

## STANLEY MATTHEWS AND THE FAST MEN

On February 26, 1877 Stanley Mathews walks into Wormley's Hotel in Washington, D.C., where he is staying. He finds the owner, James Wormley, a free-born black man with fine culinary skills learned in Europe, and asks him. "Are they all here?"

"From both parties!" Wormley whispers. He nods towards the back.<sup>1</sup>

That day's conference, John Diehl tells us in his splendid anniversary dinner paper, settles the Tilden-Hayes election dispute.<sup>2</sup> We know it as the "Corrupt Bargain" or the "Compromise of 1877 (depending on your point of view).

I'll now unfold a quite different story—about Stanley Matthews, a key figure in these events, played out in a world long forgotten, though not unlike our own: full of sharp divisions, aftershocks from war, economic depression and political upheaval.

Matthews is one of the founders of our Club. He never read a paper, and until now none has been written of him. You can see what he looks like in the 1905 composite of federal judge members that hangs near the clock in the Club library. In the upper-middle frame is a photograph, signed Stanley Matthews, Jr. He's sitting in his robes, associate justice on the U.S. Supreme Court, square face beneath a full white beard, looking off with a touch of sadness in his eyes. We don't know for sure why he ends up on the Supreme Court. We know he's born in Cincinnati, where his father teaches mathematics. And we know he graduates from Kenyon College in 1840 at age sixteen.

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1 Harold Cecil Vaughan, *The Hayes-Tilden Election of 1876: A Disputed Presidential Election in the Gilded Age* 75 (1972).

2 C. Vann Woodward, *Union and Reaction: The Compromise of 1877 and the End of Reconstruction* (1966). This definitive history tells a more nuanced story, but still does not claim to ferret out the deeper secrets of compromise that still remain hidden. Late Club historian Esie Asbury read his paper, *Rutherford B. Hayes and the Literary Club*, at the 127<sup>th</sup> Anniversary Dinner, October 25, 1976, mentioning Matthews as well as the election dispute, but does not go into Electoral Commission details. Club historian John Diehl read his paper *Rutherford B. Hayes*, at the Club's 162<sup>nd</sup> Anniversary Dinner, October 31, 2011, mentioning Matthews' Civil War service with Hayes and commenting on the disputed election but not Matthews' role in it.

Rutherford Hayes is his schoolmate, two years older but graduating two years behind him. They're life-long friends.

After graduating, Matthews reads law in Cincinnati, then moves to Tennessee where he can practice at eighteen. When he's old enough to practice law in Ohio, he returns home. That takes him to Sandusky in 1845 where Hayes—now with a Harvard law degree—sits on the bar examining committee. “I haven't gone to any law school!” Matthews tells the committee. Hayes writes, “he was beyond dispute a better lawyer than any of the examining committee. . . . When I went to Cincinnati in 1849, [at his urging] he was just entering on a successful career in his profession; was elected a judge of common pleas at the first election under the new constitution . . . He [was] a Liberty party abolitionist. His associations were with a circle of fast men . . . .”

The mixed social clubs of the day rile Matthews: “Snobbish gossip over tea and cakes,” he tells his young friends. They've just formed a club of their own, and Matthews is on a committee to report a worthy question for debate at its first meeting. On Monday evening, November 5, 1849, the twelve Literary Club founders gather. Their question is: “Ought a system of universal and liberal education to be conducted at the public expense in this country?” Braced by whiskey and beer, they hear both sides, discuss it, then vote. They vote yes! Each week, a new question, a new vote:

“Does a Devil exist?” Yes or no? They vote no!

“Should traffic in alcoholic beverages be prohibited?” No!

“Ought the rich pay a higher rate of taxation?” Yes!

“Is 'Manifest Destiny' defensible?” Yes!

“Should the U.S. try to get the whole continent?” No!

“Should the press be totally free of legal restriction?” No!

“Is slavery unconstitutional?” Yes, it is!

“I’m quitting the Liberty Party,” Matthews tells Hayes one day early 1856. “I’m going to support Buchanan!” James Buchanan is an anti-slavery Democrat running for president against Republican John Fremont from California and Know-Nothing Millard Fillmore on his comeback try. The Club debates that election, too, and votes for Fremont as does Ohio. “Doughface” Buchanan wins and appoints Matthews U.S. District Attorney for Southern Ohio. To repay the kindness, Matthews prosecutes a prominent Cincinnati for violating the Fugitive Slave Act. Then resigns in 1861 as war clouds gather.

The Club's final debate is: “Should the secession of a state be prevented by the coercive power of the Federal Government?” A fierce debate lasts five sessions, then members vote not to vote. After the shelling of Fort Sumter, Lincoln votes yes and calls for volunteers. The era of debating is over.

Matthews spurns the Burnet Rifles, but still gets a commission from Governor Dennison. He enters June 7<sup>th</sup> as lieutenant colonel of the 23<sup>rd</sup> Ohio Volunteers, with Hayes his major. By fall he sees combat, now full colonel in the 51<sup>st</sup>. Two years more, after commanding a brigade at Chickamauga and Lookout Mountain, he's up for promotion to brigadier general, but resigns when nominated for the Superior Court in Cincinnati. He writes his wife that he can do more good as judge than fighting Confederates.

Matthews seems so restive! Always on the lookout for something else, some other place, another way. Like Quixote or Don Juan, he doesn't stay long in one place. But unlike Quixote, who invents himself beyond family and place, one day Matthews gives up judging and jousting with giants and returns to law practice to represent them, railroad giants that is! He and his wife Mary Ann Black settle down in Glendale.

He's a contrarian with wife and eight children. A perfect Unitarian!

During one very bad year, Matthews loses three children to Scarlet Fever. He buries his three little boys all on the same day. For the first time in his life, unbearable grief washes over him. He seeks solace in noon prayer-meetings at the old First Church and joins the Presbyterians. He's soon elder and turns Republican. "Just in time," says his Calvinist friend Hayes.

In 1869 at age forty-five Matthews gallops to the defense of the Cincinnati Board of Education where sectarian politics are afoot. They've just banned Bible-reading. In a loud public protest, John Minor and thirty-six others ask the Superior Court to stop this affront to their religion. It's protected forever," they claim, "by the Northwest Ordinance and the Ohio Constitution!" Matthews' defense is simple: "Under the Ohio Constitution," he argues, "every citizen, without respect to religion, race, color, condition, or any of the accidents of human life [is] absolutely and perfectly equal," and the School Board would be wrong to force on students the Protestant Bible!

The Reverend W. C. McCune takes umbrage and rebukes Matthews, in a sermon reprinted in the *Enquirer*.<sup>3</sup> Two of the three judges on the case agree with McCune. They find in the Ohio Constitution a positive mandate for reading the King James Bible in public schools. It teaches good government and good citizenship, even if Catholics and Jews prefer their own bibles and free-thinkers none. The School Board loses. But the third judge, Unitarian Alphonso Taft agrees with Matthews in a strong dissent, which ultimately the Ohio Supreme Court adopts unanimously for a Matthews' win. The 1873 case of *Cincinnati Board of Education v. Minor* is instantly famous. It's a forerunner of a land-mark decision of the U.S. Supreme Court ninety years later.<sup>4</sup> But in 1873, the national court isn't so enlightened. On April 13<sup>th</sup> the Court decides the New Orleans *Slaughter House Cases*, which nearly gut the newly adopted 14<sup>th</sup> amendment. On Easter Sunday, the frightful day before, in Colfax, Louisiana a

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3 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88* vol VI, part 1, at 1315.

4 *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963) (citing Taft's opinion).

white mob brutally slaughters more than a hundred black citizens barricaded for protection in the courthouse.

Matthews now looks South. His best-paying giant lives down there—the *Texas & Pacific Railroad*. Its president, Major Thomas Scott, also heads the vast *Penn Central* empire that goes under in the Panic of 1873. The Panic begins in September when *Jay Cooke & Co.*, the nation’s premier investment bank, collapses from overextended risk—mainly on loans secured by overvalued real estate and railroads. Major Scott asks Matthews to run the National Railroad Convention at St. Louis in 1875. Their goal is to get the government to subsidize a southern railroad to the Pacific—a kind of Manifest Destiny project for the South—that will reverse Scott's own losses! The nation's first transcontinental railroad, the *Union Pacific*, was chartered and subsidized by Congress during the Civil War. Its financial agent *Credit Mobilier* makes fortunes for eastern plutocrats by various financial schemes backed by taxes, both before and after bankruptcy. Leland Stanford and C. P. Huntington amass their wealth by pushing the *Central Pacific* east from California through the Sierra Nevada’s with cheap Chinese labor, land grants and bonds sold at highly inflated value.<sup>5</sup> At Promontory Point, Utah, where the *Central Pacific* meets up with the *Union Pacific*, a fake Golden Spike foretells a *Gilded Age*, to be named after Mark Twain's first novel co-written in 1873. It's a bad farce—about corruption, and the survival of the unfit.<sup>6</sup>

In St. Louis a few years later, Stanley Matthews convenes the Railroad Convention. “We’re going to help the South,” he says. “It’s only fair and right to offer southern transcontinentals the same deal the northern's got. We’ll shortly send Congress a subsidy bill that will guarantee 5% interest payable in gold on southern railroad bonds up to \$40,000 per mile over 2,000 miles of track plus land grants for each mile as built.”

“Just like the North and the West!” shout his enemies. “If there be profit, the

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5 Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* 77-87 (2011).

6 *Id.*, at 509.

corporations may take it; if there be loss, the government must bear it.”<sup>7</sup>

In Ohio, Governor Hayes believes in regulating railroads not blessing them with double coronations like King John's. “To gild refined gold, to paint the lily,” advises the Earl of Salisbury in Shakespeare's *King John*, “is wasteful and ridiculous excess.”<sup>8</sup> Hayes will paint no guilt on any southern lilly! Certainly not with Cincinnati's *Southern Railroad* to Chattanooga in business. The few northern transcontinentals are now in continuous receivership. By 1876, three years into the Panic, half of the nation's railroads are bankrupt, almost half of the country's iron furnaces have shut down and coal production collapses. America's industrial base grinds to a near halt. The U.S. economy shrinks for 65 straight months, eclipsing by nearly two years the 43 month contraction of the Great Depression of the next century.

Stanley Matthews delivers a message to the entire country: “[Major] Scott's project [is] an act of economic statesmanship [to end] the national depression. It will resurrect and rehabilitate the South, by pouring through that fertile but distracted region of our country a perpetual tide of the world's commerce, vitalizing its railroad system, and reviving its paralyzed industries.”<sup>9</sup> Prevailing wisdom, however, believes in a theology of pain—returning to the gold standard, redeeming inflated greenbacks in specie, ending subsidies. Wholesale prices drop 30%.

These encounters with Southern Redemption teach Matthews the *ad hoc* maneuvers of a spider: He might spring into the air, or hang by a thread, or turn handsprings while assaulting a fly, but he keeps the web of his own life under him or attached to him, a routine place of retreat when in danger.<sup>10</sup> All civilization is grounded in routine, say the thinkers. The South's routine rests in “an invisible empire” of the Knights of the White Camellia and the KKK. Major Scott's routine hides within his powerful railroad

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7 Id., at 107.

8 *King John*, act 4, scene 2.

9 Vann Woodward, id., note 2, at 93-94, citing *Proceedings of the National Railroad Convention at St. Louis*. The bill will be “the great healing act of Federal legislation, giving assurance that the people of the Union and their common representatives . . . know no sections in the country, no divisions among the people.”

10 Wallace Stegner, *The Uneasy Chair: A Biography of Bernard DeVoto* 264 (1974) (Stegner's use of the spider metaphor in describing DeVoto's personality is apt for me in describing Matthews').

lobbies. The government's safe-haven dwells in a complex web of politicians, newspapermen, bankers and businessmen. And the country's routine is to forget! William Faulkner's character Snopes says so—quite truly, in the little novel *The Hamlet*: “Only thank God men have done learned how to forget quick what they ain't brave enough to try to cure.”

The year 1876 arrives with optimism. The country begins to celebrate its hundredth anniversary: fireworks in Cincinnati and the fantastic Centennial Exhibition in Philadelphia. At last, eleven years after the rebellion is put down there is hope for recovery from the most severe economic depression yet. Even if wealth is in the hands of fewer than ever seen before, celebration numbs the pain of deepening poverty, corruption and fraud that feed our kleptocracy. President Grant, too, seems oblivious. After all, he's done his duty and kept order!

Eleven years earlier, the Radical Congress insisted on rebuilding “Republican form[s] of Government”<sup>11</sup> in every state in the Confederacy. They set up five districts run by military governors. These “satraps” had full powers of military occupation. They could replace officials elected by fraud or intimidation or purge legislatures of members disloyal to the Union. The Freedmen's Bureau and a “Negro militia” helped them enroll a new electorate where black voters outnumbered whites in half the South. By 1870 all eleven southern states are nominally rebuilt, now with many newly-elected black faces. But as federal troops leave, paramilitary White Leagues and Red Shirts rise up. To tamp down a return of the Old South, Grant sends troops into the most resurgent states: Florida, South Carolina and Louisiana, especially after the Colfax Massacre.

Where are the great leaders as the election of 1876 draws near? The country is tired of state-building and carpetbaggers; it wants an end of depression. And as we know, the two sitting governors nominated—Democrat Samuel Jones Tilden popular for ending the corruption of Tammany Hall's Tweed Ring in New York and Republican

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11 US Const., Art IV, sec 4.

Rutherford Birchard Hayes, the scrupulously honest three-term governor of Ohio—both want an end to Reconstruction.

That fall with railroad support, Stanley Matthews runs for Congress on the Republican ticket from his House district in Ohio. Though a nimble lawyer and fine judge, he's a lousy politician and goes down. His friend Rutherford Hayes carries Ohio easily in the November 6 vote.

Then, abruptly and without warning, comes a crisis so grave that by year's end it nearly revives disunion. As the election results come in by telegraph late on election day the trend indicates that Tilden would have a small majority of the electoral votes, but that still-occupied Florida, Louisiana, and South Carolina are in political upheaval and that there is still chance for Hayes to win a bare electoral majority.<sup>12</sup> Straightaway, both political parties pack their bags and head South. "I'm off to New Orleans!" Mathews tells Mary Ann. "To hold Louisiana!"

Tilden wins the popular vote by a quarter million. But in the electoral vote, twenty electoral votes are in dispute, with conflicting slates of electors certified in each of the three southern states in disorder and a single disputed vote from Oregon. Tilden has 184 and Hayes 165 electoral votes; both fall short of a majority of 185. If Tilden can get just one electoral vote, he'll win with a bare majority. If Hayes can get all twenty, he'll have the bare majority and win. If neither gets a majority, the election will be thrown into the House of Representatives. God only knows what will happen there!

What does the Constitution say? Article II reads that "Each State shall appoint [Electors], in such Manner as the Legislature thereof may direct" but that Congress may "determine the Time of chusing the Electors." And the Twelfth Amendment says: "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." It doesn't tell us who should preside or do the counting, nor which votes to count if two

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12 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, suppl. to vol. VII, *Five Justices and the Electoral Commission of 1877* (1988).

conflicting certificates come in from the same state.<sup>13</sup>

A year that begins in hope turns grim by years' end. The Republican Senate and the Democratic House and the two parties are in deadlock, unyielding. Debates on Capitol Hill grow angrier; members literally begin to arm themselves. Private militias build up in the heartland. If no President is elected by Inauguration Day March 4, who'll be in charge? Is the law of presidential succession clear? Who'll be commander-in-chief? Will the last resort be resumption of civil war?<sup>14</sup>

By late January Congress settles on a bill so “ingeniously contrived” that not even Ockham's razor could slice an advantage. The bill passes. It establishes an Electoral Commission to adjudicate the conflicts and decide which certificates should be opened and counted! Hayes doesn't like that one bit, for he believes the Senate President, a Republican, has full power to open and choose between conflicting certificates. This Commission has fifteen members, five from each House of Congress and five from the Supreme Court. The Republican Senate will choose three Republicans and two Democrats, while the Democratic House will choose three Democrats and two Republicans. From the Supreme Court two from each party are named, and these four choose Justice David Davis a political independent as the fifth. He quickly gets cold feet and resigns at the first chance. Justice Joseph P. Bradley from New Jersey, a Grant appointment is chosen to replace Davis.

The Commission's decision in each dispute is to be final unless an objection to it is sustained by the separate vote of both Houses. Today, such a Commission very likely would violate separation of powers. Most histories view this Commission's work as entirely political. Still, Hayes asks Stanley Matthews, a much better judge than politician, to represent him before this Commission.

Stay with me now. We have to keep our eyes open. There's poison political ivy in

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<sup>13</sup> See, for a comprehensive review, Vasan Kesavan *Is the Electoral Count Act Unconstitutional*, 80 North Carolina Law Review 1653 (2002) (considering every nuance of language or history or founders' intent in the major episodes of electoral count disputes).

<sup>14</sup> Cynthia Nicoletti, “The American Civil War as a Trial by Battle,” 28 Law and Hist. Rev. 71 (2010).

these vines of legal procedure! Also, before you begin drifting off, here's one last thing to remember: at least five members of the Literary Club, in addition to Hayes and Matthews, are actively engaged with this Commission, and not all support Hayes: there's Republican Senator Oliver Morton of Indiana, a Commission member. One of Tilden's lawyers is Democrat George Hoadly, future Governor of Ohio. Alphonso Taft now Grant's Attorney General sends important intelligence from his agents in the South. Club member and journalist William Henry Smith is Hayes' closest political adviser. Murat Halstead, flamboyant Club member and proprietor of the *Cincinnati Commercial*, prints daily reports. Also on the Commission is Representative James Garfield from Ohio. Though not a Club member, he's a friend, expert on electoral disputes, future president, and the only Commissioner to keep notes.

With inauguration day fast approaching, on February 1<sup>st</sup>, Republican Senator Thomas Ferry of Michigan, President *pro tempore* of the Senate, convenes the required joint session with the House and begins to open and count the electoral returns in alphabetical order. The President of the Senate would have been Grant's vice president, but he dies in office. The votes are recorded until they reach Florida's conflicting certificates. "Objection, Mr. President!" Ferry sends the disputed certificates to the Electoral Commission for decision and recesses to await the result.

Formally, now before the Commission, Tilden's counsel, George Hoadly, and the Democrat objectors lead off. They argue that evidence of fraud gathered in Florida goes against Hayes and should now be admitted. Hayes believes the evidence of fraud weighs heavily against Tilden. Neither candidate shows up, but each assumes that the Commission will need to examine evidence of fraud to reach a decision. The extent of fraud is the issue. But when time comes for Hayes' case, his counsel Stanley Mathews rises to argue a starkly contrary position. He says that the Commission can't inquire into fraud in the elections of electors because Congress has no power to authorize it. Clearly under the Constitution that power rests only with the states.

Now, we all know that the founders—for good reason—didn't trust the Congress to

choose a president.<sup>15</sup> And this is Matthews' point: Constitutional silence confirms the country's distrust of Congressional meddling. The exclusive default power to appoint electors remains in the state legislatures, close to the people. And if Congress can't question the appointment of electors, neither can the Commission. The only question it can decide is which slate is properly certified as Florida law directs.

After hearing the arguments, the Commission members withdraw to deliberate, in private, like the Supreme Court does. Each member speaks in turn. In his notes, James Garfield records what happens: "This was the high point in the entire course of the Electoral Commission and no outsider was present. Judge Bradley arose at 2.13 to read his opinion. All were intent, because B. held the casting vote. It was a curious study to watch the faces as he read. All were making a manifest effort to appear unconcerned . . . before it became evident that he was against the authority to hear extrinsic evidence. His opinion was clear and strong."<sup>16</sup> Bradley concludes: "Congress cannot institute a scrutiny into the appointment of electors by a State."<sup>17</sup> He agrees with Matthews! And votes to accept the Florida certificate signed by the Reconstruction government in office on election day! Four electoral votes go to Hayes.

The Republican Senate naturally supports this decision, but the separate House Democrats begin a "series of such recesses that had the effect of a filibuster, slowing down dangerously the progress toward completion of the electoral count."<sup>18</sup> After long delays, on February 12, the joint session resumes. Not having been rejected by both Houses, the Commission decision stands. "Four votes for Hayes!" says the recording clerk, and the count goes on, with more recesses, further delays. The same procedure and decision by the Commission is reached for Louisiana and Oregon and, on February 26, for South Carolina. The filibuster grows angrier, threatening to delay the final count, by now a *fait accompli*, beyond March 4. It's a bluff for political leverage. The subtext is realignment of southern Democrats and northern Republicans to negotiate favorable terms for a new South and withdrawal of Federal troops.

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15 See *Federalist* No. 69.

16 Fairman, *id.*, note 12, at 95. Fairman sets out the opinion at length.

17 *Id.*, at 131.

18 Vann Woodward, *id.*, note 2, at 164-65.

Matthews has persuaded Bradley on a principle that elects Hayes. Now he heads for the conference at Wormley's Hotel. He knows the filibuster is all bluff and bluster. It will end anyway from self interest. But as Hayes' lawyer, Matthews wants and gets assurance that economic aid and civil rights of blacks will continue after troops leave. The press smells a secret deal. After the conference, the most unruly joint session in history breaks out March 1st. Lobbyists jam the aisles thinking they still have leverage. The filibuster finally ends as southern Democrats break with their party. Votes from the last state are counted about four o'clock in the dark early morning of Friday, March 2, 1877. Ferry announces that Hayes wins with 185 votes to Tilden's 184. The Democrat *Cincinnati Enquirer* in bold-faced type shouts out: "It is done. And fitly done in the dark. By the grace of old Joe Bradley, R. B. Hayes is 'Commissioned' as President, and the monster fraud of the century is consummated."<sup>19</sup>

Tilden blames the Commission for having evidence of fraud, in Florida at the very least, and doing nothing about it. A cynical press presumes that the Commission is part of a corrupt bargain. A journalist captures the public's mood: "Tilden stole the election first but Hayes stole it back." Even Samuel Eliot Morison in his 1965 history of the American people writes: "There is no longer any doubt that this election was 'stolen'"<sup>20</sup>

Historians today seem convinced that Bradley's deciding vote was purely partisan if not corrupt. The source for this view appears to come from a *Secret History* of the Electoral Commission, written in 1895 by Abram Hewitt, the Democratic National Chairman who lost Tilden's campaign.

Here's Hewitt's story: The night before the Commission's decision in the Florida dispute, Justice Bradley has written an opinion favoring Tilden, finding election fraud behind the Republican returns. Tilden's Florida electors will immediately throw the election to Tilden. Hewitt claims Bradley shows his opinion to late night visitors, and

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<sup>19</sup> *Cincinnati Enquirer*, March 2, 1877.

<sup>20</sup> Samuel Eliot Morison, *The Oxford History of The American People* 734 (Oxford Univ. Press, 1965) (Morison's account of the Commission's makeup and purpose is clearly in error).

they induce him to change his mind. All this is embellished further in Hewitt's *Secret History* manuscript, which he hands to Columbia Professor Allan Nevins, astute historian of the period. Nevins wants it for a biography of Hewitt and another book he is writing.

A half-century later in 1988, Stanford law professor Charles Fairman, eminent Supreme Court scholar, finds grave errors. He has studied carefully all documents of the Electoral Commission's work for a history he writes about the five justices on it.<sup>21</sup> He finds much sloppy work in Nevins' biography of Hewitt,<sup>22</sup> using hear-say and speculation from the *Secret History* without checking sources.<sup>23</sup> Perhaps, suggests Nevins, a last minute switch was made to secure "a lucrative job for Justice Bradley's son in the New York Customs House." Or maybe Bradley bows to the Texas & Pacific Railroad that accuses him of corruption in a railroad receivership case.<sup>24</sup>

Southern historian C. Vann Woodward leans heavily on Nevins' books for his definitive work on the great compromise and others do, too. When Fairman himself tracks down reports of evening visitors or of judicial corruption, he finds mush. And Vann Woodward doesn't mention Bradley's judicial opinion anywhere, let alone consider its merit.

Fairman is the first major scholar who studies the arguments of the two adversaries from the Literary Club: Hoadly's argument of judicial duty to ferret out fraud against Matthews' position that Congress lacks the power.<sup>25</sup> Whether there is fraud in electing the electors or not, Bradley finally concludes, the Constitution clearly leaves that, as well as the power of certifying electoral votes, exclusively with the states. The decision based on Matthews' argument is judicial and constitutionally correct, Fairman concludes: "*It is the most important document in the history of the Electoral Commission.*"

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21 Fairman, id., note 12.

22 Allan Nevins, *Abram S. Hewitt, with Some Account of Peter Cooper* (1935).

23 Allan Nevins (ed), *Selected Writings of Abram S. Hewitt* 156-94 (1937).

24 Fairman, id., note 12, at 171.

25 Vann Woodward, id., note 2, at 163 (claiming that the "plain law of the Constitution" was set aside to "dictate a choice of rulers" without citing where that plain law might be found).

Late in life Hayes records in his diary: "I regarded Matthews' argument before the Electoral Commission as the great argument, and as controlling in the case." How odd! Hayes didn't even agree with his argument at the time.

As expected, when Ohio Senator John Sherman resigns to be Hayes' Secretary of the Treasury, the Ohio legislature sends Matthews to the U.S. Senate in 1877 to fill out Sherman's term. Senator Matthews is named to what else but the railroad committee! Again he veers away from Hayes and his party to support the Greenbacks and railroad subsidies for unfit giants. But his *Texas and Pacific Railroad* subsidy bill fails!

Before leaving his single term in office and despite their political disagreements, Hayes nominates Matthews to fill a vacancy on the Supreme Court. The appointment dies in committee. The new president James Garfield, who was on the Electoral Commission and actually heard Matthews' argument, sends it up again and asks for a vote of the full Senate. On May 12 they vote 24 in favor, 23 against. It is the narrowest Senate vote ever taken in confirming a new justice.

Matthews serves only seven years and ten months on the Court, and his work is never fully recognized. He authors an impressive 232 opinions and five dissents. Today we remember some of the important cases, still good law, but not the author. He resigns for reasons of health in 1889 and is dead within two months.

The touch of sadness I see in Justice Matthews eyes wasn't there before I got to know him better. His life was full, yet hidden from plain view, as in his fading photograph—as in all our photographs. The strangest irony in this entire story, though, is that against Hayes' own position, this Gilded Age spider gets Hayes elected president.<sup>26</sup> Federal troops do leave the occupied South; the political parties do realign. But even Stanley Matthews and the fast men of the Literary Club couldn't keep Jim Crow from moving in and staying for a very long time.

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<sup>26</sup> In the Bush v. Gore election dispute, the US Supreme Court intervenes under the 14<sup>th</sup> amendment to hold unconstitutional the Florida supreme court's decision interpreting Florida election law. When Vice President Gore finally convenes the joint session of Congress, the new Florida certificate of electors is opened and counted for Bush without objection.