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Glittering Generalities and Historic Myths

When I began the study of constitutional law at Northwestern in the fall of 1945, my professor was Nathaniel Nathanson, a former law clerk for Justice Brandeis. Because he asked us so many questions and rarely provided us with answers, we referred to the class as "Nat's mystery hour." I do, however, vividly remember his advice to "beware of glittering generalities." That advice was consistent with his former boss's approach to the adjudication of constitutional issues that he summarized in his separate opinion in *Ashwander v. TVA*, 297 U. S. 288, 346 (1936). In that opinion Justice Brandeis described several rules that the Court had devised to avoid the

unnecessary decision of constitutional questions. As I explained in the first portion of my long dissent in the *Citizens United* case three years ago, the application of the Brandeis approach to constitutional adjudication would have avoided the dramatic changes in the law produced by that decision. I remain persuaded that the case was wrongly decided and that it has done more harm than good. Today, however, instead of repeating arguments in my lengthy dissent, I shall briefly comment on the glittering generality announced in the *per curiam* opinion in *Buckley v. Valeo* in 1976 that has become the centerpiece of the Court's campaign finance jurisprudence, and then suggest that in addition to being skeptical about glittering generalities, we must also beware of historical myths.

I

In the section of *Buckley* explaining why statutory limitations on independent campaign expenditures could not be justified by an interest in equalizing the

opportunities of rival candidates to persuade voters to vote for them, the opinion states that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." That statement has been quoted over and over again in the Court's cases dealing with campaign financing, but it is flawed because it fails to account for the distinction between campaign speech and speech about other issues.

As a general matter it is certainly true that speech about controversial policy issues such as gun control or the proper response to global warming may not be censored for the purpose of enhancing the persuasive appeal of either side of the debate. I am not aware of any state or federal laws that have attempted to censor public debate about such issues for that reason. There are, however, situations in which rules limiting the quantity of speech are justified by the interest in giving adversaries an equal opportunity

to persuade a decision-maker to reach one conclusion rather than another, regardless of the content of those adversaries' positions. The most obvious example is an argument before the Supreme Court. Firm rules limit the quantity of both oral and written speech that the parties may present to the decision-maker. Those rules assume that the total quantity permitted is sufficient to enable the Court to reach the right conclusion; such limitations are adequately justified by interests in fairness and efficiency.

Those same interests justified rules governing the conduct of the debates among Republican candidates seeking their party's nomination for President in 2012. It would have been manifestly unfair for the moderator of one of those debates to allow Mitt Romney more time than any other candidate because he had more money than any of his rivals. Restricting his speech "in order to enhance the relative voice of others" made perfect sense, and certainly was not "wholly foreign to the First Amendment."

Ironically, the paragraph containing that glittering generality concludes with this less-often quoted proposition: "The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." While the statement might sound protective of the speech of the less advantaged, the Court in fact meant that the laws should not deny the wealthy the opportunity to speak as loudly as they choose. In a way, this recalls Anatole France's remark that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges."

II

Historical myths, like glittering generalities, have played a more important role in Supreme Court adjudication than we often recognize. Sometimes the Court's failure to mention relevant facts helps to perpetuate preexisting myths, sometimes the Court

itself is responsible for myths, and sometimes myths have a longer life expectancy than the truth.

In *Ex parte Quirin* the Court upheld the sentences imposed by a military commission on eight Germans who had crossed the Atlantic in submarines and landed on the East Coast in order to sabotage American war plants. A plaque on the 5th floor of the Justice Department commemorates the work of the military commission that was convened on July 8, 1942. Exactly one month later six of the Germans were executed, and the other two began to serve prison sentences. The plaque accurately states that "the submarine-borne Nazi agents were apprehended by special agents of the Federal Bureau of Investigation within 14 days of their arrival." Neither the plaque nor the Court's detailed opinion mentioned a fact that would have dispelled the mythical inference that their apprehension was the product of superior intelligence work by the FBI. That fact, as noted by Jess Bravin (the Wall Street Journal

reporter who covers the Supreme Court) in his recent book, "The Terror Courts: Rough Justice at Guantanamo Bay," was that one of the saboteurs turned himself in and told the FBI where his colleagues were.

A second equally well known Court opinion arising out of World War II upheld the death sentence imposed by a military commission on General Tomoyuki Yamashita who had assumed command of the Japanese forces in the Philippines shortly before the war ended. That commission proceeding is responsible for the myth that General Yamashita was a war criminal because he failed to prevent the troops under his command from committing unspeakably cruel atrocities. But in his book "Yamashita's Ghost", Allan Ryan, a former law clerk to Byron White who has studied the entire record of the case, concludes - not just that the General did not authorize any of the atrocities - but that he did not even know about them and probably could not have prevented them even if he had because the advance of

the American forces severed his ability to communicate with his forces in the area where the atrocities occurred. If the prosecution's theory of the case were applied to the American Army in the Viet Nam conflict, General Westmoreland would receive the death penalty for failing to prevent the My Lai atrocities.

A myth about the adoption of the 11th Amendment has been repeated over and over again in cases extolling and expanding the doctrine of sovereign immunity. The fact that it was ratified so promptly after the Court's refusal in February of 1793 to hold that sovereign immunity barred Chisholm's collection action against the State of Georgia is treated as evidence that the decision came as a "shock" to the Nation, and therefore obviously could not have been intended by the Framers. The Amendment that was ultimately adopted, however, was not proposed until March 4, 1794, more than a year after the *Chisholm* case was decided, and before it was ratified over 11 more months elapsed. In contrast to

that two year deliberative process, the interval between the proposal on December 9, 1803 of the 12th Amendment - which significantly revised the electoral college procedures used to elect the President - and its ratification on June 15, 1804 was just a few days more than six months. Of course, a mythical "shock" that generated two years of deliberation is less troublesome than the myth that the Members of today's Court have a better understanding of the unwritten "plan of the Convention" than the Justices who sat on the Court in 1793.

A myth that received the Court's attention during the debate about the application of the Second Amendment to the City of Chicago's attempt to regulate the possession of firearms is the myth that the *Slaughter-House Cases* were incorrectly decided. In 1869 the Louisiana Legislature, which was then controlled by Republicans, enacted a law regulating the businesses conducting the slaughter of animals for the

New Orleans market. In earlier years the unregulated slaughterhouses located on the banks of the Mississippi River upstream from the City had been a principal cause of pollution that made New Orleans the most unhealthy large city in the country - with a death rate more than eight times higher than any comparable American city. The public health benefits achieved by the legislation, which was similar to laws in effect in other large cities in both Europe and America, adequately justified the State's exercise of its police powers. The majority opinion in the *Slaughter-House Cases* written by Justice Miller - who happened to have been a practicing physician for ten years before taking up the study of the law - was clearly correct in upholding the slaughterhouse legislation. In doing so, however, Miller declined to simply rely on the State's broad police power to protect the public health, and instead endorsed an unfortunately narrow construction of the "Privileges or Immunities" Clause of the 14th Amendment. Thus the lawyer for the losing litigants,

John Campbell, a former justice of the U. S. Supreme Court who had been in the majority in the infamous *Dred Scott* case and had resigned to join the Confederacy, obtained a strategic victory for the racist Democrats even though the Republican-sponsored legislation was upheld.

While the dicta in that case is often identified as the principal source of the Court's failure to construe the 14th Amendment as generously as its sponsors intended, I am persuaded that another case in which John Campbell represented white supremacists from Louisiana was even more important. In *United States v. Cruikshank*, the Supreme Court set aside the convictions of the only three defendants who had been found guilty among the many participants in the massacre of dozens of African-Americans at Colfax on April 13, 1873. The myth that they were heroes fighting for a noble cause is preserved on a marble obelisk erected by the City of

Colfax on April 13, 1921, the 48th Anniversary of the massacre.

The trial judge in the *Cruikshank* case was William Burnham Woods, a Fifth Circuit Judge who was later appointed to the Supreme Court. He had previously written an important opinion on which lawyers in the Grant administration had relied when they successfully prosecuted members of the Ku Klux Klan for their use of violence to prevent black citizens from voting. After quoting the text of the Equal Protection Clause and the final section of the 14th Amendment authorizing Congress to enforce the provision, Judge Woods wrote:

"From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or

enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. *Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for the protection of his fundamental rights, as well as the enactment of such laws.*" 26 F. Cas. 79, 81 (No. 15,282) (CC SD Ala.1871).

Under Judge Woods' reading of the Equal Protection Clause as covering state inaction as well as state action, the police would violate federal law not only when they actively participated in race riots, as they did in New Orleans in the riot in 1872, but also when they merely stood by and watched the Ku Klux Klan massacre blacks as they did in Memphis in 1866. I think the Supreme Court's erroneous reversal of Judge Woods' rulings in the *Cruikshank* case and its rejection of his interpretation of the 14th Amendment did much

more harm to the new class of citizens than Justice Miller's opinion in the Slaughterhouse cases. The title of Charles Lane's excellent book about the Colfax riot - "The Day Freedom Died" - refers not to the date of the riot but to March 27, 1876, the date the *Cruikshank* decision was announced.

In the epilogue to his book, Lane describes not only the obelisk honoring the memory of the heroes "who fell in the Colfax Riot fighting for White Supremacy" that was erected in 1921, but also the unveiling in 1951 of a historic marker commemorating the event that "marked the end of carpetbag misrule in the South." Those few words enshrine at least three different myths: that "carpetbaggers" were bad guys; that laws that failed to preserve white supremacy were "misrule"; and that reconstruction ended in 1873.

Presumably James Beckwith, the federal district attorney in New Orleans who was in charge of the

investigation and prosecution of almost 100 participants in the Colfax riots, and Judge Woods, who presided at the trial, qualified as "carpetbaggers" because they were born in Ohio and New York respectively and moved to the South after the Civil War. Their failure to support the cause of White Supremacy surely did not make them bad people.

Laws enacted in Louisiana in 1868 when the Republicans were in control of the State Government would not qualify as "misrule" if they were judged by today's standards. I have already mentioned the *Slaughter-House* legislation, which unquestionably served the best interests of the community. Two other examples are relevant.

Article 13 of the Louisiana State Constitution adopted in 1868 provided that "All persons shall enjoy equal privileges upon any conveyance of a public character." Under that provision blacks could not be

required to ride in the back of the bus. Legislation implementing that Article enacted in February of 1869 provided victims of discrimination on common carriers with a cause of action for damages. Josephine DeCuir was such a victim. As a passenger on a steamboat on the Mississippi River she had been excluded from a portion of the ship reserved for whites. The state trial court awarded her damages of \$1,000 and the State Supreme Court affirmed, rejecting an argument that the statute did not apply to vessels engaged in interstate commerce. When the case was reviewed in the United States Supreme Court, all nine justices agreed that the statute as construed by the Louisiana courts imposed an impermissible burden on interstate commerce. The term "misrule" is more appropriately applied to the Supreme Court's opinion in *Hall v. De Cuir* than to the Louisiana legislation.

Another provision of Louisiana's 1868 Constitution expressly authorized free public schools open to both

blacks and whites. Thus while the Republicans were in control of the State, they took essentially the same action that Thurgood Marshall, almost a century later, persuaded the Supreme Court was actually mandated by the 14th Amendment.

The notion that it was the Colfax massacre in 1873 that brought an end to "carpetbag misrule" is embarrassingly incorrect. The provisions of Louisiana law that I have just described remained in effect until the State adopted a new constitution in 1879. It was in 1879 that the 1868 requirement of equal treatment of passengers was repealed and that the authorization of an integrated public school system was replaced with provisions that required segregation in various public facilities including schools, swimming pools, and restrooms. Moreover, the Colfax massacre was certainly not the principal cause of the end of reconstruction; instead, I am persuaded that it was the withdrawal of the Union troops that had been stationed at strategic

locations in the South during the Grant Administration. That withdrawal was the product of the last myth that I shall mention this evening.

Ulysses S. Grant was a true military hero whose accomplishments in battle are well known. His effective leadership in the central debate that continued to separate the North from the South after he became President is less well recognized. The 13th Amendment, prohibiting slavery, and the 14th Amendment, granting citizenship to the former slaves, were both ratified before he became President, but the 15th Amendment guaranteeing the new citizens the right to vote, was proposed and ratified while Grant was in office. He supported civil rights legislation that was designed to put an end to the atrocities committed by white supremacists in the South; one of those statutes, known as the Ku Klux Klan Act, now codified as section 1983 of Title 42 of the U. S. Code, is still the principal statute authorizing litigation raising

constitutional issues. Perhaps of greatest importance, he used his power as Commander-in-Chief of the Army to support efforts to protect the blacks' right to vote. The presence of armed forces at strategic locations in the South made it possible for Republicans, including the new class of African-American citizens, to influence the outcome of enough elections to obtain control of some state governments.

Despite Grant's exceptional popularity during his tenure as President of the United States from 1869 until 1877, in the Congressional election following the financial Panic of 1873, the Democrats won a majority of the seats in the House of Representatives. And in the Presidential election in 1876, Samuel Tilden, the Democratic candidate, won a majority of the popular vote. That he was the favored candidate of a majority of the eligible voters may well, however, be a myth. In his book, "Centennial Crisis," Bill Rehnquist quotes

this dispatch written by a U. S. Marshall in Mississippi on the eve of the election:

"I am in possession of facts which warrant me in saying that the election in the northern half of this State will be a farce. Colored and white Republicans will not be allowed to vote in many of the counties. The Tilden clubs are armed with Winchester rifles and shotguns, and declare that they will carry the election at all hazards. In several counties of my district leading white and colored Republicans are now refugees asking for protection. . . . A reign of terror such as I have never before witnessed exists in many large Republican counties to such an extent that Republicans are unable to cope with it. If it were not for rifles and shotguns this State would give Hayes and Wheeler from 20,000 to 30,000 majority." (WHR, 89-90)

In any event, for Tilden to win the election, he needed a majority of the votes in the Electoral

College, and the results in three southern States - Florida, Louisiana, and South Carolina were disputed. With Republicans in control of the Senate, and Democrats in control of the House, Congress sensibly concluded that it could not resolve the dispute itself, and therefore created a special 15 man commission composed of ten legislators (five from each party) and five Supreme Court Justices to do the job. Instead of presuming that all five representatives of the judiciary would impartially adjudicate the matter, they selected two justices appointed by Democratic Presidents, two appointed by Republicans, and as the fifth they chose David Davis, a Lincoln appointee who was thought to be completely impartial. When Davis refused to serve, they finally agreed that Joseph Bradley could be trusted to act impartially despite the fact that he was a Republican. There was never any doubt about how 14 members of the commission would vote, but Bradley's deciding vote was unknown until the end of the proceedings when he announced his ruling in

favor of the Republican candidate. His decision awarding the presidency to Rutherford B. Hayes is generally regarded as a significant victory for the Republican Party. That may well be a gigantic myth. For there is also evidence that a few days after he made his decision, at a meeting at Wormley's Hotel in Washington, Democrats agreed to accept Bradley's award of the office to Hayes as consideration for his promise to withdraw all Union troops from the South. His performance of that promise may well have given the party of the white supremacists its most important victory in history.