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BOOK REVIEW

THE PETITIONERS: The Story of the Supreme Court of the United States and the Negro. By Loren Miller. Cleveland: Meridian Books by World Publishing Co., 1966. 461 pp.

THIS VOLUME has been available in paperback since 1966 and deserves a wider readership than it has received. As the subtitle states, it is "the Story of The Supreme Court of the United tSates and the Negro." It is in essence, then, an historical monograph. Divided into four parts, the first deals with the framing and stabilizing of the U.S. Constitution and the Supreme Court's early decisions involving the Negro. Part two moves from the *Dred Scott Case*[1] to *Plessy v. Ferguson.*[2] Parts three and four develop in a topical, rather than linear narrative, the legal history of the relationship between the black man and the Court from 1895-1965. Generally, those topics are: labor-employment, education, the franchise, fair trial, housing, and the role played by the National Association for the Advancement of Colored People (NAACP) in the struggle for racial equality before the law. Before formally beginning this review, however, it is appropriate to draw a vignette of the book's author, the late Judge Loren Miller.

Failure to pay public, and personal, tribute to the human being, Loren Miller, would have been a serious error here. He was modest, warm, and strong; and had a way of looking at one that seemed to blend those reassuring Nebraskan qualities suggestive of his birthplace with the stark, sharp, finely honed intellect suggestive of his long life in California. Reporter, newspaper publisher, lawyer, judge, scholar, and Negro activist (when speaking those last two words in the same breath was tantamount to making contradictory assertions of fact), his was indeed an illustrious and valuable life. However, two other qualitative aspects of that life may have been of greater importance — one objective, the other subjective. Loren Miller was a "beautiful human being"; he cared for his fellow man, and he helped his fellowman. One suspects, however, that the one pride in his life he allowed himself to thoroughly enjoy, even to the point of "sinfulness," was his awareness of the response provoked when a southern attorney discovered who was on the case preparation for the NAACP's opposing brief. The name "Loren Miller" meant a very difficult fight had been arranged, probably had been promoted. To mark that fact and to celebrate it in this publication, is particularly appropriate.

TWO THEMES dominate Judge Miller's recitation of his story of the Supreme Court and the Negro. One is the "forced reliance of the Negro on Supreme Court action for vindication of ordinary rights and privileges of citizenship,"[3] a reliance required by the guardian-ward relationship initiated by the Court and imposed during the mid-1800's. The other theme we shall call "The Civil Rights Circle." In a sense it is derivative from the guardian-ward relationship. For Judge Miller argues that the Civil War Amendments and Reconstruction legislation has decreed legal (and political) equality for the newly freed black man. That decree was subverted by narrow Supreme Court interpretations and, ultimately, destroyed by that body's assignment of its self-created guardianship, with its concomitant duties, to the states. The Court perpetrated such questionable activity for the purpose of reestablishing its suprem-

1. *Dred Scott Case*, 19 How. 393 (1857).
2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
3. Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro at 13 (1966) [hereinafter cited as Miller].

acy in the United States governmental system.[4]

The process began with the *Slaughterhouse Cases*,[5] it took impetus from the Hays-Tilden compromise of 1877, it gained momentum by avoiding involvement in the nation's mania for industrial and territorial expansion, and it careened in abrupt patterns when these dynamics created anew a lack of interest in the welfare of the black man. The *Slaughterhouse Cases*[6] contributed to its early thrust by destroying the unitary, national-state citizenship intended by the framers of the Fourteenth Amendment, while, at the same time, emasculating as well the Privileges and Immunities clause in Section One. Further, in a series of cases from 1866 to 1883, the Supreme Court struck down "four general congressional acts of importance to Negroes."[7] The key cases among, them, however, were those settling the essential scope and reach of the powers and limits inherent in the Fourteenth Amendment.[8]

THE *Civil Rights Cases*, held that the proscriptive scope of the Fourteenth Amendment did not include individual invasion of individual rights. But they also held that the Amendment's limitations did not permit that invasion to be supported by state authority — whether it be in the shape of laws, customs, judicial or executive authority, or actions done under the color of state law or authority.[10] What that limit specifically included, of course, was to be developed through the now familiar doctrine known as "state action." Nevertheless, the holding in the *Civil Rights Cases* clearly implied that the Fourteenth Amendment provided at least *some* protection against invidious discrimination by the states. Historically, it would seem, in 1883, this protection at minimum would prohibit state laws based on racial classifications.

Judge Miller argues that even this cabined promise was not realized. His demonstration involves tracing a line of cases through *Plessy v. Ferguson*[12] and into reinterpretation of a case involving state law and race. In 1906 the Supreme Court decided *Berea College v. Kentucky*.[13] Berea College was a privately incorporated, nonsectarian institution that ran afoul of a Kentucky statute forbidding instruction of students in racialy mixed classes.[14] The state supreme court held that the statute was based on the valid legislative purpose of "preservation of the purity of the races" and protection against "social amalgamation." This, the court said, was reflected in the action of the state legislature that was merely "following the order of divine Providence."[15] Thus, voluntary association could be prohibited in Kentucky on the explicit basis of race.

Facing the U.S. Supreme Court in *Berea*,[16] as Judge Miller put it, was "the great constitutional issue . . . whether or not a state could classify its citizens on the basis of race and forbid their voluntary association for innocent purposes on the basis of that racial classification."[17] The Supreme Court upheld the Kentucky decision, thereby going a step beyond the *Plessy* holding — a step important to legitimation of the Jim Crowism that followed. For it allowed the states to act explicitly on the basis of racial categories and, therefore, to forbid interracial association for innocent purposes. The effect was that:

> States and cities took the cue and tumbled over themselves to pass laws and ordinances prohibiting innocent association of Negroes and white persons in pool halls, taxicabs, restaurants, hotels, barber shops, hired automobiles, ball parks, theaters, yards, auditoriums, toilet facilities, domino or checker contests, card

4. Id. at 116.
5. *Slaughterhouse Cases*, 16 Wall. 36 (1873).
6. Slaughterhouse Cases, supra at p. 3.
7. Miller, supra note 3, at 116.
8. *Ex parte Garland*, 4 Wall. 333 (1867); *Rees v. City*, 19 Wall. 07 (1874); *U.S. v. Harris*, 106 U.S. 629 (1883).
9. *Civil Rights Cases*, 109 U.S. 3 (1883).
10. Miller, supra note 3, at 228.
11. *Civil Rights Cases*, supra at p. 3.
12. *Plessy v. Ferguson*, supra at p. 1.
13. *Berea College v. Kentucky*, 211 U.S. 45 (1908).
14. Miller, supra note 3, at 200.
15. Id. at 200-201.
16. *Berea College v. Kentucky*, supra at p. 7.
17. Miller, supra note 3, at 202.

games, or in almost any conceivable place where association might occur,[18]

Even conceding the difficulty of imputing historical casuality in an area like constitutional decisions, the logical line linking *Plessy, Berea,* and such state enacted prohibitions seem clear.

THE RESULTING structure of caste and class in the South maintained Supreme Court support until the early 1930's. Reconsideration of that supportive position, Judge Miller posits, was indicated by the decisions in what have become known as the *Scottsboro Cases.*[19] Throughout the final quarter of the book, then, he traces the reversal of the trend begun in the *Slaughterhouse Cases* in 1873; a reversal which developed, ultimately, into a legal situation roughly equivalent for the black man in 1965 to that which obtained prior to the *Civil Rights Cases* in 1883. This Civil Rights Circle can be seen as the result of the second historical theme, adduced above, in the relations between the Supreme Court and the American Negro.

This trend finds its roots deep in the general United States constitutional framework. It is suggested in the organic document itself, germinates during the nations' infancy, and emerges full-blown from the hurricane of *Dred Scott v. Sanford.* The Supreme Court became the guardian of all Negroes in America, free and slave, "by attributing to the Constitution a complete scheme defining and regulating their relationships with the federal government, the states, and the body politic,"[20] and by assuming to itself the sole power to define the nature and extent of those relationships. Thus, the black wards of the Supreme Court were placed in a paternalistic (not Miller's term) legal context . . . a context Judge Miller does not say was eliminated by the time of his writing (1965).

The key difficulty within this relationship was the guardian's failure to provide due, let alone diligent, care for its wards. In fact their welfare was resigned to thoroughly antagonistic national family members — the southern states. This flower from a "Supreme-Court-contrived fiction that state control and regulation of civil rights offered assurance or hope to Negroes that their rights would be respected or enforced."[21]

Such resignation of control over the sphere of civil liberty was not, according to Judge Miller, the intent of the framers of the Civil War Amendments.[22] Nevertheless, such was the result of Supreme Court interpretation of those Amendments. Precedent built upon precedent, and social and political structure built upon social and political structure until the great Tower of Babel known as the racist component in the American legal system was erected.[23]

This writer has read every word recorded in the Congressional Globe for the Thirty-Ninth Congress and has struggled to keep abreast of the flood of literature on Reconstruction. Although it is not possible on the basis of that extended research to ascribe fully to Judge Miller's view on this point — that the Reconstruction congress intended to "nationalize the whole sphere of civil liberty,"[24] it is necessary to concur in his opinion to a very great degree indeed. The extent to which the Reconstruction congress intended to nationalize the sphere of civil liberty has been inadequately dealt with in the annals of American legal history. Interestingly, the thesis presented by Justice Miller is stated forthrightly, even casually, by most present day historians and by a great many political scientists.

THE TWO themes of American legal history traced by Judge Miller are woven into a unified story: The tale of the Negro ward of the U.S. Supreme Court, who was left in the infancy of his freedom to the "benign" care of the states and who, in the growth of his strength and political

18. Id. at 205.
19. *Scottsboro Cases: Powell v. Alabama,* 287 U.S. 45 (1932); *Norris v. Alabama,* 294 U.S. 587 (1935); *Patterson v. Alabama,* 294 U.S. 600 (1935).
20. Miller, supra note 3, at 79.
21. Id. at 415.
22. Id. at p. ix.
23. Id. at 180, 203.
24. Id. at p. ix.

understanding, has been recovered by his guardian.

Criticism of Judge Miller's views might begin with his too easy acceptance of the paternalism implicit in his position concerning federal government protection of the black man's rights. It would serve little purpose here, however, and simple notation will be the extent of consideration given. First, however, the strong points of his work must be mentioned.

Of prime importance to the technical, legal reader, the volume is an extremely well done history of the constitutional law of racism and civil rights. Cases are handled thoroughly and carefully. Discussions of the dissenting, and often concurring, opinions in many cases are of particular value to the legal scholar and historian. Further, such discussions are done in a manner and with an understanding that only someone like Judge Miller could command. His years as advocate for "the petitioners" and as judge gave him an intimate knowledge of and perspective on the legal problems at point — a knowledge and perspective that few can claim.

In addition, Judge Miller's treatment of the historic, and perhaps epic, dissents of the first Justice John Marshall Harlan pays the respect due a man often promised his prompt and full due but who is usually given only a partial credit entry in passing. Harlan's opinions are given extended and warm consideration, and his historic dissents are made an integral part of the case analyses. On the other hand. Justice Homes' views on civil rights are put in their proper perspective; particularly as against the unfounded claims of his "liberalism" in civil rights that are advanced by some. Miller sets forth chapter and verse to support his flat conclusions that Homes was not an equalitarian, believed that demands for equality were only a species of envy, and that he "offered no leadership in the area of civil rights."[25]

Finally, it is important to note that the volume is written in a thoroughly readable manner. The style is often light and dry, at times humorous, and sometimes simply delightful.[26]

On the more clearly negative side, it it necessary to recognize that the judiciocentric perspective which serves him well in other areas also locks Judge Miller into a limited interpretation of the relationship between the Supreme Court and the race problem. Thus, at times, he values the judicial pronouncement more than the strategy of advancing a position or implementing a goal won, at times even subordinating history to his desire for the "right" decision. This can be readily seen in his attempt to argue that historical events would have been different if the Supreme Court had upheld the 1875 Civil Rights Act, or if Justice Harlan's dissent in *Plessy* had become the Court's majority opinion.[27] Given the social and political conditions of the times, however, contra-factual, conditional speculation is rendered even more doubtful than usual. In fact, it would seem more accurate to speculate that the decisions for which Judge Millers' appeals could have been more damaging than the ones actually made. For the "right" decisions almost certainly would have been ignored in the society at large (much as the prayer decision today)[28] and such matters might have resulted in a body of law specifically justifying behavior deviant from explicit statute and precedent. Perhaps the *Plessy* decision would have been better if never rendered at all. Then, at least, U.S. Supreme Court decisions would have contained neither justification nor condemnation of state government racist behavior. But even that speculation falls before the ineluctable forces of racism in U.S. history. And it is their explicit consideration that raises another flaw in Judge Miller's effort.

He simply does not seem to have realized fully the extent and depth of racism in America. Even though he often explicitly condemns northern case rulings and state laws as racist, Judge Miller still

25. Id. at 244.
26. Id. at 62-64.
27. Id. at 181-182.
28. *Engel v. Vitale*, 37 U.S. 421 (1838).

appears to believe that race prejudice is a phenomenon of essentially southern vintage — distilled from the bitter grapes of "mean-minded" men. Rightly decided and properly reasoned decisions by reasonable judges, therefore, would remedy the unreason here. Few students of institutional racism today could accept such a view. On this point when criticizing, however, one should proceed slowly. For few people realized the extent and depth of American racism prior to the 1960's. And those who did realize it, needed the myth of "reasonable man" to sustain even the shred of hope necessary to attack such a gargantuan problem.

IN A MORE specific vein, there are some rather grave case omissions and occassional misrepresentations influenced by the theses adduced above. For example, Judge Miller[29] explicitly traces to a 1936 state case[30] the extension against the state through the Fourteenth Amendment of the exclusionary rule of evidence illegally obtained. This is to ignore the fact that the rule had been a matter of federal law since 1914 when set forth in *Weeks v. U.S.*[31] Although *Weeks* did not involve a race issue, and therefore could be ignored as subject to thematic exclusion from the book, neither did the extensively treated *Slaughterhouse Cases*. Further, it is simply historically inaccurate to assign the exclusionary rules' origin or its extension against the state to *Brown*. Furthermore, important cases are not included. Omitted entirely are cases of the importance of *Lassiter v. Northampton County Board of Electors,*[32] wherein the Supreme Court, per Mr. Justice Douglas upheld, as not discriminatory on its face, a literacy requirement provision for voting contained in the North Carolina constitution; this despite the fact that the requirement was located in part of a section that also included a "Grandfather clause." Also omitted are some incidental, but supplementary, cases such as *Aldridge v. U.S.*,[33] where the court upheld questioning of prospective federal jurors as to their racial views in cases involving black defendants. Finally, analyses of the Civil Rights Acts of 1957 and 1960 would not have been inappropriate to the context of the work; especially since the Acts of 1875, 1964, and 1965 were considered.

One final point, of small import perhaps but nonetheless disturbing. There are occassional factual errors of a kind that mar the effort. For example, in one discussion Judge Miller imputes to the "sheer weight' 'of the Court's example "inspiration of a similar zeal on the part of the executive branch" of the federal government.[34] Although the executive branch did act in the area of civil liberty, it did so cautiously, in response to political pressures from civil rights organizations, and only after the Supreme Court had refused to enter the area at question. In fact, some of the difficulties in implementing *Brown v. Board of Education*[35] must be laid at the feet of an executive who publicly stated his unwillingness to support the decision. Corroborative evidence for this criticism is furnished later in the book by Judge Miller himself, when he contradicts his earlier statement about executive actions and praises the Supreme Court for its valiant efforts even though it had "no legislative help and precious little assistance from the executive branch."[36]

In summary, however, it must be said that Judge Miller has written a worthwhile book indeed. It can be read comfortably by the legal scholar, the lawyer, the specialist in constitutional law, and the layman. And it can be read with profit by each. The unfortunate fact is, however, that the book has not received the recognition nor the wide circulation that it deserves.

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29. Miller, supra note 3, at 282.
30. *Brown v. Mississippi*, 297 U.S. 278 (1936).
31. *Weeks v. U.S.*, 232 US. 383 (1914).
32. *Lassiter v. Northampton County Board of Electors*, 360 U.S. 45 (1959).
33. *Aldridge v. U.S.*, 28 U.S. 309 (1931).
34. Miller, supra note 3, at 14.
35. *Brown v. Board of Education*, 347 U.S. 483 (1954).
36. Miller, supra note 3, at 293.

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