

In time, through private study he mastered all the great writers, ancient and modern, in his field. Primarily through his efforts the past was brought to bear on American law. He was ever the scholar.

Beginning his profession and entering politics just as the Constitution was being ratified and the new government established, Kent became an ardent supporter of Alexander Hamilton and his Federalist policies. He hated democracy and feared it. He associated it with lawlessness and dishonesty. To the defense of property and the maintenance of established privilege he dedicated his learning and his abilities. Consciously he strove to make the law an instrument for their protection.

Equal to his distrust of democracy was his admiration of English government and law. Blackstone, Mansfield, and Hardwick were his models. Grimly he set about incorporating the common law into American law and then establishing American equity upon English precedents. Her land law and her maritime law were brought to the defense of New York's great landed interests and her growing commerce. Even the law of nations buttressed the Jay treaty!

Opportunity to translate his knowledge and prejudices into action came early. In 1793 he was appointed to a professorship of law at Columbia University. Then followed rapidly appointment as a master in chancery and as Recorder of the City of New York. These were stepping stones to the New York Supreme Court and, after sixteen years on circuit, to the office of chief justice (1804). For ten years he presided over the court and completely dominated its decisions. For ten years more he held the office of chancellor.

From these lofty stations he fought the rising tide of democracy and asserted the application of English common law and equity. He checked labor's efforts to organize combinations for the purpose of raising wages. He protected "vested interests" against legislative enactments (*Dash v. Van Kleeck*). He upheld the Livingston steamboat monopoly on the waters of New York. He decided that "truth" could not be given in evidence in libel cases (*People v. Croswell*). And each and every decision, as well as a whole new American system of equity, was based with a great show of learning on English precedent.

"Jacobinical minds" at last upset his power, abolished the Council of Revision, brought on the War of 1812, widened the suffrage, and forced his retirement. But the records of his court edited and published and soon assisted by his *Commentaries* gave endurance and nation-wide influence to his work.

Such is the story Professor Horton tells with brevity, wit, and keen understanding.

AVERY CRAVEN*

Mr. Justice Miller and the Supreme Court, 1862-1890. By Charles Fairman. Cambridge: Harvard University Press, 1939. Pp. 431. \$4.50.

Studies in judicial biography are not numerous in American legal literature; and their value to the student and to the practitioner no one has yet taken the trouble to appraise. Lives of Marshall have until recently almost had the shelf to themselves, although a life of Field appeared in 1930,¹ one of Taney in 1935,² one of Waite in 1938,³

* Professor of American History, University of Chicago.

¹ Swisher, Stephen J. Field, Craftsman of the Law (1930).

² Swisher, Roger B. Taney (1935).

³ Trimble, Chief Justice Waite, Defender of the Public Interest (1938).

and one of Kent in 1939.⁴ The present life makes practically complete a series of judicial biographies covering the nineteenth century from beginning to end.

Our system of constitutional limitations, which a recent book has shown to have deeper roots in English history than is generally realized,⁵ calls for a peculiar type of what Professor Fairman calls "judicial statesmanship," and causes the public to "be more than ordinarily concerned with the judicial process." Yet a personal element inevitably enters in, as is revealed by the "adjustments which result from the impact of a dominant personality among the justices."⁶

Miller himself stands forth as a figure of "majestic port."⁷ In his youth a country doctor,⁸ without a liberal arts degree, he brought to his office not education or learning but judgment and statesmanship.⁹ Presiding at circuit, he would be patient up to the moment when enough had been said to reveal the issues, and whatever was necessary to their just resolution. Beyond that point a certain intolerance would display itself, and to the pettifogger, the time-waster, the obscurantist, he showed a deadly hostility.¹⁰ He was "as ready to talk to a hod-carrier as to a cardinal,"¹¹ and enjoyed a personal popularity which seems never to have been surpassed in the annals of the Court.¹²

Apart from satisfying the public curiosity concerning the judicial process, the great value in a biography of a judge such as Miller, who was on the bench for twenty-eight years, lies in its capacity to enable us to see how changes in the law are brought about, how slowly changes occur, and what are the fundamentals that do not change at all.

One must take care in reading of the work of the Supreme Court in Miller's day not to overestimate its hostility to change. Actually the extent to which the Court has been in step with the time has been fairly constant; it was only in the years 1937 and 1938 that it had to break into a run to bring the time-lag down again to normal size after the slow-up of the years 1922-1936. The impression of antiquatedness one receives from re-reading the decisions of Miller's day is due to the fact that lawyers know the decisions better than they know their background, for the lawyer has no time to make such a study of contemporary newspapers, Congressional debates, and utterances of public men as would enable him to measure justly the Supreme Court's sensitiveness to current social trends.

The Civil War,¹³ the "greenback" problem,¹⁴ which would not have arisen had the

⁴ Horton, James Kent: A Study in Conservatism (1939), reviewed in 7 Univ. Chi. L. Rev. 580 (1940).

⁵ McIlwain, Constitutionalism and the Changing World (1939). See particularly pp. 55, 172, 176, 206-12.

⁶ These three passages are from p. 3. See also pp. 57, 147.

⁷ P. 425.

⁹ Pp. 25, 63, 248, 320.

¹¹ P. 427.

⁸ Chapter I.

¹⁰ Chapter XVII.

¹² P. 424. Oddly enough, Miller had little faith in the ballot box, and is quoted at p. 335 as having said: "I would have no person whose duty it is to enforce or administer the law dependent for his office on popular elections."

¹³ Chapters IV and V. A forgotten episode of the Civil War (brought to light at p. 310) is the injunction granted in New Jersey to enjoin one railroad from carrying troops in defiance of the right of monopoly in transportation enjoyed by another railroad. Delaware & Raritan Co. v. Camden & Atlantic R. Co., 16 N.J. Eq. 321, 373-4 (1863), aff'd 18 N.J. Eq. 546 (1867).

¹⁴ Chapter VII.

Government "had better technical advice,"¹⁵ the three amendments adopted at the close of the war,¹⁶ and the gigantic output of municipal bonds to aid railroad construction¹⁷ were the most important events affecting the work of the Supreme Court in Miller's day. The narrative, however, makes dull reading today, for notwithstanding their contemporary importance, the Supreme Court took these events in stride, and passed them without much backing and filling, and without any radical alteration of its fundamental concept of its functions. It is a fact that when we contrast Lincoln's announcement that the nation cannot exist half slave and half free with Roosevelt's resolve that the "nation cannot exist half boom and half broke,"¹⁸ the former did not rock the judicial ship whereas the latter nearly sank it.

The slowness of changes in the law, or rather the slowness with which judges and lawyers become aware of them and accept them, is a perdurable phenomenon in our profession. As Professor Beale said: "It usually takes the bar at least twenty years to appreciate the real reasons for a novel decision that maintains itself."¹⁹ The course of political development in America, as Professor Fairman points out, has moved along a curve which tends generally to keep swinging toward the political left; but "if the course of social movement has been along a curve, the tendency of the Court has been to go along a tangent. A justice will often keep his face set in the direction on which the course was set at the time of his appointment, or earlier."²⁰

Miller's approach to the problems raised in the cases assigned him was generally pragmatic. His method was to cite few cases but to impress the court with the reason of the law.²¹ His sense of right was greater than his capacity for precise analysis. "In this characteristic of looking through forms to the substance of taxation Miller's mental processes stood in notable contrast to those of his brother Field, whose syllogistic mind would push general propositions to absolute extremes, even though they led to results which, otherwise achieved, he would have regarded as unconstitutional."²²

The disposition of various Presidents to try to ascertain, in advance of nominating him, the views on important subjects of a proposed appointee to the supreme bench, has been an immanent feature of our system of government, and is not an invention of the New Deal. But the extent of its propriety was nowhere better stated than by Lincoln: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore we must take a man whose opinions are known."²³

Many an interesting cliché of the Court and its habits is furnished us—Jeremiah

¹⁵ P. 150.

¹⁶ Chapter VIII.

¹⁷ Chapter IX.

¹⁸ Quoted in Guedalla, *The Hundred Years* 58 (1936).

¹⁹ 39 *Harv. L. Rev.* 426 (1926). And see Miss Brown's admirable volume, *Lawyers and the Promotion of Justice* 74, 80, 120, 217, 290 (1938).

²⁰ P. 398.

²¹ P. 23. And see pp. 63, 307, 316, 319, 329, 337.

²² P. 316. Cf. pp. 67, 174.

²³ P. 177. See also pp. 103, 107, 167, 176, 253, 341, 357, 371. A newspaper said Miller's appointment could not 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" (p. 52). Irreverence seems to be a perennial American phenomenon.

Black, pausing in his argument "to deposit a wad of tobacco in his cavernous jaws, or reach for the silver snuff box which was still a part of the fixtures of the Court;"²⁴ Justices Swayne and Davis sending a page out for stick-candy to chew during an argument;²⁵ or Mr. Justice Grier, offended by the ex-Attorney-General, Cushing's, argument,²⁶ leaning over and telling his opponent to "give that damned Yankee hell."²⁷ To these we may add the episode of the woodcutter in a coonskin cap appearing before the federal district court at Little Rock²⁸ to assert a claim in respect of wood and ties sold to a railroad in receivership, thereby implanting in the mind of the Court the germ of the doctrine later established in *Fosdick v. Schall*.²⁹

Professor Fairman has been diligent in research and masterly in synthesis. The portrait lives; and the path along which the Nation moved in the years of Miller's incumbency stands forth as clear and massive as a concrete arch.

PAXTON BLAIR*

A Brief Survey of the Jurisdiction and Practice of the Courts of the United States. By Charles W. Bunn. 4th ed. St. Paul: West Publishing Co., 1939. Pp. ix, 257. \$2.00.

This book is not intended to be an extensive or exhaustive treatise. Like the preceding editions, it is designed to be a handbook or outline of the essential principles governing the jurisdiction and practice of the courts of the United States.

To accomplish this purpose in the complicated and comprehensive field of the federal judicature system presents a difficult problem of selection: what may be omitted, what must be included. The magnitude of the task is disclosed when it is recalled that a standard treatise in this field consists of eight volumes of about 900 pages each and that a popular practice desk book has 1190 pages. That the text under review has only 257 pages is evidence of the drastic condensation which has been made.

After it has been decided what shall be included, there still remains the exacting undertaking of stating the rules with practical accuracy—but without all their possible qualifications and limitations—and giving reference to the basic statutory provisions and court decisions.

These results have been accomplished with commendable ability. The author of this edition, a Professor at the School of Law of the University of Wisconsin, has expanded the scope of treatment over that of previous editions, brought it to date, and generally made it a more useful book. This text has a definite field of usefulness. It will give the student a helpful introduction to a difficult subject. It will give the practitioner, wearied by detail and elaboration, or uncertain about recent innovations, a clear and concise outline of the subject as a whole together with the basic authorities.

LAURENCE M. SPRAGUE†

²⁴ P. 110.

²⁵ P. 105.

²⁶ In *The Fossat Case*, 2 Wall. (U.S.) 649, 688 (1864).

²⁷ P. 262.

²⁸ P. 244.

²⁹ 99 U.S. 235 (1878).

* Assistant Corporation Counsel, New York City.

† Assistant Professor of Law, University of Detroit.