

# The Pandemic and the Justice

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In times of national hardship like the present, stories from the American past are useful, but not predictably so. History doesn't repeat itself exactly. Instead, it can give perspective on human experiences, showing how lives of those who've gone before connect to present lives in surprising ways. The past is never entirely past. So it is with this story of an individual from the 19th century whose fate was to cross paths with a pandemic, a fate of hardship to be sure but also one that shaped his life's direction and purpose. He would go on to found a law firm that today is still going strong 150 years later. He would go on to author one of the most important legal decisions in the history of equal justice under law, a decision that lives in the present as legal precedent, cited more than a hundred times by the United States Supreme Court on which he served as a Justice. This is a story that traces the threads of a pandemic experience through the extraordinary life of Stanley Matthews.

When he was thirty-five, a young Cincinnati lawyer and his wife Mary suffered a tragedy, the profound dimensions of which can only be imagined. In the course of one week in 1859, the Matthews family lost four of six children to scarlet fever, also known as scarletina. Cincinnati's outbreak was part of a world pandemic of scarlet fever between 1820 and 1880. In 1863, Tad Lincoln, the young son of Mary Lincoln and President Abraham Lincoln, contracted and survived scarlet fever. Having been exposed, President Lincoln was suffering from fever, fatigue and the symptoms of scarletina when he delivered the Gettysburg Address, dedicating the Soldiers' National Cemetery and exhorting his listeners to resolve "that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

Within two years of his terrible loss, Stanley Matthews volunteered to fight in Mr. Lincoln's Army. When the pandemic struck his family, Matthews was a United States Attorney for the Southern District of Ohio, serving from 1858 to 1861. He gave up his job as U.S. Attorney to serve as lieutenant colonel with the 23rd Ohio Infantry regiment of the Union Army. His superior officer was future president Rutherford B. Hayes and future president William McKinley also served in the 23rd regiment which fought at the battle of Carnifex Ferry.

Before becoming a lawyer and serving in the Civil War, Matthews graduated from Kenyon College in 1840. A fervent opponent of slavery, he took a position as an assistant editor of the Cincinnati Daily Herald, the city's first anti-slavery daily newspaper. Today, Kenyon has

a marble statue of Stanley Matthews and his wife by the famous American sculptor Augustus Saint Gaudens, a leading 19th century sculptor of Union war heroes and President Lincoln. A bronze version of the sculpture is at the Cincinnati Art Museum. After the Civil War, Matthews served as a judge in Cincinnati and then as a U.S. Senator. In 1871, he co-founded the law firm of Matthews and Ramsey in Cincinnati which became Graydon, Head & Ritchey, today celebrating its 150th year.

For deeper insight into Stanley Matthews and how the pandemic experience changed him, historians can look to a particular case that consumed his legal and public career beginning in about 1869, making its way to the Ohio Supreme Court which decided *Board of Education of the City of Cincinnati v. Minor* in 1872. That case today holds an important place in legal history and the constitutional jurisprudence of freedom of religion. In 1869, Cincinnati was embroiled in what became known as the Cincinnati Bible War. The historical context for the Bible War was rancorous division between Protestants and Catholics over the existing practice of Bible reading in the Cincinnati Public Schools. Emotions ran high all around with petitions, protests, angry rhetoric, religious hostility and what a Cincinnati newspaper described as a ‘mob spirit.’ Each side wanted its religious version of the Bible read and taught in the public schools. Unable to satisfy either side, the Cincinnati School Board decided to discontinue the Bible reading altogether. The School Board hired Stanley Matthews to defend the decision. His defense of the School Board was thorough, strong, extensively researched, wide-ranging across law and religion, passionate and personal, as evidenced by a 400-page brief he filed in the case.

Eventually, Matthews won his case before the Ohio Supreme Court. The Court and Justice John Welch didn’t squarely adopt all of Matthews’ wide-ranging arguments, but it did decide to uphold the school board’s decision to prohibit religious instruction from the Bible in public schools. The case still resonates in the 21st century debate over separation of church and state, especially in the education context. One historical twist to the *Minor* case: The lawyer on the other side of Matthews was William Ramsey, the opposing advocates being sufficiently impressed with each other that they went into law practice together.

Nineteenth-century America was a less secular society than today. Law and legal argument back then was more amenable to persuasion with a religious tone and reference. So it was that Stanley Matthews’ religious views and his legal arguments in the *Minor* case were intertwined. He also knew his audience, his client and the public opinion challenge of defending the hot button decision to remove the Bible from schools. With public emotions running high with name-calling rhetoric like “infidel” against his client, Matthews decided to thread the needle by showing that his client the School Board was actually doing religion a favor, was acting in concert with Christianity, by removing government (i.e. the public

schools) from the job of Christian education. The legal grounding of this argument was separation of church and state, the constitutional principle of the non-establishment of religion by government. But Matthews' argument went a step further than law, saying that since God rather than the government or a public school board was the source of religious freedom, it was not good for religion to substitute the school board for God in requiring Bible reading. Note here, as it will come up again later in Matthews' career, the theme that governmental authority is not absolute and its powers are not unlimited, as against individual freedom and equality. The school board should not, Matthews believed, put its governmental authority and power to work in the spiritual realm through compelled Bible reading in school.

This argument was consistent with the personal religious views of Matthews which changed in light of the tragedy of losing four children in a week to scarlet fever. Prior to suffering that devastating loss, Matthews and his wife had been Unitarians. Afterwards their faith intensified into Calvinism, a theology based on Martin Luther's doctrine of justification by faith alone, emphasizing the grace of God and the doctrine of predestination. The Calvinistic idea that God's authority was direct to the person without intervention or permission of worldly authority lines up with the idea that a public school board should not be a Bible teacher.

Our story fast forwards to 1886. Matthews was then in his fifth year as 46th Justice of the United States Supreme Court, nominated by fellow Buckeye James A. Garfield within the narrow window of six and a half months that Garfield served as President before a madman named Charles Guiteau shot Garfield in the back at the Baltimore and Potomac Railroad Station in Washington D.C. Equally narrow was the one-vote margin by which Matthews had been confirmed as Associate Justice by the U.S. Senate in a contentious and politicized process. Whether by narrow margin, or the random mechanics of the Supreme Court's docket or by, in his mind, Calvinistic predestination, the life of Stanley Matthews in 1886 crossed paths with that of a man named Lee Yick. It would be the most important crossing in Lee Yick's life and the most important crossing in Stanley Matthews' legacy to the present.

Outwardly, the two men could hardly have been more different. Matthews was sixty-two years old, a white-bearded veteran of war and public service, sitting on the highest Court in the land in Washington D.C., only three years away from his death and burial in Cincinnati's Spring Grove Cemetery. He knew that the America of 1886 had seen the post-War Reconstruction Era with its resurgence of Jim Crow racism and was in the midst of the Gilded Age along with rapid industrialization, massive immigration, xenophobia and inequality. Tension over the influx of immigrants was at its peak thousands of miles from

D.C. in California where Chinese immigrants had come to America, helped build the Transcontinental Railroad and were becoming successful at other work, including the operation of laundries. In San Francisco alone, about 89% of the laundry workers were of Chinese descent. In 1882 a law called the Chinese Exclusion Act was passed to rid California of the Chinese. Lee Yick was a citizen of China, not an American citizen, who operated a successful laundry in San Francisco until the city's Board of Supervisors passed an ordinance making it illegal to operate a laundry in a wooden building without a permit from the Board of Supervisors. Whether to grant a permit or not was entirely within the power and discretion of the Supervisors who granted permits to virtually all non-Chinese applicants but granted only one out of two hundred applications by Chinese laundry owners. The pretext was public health and safety. The Supervisors denied Lee Yick's permit application to operate his laundry. He refused to shut his laundry down. The Supervisors fined him ten dollars. He refused to pay the fine. The Supervisors put Lee Yick in jail.

Landmark cases in American constitutional law have depended on the courage of individuals, acting alone or in concert with a few other people of courage. In 1954, for example, the Supreme Court in *Brown v. Board of Education* struck down *de jure* racial segregation in American public schools after a talented lawyer named Thurgood Marshall represented school children before a Court whose Chief Justice Earl Warren persuaded all of his fellow Justices that the separate but equal rule was unconstitutional under the Equal Protection Clause. In 1886, Lee Yick had taken his case all the way to Associate Justice Stanley Matthews who wrote the opinion for a unanimous Court in *Yick Wo v. Hopkins*. Justice Matthews freed Lee Yick from jail and his fine in a landmark decision. It was the first time the United States Supreme Court ever ruled that a law that is neutral on its face, but is administered in a racially discriminatory manner, violated the Constitution's Equal Protection Clause of the Fourteenth Amendment.

Reading Matthews' decision from the perspective of the 21st century, it is remarkable how modern and prescient his 19th century arguments were. The phrase "ahead of your time" is overused, but as applied to Stanley Matthews, he most certainly was in *Yick Wo*. His times in late 19th century America were not shining on the likes of a Chinese laundry owner jailed for not paying a fine for operating a laundry. They were times when American law still accepted the separate but equal doctrine to justify racial segregation, as the Supreme Court so held in the case of *Plessy v. Ferguson* decided in 1896 after Stanley Matthews had died.

In recent times, with tensions over immigration and travel bans in the courts, *Yick Wo* lives on as a precedent because Justice Matthews ruled that the Fourteenth Amendment applies to "persons" not just citizens. Since Lee Yick was a person, but not a citizen, he still had the constitutional right not to be discriminated against by government because of his race. *Yick*

*Wo* lives on in hundreds of cases, including those of the Warren Court, where courts have relied on its principles to strike down neutral laws applied discriminatorily. *Yick Wo* lives on in the education of today's law students, in the praise of legal scholars and Supreme Court Justices such as Anthony Kennedy and in a public elementary school in San Francisco named after the case.

Listen to the central principle of *Yick Wo* in the words of Justice Matthews: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

*An evil eye and and unequal hand.* Throughout his decision, the single thing—the evil eye and unequal hand—that really bothered Justice Matthews was the abuse of unchecked power and authority vested in one person over another, one Board of Supervisors over Lee Yick. This was the same Stanley Matthews who believed the power and authority of teaching religion to the young should not be vested in one Board of Education in Cincinnati. It was the same Stanley Matthews who understood that suffering and hardship, whether from a pandemic or incarceration because of one's race, has a way of revealing the basic equality of human beings and hence the equal justice we must work to protect.