

The Easter Massacre and Legal Abstraction

Robert Goldman. *Reconstruction & Black Suffrage: Losing the Vote in Reese & Cruikshank*. Landmark Law Cases & American Society. Lawrence: University Press of Kansas, 2001. xiv + 182 pp. Bibliographical essay and index. \$29.95 (cloth), ISBN 0-7006-1068-5; \$14.95 (paper), ISBN 0-7006-1069-3.

Reviewed for H-POL by J. Morgan Kousser, Division of Humanities and Social Sciences, California Institute of Technology.

When the largest peacetime massacre of African-Americans in nineteenth century America took place on Easter Sunday, 1873, in Colfax, Louisiana, the U.S. government possessed the tools to prosecute the murderers. The First Enforcement Act, passed 62 days after the ratification of the Fifteenth Amendment, prohibited private individuals, as well as state officials, from taking any of a series of specific actions aimed at prohibiting or discouraging anyone qualified to vote in a state or local election from voting or from performing any prerequisites to voting. After all, what was the use of removing the word “white” from state suffrage laws if the states disfranchised blacks by other means or offered no protection to African-Americans who sought to vote or to assume offices to which they were legally elected? And the law clearly applied to the “Colfax Massacre” of at least 105 black men, about 50 of whom were executed after surrendering to the well-organized group of about 300 armed whites, because the massacre was the direct result of a disputed election. After an election in which they had almost surely won a majority of the votes, local black Republican candidates had attempted a peaceful occupation of the Grant Parish court house. Their slaughter was not a conventional assault that a local or state government could be expected to handle, but the climactic event in a struggle for control of local government -- Columbus Nash, the Democratic candidate for sheriff, led the white mob.

The events in Colfax evoked national outrage. In response, federal District Attorney James R. Beckwith indicted and eventually convinced a southern jury to convict three of the murderers. Although hardly equal and exact justice, the punishment of at least a few of the white terrorists signaled that the Grant Administration would continue to try to protect its loyal followers’ voting rights. That signal sent a bolt of fear through the southern Democratic Establishment, whose efforts to mount coups d’etat against the Republican Reconstruction state governments depended on having a free hand to murder and intimidate its white and especially its black opponents and to stuff ballot boxes to overcome the votes of those who were not cowed. The trio’s upper class lawyers, the flower of the state and national Democratic bar, contested the case in the U.S. Circuit Court. When the two circuit court judges, including Supreme Court Justice Joseph P. Bradley, disagreed with each other, the case was certified to the U.S. Supreme Court as *U.S. v. Cruikshank*.

Just as clearly covered by the provisions of the Enforcement Act was the refusal of Lexington, Kentucky tax collector James F. Robinson, Jr. to accept the poll tax payment of the African-American William Garner, who proffered his \$1.50 in an attempt to qualify to vote. Faced with a probable black majority within its city limits, white Democratic officials, one month after the

ratification of the Fifteenth Amendment, had gotten the state legislature to amend the city charter to increase its residency requirement and mandate the payment of a poll tax before any person could vote in municipal elections. In the January, 1873 election, the poll tax reportedly disfranchised two-thirds of black voters and preserved white Democratic supremacy. Even those like Garner, who could raise the money to pay their taxes, could be denied the suffrage if officials pleased. For when Garner appeared at the polls, election supervisors Hiram Reese and Mathew Foushee refused to accept his vote unless he presented a receipt showing that he had paid his poll tax, which Collector Robinson, another Democrat, had refused to allow Garner to do. Although Robinson's action apparently seemed so indirectly connected with voting that he was not charged under the Enforcement Act, the denial of Garner's right to vote by Reese and Foushee clearly qualified as relating to voting, for the prescient framers of the Enforcement Act had foreseen that official as well as unofficial, bureaucratic as well as violent, subtle as well as blatant means would be employed to deny African-Americans an equal political voice. Even before Reese could be tried, his lawyers demurred (objected) to his indictment, and as in Cruikshank, two circuit court judges divided.¹ The U.S. Supreme Court would now have two cases with which to consider the interpretation and constitutionality of the First Enforcement Act.

Although historians have long prominently mentioned these cases and there are lengthy and detailed discussions of them in larger monographs,² this is the first book-length treatment easily accessible to students. Goldman's book illustrates the proposition that squinting at legal cases by narrowing one's view to the strictly legal materials of one or a few cases inevitably produces serious distortions.

Despite the existence of congressional hearings, an army report, a long trial that featured 300 witnesses in Cruikshank, and a plethora of recent work on Reconstruction in both Louisiana and Kentucky, Robert Goldman only briefly sketches the backgrounds of each case and tells us almost nothing about the plaintiffs or defendants and not much more about the lawyers who represented them or the federal judges who decided the cases at each level. Nor does he examine the consequences of the cases for the parties involved. Were Cruikshank, Reese, and their compatriots rewarded for their labors for the party of white supremacy with higher office? Were the blacks who survived Colfax driven from politics? How comparatively effective were violence and legal maneuvers in stemming the Republican threat? Although Goldman does not note it, the Republican ticket in Grant Parish polled nearly as high a percentage in the 1876 presidential election as the percentage of African-American males of voting age in the parish, an indication that the epic violence was less of a final solution than the Democrats hoped it would be. Such stirring events, such a chance to recover the memory of so many sufferers and villains, such an opportunity to breathe life into the abstract formalism of the law – squandered!

It is not that the formal legal issues in Reese and Cruikshank are uninteresting. Indeed, they are as weighty as they are complex. The bevy of legal talent representing the Democrats, which included a former senator, two former U.S. Attorney Generals, and even ex-U.S. Supreme Court Justice John A. Campbell, launched a similar barrage of criticisms of the indictments in both

cases. The most extreme declared that the only effects of the three Reconstruction constitutional amendments were to ban slavery and to force states to remove the word “white” from their suffrage laws. In this view, the national government had no more power to protect any rights, including those related to the right to vote, such as the right not to be killed when going to the polls, than it did before the Civil War. States could not be required to protect their citizens, and the national government could not intervene to protect individuals if the states failed to do so. It is interesting to note, though Goldman does not, that former Justice Campbell had argued an equally extreme nationalist position, that the Reconstruction Amendments brought nearly all rights under national protection (“conscience, speech, publication, security, freedom, and whatever else is essential to . . . liberty,” is the way he put it), as attorney for the Butchers’ Benevolent Association in the 1873 Slaughter House Cases. Next in ideological radicalism came the view, espoused in oral argument by David Dudley Field, the brother of sitting Supreme Court Justice Stephen J. Field (who did not recuse himself in the case), that the Enforcement Act and all other acts that Congress had so far passed pursuant to the Reconstruction Amendments were unconstitutional, because the Amendments granted Congress power only to prescribe judicial remedies for any state laws that violated the Amendments, not to criminalize specific actions by individuals or state officials. Goldman, who offers few explicit comments or critiques of the arguments for the defendants, inexplicably characterizes Fields’s argument as “moderate” (p. 86). Third was the contention that the constitutional amendments applied only to explicit state legislation, not to the actions of state officials. A fourth position was that the Amendments constrained only the actions of a state, not those of private parties. This might have invalidated the provisions of the Enforcement Acts banning private persons or officials who could claim not to be acting in their official capacities, from interfering with voting, but it could hardly have saved Reese, whose refusal to accept Garner’s vote would have been meaningless if he had lacked the authority to do so. The fifth argument was that the only constitutional justification of the Enforcement Act was the Fifteenth Amendment’s ban on discrimination in voting “on account of race,” and that the sections of the Enforcement Act that defined crimes lacked justification under the Fifteenth Amendment because they did not explicitly mention race, as other sections of the Act did. A contradictory sixth stance attacked the words of the indictments because they failed to mention race as the cause of the discrimination, words that the law, on this reading, required.

It was this last argument, that although the Enforcement Acts were constitutional, the indictments were deficient, because they did not allege a racial purpose for the murders in Cruikshank, that Justice Bradley, sitting on circuit, as Supreme Court justices had to before 1891, latched onto. Disagreeing with the other judge in the trial, U.S. Circuit (and later Supreme Court) Judge William B. Woods, Bradley ruled that the defendants should go free. The split vote automatically brought the issue before the U.S. Supreme Court on a division of opinion.

It was very curious for Bradley to take that position in his June 27, 1874 opinion in Cruikshank, because he had espoused a much more nationalistic view in his forceful dissent to the Supreme Court’s 5-4 decision in the Slaughter House Cases. A Louisiana case, Slaughter House was the first by the U.S. Supreme Court to construe the Fourteenth Amendment, and it

was decided, coincidentally, the day after the Colfax Massacre, on April 14, 1873. In *Slaughter House*, the majority ruled that the Fourteenth Amendment did not nationalize rights such as the right to practice an occupation, unrestrained by state laws aimed at protecting people's health and safety. In his dissent from that ruling, Bradley took the position that the Fourteenth Amendment did nationalize such "privileges or immunities," a stance that was entirely consistent with the theory under which federal attorneys throughout the South had been interpreting the Enforcement Acts – that the Thirteenth, Fourteenth, and Fifteenth Amendments gave Congress the power to protect all peoples' positive rights to assemble freely, to bear arms, and not to be deprived of life, liberty, or property without due process of law, rather than merely providing that the states could not deny to blacks whatever rights they granted to whites. The purpose of the Fourteenth Amendment, Bradley said in *Slaughter House*, was to make American citizenship "a sure guaranty of safety . . . [so that] every citizen of the United States might stand erect in every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation." The black bodies rotting in the swamp in Colfax could not hear and would not have appreciated the delicate irony of Bradley's transformed words only fourteen months later in *Cruikshank*. The nationalistic position, based principally on the Fourteenth Amendment, which does not mention race, allowed Congress and the courts considerably more power, power that they clearly needed in order to protect African-Americans from a different sort of white butchers than those involved in *Slaughter House*. By contrast, under the theory that Bradley adopted in *Cruikshank*, Congress's powers to pass the Enforcement Acts derived only from the Fifteenth Amendment, which does mention race, and prosecutors had to allege and prove a racial intent behind every discrimination. Goldman (pp. 58-59) suggests that Bradley adopted the narrow construction of congressional powers not to follow the previous year's Supreme Court majority or to agree with the Democratic lawyers' constricted views of congressional power, which left them free to overthrow Reconstruction by violence and chicanery, subject only to the laws of the states, once they controlled them, but simply to bring the issue before the Supreme Court, perhaps without a strong view on how it should be decided.

There are three difficulties with Goldman's interpretation: First, since widespread violence and electoral discrimination offered the Grant Administration so many chances to indict well-connected perpetrators, it was inevitable that the issues would eventually come to the Supreme Court. There was no need for Bradley to disagree with Woods to raise the issue to the highest judicial level.³ Indeed, the *Reese* case had been on the Supreme Court's docket for five months when Bradley issued his opinion. Second, if the New Jersey Republican justice had been at all ambivalent about the legality of Enforcement Act prosecutions, and if he had wished to preserve the lives of at least a few black political activists, he could have agreed with Woods's decision and allowed the Enforcement Acts to retain their vigor in the extremely important circuit in which the case took place, perhaps inhibiting some of the later terrible violence there. Third, if Bradley had been even the slightest bit unsure of his newfound position, he would not have personally sent his opinion to federal district judges throughout the South, members of the U.S. House and Senate Judiciary Committees, and the editors of three legal periodicals.⁴ Bradley's liberal ideals were for white businessmen alone, and more than any other figure, he shaped the

Cruikshank case. It is unfortunate that Goldman spends so little time trying to explain Bradley's motives and account for his role.

The government was represented by distinguished counsel in the cases, including future Supreme Court justice John Marshall Harlan in the circuit court trial in Kentucky, and one of the longest serving Solicitor Generals in American history, North Carolina Republican Samuel F. Phillips, in the Supreme Court. Phillips, assisted by Attorney General George Williams, argued that the Kentucky officials' actions, taken in their official capacities, were those of the state, and that because the Fifteenth Amendment did not specifically mention a particular protected race, the sections of the Enforcement Act were clearly within the purview of the Amendment, even though they did not make racial considerations an explicit part of the crimes they announced. Phillips contended, as well, that the right to vote was either one of the undefined privileges and immunities of citizenship according to the original constitution (a position, though Goldman does not note it, similar to that taken on fundamental rights by the principal framer of the Fourteenth Amendment, John A. Bingham) or that it had become such a privilege since the passage of the Fourteenth Amendment. Although insisting on the power of the national government to protect the political rights of citizens of any race, for this case, Phillips relied purely on the Fifteenth Amendment's authorization of protection of the right against discrimination on account of race. The evidence produced at the trials, Phillips believed, had demonstrated the requisite racially discriminatory intent. In Cruikshank, Phillips further asserted that under common law, inherited by the American legal system, the English government had enjoyed extensive power to punish conspiracies, a power invoked by Section 6 of the Enforcement Acts, under which Cruikshank and his confederates were convicted. The defense's counter-argument, that conspiracy law had often been used in the past to trample civil liberties, was not only outrageous in this case, coming as it did not from the slaughtered, but from the poor, persecuted mass murderers, but it also contradicted the defendants' other arguments that the national government had no business concerning itself with individual rights, such as, in this instance, the right to form a violent conspiracy.

The Supreme Court docketed Reese in February, 1874 and Cruikshank in October, 1874, and heard oral arguments in the cases in January and March, 1875, but did not issue opinions in them until March 27, 1876. Goldman neither explains why it took so long nor compares the decision time in this with that in other cases of the era to see how extraordinary this length of time was then. After all, the Court was nearly unanimous in both cases, and Justice Bradley had already written an opinion that tracked the final outcome on most issues. The timing of the decisions remains an interesting puzzle. More important, Goldman does not recount the events of the period between the Circuit and Supreme Court decisions, events that provided a stark background to the issues and almost certainly affected the decisions. All over the South, Democrats, gleefully, and Republicans, fearfully, interpreted Bradley's opinion as a signal for the escalation of racial violence of whites against blacks and political violence of Democrats against Republicans.⁵ In the guise of the "White League," "Red Shirts," or Ku Klux Klan, Democrats then brought terror to a crescendo. In Louisiana itself, a "riot" in New Orleans, one of whose leaders, Robert H. Marr, represented Cruikshank in both the Circuit and Supreme

Courts, prepared the way for the complete overthrow of the governments of New Orleans and Louisiana. In the fall of 1874, Democrats won a shocking and decisive national victory in the congressional elections, taking control of the House for the first time since secession and threatening to overturn every facet of Reconstruction except perhaps the antislavery Thirteenth Amendment. Outraged by the violence and frightened by the prospect that Democrats would win the 1876 elections, the Republican caucus in the House in February, 1875, before the newly elected Congress could take office, agreed on a new, far-reaching Enforcement Act. Among other provisions, the bill gave federal election supervisors the right to arrest people for intimidating voters, increased the penalties for election irregularities, mandated federal registration of voters, prohibited excessive poll taxes, forbade carrying guns on election day, and greatly enhanced the powers of election supervisors in rural areas. After overcoming Democratic delaying tactics and blustery, racist, partisan rhetoric that briefly transfixed the nation, Republicans passed a slightly weakened bill in the House on Feb. 28. The bill failed in the Senate in the last days of the lame duck session in early March, after Reese had been argued and a few weeks before the oral argument in Cruikshank. To rule the First Enforcement Act unconstitutional in Reese or Cruikshank was to sweep away the strongest existing protection of African-American suffrage and to abort more comprehensive protection, such as the 1875 bill, whenever the Republicans regained a majority in both houses of Congress, not just to invite Congress to amend the Act to cure slight flaws. A decision like Justice Bradley's, which merely threw out the indictments, was unjust, but probably remediable. But finding the law even a little bit unconstitutional was fatal. It would be 82 years before Congress managed to pass other legislation to protect minority voting rights.

From 1789 to 1875, the Supreme Court had overturned only three laws of Congress – in Marbury v. Madison, Dred Scott v. Sandford, and The Legal Tender Cases. This record implies that the Court followed two more recent conventions: if it can avoid a constitutional issue by deciding on the basis of a statute, it does so; and if it can equally well construe a law in ways that make it constitutional and unconstitutional, it chooses the constitutional construction. Adhering to these conventions minimizes conflicts with the legislature. Ignoring them prompts charges that the judges are seeking uncontrollable power.

Chief Justice Morrison R. Waite, President Grant's seventh choice to replace the deceased abolitionist Salmon P. Chase, presented his strike for judicial – and white – supremacy as an instance, instead, of judicial deference. Although Sections 1 and 2 of the brief First Enforcement Act mentioned race and claimed Fifteenth Amendment justification, Sections 3 and 4 did not repeat such formulas, referring only to the “wrongful act or omission as aforesaid” or using similar locutions. Writing for an 8-1 majority in Reese, Waite contended that to interpret Sections 3 and 4 as in the context of Sections 1 and 2, instead of separately, as if no other part of the law existed, would have effected the judicial, not the legislative will, requiring the Court “to make a new law.” Ruling that the Fifteenth Amendment was the only possible justification of the law, and finding that Sections 3 and 4 did not mention race, Waite threw out these sections as beyond the constitutional power of Congress and dismissed the indictments based on them. The Chief Justice never examined the congressional debates or any other

materials besides the text of the law in reaching the conclusion that the two sections of the law had nothing to do with the provisions that immediately preceded them. Neither does Goldman.

That Waite forced the constitutional issue, instead of avoiding it and allowing later prosecutions for interfering with political rights, is underlined by the reactionary Justice Nathan Clifford's concurring opinion, which had originally been scheduled to be the opinion of the Court.⁶ Clifford doubted that William Garner was properly qualified to vote, either because of Clifford's racist view that the black Garner could not have raised \$1.50 to pay his poll tax (as Goldman believes), or because poll tax payment and depositing a ballot were separate acts under the control of different officials. It followed for Clifford that Reese and Foushee had not illegally disfranchised Garner, and the justice therefore did not need to reach the question of constitutionality. His opinion could have been circumvented by drafting indictments and presenting evidence more carefully to include tax collectors and show their connection to voting. Waite's view was thus more racially retrogressive than that of the last antebellum appointee still sitting on the Supreme Bench in 1875.

Waite's opinion in *Cruikshank* expanded on that in *Reese*, dispatching the constitutional bases for national protections with as little concern as the Louisiana thugs had shown in finishing off their black prisoners. In what might be viewed as the essential part of his opinion, Waite echoed Justice Bradley's opinion on circuit, holding that the indictments were deficient because they did not allege that the victims had been targeted because of their race. But the Chief Justice did not stop there. Instead, he adopted virtually the whole states' rights program of the most extreme defendants and commented not just on the Fifteenth Amendment issues, to which Phillips and Williams had primarily confined their brief, but to explicating the whole Reconstruction constitutional settlement. According to the Chief Justice, the Fourteenth and Fifteenth Amendments created no national rights except the right not to be discriminated against because of race, which had to be shown explicitly. For the protection of virtually all other rights, such as the rights to assemble peacefully and to bear arms, or to take any action related to voting in a state or local election, citizens had to look to the states alone. This position, so contradictory not only to the view of the four dissenters in *Slaughter House*, three of whom remained on the Court in 1875, but also inconsistent with the expansive tone with which Justice Samuel Miller's majority opinion in that case had promised protection of black rights, severely constrained all future national legislation. Violence, intimidation, ballot box stuffing, restrictive election laws, suppression of all means of exercising or enjoying political rights – none of these, at least in connection with state and local elections, could be counteracted by national legislation unless it could be proven in court that those who perpetrated them did so on account of race. The debate over the 1875 Enforcement Act, which only a year earlier had convulsed the Congress for a month, was futile, for it would all have been unconstitutional. Thus, Waite's opinions disarmed federal protectors of voting rights just as political violence reached a climax, enabling white Democratic supremacists to overthrow Reconstruction governments without fear of effective prosecution. The opinions were not simply part of the Compromise of 1877; without them, Hayes would have won easily and there would have been no crisis and no need for a compromise at all.

In a lone, persuasive dissent, Justice Ward Hunt strongly criticized Waite's interpretative severing of parts of the Enforcement Act from each other in *Reese* as violative of the intent of Congress in passing the law, as well as of the Fifteenth Amendment. Concerning himself with legal exegesis on the narrowest part of Waite's opinions, he effectively treated the other parts as *dicta*, that is, as inessential to the Court's holding. Characteristically, Goldman praises Hunt's narrowness and condemns the Solicitor General's expansive brief for not following the Justice's strategy (p. 100).

Goldman's revisionist claims, the major themes of his book, that the Waite opinions were "narrow" and "moderate," and that they did not adopt the defendants' extreme states' rights positions, abort future national protection of voting rights, or even declare certain sections of the First Enforcement Act unconstitutional (pp. 100-06), are insupportable.⁷ They are the product not only of what I have indicated above that I believe to be misreadings of the opinions themselves, but more basically, of abstract, static, internalist legal history itself. Although abstractions are important, segregating legal history into a doctrinal ghetto, apart from elections, legislative policy making, and the currents of popular opinion, distorts both the explanations for legal decisions and the evaluation of the consequences of those decisions.

The argument, which Fairman had previously developed, that Waite's opinions in *Reese* and *Cruikshank* were moderate because they did not expressly foreclose national protection of voting, is unconvincing for four reasons. First, it is based on hindsight. In *Ex Parte Yarbrough* (1884), a unanimous Supreme Court upheld an Enforcement Act prosecution not under the Fifteenth Amendment, but under the Article I, Section 4 power of Congress to control the "times, places, and manner" of congressional elections, and Justice Miller implied in his opinion that congressional power under this provision was quite extensive. If such a novel reading of this section of the Constitution had been imagined either at the time of consideration of the Enforcement Acts or during the litigation of *Reese* and *Cruikshank*, however, some lawyer would surely have included it in a speech or brief. Since no one did, it is anachronistic and illogical to impute it to Chief Justice Waite or to those who interpreted his opinions when they were issued. Waite's statements were sweeping, seeming to preclude any national protection of the rights of voters, and it was impossible to know at the time which of his sentiments would be considered as *dicta*. Indeed, *dicta* in general become visible only by hindsight; at the time an opinion is written, all of it seems essential, for otherwise, it would have been omitted.

Second, the argument for moderation ignores the fact that state and local elections and office-holding could be and often were separated from national elections and office-holding. Both the Colfax Massacre and the Lexington poll tax issue concerned local government, and it is difficult to see how they would have been affected by a law growing out of *Yarbrough*, such as the Lodge Elections Bill of 1890, which passed the House and was shelved in the Senate by one vote.

Third, the argument disregards the timing of *Reese* and *Cruikshank*. The circuit court

opinion preceded and the Supreme Court opinion followed the heated battle over the last really strong voting rights legislation considered in Congress until 1965. Bradley's opinion in Cruikshank gave congressional Democrats constitutional ammunition for the debate and hope that the Court would disallow any resulting law. By requiring a proof of a racially discriminatory purpose and eliminating the states' failure to protect rights equally as a justification for national intervention, Waite's opinions made framing any law to safeguard voters exceedingly difficult and severely constrained what any such law could accomplish. Coming when they did, the decisions also, as I have said before, greatly facilitated the overthrow of the remaining Republican governments in the South.

Fourth, the First Enforcement Act was almost by definition within the original intent of the framers of the Fifteenth Amendment, for it was passed in the same session of Congress that wrote the Amendment and got it ratified in virtually record time. Cobbled together from several shorter bills, the Act was broad and complex, and a few Republicans raised objections to the wording of some of its sections. But they voted 181-1 for it in both houses of Congress, as they had voted 183-5 in favor of the Fifteenth Amendment earlier in the session, which is as strong an endorsement of a law's alignment with original intent as one could imagine. How can opinions which disregarded such evidence and nullified the law only six years later be regarded as "moderate"?

We cannot understand the significance of Reese and Cruikshank unless we set them in their whole racial, partisan, and policymaking context, place them in the actual time when they were decided, and consider both their human causes and their human consequences. Since, like most legal historians, Goldman does not complete this task, his book leaves much to correct and much to be done.

Endnotes

1. As Charles Fairman, Reconstruction and Reunion, 1864-1888 (New York: Macmillan, 1987), II, 251-53, points out, it has been known since 1892 that the Supreme Court erred in considering the whole cases of Reese and Cruikshank, instead of just those points of law on which the circuit court judges disagreed. Technically, therefore, the Supreme Court's opinions were invalid. Goldman, who cites Fairman's book in his bibliography, leaves out this curious fact.
2. In addition to Fairman's very detailed chapter, II, 225-89, there is a lengthy treatment in Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876 (New York: Oceana Publications, Inc., 1985), 173-227.
3. As Fairman, II, 269, but not Goldman, points out, there was no general right to appeal to the Supreme Court in a criminal case until 1889. But a disagreement between two circuit court judges did result in an automatic appeal. The Supreme Court received its current extensive discretionary power to choose cases in 1925.
4. Fairman, II, 265.

5. Kaczorowski, 188-93.

6. Waite took the opinion for himself when he concluded that, in his words, it “would be decided on constitutional grounds.” Goldman, p. 89.

7. After Clifford initially drafted his opinion, Waite reassigned the majority opinion to himself because of his desire “that the enforcement cases would be decided on constitutional grounds.” Quoted in Fairman, II, 244.