller is known today largely through his *Slaughter-House* opinion which, while not overruled, is regarded with virtual unanimity to have been incorrectly decided.147 Justice Bradley continued on the Court until 1892 when he died. Though touted as one of the great justices by New Deal era lawyers like Felix Frankfurter and his protégé, Charles Fairman, by 1948 even Fairman could find no decision by Justice Bradley worthy of being included in his constitutional law casebook.148

140. *Id.* at 129-32.
141. *Id.* at 29.
142. *Id.* at 29.
143. *Id.* at 12.
144. *Id.* at 30.
145. *Id.*
146. Charles Fairman, Mr. Justice Miller and the Supreme Court 1862-1890 (1939). But we can look forward to Michael Ross's fresh work on Miller.
147. Aynes, supra note 4, at 627 n.4.
The Supreme Court continued on its path of restricting protections and national rights in *U.S. v. Cruikshank*,\(^{149}\) declaring the 1875 Civil Rights Act unconstitutional,\(^{150}\) supporting segregation\(^{151}\) and a variety of similar decisions. It was not until almost a century had passed, in *Reed v. Reed*\(^ {152}\) that the Supreme Court used the equal protection clause (rather than the privileges and immunities clause) to accomplish what Chase might well have intended with his dissent in the *Bradwell*.

It may be that somewhere in heaven Kate Chase and Myra Bradwell both smiled at Reed's adoption of Salmon Chase's principles.

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149. 92 U.S. 542 (1875).
150. The Civil Rights Cases, 109 U.S. 3 (1883).
152. 404 U.S. 71 (1971).