*OPENING REMARKS*

# A HANDY "CF." OR TWO FOR CITATION STUDIES

*Ross E. Davies*[†]

This note from Justice Joseph P. Bradley[1] of the Supreme Court of the United States must have been quite gratifying to the recipient, Justice Amos R. Manning[2] of the Supreme Court of Alabama:

> Washington April 23d 1878
>
> Dear Judge,
>
> I did not answer your letter of 26 Feby last, as, from inquiry of our Clerk, I found there was no occasion – he having communicated with counsel, and the case not being reached before our recess. I write now, simply to excuse my seeming inattention.
>
> Your opinion in the case of Meyer v. Johnston attracted a good deal of attention from our judges, and its exhaustive examination of the cases was of great use to us. We had the Alabama and Chattanooga case before us on appeal, and I send you a copy of the opinion. It touches, toward the close, the question of Receivers' Certificates.
>
> With kind regards, dear Sir, I am, yours sincerely
>
> Joseph P. Bradley

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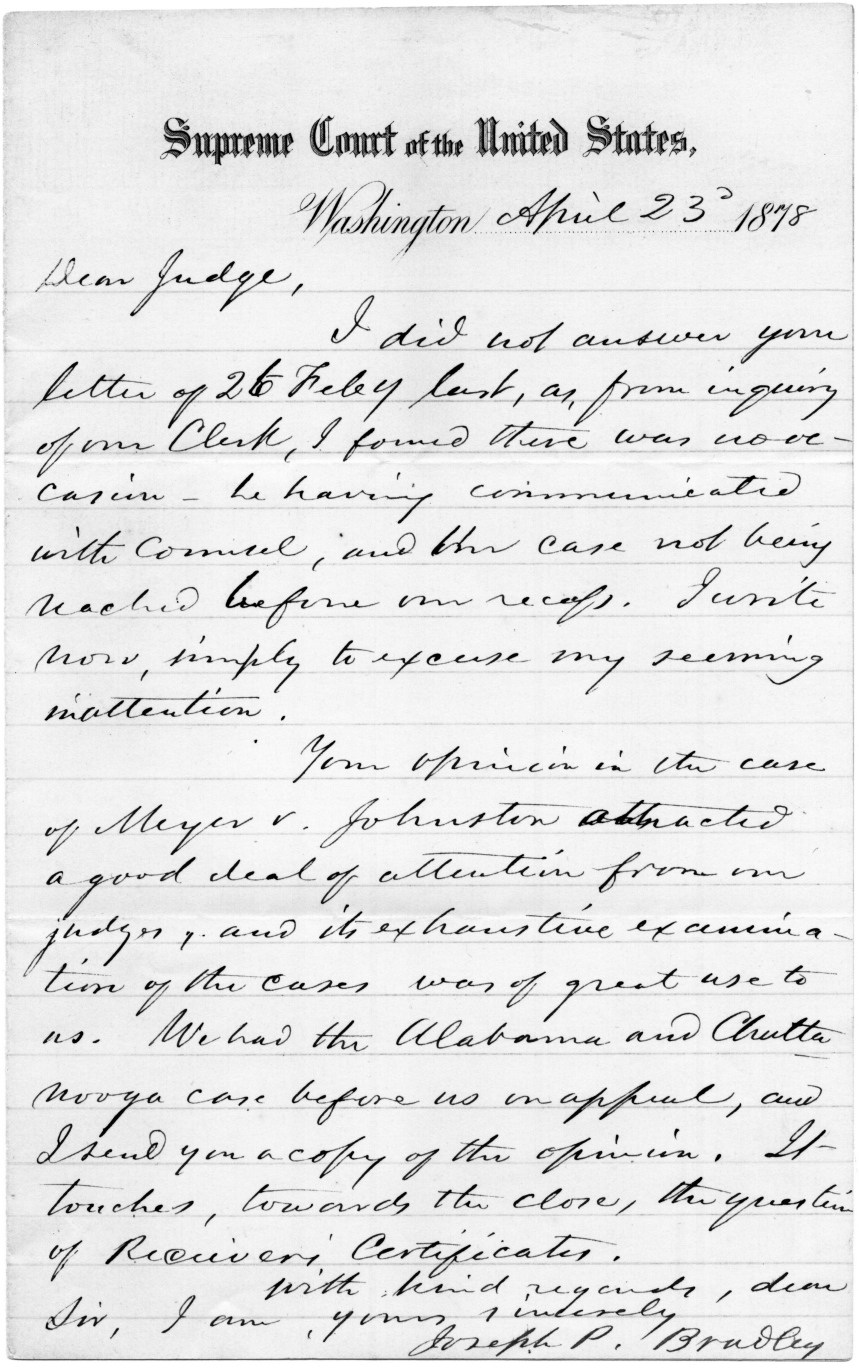
[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] Bradley was born in 1813 in upstate New York. He moved to New Jersey, where he graduated from Rutgers in 1836, and spent most of his adult life in law practice there until he was made a Justice of the U.S. Supreme Court in 1870. He died in office in 1892, in Washington, DC.

[2] Manning was born in 1810 in New Jersey. He moved to Alabama and, after graduating from the University of Tennessee, spent most of his adult life back in Alabama practicing law and politics. He was elected to the Alabama Supreme Court in 1874 and served until his death (shortly after undergoing surgery in New York City) in 1880. As best I can tell, Manning and Bradley never met and were not pen pals, despite their shared sympathies for receivers in bankruptcy and connections to New Jersey and New York.



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So, Manning – who already knew his opinion in *Meyer v. Johnston* was the law of the land in Alabama[3] – now knew (courtesy of an authoritative source) that it was a significant influence on the law of the land nationwide. That made for a nice note, but not a very interesting one for anyone other than Manning. Today, though, that note is more interesting – not for what it said, but for what it did not say:

First, in his note to Manning, Bradley did not describe how the Court actually treated *Meyer v. Johnston* in the "Alabama and Chattanooga case" – *Wallace v. Loomis*.[4] *Loomis* was, like *Meyer*, an Alabama case involving a railroad bankruptcy and a chancery court's power to authorize receivers to issue debt with priority over pre-receivership debts. Indeed, at that time, *Meyer* was a leading case on the subject. And yet *Meyer* – which "attracted a good deal of attention" within the Court and "was of great use" to the Court – was not cited or even mentioned in the Court's unanimous opinion in *Loomis*. Thus, a modern citation study – the kind in which scholars analyze data gathered and coded by research assistants digging in databases – would show that Manning and his opinion had no influence at all in *Loomis*. Hmm. Doesn't it make you wonder just how many opinions like Manning's in *Meyer* there are out there, and how many notes like Bradley's to Manning, and how many similar notes that were never sent but could have been? And what they might teach us.

Second, in his note to Manning, Bradley did not identify the Justice who wrote the opinion for the Court in *Loomis*. It was Bradley himself. Moreover, in his *Loomis* opinion, Bradley failed to identify himself as the "justice of the fifth circuit" who first dealt with the initial complaint in *Loomis* when it was filed in 1872, as well as other matters in the case.[5] (Those were the days when members of the U.S. Supreme Court routinely sat on matters in the circuit courts to which they were assigned.[6]) And, obviously, Bradley did not recuse himself. Why so shy about stating in *Loomis* both that he had been the judge on circuit and that Manning's opinion in *Meyer* had been "of great use" to the Court?

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[3] 53 Ala. 237 (1875).

[4] 97 U.S. 146 (1878).

[5] *Id*. at 147, 150; Transcript of Record, *Wallace v. Loomis*, 97 U.S. 146 (1878), 163-64, 558-60 (filed Nov. 21, 1874); Appeal from the Circuit Court of the Southern District of Alabama, at Mobile, *Wallace v. Loomis*, 97 U.S. 146 (1878), 57 (O.T. 1877); 97 U.S. v-vi (1879).

[6] *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003).

Perhaps Bradley's third omission from his note to Manning is a clue. (It probably was not about Bradley's failure to recuse, which would not have been an eyebrow-raiser by itself, because conflicts and recusals were not treated then as they are now.[7]) What was telling was that in the note, Bradley did not thank Manning for treating him so well in *Meyer*. Manning's opinion in *Meyer* had repeatedly and respectfully (fawningly would be a slight overstatement) cited Bradley by name for his decisions on circuit in the *Loomis* case.[8] In other words, in an intriguingly serpentine and slippery sequence of citations and silences: (1) Bradley's decisions as "justice of the fifth circuit" in *Loomis* in 1872 were (2) cited and relied upon by Manning as a justice of the Alabama Supreme Court in *Meyer* in 1875 and (3) Bradley was telling Manning in a private note in 1878 that his opinion in *Meyer* was "of great use" to the U.S. Supreme Court in (4) the Court's decision reviewing and upholding, in an opinion written by Bradley in 1878, (5) Bradley's decisions as "justice of the fifth circuit" in *Loomis* in 1872. At some point, Bradley may have recognized that a half-measure of reciprocal citational backslapping in print was not sustainable, and that he had to choose between publicly giving full credit where it was due, or none at all. He chose none. Doesn't it make you wonder just how many modern judges (and scholars) have arrived at a similar moment in their own work and made a similar decision?[9]

Professor Paul Carrington once said, "To be cited by a court on an issue laden with political implications is not to have influence, but to be used."[10] Perhaps he should have added that sometimes to be uncited on an issue laden with predeterminations is not to lack influence, but to have too much.

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[7] *See, e.g.*, Malcolm J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person*, 7 St. Louis U. J. Health L. & Pol'y 201, 255 n.175 (2014) (describing the non-recusal practices of Stephen J. Field, one of Bradley's contemporaries on the Court); *see generally* G. Edward White, *Recovering the World of the Marshall Court*, 33 J. Marshall L. Rev. 781 (2000).

[8] 53 Ala. at 310, 341-44.

[9] *See, e.g.*, Benjamin J. Keele and Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 Law Libr. J. 383, ¶¶31-37 (2012) (citing, along with many other interesting works, Carol M. Bast and Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 Cath. U. L. Rev. 777 (2008), and Richard A. Posner, *The Little Book of Plagiarism* 43 (2007)); *cf.* Brenda Maddox, *Rosalind Franklin: The Dark Lady of DNA* (2002).

[10] *Stewards of Democracy: Law as a Public Profession* 70 (1999).