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Dean Pound tells me of a personal recollection of Justice Miller, which will serve as the starting-point of this article.

It was in the summer, about 1880. Miller, on the rounds of his circuit, had come to Omaha, where, in chambers, he was to hear counsel argue a mining case from Colorado. In the hall of the post office building, Miller saw Roscoe Pound (aetat circa 10[1] and already known to the Judge), and greeted him with the inquiry: Well, sonny, how would you like to come with me while I hear a case? Gladly the lad went along, and seated himself on the floor, Turkish-fashion, under the Judge's desk. The controversy concerned what was then a new and highly important matter under the federal mining law: did the claim in question constitute a "vein" as distinguished from a "placer"? "Placers" included "all forms of deposit, excepting veins . . . in place";[2] the owner was confined within the lines of his survey. "Veins," on the other hand, might be followed "throughout their entire depth," even though their course might "extend outside the vertical side-lines" of the surface location.[3] Where the rock covering of the ore-bearing quartz had fallen away, it would be hotly contested whether this remained a "vein in place" which the owner was entitled to pursue. At the conclusion of the arguments as to how this particular location should be classified, Miller looked down and inquired, "Sonny, what do you say"? The boy had been following closely and was ready with his response: "Judge Miller, it was *there,* wasn't it"? Yes, said Miller, picking up the pithy reply—Sonny's right, it was still there: the vein remained "in place," even though the overlying rock had

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One who has written a full-length biography will find it difficult thereafter to say much that is new about his subject. Most of what is said here, and much more, may be found in FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939) (hereinafter referred to as MR. JUSTICE MILLER). I have, however, woven in some quotations not heretofore in print. Justice Miller knew himself. His character was not complicated. So his own writings are the best reflection of the man.

Justice Miller's letters quoted herein, unless otherwise appears, were written to his brother-in-law, William Pitt Ballinger of Galveston, Texas. They are in my possession.

1. Dean Pound thinks that his presence at the federal court at Omaha was probably in connection with some early phase of Giles v. Little, 13 Fed. 100 (D. Neb. 1881), *aff'd,* 104 U.S. 291 (1881). This protracted litigation involved a good deal of land in Lincoln, including some held by Mr. Lionel C. Burr—partner of Judge Stephen Pound, and father of Charley Burr, Roscoe Pound's boy friend.

2. REV. STAT. § 2329 (1875).

3. REV. STAT. § 2322 (1875).

broken away. That was the sensible answer, and Miller adopted it.

Without undue strain, this simple incident suggests several themes on which this essay would dwell. Miller's forthrightness: he moved unerringly to "the main points, the controlling questions";[4] he had an instinct for the essential. Here is an estimate that comes from the *Central Law Journal*,[5] published in St. Louis, where he held circuit court:

> His extraordinary quickness of perception, and the rapidity of his mental movements, combined with his industry and large experience, enable him to dispose of the business of a term with a dispatch that is really extraordinary. He wastes no time, and allows the bar to waste none. No judge is more patient until he has been put in full possession of all of the facts and considerations pertaining to the case in hand, but when his is *sure* he has these, and when his own mind sees its way clearly to a satisfactory judgment, he does not allow time of the court to be consumed in useless and immaterial discussions. . . .
>
> Hung juries are almost unknown when he presides at a trial; for he extracts the turning point of the case and then lays down the law so positively and so plainly as to preclude such a miscarriage . . . . And no losing party complains, for he knows that he will get a fair bill of exceptions. . . . [Judge Miller] is popular with his bar—a popularity which is based upon their respect for his character, admiration for his abilities, and attachment for his personal and social qualities. No other word will express the sentiments of his associates on the Bench of the Circuit except to say, *they love him.*

Closely related is another observation: the law, in Miller's time and place, was being adapted to the needs of an expanding and westward-moving nation; practical good sense was often more to the purpose than antique learning. As Chief Justice Wright[6] of Iowa—before whom Miller had often appeared—said in a memorable passage:

> We have assumed that it is only so much of the common law as is *applicable*, that can be said to be in force, or recognized as a rule of action in this state. To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force, until changed by some legislative rule, we believe has never been claimed, neither indeed could it be, with any degree of reason. . . . [T]o determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and live (*sic*) under these institutions.[7]

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4. Miller's own characteristic expression. Letter of July 1, 1874, MR. JUSTICE MILLER at 415.

5. 5 CENT. L.J. viii (1877).

6. "The verdict of the Bar at the time and now would be that all in all Judge Wright had no equal among the State's chief justices or judges." John F. Dillon—himself a former chief justice of the Iowa Supreme Court—in *Early Iowa Lawyers and Judges*, 40 AM. L. REV. 377, 381-82 (1906).

7. Wagner v. Bissell, 3 Iowa 395, 402-03 (1857).

In a period when the law's most notable growth was on the side of judicial decision, Miller declared, with confident authority, the best values implicit in contemporary American life. He was a man of broad social sympathies, with a special concern for the hard-working people who were opening the upper Mississippi basin. In his brief practice at the bar his mind had never been preoccupied with the interests of great corporate clients. He was an authentic "Western lawyer"—the first member of the Court born west of the Appalachians, the first to be appointed from beyond the Mississippi. Of extraordinarily powerful mind, self-educated, ambitious to employ his strength to useful ends but almost indifferent to material reward, Miller was indeed able "to give new impulse and add new honor to the profession of the law."[8]

As Dean Pound's story suggests, Miller was warm, kindly, unaffected: "as ready to talk to a hod-carrier as to a cardinal" was a newspaper comment at the time of his death. "Nor has there ever been a public man in Washington of a more cosmopolitan acquaintance or a more democratic disposition. The hack-drivers and street-car conductors all knew him as well as the Senators and members of the diplomatic corps, and he was able to greet many of them by name."[9] Here was a Judge who was easy on the minds of his brethren, although he was justly severe in his appraisal of the weak ones among them. Within the Court he exerted himself purposefully, and came to have an enormous personal authority. His methods, however, were direct, not covinous; it was no more than the truth when he said that he "strove very hard . . . to have things go right and to get all the good out of our Chief [Waite] and my brethren that could be had."[10] On the circuit where he held sway, Miller often seemed brusque, and his remarks from the bench might be breathtaking. Yet in the words of John F. Dillon—for ten years Miller's colleague on the circuit court—"under this severe exterior" he had a heart that was tender and loyal. "He is one of the most illustrious judges this country has produced. We all saluted him as master."[11]

That a physician practising in a Kentucky hamlet in 1847 would within fifteen years become a Justice of the Supreme Court of the United States seemed incredible, even under the mobile conditions of American life a century ago. Miller told his story in his own words at the request of an old neighbor who in 1882 was making a collection of sketches, *Keokuk Biographical and Historical*.[11a] This little auto-

8. His aspiration for Western lawyers of the future, in an address before the Iowa State Bar Assn., 20 ALBANY L.J. 25, 29 (1879); 13 WESTERN JURIST 241, 250 (1879).
9. The Gate City, Keokuk, Oct. 12, 1890, quoting other newspapers.
10. Letter of Dec. 5, 1875, MR. JUSTICE MILLER at 373.
11. Dillon, *Early Iowa Lawyers and Judges*, 40 AM. L. REV. 377, 383 (1906).
11a. Compiled by C. F. Davis, Esq., of Keokuk; now in the possession of Mr.

biographical outline has, I believe, never before been printed; in it one learns some principal facts, and something more. In a covering letter, Miller wrote that he "did not have a very clear idea of what you desired. . . . If the sketch suits your purpose well and good. If not destroy it as it is of no consequence otherwise." The tone is that which marked the biographical accounts—written, and often paid for by the subject—common in the local histories of that day. The writing, one will think, is stiff and conventional—like photographs in the velvet-covered family album.

> Samuel Freeman Miller, one of the Justices of the Supreme Court of the United States, was born in Richmond, the county seat of Madison Co. Kentucky, April 5th, 1816.
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> He received his education at the Academy in that town, and at the age of eighteen began the study of Medicine, and after several years study, which included two courses of lectures in the medical department of Transylvania University at Lexington, received the diploma of Doctor of Medicine in 1838.
>
> He practised this profession in Barbourville, the county seat of Knox county, for eight or ten years during which time he was married to Lucy, daughter of James F. Ballinger of that town, by whom he had four children only one of whom, Mrs Pattie M. Stocking, is now alive. About the year 1845 he decided to change his profession, and after two years study of the law, was admitted to the bar in the same town where he was then busily engaged as a medical practitioner.
>
> Having been an active emancipationist, and becoming satisfied after the adoption of the constitution of 1848 in Kentucky, that slavery would never voluntarily be abolished by a slave state, he decided to leave Kentucky, and in the autumn of 1849 first saw Keokuk in a general tour of the north-west. He determined to make that place his future home, and arrived there on the 7th day of May, 1850 with his family. . . .
>
> Mr Miller supposed himself unknown to any human being in Keokuk when he landed there one morning in May to find the ground covered with snow. But he shortly found an old schoolmate in William Clark, familiarly know[n] as "Bill Clark," who had been the first mayor of the city of Keokuk. The three brothers, Joseph, William and Robert Clark, who were all early citizens and business men of Keokuk, were sons of Mr. Thomas A. Clark who was for many year[s] Sheriff of Madison county Kentucky and was an exemplary elder in the Presbyterian Church. . . .
>
> Through the friendship of Mr Clark, Mr Miller formed an advantageous partnership with Lewis R. Reeves, who was perhaps the ablest lawyer of the Keokuk bar then in active practice and who having a large real estate interest in the half breed tract, desired a law partner who would attend to the general business of the firm, and aid him in the litigation which then involved all half breed lands. The connection proved in every way a fortunate one for Mr Miller, who at once found himself engaged in a large and remunerative practice, and took a front rank among the lawyers of the state. The friendship and confidence between

Edward Johnstone, president of the Keokuk Savings Bank. The sketch is in handwriting, apparently of Miller's daughter, Lida.

Mr. Reeves and himself was unreserved, and uninterrupted until the death of Mr Reeves in 1854, when the latter gave the strongest evidence of this in making Mr Miller one of his executors of a will which left them a very large discretion in the control of his property for many years of the expected minority of his only child.

Not long after the death of Mr Reeves, Mr Miller also lost his wife by consumption, leaving him three young children, all girls.

In about two years and a half after this, he and Mrs Reeves united their fortunes in a marriage which has been one of unmixed happiness, and which has resulted in two children, a son and a daughter, both unmarried and now living with their father and mother in Washington city.

Mr Miller while always taking an active part in politics as a Whig and as one of the organizers of the Republican party in Iowa, had steadily refused to be a candidate for any office, though his name was used against his wishes in a race for the state senate when defeat was inevitable, in a district composed of the two democratic counties of Lee and Van Buren.

When the ascension of the republican party to power caused the reorganization of the judicial circuits and the creation of one west of the Mississippi river, including the states of Missouri, Iowa, Minnesota and Kansas, and there were two vacancies on the bench of the Supreme Court of the United States, Mr Miller's name was presented by this new circuit with almost unanimity for one of these places.[12] His recommendation was also signed by twenty-eight out of thirty-six senators then composing the United States senate, and an hundred and twenty-six members of the House of Representatives, a recommendation to office almost unequalled in this country.[13] His name was sent to the Senate and confirmed in half an hour without reference to a committee, a courtesy usually reserved for persons who have been members of that body. His commission, signed by Mr Lincoln bears date July 16th 1862.

Of the subsequent career of Judge Miller as a member of that high tribunal it is probably not appropriate to say much in this place. An opinion may be formed of his standing as an American jurist and his conduct as a judge from the fact that on the death of Chief Justice Chase in 1873 he was recommended with entire unanimity as his successor by the bar of every state in his circuit, the largest but one in the Union, and he was manifestly the choice of the legal profession of the United States for that place.[14]

In the twenty years of service as Judge he has delivered many opinions giving construction to the Constitution of the United States and has been the organ of the court in that class of cases as often as any one who ever sat on that bench.

He was also a member of the Electoral commission made so by the terms of the bill as it passed Congress for deciding and reporting to that body such questions concerning the count of the votes of the States for

12. There was great difficulty in getting a new eighth circuit composed only of territory west of the Mississippi. Once that had been accomplished—with the result that Miller's candidacy was relieved of troublesome competition—his nomination proceeded easily. MR. JUSTICE MILLER, c. 3.

13. When the Lincoln Papers in the Library of Congress were opened to the public, the recommendation became available. I have set it out in *What Makes a Great Justice?* (Gaspar G. Bacon Lectures on the Constitution of the United States, 1949), 30 B.U.L. REV. 49, 98 (1950).

14. That this was an accurate generalization, see MR. JUSTICE MILLER, c. 11.

> President in 1876 as should be referred to the commission by the two houses of Congress under that statute. He was by the committee made chairman of the sub-committee which in each of the several contested returns presented the reasons on which their judgement was founded.
>
> These, with his opinions delivered in the sessions of the committee, will ever stand as the vindication of the action of the Commission and of the Congress which approved it.

This parting reference to the Electoral Commission of 1877, which by 8 to 7 vote held for the Republican candidate, may stir old resentments. Almost everybody has a strong impression about the Disputed Election, but almost nobody has any acquaintance with the legal issues, as developed in opposing briefs and arguments to be found in the Proceedings. Here I confine myself to one remark: a seminar last year was the occasion for finding out what a number of able and completely fresh minds would conclude as to the merits of the several cases submitted to the Commission. The result of close study of each instance was that on the law, the Republicans were entitled to the judgment.

As to Justice Miller's opinions on the Court, nothing more will be attempted here than the briefest summary, to refresh recollection. Accepting the preservation of the Union as the Constitution's major premise, he stood foremost in sustaining the war measures,[15] including the establishment of congressional authority over legal tender.[16] As spokesman for the bare majority of the Court in the *Slaughter-House Cases*,[17] he rejected the mighty tour-de-force whereby John A. Campbell sought to make the new fourteenth amendment serve to shield the people of the South against a carpet-bag administration. Putting it more generally, Miller rejected such a reading of the privileges and immunities clause as "would constitute this court a perpetual censor upon all legislation of the States . . . ."[18] It was after Miller's time that the due process clause came to perform the function Campbell would have assigned to privileges and immunities. Miller stood with the majority in *Strauder v. West Virginia* and cases heard with it,[19] wherein it was held that the equal protection clause promised the Negro a jury from which members of his race had not been excluded because of color, and in *Ex parte Siebold*,[20] which sustained the power of Con-

15. The Prize Cases, 67 U.S. (2 Black) 635 (1863); joining in the minority opinion in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 132 (1866). See generally MR. JUSTICE MILLER, c. 4.

16. Concurring in Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871). Dissenting in Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 626 (1870); Butler v. Horwitz, 74 U.S. (7 Wall.) 258, 262 (1869); Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 255 (1869). See MR. JUSTICE MILLER, c. 7; Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 1128 (1941).

17. 83 U.S. (16 Wall.) 36 (1873).

18. *Id.* at 78.

19. 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); *Ex Parte* Virginia, 100 U.S. 339 (1880).

20. 100 U.S. 371 (1880).

gress to impose penalties upon State officers for wrongful conduct in federal elections. Clifford and Field, JJ., dissented throughout. To his brother-in-law, a leader at the Texas bar, Miller wrote:

> We have been engaged for the two first weeks [of the October term, 1879] in cases of a political character, involving the constitutional validity of the acts of Congress covering juries in the state courts and the election law.
>
> These cases came up in various shapes, on writs of error, habeas corpus, and are some of them much complicated by questions of jurisdiction in our court.
>
> It would be a very great relief to me if no question of a partizan political character should ever come before our court.[21]

One will note that it is only in very recent times that this constitutional right in respect of juries, declared in 1880, has in some measure been made effective in the southern states.

Miller spoke for a unanimous Court in *Ex parte Yarbrough*,[22] "The Ku-Klux Cases," upholding the statute whereby Congress made it an offense to interfere with a citizen in the exercise of his right to vote in federal elections:

> The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words that expressly grant it.[23]

One characteristic of this strong judge was his readiness to enforce the reason and spirit of the Constitution—as in *Crandall v. Nevada*,[24] drawing upon the federal right to go from state to state; *In re Neagle*,[25] inferring an executive duty to protect the federal judges; and *United States v. Lee*,[26] sustaining an action to eject one holding under claim of title in the United States. From the *Lee* case comes this passage—"one of the best things ever uttered by me in the court":[27]

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[28]

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21. Letter of Oct. 29, 1879.
22. 110 U.S. 651 (1884).
23. *Id.* at 658.
24. 73 U.S. (6 Wall.) 35 (1868).
25. 135 U.S. 1 (1890).
26. 106 U.S. 196 (1882).
27. MR. JUSTICE MILLER at 337.
28. 106 U.S. 196, 220 (1882).

"The most painful matter connected with my judicial life,"[29] as Miller put it, was the mass of cases dealing with municipal bonds improvidently issued in aid of various enterprises, chiefly railroads. Notwithstanding defenses based upon state law—many of which now seem very substantial—the Court set its face squarely against what it conceived to be repudiation. This great episode was one major aspect of agrarian discontent in the '70's and '80's: it ran into problems in several fields of the law, and is far too complicated for quick summary. When the issue was one of receiving aid from taxation, the railroads argued that they were "public"; then when the question arose of the validity of statutes to regulate rates, the railroads contended that they were "private." Miller was able to speak for the Court in holding, in *Loan Association v. Topeka*,[30] that where a tax is laid for a purpose the courts do not recognize as "public"—in that case, to attract a bridge company—the statute will be held invalid, even without aid of any specific constitutional prohibition:

> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . .[31]

Attention has recently turned back to *Cummings v. Missouri*[32] and *Ex parte Garland*,[33] cases where the Court in 1867 struck down State and federal legislation that sought to exclude from the practice of a profession those who had participated in the Rebellion. Miller, speaking for the minority of four, argued that these measures should not be regarded as punishment after the event, but as valid regulations of professions in which the public had an interest. To his brother-in-law in Texas, who would take the benefit of the *Garland* decision, Miller wrote:

> I have felt bound by my clear convictions of law thus to vote and I am not sorry that the result is adverse to my opinion, on your account and generally because I think the requirement unnecessarily harsh at present.[34]

29. MR. JUSTICE MILLER at 231. The matter is discussed at length in c. 9, "The Mortgaged Generation".
30. 87 U.S. (20 Wall.) 655 (1875). The matter came up from a federal court in a case of diversity of citizenship, and Miller felt free to speak more expansively than would have been the case had only a question of federal constitutional law been presented.
31. *Id.* at 663.
32. 71 U.S. (4 Wall.) 277 (1867).
33. 71 U.S. (4 Wall.) 333 (1867).
34. MR. JUSTICE MILLER at 134.

As the incident illustrates, Miller respected the distinction between what is ultra vires and what is only unwise.

Also of renewed interest is *Kilbourn v. Thompson*,[35] one among Miller's great cases. The opinion—by its overtones more than by its holding—took a narrow view of congressional investigations. The actual decision was that the House was without power to compel the attendance of a witness in the investigation of a real estate pool in which a debtor of the Government had participated; the subject matter was judicial—not legislative—and was already pending before the proper court.

For a season—notably in the light of events in the 1920's—the "informing" function of each House of Congress stood in high favor, and accordingly *Kilbourn v. Thompson* was held in poor repute. Lately, one may notice, the old case is being cited with a certain wistful sympathy.

Miller's view of Congressional Reconstruction had led him to regard the legislature as the least reliable branch of government. Thus in 1867 he had written:

> The strain upon constitutional government, from the pace at which the majority is now going, is one which cannot be much longer continued without destroying the machine. Yet as long as there is southern resistance, there is no power in the north capable of arresting the onward course of public affairs.[36]

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35. 103 U.S. 168 (1880). Miller's letter of Mar. 20, 1881, discloses that the thought of a majority of the Court, his own included, went a good deal further than what was said in the unanimous opinion.

> I think if you had had the opinion before you so as to examine it again you would have seen that there was a careful and avowed avoidance of the ground which you have discussed, namely, the power of one house to compel by punishment witnesses to appear and answer questions which may throw light on the legislative duties of those bodies. The reason of this was that on that point the court was not united, and dealing as we were with the asserted privileges of one of the most important coordinate branches of the government, it was very desirable to have unanimity in the court, as well as to decide no more than what was necessary. It was partly due to my conservative habit of deciding no more than is necessary in any case, that I was selected to write the opinion. MR. JUSTICE MILLER at 333.

Similarly in commenting on his opinion for a unanimous Court in Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872) (allowing recovery for the flooding of land, in a case where the Court had had to consider a number of holdings that there was no redress for injuries consequent upon works of public improvement), Miller made this explanation:

> I shall inclose with this a revised proof of an opinion just delivered by me on a subject much considered by the Court, and in which as you will see I was hampered by the desire to get unanimity. The majority were willing to have gone considerably further than the opinion goes if I had urged it. But I have always held in the Conference room that where unanimity can be had on a proposition sufficient to decide the case it ought to be done, and though I have always had a strong conviction in the direction indicated by the opinion, I submitted to the limitation which it contains. Letter of Mar. 9, 1872.

36. MR. JUSTICE MILLER at 138.

And in 1868:

> [I]n the threatened collision between the Legislative branch of the government and the Executive and judicial branches I see consequences from which the cause of free government may never recover in my day. The worst feature I now see is the passion which governs the hour in all parties and all persons who have controlling influence. In this the Supreme Court is as fully involved as the President or House of Representatives.[37]

Miller's rather poor opinion of Congress' performance was inspired in part by the persistent unwillingness to enact legislation to give the federal judiciary, and especially the Supreme Court, relief adequate to the tremendous expansion of judicial business after the Civil War. In 1870 he wrote:

> [I]t makes my heart sick to undertake to get any legislation through Congress that does not partake of a political character or does not involve moneyed considerations sufficient to press it forward by its own weight.
>
> It is a shame, but it is an almost hopeless task. Matters concerning the judiciary are particularly so, because the legislation of the war and reconstruction have [sic] made the judiciary committees of both houses, the political committees, and the politicians *par excellence* alone are found on them.[38]

He himself put forward a measure that would have reduced radically the resort to the Supreme Court. His disappointment was expressed in this letter of 1872:

> My bill which passed the House hangs fire in the Senate Committee which is a Committee of all the talents and all the politicians and all the elements of discord, and is the greatest nuisance of its kind in either House of Congress.[39]

His own conception of values is expressed in this passage from an article on *Judicial Reforms,* in 1872:

> [I]t is remarkable, that those who are afraid to increase the sum which in a civil case admits of appeal, have never advocated any change in the law which refuses to a man, whose life or liberty has been forfeited by the judgment of a single judge, any review of his case, either by appeal or writ of error. If we were at liberty to choose, we would much prefer a system which gave an appeal in cases involving property rights only where the sum in controversy amounted to $10,000, and which at the same time gave to every man on whom the sentence of death or imprisonment was passed a writ of error, to the present system which denies to the latter any review whatever, and gives it to property rights involving only $2,000.[40]

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37. *Id.* at 140.
38. Letter written in spring of 1870.
39. Letter of Apr. 23, 1872.
40. 6 WESTERN JURIST 49, 57 (1872).

Eventually Congress came around to what Miller in 1872 had described as "the plan which has always had my preference, an intermediate appellate court in each circuit. . . ."[41] That was the Circuit Courts of Appeals Act of 1891. But Judge Miller did not live to take the benefit from that relief: returning from his circuit in October 1890, he collapsed in Thomas Circle, within sight of his home, and died three days thereafter.

Quite aside from these matters of the jurisprudence and the business of the Supreme Court, Justice Miller offers much of current interest to the working lawyer and judge. Buried in a little book entitled *Rhetoric as an Art of Persuasion, From the Standpoint of a Lawyer*[42] may be found a letter from Justice Miller on the topic, "the statement of the case." It expresses Miller's sense of the importance to the advocate of "choosing the ground on which the battle is to be fought." Since the letter is worthy of preservation, I set it out at length:

> The meaning of this phrase ["statement of the case"] is such a preliminary statement to the judge or jury of the matters of law or of fact, or of both, as will enable the persons addressed to comprehend the nature of the questions to be discussed, and the main proposition on which the speaker relies to establish his case. These are afterwards amplified, illustrated, and sustained by references to testimony, to the inferences to be deduced from that testimony, and to principles of law involved in the case, supported by appropriate citations of authority.
>
> But to enable the judge or jury to understand fully, and appreciate correctly, the force and value of the more elaborate argument, it is necessary in the first instance to give a clear view of the aspect of the case; of the matter to be decided, and of the elements of which that decision must be composed. This object is not successfully attained either by the announcement that certain abstract questions of law are necessary to be decided in the judgment to be rendered nor that certain items of evidence will be introduced.
>
> The counsel whose duty it is to make the opening statement for his side of the case, should have a clear theory of that case; a theory around which he should group all the facts which he admits as established for the other side, and those which he intends to rely on as proved by his own. And while he need not in terms state what that theory is, his statement of the case should conform to it strictly; should suggest it to the mind of the court or jury, with such a distinct and clear perception of it, that the legal propositions appropriate to counsel's view of the case seem naturally to arise out of the statement.

41. MR. JUSTICE MILLER at 404.

42. At 38-40. This book "by a lawyer," published in 1880 by Mills & Co., law publishers at Des Moines, was actually written by Daniel F. Miller of Keokuk. 14 WESTERN JURIST 569 (1880). This man had been a member of the Thirty-first Congress (seated Dec. 20, 1850). When Samuel F. Miller was urged upon Lincoln in 1862, the President asked "if he was the same man who had some years before made a frontier race for Congress from the southern district of Iowa, and had trouble about the Mormon vote." Miller in Iowa had been unknown to Lincoln in Illinois. After the appointment was made, the same confusion occurred in the press. MR. JUSTICE MILLER at 49, 51.

> It is such a statement as this, that has given rise to the remark, almost become trite, of many eminent lawyers: "That their statement of the case is more convincing than the full argument of other men." The faculty of doing this in perfection is rare; but cultivation and close attention to the best models, and an effort to discover what such a statement is, and what it is not, will be rewarded with a reasonable degree of success in any well regulated mind.
>
> It is also important to understand that a chronological, or other detailed statement of the evidence, with numerous dates, and names of witnesses, is *not* such a statement. Nothing is such a statement which the mind of an ordinary man cannot carry with him, and remember without taking notes. No reference to cases and pages in law books, nor any abstract announcement of legal propositions unconnected with the facts to which they are to be applied, will answer the requirement. The propositions of law and of fact on which counsel rely must be stated so as to show clearly their relation to each other, and be so plainly expressed as to present a chart of the road to be traveled, without a map in detail of the country through which that road is to go.
>
> I wish to express my cordial approval of the remarks under the head of fallacies, as to the effect of counsel being carried away from the strong points of their case by the art of an opponent who insists upon discussing other matters.
>
> My experience teaches me that more sound lawyers and able advocates are misled by this artifice, to the prejudice of their cases before the court and jury, than by any other.
>
> Such has always been my opinion of the value of choosing the ground on which the battle is fought, that when at the bar, it was my practice contrary to that of most lawyers who had the right of choice, to open the argument, rather than close it, where two speeches were to be made on the same side.
>
> A skillful lawyer in opening a case will often be able to throw so much doubt around a clear matter, or give so much importance to an immaterial one, that his unwary opponent follows him into the web of sophistry, when he could have stood secure on ground of his own selection.

It was recalled of Miller at the bar that "he grasped at once the theory of the [Iowa] code of practice . . . and in this respect his court papers were an education to the younger bar."[43] It was fortunate that in 1851—the year after Miller went to Iowa—the Legislature adopted a new and rational code of civil procedure.[44] Years later, in addressing the Bar Association of the State of New York, Justice Miller looked back on the movement for procedural reform, represented by the draft code on that subject prepared by David Dudley Field. In New York, he recalled, it had encountered "the hostility of a profession which shrinks from innovation as from a plague. . . . Outside of this State, it has met with as general approval, wherever it has been tried,

43. 1 STRONG, ANNALS OF IOWA, 3 ser., 255 (1894). Strong was a well-trained and able lawyer, and a life-long friend of the Judge.

44. Part of the Code of Iowa enacted that year.

as any reform in the law can be expected to meet."[45] He recalled what had been done by his own state by its legislation of 1851:

> The chapter on pleading contained 33 sections and that in regard to trials, 63, and both of them occupied seven pages of the book. The first section declared that "all technical forms of action and of pleading are hereby abolished." A few general definitions of the nature of pleading, and provisions for the correction of errors and mistakes followed, and the courts were but to apply to this skeleton the principles of the science of pleading, which are of universal acceptance under all systems of practice. The courts and the lawyers, with few exceptions, conformed to the change in the proper spirit, and the result is that fewer practice cases are reported in the forty-eight volumes of Iowa Reports than in any equal number of such volumes in the United States. . . .[46]

He remarked how greatly the administration of federal justice would be facilitated by the enactment of "a short, a simple, and a uniform Code of Procedure."[47]

Of jury trial in civil cases, Miller once said that

> It requires all the veneration which age inspires in this mode of dispensing justice, and all that eminent men have said of its value in practice, to prevent our natural reason from revolting against the system, and especially some of its incidents.[48]

Returning to the subject some years later, he recalled that "my practice in the courts, before I came to the bench, had left upon my mind the impression that as regards contests in the courts in civil suits, the jury system was one of doubtful utility."[49] Continuing,

> This impression upon me, growing out of my practice, I have since come to think, however, was largely due to the fact that owing to popular and frequent elections of the State judges, and insufficient salaries, the judges of those courts in which I mainly practiced were neither very competent as to their learning, nor sufficiently assured of their position, to exercise that control over the proceedings in a jury case, and especially in instructing the jury upon the law applicable to it, which is essential to a right result in a jury trial. It may as well be stated here that a case submitted to the unregulated discretion of a jury, without that careful discrimination between matters of fact and matters of law which it is the duty of the court to lay before them, is but little better than a popular trial before a town meeting.[50]

In Miller's experience, a weak judge was more to be feared than a corrupt one. In his frank correspondence with his brother-in-law, at

45. 2 N.Y. STATE BAR ASS'N PROCS. 31, 48 (1879).
46. *Id.* at 49.
47. *Id.* at 50.
48. *Id.* at 41.
49. Miller, *The System of Trial by Jury*, 21 AM. L. REV. 859, 861 (1887).
50. *Id.* at 862.

the Galveston bar, there was often an exchange of views about federal justice in the Southern states. Sometimes a question would be raised whether a particular judge, or applicant for appointment, was honest. In that context Miller expressed the following reflection:

> My own observation has been that a competent man though open to approaches in a few great cases, is more tolerable to a lawyer in full practice than a weak, vacillating, or ignorant Judge, who never knows when he is right, and on whom you can never rely to stand firm when you have convinced him.[51]

Elsewhere he wrote:

> From my own experience I would say that the most disagreeable defect in a *nisi prius* Judge is the [want of intellectual capacity or moral firmness], when it leaves him perpetually open to renewed struggles on points decided, or subjects him to the control of bold and unscrupulous attorneys.[52]

One of Miller's juniors at the Iowa bar wrote in retrospect that

> He was almost invincible in argument in the higher courts, so that we younger men were inclined to feel that he appeared before the Judges *auctoritate doctissimi,* who treated his utterances as *responsa prudentum,* and that our learning was not fully appreciated.[53]

"Miller's method . . . was to cite few cases but to impress the court with the reason of the law."[54] In 1888, when he addressed the Law School of the University of Pennsylvania, Justice Miller talked to the students about his conception of *The Use and Value of Authorities.*[55] His remarks have lost nothing in timeliness:

> [I]n their printed arguments or briefs counsel frequently seem to forget the grave and burdensome duties of the courts to which they are presented. If it were not so common it would be a matter of wonder that counsel, in making what they call a "brief," or even in a printed argument, where a proposition of law is suggested as applicable to the case, should append to it from twenty to a hundred citations of adjuged cases, with their names and the books where they are to be found.
>
> It is very easy to see, in many instances, that counsel have simply abridged their own labor by attempting to transfer to the court the duty of examining this list of authorities, which they themselves have shirked, by copying from a string of cases found in a digest, and supposed to have reference to the proposition in question. I do not hesitate to say that in the condition of business in the courts of higher jurisdiction in this country, it

51. Letter of Jan. 28, 1872.
52. Letter of Mar. 9, 1872.
53. STRONG, *op. cit. supra* note 43.
54. *Ibid.*
55. 121 Pa. xix (1888).

> is an absolute necessity simply to disregard such a list as that. Unless the counsel who prepares these printed briefs or arguments has examined the cases for himself, and is capable of stating them in a condensed form, he has no right to expect an overworked court to do it for him, neither has he any right to cite or refer to a case the value and applicability of which he has not fully ascertained. It has often been stated, and it cannot be too strongly asserted here, that a few cases directly in point, and well presented, decided by a court or courts of high estimation, are far more valuable than the innumerable references to cases whose analogy is very remote, whose authority is not very high, and whose only weight would seem to be that of their number.[56]

"A court or courts of high estimation": Miller had a discriminating appreciation of the value of "authorities," based on the mental and moral quality of the men who were their authors. He said further:

> It has often been my fortune to listen to able counsel citing the decision of some very inferior judge or judicial officer as if it were entitled to control the action of the court which he addressed, and the observation has been forced from me, "Tell me what *you* think about this, for I esteem your opinion of much more value than that of the authority cited.[57]

Every year, at the close of the term, Justice Miller would collect important records and briefs and have them shipped to his brother-in-law. They both recognized the value of these books—as throwing light on the decision, and as a starting point in like cases. Lawyers generally—practitioners, judges, teachers—have been very slow in exploiting these important materials. Not until 1931 was the distribution of Supreme Court records and briefs governed by rule rather than by judicial favor.[58] In particular, authors of historical and biographical studies of the Court have ordinarily ignored the paper books.

Since to Miller's independent mind an "authority" must rest upon its reason, it follows that he took a somewhat liberal view of stare decisis. Of course he recognized the distinction between great questions of public right and matters where stability serves the highest good. One of the classic passages comes from his dissent in *Washington University v. Rouse*,[59] where he had renewed the old effort to establish the view that the power to tax—like the police power—was inalienable, even by express grant:

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56. *Id.* at xxvii, xxviii.
57. *Id.* at xxv.
58. Hallam and Hudson, *United States Supreme Court Records and Briefs: A Union List, with a Note on their Distribution and Microfilming.* 40 LAW LIB. J. 82 (1947).
59. 75 U.S. (8 Wall.) 439 (1870).

> With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned.[60]

The lawyer who bears Justice Miller in his thoughts will have a responsive and ever-helpful companion. Great in spirit, in mental power, in sense of right, and in patriotism, he was indeed a strong judge.

60. *Id.* at 444.