

BOOK REVIEWS

MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890. By Charles Fairman. Cambridge: Harvard University Press, 1939. Pp. vii, 456.

Let no one be misled. Supreme Court justices are not alone jurists; they are statesmen as well. And this is necessarily so, for, as the present Mr. Justice Frankfurter has poignantly expressed, "the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the justices are their 'idealized political picture' of the existing social order." It is then because the American system of constitutional limitations calls for a peculiar type of judicial statesmanship that the experience, environment, fears and imaginations of justices become the signposts along the road leading to an intelligent understanding of particular pronouncements of these men.

From time to time inquiring scholars have canvassed the lives and times of certain justices whose careers are said to have been outstanding and so have given us a rich insight into their professional activities. But the lives and times of those whose days on the Court have been draped in less popular glory have too often remained unknown. Samuel Freeman Miller may not have enjoyed the leadership of Marshall nor the scholarship of Holmes, but his role in the history of the Court is not of little significance. Indeed, it was he to whom Chief Justice Chase referred as "the dominant personality [then] upon the bench, whose mental force and individuality [were] felt by the Court more than any other." Our attention may well be focused upon one who wielded so great an influence on the Court. To Mr. Fairman we are indebted for having given us a remarkable insight into and a definite treatment of Mr. Justice Miller and his time; a treatment based upon a careful investigation of an impressive width of material.

Happily, the book is "less a biography than a study of a distinct period in the annals of the Court."¹ Biographical references are incident and subordinate to the more significant chronicle of his times. Owing to Miller's full life and buoyant personality these biographical references serve well as the fulcrum for an exposition of the judicial history of a period when the forces of nationalism released by the Civil War produced a variety of new constitutional issues; a period during which the influences of the Court were still formative and when the destiny of a divided nation was being welded.

Miller's penchant for law was a belated one. In his youth he studied medicine but his chief interest seems to have been debating fellow-townsmen in a small Kentucky lyceum at a time when he was still untempered by responsibility and not yet disillusioned by experience. An active emancipationist, Miller gave expression to his antipathy for slavery by leaving Kentucky in 1849, after having satisfied himself that slavery would never be voluntarily abolished in a slave state, and departed for what was then

1. P. v.

classed as the Northwest. Settling in Keokuk, Iowa, he soon adapted himself to the Iowa practice and before long attracted the attention of the local bar. To the extent that his professional activities permitted, Miller aligned himself with the Republican party. As an outstanding leader in the state, the course of political development seemed to call him to some public employment. But his activities were essentially local and his fame not widespread. Indeed, when President Lincoln sent to the Senate his nomination as an associate justice, the New York Tribune stated: "Mr. Miller's name is printed *Samuel* in the despatches, but we presume it is Daniel F. Miller, the first Whig member of Congress ever chosen from Iowa."

Miller had no false modesty. His appointment to the Court cannot be said to have been unsolicited. Miller's desire to wield public power, self-assurance in the soundness of his principles, personal ambition and zeal for the common good found in him a happy combination. To induce President Lincoln to appoint Miller, it was first necessary to enlist the active support of the senators and representatives of Iowa, the state bar, the governor and the state legislature. And Miller, himself, went to Washington to see that nothing was left undone. The most important barrier to his appointment was the then pending judiciary bill, for, if Miller was to be appointed, it was essential to cause the four trans-Mississippi states, Missouri, Iowa, Kansas and Minnesota, to be grouped in the Ninth Circuit. Largely due to the efforts of Representative James F. Wilson, of Iowa, Congress accepted this division of judicial districts and Miller's appointment was made possible. In terms of present day canons of conduct, Miller's efforts in behalf of his appointment appear to have been in poor taste, to say the least, but judged in light of the customs of the day it did not represent a departure from accepted practice. At any rate his appointment was confirmed within a half hour after its submission to the Senate and without reference to a committee.

Miller retained the same sentiments toward the Court as virtually every other mid-western Republican of the time; sentiments which are epitomized by a statement in the "home town" newspaper greeting his appointment: "He is the model the *beau ideal* of a Western Lawyer and a Western Judge, and his advent to the bench cannot fail to create a sensation even in that fossilized circle of venerable antiquities which constitutes the Bench of the Supreme Court of the United States." Whatever Miller's own sentiments toward the justices were, once on the Court he succeeded in maintaining good personal relations with his colleagues, and his pleasant manner survived the acrimony of the conference room. He lived to command the encomiums of his fellow justices.

While a member of the Court, Miller was called upon to participate in decisions where the issues involved touched the nerve center of our economic and social life. Here his commendable candor provokes a vividness of treatment. Fully aware that it was not the duty of a Supreme Court justice to be an architect of policy, he was never anxious to draw from the uncertain contours of vague constitutional language finicky limitations as a

means of circumscribing the discretion of Congress.² And so in the case of *Davidson v. New Orleans*³ we find him saying: "If this is not due process of law, it ought to be." His treatment of cases arising under the commerce clause gives a revealing insight into his understanding of the extent of the authority of Congress over the subject. In *Crandall v. Nevada*⁴ he spoke for the Court in holding that the state may not impose a tax on persons leaving its borders; he spoke for the Court in an instance where the visa of the judiciary was given to Congress' exclusive control over immigration;⁵ and he again spoke for the Court in the important case of *Wabash, St. L. and Pac. Ry. v. Illinois*⁶ holding that the matter of interstate shipments required exclusive national regulation. A few months later, the Interstate Commerce Act was passed. His position in the *Legal Tender Cases*⁷ has recently been cited with approval.⁸

Miller's judicial acumen was not confined to public law matters. His dictum in *Nichols v. Eaton*⁹ is considered by an outstanding authority to have been "the greatest single factor in the development of spendthrift trusts"¹⁰ (but he died intestate!). In the field of criminal law his dislike for capital punishment often caused him to search for constitutional grounds for setting aside a sentence of death.¹¹ His opinions in cases involving ecclesiastical disputes, where he steadfastly held that such matters were not properly for the decision of a civil tribunal, are examples of what is now referred to as judicial self-restraint.¹²

Following the death of Chief Justice Chase in 1873 there was much popular support for Miller to succeed him. But President Grant was inclined to quite a different and characteristic choice. President Grant first offered the appointment to Senator Roscoe Conklin, one of undoubted intelligence but with questionable professional qualifications. The President then nominated Attorney General Williams, but he was unacceptable to the Senate and so the nomination was withdrawn. Then the nomination of Caleb Cushing was sent to the Senate. This nomination met with universal disapprobation. Miller, who regarded himself as the spontaneous choice of the bar and is revealed to have resented the President's failure to appoint him to the Chief Justiceship did not permit his personal disappointment to prompt him to foster actively the rejection of Attorney General Williams. Perhaps this was because, as he wrote, "Williams was

2. See *In re Neagle* (1890) 135 U. S. 1; *Ex parte Yarbrough* (1884) 110 U. S. 651; *United States v. Kagama* (1886) 118 U. S. 375.

3. (1877) 96 U. S. 97, 100.

4. (U. S. 1868) 6 Wall. 35.

5. *Henderson v. Mayor of New York* (1876) 92 U. S. 259; *The Head Money Cases* (1884) 112 U. S. 580.

6. (1886) 118 U. S. 557.

7. *Knox v. Lee* (U. S. 1871) 12 Wall. 457; see particularly his dissenting opinion in *Trebilcock v. Wilson* (U. S. 1872) 12 Wall. 687.

8. *Norman v. Baltimore & Ohio R. R.* (1935) 294 U. S. 240.

9. (1875) 91 U. S. 716.

10. Griswold, *Spendthrift Trusts* (1936) 25.

11. *Kring v. Missouri* (1882) 107 U. S. 221; *Ex parte Medley* (1890) 134 U. S. 160.

12. *Watson v. Jones* (1872) 13 Wall. 679.

an old Keokuk friend" and because Miller had reason to believe that Williams was of a docile character and that he would be amenable to Miller's influence. But the Cushing appointment was quite a different matter. Miller knew that Cushing possessed a strong and independent mind. Though the Washington Chronicle took the lead in opposing Cushing's nomination, Miller, though not sympathetic with this scurrilous newspaper attack, was not an unwilling participant in the successful movement to prevent Cushing's confirmation. Finally, the President nominated Morris A. Waite, of Ohio, and a grateful Senate gave its confirmation. Professor Fairman writes that, "In the form of his [Miller's] own conscience he suffered no condemnation" for his part in the Cushing affair. It must be said that Miller's pursuits were in the direction of what he regarded to be right without regard to whether such pursuits would be subjected to misconstruction and criticism.

Much of Miller's candor in his opinions only foreshadows his true feelings, which he expresses with less restraint in the greater freedom of private correspondence. In *Gelpeke v. Dubuque*,¹³ he expresses his antipathy for the "gambling stockbroker of Wall Street" who "buys at twenty-five per cent of their value" municipal bonds of doubtful validity, and regrets that the decision of the majority is likely to facilitate the operations of rich corporations * * * or rich men making contracts with the legislatures" in effecting their antisocial ends. In the same term of court¹⁴ he speaks of a decision of his brethren as having been arrived at by a "stretch of fancy, only to be indulged in railroad bond cases." In a private correspondence he wrote:

I have met with but few things of a character affecting the public good of the whole country that has shaken my faith in human nature as much as the united, vigorous, and selfish effort of the capitalists,—the class of men who as a distinct class are but recently known in this country—I mean those who live solely by interest and dividends. Prior to the late war they were not numerous. They had no interest separate from the balance of the community, because they could lend their money safely and at high rates of interest. But one of the effects of the war was greatly to reduce the rate of interest by reason of the great increase in the quantity of the circulating medium. Another was by the creation of a national funded debt, exempt from taxation to provide a means for the investment of surplus capital. This resource for investment was quadrupled by the bonds issued by the States, by municipal corporations, and by Rail Road companies. The result has been the gradual formation of a new kind of wealth in this country, the income of which is the coupons of interest and stock dividends, and of a class whose only interest or stake in the country is the ownership of these bonds and stocks. They engage in no commerce, no trade, no manufactures, no agriculture. They *produce nothing*.¹⁵

May one hazard an expression as to how Miller would have reacted to such laws as the National Labor Relations Act, the Fair Labor Standards Act, the Public Utility Holding Company Act and the Social Security Act?

13. (1864) 1 Wall. 175, 214.

14. *Meyer v. Muscatine* (1864) 1 Wall. 384, 397.

15. Letter of April 28, 1878.

One is reluctant to attribute to any justice of the Court all the convictions and intellectual facility of Justice Holmes about the unwisdom of attempting, by judicial omniscience, "to save society from its own mistakes." Yet it is true that Miller refused, in sustaining legislation, to indulge, as did Holmes later, in fictions and apologetic phrases "to beautify what is [was] disagreeable to the sufferers."¹⁶

Miller was plain-spoken. We are told that of all of the justices on the Court, Miller was least out of sympathy with the course of congressional reconstruction, although in voting to sustain the radical legislation he did not for one moment think that it was wise. In fact, in private correspondence he clearly indicates his disapproval of the course of legislation which, as a judge, he refused to strike down. In the *Slaughter-House* decision¹⁷ he succinctly stated that he regarded the police power as being inalienable, and though he was a little hasty in *Loan Association v. Topeka*,¹⁸ to speak in a jargon strangely familiar to that oft-found in due process cases, it must be said that he would today be surprised to learn that the "natural rights" of which he was solicitous in the *Slaughter-House Cases* have since been grafted to the due process clause where they now flourish in riotous profusion.

Miller took a legitimate and vitalizing pride in his efforts for the reform of the judiciary. Deserved mention must be made of Miller's increasing efforts in connection with the establishment of federal circuit courts of appeals. In the press of business after the Civil War, the Supreme Court could not keep pace with its docket and the requirement of "going on circuit" prevented the lengthening of the Court's term at Washington. More and more "going on circuit" was proving an onerous and burdensome task. Miller had urged legislation to curtail the jurisdiction of the Supreme Court and had urged the establishment of the circuit courts. Some of his reforms were realized by the Act of February 16, 1875. However, adequate relief for the Court, through the creation of intermediate appellate tribunals, was not achieved until after Miller's death, by the Circuit Courts of Appeals Act of 1891.

So Miller went about his circuit till the last. Interestingly enough for readers of the *LAW QUARTERLY*, three days before his death Miller held his last circuit court at St. Louis in October, 1890. It is said that he was a favorite of the St. Louis Bar. More local interest is found in mention of the names of Samuel Miller Breckenridge and Henry Hitchcock as candidates for the position of associate justice left vacant by Justice Davis' acceptance of an appointment to the Senate.¹⁹ It is also interesting to find that Miller's impatience with narrow-visioned opposition, which sprang from his confidence of his intellectual processes and from his ambitions to see his con-

16. Holmes, J., in *Tyson & Bro. v. Banton* (1927) 273 U. S. 418, 446.

17. *Butchers' Union Co. v. Crescent City Co.* (1884) 111 U. S. 746.

18. (1874) 20 Wall. 655.

19. Neither of these St. Louisans was successful. Miller's tireless endeavour to get his brother-in-law, William P. Ballinger, appointed to the Court also failed to succeed. The appointment was given to John M. Harlan of Kentucky.

clusions materialize, is well expressed in letters to Judge Samuel Treat of St. Louis; these letters are generously sprinkled through the pages of the book. It is a credit to Miller as a judge that he wasted no time and allowed the bar to waste none. A colloquy between Miller and a St. Louis attorney is reported as follows:

"Damn it, Brown, come to the point!"

"What point, your Honor?"

"I don't know; any point; some point."

It is fair to say that no judge was more patient until he had been put in full possession of all the facts and considerations pertaining to the case in hand; but when he was certain of these he did not allow the time of the court to be consumed in useless and immaterial discussion.²⁰

Miller's life was full of incident and color, and Professor Fairman has presented a treatment, the impact of which is not small. Reading this book is well worth while. Professor Fairman has forced us willingly into his debt; he has presented an interesting and commendable treatise of the judicial history of that vital period of 1862-1890 when new problems which pressed for new solutions sprang forth with hopeless abandon.

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THE JUDICIAL PROCESS IN TORT CASES. By Leon Green. Second edition. St. Paul: West Publishing Company, 1939. Pp. xxi, 1356.

About a dozen years ago Dean Green, then a member of the Yale Law faculty, wrote a monogram of book length entitled *The Rationale of Proximate Cause*. Besides being an extraordinarily skillful piece of writing, the work was boldly iconoclastic. It challenged one of the supreme idols in the House of Torts—the idol of *proximate cause*. It asserted that the fetish was a misnomer to begin with: the invocation of *proximate cause* in nine out of ten cases was not for the purpose of resolving the question of causation, as was currently supposed, but rather to determine fundamental issues of legal liability that had nothing whatever to do with the matter of causation. These issues, obviously not issues of fact such as a jury is theoretically called upon to decide, were peculiarly within the province of the court and demanded the exercise of the highest function of the judge. To submit them to the jury under the guise of *proximate cause* was not only to confuse the real and ordinarily uncomplicated issue of causation (normally determined quite easily by the "but for" test: "Would the plaintiff have sustained the damage if the defendant had not done what he did?"), but, even worse, to obliterate the important distinction between the proper functions of judge and jury. In order to preserve that distinction intelligently and practically, Dean Green suggested a new method of analysis for determining tort liability in cases where the chief problem was that which was currently concealed under the phrase *proximate cause*, and as an aid in the handling of that analysis he offered a novel pattern for the classification of tort cases.¹

20. See editorial in *Central Law Journal* of July, 1877.

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1. Green, *Judge and Jury* (1930) c. 1.