1987

The Figure in the Judicial Carpet: Images of Family and State in Supreme Court Opinions

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"I am told at times by friends," Benjamin Cardozo wrote drily some sixty years ago, "that a judicial opinion has no business to be literature."[1] Yet legal prose uses the same rhetorical equipment as self-consciously literary prose, and the opinion writer remains subject to the limitations and the possibilities of his medium. Chief among these is the figurative quality of language, the tendency of seemingly straightforward functional diction to suggest subtler, sometimes contradictory meanings through deliberate or inadvertent metaphor. It is the role such figurative language plays in judicial opinions that this paper will examine.

Authors of judicial opinions occupy a privileged position among authors of occasional prose. They are, at the outset, assured publication of their every work and, rarer even than publication, the serious attention and scrutiny of a captive audience. This privilege is, of course, accompanied by a substantial burden because that audience is composed largely of critics and revisionists—lawyers, scholars, legislators, and fellow judges for whom the published opinion is simply the raw material of the law, to be expanded, restricted, obliterated, redirected, and otherwise adapted to the reader's immediate need for litigation, analysis, legislation, and further decision-making.

The author of an appellate opinion carries an additional burden, because to speak for the court his work must first persuade a majority, often by a process of compromise and revision that discourages idiosyncracies of style.[2] Even in concurrence or dissent, where a judge theoretically speaks

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1. Benjamin Cardozo, Law and Literature, *in* Law and Literature 3 (New York, 1931). Cardozo's essay describes six types of judicial opinions in terms of their literary method. For an admiring application of Cardozo's essay to his own opinions, see Louis Auchincloss, The Styles of Justice Cardozo, *in* Life, Law & Letters, 47 (Boston, 1979). For an attack on Cardozo's style as antiquated and anglophiliac, see Jerome Frank, writing anonymously, The Speech of Judges: A Dissenting Opinion, 29 Va. L. Rev. 625 (1943).
2. According to Associate Justice William J. Brennan of the United States Supreme Court, "each of us will accept an expression in an opinion that, left to himself, he might either phrase differently or not use at all. Call that compromise if you will." Interview, New York Times, April 16, 1986 (Sec. B), at 8. It is no secret that law clerks also assist in the drafting of judicial opinions, and their participation tends to lessen the stamp of an individual style. On the subject of clerks as authors of opinions, see William O. Douglas, The Court Years

 Cite as 37 J. Legal Educ. 331 (1987).

only for himself, the impulse to persuade at least some of one's colleagues to join may tame the excesses of unrestrained personal style. And while the majority opinion seeks to persuade an immediate audience—the losing party and counsel, a trial court held in error, a higher court conducting its own review for error, a coordinate court seeking guidance in the resolution of a similar issue—the minority opinion seeks its vindication from the remote audience of the future which will at last heed the voice crying in the wilderness.[3] It is little wonder that with such an exacting readership most appellate prose tends to play it safe, to avoid the colorful phrase or suggestive term that might create unpredictable or uncontrollable possibilities.

Some judges, of course, have resisted the pull toward safe prose and developed instead a distinctive and recognizable style. Among the most exuberant of judicial stylists is Michael A. Musmanno, from 1952 until his death in 1968 a justice of the Pennsylvania Supreme Court. Musmanno wrote his opinions, those for the majority as well as his dissents and concurrences, in a colorful narrative style characterized by vivid metaphors. Thus, in his prose, a deed restriction is "a battering ram,"[4] injury to a longshoreman's back the springing of "a tendon in Atlas' shoulders,"[5] and the majority's "reputable citizenship" a "cloak of dignity" which may conceal "the bolo of intolerance and the falchion of fanaticism."[6] Musmanno was not always in control of his pen, as his occasional mixed metaphors demonstrate. In one passage land that had become a "white elephant" is described as entering "a golden metamorphosis when, with the Point-Clearing Project, it acquired the Midas touch of a commercial parking lot."[7] Not only is the white elephant turned into gold; it also assumes Midas' power of transformation. In dissent Musmanno has called upon the majority "standing on the high plateau of review . . . to repair the rent in

1939-75, at 172 (New York, 1980).

3. In the often quoted words of Chief Justice Charles Evans Hughes: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Charles Evans Hughes, The Supreme Court of The United States 68 (New York, 1928). Justice Brennan has recently described the usefulness of the dissenting opinion. See William J. Brennan, In Defense of Dissents, 37 Hastings L. J. 427 (1986).
4. Mailey v. Rubin, 388 Pa. 75, 77, 130 A.2d 182, 184 (1957).
5. Smith v. Blumberg's Son, Inc., 388 Pa. 146, 153, 130 A.2d 437, 441 (1957) (Musmanno, J., dissenting). Musmanno was a prolific and lively dissenter. In his first five years on the Pennsylvania Supreme Court, he wrote more dissents than his colleagues combined, and in 1957 a collection of his dissents was published, the first such volume since the publication of Holmes' dissents in 1929. See Abraham E. Freedman, The Dissenting Opinions of Justice Musmanno, 30 Temp. L. Q. 253 (1957). For Musmanno's views on the importance of judicial dissents, see Michael A. Musmanno, Dissenting Opinions, 60 Dick. L. Rev. 139, 152-53 (1956).
6. Conversion Center Charter Case, 388 Pa. 239, 257, 130 A.2d 107, 115 (1957) (Musmanno, J., dissenting).
7. Hostetter Estate, 388 Pa. 339, 342, 131 A.2d 360, 362 (1957).

the fabric of *stare decisis*,"[8] a challenging enterprise even when carried on at sea level.[9]

These images are not simply striking locutions in the largely undistinguished field of legal prose. They contain, in Dr. Johnson's description of metaphysical wit, "the most heterogeneous ideas . . . yoked by violence together."[10] These linkages startle, interest, amuse us; they furnish welcome relief in our progress through an otherwise earnest opinion. Unlike their metaphysical ancestors, however, they do not tell us obliquely anything that the opinion has not also communicated directly. When John Donne compares two parting lovers to a pair of compasses, the image extends our understanding of a conventional relationship.[11] Such metaphors are organic, forming an essential part of a text's meaning. When Musmanno compares a garrulous testator to a self-winding phonograph, [12] the image does no more than enliven a condition already apparent to us. Such metaphors are ornamental, merely decorating the surface of the text without affecting its meaning.

Judicial metaphor is not limited to Musmanno's ornamental figures. Quieter organic metaphors whose figurative quality is extracted only with effort also exist and prove more serviceable agents of meaning. Owen Barfield, a lawyer as well as a literary theorist, has observed that "every modern language, with its thousands of abstract terms and its nuances of meaning and association, is *apparently* nothing, from beginning to end, but

8. Thomas v. Metropolitan Life Ins. Co., 388 Pa. 499, 520, 131 A.2d 600, 610 (1957).
9. Another exuberant metaphorist, recently retired Associate Justice Leo Parskey of the Connecticut Supreme Court, specializes in the use of extravagant imagery to define a negative condition. Thus, "[d]ue process is not to be regarded as a giant constitutional vacuum cleaner which sucks up any claims of error which may occur to a party upon microscopic examination of the trial record." State v. Kurvin, 186 Conn. 555, 564, 442 A.2d 1327, 1331 (1982); and a trial court bypass for claims of error "is a narrow constitutional path and not the appellate Champs-Elysees." State v. Gooch, 186 Conn. 17, 18, 438 A.2d 867, 869 (1982). For an appreciation of Justice Parskey's style, see William Domnarski, The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parskey, 18 Conn. L. Rev. 459 (1986).
10. Samuel Johnson, Cowley, *in* Lives of the English Poets, ed. G.B. Hill, 20 (Oxford, 1905). For a classic discussion of metaphysical imagery, see T.S. Eliot, The Metaphysical Poets, Selected Essays 241 (New York, 1950).
11. John Donne, A Valediction: Forbidding Mourning, *in* The Poems of John Donne, ed. Herbert J.C. Grierson, 49, 50-51 (Oxford, 1912). The compass image for the souls of separated lovers occurs in the final stanzas of the poem:

> If they be two, they are two so
> As stiffe twin compasses are two,
> Thy soule the fixt foot, makes no show
> To move, but doth, if the'other doe.
>
> And though it in the center sit,
> Yet when the other far doth rome,
> It leanes, and hearkens after it,
> And growes erect, as that comes home.
>
> Such wilt thou be to mee, who must
> Like th'other foot, obliquely runne;
> Thy firmnes makes my circle just,
> And makes me end, where I begunne.

12. Erdeljac Will, 388 Pa. 327, 330, 131 A.2d 97, 99 (1957).

an unconscionable tissue of dead, or petrified, metaphors."[13] The language of the law is punctuated by such words. Lawyers and judges speak of restraints that chill First Amendment freedoms, or of a party's standing to raise a claim before the court, with no conscious intention of evoking a speaker frozen to silence or a litigant risen to voice his grievance. Yet such meanings inhabit these legal shibboleths and can, under appropriate conditions, be released to invigorate judicial prose.

One means of release is the placement of organic metaphors in a context that encourages their submerged meanings. Asked to perform the routine judicial task of interpreting "income" under the federal tax code, Justice Holmes paused to reflect that "[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[14] My concern in this essay is the submerged meanings of diction in the context of seminal United States Supreme Court opinions on three highly sensitive subjects: the status of slaves in free territory, the right of women to practice law, and the right of parents to direct their children's education.

Judicial opinions about race, gender, and parenthood treat our most basic cultural assumptions and personal relations. For author as well as reader, such subject matter may tap responses usually remote from legal analysis and argument, responses expressed indirectly through resonant diction and imagery. In two of these opinions, Justice Taney writing for the majority in *Scott v. Sandford*[15] and Justice Bradley concurring in *Bradwell v. State*,[16] images of family and state used to advance a legal argument reach beyond the logic of the text to express a complicated relationship of the private world to the public. When, however, the Court addresses that relationship directly in two opinions by Justice McReynolds, *Meyer v. Nebraska*[17] and *Pierce v. Society of Sisters*,[18] figurative language is distilled to a pair of historical allusions that obliquely illuminate the subtext of his cautious legal prose. All four opinions demonstrate the way in which the context of particular opinions—Holmes' circumstance and time—calls forth the buried meanings of judicial language.

I. *Scott v. Sandford*: The State as Family

Chief Justice Taney's opinion for the Court in *Scott v. Sandford* argued emphatically that Dred Scott, the Missouri slave who claimed that the years spent with his master in Illinois and in the Wisconsin Territory had made him a free man, was a slave still under Missouri law.[19] More precisely,

13. Owen Barfield, Poetic Diction 63, 2d ed. (London, 1952).
14. Towne v. Eisner, 245 U.S. 418, 425 (1918). For a fuller statement of Holmes' position, see Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899).
15. 60 U.S. (19 How.) 393 (1857).
16. 83 U.S. (16 Wall.) 130 (1872).
17. 262 U.S. 390 (1923).
18. 268 U.S. 510 (1925).
19. Taney twice revised his opinion. After reading it from the bench, he withheld the text from publication, adding eighteen pages of historical material (included in his published

Taney argued that Scott was not a citizen of Missouri and so lacked standing to bring his suit; further, no slave or slave's descendant could ever become, by birth or naturalization, a citizen of any state of the United States. Taney's opinion has been subjected to severe criticism and scrutiny since it appeared in 1857. Its historical facts, judicial method, and political bias have been exhaustively examined and denounced.[20] For present purposes, the significant aspect of Taney's opinion is less its substance than its expression, in so far as those two elements of prose can ever be disentangled.

In arguing that blacks, whether slave or free at the inception of the Constitution, were deliberately denied the status of citizen, Taney settles on the image of the United States as a "political family." The fusion "of those who were at that time members of distinct and separate political communities into one political family" was intended by the founders "for them and their posterity, but for no one else."[21] The family is thus established early in the opinion as a unit distinguished by its power of exclusion. The image is repeated at least seven more times, with incremental emphasis on the unbridgeable gap between the family's rightful members and those outside.[22]

In addition to repeating his image, Taney rings some revealing changes on the idea of a nation as a political family. When the colonies formed a new sovereign state, they "took their places in the family of independent nations."[23] Within this international perspective, "family" acquires a new dignity and status by seating the youngest nation at the table of its established elders. That there are hierarchies within the family is readily conceded; the United States is a junior member of this extended family but included nonetheless. Later in the opinion, Taney argues that not all citizens possess equal powers, although all are inherently superior to those denied membership; for example, "women and minors, who form a part of the political family, cannot vote."[24] Each such person is "a member of the community who form the sovereignty,"[25] though denied a share of its

opinion) to counter the evidence of black citizenship cited in Justice Curtis' dissent. In 1858 Taney prepared a supplement, this time using English authorities to argue the inherent inferiority of blacks. The supplement was not published in Howard's official court report, apparently because his fellow justices refused permission. See Carl B. Swisher, The Taney Period, 1836-1864, at 632-33, 651, 5 History of the Supreme Court of the United States (New York, 1974) [hereinafter cited as Swisher]. While Taney wrote for the court, each of the other justices contributed a separate opinion. Justices Wayne, Nelson, Grier, Daniel, Campbell, and Catron concurred; Justices McLean and Curtis dissented.

20. Although Taney, a Maryland property owner, was generally perceived as an unwavering supporter of slavery, he had in fact freed his own slaves years before the issue came before him. See David M. Potter, The Impending Crisis 1848-1861, at 281 (New York, 1976). For accounts of the fierce contemporary response to Taney's opinion, see *id.* at 279-84; Swisher, *supra* note 19, at 632-52.
21. 60 U.S. (19 How.) 393, 406 (1857)
22. In addition to the uses quoted below, the image also appears six times. *Id.* at 410 (twice), 417, 418, 422, 441 (in a more general context).
23. *Id.* at 407.
24. *Id.* at 422.
25. *Id.*

political power. The idea of family, then, includes for Taney a notion of internal hierarchy (some members are more equal than others) and a mode of relationship to foreign states (an international family welcomes the infant nation, however unformed its powers).

To be part of the political family is to enjoy a warmth distinct from such benefits of membership as the franchise and the right to hold office. The verb that recurs some seven times to express inclusion is "embrace," suggesting the potent benefits conveyed. In its first appearance, those intended as members are simply "embraced in this new political family."[26] Later uses, however, make clear that it is the language of the Declaration of Independence and the Constitution which either offers its embrace, and so its protection, to outsiders or rejects them. The framers of the Declaration, Taney tells us, knew that their language "would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."[27] Any such embrace "would have been utterly and flagrantly inconsistent with the principles they asserted" and would have earned the framers "universal rebuke and reprobation."[28] Further, the fugitive slave clause of the Constitution and the provision extending the slave trade until 1808 are evidence that blacks are not "embraced in any of the other provisions of the Constitution."[29] To be denied that embrace is simply, in Taney's words, to be doomed to slavery.

Two other lines of imagery serve to reinforce Taney's idea of the unbridgeable gap between blacks and rightful members of his political family. Slaves are characterized as "ordinary article[s] of merchandise," a part of the commercial traffic like any other form of property. The phrase is first used early in the opinion to describe "the state of public opinion" at the time of the Declaration of Independence and the Constitution, attributed by a careful *erlebte rede* to the thinkers of another era.[30] On a subsequent appearance, the phrase is merely descriptive of the way in which all blacks had migrated to the United States "as ordinary articles of merchandise."[31] In a later appearance, however, the phrase has been assimilated to Taney's own voice, as he asserts that the Constitution affirmed "the right to traffic . . . in [slaves], like an ordinary article of merchandise and property," for twenty years.[32]

A second image of separation is that of the brand inflicted on blacks by whites through a series of laws enacting special burdens and disabilities. Taney repeatedly sees these laws as creating "such deep and enduring marks of inferiority and degradation"[33] that they have "stigmatized" blacks and placed them forever beyond the pale of civilization: "To call persons

26. *Id.* at 406.
27. *Id.* at 410.
28. *Id.*
29. *Id.* at 411.
30. *Id.* at 407.
31. *Id.* at 408.
32. A variant of the phrase, "articles of merchandise," also appears in the opinion. *Id.* at 411.
33. *Id.* at 416.

thus marked and stigmatized, 'citizens' of the United States, 'fellow-citizens,' a constituent part of the sovereignty, would be an abuse of terms."[34]

Together with the imagery of merchandise, the idea of blacks as forever stigmatized by their role as slaves supports Taney's position in several ways. It implies the existence of what he calls "a perpetual and impassable barrier"[35] between the races, just as the distance between person and thing, citizen and article of merchandise, is too broad to span by mere judicial force. Taney's whole opinion stresses the inevitability, the fateful propriety of the existing social order. If blacks are "doomed" to slavery, then efforts toward abolition and reform are both futile and inappropriate.

This notion of inevitability contrasts sharply with Taney's brief comparison of blacks to Indians. The situation of the blacks, he insists, is "altogether unlike that of the Indian race"[36] because Indian tribes were regarded by the English and colonial governments "as foreign governments, as much so as if an ocean had separated the red man from the white."[37] The ocean, unlike the perpetual barrier of stigmatization, can be crossed by treaties, alliances, and finally naturalization. Taney describes the Indians as "in a state of pupilage," an image conveying the possibility, even the likelihood, of maturation by time and instruction into a being comparable to white citizens. Thus, "if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."[38]

Taney's insistence on separation between whites and blacks as an irreversible condition is illuminated by the historical evidence he offers in support of his thesis. His "positive and indisputable proof" that blacks were uniformly regarded as property alone is the 1717 law of Maryland and the 1705 law of Massachusetts prohibiting intermarriage between whites and negroes or mulattos. Taney's choice of proof echoes his dominant metaphor, the political family, in a strikingly direct manner. If blacks are excluded from the political family, then they are also excluded from the domestic family, literally as well as metaphorically separated from whites by the stigma of race that, on the evidence of colonial statutes including mulattos, even previous racial mixture cannot erase.

The play between political and domestic families is further complicated by Taney's preference for the verb "embrace." He seems to link inclusion in the political community with some form of physical or sexual contact. The linkage is almost certainly unconscious, but the shape of Taney's argument as well as his diction supports its existence. The colonial intermarriage statutes are presented early in the opinion as an unanswerable historical premise. If blacks have been forever excluded from literal white families, then constitutional language cannot embrace them as members of the new

34. *Id.* at 421.
35. *Id.* at 409.
36. *Id.* at 403.
37. *Id.* at 404.
38. *Id.*

political household. Conversely, if they have been deliberately excluded from citizenship and the political participation it carries, then there can be little doubt that social exclusion—the gap between people and merchandise, the unmarked and the marked—is appropriate and ordained.

Taney's confusion, whether calculated or not, of the external political world and the interior domestic world suggests a judicial perspective in which everything personal has political consequences and political decisions in turn penetrate to the personal sphere. His opinion approaches a fundamentally political question, whether the descendants of slaves may be citizens under the Constitution, by way of the most private unit in the polity, in effect precluding a broadly comprehensive reading of "citizen" before he presents his argument. The intertwining of the personal and the political recurs in later court decisions more immediately concerned with the family, but no judicial voice more clearly expresses its sense of political life as the domestic life of its citizens writ large.

II. *Bradwell v. State*: The Family As State

The decision in *Bradwell v. State*,[39] like that in *Scott v. Sandford*, depends on an interpretation of citizenship. The majority opinion, by Justice Miller, follows by one day his opinion for the Court in the *Slaughter-House Cases*[40] and follows as well its limited definition of the rights of United States citizens. In little more than two pages, Miller straightforwardly declares that the right to practice law is not a right belonging to a citizen of the United States and so a decision by the state of Illinois to deny any woman a license to practice law is not a violation of the Fourteenth Amendment. Except in his statement of the facts, Miller omits any mention of the plaintiff's gender; the opinion as written would apply equally to any party claiming discriminatory exclusion from the bar. It remained for Justice Bradley, concurring in the Court's judgment but rejecting its reasoning, to earn an uncomfortable niche in American social history by reaching the same judicial conclusion through a disquisition on the role of women.[41]

Bradley had dissented in the *Slaughter-House Cases*, asserting in the strongest terms that the right to pursue lawful employment was a right belonging to every citizen of the United States "and one which the legislature of a State cannot invade, whether restrained by its own constitution or not."[42] His dissent also emphasized the general language of the Fourteenth Amendment, occasioned by the treatment of blacks but purposely "embracing all citizens."[43] When the citizen claiming exclusion from employment was a woman, however, Bradley, like Taney, found the constitutional embrace to be selective.[44] Unable to endorse Miller's opinion,

39. 83 U.S. (16 Wall.) 130 (1873).
40. 83 U.S. (16 Wall.) 36 (1873).
41. Justices Swayne and Field joined in the Bradley opinion. Chief Justice Chase registered a solitary dissent without writing an opinion.
42. 83 U.S. (16 Wall.) at 114 (Bradley, J., dissenting).
43. *Id.* at 123.
44. In Great Britain women were denied admission to the legal profession on a similar theory in the so-called "persons" cases, which held that qualified women could not vote, enter

Bradley fashioned a concurrence which, stripped of its rhetoric, argues that since women have never been lawyers there can be no constitutional obstacle to Illinois policy in rejecting Myra Bradwell's application.[45] Bradley relies heavily on the force of tradition to support his position, and in the process he posits a unity of state and family that dissolves the boundaries of the political and the personal.

Bradley's opinion summons to its aid a conventional alliance: history, the common law, and divine ordinance. These forces are separated, regrouped, paraded in various configurations, each gaining added strength from the others. Initially, Bradley invokes "the rules of the common law and the usages of Westminster Hall from time immemorial"[46] to buttress a reading of the gender-neutral Illinois statute that draws from it the authority to exclude women from the state bar. On the basis of such evidence, "it could not be supposed that the legislature had intended to adopt any different rule."[47] The first assumption, then, is continuity—to establish the past is to determine the future.

In the most celebrated passage of the opinion, Bradley develops his alliance of history, law, and nature:

> It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[48]

The passage begins by asserting a negative, that the right to practice a profession has not yet been established as a woman's right. Since this is also the issue under decision, Bradley's somewhat convoluted syntax disguises his question in its own fatal logical premise. In its positive formulation, the absence of such a right becomes a recognition of the different spheres of

professions, or hold public office because they were not "persons" under the applicable statutes. See Rose Pearson & Albie Sachs, Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession, 43 Mod. L. Rev. 400, 401-405 (1980).

45. Myra Bradwell, editor of Chicago Legal News, studied law with her attorney husband, James Bradwell, and was certified as qualified by the Illinois bar examiners before the Illinois Supreme Court rejected her claim for admission. In response to the court's position that any change in Illinois policy regarding the admission of women to the bar should come from the legislature, that body passed a law prohibiting occupational discrimination on the basis of gender. Although the statute was passed in March 1872, only two months after the case was argued before the United States Supreme Court, neither Miller nor Bradley mentions it. See Charles Fairman, Reconstruction and Reunion, 1864-88, at 1364, 6 History of The Supreme Court of the United States (New York, 1971). In 1879, when the Lockwood Bill admitted women to the bar of the United States Supreme Court, there were only twenty-six practicing women lawyers in the country. See *id.* at 1366-67; William Leach, True Love and Perfect Union: The Feminist Reform of Sex and Society 173 (New York, 1980) [hereinafter cited as Leach].
46. 83 U.S. (16 Wall.) at 140.
47. *Id.*
48. *Id.* at 141. Justice Brennan quoted this passage as an example of discredited "romantic paternalism" in Frontiero v. Richardson, 411 U.S. 677, 684 (1973), an opinion published exactly one hundred years after Bradwell.

men and women. The existing civil law is coupled with "nature herself" not as legal precedent but as evidence of the proper social order; shortly thereafter female timidity and delicacy are both "natural and proper." It is no surprise that the sentence which follows yokes "the divine ordinance" to "the nature of things," producing an authoritative religious-secular synthesis of the proper role of woman. The argument is carried along by adverbs rather than logic: the sequence of "certainly," "evidently," and "properly" propels the reader past the omitted grounds for the perpetuation of two distinct spheres.

Bradley's second premise concerns "the harmony, not to say identity, of interests and views which belong, or should belong, to the family institution."[49] Again, he argues backward to legal precedent and forward to its continued survival without stopping for the missing middle term, an analysis of the present legal basis for such restrictions. The "maxim" of the common law, that a woman had no legal existence separate from her husband, is unaffected by the glancing reference to "some recent modifications of this civil status."[50] Similarly, the inapplicability of the maxim to unmarried women is dismissed as "exceptions to the general rule," which is itself reaffirmed under the triple aegis of God, law, and nature: "This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[51] The legal argument is sketchy at best. Since most states still prohibited women from making enforceable contracts without their husbands' consent, women could not function as the legal representatives of male clients. Bradley does not consider the woman attorney representing women clients, nor does he consider state laws permitting married women to contract in relation to their right to practice law.[52] All such quibbles are subsumed "in the nature of things."

It is perhaps too easy to poke additional holes in Bradley's already porous opinion from the vantage of a later century. He is doing little more than transposing conventional Victorian social dogma into a judicial context without attempting fresh scrutiny. What is interesting about Bradley's opinion, especially in the wake of Taney's approach, is the underlying assumption that the law moves continuously from the public sphere where lawyers practice to the private sphere where women do, or do not, marry. Bradley conceptualizes a question of legal definition—what specific rights belong to a citizen of the United States—as a question of social order. The barrier to women serving as attorneys is the family, and the court is its appropriate defender, even when the majority considers the family irrelevant to an adequate resolution of the legal issue presented.

To Bradley, the crucial factor in his opinion is what he calls "the constitution of the family organization."[53] His pun on "constitution" is a

49. 83 U.S. (16 Wall.) at 141.
50. *Id.*
51. *Id.* at 141-42.
52. For an account of the progress of state legislation endorsing and increasing the contractual rights of women, see Leach, *supra* note 45, at 174-178.
53. 83 U.S. (16 Wall.) at 141.

revealing one. It refers at once to the composition of the family—its constituent elements, chiefly the dominant husband and subordinate wife—and the fixed body of principles governing family life. Like the union of the states, the family institution should have a "harmony, not to say identity, of interests."[54] The family constitution, Bradley suggests, has its origins in natural and divine law. Now hallowed by history and tradition, it is impervious to claims that a new social principle should be admitted. That precious harmony of interests is insured by a legal presumption that, whatever the facts, a woman's interests are best expressed and protected by her husband. The idea of the family as a political unit is emphasized by Bradley's insistence on the common-law view that a husband is his wife's "head and representative in the social state."[55] The family state sends its delegate to the social state; under the terms of the established constitution, the family authorizes the husband to represent its unified vision.

In the context of the Bradwell claim, the doctrine of the family state works in several ways. It permits Bradley to resolve an interpretational question of one constitution by reference to a traditional reading of another, unwritten constitution. If the family constitution mandates a particular social order and the family is both continuous with and constituent of the political state, then that social order is mandated as well by the political constitution. The consequences of a victory for Bradwell would be both domestic and political. A woman attorney licensed to represent her clients, male and female, might expect to represent her own interests at home and her family's interests before the state. In short, she might aspire to both domestic and political power.

Bradley's response to this threat is his reliance on the state's right to make decisions affecting and affected by the family:

> [I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.[56]

The constitution of the family, its origins shrouded in time immemorial, becomes the basis for a judicial opinion under a political constitution in existence for less than a century. This method of argument effectively cuts off any appeal to changing social conditions or evolving constitutional rights. By intertwining family and state, Bradley insists that the family predates and predetermines the assignment of roles and power in the state. Since civil law must conform to "the general constitution of things," social custom assumes the force of legal precedent and constitutional doctrine.

III. *Meyer v. Nebraska*: Family and State in Conflict

The dual imagery of Taney's political family and Bradley's family state are noticeably absent from the first Supreme Court cases to confront

54. *Id.*
55. *Id.*
56. *Id.* at 142.

directly the relationship of the family to the state, *Meyer v. Nebraska*[57] and *Pierce v. Society of Sisters*.[58] The two opinions, written two years apart by Justice McReynolds, follow by almost fifty years Bradley's vision of the family as a determinant of state power. Together, *Meyer* and *Pierce* provide the doctrinal cornerstone for the rights of parents to reject state intervention in the upbringing of their children. When the submerged theme of *Scott* and *Bradwell*—the effect of state action on the private life of the family—becomes dominant, the Court responds with a firm statement of separation between family and state, a position alternately eroded and rebuilt in the succeeding years.[59]

Both *Meyer* and *Pierce* are cases brought by educational authorities to defend their professional prerogatives. In *Meyer* a teacher of German challenged a Nebraska law prohibiting the teaching of any foreign language to children who had not yet completed eighth grade. In *Pierce*, a Catholic school and a military academy challenged an Oregon law requiring parents to send children between the ages of eight and sixteen to public school. The Court struck down both laws as violations of the Fourteenth Amendment, the first infringing on liberty and the second on property rights. Although the plaintiffs in both cases were educators and the central figures were children, the rights most emphatically endorsed were those of parents.

In *Meyer*, McReynolds was responding to a state supreme court interpretation of the Nebraska law as protective of national security by insuring the primary loyalty of all children to the United States. His opinion includes a much quoted paragraph enumerating the liberties protected under the Fourteenth Amendment:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[60]

It seems appropriate that for McReynolds, a decade later one of the staunchest of the four horsemen opposing New Deal legislation,[61] the right to contract heads a list that has been most often invoked for its non-contractual freedoms. The opinion twice refers to "the opportunities of

57. 262 U.S. 390 (1923).
58. 268 U.S. 510 (1925).
59. In Prince v. Massachusetts, 321 U.S. 158 (1944), for example, the Supreme Court upheld the state's power to prohibit a child from selling religious materials under her guardian's supervision. Some twenty years later *In re* Gault, 387 U.S. 1 (1967), recognized the child's right to counsel, independent of his parents, in juvenile court proceedings. More recent decisions have authorized parents to commit their minor children to mental institutions without a hearing. Parham v. J.R., 442 U.S. 584 (1979); and prohibited parents from interfering with a child's decision to have an abortion. Bellotti v. Baird, 443 U.S. 622 (1979). For a discussion of Supreme Court jurisprudence of the family, see Robert A. Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329, 329-45.
60. 262 U.S. at 399.
61. For a lively, though not dispassionate, account of McReynolds' role on the New Deal court, see Fred Rodell, Nine Men 213-54 (New York, 1955).

pupils to acquire knowledge,"[62] but McReynolds' principal concern is the right of parents to resist state interference with the family. Although "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally," it remains clear that "the individual has certain fundamental rights which must be respected."[63]

If McReynolds is a surprising proponent for these libertarian views,[64] even more surprising is Justice Holmes' brief and reluctant dissent. To Holmes the question before the court is whether the Nebraska statute deprives teachers of their Fourteenth Amendment freedom. Unable to find the statute an unreasonable method of achieving a proper state objective—a common tongue for all citizens—he concludes that "it is not an undue restriction of the liberty either of teacher or scholar."[65] Holmes makes no mention of the parental rights that worry McReynolds and clearly sees no impermissible intrusion by the state into the life of the family in such educational restrictions.

In contrast to Holmes' emphasis on the teacher's rights implicated by the statute, the crucial issue to McReynolds is the parent's right to select an appropriate education for his child: "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[66] That right is reformulated in *Pierce* as "the liberty of parents and guardians to direct the upbringing and education of children under their control."[67] Neither opinion considers, as Justice Douglas does in *Wisconsin v. Yoder,* the possibility that child and state might form an alliance against the parent.[68] In the Court's view, the parent is the family's designated representative and alone defends its interests against the state.

The language and argument of both opinions are generally calm and

62. 262 U.S. at 401.
63. *Id.*
64. Although there is no satisfactory explanation for McReynolds' uncharacteristic position in *Meyer* and *Pierce*, the eulogies offered to the Supreme Court after his death in 1947 offer some clues. 334 U.S. V (1948). Both Solicitor General Perlman and Attorney General Clark described McReynolds as the perfect embodiment of the "rugged individualist" and an inflexible jurist who resisted the intrusion of the federal government on the reserved powers of the states or the rights of the individual. *Id.* at VII-VIII, XVIII-XIX. At the same time, McReynolds, who never married, apparently retained throughout his life a strong concern for children, supporting and corresponding with thirty-three homeless British children during World War II and contributing generously to child welfare charities. *Id.* at XIV-XV, XXIII. He was also interested in the education of young people, according to Chief Justice Vinson leaving bequests to several educational institutions. *Id.* at XXIII-XXIV. Perhaps the intervention of state government in education triggered an individualist's concern for pedagogic independence and variety, although Holmes' approach in his Meyer dissent more directly addresses the challenge to the educational process represented by the Nebraska and Oregon statutes. 262 U.S. at 412 (Holmes, J., dissenting).
65. 262 U.S. at 412 (Holmes, J., dissenting).
66. *Id.* at 400.
67. 268 U.S. at 534-35.
68. See Justice Douglas' dissent in Wisconsin v. Yoder, 406 U.S. 205, 241 (1972), where he insists that "despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children." On the question of whether the child's rights should be viewed as part of the family's rights, see Burt, *supra* note 59.

measured. *Meyer*, in fact, responds directly to postwar anxieties about the loyalty of non-English speaking citizens by recalling "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries"[69] which prompted the Nebraska legislation. In a time of peace, such precautions exceed the power of the state to restrict constitutionally guaranteed rights.

There is, however, one curious digression that suggests a hidden concern underlying the opinion. After asserting that "[t]he protection of the Constitution extends to all,"[70] even non-English speakers, McReynolds abruptly introduces the childrearing practices of Plato's Republic and of Sparta:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians.[71]

Both societies practice the crudest forms of state intervention by removing children from parents' care and training them according to state values. Plato goes so far as to authorize discriminations based on the goodness of parents and the deformities of children. Such subordination of the individual to the welfare of the state is antithetical to constitutional protections:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[72]

McReynolds' nightmare vision emerges like an hysterical interlude in an otherwise rational argument. The bogey reappears in *Pierce*, where McReynolds declares that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."[73] The fear of standardization contrasts sharply with Bradley's complacent assertions of harmony within the family and the state. At some point, perhaps, identity of interest ceases to be harmony and becomes enforced uniformity. The family in *Bradwell* apparently stops far short of any danger, while that in *Meyer* and *Pierce* is palpably at risk of losing autonomy. It is worth noting, too, that the societies McReynolds invokes belong to Greek culture, not the Anglo-Saxon tradition celebrated by Bradley. They are alien, but also admirable, opposite

69. 262 U.S. at 402.
70. *Id.* at 401.
71. *Id.* at 401-02.
72. *Id.* at 402.
73. 268 U.S. at 535.

ideals of the peaceful and the martial state; they flourish by violating the Fourteenth Amendment.

What distinguishes McReynolds' opinions is their sense of the family as an adversary of the state. Far from perceiving continuity or analogy, he sees the state as a potential threat to diversity, individualism, even privacy. Perhaps, like the Nebraska legislature, he too was recalling the unified national purpose of the war years, but such unity suggests to him two nations, the Platonic Republic devoted to virtue and the Spartan state devoted to military triumph, which subordinate the individual to the collective. When McReynolds declares that "[t]he child is not the mere creature of the State,"[74] it is hard to say who thought otherwise outside Sparta and the Dialogues. The family is being defended against a relatively mild excess of state police power as though family and government were locked in combat over the control of every child's destiny.

IV. Conclusion

While the opinions of Taney, Bradley, and McReynolds do not exhaust Supreme Court approaches to difficult problems of social order and constitutional rights, they do hint at some significant changes in attitude toward the relation of family to state. In the *Scott* opinion, Taney's aim is to justify the exclusion of blacks from both political and domestic families. In *Bradwell*, Bradley's aim is to justify the exclusion of women from the legal profession. One wants to keep blacks outside, the other to keep women inside the family, but both assume a continuity of political and personal life. Just as colonial miscegenation statutes support the denial of citizenship to blacks, so centuries of social custom support the denial of admission to the bar to women. This assumption of the primacy of the social over the political order is inverted in *Meyer* and *Pierce*, where McReynolds casts himself as defender of the embattled and endangered family against political power capable of altering social order. For Taney and Bradley, family and state are parallel orders, an identity expressed through complementary images, and what is true of one must also be true of the other. For McReynolds, the natural order of the family is in conflict with the utilitarian order of the state, dramatically represented by the imagery of communal childrearing in the Platonic and Spartan states.

For all three authors, then, submerged metaphors convey the implicit but unstated assumptions underlying their opinions. These figures serve to enlarge and illuminate the authors' themes without committing them to a direct statement of political philosophy that in such sensitive contexts would almost certainly attract disapproval and opposition. In short, by transcending the limits of functional language, these organic metaphors carry the opinions that contain them where Cardozo long ago told us judicial prose belonged, into the literary business of indirect expression.

74. *Id.*