

To the *Bag*:

In *Changing of the Chiefs* (9 GREEN BAG 2D 175 (2006)), I wrote that President Kennedy nominated Judge McGowan to his seat on the U.S. Court of Appeals for the D.C. Circuit, and that President Johnson renominated him. President Johnson did not renominate Judge McGowan, who was confirmed by the Senate before President Kennedy was assassinated. I regret the error.

Joseph C. Zengerle  
George Mason University School of Law

### **The Reason Why Scalia**

To the *Bag*:

Regarding your review of the second edition of *The Oxford Companion to the Supreme Court of the United States* (see 9 GREEN BAG 2D 103 (2006)), the reason for my less than neutral treatment of Justice Scalia as compared with what I wrote for the original (1992) edition results from the editors' allowing me three times as many words to do him justice as they originally provided. Hence, the opportunity to display the flesh which the skeleton of a rather meatless biographical sketch omitted. As for Scalia's offending my sensibilities, not true. I adhere to an empirical line that allows the chips to fall where they may.

Harold J. Spaeth  
Michigan State University

### **A Ghostly Reply**

To the *Bag*:

Professor Richard Epstein declares that I am mistaken in my decision prohibiting the use of public funds to build privately-owned railroads in Michigan. See *The Public Use, Public Trust & Public Benefit*, 9 GREEN BAG 2D 125 (2006). Perhaps his general position might be defensible with respect to corporate

welfare in other industries. But he is quite wrong in regard to public subvention of private railroads.

The railroad industry is perhaps the clearest example of the potential diseconomies of markets. Many rails were laid in America in anticipation of monopolistic profits to be acquired by gouging shippers and passengers with rates bearing no relation to the costs of providing services. And much gouging occurred. But many rails were also laid in false hopes frustrated by the laying of competing tracks. Adequate returns were infrequently received by competing lines. A reason was that the cost of rail transportation is heavily weighted in the initial construction. And once built, rail lines can be very efficient in moving freight to people, but they cannot relocate in response to market conditions. Shippers do not much care what route their freight takes to get to its destination. So rates on competing lines tend rather quickly to drop to a bare sufficiency to cover marginal operating costs, with little or nothing left to cover the cost of capital. Many, indeed perhaps a majority, of our railroads were bankrupt or nearly so not long after they were erected. Those who loaned money for construction, including taxpayers, were often not repaid. Only the monopolist lines were profitable and they were very profitable indeed.

In many other nations, rail lines were planned by, and laid at the direction of, public officials who were empowered to erect and maintain a network that would best serve the people. There was therefore less waste. In nations served by publicly owned railroads, the people are likely to be found still in the 21st century benefiting from services on which they can depend, and at reasonable cost to shippers, passengers, and taxpayers. The benign environmental consequences of the use of rails as contrasted with automobiles on highways should also be taken into account.

In America, citizens were never well served by

their private rail carriers. Taxpayers and small investors were made to bear the loss while a few bankers and lucky corporate managers made off with the money. After 1887, my Interstate Commerce Commission did what could be done to correct an unfortunate nationwide situation. An important cause of that situation was the misuse of public funds to lay tracks that should not have been laid. The hapless taxpayers of Salem, Michigan could have had no idea whether it was efficient to run the line through their town. They were quite likely to lose the town's shirt in the transaction. My decision forbidding them to repay the town bonds issued to build a track to be owned by a private entrepreneur was celebrated in my time because I was right in putting an end to the practice of taxpayer extortion, and the people of Michigan recognized this to be so.

Thomas McIntyre Cooley  
Interstate Commerce Commission

*Editors' note: Judge Cooley's letter reached us via the medium Professor Paul Carrington of Duke Law.*

## **Equal Time for Hamantashen**

To the *Bag*:

Just got my issue of the *Green Bag*. I'm sensing some serious bias – it's all well and good that Professors Stone and Kontorovich take opposite sides, but the only recipe you've included is a latke recipe??? 9 GREEN BAG 2D 203 (2006). I read the *Green Bag* for balanced, nuanced pieces and now you prove yourselves to be practitioners of gastronomical bigotry. For shame.

I hope that this omission was for want of a good hamantashen recipe. Having just recently returned from my family's HamantashenFest '06 (an annual tradition in which approximately 1,500 hamantashen are made in a single day), I can tell you that the attached recipe makes the best hamantashen in the