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SAMUEL FREEMAN MILLER

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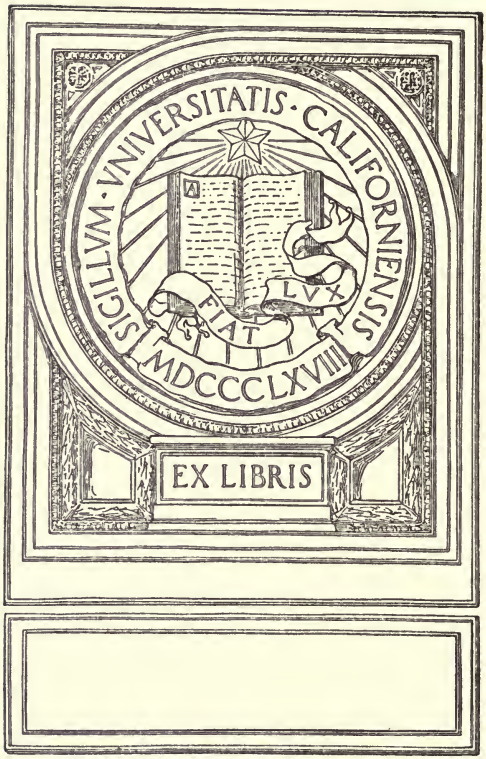
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SAMUEL FREEMAN MILLER

ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE
UNITED STATES 1862–1890

IOWA BIOGRAPHICAL SERIES

EDITED BY BENJAMIN F. SHAMBAUGH

SAMUEL FREEMAN MILLER

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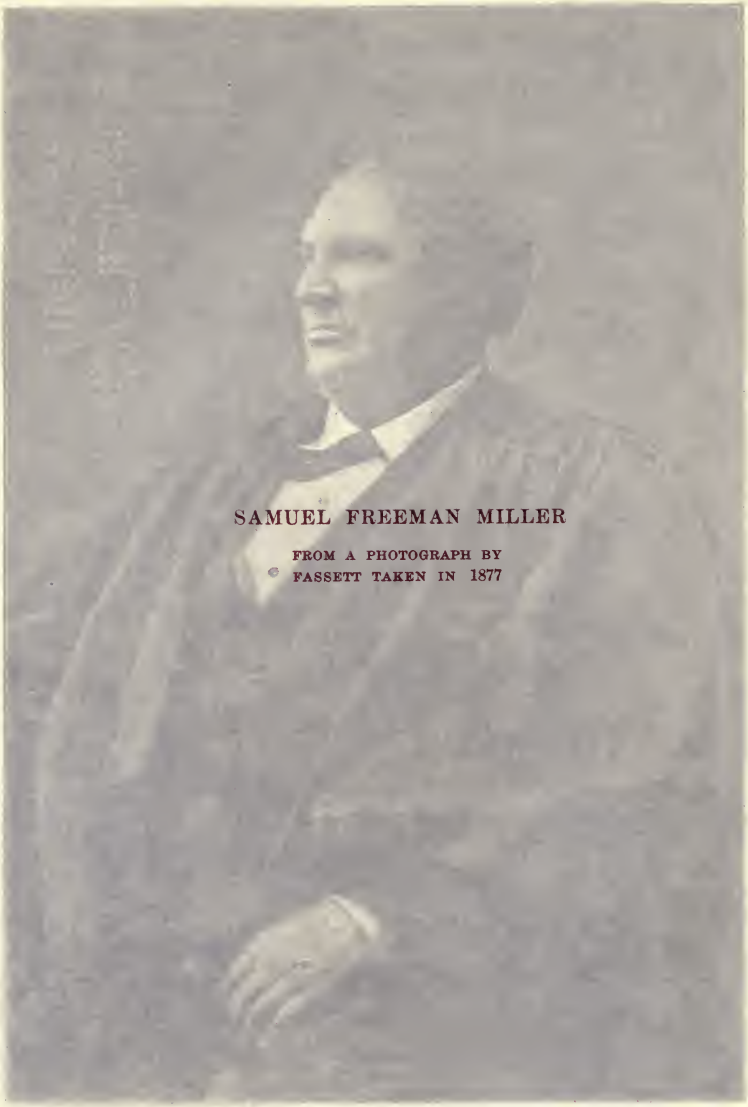
FROM A PHOTOGRAPH BY
PASSETT TAKEN IN 1877

CHARLES NOBLE GREGORY A.M. LL.D.

THE STATE HISTORICAL SOCIETY OF IOWA

IOWA CITY IOWA 1907



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CHARLES NOBLE GREGORY A.M. LL.D.

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EDITOR'S INTRODUCTION

THE career of Samuel Freeman Miller is that of an eminent jurist who for twenty-eight years served as Associate Justice of the Supreme Court of the United States. He was one of a group of men of commanding eminence (to which Grimes, Kirkwood, Harlan and Wilson belong) early contributed by the Commonwealth of Iowa to the public service of the United States.

For the biographer the life of a justice of the Supreme Court of the United States does not afford the same rich opportunities as surround the lives of those whose activities have been in the direction of legislation, administration, and the affairs of practical politics—albeit the historical importance of the work of the jurist is as significant in the growth of social institutions as that of the statesman.

Justice Miller's contributions to history are chiefly to our system of Jurisprudence —more especially to our Constitutional Law. And so his biography must very naturally be brief or consist of many digressions into the principles of the Common Law and of the Constitution of the United States. Happily the author of the biographical essay which follows has refrained from excursions into the field of Jurisprudence which must have tempted him at many points.

For those who desire first-hand knowledge of Justice Miller's views and opinions, four appendices have been added. These include three addresses and an exhaustive calendar of the cases in which Justice Miller wrote opinions while on the Supreme Bench. From this calendar it is interesting to observe that in the twenty-eight years of his Associate Justiceship, Mr. Miller is credited with seven hundred eighty-three opinions, of which one hundred sixty-nine are dissenting opinions. One hundred and

forty-one of his opinions relate to Constitutional Law.

Much of personal interest in the life of Mr. Miller was doubtless lost forever with the unfortunate destruction of his private letters and correspondence soon after his death.

BENJ. F. SHAMBAUGH

OFFICE OF THE SUPERINTENDENT AND EDITOR
THE STATE HISTORICAL SOCIETY OF IOWA
IOWA CITY

AUTHOR'S PREFACE

This essay on the life and services of Samuel Freeman Miller, Associate Justice of the Supreme Court of the United States, has been undertaken at the request of The State Historical Society of Iowa. It has been completed under many conflicting labors and is submitted with diffidence, especially to the many who bear Justice Miller in personal remembrance.

Nothing but casual notices and brief articles and addresses seems to have been printed concerning him up to this time. The writer was not so fortunate as to get either letters, journals, papers, information, or reminiscences from his kindred or surviving intimates, except that Judge Frank Irvine, Justice Miller's nephew, to whom grateful thanks are tendered, very obligingly gave such information as he had concerning the latter's family.

The facts here presented have been gathered from many sources and are, it is hoped, supported and supplemented by the *Notes and References* given in all important matters at the close of the text.

CHARLES NOBLE GREGORY

OFFICE OF THE DEAN OF THE COLLEGE OF LAW
THE STATE UNIVERSITY OF IOWA

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PLATES

I

Early Years[1]

In the history of the United States two periods must always excite especial interest: that of the revolt from England, and the consequent framing of an independent constitutional government; and that of the "Great Rebellion" of the sixties, and the consequent amendment of the Constitution, the extinction of slavery, and the vastly closer union of the States. Each had its leading figure, overshadowing all the others. Washington stands as the military and civil chief in the first; Lincoln as the civil chief in the latter period. There were certainly great men serving under Washington, but his predominance is unquestioned in both peace and war. Lincoln's predominance in peace is quite as undoubted, but Grant was the great military leader of the last struggle.

In another department of government, the Judicial, as Chief Justice Fuller has said, "Great problems crowded for solu-

tion." Each period presented new and almost overwhelming difficulties which were presently met in the former by the adoption of the Federal Constitution and in the latter by the far reaching amendments to it. Each period developed great jurists who were able to construe these documents, to determine these "problems" masterfully and in accord with the permanent judgments of men. The greatest of these in the period following the Revolution, especially in the construction of the new Constitution, was, beyond dispute, John Marshall, the revered Chief Justice. Without the rank or distinction which belongs to the Chief Justiceship, the controlling mind in the solution of the momentous questions of constitutional construction during the Rebellion and the period of Reconstruction, involving the scope and meaning of the great amendments,[2] was Samuel Freeman Miller, of Iowa, Associate Justice of the Supreme Court of the United States, the subject of this essay.

Samuel Freeman Miller was born at Richmond, Kentucky, April 5, 1816, as Judge Embry said after his death, "twenty-four miles from the home of Henry Clay, and

twelve miles from the historic spot where Daniel Boone laid the first rude foundations of civilization on the soil of Kentucky."[3] He was a poor boy, the son of a farmer of German ancestry who had emigrated from Pennsylvania to Kentucky in 1812 and married there the daughter of a family which had come to Kentucky from North Carolina. The first twelve years of boyhood were spent on his father's farm. After that, and until he was fourteen years old, he studied at the schools of Richmond, including a high school spoken of as "excellent." He left school to work in a local drug store as a clerk. There medical books fell in his way and he read them eagerly, planning to become a physician. In 1836 he entered the Medical Department of Transylvania University (now the University of Kentucky), and graduated therefrom in 1838. He went back to Richmond to practice his new profession, but shortly removed to Barboursville, Knox County, Kentucky, a little settlement of four hundred inhabitants in the mountains, not far from Cumberland Gap and near the Tennessee and Virginia borders. There he practised as a country doctor with no competition for over ten years,

riding day and night, with his drug store in his saddle bags, over the rough mountain roads of that sparsely settled region, to minister to the sick, where none were rich and most were very poor.

Certain influences began, however, to alienate him from this useful but obscure vocation. A debating society in Barboursville seems to have offered its principal social and intellectual diversion, and there Miller discovered and exercised logical, and controversial powers which gave him the leadership. He shared the office of a local lawyer[4] and began to look into law books. Gradually his interest and his ambition turned away from the medical profession until he felt an utter aversion to it. During these years he filled his unoccupied time by reading law (doing this secretly lest it injure his medical practice), and in 1847 was at last admitted to the bar, when over thirty years of age.

He was an enthusiastic follower of Cassius M. Clay.[5] And, more for the sake of the Whites than from sympathy for the Blacks, he was strongly opposed to slavery. He entered politics, and seems to have been a candidate for County Attorney. Then he

sought to be chosen a delegate to the State Constitutional Convention, but seems to have been supplanted by another candidate from his own county. He vigorously supported Gen. Taylor for the Presidency. Taylor was elected and Kentucky gave him its twelve electoral votes; but the attempt to amend the State Constitution so as to do away with slavery failed, and Miller, who had with characteristic vehemence supported it, was at outs with his party and his community. He decided that he would no longer live in a slave State.

Mr. Miller was now nearly thirty-five years old, married, and the father of two children. In 1850 he took his slaves with him to Keokuk, Iowa, and there with uncalculating generosity, emancipated them. In Keokuk he established a home and opened a law office. With surprising rapidity, he attained a leadership of the bar of the State and of the new Republican party with which that State has been so conspicuously identified. There was not then a mile of railroad in the State of Iowa, as Miller long after wrote. He entered into partnership with Lewis R. Reeves;[6] and later, on Mr. Reeves's death (in 1854), having been some

time a widower, he married Mrs. Reeves as his second wife.

As Judge Woolworth, of Omaha, his intimate friend and associate said: "It was a favorite theory of Judge Miller that a country town is the best place for a young lawyer. He valued its opportunities for reflection and study; its close and sharp contact with various characters; the development of individuality which it favored. He thought these conditions aided the slow and therefore solid growth of self-dependence and force of character which make the strong lawyer. These advantages he often set off against those of the large city and gave them preference."[7]

The force of his personality and his power of application were equally extraordinary; and within ten years he was generally considered "the ablest man of his age at the bar in his state," though but little known beyond its borders. Mr. Attorney General Miller, in addressing the Supreme Court at the time of Justice Miller's death said: "In 1862, President Lincoln found Mr. Miller in Iowa, as a few years before the country had found Mr. Lincoln in Illinois, devoting his life to a somewhat obscure and unre-

munerative, though for the place and time, successful practice of the law.'"[7]

In the many eulogistic addresses delivered and articles printed concerning him at his death, it is often stated that he steadily declined all political office and devoted himself consistently and exclusively to his profession. This is a common euphemism concerning eminent men, and in this, as in most cases, it seems to be untrue. His political activity in Kentucky we have mentioned. Hon. Elijah Sells, formerly Secretary of State of Iowa, has printed a letter saying that Mr. Miller was a candidate for Governor of Iowa when Governor Kirkwood was nominated a second time, and that Miller appealed to Sells earnestly for help, saying: "You can nominate me if you will. You were for Kirkwood before, you ought to be for me now." Mr. Sells says Kirkwood was nominated and Miller's friends then tried to induce Sells to be a candidate against him.[8]

Governor Kirkwood was reëlected by an overwhelming majority, and later became Senator of the United States and Secretary of the Interior.[9] Miller, writing of his old rival in 1889, says: "He has now retired

from public life and is enjoying a well deserved rest, with a popularity not surpassed among the citizens of the State.'"[10]

Kirkwood, while Governor, aided in securing Miller's appointment to the bench, and thus removed from the State a dangerous and powerful political rival.

Laurels are seldom of spontaneous growth in our public life. They have generally been vigorously cultivated for years by the sweat of the brow which they at last adorn. It was plainly so in Miller's case.

II

Appointment to the Supreme Court of the United States

In 1862 the Supreme Court of the United States was reorganized as to its circuits;[11] and two vacancies in the court were created by the death of Mr. Justice Daniel and the resignation of Mr. Justice Campbell.[12] The passage of the act of reorganization was said to have been delayed by the rival claims of aspirants from the different northwestern States for the judicial seats to be filled. Mr. Miller had secured the recommendations of the bars of his State and of Minnesota, Kansas, and Wisconsin.

The *National Cyclopaedia of American Biography* says, speaking of his appointment to the bench, that Mr. Miller was personally on terms of warm friendship with Mr. Lincoln, but that "it was not this alone that brought to him this high position."[13] This seems erroneous. The Hon. John A. Kasson, formerly member of Congress from Iowa and our Minister to Austria and

Germany,[14] has printed a letter in which he says that Mr. Miller was recommended for appointment by the bars of several States in the northwest circuit, and he adds: "When, at his request, I called on President Lincoln to ascertain the cause of delay in his nomination, I found that his reputation as a lawyer had not then even extended so far as to Springfield, Illinois, for the President asked me 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." Mr. Kasson corrected this impression and told the President that he deemed impartiality and equanimity essential qualities of Mr. Miller's mind, and that "nature herself had fitted him for the administration of justice."[15]

Mr. H. W. Lathrop published, after Judge Miller's death, an account of an interview with President Lincoln in his behalf shortly before his appointment, which he says was during the war when the President was called upon frequently to make military appointments. During the pendency of the matter, "while Governor Kirkwood was presiding over the affairs of the

state, he happened to be in Washington, when he was invited by Senator Harlan, in company with a couple of the representatives from this State, to call upon Mr. Lincoln and urge the appointment of the Justice. In calling upon him they found him sitting sidewise at his writing table, with his long legs around each other in a grapevine twist, and after a little formal conversation, Mr. Harlan, as spokesman of the callers, said: 'We have called Mr. President, to see you again in regard to that appointment, as we are anxious that it should be made,' to which the Governor added, 'It is one that would give great satisfaction to the people of Iowa, and is, we think a very fit and proper one to be made.' Thus far no office nor the name of the man to fill it had been mentioned, Mr. Harlan and those with him, supposing that the President knew what office and to what person for it they alluded. Mr. Lincoln, relieving his legs from their accustomed twist, turned around to his table, picked up his pen, and drawing a paper to him as if to make the appointment in compliance with their wishes, said to them, 'what is the office, and whom do you wish to be placed in it?' Mr. Harlan replied 'We

wish to have Mr. Miller of Iowa chosen by you to the vacancy on the Supreme Bench.' 'Well, well,' replied the President, replacing his pen and pushing back his paper, 'that is a very important position, and I will have to give it serious consideration. I had supposed you wanted me to make some one a Brigadier General for you.' " The callers left with no assurance as to their success.[16]

Mr. Miller in August, 1888, wrote a letter to Mrs. Grimes, widow of Senator James W. Grimes,[17] in which he gave some interesting particulars concerning his appointment. He says: "At the time of my appointment, there were then in Congress from Iowa, June, 1862, Senators Harlan[18] and Grimes, and Mr. Wilson, now in the Senate, but then in the House of Representatives, and the only member of the House then in Washington.[19]

"My appointment was known to depend upon such an arrangement of the Judicial circuits by a bill then pending in Congress, as would include Iowa in a circuit entirely west of the Mississippi river. To this end all three of the gentlemen named contributed their best efforts, but Mr. Wilson, being on

the Judiciary committee of the House, to which the bill was referred, was especially efficient. As soon as the bill was passed as they desired, Mr. Grimes drew up in his own handwriting a recommendation of my name for one of the two places then vacant on the Bench of the Supreme Court, to be laid before the President. This he signed, and assisted by Mr. Harlan, the other Iowa Senator, procured twenty-eight (28) of the thirty-two senators then in Congress to sign it also, the latter number (32) being all that was left of that body after the secession of the Confederate senators. Mr. Wilson circulated a similar recommendation in the House of Representatives, and it received the signatures of over one hundred and twenty (120) members, which was probably three fourths of those in attendance.

"I do not know or remember who presented these petitions to the President, but he afterwards said in my presence that no such recommendations for office had ever been made to him."[20]

The recommendations were successful, and President Lincoln almost at once (July 16, 1862, at 9. P. M.) sent the nomination of Mr. Miller to the Senate, by which it was

promptly and unanimously confirmed. His commission dated from the day last given and he took his seat in December of that year. Mr. Miller was the first Justice of the Supreme Court of the United States ever appointed from beyond the Mississippi, as the late Col. David B. Henderson, of Iowa, was the first Speaker of the House of Representatives from the western side of that great river.[21]

It is, perhaps, of interest to recall that President Lincoln's appointees to the Supreme Bench were five in number and all from the West: Justices Swayne, Miller, Davis, Field, and Chief Justice Chase.[22] President Roosevelt's two appointments, on the other hand, have gone one to the West (Justice Day) and one to New England (Justice Holmes).[23]

The appointment of Justice Miller met with high favor, as was natural, in the community where he was best known; but his name seems to have been wholly unrecognized by the eastern press. Thus *The Weekly Gate City,* a newspaper of Keokuk (Justice Miller's home), in an editorial concerning the appointment published July 23, 1862, said of him: "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." On the other hand the *New York Tribune* of July 26 discusses the appointment and says editorially: "Mr. Miller's name is printed 'Samuel' in the dispatches, but we presume it is Daniel F. Miller, the first Whig Member of Congress ever chosen from Iowa." And it says further that no appointment had yet been made to the other justiceship vacant, but mentions "Daniel" Davis, of Illinois, as a candidate, undoubtedly meaning David Davis who later received the appointment.

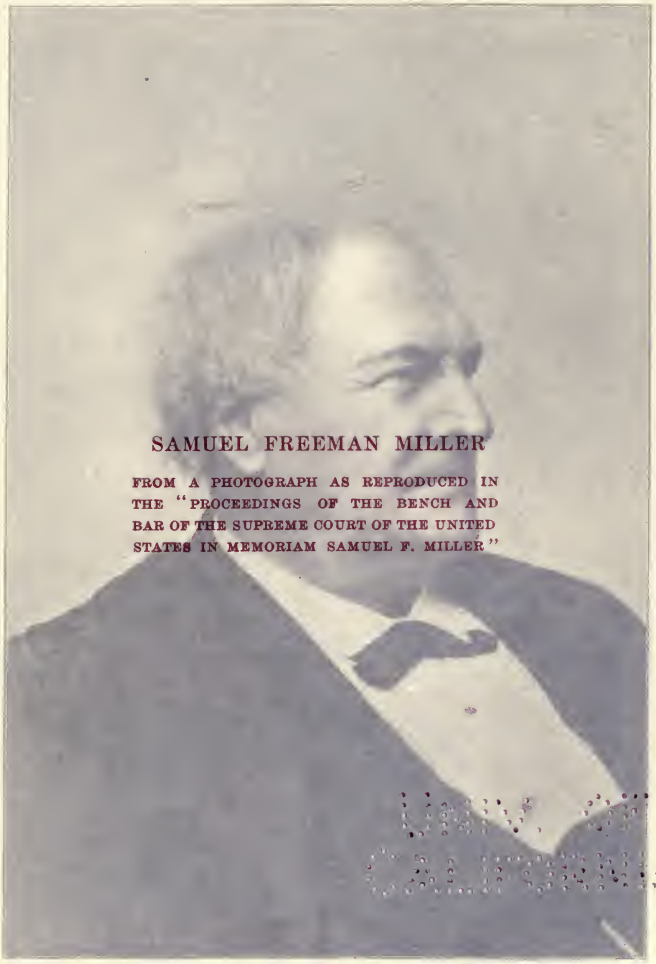
The circumstance shows how unfamiliar each name was in the East. Yet, from the time of the taking his seat until the time of his death, Justice Miller was regarded, not perhaps as the most enlightened, certainly not the most learned, but, it is believed, as the strongest man on the bench, and as one who united integrity with conviction.

III

Associate Justice of the Supreme Court of the United States

Justice Miller's preparation for his great office consisted of ten years of practice as a country doctor and twelve years as a country lawyer. It seemed most inadequate, and this must have been obvious to himself. However, he always insisted that his medical studies had been of great service to him in preparing him by the pursuit of natural science to systematically take up the mastery of law.[24] He seems to have resolved to overcome this lack, and so with remarkable industry and power of assimilation he now went through every reported case decided by the Supreme Court of the United States from its institution until he took his seat, reading and re-reading them until his mind had fully appropriated them.[25]

In the case of *Calais Steamboat Company* v. *Van Pelt's administrator* (2 Black, p. 393), we find his first printed opinion—a



SAMUEL FREEMAN MILLER

FROM A PHOTOGRAPH AS REPRODUCED IN THE "PROCEEDINGS OF THE BENCH AND BAR OF THE SUPREME COURT OF THE UNITED STATES IN MEMORIAM SAMUEL F. MILLER."

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In the case of *Calais Steamboat Company* v. *Van Pelt's administrator* (2 Black, p. 393), we find his first printed opinion—a

brief, positive dissent, covering about a quarter of a page. Chief Justice Fuller said at Justice Miller's death: "His style was like his tread, massive but vigorous. His opinions from his first in the Second of Black's Reports, to his last in the One hundred and thirty-sixth United States, some seven hundred in number (including dissents), running through seventy volumes, were marked by strength of diction, keen sense of justice, and undoubting firmness of conclusion."[26]

Judge Woolworth said: "His first opinion, in the Wabash case reported in 2 Black, and his last *in re* Burrus, the last of the judgments of the last term, reported on the last page of 136 U. S., not only bear traces of the same hand, but they are not greatly unequal in accuracy of statement, force of reasoning, and that felicity of judicial style which make his judgments models of such compositions."[27]

He early identified himself with the construction of the Constitution, and more often than any other justice he was assigned to prepare the opinion of the Court in constitutional cases. He, himself, told Hon. John A. Kasson "that he had given during

his term on the bench, more opinions construing the Constitution, than all which had previously been announced by the court during its entire existence."[28]

There were, during his service, far more experienced lawyers and more eminent legal scholars upon the bench (as in the case of Mr. Chief Justice Taney and Mr. Justice Gray), but there was no so positive a character. He had no doubts. With honest and unfaltering, and it may be added justified, self-confidence he sought to solve the many profound and difficult questions presented by the circumstances of the Rebellion and the succeeding Reconstruction.

Lord Mansfield said, as became a great Judge: "I never like to entangle justice in matters of form and to turn parties round and round upon frivolous objections, where I can avoid it";[29] and Miller's mind was like his in this respect. It was sometimes said of him, as the Attorney General recalled at his death, that "he was wont to sweep away the law in order that justice might prevail."[30] He was often impatient of the distinctions made by the law when he thought them artificial, and was, for instance, never reconciled to the legal differ-

ences between real and personal property. On such points as this, his learned associate, Mr. Justice Gray, used to lament, perhaps unnecessarily, that a mind of such power and aptitude had not been duly grounded in the law.

Hon. Joseph H. Choate said of Justice Miller at the time of his death: "He took his place upon the bench at a time when one half of the country was excluded from any participation in its affairs, and he sat there during the whole period that has followed, until at last it would appear that by his aid almost every question of irritation and division that could possibly arise between different sections and interests of the American people had been finally set at rest."[31]

Chief Justice Fuller admirably said of Miller: "The suspension of the habeas corpus; the jurisdiction of military tribunals; the closing of the ports of the insurrectionary States; the legislation to uphold the two main nerves, iron and gold, by which war moves in all her equipage; the restoration of the predominance of the civil over the military authority; the reconstruction measures; the amendments to the Constitution, involving the consolidation of the Union,

with the preservation of the just and equal rights of the States—all these passed in various phases under the jurisdiction of the Court; and he dealt with them with the hand of a master.''[32]

Justice Miller made often but slight reference to preceding decisions, but stated his own conclusions clearly and with an accent almost of contempt for any other view. These opinions had none of the high lucid persuasive amenity of Marshall, but they were direct, vigorous, positive, and withal honest.

He is thought to have held the line very steadily and firmly between State and Federal power and competency. For instance, he held that a United States Marshal who levies a writ of attachment upon the goods of the wrong man may be sued for the trespass in the State courts and there made to respond in damages;[33] and in the so-called *Slaughter House Cases,*[34] in one of his most famous opinions, he held that the State of Louisiana could grant to a corporation the exclusive privilege of maintaining stock yards and slaughter houses in a region including the city of New Orleans and nearly twelve hundred square miles of territory,

and could close all other such yards and houses within such territory and forbid them further operation, that such a grant of monopoly violated no provision of the amended Constitution and was not taking property without compensation or denying the equal protection of the law, but was a mere police regulation over which the State had plenary authority.

In the very last opinion written by Justice Miller in the Supreme Court,[35] he held that a District Court of the United States has no authority in law to issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grandparents, holding that the "custody and guardianship by the parent of his child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them . . . . that the relations of father and child are not matters governed by the laws of the United States and that the writ of *habeas corpus* is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction."

On the other hand, he denied the power to

the State to authorize a municipality to contract debts or levy taxes for other than a public object, and therefore held city bonds issued to aid a private manufacturing enterprise, even when sanctioned by a State statute, void.[36] In this case he used the following language—perhaps as often quoted as any of his utterances:

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case

of McCulloch v. The State of Maryland, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. A 'tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citi-

zen by government for the use of the nation or state.' Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

The foregoing passage has been constantly referred to by writers and speakers in favor of free trade as showing the inherent injustice and unconstitutional tendency of a protective tariff.

So he upheld strongly the power and duty of the Federal Executive to protect the Federal judges in the discharge of their duty, and wrote an opinion holding that a special deputy marshal might be assigned to attend a Justice where there was just reason to believe him in danger while executing his office, and that such deputy might take life if necessary in defending his charge. He held further that the act of such deputy would then be his official act as a Federal officer in discharge of duty, and that the Federal courts could and should discharge him on *habeas corpus* from the custody of a State court wherein he was held in a criminal prosecution for such act. This was in the famous case of *In Re Neagle,*[37] where such deputy in protecting the venerable

Justice Field from a murderous assault by David S. Terry shot and killed the latter.

Justice Miller's views which were first expressed as dissenting opinions not unfrequently were ultimately adopted by the Court and became its prevailing decisions in affairs of the greatest scope. Thus, in opposition to the platitudinous Chief Justice and the majority of the justices, Miller maintained, in *Hepburn* v. *Griswold,*[38] the power of the Federal government to make its paper notes legal tender for the discharge of all obligations past or future, supporting himself largely by the opinions of Marshall. The views of Miller, as is well known, prevailed in the later decisions,[39] and the earlier case was, on this point, overruled. He is believed to have aided in shaping the statutes in question[40] and to have frequently advised the various administrations in legal matters.

In the same way Miller dissented from the doctrine affirmed by the majority, in *State Tax on Railway Gross Receipts,*[41] that a State could tax the gross receipts of a railway operating an interstate business. He said: "I lay down the broad proposition that by no device or evasion, by no form

of statutory words, can a state compel citizens of other states to pay to it a tax, constituting a toll, for the privilege of having their goods transported through that state by the ordinary channels of commerce." This view seems sustained by the later decision of *Philadelphia & S. Steamship Company* v. *Pennsylvania,*[42] where the former decision is questioned and in part disapproved.

Mr. William A. Maury, in an article upon Justice Miller contributed to *The Juridical Review* of Edinburgh (January, 1891), finds in Miller's mind a "happy union of originality and conservatism," and thinks that his opinion in the *Slaughter House Cases,* and in *Murdock* v. *Memphis*[43] especially exemplify the conservatism. The question involved in the latter case was the construction to be given to the act of February 5, 1861, amending the Judiciary Act of 1789. It was contended that, under the language of this amendment, the Supreme Court of the United States, when reviewing the proceedings of a court of last resort in which a Federal question was claimed to be involved, should consider all the questions involved, Federal or otherwise, and render

final judgment in the whole case. It was also urged that it could consider only the technical record of the State court. The majority of the Court held (Miller writing the opinion) that the Supreme Court might look not only at the record but also at the opinion of the State court to determine the questions actually decided; that it was essential to the jurisdiction of the Federal Supreme Court; that a Federal question was raised and presented to the State court and decided by it against the plaintiff in error; that this appearing, the decision would be examined to ascertain whether the Federal question was correctly adjudicated, if so, judgment would be affirmed, if not, then, if there were other issues broad enough to maintain the judgment and proper for determination by the State court, it must still be affirmed without reviewing the soundness of the rulings on such other questions; and that if the Federal question must control the whole case, then the Federal Supreme Court would reverse if it had been erroneously decided and either render such judgment as the State court ought to have rendered or send the case back to that court for further proceedings.

Justices Clifford, Swayne, and Bradley, three out of the eight Justices participating, dissented. Chief Justice Waite took no part, as the case was argued before his appointment. The effect of a different holding would have been to almost destroy the independence of the State judiciary. Even as to questions in no way involving the "Constitution, laws, or treaties of the United States" wherever a Federal question was in any way raised in connection with matters fit for State cognizance, the Federal review of the whole case would have been possible.

Justice Miller, throughout the critical period of his service, stood like a rock for the powers of government in general; but while determined to find for the national government all that was necessary for its adequate maintenance, he was equally resolved that the State governments should not be destroyed or unnecessarily crippled. In other words he thoroughly accepted and in our court of last resort loyally maintained with unswerving conviction and dominating personality our constitutional form of government; and his judicial leadership from 1862 to 1890 was of paramount importance in

preserving its integrity. A war the most bloody and most costly of modern times had been fought for State Rights. They had lost in the trial by battle; and the most just and reasonable claims of independence on the part of the States shared the odium of those which led to the contest. The questions arising went of necessity to the Federal Supreme Court; and there Justice Miller, a Southerner who had left the South for principle's sake, "a mastiff-mouthed man", to use Carlyle's phrase, held the field against all comers for the doctrine that the Federal government should be maintained in vigor and efficiency, but that the State government should neither perish nor sink into insignificance. His was an inestimable service if we value our frame of government.

Marshall wrote the opinion in *Marbury* v. *Madison*,[44] holding that executive officers in the United States could be compelled by mandamus to discharge ministerial duties which they were bound to perform and as to which they had no discretion. Justice Miller wrote the opinion in *United States* v. *Schurz*,[45] applying this doctrine to the case of Hon. Carl Schurz, Secretary of the

Interior, who after a land patent had been signed by the President and recorded in the Register of Patents made an order that it should not be delivered. The proper district court was authorized to issue a writ to compel Mr. Schurz to deliver this patent, and it was held he had at this stage no power over the title and no right to retain the patent. Mr. Schurz had acted in accordance with precedent which was thus corrected. The Chief Justice and Justice Swayne dissented. In a supplemental opinion, also written by Justice Miller, it was held that Mr. Schurz must be adjudged to pay the costs of this proceeding.

In *Johnson* v. *Towsley*[46] and *United States* v. *Throckmorton*[47] Justice Miller wrote the opinions upholding the conclusiveness of the action of the land officers in issuing patents, but scrupulously preserving to those injured the right to equitable relief in private suits on the ground of fraud or deception practised upon the unsuccessful party. These judgments were most substantial contributions to the foundations of land titles, which in much of the country rest wholly upon such government patents.

As an example of Justice Miller's desire and ability to do away with technical and artificial rules, one may cite his opinion in *Lovejoy* v. *Murray*[48] in which he held that the recovery of a judgment against one of several joint and several trespassers was no bar against another for the same trespass, holding "the whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning"; and again, that while the principles invoked "may well be applied in the case of a second suit against the same trespasser, we do not perceive its force where applied to a suit brought for the first time against another trespasser in the same matter." This wholesome decision was cited to the English court of Common Pleas in *Brinsmead* v. *Harrison;*[49] but, though referred to with great respect by the judges, they characteristically adhered to the more technical English view and declined to follow it.

When in 1877 the serious contest arose between Mr. Hayes and Mr. Tilden as to the Presidency, involving controversy as to the electoral votes of Louisiana, Florida, and South Carolina, and as to one elector from Oregon, Congress passed a bill for a

presidential electoral commission consisting of five Senators, five Representatives and five Justices of the Federal Supreme Court. Four of the Justices were named (by their circuits) in the act, and Justice Miller of the Eighth was one of these; and these four chose as the fifth, Justice Bradley.[50]

From the first Justice Miller, as was inevitable from the type of his mind, took an active and imperious part with the Republican majority, pressing for expedition and exclusion of testimony and acting throughout with the eight commissioners who outvoted the seven. It need not be alluded to as a judicial service, but it was a political service for which his undoubting and resolute disposition especially fitted him.

IV

Miscellaneous Writings and Addresses

Justice Miller delivered from time to time addresses before bar associations, law schools, universities, and various public bodies which were, of course, well received. Both his office and his ability assured that. Thus, he gave the address before the New York Bar Association in 1878[51] and poured upon our jury system some of that contempt which a distinctly arbitrary judge is apt to feel for any impediment to his own will. "It requires", he said, "all the veneration which age inspires for this model 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. If a cultivated oriental were told for the first time that a nation, which claims to be in advance of all others in its love of justice and its methods of enforcing it, required as one of its fundamental principles of jur-

isprudence, that every controversy between individuals, and every charge of crime against an offender should be submitted to twelve men without learning in the law, often without any other learning, and that neither party to the contest could prevail until all the twelve men were of one opinion in his favor, he would certainly be amazed at the proposition." The writer would suggest that we may, however, bear with equanimity the amazement of the "cultivated oriental" when we reflect upon the "justice" and methods of enforcing it which he has evolved and been content to cherish where he has held sway.

In 1887 Justice Miller gave an address before the Alumni Association of the Law Department of the University of Michigan, in which, among other things, he discussed the vast results of the *Dartmouth College Case.*[52] In 1888 he gave the commencement address before The State University of Iowa on *The Conflict in this Country between Socialism and Organized Society,* in which he showed no sympathy for socialism; and with a trite conservatism natural to his office and advanced age he denounced "the new doctrines" as "utterly inconsistent

with the good old-fashioned ideas of honesty."[53]

The same year Justice Miller gave an address of permanent value before the Law Department of the University of Pennsylvania, taking for his theme *The Use and Value of Authorities in the Argument of Cases before the Courts and in the Decision of Cases by the Courts.*[54] He said he had selected a subject which, as far as he knew, had "escaped the attention of essayists and book makers on the law." This was remarkable since the whole field of law had been explored by recent writers of books, "mainly at the instance of law publishers. In truth, nearly all the later works of that class have been written at the suggestion of the book publisher for a compensation, and not because the writer is impressed with the value or importance of the subject that he writes about, or because he is filled with the knowledge and the inspiration necessary to the production of such a work. Most of these modern treatises, as they profess to call themselves, are but digests of the decisions of the courts, and though professing to be classified and arranged in reference to certain principles discussed in the book, they

are generally but ill-considered extracts from the decisions of the courts on the subjects treated of. It is time that it was understood that this field of literary labor has been overworked, and that the public, at least the professional public, is tired of the endless production of books not needed and of little value."

He says no statutes now regulate the extent to which authorities are to be relied upon, though some States, like Virginia and Kentucky, forbade, at one time, by acts of the legislature, now long since repealed, a reference in court to cases decided before 4 James I.

Admitting that Blackstone's *Commentaries,* Story's *Equity,* and *Greenleaf on Evidence,* and many others of like standing, may be considered as authorities, he limits himself to discussing the authority of adjudged cases. He points out that the value of a case as an authority is often very much enhanced by the standing of the judge who delivered the opinion, especially if "he stands out prominently as a leading man of the times in the law." "It is impossible", he says, "to read the clearly announced opinion of Marshall, or Kent, or Shaw, or

Story, of this country, or that of Mansfield, or Hardwicke, or Lord Stowell, of England, without feeling that whatever they have fully considered and clearly announced, is of immense weight and of persuasive force upon any other court or judge in making up an opinion." We may surmise that Justice Miller with good reason thought of himself in this class. "He would be a bold man", he says, "who would undertake in a court of the United States to controvert a decision or a proposition of law laid down by Chief Justice Marshall in delivering an opinion. While the exigencies of politics, or the unconsidered impulses of the legislative orator, may induce him to question the authority of the great expounder of the Constitution, such an effort would be wasted in a court of the United States."

He points out that the decisions of the three Common Law Courts of England are the great resort in disputed questions of Common Law to which we look for rules of property and personal rights. That the decisions of the High Court of Admiralty, and especially those of Sir Wm. Scott, afterwards Lord Stowell, are "a mine of existing authority on that subject." And

above all the decisions of the High Court of Chancery "must always be looked to as a fountain of light on controverted questions of equity and jurisprudence." He says that, while the decisions of the United States Supreme Court are conclusive upon all Federal Courts, they are not necessarily so in the State courts, except as to Federal law; but that even there they are held "more persuasive, and of more weight than the decisions of any other court with the exception of that of the highest court of the state in which the matter is under consideration."

On the doctrine of *stare decisis* he says: "All courts, however, of dignity and character, have a due regard for the principle that in most instances it is better that the law should be firmly settled than that it should be settled with entire soundness. It is not to be expected that such court will lightly overrule its former decisions, and thus subject the question at issue to perpetual controversy. . . . .

"Yet, there may have been decisions hastily made or concurred in by a bare majority of a court of many members, or one which some resulting experience has shown to be disastrous in its operation, which

should be overruled." Perhaps the veteran Justice was revolving the many occasions where he had finally forced the majority to come to his minority opinion, as in the famous *Legal Tender Cases*. He thinks courts should compel counsel to manfully admit the hostility of a decision which stands in their way, to say that they are not seeking to evade it or juggle with the court, but that they desire a reconsideration of it.

Decisions from States where there are great cities and extensive commerce, he observes, are of commanding weight in commercial law; that the courts of certain States have long preserved their character for ability, care and labor, and have on this account special consideration, and as such he classes the courts of Massachusetts, New York, Pennsylvania, and South Carolina in her best days; and that on all questions involving the Civil Law and the Code Napoleon the decisions of the Louisiana courts have always been accepted as of high authority by all other courts of this country.

He says, furthermore, that counsel in citing a case, unless the case is very well known, should in oral argument put the court in possession of so much of the ele-

ments of it as is necessary to understand what was decided in it; that the most effective counsel will, with the book before them, make, in their own language and not that of the reporter, a condensed statement of the issues of the case and how they arose, and then read from the report of the opinion the most condensed statement he can find of the decision of the court and of the reasons on which it was based. That this is vastly more effective than reading page after page which the court can not remember and obscuring what is pertinent by much which is not; that a few cases directly in point, and well presented, decided by courts of high estimation, are far more valuable than innumerable reference to cases of remote analogy; and that the printed argument also should follow the above suggestions, and, after giving the points considered in the cases cited, should then "give one or two extracts in the precise terms of the opinion of the court as to the point under discussion. It will be so apparent to the court, when an authority is presented in that manner, that it has before it in the brief of counsel what is useful to be considered, that it will not be necessary to hunt up and read

the whole case to be sure in that respect; and, while generally the court should not decide a case upon the authority of a previous decision without reading it carefully, the judge in examining the case, will, in many cases, be so well satisfied that a correct statement of it has been made by counsel that he need look no further for his own satisfaction.''[55]

It is submitted that this is golden advice to the practitioner from a source where experience and ability unite to give weight and value to the views expressed.

Justice Miller contributed to *Harper's Magazine* for July, 1889, an article on *The State of Iowa* in which the critics found innumerable small errors and inaccuracies, but which abounds in loyal feeling. It is his tribute to the State which he regarded as his home from 1850 until his death, and is, therefore, more fully noticed than some other publications. He begins by giving the latitude and longitude of Iowa, its boundaries, area, date of organization as a Territory and as a State, and the facts of the acquisition of the region by the United States.

He discusses the origin of the name of Iowa (which he says is derived from the

name of an Indian tribe) and adds: "Washington Irving, with the license allowable to an imaginative writer, states that the meaning of the word is 'beautiful,' and recounts the incident by which the phrase was first applied to the country, saying that the tribe who in their wanderings arrived at the highest point in the Iowa prairies, looking over the vast expanse of country uninterrupted by hills or swamps, involuntarily uttered the word 'Iowa,' meaning 'beautiful.'" He says that probably "better authority for the meaning of the word was Mr. Antoine LeClaire, a half-breed of the 'Sac' and 'Fox' nations, who always asserted, humorously, that he was the first white man born in Iowa, though his mother was an Indian. He was employed for many years by the United States as an interpreter in their dealings with the various Indian tribes. His definition of the word was, 'Here is the spot —this is the place—to dwell in peace.' It is very certain, however, that the name of the State and the name of one of its secondary rivers, running through a large part of the centre of the state, is derived from the name of the tribe."[56]

He shows that the first two settlements by

white persons in this region were by Julien Dubuque, a Canadian, who got permission from the Fox Indians about 1788 to work lead mines at the point where the city of Dubuque is now situated, which privilege was confirmed by the Spanish Governor Carondelet, and that Dubuque spent his life in mining and trading at that point until his death in 1810. The other settlement was about fifteen miles north from the southern border of the State, where is now the town of Montrose, at which point Louis Honoré Tesson established a trading post. The settlements were both on the Mississippi, both by Frenchmen, and about two hundred miles apart.

The Indians (mainly the Sacs and Foxes) controlled the country until the Black Hawk War of 1832, resulting in a treaty by which a portion of Iowa was ceded to the United States by the Indians.[57] Black Hawk, Chief of the Sac and Fox tribes, was deposed by our government, and Keokuk, a lesser Chief, was made principal Chief. For him was named the city which arose on the site of his village, and this city was the later home of Justice Miller and the place of his burial.

Justice Miller discussed the agricultural

resources of the State, its growth in population, its common schools, its high schools (casting doubt upon the validity of the institution of the latter), all in the simple strain of boastfulness, without apparent knowledge of what had been achieved elsewhere—which is a marked attribute of all public and most private utterances in many prosperous regions.

He does, however, indulge the critical spirit as to one department of education. "In regard to the other class of educational institutions—colleges and universities,"—he says, "Iowa has suffered in common with nearly all the Western States, and perhaps some of the Eastern States, by the efforts to create a college in every town of any size, and for every religious denomination, as well as the college and university established by the State. There is no more unfortunate delusion than that which possesses some men who desire to leave their property at their death to charitable and benevolent institutions than to devise a sum for the creation of a college, the amount of which will barely suffice to erect the first building necessary for such institutions, leaving the support of the professors, the establishment of

scholarships, the purchase of laboratories, globes, and maps, necessary to the conducting of any college, to chance or to solicitation, or to any means which may be supposed to supply these necessities of college instruction.

"In addition to colleges thus projected, almost every Christian denomination in the State of Iowa has attempted to establish one of its own. And the Methodists, the early pioneers of civilization and religion, possessing the largest membership of any Christian Church in the State, have thought it necessary to attempt the establishment of a college for each of its four Conferences. The result of this has been, in the State of Iowa, that the efforts of the friends of liberal education have been divided and paralyzed. The colleges are unable to give salaries sufficient to command the services of competent professors; none of them have the philosophical apparatus which should be provided, all of them are struggling inefficiently, with one or two exceptions."

" 'Iowa State University,' at Iowa City," he says, "has not been without reasonable endowments by the proceeds of lands given by the Federal government and by some

contributions from the State treasury, but has not been very fortunate in the manner in which it has been conducted by the trustees appointed by the State.

"It is now, however, placed upon a footing which promises success and with a new and efficient president (Schaeffer) and with the confidence of the public, with an efficient medical department and a still more successful law department, it may be said to be fairly deserving the name of 'University.' "

He discusses some of the public men of Iowa. Of General Belknap, his townsman and former Secretary of War, he says: "It is true that in the House of Representatives, articles of impeachment were preferred against him, charging him with improper conduct in the disposal of a sutlership or post-tradership in the army. He was, however, acquitted on trial before the Senate, and has ever since retained the undiminished confidence of those who knew him well and were best qualified to judge of his character."

It is curious that the life of General Belknap, his fellow townsman at Keokuk, came to its close in Washington on the same night on which Justice Miller died, and these

words of vigorous defense take on new interest as we remark that the old friends and neighbors were not divided in death.

Dealing with the inadequacy of public salaries, which he bitterly felt in his own case, he shows that Hon. Geo. W. McCrary, of Iowa, was Secretary of War under President Hayes, was appointed thence Circuit Judge of the United States, but after struggling with comparative poverty, having a large family, was compelled to resign to accept ten thousand dollars per annum as attorney and counsellor for a western railway.[58] "It is thus", he says, "that by a niggardly policy and insufficient salaries, the best offices of the country, especially its judicial offices, are abandoned for the pursuits of private life." Justice Miller cites, also, the case of John F. Dillon, of Iowa, as illustrating the same doctrine, saying that he resigned the same United States Circuit Judgeship "in the height of his usefulness and of his reputation as a great judge, and accepted the place of professor in the Columbia College law school in New York, and of counsel and attorney for the Union Pacific Railway Company, in which two places alone his compensation was three times as

large as that which he received from the government of the United States as Circuit Judge.''[59]

At the celebration of the Centennial of the Constitution in Philadelphia, September 17, 1887, Justice Miller was the orator and spoke with reverent affection of the instrument he had so often been called upon to construe.[60] The Annapolis Convention of 1786 suggested a convention of delegates from all States ''to devise such further provisions as might appear to be necessary to render the constitution of the federal government adequate to the exigencies of the union.'' The Constitution which that later convention drafted was always construed by Marshall and by Miller (upon whom the mantle of the former fell) in the spirit of that first suggestion to make it ''adequate to the exigencies of the union.''

With accustomed constancy he expresses in this address his dominant ideas in support of a strong Federal government, yet with due regard for the rights of the States. He says: ''If experience can teach anything on the subject of theories of government, the late civil war teaches unmistakably that those who believe the source of danger to be

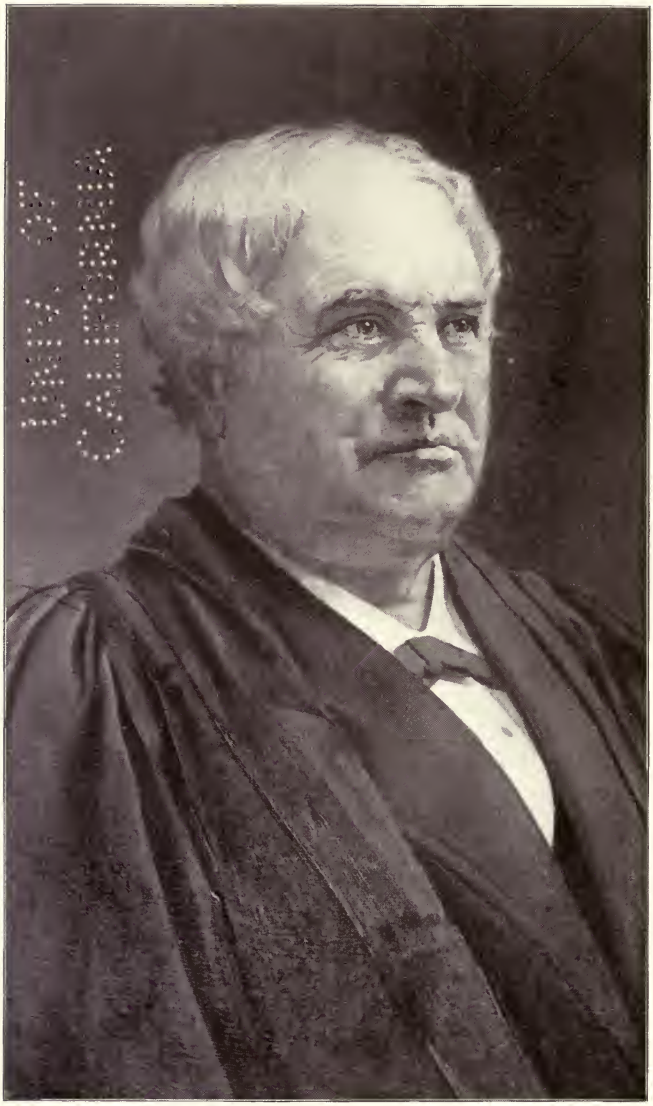
in the strong powers of the Federal government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were right." Again, he said: "In my opinion the just and equal observance of the rights of the States, and of the general government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century, as it has been for the one whose close we are now celebrating."

This address is not eloquent, although it was a theme to excite eloquence. It is not informed by warmth of feeling, although it was given at a time and a place to lift up men's hearts; but it displayed Miller's strong grasp of essential facts and elucidates the whole history of the Constitution so that its absolute necessity when it was adopted and its wonderful adequacy in a hundred years of trial are plain even to the casual reader.

This with the Michigan address and the manuscript of ten lectures on the Constitution of the United States, read by Justice Miller before the Law School of the National University at Washington, were pub-

lished in 1891, after their author's death, under the title of *Miller on the Constitution of the United States.*[61] This work has those merits of clearness and positiveness which marked all his utterances, but has met with little recognition or success. Most lawyers do not know of its existence. Blackstone and Kent are more distinguished for their commentaries than for their judicial opinions; but the opposite is true of Miller.

When we consider the severity of his judgment on most legal treatises, the obscure fate of his posthumous volume is affecting and instructive. Officials, even those who do their public work well, if they wish to scorn the scholar and publicist, should seldom attempt to compete with him.

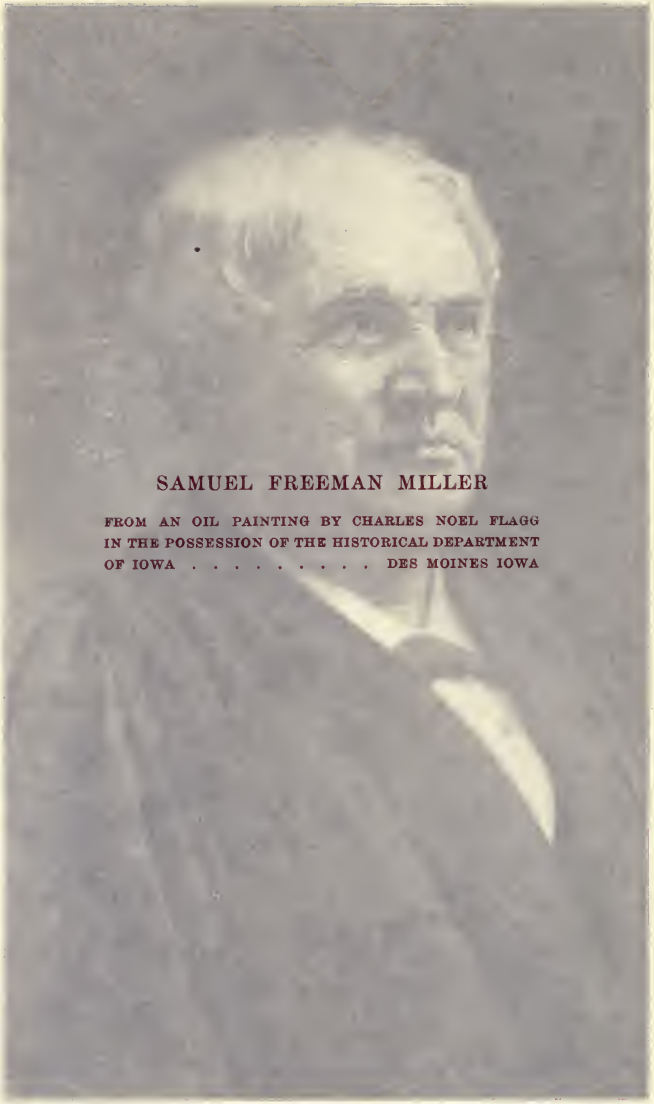


V

Justice Miller—A Characterization

Beside the ordinary kindness, which as husband and father he evidenced to wife and children, Justice Miller lovingly watched over an invalid sister; he showed unfailing affection to a venerable mother who attained her eighty-third year, and for the last twenty-five years was blind; he gave a home to a nephew while obtaining his professional education. The writer is permitted to extract the following from a private unpublished letter of Justice Miller to this nephew, dated Washington, October 17, 1881:

> It has been one of my wishes for several years past that when you and X——— should have graduated from Cornell I could see my way to get some places under the government where you could study law and attend one of the very good law schools here until you were prepared to begin the practice.
>
> I have a place in the patent office promised for X——— to begin next month and I look for him



SAMUEL FREEMAN MILLER

FROM AN OIL PAINTING BY CHARLES NOEL FLAGG
IN THE POSSESSION OF THE HISTORICAL DEPARTMENT
OF IOWA . . . . . DES MOINES IOWA

V

Justice Miller—A Characterization

Beside the ordinary kindness, which as husband and father he evidenced to wife and children, Justice Miller lovingly watched over an invalid sister; he showed unfailing affection to a venerable mother who attained her eighty-third year and who for the last twenty-five years was blind;[62] he gave a home to a nephew while obtaining his professional education. The writer is permitted to extract the following from a private unpublished letter of Justice Miller to this nephew, dated Washington, October 17, 1881:

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>
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home now every day. While looking out for X———, Col. ——— told me he thought by some changes in his office of U. District Attorney he could give X—— a clerkship at $600 or $700 per year. When I had secured X——— the place in the Patent Office at $900 per year I asked Col. ——— to let you have the clerkship in his office. He readily agreed to this, but in completing his final arrangements with the assistant which he must have and with the money the law allows him, he finds he has but $500 per annum to give a clerk. This he authorizes me to offer you, counting it from the first day of this month. Of course if you had to pay board this would do you no good. But with your Aunt's approval and with my own free wishes and earnest desire I offer you a home in my house for the next two years and we all hope you will find it to suit you to accept it.

It is possible that after you come we may get you some more remunerative place than this one Col. ——— offers. I think this could be done easily if your politics had been of the right sort, or if you had been simply neutral. I do not mention this with any view to a change for I know you too well to believe you would do so, nor would I wish to see you do it for the sake of an office. I mention it as a reason why I can not so easily do for you what I have done for X———. With Col. ———, who has the appointment of his own clerks, your politics is a matter of no consequence.

What is here offered is not much, but as something better may come, and as it will familiarize you with the details of a large practice and enable you to graduate at a good law school, I have thought it might

be worth your consideration. Lida is at home. The house is filled with carpenters, plumbers, etc., etc.

All send love to your mother and to the family and are anxious that you should find it to your interest to come and live with us.

Affectionately your uncle,

SAM. F. MILLER.

Justice Miller seems to have excited and returned a warm affection in his relations to his brother Justices. It was feared that on his appointment he might collide with the venerable Chief Justice Taney; but on the other hand, a rare and tender regard sprang up between these men so opposite in their views. At the end of their first year of service together, as the Judges separated to attend their circuits, the aged Chief took his young associate by the hand and said: "My brother Miller, I am an old and broken man. I may not be here when you return. I cannot let you go without expressing to you my great gratification that you have come among us. At the beginning of the term, I feared that the unhappy condition of the country would cause collisions among us. On the other hand, this has proved one of the pleasantest terms I have ever attended. I owe it greatly to your courtesy. Your

learning, zeal, and powers of mind assure me that you will maintain and advance the high traditions of the Court. I predict for you a career of great usefulness and honor."[63]

Mr. Henry E. Davis has preserved a statement of Judge Miller as to the Chief Justice, which is a most interesting supplement to this. "He once said to me", says Mr. Davis, " 'when I came to Washington, I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the bank of the United States, and I hated him for it. I remembered that he took his seat upon the Bench, as I believed, in reward for what he had done in that connection, and I hated him for that. He had been the chief spokesman of the court in the Dred Scott case, and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the Court had passed, I more than liked him; I loved him. And after all that has been said of that great, good man, I stand always

ready to say that conscience was his guide, and sense of duty his principle.' "[64]

Chief Justice Chase declared that "beyond question, the dominant personality now upon the bench, whose mental force and individuality are felt by the court more than any other is Justice Miller, who is, by nature, by intellectual constitution, a great jurist."[65] And a leading law journal spoke of his death as removing "the most conspicuous legal figure in the United States."[66]

Twice Miller was pressed for the Chief Justiceship—upon the death of Taney and of Chase. Judge Williams has recorded his interview with President Grant on the latter occasion during a memorable ride at Long Branch. "I told him", he says, "I was in favor of the appointment of Justice Miller for reasons then apparent to me, which need not here be repeated, for his judicial career has made them known to all the people of this country. The President replied that he had reflected not a little upon the subject, and had decided not to make an appointment from the Bench. He expressed the highest admiration for Justice Miller, but said in substance that Justice Swayne was a judge of great experience and

abilities, and the senior of Justice Miller upon the Bench, and he could give no good reason for subordinating his claims to those of Justice Miller. He spoke in high terms of Justices Strong and Bradley, and declared he was quite unable and altogether unwilling to decide which one of these distinguished jurists was entitled to the preference. He also expressed doubts as to the expediency of promoting a Justice to the Chief Justiceship; 'for,' said he, 'if that policy is adopted when the Chief dies his associates will become rival candidates for the place, and thus feeling might be engendered that would disturb the harmony and affect unfavorably the efficiency of the Court.' He gave as another reason for his decision, that there was no precedent for promoting an Associate Justice to the head of the Court, and he was not disposed to innovate upon what he considered a salutary practice, and so with these kind and gentle words were nipped as with a killing frost the budding hopes of more than one aspirant for the Chief Justiceship of the United States."[67]

It is said that on the death of Chief Justice Waite, President Cleveland for some

days hesitated between Miller and Carlisle as his successor, but was ultimately controlled by the same reasons that prevailed with President Grant when Waite was appointed.[68]

Justice Miller might have retired from the bench with his full salary, some years before his death; but he retained his strength to almost the last, enjoyed his work, and scouted the idea of retirement.[69]

In the last summer of his life, when seventy-five years of age, he declared in a characteristic utterance: "I have never been more capable of work than I am now. I cannot be idle, I must do something, and there is nothing I can do or like to do so well as the work which my office devolves upon me. Why then, should I retire."[70]

On the 19th of May, Judge Miller read from the Bench in Washington his last opinion, and the Court adjourned for the term. He went his circuit; and in a visit to Colorado, was inconvenienced by the climate, which was not congenial to him. His wife's illness, however, detained him there.[71]

On October 2, 1890, at St. Louis, he sat upon the bench for the last time.[72] He went back to Washington with strength

abated rather than recruited by the summer's respite, and visited the rooms of the Court. As he returned, when in sight of his home, he was stricken down with apoplexy. After some hours of failing consciousness, the end came.[73] He died at his home, October 13, at near eleven o'clock at night. The funeral services were held in the Supreme Court room, October 16. The chair at the right of the Chief Justice was vacant, draped in black. There were no other mourning decorations.

They laid on the coffin among the flowers a wreath of autumnal oak leaves—a fit symbol. They sang that hymn, dear to stricken hearts, *Abide with Me, Fast Falls the Eventide.* Rev. Dr. Shippen conducted the Unitarian services. Rev. Dr. Bartlett, of the Presbyterian Church, exhibited the customary banalities of funeral addresses, characterizing him as "A great American man," and comparing him in fecundity to the Mississippi Valley. As night fell the western bound train bore his body with a little group of mourners and Chief Justice Fuller and Justice Brewer, representing the Court, toward his old home, Keokuk.[74]

For three years Justice Miller had served

as the President of the National Unitarian Conference. He was one of the founders of the Unitarian Church at Keokuk and he drew up its articles of incorporation in 1853; and there where he had retained his membership the last funeral ceremonies were held at the time of his burial.

Although so long the senior Associate Justice and so predominant in the consultation room, Miller never forgot while on the Supreme Bench that he was not the Chief Justice. His interruptions of counsel were fewer than those of his weaker associates, but they were apt to be pertinent and sometimes disastrous to the speaker, carrying the assurance that the Court "was not with him and never would be."[75]

Justice Miller's sternness, his desire to dispatch business and the scant ceremony with which he dealt with tediousness or delay left many wounds among the bar of his circuit. He was apparently unaware of these traits, and he certainly gave to and received from kindred and friends a warm and enduring affection. In his address before the New York Bar in 1878, he said: "A vile and overbearing temper becomes sometimes in one long accustomed to the ex-

ercise of power unendurable to those who are subject to its humors," and he suggested that it be made cause for removal.[76]

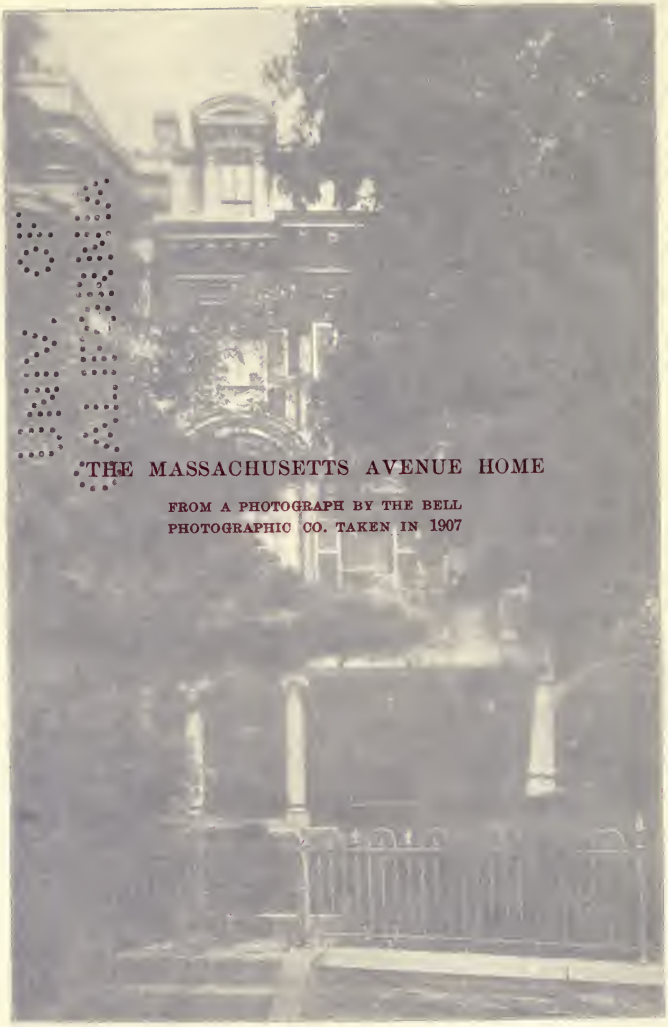
The writer owes to a gifted Chief Justice this illustrative anecdote. A young lawyer had submitted a motion to Justice Miller at the circuit and met the usual humiliating treatment. As he turned back he met a fellow member going up in turn for a like purpose and they condoled together. "Well, what are you going to do?" said the first. "Oh", answered the other, "I'm going up to be stamped all over by that damned old Hippopotamus."

Yet Senator C. K. Davis, after speaking of his "rugged and frosty, sometimes, yet always kindly manner," says: "I was always more pleased to see him in the administration of justice in trying jury cases than in any other aspect in which I viewed the man. His patience with the jury; his blunt, plain manner in which he led and instructed them; the appropriate humor with which he sometimes enlivened the tedious details of the trial, and his occasional reproof of counsel or witnesses, will long be remembered."[77] And Mr. Garland said that when Justice Miller first held court at Little Rock

"the means sometimes that he used to discipline us in these new ways were not entirely agreeable to us at the time, and to some extent we flinched under his affectionate chastisement, but when he left Little Rock, at the close of that term, there was not a member of that Bar who did not esteem and admire him, and he has had their unbroken affection ever since."[78]

He was a large man, six feet in height and weighing over two hundred pounds. His features, too, were large, and his clear cut Roman profile and the velvet cap which he wore on the bench in later years, made him a noticeable classic there.[79] He generally walked to and from the Court, and only used a carriage on special occasions.[80] The newspapers at his death said that he was worth "$100,000 or so;"[81] but unfortunately they were mistaken.

A writer in *Harper's Weekly* at the time of his death (October 18, 1890) says: "Personally, Justice Miller was a hearty, genial, democratic man. His life was laborious. He loved his profession and his work. He was usually in his office in the basement of his house on Massachusetts Avenue, at work on the opinions which fell to his lot to pre-



THE MASSACHUSETTS AVENUE HOME

FROM A PHOTOGRAPH BY THE BELL PHOTOGRAPHIC CO. TAKEN IN 1907

"the means sometimes that he used to discipline us in these new ways were not entirely agreeable to us at the time, and to some extent we flinched under his affectionate chastisement, but when he left Little Rock, at the close of that term, there was not a member of that Bar who did not esteem and admire him, and he has had their unbroken affection ever since."[78]

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pare, when he was not in the court room.[82] An occasional dinner at the White House or in the Supreme Court set, which is traditionally at the head of the society of Washington, and a game of whist now and then, constituted his social pleasures. He saw everyone who called, was interested in a wide range of subjects, especially of the practical kind, but most of his literature was found in the law books. When he wandered from them like a good many other eminent jurists, he found delight in fiction. To the last he preserved his extraordinary intellectual vigor and, to within a year, his wonderful physique."

Justice Miller married first a Miss Ballinger, of Kentucky. By her he had three daughters. One died in early girlhood. Another married George B. Corkhill, Esq., then of Mt. Pleasant, Iowa, afterwards for long United States District Attorney for the District of Columbia. Her death occurred about 1870. The third married W. F. Stocking, Esq., of New York, and still survives.

After the death of his first wife, Judge Miller in 1857 married, as has been mentioned, Mrs. Eliza W. Reeves, widow of

Lewis R. Reeves, Esq., of Keokuk. Her maiden name was Winter and she was born at Sharon, Pennsylvania, in 1828. Her death occurred at Washington, December 1, 1900, of heart disease, she having outlived her husband ten years. Two children of this second marriage survive; Mrs. Lida M. Touzalin, of Colorado Springs and New York, and Mr. Irvine Miller, of Springfield, Ohio.[83]

Justice Miller died poor and left no income to support his widow. An appeal was published in the *American Law Review* for a subscription for her benefit.[84]

The memorial presented for the bench and bar of Nebraska by Mr. Woolworth, says of him: "Impatient of incompetency of counsel and inconsequence of argument, he gladly accepted all real aids to correct conclusions. . . . . His reasoning was direct, rapid, accurate and certain, so that in the result the impression was not of the process so much as of the power of the demonstration. To him may be applied Charles Lamb's description of the Old Bencher of the Inner Temple; 'His step was massy and elephantine, his face square as the lion's. his gait peremptory and path-keeping, indivertible

from his way as a living column.' .... When not exercising his magistracy, the severity of the judicial mien gave way to kindly and gentle impulses. He was easy of approach, gracious and complacent." Again Mr. Woolworth says: "He was a very human man, he loved the wit of pithy speech and anecdote, the music of song and string, the speed of the horse, the game of endless combinations and various change and skill, the pleasure of the table, and the splendor of a noble woman."[85] This is an eloquent idealization of the venerable Kentuckian.

Chief Justice Fuller, replying to the address of the bar on Justice Miller's death, appositely and with great beauty, said: "His last years were suffused with the glow of the evening time of a life spent in the achievement of worthy ends and expectations, and he has left a memory dear to his associates, precious to his country, and more enduring than the books in which his judgments are recorded."[86]

So he sleeps in the quiet city on the western bank of the great river, where he freed the black slaves whom he brought from Kentucky, and where his twelve years of achievement at the bar lead up to the great

office which he so long and ably upheld, and "his works do follow him."

Washington, in his letter to the president of Congress, submitting the results of the labors of the constitutional convention, describes it with his customary moderation as "that constitution which has appeared to us as most advisable." The two chief guides to the due understanding of "that constitution" are, and must forever remain, the opinions of Chief Justice Marshall, of Virginia, and Associate Justice Miller, of Iowa. More than any others, they have written its glossary and share what we hope is the immortality of that great charter of our rights, that precious epitome of our fundamental and paramount law.

NOTES AND REFERENCES

NOTES AND REFERENCES

CHAPTER I

[1] The materials on the life of Samuel Freeman Miller are exceedingly meagre. With the exception of judicial decisions, a calendar of which is given in Appendix D, almost no original material seems to exist. In the newspapers of the State at the time of his appointment to the Supreme Bench and in the newspapers and magazines generally at the time of his death may be found notices and sketches which are of some value. But even here estimates of his judicial abilities and of his public work largely take the place of definite facts concerning his life. In 1891 there was printed a volume of *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller.* This contains resolutions, passed upon the death of Justice Miller, by the bench and bar not only of the Supreme Court but also of various States of the Union, and addresses by members of the bar and by his associates of the Supreme Court. *The National Cyclopaedia of American Biography* and *Appleton's Cyclopaedia of Biography* give brief sketches of his life; and in the *Annals of Iowa* and the *Iowa Historical Record* are found a number of articles furnishing valuable information.

[2] The Thirteenth Amendment, declared in force December 18, 1865; the Fourteenth Amendment, declared in force July 28, 1868; and the Fifteenth Amendment, declared in force March 30, 1870.

[3] The home of Henry Clay for the greater part of his life was Lexington, Kentucky. The "historic spot" referred to in connection with Daniel Boone was probably Boonesborough, which Boone founded in 1775. The town no longer exists.

[4] Benjamin F. Gue, in his *History of Iowa,* Vol. IV, p. 192, states that Miller studied law with Judge Ballinger in 1845.

[5] Like Justice Miller, Cassius M. Clay was a native of Madison County, Kentucky. He was an ardent abolitionist; and in 1845 established *The True American,* a vigorous anti-slavery paper, at Lexington, Kentucky. He was minister to Russia in 1861, and again from 1863-1869. He served in both the Mexican War and the Civil War, and for over half a century was prominent in political circles.

[6] It appears that Mr. Miller was also in partnership with J. W. Rankin for some years. Concerning Mr. Rankin, Dr. J. M. Shaffer, of Keokuk, quotes in a letter the following from the *Biographical Catalogue of Washington and Jefferson College,* 1889, p. 309:

"Rankin, John Walker. Son of John M. and Agnes M. (Burns), grandson of James Burns, cousin of Robert Burns the poet: born Ohio, July 11th, 1823; teacher Dalton, O. '41-42, Fredericksburg O. '42-43, Wooster '44-45, law student Wooster O. with J. C.

Miller and E. Pardee. Practiced Law Ashland O. '46-48, Keokuk, Iowa '48-69: Iowa Senate: Judge of the Court: U. S. Army colonel 17th Regiment Iowa Infantry: married Oct. 21, 1850, Sara D. daughter of Hon. W. P. Thomasson, Louisville, Ky: died Keokuk Iowa July 10th '69, cholera morbus. Lawyer."

[7] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* pp. 60 and 33.

[8] This letter is printed in the *Annals of Iowa,* Third Series, Vol. II, No. 7, October, 1896, p. 525.

[9] Samuel J. Kirkwood was Governor of Iowa from 1860 to 1864. In 1866 he was chosen United States Senator to fill out the unexpired term of James Harlan. In 1876 he again became Governor of Iowa, but resigned in 1877 to re-enter the United States Senate where he remained until 1881. In that year he was appointed Secretary of the Interior under President Garfield, but left the cabinet in the following year. His death occurred at Iowa City, Iowa, in 1894.

[10] *Harper's New Monthly Magazine,* July, 1889, p. 177.

CHAPTER II

[11] Congress, on July 15, 1862, passed an act rearranging the United States Circuits. Previous to this time Iowa and a number of other States had not been assigned to any Circuit, the District Courts having the power of Circuit Courts and the District Judges acting as Circuit Judges. By this act of

1862 the Ninth Circuit comprised Missouri, Iowa, Kansas, and Minnesota.—*United States Statutes at Large,* Vol. XII, p. 576. Later by the act of July 23, 1866, it was provided "that the districts of Minnesota, Iowa, Missouri, Kansas and Arkansas shall constitute the eighth circuit."—*United States Statutes at Large,* Vol. XIV, Ch. 209.

[12] Several changes in the personnel of the Supreme Court were made in 1861 and 1862. In April of 1861 Justice John McLean died, and his place was filled by the appointment of Noah H. Swayne. Two other vacancies were created by the death of Justice Peter V. Daniel, on June 30, 1860, and by the resignation, in 1861, of Justice John A. Campbell who became Assistant Secretary of War of the Confederate States and was in 1865 one of the peace commissioners appointed to confer with Lincoln and Seward. These two vacancies were not filled until 1862 when Samuel F. Miller and David Davis were appointed by President Lincoln.

[13] *The National Cyclopaedia of American Biography,* Vol. II, p. 473.

[14] John A. Kasson came to Iowa from Massachusetts about 1857. In the campaign of 1860 he vigorously supported Lincoln for President, and was afterward appointed by him First Assistant Postmaster General. He was a Republican member of Congress from Iowa from 1863 to 1867, and again from 1873 to 1877, and from 1881 to 1884. He was sent as Minister to Austria-Hungary by President Hayes in 1877, and as Minister to Germany by President Ar-

thur in 1884. He has been prominent in diplomatic circles, serving on a number of important commissions.

[15] This letter was written in November, 1893, and read at the exercises in connection with the presentation of a portrait of Justice Miller to the State of Iowa on November 21, 1893. The portrait was painted by Mr. Charles Noel Flagg upon the initiation of Mr. Charles Aldrich. The Hon. Henry Strong delivered an address, presenting the portrait to the State; and the Secretary of State, William M. McFarland, accepted in a brief speech. Beside the letter of Mr. Kasson, there were letters read from John W. Noble, Francis Springer, and others who were unable to be present at the exercises. The proceedings connected with the presentation of this portrait are printed in the *Annals of Iowa,* Third Series, Vol. I, No. 4, January, 1894, p. 241.

[16] This account is published in the *Iowa Historical Record,* Vol. VII, No. 1, January, 1891, p. 16. Henry W. Lathrop was an early pioneer of Johnson County, Iowa, coming to Iowa City about 1847. He was for a time editor of the *Iowa City Republican,* served for two years as County Superintendent of Schools, and was for a number of years Librarian of The State Historical Society of Iowa. In 1893 he published *The Life and Times of Samuel J. Kirkwood.* Lathrop was a personal friend of Kirkwood, and the manuscript for the biography passed through the hands of Kirkwood himself before being published.

[17] James W. Grimes came to Iowa in 1836, two years

before it was organized as a separate Territory. He took an active part from the first in legal and political matters, serving in the legislature of both the Territory and the State. He was Governor of Iowa from 1854 to 1858, during which time he aided in the organization of the Republican party in the State. From 1859 to 1869 he represented the State of Iowa in the United States Senate. In the trial of Andrew Johnson on impeachment by the House of Representatives, Senator Grimes spoke and voted in favor of acquittal, thereby incurring much unpopularity at the time, though later years have justified his position. He left the Senate in poor health, and died in 1872 at his home in Burlington, Iowa.

[18] James Harlan was chosen in 1855 to succeed Augustus C. Dodge as United States Senator from Iowa. Being reëlected he served until 1865 when he entered President Lincoln's Cabinet as Secretary of the Interior. He resigned, however, during the same year and was again elected to the Senate, remaining in that body until 1882 when he retired from public life.

[19] James F. Wilson represented Iowa in the lower house of Congress from 1861 to 1869 taking an active part in affairs connected with the War and Reconstruction. In 1869 he was tendered the office of Secretary of State by President Grant, but declined to accept. In 1882 he was chosen as United States Senator and served until 1895, the year of his death.

[20] *Iowa Historical Record,* Vol. VII, No. 2, April, 1891, p. 88.

[21] David B. Henderson, a native of Scotland, came to Iowa with his father's family in 1849. While attending Upper Iowa University the War of the Rebellion broke out and he entered the service. In 1882 he was chosen a member of the lower house of Congress and served until 1903. In 1899 he was made Speaker of the House of Representatives and held that position until he left Congress in 1903.

[22] Noah H. Swayne, Ohio; Samuel F. Miller, Iowa; David Davis, Illinois; Stephen J. Field, California; and Salmon P. Chase, Ohio.

[23] William R. Day, of Ohio, and Oliver W. Holmes, of Massachusetts.

CHAPTER III

[24] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 26.

[25] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 61.

[26] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 38.

[27] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 60.

[28] *Annals of Iowa,* Third Series, Vol. I, No. 4, January, 1894, p. 252. From the calendar of opinions

given in Appendix D below, it appears that Justice Miller wrote 141 opinions on Constitutional Law.

[29] Truman *v.* Fenton, Cowper, 544.

[30] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 35.

[31] *Chicago Evening News,* October 15, 1890.

[32] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 38.

[33] Buck *v.* Colbath, 3 *Wallace* 334.

[34] Slaughter House Cases, 16 *Wallace* 36.

[35] In re Burrus, 136 *United States* 586.

[36] Loan Association *v.* Topeka, 20 *Wallace* 655.

[37] In re Neagle, 135 *United States* 1.

[38] Hepburn *v.* Griswold, 8 *Wallace* 603.

[39] Legal Tender Cases, 12 *Wallace* 457.
Railroad Company *v.* Johnson, 15 *Wallace* 195.

[40] *Harper's Weekly,* October 18, 1890.

[41] State Tax on Railway Gross Receipts, 15 *Wallace* 284.

[42] Philadelphia and Southern Steamship Company *v.* Pennsylvania, 122 *United States* 326.

[43] Murdock *v.* City of Memphis, 20 *Wallace* 614

[44] Marbury *v.* Madison, 1 *Cranch* 137.

[45] United States *v.* Schurz, 102 *United States* 378.

[46] Johnson *v.* Towsley, 13 *Wallace* 72.

[47] United States *v.* Throckmorton, 98 *United States* 61.

[48] Lovejoy *v.* Murray, 3 *Wallace* 1.

[49] Brinsmead *v.* Harrison, *Law Reports,* 7 *Common Pleas* 547.

[50] The Electoral Commission was composed of the following persons:—

From the United States Supreme Court:
- Nathan Clifford
- William Strong
- Samuel F. Miller
- Stephen J. Field
- Joseph P. Bradley

From the United States Senate:
- George F. Edmunds
- Oliver P. Morton
- Frederick T. Frelinghuysen
- Thomas F. Bayard
- Allen G. Thurman
- Francis Kernan (substituted February 26, 1877, because of Senator Thurman's physical disability).

From the House of Representatives:
- Henry B. Payne
- Eppa Hunton
- Josiah G. Abbott
- James A. Garfield
- George F. Hoar

The proceedings of the Electoral Commission are printed in the *Congressional Record,* 44th Congress, 2nd Session, Vol. V, Part 4.

CHAPTER IV

[51] This address is found in the *Albany Law Journal,* Vol. XVIII, November 23, 1878, p. 405. The quotation which follows is from page 408.

[52] The Trustees of Dartmouth College *v.* Woodward, 4 *Wheaton* 518.

[53] This address is printed in full in Appendix C below.

[54] 121 *Pennsylvania State Reports,* p. xix.

[55] For this address in full see Appendix B below.

[56] Articles or notes upon the derivation of the name Iowa are found in the *Annals of Iowa,* Vol. II, April, 1864, p. 268, Vol. X, July, 1872, p. 235, Vol. X, October, 1872, p. 286, Vol. I (Howe's Annals), January, 1882, p. 4, and Third Series, Vol. III, No. 8, January, 1899, p. 641; also in the *Iowa Historical Record,* Vol. I, No. 3, July, 1885, p. 135, and Vol. XII, No. 2, April, 1896, p. 458.

[57] This treaty was negotiated with the Sac and Fox Indians by General Winfield Scott, of the United States Army, and Governor John Reynolds, of Illinois, at Fort Armstrong, Rock Island, Illinois, on September 21, 1832.—*Indian Affairs: Laws and Treaties,* Vol. II, p. 349.

[58] George W. McCrary was early associated with Samuel F. Miller. At the age of nineteen he began the study of law in the office of Rankin and Miller, and when Miller was appointed to the Supreme Bench, he became a member of the firm. He served in the State legislature and in the lower house of the United States Congress for a number of years. In 1877 he was appointed Secretary of War by President Hayes, but resigned to become United States Circuit Judge of the Eighth Circuit in 1880. Four years later he accepted the position of counsellor for the Sante Fe Railroad.

[59] John F. Dillon, after serving for several years as District Judge and as Justice of the Supreme Court of Iowa, was appointed by President Grant, United States Circuit Judge in the Eighth Circuit. After ten years' service he resigned this position to re-enter the practice of law in New York City. He became also a member of the faculty of the Columbia College Law School. His legal and historical publications have given him an international reputation.

[60] His address upon this occasion is printed in full in Appendix A below. The address for the State of Iowa at the Centennial Celebration in 1876 was delivered by Hon. C. C. Nourse.

[61] Published by Banks & Brothers, New York and Albany, 1891.

CHAPTER V

[62] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 22.

[63] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 61.

[64] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 17.

[65] *Annals of Iowa,* Third Series, Vol. I, No. 4, January, 1894, p. 247.

[66] *Albany Law Journal,* Vol. LXII, October 25, 1890, p. 321.

[67] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 73.

[68] *Chicago Times,* October 14, 1890. *Chicago Tribune,* October 14, 1890.

[69] Congress in 1869 provided that any judge of any court of the United States could, upon attaining the age of seventy years, and having held his commission at least ten years, resign and receive his full salary for the remainder of his life.—*United States Statutes at Large,* Vol. XVI, p. 45.

[70] *The Des Moines Leader,* October 16, 1890.

[71] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 64.

[72] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 44.

[73] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 65.

[74] *New York Times,* October 17, 1890, p. 9.
Iowa State Press (Iowa City), October 22, 1890.
The Des Moines Leader, October 23, 1890.

[75] *Harper's Weekly,* October 18, 1890.

[76] *Albany Law Journal,* Vol. XVIII, November 23, 1878, p. 408.

[77] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 12.

[78] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 8.

[79] *Chicago Times,* October 14, 1890.

[80] *Chicago Tribune,* October 14, 1890.

[81] *Chicago Times,* October 14, 1890.

[82] This house on Massachusetts Avenue is now owned and occupied by Senator J. P. Dolliver, junior Senator from Iowa.

[83] These family matters are taken from the *Annals of Iowa,* Third Series, Vol. IV, No. 8, January, 1901, p. 639, and from information furnished the writer by a nephew of Justice Miller.

[84] *American Law Review,* Vol. XXVI, January-February, 1892, p. 97.

[85] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* pp. 54, 66.

[86] *Proceedings of the Bench and Bar of the Supreme Court of the United States in Memoriam Samuel F. Miller,* p. 39.

APPENDIX A

APPENDIX A

THE FORMATION OF THE CONSTITUTION[1]

MR. PRESIDENT AND FELLOW-COUNTRYMEN:—The people of the United States, for ten or twelve years past, have commemorated certain days of those different years as the centennial anniversaries of important events in their history. These gatherings of the people have been in the localities where the historic events occurred. It is little over eleven years since the great centennial anniversary of the adoption of the Declaration of Independence was celebrated in this city, where the Congress sat which proclaimed it. The grand industrial exhibition, the august ceremonies of the day, and all the incidents of the commemoration, in no respect fell below what was demanded by the importance of the occasion. May it be long before the people of the United States shall cease to take a deep and pervading interest in the

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[1] An address delivered by Justice Samuel F. Miller as a part of the ceremonies of "Memorial Day" which took place in Independence Square, Philadelphia, on September 17, 1887. The occasion was the celebration of the one hundredth anniversary of the promulgation of the Constitution of the United States. The address as here given is taken from Carson's *History of the Celebration of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States*, Vol. II, p. 262.

Fourth of July, as the birthday of our national life, or the event which then occurred shall be subordinated to any other of our national history.

We are met here to commemorate another event in our progress, in many respects inferior to none in importance in our own history, or in the history of the world. It is the formation of the Constitution of the United States, which, on this day, one hundred years ago, was adopted by the Convention which represented the *people* of the United States, and which was then signed by the delegates who framed it, and published as the final result of their arduous labors,—of their most careful and deliberate consideration,—and of a love of country as unmixed with selfishness as human nature is capable of.

In looking at the names of those who signed the instrument, our sentiment of pious reverence for the work of their hands hardly permits us to discriminate by special mention of any. But it is surely not in bad taste to mention that the name of George Washington is there as its first signer and president of the Convention; the man of whom it was afterwards so happily declared by the representatives of a grateful people, that he was "first in war, first in peace, and first in the hearts of his countrymen." He was the first man selected to fill the chief executive office of President created by the Constitution; and James Madison, another name found in the list of signers, filled the same office.

James Wilson, of Pennsylvania, John Blair, of Virginia, and John Rutledge, of South Carolina, were made justices of the court established by that instru-

ment, with a large view among its other functions of expounding its meaning. With no invidious intent it must be here said that one of the greatest names in American history—Alexander Hamilton—is there as representing alone the important State of New York, his colleagues from that State having withdrawn from the Convention before the final vote on the Constitution. Nor is it permissible, standing in this place and in this connection, to omit to point to the name of Benjamin Franklin, the venerable philosopher and patriot; of Robert Morris, the financier of the Revolution; and of Gouverneur Morris, the brilliant scholar and profound statesman.

It is necessary to any just appreciation of the Constitution, whose presentation for acceptance to the people of the United States a hundred years ago, on this day we commemorate, that some statement of its origin, and of the causes which led to it, should be made. The occasion requires that this shall be brief.

The war of seven years, which was waged in support of the independence of these States, former provinces of Great Britain,—an independence announced by the declaration of July 4, 1776, already referred to,—the war which will always be known in the history of this country as the war of the Revolution, was conducted by a union of those States under an agreement between them called Articles of Confederation. Under these Articles each State was an integer of equal dignity and power in a body called the Congress, which conducted the affairs of the incipient nation. Each of the thirteen States which composed this confederation sent to Congress

as many delegates as it chose, without reference to its population, its wealth, or the extent of its territory; but the vote upon the passage of any law, or resolution, or action suggested, was taken by States, the members from each State, however numerous or however small, constituting one vote, and a majority of these votes by States being necessary to the adoption of the proposition.

The most important matters on which Congress acted were but little else than recommendation to the States, requesting their aid in the general cause. There was no power in the Congress to raise money by taxation. It could declare, by way of assessment, the amount each State should contribute to the support of the government, but it had no means of enforcing compliance with this assessment. It could make requisitions on each State for men for the army which was fighting for them all, but the raising of this levy was wholly dependent upon the action of the States respectively. There was no authority to tax, or otherwise regulate, the import or export of foreign goods, nor to prevent the separate States from taxing property which entered their ports, though the property so taxed was owned by citizens of other States.

The end of this war of the Revolution, which had established our entire independence of the crown of Great Britain, and which had caused us to be recognized theoretically as a member of the family of nations found us with an empty treasury, an impaired credit, a country drained of its wealth and impoverished by the exhaustive struggle. It found us with a

large national debt to our own citizens and to our friends abroad, who had loaned us their money in our desperate strait; and, worst of all, it found us with an army of unpaid patriotic soldiers, who had endured every hardship that our want of means could add to the necessary incidents of a civil war, many of whom had to return penniless to families whose condition was pitiable.

For all these evils the limited and imperfect powers conferred by the Articles of Confederation afforded no adequate remedy. The Congress, in which was vested all the authority that those Articles granted to the general government, struggled hopelessly and with constant failure from the treaty of peace with England, in 1783, until the formation of the new Constitution. Many suggestions were made for enlarging the powers of the Federal government in regard to particular subjects. None were successful, and none proposed the only true remedy, namely, authority in the national government to enforce the powers which were intrusted to it by the Articles of Confederation by its own immediate and direct action on the people of the States.

It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times,—that of all the agencies of civilization and progress of the human race, commerce is the most efficient. What our deranged finances, our discreditable failure to pay debts, and the sufferings of our soldiers could not force the several States of the American

Union to attempt was brought about by a desire to be released from the evils of an unrelegated and burdensome commercial intercourse, both with foreign nations and between the several States.

After many resolutions by State legislatures which led to nothing, one was introduced by Mr. Madison into that of Virginia, and passed on the twenty-first day of February, 1786, which appointed Edmund Randolph, James Madison, Jr., and six others, commissioners, "to meet such commissioners as may be appointed by other States in the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony"

This committee was directed to transmit copies of the resolution to the several States, with a letter respecting their concurrence, and proposing a time and place for the meeting. The time agreed upon was in September, 1786, and the place was Annapolis. Nine States appointed delegates, but those of five States only attended. These were New York, New Jersey, Pennsylvania, Virginia, and Delaware. Four other States appointed delegates, who, for various reasons, did not appear, or came too late. Of course such a convention as this could do little but make recommendations. What it did was to suggest a convention of delegates from all the States, "to devise such further provisions as might appear to be necessary to render the Constitution of the Federal government

adequate to the exigencies of the Union." It also proposed that whatever should be agreed upon by such a convention should be reported to Congress, and confirmed by the legislatures of all the States.

This resolution and an accompanying report were presented to Congress, which manifested much reluctance and a very unreasonable delay in acting upon it, and a want of any earnest approval of the plan. But the proceedings of the Annapolis Convention had been laid before the legislatures of the States, where they met with a more cordial reception, and the action of several of them in approving the recommendation for a convention, and appointing delegates to attend it, finally overcame the hesitation of Congress. That body, accordingly, on the 21st of February, 1787, resolved that, in its opinion, "it was expedient that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

On the day here recommended,—May 14,—delegates from Virginia and Pennsylvania met and adjourned from day to day until the 25th, during which period delegates from other States made their appearance. On that day the delegates of seven States, duly appointed, being present, the Convention was

organized by the election of General Washington as its president, at the suggestion of Franklin. On the 28th the representation in the Convention was increased to nine States; and on the 29th Edmund Randolph, delegate from Virginia, and governor of that State inaugurated the work of the Convention by a speech in which he presented an outline of a constitution for its consideration.

From this time on the Convention labored assiduously and without intermission, until, on the seventeenth day of September, one hundred years ago, it closed its work by presenting a completed instrument, which, being subsequently ratified by the States, became the Constitution of the United States of America.

All the States except Rhode Island were finally represented in the Convention and took part in framing the instrument, a majority of the delegates of each State assenting to it. That State sent no delegate to the Convention; and when the Constitution was presented to it for ratification no convention was called for that purpose until after it had gone into operation as the organic law of the national government; and it was two years before she accepted it and became in reality a State of the Union.

It is a matter for profound reflection by the philosophical statesman, that while the most efficient motive in bringing the other States into this Convention was a desire to amend the situation in regard to trade among the States, and to secure a uniform system of commercial regulation, as necessary to the common interest and permanent harmony, the course of Rhode

Island was mainly governed by the consideration that her superior advantages of location, and the possession of what was supposed to be the best harbor on the Atlantic coast, should *not* be subjected to the control of a Congress which was by that instrument expressly authorized "to regulate commerce with foreign nations and among the several States," and which also declared that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor any vessel bound to or from one State be obliged to enter, clear, or pay duties in another."

That the spirit which actuated Rhode Island still exists, and is found in other States of the Union, may be inferred from the fact that at no time since the formation of the Union has there been a period when there were not to be found in the statute-books of some of the States acts passed in violation of this provision of the Constitution imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce which the Constitution says shall only be done by the Congress of the United States.

During the session of the Supreme Court which ended in May last no less than four or five decisions of the highest importance were rendered, declaring statutes of as many different States to be void because they were forbidden by this provision of the Federal Constitution.

Perhaps the influence of commerce in bringing into harmonious action a people whose interests are com-

mon, while the governments by which they are controlled are independent and hostile, is nowhere more strikingly illustrated than in the unification of the German people which has taken place under the observation of most of us. Only a few years ago,—very few in the chronicles of a nation,—what is now the great central empire of Europe consisted of a number of separate kingdoms, principalities, and free cities. Some of these were so powerful as to be rated among the great powers of Europe. Several of them were small dukedoms, each with an autonomy and government of its own. Each levied taxes and raised revenue from all the merchandise carried through its territory, and customs officers at the crossing of every line which divided one of them from the other collected duties on all that could be found in the baggage or on the person of the traveller. When the railroad system had pervaded Europe, and persons and property could be carried by them for two or three hundred miles on a continuous track through many of these States, the burden became intolerable. Their governments began to make treaties for the rates of taxation, for freer transit of persons and goods, and to these treaties the States became parties one after another, until the Zollvereins of North Germany and of South Germany included at last all of them except Austrian Germany. When this was done the unification of Germany was a foregone conclusion. The war with France only hastened what the Zollverein had demonstrated to be a necessity. What her poets and statesmen, and the intense longing of the sons of Germany for a union of all who

spoke the language of the Fatherland, and the wisdom of her patriotic leaders had never been able to accomplish, was attained through Zollverein, and the demands of commerce were more powerful in the unification of the German people than all the other influences which contributed to that end.

We need not here pursue the detailed history of the ratification and adoption of the Constitution by the States. The instrument itself and the resolution of Congress submitting it to the States both provided that it should go into operation when adopted by nine States. Eleven of them accepted it in their first action in the matter. North Carolina delayed a short time, and Rhode Island two years later changed her mind; and thus the thirteen States which had united in the struggle for independence became a nation under this form of government.

Let us consider now the task which the Convention undertook to perform, the difficulties which lay in its way, and the success which attended its efforts. In submitting to Congress the result of their labors, the Convention accompanied the instrument with a letter signed under its authority by its president, and addressed to the president of Congress. Perhaps no public document of the times, so short, yet so important, is better worth consideration than this letter, dated September 17, 1787. From it I must beg your indulgence to read the following extracts:

"Sir,—We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable. The friends of our country have

long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the Union; but the impropriety of delegating such extensive trusts to one body of men [meaning Congress] is evident. Hence results the necessity of a different organization. It is obviously impracticable in the Federal government of these States to secure all the rights of independent sovereignty to each, and yet provide for the interest and safety of all." Again:

"In all our deliberations on this subject we kept steadily in view that which appears to us the greatest interest of every true American,—*the consolidation of our Union,* in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might otherwise be expected; and thus the Constitution which we now present is the result of a spirit of amity, and of that natural deference and concession which the peculiarity of our political situation rendered indispensable."

The instrument framed under the influence of these principles is introduced by language very similar. The opening sentence reads: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to our-

selves and our posterity, do ordain and establish this Constitution for the United States of America."

This Constitution has been tested by the experience of a century of its operation, and in the light of this experience it may be well to consider its value. Many of its most important features met with earnest and vigorous opposition. This opposition was shown in the Convention which presented it, and the conventions of the States called to ratify it. In both, the struggle in its favor was arduous and doubtful, the opposition able and active. For a very perspicuous and condensed statement of those objections, showing the diversity of their character, the importance of some and the insignificance of others, I refer my hearers to Section 297 of the Commentaries of Mr. Justice Story on the Constitution. Perhaps the wisdom of this great instrument cannot be better seen than by reconsidering at this time some of the most important objections then made to it. One of these which caused the opposition of several delegates in the Constitutional Convention, and their refusal to sign it, was the want of a well-defined bill of rights. The royal charters of many of the colonies, and the constitutions adopted by several States after the revolt, had such declarations, mainly assertions of personal rights and of propositions intended to give security to the individual in his right of person and property against the exercise of authority by governing bodies of the State. The Constitution was not void of such protection. It provided for the great writ of *habeas corpus,* the means by which all unlawful imprisonments and restraints upon personal lib-

erty had been removed in the English and American courts since Magna Charta was proclaimed; and it declared that the privilege of that writ should not be suspended, unless in cases of rebellion or invasion the public safety should require it. The Constitution also declared that no *ex post facto* law or bill of attainder should be passed by Congress; and no law impairing the obligation of contracts by any State. It secured the trial by jury of all crimes within the State where the offence was committed. It defined treason so as to require some overt act, which must be proved by two witnesses, or confessed in open court, for conviction.

It can hardly be said that experience has demonstrated the sufficiency of these for the purpose which the advocates of a bill of rights had in view, because upon the recommendation of several of the States, made in the act of ratifying the Constitution, or by legislatures at their first meeting subsequently, twelve amendments were proposed by Congress, ten of which were immediately ratified by the requisite number of States, and became part of the Constitution within two or three years of its adoption.

In the presentation and ratification of these amendments, the advocates of a specific bill of rights, and those who were dissatisfied with the strong power conferred on the Federal government, united; and many statesmen who leaned to a strong government for the nation were willing, now that the government was established, to win to its favor those who distrusted it by the adoption of these amendments. Hence a very slight examination of them shows that

all of them are restrictions upon the power of the general government, or upon the modes of exercising that power, or declarations of the powers remaining with the States and with the people. They establish certain private rights of persons and property which the general government may not violate. As regards these last, it is not believed that any acts of intentional oppression by the government of the United States have called for serious reprehension; but, on the contrary, history points us to no government in which the freedom of the citizen and the rights of property have been better protected and life and liberty more firmly secured.

As regards the question of the relative distribution of the powers necessary to organized society, between the Federal and State governments, more will be said hereafter.

As soon as it became apparent to the Convention that the new government must be a nation resting for its support upon the people over whom it exercised authority, and not a league of independent States, brought together under a compact on which each State should place its own construction, the question of the relative power of those States in the new government became a subject of serious difference. There were those in the Convention who insisted that in the legislative body, where the most important powers must necessarily reside, the States should, as in the Articles of Confederation, stand upon a perfect equality, each State having but one vote; and this feature was finally retained in that part of the Constitution which vested in Congress the elec-

tion of the President, when there should be a failure to elect by the electoral college in the regular mode prescribed by that instrument.

The contest in the Convention became narrowed to the composition of the Senate, after it had been determined that the legislature should consist of two distinct bodies, sitting apart from each other, and voting separately. One of these was to be a popular body, elected directly by the people at short intervals. The other was to be a body more limited in numbers, with longer terms of office; and this, with the manner of their appointment, was designed to give stability to the policy of the government, and to be in some sense a restraint upon sudden impulses of popular will.

With regard to the popular branch of the legislature, there did not seem to be much difficulty in establishing the proposition, that in some general way each State should be represented in it in proportion to its population, and that each member of the body should vote with equal effect on all questions before it. But when it was sought by the larger and more populous States, as Virginia, Pennsylvania, and Massachussetts, to apply this principle to the composition of the Senate, the resistance of the smaller States became stubborn, and they refused to yield. The feeling arising under the discussion of this subject came nearer causing the disruption of the Convention than any which agitated its deliberations. It was finally settled by an agreement that every State, however small, should have two representatives in the Senate of the United States, and no State should

have any more; and that no amendment of the Constitution should deprive any State of its equal suffrage in the Senate without its consent. As the Senate has the same power in enacting laws as the House of Representatives, and as each State has its two votes in that body, it will be seen that the smaller States secured, when they are in a united majority, the practical power of defeating all legislation which was unacceptable to them.

What has the experience of a century taught us on this question? It is certainly true that there have been many expressions of dissatisfaction with the operation of a principle which gives to each of the six New England States, situated compactly together, as much power in the Senate in making laws, in ratifying treaties, and in confirming or rejecting appointments to office, as is given to the great State of New York, which, both in population and wealth, exceeds all the New England States, and nearly if not quite equals them in territory.

But if we are to form an opinion from demonstrations against, or attempts to modify, this feature of the Constitution, or any feature which concerns exclusively the functions of the Senate, we shall be compelled to say that the ablest of our public men, and the wisdom of the nation, are in the main satisfied with the work of the Convention on this point after a hundred years of observation. And it is believed that the existence of an important body in our system of government, not wholly the mere representative of population, has exercised a wholesome conservatism on many occasions in our history.

Another feature of the Constitution which met with earnest opposition was the vesting of the executive power in a single magistrate. While Hamilton would have preferred a hereditary monarch, with strong restriction on his authority, like that in England, he soon saw that even his great influence could not carry the Convention with him. There were not a few members who preferred in that matter the system of a single body (as the Congress) in which should be reposed all the power of the nation, or a council, or executive committee, appointed by that body and responsible to it. There were others who preferred an executive council of several members, not owing its appointment to Congress.

Our ancient ally,—the French nation,—following rapidly in our footsteps, abolished the monarchical form of government, and in attempting the establishment of a representative republic, has found the governments so established up to the present time very unstable and of short duration. It is impossible for an American, familiar with the principles of his government and the operation of its Constitution, to hesitate to attribute these failures of the French people very largely to the defects in their various constitutions in points where they have differed from ours. Their first step, upon the overthrow of the monarchy, was to consolidate into one the three representative estates of nobles, clergy, and commons, which had always, when called together by the king, acted separately. After a little experience in governing by committees, this body selected seven of their number, called the directors, to whom the ex-

ecutive powers were committed. It is sufficient to say of this body that, though tolerated for a while as an improvement on Robespierre and his Committee of Public Safety, it was easily overturned by Napoleon, who in rapid succession established an executive of three consuls, of which he was chief, then of consul for life in himself, and finally the empire, of which he was the head, and was at the same time the executive, the legislature, and the fountain of justice. It is needless to recount the history of the second republic and the second empire. For a third time France now has a republican government. This has a President, a Senate and a House of Deputies, as our Constitution has; but its President is a cipher, elected by the assembly for seven years. It was supposed that the length of the term would give stability to the government and efficiency to the office. It has in practice turned out that the President is but a public show, the puppet of the prevailing faction (it can hardly be called a party) in the House of Deputies. His main function—a very disagreeable one—is to reconstruct perpetually dissolving cabinets, in which he has no influence, and whose executive policy is controlled by the deputies on whose demand they are appointed, all of them acting under constantly impending dread of a Parisian mob. The Senate of this system, like the House of Lords of Great Britain, is without any actual influence on the government. and is unlike our Senate, the members of which represent States, and have both the power and the courage, when they deem it necessary, to resist the President or the House of Representatives or both.

The present government of France has existed longer than any republic ever set up in that country. The sentiment of the people is essentially republican. The strongest sympathies, the ardent wishes of every lover of liberty and of republicanism in the world, are with that gallant people; and commemorating, as we do to-day, the events of a hundred years ago,—the successful establishment of the grandest republic the world has ever known,—our hearts, filled with grateful remembrance of their valuable aid, are warm with ardent wishes that they may share the blessings we enjoy.

It was urged against our Constitution by many liberty-loving men, both in the Convention and out of it, that it conferred upon the executive, a single individual, whose election for a term of four years was carefully removed from the direct vote of the people, powers dangerous to the existence of free government. It was said that with the appointment of all the officers of the government, civil and military, the sword and the purse of the nation in his hands, the power to prevent the enactment of laws to which he did not assent,—unless they could be passed over his objection by a vote of two-thirds in each of the two legislative houses,—and the actual use of this power for four years without interruption, an ambitious man, of great personal popularity could establish his power during his own life and transmit it to his family as a perpetual dynasty.

Perhaps of all objections made to important features of the Constitution this one had more plausibility, and was urged with most force. But if the

century of our experience has demonstrated anything, it is the fallacy of this objection and of all the reasons urged in its support.

The objection that the electoral college was a contrivance to remove the appointment of the President from the control of popular suffrage, was, if it had any merit, speedily overcome without any infraction of the Constitution by the democratic tendencies of the people. The electors composing the college, who it was supposed would each exercise an independent judgment in casting his vote for President, soon came to be elected themselves on distinct pledges, made beforehand, that they would vote for some person designated as a popular favorite for that office. So that at the present time the electors of each State, in sending to the capital their votes for President, do but record the instruction of a majority of the citizens voting in the State. The term of four years for the Presidential office is not now deemed too long by any one, while there are many who would desire that it should be made longer, say seven or ten years.

The power of appointment to office requires the consent of the Senate to its exercise; and that body has asserted its right of refusing that assent so courageously and so freely, that there can be no real fear of its successful use by the President in a manner to endanger the liberty of the country, unless the Senate itself shall be utterly corrupted. Nor can the means for such corruption be obtained from the public treasury until Congress in both branches shall become so degenerate as to consent to such use.

Nor have we had in this country any want of am-

bitious men, who have earnestly desired the Presidency, or, having it once, have longed for a continuation of it at the end of the lawful term. And it may be said that it is almost a custom when a President has filled his office for one term acceptably, that he is to be reëlected, if his political party continues to be a popular majority. Our people have also shown the usual hero worship of successful military chieftains, and rewarded them by election to the Presidency. In proof of this it is only necessary to mention the names of Washington, Jackson, Harrison, Taylor, and Grant. In some of them there has been no want of ambition, nor of the domineering disposition, which is often engendered by the use of military power. Yet none of these men have had more than two terms of the office. And though a few years ago one of the most largely circulated newspapers of the United States wrote in its paper day after day articles headed "Cæsarism," charging danger to the republic from one of its greatest benefactors and military chiefs, it excited no attention but derision, and deserved no other.

There is no danger in this country from the power reposed in the Presidential office. There is, as sad experience shows, far, far more danger from nihilism and assassination, than from ambition in our public servants.

So far have the incumbents of the Presidency, during the hundred years of its history, been from grasping, or attempting to grasp, powers not warranted by the Constitution, and so far from exercising the admitted power of that office in a despotic manner, a

candid student of our political history during that time cannot fail to perceive that no one of the three great departments of the government—the legislative, the executive, and the judicial—has been more shorn of its just powers, or crippled in the exercise of them, than the Presidency.

In regard to the function of appointment to office, —perhaps the most important of the executive duties,—the spirit of the Constitution requires that the President shall exercise freely his best judgment and follow its most sincere conviction in selecting proper men.

It is undeniable that for many years past, by the gradual growth of custom, it has come to pass that in the nomination of officers by the President, he has so far submitted to be governed by the wishes and recommendations of interested members of the two houses of Congress, that the purpose of the Constitution in vesting this power in him, and the right of the public to hold him personally responsible for each and every appointment he makes, is largely defeated. In other words, the great principle lying at the foundation of all free governments, that the legislative and executive departments shall be kept separate, is invaded by the participation of members of Congress in the exercise of the appointing power.

History teaches us, in no mistaken language, how often customs and practices, which were originated without lawful warrant, and opposed to the sound construction of the law, have come to overload and pervert it, as commentators on the text of Holy Scripture have established doctrines wholly at variance with its true spirit.

Without considering many minor objections made to the Constitution during the process of its formation and adoption, let us proceed to that one which was the central point of contest then, and which, transferred to the question of construing that instrument, has continued to divide statesmen and politicians to the present time.

The Convention was divided in opinion between those who desired a strong national government, capable of sustaining itself by the exercise of suitable powers, and invested by the Constitution with such powers, and those who, regarding the Articles of Confederation as a basis, proposed to strengthen the general government in a very few particulars, leaving it chiefly dependent on the action of the States themselves for its support and for the enforcement of its laws.

Let us deal tenderly with the Articles of Confederation. We should here, on this glorious anniversary, feel grateful for any instrumentality which helped us in the days of our earliest struggle. Very few are now found to say anything for these Articles, yet they constituted the nominal bond which held the States together during the War of Independence. It must be confessed that the sense of a common cause and a common danger probably did more to produce this united effort than any other motives. But the Articles served their purpose for the occasion; and though, when the pressure of imminent danger was removed, they were soon discovered to be a rope of sand, let them rest in a peaceful, honorable remembrance.

Between those who favored a strong government of the Union and those who were willing to grant it but little power at the expense of the States there were various shades of opinion; and while it was the prevailing sentiment of the Convention that "the greatest interest of every true American was the consolidation of the Union," there were many who were unwilling to attain this object by detaching the necessary powers from the States, and conferring them on the national government.

These divergent views had their effect, both in the Constitutional Convention and in those held for its ratification. Around this central point the contention raged; and it was only by compromises and concessions, dictated by the necessity of each yielding something for the common good,—so touchingly mentioned in the letter of the Convention to Congress,—that the result was finally reached. The patriotism and the love of liberty of each party were undisputed. The anxiety for a government which would best reconcile the possession of powers essential to the State governments with those necessary to the existence and efficiency of the government of the Union was equal, and the long struggle since the adoption of the Constitution on the same line of thought, in its construction, shows how firmly these different views were imbedded in our political theories.

The party which came to be called the party of State Rights has always dreaded that the alleged supremacy of the national power would overthrow the State governments, or control them to an extent incompatible with any useful existence. Their oppo-

nents have been equally confident that powers essential to the successful conduct of the general government, which either expressly or by implication are conferred on it by the Constitution, were denied to it by the principles of the State Rights party. The one believed in danger to the States, from the theory which construed with a free and liberal rule the grants of power to the general government, and the other believed that such a construction of the Constitution was consistent with the purpose and spirit of that instrument, and essential to the perpetuity of the nation.

If experience can teach anything on the subject of theories of government, the late civil war teaches unmistakably that those who believed the source of danger to be in the strong powers of the Federal government were in error, and that those who believed that such powers were necessary to its safe conduct and continued existence were in the right. The attempted destruction of the Union by eleven States, which were part of it, and the apparent temporary success of the effort, was undoubtedly due to the capacity of the States under the Constitution for concerted action, by organized movements, with all the machinery ready at hand to raise armies and establish a central government. And the ultimate failure of the attempt is to be attributed with equal clearness to the exercise of those powers of the general government, under the Constitution, which were denied to it by extreme advocates of State Rights. And that this might no longer be matter of dispute, three new amendments to the Constitution were

adopted at the close of that struggle, which, while keeping in view the principles of our complex form of State and Federal government, and seeking to disturb the distribution of powers among them as little as was consistent with the wisdom acquired by a sorrowful experience, these amendments confer additional powers on the government of the Union, and place additional restraints upon those of the States. May it be long before such an awful lesson is again needed to decide upon disputed questions of constitutional law.

It is not out of place to remark that while the pendulum of public opinion has swung with much force away from the extreme point of State Rights doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States, and of the general government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country, and to its existence for another century, as it has been for the one whose close we are now celebrating.

Having considered the objections originally made to this great work, in the light of its operation for a century, what shall we say of it in regard to those great features which were more generally acceptable? The doctrine of Montesquieu, then in the height of his fame, that the powers essential to all governments should be distributed among three separate bodies of magistracy,—namely, legislative, executive, and judicial,—was, as Madison affirms in number xlvii. of the "Federalist," recognized by the Convention as the

foundation of its labors. The apparent departure from that principle in making the Senate a participant in the exercise of the appointing power, and the treaty-making power, works well, because the initiative remains with the executive. The power of that body to try impeachments of public officers for high crimes and misdemeanors,—a function essentially judicial, while it has not produced any substantial injury,—has, perhaps, operated as a safety-valve in cases of great popular excitement. As an efficient remedy, it must be conceded to be a failure.

But the harmony and success with which the three great subdivisions of the organized government of the Constitution have coöperated in the growth, prosperity, and happiness of this great people, constitute the strongest argument in favor of the organic law, which governs them all. It is the first successful attempt, in the history of the world, to lay the deep and broad foundations of a government for millions of people and an unlimited territory in a single written instrument, framed and adopted in one great national effort.

This instrument comes nearer than any of political origin to Rousseau's idea of a society founded on a social contract. In its formation, States and individuals, in the possession of equal rights,—the rights of human nature common to all,—met together and deliberately agreed to give up certain of those rights to government for the better security of others; and that there might be no mistake about this agreement, it was reduced to writing, with all the solemnities which give sanction to the pledges of mankind.

Other nations speak of their constitutions, which are the growth of centuries of government, and the maxims of experience, and the traditions of ages; many of them deserve the veneration which they receive. But a constitution, in the American sense of the word, as accepted in all the States of North and South America, means an instrument in writing, defining the powers of government, and distributing those powers among different bodies of magistrates for their more judicious exercise. The Constitution of the United States not only did this as regards a national government, but it established a federation of many States by the same instrument, in which the usual fatal defects in such unions have been corrected, with such felicity that during the hundred years of its existence the union of the States has grown stronger, and has received within that Union other States exceeding in number those of the original federation.

It is not only the first important written constitution found in history, but it is the first one which contained the principles necessary to the successful confederation of numerous powerful States. I do not forget, nor do I mean to disparage, our sister, the federal republic of Switzerland. But her continuance as an independent power in Europe is so largely due to her compact territory, her inaccessible mountains, her knowledge of the necessity of union to safety, and the policy of her powerful neighbors, which demands of each other the recognition of her rights, that she hardly forms an exception. But Switzerland stands to-day—may she ever stand—as

the oldest witness to the capacity of a republican federation of States for sound government, for the security of freedom, and resistance to disintegrating tendencies. But when we look to the results of confederation in the Olympic Council, and the Achaian League of ancient history, and in modern times to the States of Holland and the old German empire, we must admit that the United States presents the most remarkable, if not the only successful, happy, and prosperous, federated government of the world.

Let us consider for a moment the evidence of this. When the Constitution was finally ratified, and Rhode Island also accepted it, the government was composed of thirteen States. It now numbers thirty-eight. The inhabited area of those States was found between the Alleghany Mountains and the Atlantic Ocean, a region which, when we now look over a map of the United States, seems to be but the eastern border of the great republic. Its area now includes all the territory between the Atlantic and Pacific Oceans,—a distance of over three thousand miles east and west,—and between the St. Lawrence and the great lakes on the north and the Gulf and States of Mexico on the south. Besides these thirty-eight States, the remainder of this immense region is divided into eight Territories, with an organized government in each, several of which are ready to be admitted into the Union as States, under a provision of the Constitution on that subject, and in accordance with the settled policy of the nation.

The thirteen States which originally organized this government had a population believed to be, in round

numbers, three millions, many of whom were slaves. To-day it seems probable that sixty millions are embraced in the United States, in which there breathes no soul who owns any man master.

I have already suggested the impoverished condition of the country at the close of the Revolutionary War. To-day I do not hesitate to make the assertion, that if you count only that which is real wealth, and not accumulated capital in the shape of evidences of debt,—which is but a burden upon such property,—I mean if you count lands and houses and furniture and horses and cattle and jewels,—all that is tangible and contributes to the comfort and pleasure of life,—the United States to-day is the wealthiest country upon the face of the globe, and is the only great government which is so rapidly paying off its national debt that it is begging its creditors to accept their money not yet due, with a reasonable rebate for interest.

Under the government established by this Constitution we have, in the century which we are now overlooking, had three important wars, such as are always accompanied by hazardous shocks to all governments. In the first of these we encountered the British empire, the most powerful nation then on the globe,—a nation which had successfully resisted Napoleon, with all the power of Europe at his back. If we did not attain all we fought for in that contest, we displayed an energy and courage which commanded for us an honorable stand among the nations of the earth.

In the second,—the war with Mexico,—while our

reputation as a warlike people suffered no diminution, we made large accessions of valuable territory, out of which States have been since made members of the Union.

The last war,—the recent civil war,—in the number of men engaged in it, in the capacity of the weapons and instruments of destruction brought into operation, and in the importance of the result to humanity at large, must be esteemed the greatest war that the history of the world presents. It was brought about by the attempt of eleven of the States to destroy the Union. This was resisted by the government of that Union under the powers granted to it by the Constitution. Its results were the emancipation of three millions of slaves, the suppression of the attempt to dissever the Union, the resumption of an accelerated march in the growth, prosperity, and happiness of this country. It also taught the lesson of the indestructibility of the Union, of the wisdom of the principles on which it is founded, and it astonished the nations of the world, and inspired them with a respect which they had never before entertained for our country.

I venture to hope that with the earnest gaze of the wisest and ablest minds of the age turned with profound interest to the experiment of the federative system, under our American Constitution, it may suggest something to relieve the nations of Europe from burdens so heavy that if not soon removed they must crush the social fabric. Those great nations cannot go on forever adding millions upon millions to their public debts, mainly for the support of permanent

standing armies, while those armies make such heavy drafts upon the able-bodied men whose productive industry is necessary to the support of the people and of the government.

I need not dwell on this unpleasant subject further than to say that these standing armies are rendered necessary by the perpetual dread of war with neighboring nations.

In the principles of our Constitution, by which the autonomy and domestic government of each State are preserved, while the supremacy of the general government at once forbids wars between the States, and enables it to enforce peace among them, we may discern the elements of political forces sufficient for the rescue of European civilization from this great disaster.

Do I claim for the Constitution, whose creation we celebrate to-day, the sole merit of the wonderful epitome which I have presented to you of the progress of this country to greatness, to prosperity, to happiness, and honor? Nay, I do not; though language used by men of powerful intellect and great knowledge of history might be my justification if I did.

Mr. Bancroft, the venerable historian, who has devoted a long and laborious life to a history of his country, that is a monument to his genius and his learning, says of the closing hours of the Convention: "The members were awe-struck at the result of their councils; the Constitution was a nobler work than any one of them believed possible to devise." And he prefaces the volume of his invaluable history of the formation of the Constitution with a sentiment

of Mr. Gladstone, the greatest living statesman of England. He says: "As the British constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

And while I heartily endorse this, and feel it impossible to find language in which to express my admiration and my love for the Constitution of the United States, and my profound belief that the wisdom of man, unaided by inspiration, has produced no writing so valuable to humanity, I should fail of a most important duty if I did not say on this public occasion, that no amount of wisdom in a constitution can produce wise government unless there is a suitable response in the spirit of the people.

The Anglo-Saxon race, from whom we inherit so much that is valuable in our character, as well as our institutions, has been remarkable in all its history for a love of law and order. While other peoples, equally cultivated, have paid their devotion to the man in power, as representative of the law which he enforces, the English people, and we, their descendents, have venerated the law itself, looking past its administrators, and giving our allegiance and our obedience to the principles which govern organized society. It has been said that a dozen Englishmen or Americans, thrown on an uninhabited island, would at once proceed to adopt a code of laws for their government, and elect the officers who were to enforce them. And certainly this proposition is borne out by the early history of our emigrants to California, where every

mining camp organized into a political body, and made laws for its own government, which were so good that Congress adopted them until they should be repealed or modified by statute.

I but repeat the language of the Supreme Court of the United States when I say that in this country the law is supreme. No man is so high as to be above the law. No officer of the government may disregard it with impunity. To this inborn and native regard for law, as a governing power, we are indebted largely for the wonderful success and prosperity of our people, for the security of our rights; and when the highest law to which we pay this homage is the Constitution of the United States, the history of the world has presented no such wonder of a prosperous, happy, civil government.

Let me urge upon my fellow-countrymen, and especially upon the rising generation of them, to examine with careful scrutiny all new theories of government and of social life, and if they do not rest upon a foundation of veneration and respect for law as the bond of social existence, let him distrust them as inimical to human happiness.

And now let me close this address with a quotation from one of the ablest jurists and most profound commentators upon our laws,—Chancellor Kent. He said, fifty years ago: "The government of the United States was created by the free voice and joint will of the people of America for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and

protection on the consolidation of the Union. It is clothed with the principal attributes of sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of our national greatness."

APPENDIX B

APPENDIX B

THE USE AND VALUE OF AUTHORITIES IN THE ARGUMENT OF CASES BEFORE THE COURTS AND IN THE DECISION OF CASES BY THE COURTS[1]

I have selected for the subject of my discourse on this occasion a topic, which, as far as I know, has escaped the attention of essayists and bookmakers on the law. It is, the use and value of authorities in the argument of cases before the courts, and in the decision of cases by the courts.

In saying that this subject has escaped the attention of the modern text writer, I may be mistaken, but if there be any such work it is unknown to me. This is rather remarkable, considering that the whole field of the law has been explored with great industry by recent writers of books, mainly at the instance of law publishers. In truth, nearly all the later works of that class have been written at the suggestion of the book publisher for a compensation, and not because the writer is impressed with the value or

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[1] Delivered by Justice Samuel F. Miller as an introductory address before the Law Department of the University of Pennsylvania, Monday, October 1, 1888, and printed in *Pennsylvania State Reports*, Vol. CXXI, p. xix.

importance of the subject that he writes about, or because he is filled with the knowledge and the inspiration necessary to the production of such a work. Most of these modern treatises, as they profess to call themselves, are but digests of the decisions of the courts, and though professing to be classified and arranged in reference to certain principles discussed in the book, they are generally but ill-considered extracts from the decisions of the courts on the subjects treated of. It is time that it was understood that this field of literary labor has been overworked, and that the public, at least the professional public, is tired of the endless production of books not needed and of little value.

I say, therefore, that it is remarkable that no book has been written, or none that I have seen, distinctively devoted to the topic which I have suggested. Indeed, the sources of such a work are not ample. and are difficult to come at. There are no statutes regulating the extent to which authorities other than statutes are to be relied on, or the force to be given to them in the decisions of the courts, though some of the states, as for example Virginia and Kentucky, forbade, by an act of the legislature long since repealed, a reference in court to cases decided before 4 James I. The effect of these authorities in the courts themselves is not governed by any fixed rules, and the recognition of their force in determining the decision of cases pending, is mainly to be found in casual remarks in the opinions of judges in announcing their decisions, and these remarks are not always consistent or very forcible.

The term "authorities," as used in the courts and by counsel, is perhaps generally held to include treatises by text writers of eminent authority, and the word is undoubtedly used with propriety for such books as Blackstone's Commentaries, Story's Equity Jurisprudence, Greenleaf on Evidence, and many others of like standing and ability. But in the consideration to which I invite your attention at this time I propose to limit myself to the authority of adjudged cases. This subject presents itself in so many shapes, each of which is subject to a different treatment, that it is difficult to classify or arrange the manner in which it should be treated.

First, perhaps we should consider the influence which they legitimately ought to exercise in a court to whose attention they are brought in some case on hearing. This obviously depends, in the first place, upon the closeness of the analogy of the case cited or produced to the one which the court has before it, and, while the identity of the cases themselves or of the facts or pleadings in them, adds to the value of the decision cited, it is clear, upon very slight reflection, that the identity of the principle decided, which is the main thing to be considered, may be very close, while the facts or the pleadings of the two cases may be variant in many particulars. As to the applicability of the decision cited to the case in hand, a court is bound to examine carefully into all the circumstances under which the former decision was made, and to discover from this and from the opinion of the court, how far it was intended to decide the principle for which it is quoted. This can only

be done by the court to whom the case is cited placing itself as nearly as possible in the position of the court which made the decision.

The most important point with the court, therefore, is to determine exactly what the first court did decide in reference to the matter in issue at the present hearing. In regard to this arises the question of obiter dicta, a phrase applied to principles stated in the opinion of a court which are not necessary to the decision of the case, and which is often applied to matters of argument, only remotely connected with the matter in hand. In other words, they are those observations thrown out by a court in delivering its opinion, which, though in themselves valuable as a statement of principles, and often sound principles, were not involved in the case before it, and therefore are to be treated merely as the suggestion of the judge and not as the decision of the court.

Very much of what is presented to a court as authority in the hearing of a case is of this character, and while it is not decisive, and does not carry the weight of a direct decision of the court in the case, it cannot be said to be wholly useless when the observations proceed from a distinguished judge of high authority, and whose opinions are entitled to respect. But as the main value of former decisions as precedents consists in the fact that they are the judgments of a court of competent jurisdiction and respectability, of course the observations, however learned and wise, of one of the judges of that court, or of the single judge of the court, not directly in point, are not of so great weight when presented in this way.

This leads to another observation, that while the main value of the authority of adjudged cases is in the character of the court which decided them, it often occurs that this value is very much enhanced by the standing of the judge who delivered the opinion. If he be a man who has attained high reputation as a jurist, as a judge, as a law writer; if he be one of those members of the legal profession who stands out prominently as a leading man of the times in the law, or in any particular branch of it, this character in the man from whom the opinion emanated, is often of more value than the character of the particular court which may have made the decision. It is impossible to read the clearly announced opinion of Marshall, or Kent, or Shaw, or Story, of this country, or that of Mansfield, or Hardwicke, or Lord Stowell, of England, without feeling that whatever they have fully considered and clearly announced is of immense weight and of persuasive force upon any other court or judge in making up an opinion. This is the inevitable result of the superior reasoning powers, great learning, and the care and industry which it is known belong to such men; and, while it has been shown that, in some instances, they have been mistaken, for important decisions of the greatest men have been overruled, still it remains true that the well-considered judgment of such men on a subject which it is known they understood, can hardly be over-estimated in its value or influence upon a court of justice. He would be a bold man who would undertake in a court of the United States to controvert a decision or a proposition of law laid down by

Chief Justice Marshall in delivering an opinion. While the exigencies of politics, or the unconsidered impulses of the legislative orator, may induce him to question the authority of the great expounder of the Constitution, such an effort would be wasted in a court of the United States. So, any one of the cases decided by Chancellor Kent in the seven volumes of Johnson's Chancery Reports, will stand, so far as it applies, as almost conclusive of the principles of equity jurisprudence in the High Court of Chancery of England.

As regards the weight of the principles announced in adjudged cases, it must very largely depend upon the character of the court from which they are delivered. It is impossible to attach as much importance to an opinion delivered in a District Court of the United States as to one upon the same subject emanating from the Supreme Court, though many opinions of the District Courts, coming from men of marked ability, or who have subsequently become distinguished as great judges, will carry a weight proportionate to that character. So in regard to other courts.

In this country the decisions of the courts of England upon common law subjects, have been received, and wisely, as of the highest authority. The three common law courts of the King's Bench, the Common Pleas, and the Exchequer, previous to their merger into one common court by the recent act of Parliament, are to-day the great resort in disputed questions of common law; and as the common law of England, as we have defined its limitations, is in this country

the great source to which we look for rules of property and personal rights, this body of authoritative decisions is of immense value to the courts. So the decisions of the English High Court of Admiralty, at the head of whose list of judges deservedly stands Sir William Scott, afterwards Lord Stowell, is a mine of existing authority on that subject which no court in the United States exercising admiralty jurisdiction can do without. But, above all, the decisions of the High Court of Chancery, under a succession of eminent men from Lord Hardwicke down to the present time, whom it is impossible to enumerate, must always be looked to as a fountain of light on controverted questions of equity jurisprudence.

Of course the House of Lords, whose appellate jurisdiction extends to both chancery and common law cases, being the highest court of final review in England, and administered by the ablest judges of that country, is considered, both at home and in this country, as of the very highest judicial authority, although to the mind of the American statesman it presents itself as an anomalous tribunal not easily to be reconciled with our views of judicial subordination.

In this country, however, it may be remarked in regard to the decisions of the Supreme Court of the United States, to which preëminence is conceded in all courts, that while they are conclusive upon all Federal courts, or courts of the United States, properly speaking, they are not necessarily so in those of the respective states of the Union, unless it be upon matters of Federal law, in regard to which it is a tribunal of final resort. Even where they are not

accepted as conclusive, they are yet considered as more persuasive and of more weight than the decisions of any other court, with the exception of that of the highest court of the state in which the matter is under consideration. The same observation may be made in regard to the highest appellate tribunal of a State, concerning its opinions upon the judgments of the inferior courts holden within that state. In this last class of courts the decisions of the state Supreme Court, or that of highest appellate jurisdiction, is conclusive and must be followed, but the decisions of high courts in other states may be looked into and examined, and such weight attached to them as the character of the court and the nature of the decision justifies.

The value of a decision as a precedent is very much enhanced, by the care with which it has been considered, and if the opinion itself shows that other decisions of the same court, or of other courts upon the same point, have been reviewed and examined, it adds to the value of the decision made on such consideration. But a far more important element in determining the weight to be given to the opinion or decision of a court is the fact that it has been judicially decided, after full argument on both sides of the case; and if the report of the case shows that counsel directed the attention of the court to the main proposition to be decided, and gave the aid which they should always give, arising from their own careful examination of the matter, to enable the court to decide correctly, it is then a case decided by a court upon due consideration after full argument on both sides, and

it necessarily carries the weight which attaches to the care with which the case has been examined.

Another matter of much importance in the consideration of adjudged cases as authority is, whether it is a new and a first assertion of a distinct principle of law, or whether it is one of a long line of decisions upon the same subject; and whether it be at the beginning or end of such a line, its value will depend greatly upon its relation, either of conformity or of difference with those decisions. An opinion of a court upon a proposition fairly in issue before it, which is supported by a reference to an unbroken line of previous authorities, or which, if there are opposing decisions, discusses in a clear and satisfactory manner the question of conflict between them, is all the more valuable from that discussion.

As we are here speaking of the considerations which govern a court in determining the weight which it will give to previous decisions on the same subject, it is proper to make a remark upon the question of a reconsideration by a court of last resort in any case of its own former opinions. It is obviously due to the uniformity of the administration of justice that subordinate courts should follow without hesitation the opinions of the highest court which has power to review the decision of the inferior one, and that whatever may be its convictions as to the soundness of such decision, its duty to follow it is plain.

But a question of more delicacy presents itself when, in a court of last resort, its own prior decisions are called in question. In such case it is undoubtedly in the power of the court to review and

overrule its prior opinions on any question not concluded by statute. All courts, however, of dignity and character, have a due regard for the principle that in most instances it is better that the law should be firmly settled than that it should be settled with entire soundness. It is not to be expected that such court will lightly overrule its former decision and thus subject the question at issue to perpetual controversy. This stability of the opinions of the same court is much increased if the decision sought to be questioned has been repeated many times in that court, yet there may have been decisions hastily made or concurred in by a bare majority of a court of many members, or one which some resulting experience has shown to be disastrous in its operation, which should be overruled. Generally speaking the more recently such decision has been made the less reluctance the court would feel to its reconsideration, for in many cases such decisions have become rules of property. But in all instances the court should require of counsel who propose to controvert such decisions to state expressly to the court that they are not seeking to evade, get around or to juggle with the court in regard to its applicability to the case in hand. They should manfully admit that it stands in their way and courageously state that they desire a reconsideration of it.

I have already stated that there is a great difference in the relative value as precedents of the decisions of different courts. In this country, where the delivery and reporting of opinions of courts and judges has multiplied almost indefinitely, and where

opinions are cited and published from referees, commissioners, registrars in bankruptcy, and from city courts, and those of all manner of inferior grade up to the highest appellate courts of the states and of the United States, it is obviously impossible in this short address to distinguish between them as to their value, or to make any specific statement of the weight to be attached to each of these classes of decisions. 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."

But it may be stated, that the opinions of all courts of appeal, although they may be subject to revision in some higher court, as in Missouri and Illinois, and the opinions of the Circuit Courts of the United States, which are often beyond writ of error or appeal, and perhaps those of others not readily brought to mind, are, if pertinent to the point in issue, worthy of consideration.

One of the difficulties which the judicial mind most frequently encounters in determining the weight to be given to conflicting authorities, is to be found in cases decided in the highest courts of the states. It is obvious that in such courts in states where, by reason of great cities, the commerce is extensive and the moneyed transactions of great value, the commercial law is of supreme importance, the decisions are of commanding weight. So also there are states in

which the purity of the separate jurisdiction in equity has been preserved far beyond that of others, and this adds to the authority of their decisions in such cases. There also may be, and there probably are, courts in which the land laws have attained a uniformity of administration, rendering their decisions in regard to land titles of superior value. Then there are courts of the states which have long preserved their character for ability, care and labor, and in regard to which it is sufficient to say at once, that this is a case decided by the Supreme Court of Massachusetts, of New York, of Pennsylvania, or of South Carolina in her best days, to demand for it at once the consideration of the court.

But while it may be indelicate, and not precisely proper in this place to continue this comparison, if it may be called such, between the estimation in which the highest courts of the different states is held, there is one court which, from the nature of the jurisprudence it administers and the high character of the judges in the early days of the court, deserves a passing remark.

Louisiana commenced her existence as a state under a code of laws differing from all the other states which were founded on the common law, in that its code, a new one, was founded mainly on the Civil Law and the Code Napoleon of France. The common law has never prevailed in the courts of that state. The decisions, therefore, of the courts of Louisiana, at least those which in the early days established the construction of this code, and which, in doing so, had large reference both to the Civil Law and the

Code Napoleon, have always been of high authority upon any question in the other courts of the United States which involved a consideration of these subjects.

We have thus far been considering the value of prior decisions in the courts which are called upon to follow or reject them, and most of the rules which govern the judge, both in regard to the applicability of the decision and the weight of its authority, must also govern the counsel and the advocate in determining how far he will use them in argument before the court. Of course it is his duty to examine these cases with great care to satisfy himself that they have a bearing on the case which he has before him, and how far he shall use it in argument.

It will also be his duty to criticise the cases produced by his adversary and point out to the court anything which detracts from their value in guiding the decision of the case on hand. He should carefully consider whether there is any analogy between the cases before the court and the opinion or decision cited by his opponent, and he should be ready to point out the want of such analogy, or its limited extent, and often in this manner to show that it really favors his view of the case.

An observation or two in regard to the manner in which counsel should present authorities to the court, will close what I have to say to you on this occasion.

This presents itself under two aspects: first, as to the manner in which adjudged cases are to be used in oral argument; and second, in briefs or written or printed arguments.

As regards the former, it is of very little use to the court that counsel should refer to a case in a general way, unless it is one of those remarkable cases, the principle of which is well known to all lawyers and judges, and it is no compliment to a court for counsel to rely upon a case, of which in oral argument he merely reads a part of the syllabus or a few lines of the head notes.

It is one of the rarest qualities of a reporter to be able to make a good syllabus to his report of a case. Many reporters who use accuracy and skill in stating the pleadings and the evidence in a case, and the opinion of the judge who delivered it, do not seem capable of summarizing in a few sentences the principles on which the court proceeded; and they avoid this by a long sentence in which it is said that where A. did so and so to B., and B. did so and so to E., and C. had such and such an interest in it, "Held;" and what was held is simply a decision of the case for or against one of the parties. At all events, if a case is worth citing in an oral argument to the court, and especially to a court of final resort, it is worth while to put that court in possession of so much of the elements of it as is necessary to understand what was decided in it.

The counsel whom I have known who used the authority of adjudged cases with most skill and effect, will, with the book from which they intend to read lying before them, make, in their own language and not in that of the reporter, a condensed statement of the issues in the case, and how they arose, so far as they are applicable to the point in hand. Having

done this and given the court whom he is addressing to understand, if necessary, the character of the court which decided the case he is about to cite, counsel then reads from the report of the opinion the most condensed statement he can find of the decision of the court and of the reasons on which it was based. This can be done within a very short time, if counsel will prepare themselves in advance for the presentation of the case, and it is vastly more effectual in its influence on the mind of the listening court than reading page after page from a voluminous decision which the court cannot remember, much of which is useless so far as the case in hand is concerned, and the relation of that part which may be pertinent obscured by the reading of a long and uninteresting opinion. By the former method the court is at once put in possession of the point actually decided in the case cited, and is enabled to discern how far it is applicable to the case before it, and to gain some idea of the reasoning on which that principle was made to rest in the former case. If it becomes necessary in the further consideration of the matter by the court to refer to this decision, the care and skill of counsel has pointed out where all that is valuable may be found without the labor of reading through a hundred pages of useless matter to find it.

It is not so often in an oral argument that the court is overrun with the number of cases read from and commented upon by counsel, but in 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 adjudged 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 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.

It is not too much to expect of counsel, and it is certainly to their interest, and that of their clients,

that they should pursue in their printed arguments or briefs the course I have suggested in regard to oral arguments; selecting a few of the strongest cases in their favor; stating in a few words the character of the court, if this be necessary, which decided them, and in language as condensed as possible the point under consideration in that court, the manner in which it arose, and then give one or two extracts in the precise terms of the opinion of the court as to the point under discussion. It will be so apparent to the court, when an authority is presented in that manner, that it has before it in the brief of counsel what is useful to be considered that it will not be necessary to hunt up and read the whole case to be sure in that respect; and, while generally the court should not decide a case upon the authority of a previous decision without reading it carefully, the judge in examining the case will in many cases be so well satisfied that a correct statement of it has been made by counsel that he need look no further for his own satisfaction.

It is a very great mistake, common to counsel, and especially to young counsel, to consider that a decision of any court must necessarily command the respect of another. The time of counsel in an oral argument, or space in a printed one, is generally used much more profitably in a careful presentation in his own language and style, of the reasoning on which the different decisions are based, as well as of his opinion of the soundness of that reasoning and of its applicability to the case on hand, than in reading from or citing innumerable decisions imperfectly re-

ported, insufficiently sustained by the reasoning of the court itself, and deserving but little weight from the character of the court which decided them.

The subject is inviting and the field large. The value of treatises, good and bad, would be a good topic for a magazine article, or an address. But I have detained you long enough, and with thanks for your attention I forbear to burden it further.

APPENDIX C

APPENDIX C

THE CONFLICT IN THIS COUNTRY BETWEEN SOCIALISM AND ORGANIZED SOCIETY[1]

LADIES AND GENTLEMEN:—It is always an occasion of great interest when a considerable portion of those who have been pursuing a course of education and training, whether in the lower or higher grades, come to the end of their school-days, and leave the institution of learning in which their time has been spent for the active pursuits of life, carrying with them the ordinary evidences, by way of diplomas, that they have faithfully attended and profited by the course of instruction thus ended. We come together at these Commencement Days of the Iowa State University, fostered and protected as it is under the auspices of the state government, to take part in the exercises incident to the graduation of its various classes: the scientific, classical, literary, law, and medical. The instructors, the pupils, and the graduates are all here, with the people interested in the success of the institution, and especially those who have at heart the happiness and prosperity of the pupils who now take

[1] An address delivered by Justice Samuel F. Miller at the Commencement of The State University of Iowa, June 19, 1888. The address as here given is taken from a pamphlet published by The State University of Iowa.

their departure from its halls for the long journey of life. I am happy in being chosen to express the congratulations of this large audience, made up of people collected from all parts of this state, as well as from other states, upon the successful termination of another year for this University, and to voice the good wishes of all for the graduates who now close their school career and set up for themselves in life.

No doubt various emotions fill the hearts of the young people who to-day graduate from this college. Many go forth with bright anticipations, seeing no cloud hanging over the way along which they are to travel, confident of their success; others feel the embarrassment and responsibilities of their new position, distrust their capacity, and doubt the result; while still others feel, as all ought to feel, the resolution to perform their duty, trusting that the consequences will prove to be those which follow an assiduous and industrious application to the work of life. It does not consist with my purpose to-day, nor with my feelings on such a joyous occasion as this, to throw a cloud over your brilliant expectations, for, indeed, my own experience and observation is that the way is open for all to reach that degree of success in life which is consistent with the highest degree of happiness. You may not all attain the topmost round of the ladder of ambition or fame in the pursuit which you shall adopt, or in the course which may be marked out for you, but you can, by well-directed effort and perseverance, attain to a reasonable success, secure a standing in the community and a character in the profession or pursuit which you may select,

obtain the confidence and respect of your neighbors and associates, and draw to yourself the love and affection of surrounding friends; so that, with a reasonable amount of the world's goods, if you do not reach the zenith of your ambition you may yet be in the happy condition which was desired by the wise man of the olden time, when he said: "Give me neither poverty nor riches" (Prov. xxx., 8), and may live both usefully and happily, enjoying in this world what God intended should fall to your lot and diffusing around you the blessings which always attend a well-spent life.

I wish, however, on this occasion to lay aside the considerations mainly pertinent to your personal happiness, and to point out to you that there are duties which every man owes to the community at large, and I cheerfully add every woman, too, in regard to matters which interest all, but which, while they concern everybody and each member of the body politic, can only be governed and controlled by public action. To the good and useful results which it is desirable should be attained by the agitation of such matters it is essential that there should be a sound sentiment among the great body of the people, and that this should be formulated into public action. The world, after all, is being governed more and more, in regard to a vast number of things, as to which the great mass of the people were formerly indifferent, by the currents of popular feeling and opinion. It is fortunate for the world that as this increasing power exercised by public opinion over the comforts and happiness of the masses of the community has grown with such great

rapidity during the last few years that it has been accompanied by an equal growth in the enlightenment of the public mind, and by the spread of information, not only as regards the new acquisitions of knowledge and science, and their application to the needs and pleasures of human society, but by the diffusion among all classes of the people of what we may call a universal education, thus making the public opinion, which must govern the general body politic, and control, not only the future of this nation but that of others, a more enlightened one as its power has increased.

In what I am now about to say to you, I address myself to all classes of persons in this audience. The subject is a profoundly interesting one to professors and tutors, in whatever department of instruction they may be engaged, to the trustees of this growing institution, to the pupils who may yet remain to finish their course of study, and to all who have gathered here upon this occasion and who seem by their presence to suggest the sympathy which they doubtless feel in the cause of education and human advancement.

But to the young gentlemen who have just graduated, the appeal is the stronger because of their youthful energy and probable length of life, as well as by reason of the fact that their minds may be supposed to be open to all the considerations which ought to govern their future actions in regard to these matters. They are also under special obligations to take part in the controversy to which I shall presently allude, because they have received the benefits of the

contribution made by the government of the state to this institution in which they have been educated. Their instruction has been in effect the putting on of armor for the great battle which is to come, if indeed it is not upon us now. An ancient king of Israel once said: "Let not him that girdeth on his harness boast himself as he that putteth it off." (1 Kings, xx., 11). You are just putting it on; you are freshly prepared for the great battle in which you can not refuse without disgrace to take your part. I use the word "battle" as meaning an intellectual and moral conflict, but it may result in that not more important but perhaps more distressing kind of struggle in which cannon and sword and blood shall determine the victory.

It is a very great mistake, and a very common one, even for well-read persons, to adopt the idea that the progress of the human race in the science of government, in the arts of civilization and refinement, and in the establishment of morality and religion, has been constantly and steadily towards improvement and perfection. The reverse has often been the case. When we consider its condition now as compared with very early times, it is certainly true that there has been great progress in all that concerns humanity, and that the world is now vastly better, wiser, and happier than it was five thousand, or even two thousand, years ago; and yet the course of this great gain towards betterment of the human race has often been interrupted. Bright periods, when its advancement was rapid, have been followed in its history by long intervals of moral darkness and stagnation, if not ac-

tual retrogression. If its amelioration has gone at times in an upward direction *per saltum,* it has taken now and then sudden leaps downward into the chasm of barbarism and ignorance.

I need not detain you by references to the numerous illustrations of this fact which might be drawn from the history of the past. There was a high degree of advancement at one time in ancient Egypt, and we, even now, marvel over the remains of the great Babylonian civilization, of which we only have the remnants and memorials in the fragments of its architecture and its arts that time has not been able to destroy. The culture and refinement of those nations have perished; the people among whom they once existed have become ignorant and degraded, and are not as highly civilized or as happy to-day as they were thousands of years ago.

To come down to historic epochs, regarding which we have abundant written accounts, it is well known that Greece, the brightest spot of ancient history, had a civilization of the highest order. It has left remains of its attainments in painting, poetry, and sculpture which the present day has hardly equalled, and certainly has not been able to excel. Yet that country, with all its civilization, retrograded into a home for pirates and robbers, and slumbered for ages in a depth of ignorance, in which the only art or culture remaining was the indestructible remnant of what had been left as their heritage from the days of Grecian power and glory.

The same may be said of Rome, and of all other countries that have at any time made for themselves

a name among the nations. After the principal epoch which distinguished the advancement of the Roman people, succeeding that of Greece, there came the dark period of the middle ages, when the little learning still cultivated was only to be found in the convents and monasteries, among the ecclesiastics and religious bodies, whose general state of information was but little elevated above that of the most common and ignoble classes.

It was in this gloomy condition of affairs that the sturdy priest of Wittenberg nailed his theses upon the gates of the church, and offered to maintain them in the university against all impugners. Therein he challenged the priests for their ignorance of the religion which they professed to teach, and the wickedness of the means by which they undertook to save the souls of men. and so brought about the reformation, mainly intended to be of a religious character, but which carried with it the revival of learning, the increased study of the classics and poetry, the introduction of modern scientific research, and marvelous improvements in the arts, and in a comparatively short space of time revolutionized the civilized world.

It is a very remarkable fact that this great reform in religious matters, which swept over and seemed to take possession of about half of Europe, so far as territorial extension is concerned, has made very little advance since the death of Luther. The map stands divided to-day between the Protestant and the Catholic forms of belief by a line which neither the changes of government nor the fluctuations caused by conquests, or the formation of confederacies, have

been able to obliterate. The impulse which animated the great uprising of that period seems to have almost burnt itself out, and passed away with the lives of the men among whom it originated.

Coming more specifically to consider the form and success of political institutions, in regard to their influence upon the people subjected to them, it seems probable that at no period in the history of the world was human government, as a means of conducting organized society, in a more deplorable condition than it was at the outbreak of the French revolution, if we regard the amount of knowledge, intelligence, scientific investigation, and all that concerned the happiness of man which then existed among the most enlightened nations of Europe. Indeed, while Voltaire, with his witty attacks upon the priesthood and the corruptions of the nobility, and his stinging criticisms of their oppressions of the poor, was entertaining the world with the brilliancy of his genius on these interesting subjects, and while Rousseau was writing in the capital of France his "Social Contract," enunciating principles utterly at variance with the rights of kings and barons, they were both abandoning themselves to luxuries of the most debasing character. Neither these pungent writers, nor their disciples, nor the literary "doctrinaires," as they were called in France during the revolution, seemed to realize the fact that they were playing with dangerous weapons, and that the principles which their teachings tended to establish must lead to the overthrow of the existing order of things both in government and in social life.

But they did accomplish this very result. The truths, or the ideas, whether they were true or not, which they advocated and sought to establish permeated the minds, not only of the French, but of the people of the continent of Europe generally, and directly tended to the complete overthrow of the existing political and social conditions.

A state of abject poverty and suffering, and in many places of degradation amounting almost to brutality, existed among millions of the peasantry or common people. The nobility were characterized by the licentiousness of their private lives and the oppressiveness of their conduct toward their inferiors, while the loose morals of most of the teachers of religion, combined with these dangerous elements, constituted a magazine prepared for destruction to which in a single day the torch was applied, and the entire social fabric exploded.

It is not expedient or necessary for me to attempt to describe here the horrors of the French revolution, nor to seek to balance its evil and its good. Undoubtedly the ultimate benefit to humanity has been very great. The condition of the lower orders of people has been vastly improved, and the doctrines of the equality of man in regard to his rights in the conduct of the government under which he lives have been gradually established, though with many fluctuations. There is no more striking evidence of the principle to which I adverted a few moments ago—that the progress of humanity towards civilization and the secure establishment of the rights and happiness of all men is by fits and starts, often retrograd-

ing, often advancing—than the history of the French nation, from the period of the revolution down to the present time. The despotisms of the two Napoleons, the radical attitude which the government assumed as conducted by different legislative bodies, all show this uncertain and zigzag movement which has characterized its march toward the summit of the mountain of human happiness.

I have endeavored to produce before your imagination this picture of the mode in which the human race makes its journey from the lower depths of ignorance, poverty, and misery to the higher ground of plenty, of civilization, and of social well-being; and my object in doing this is that you may see that even this government of ours, of which we are said to be so vain, and of which Fourth of July orators and aspirants for public honors give you nothing but eulogy and praise, may possibly suffer some retrograde action, which, if not as disastrous as the French revolution or as fatal as the downfall which extinguished the glories of Egypt and of Babylon, may yet, if not well attended to, set us back for a century or more in the race of national advancement.

From the time of the establishment of our independence as a nation we have been taught to believe that the principles upon which our government is founded are those of all others best adapted to securing the just rights of all its citizens, to guard us against dangers from abroad and convulsions within, to provide such a condition of society that every individual may in peace enjoy the products of his own labor, and sit safely, to use a scriptural expression,

under his own vine and fig tree, and feel sure that he shall be protected in the enjoyment of what he has, whether it be the production of the work of his own hands or an inheritance from his father, who had made and earned it for him. In short, we have come to consider that honest industry, careful thrift, judicious economy, and the acquisitions of labor, which are the rewards of merit, are all better protected and made more safe by our form of government than under that of any other in the world.

But he must be a very unobservant man who has not seen, within the past few years, that there are dangers threatening the principles lying at the foundation of our social fabric which suggest possibilities not at all pleasant to the lover of his race. We have recently passed through a civil war which shook our institutions to their very base, and which, during its continuance, seemed capable of overturning altogether the established government, and of putting in its stead a system of society more intolerable, for a very large proportion of the people, than was the semi-barbarism of the ages when the barons held sway in Europe. We fortunately escaped that catastrophe, and our civic establishment is now settled upon a firmer basis than ever before; but, in the few years that have elapsed since the close of that great struggle, an insidious form of attack has been made, not only upon the principles which underlie all governments, but upon those also which are essential to the organized existence of mankind in the bonds of social union.

This warfare is being continually and energetically

urged by bands of men, united in a common purpose, with the aid of learning and all the helps that modern science can afford, and it is pressed with an audacious avowal of doctrines which must be utterly abhorrent to those brought up in the belief that a certain amount of restriction is essential to the best interests of all communities. Under the various cognomens of anarchists, nihilists, socialists, or communists, these men are banded together into clubs or associations, and sometimes into communities, whose object, avowedly in some cases, and in most of them apparently, is the destruction of organized society. They maintain that government and social life, as constituted in all civilized communities throughout the world, is so radically opposed to the true interests and well-being of the human race that it can not be reformed, modified, or even gradually changed to meet their extreme views, but that it must be overturned and annihilated; that it must be resolved into its original elements in order that a new form of communal association may be reconstructed upon its ruins.

It is difficult to see wherein the condition of society, as it is proposed to be constituted under the ultra principles adopted by these propagandists, would differ materially from the horrors and the state of degradation in which the earliest ancestors of the human race found themselves, or even the situation of some of the primitive tribes of savages still in existence. So far as a common principle can be discerned as animating and running through the distinctions of these different classifications of men

who seek to overthrow the existing order of things, it is the abolition of the right of property. Their success means the redistribution of all the existing accumulations of wealth and the means of comfortable existence, among all individuals of which society is composed, of all characters, of all ages, and of all pursuits. This distribution is to be one of perfect equality, and in many cases implies the extinction of the family relation, and as advocated by most of them, it signifies freedom from all social, moral, and governmental restraint. It means that all future acquisitions of property, all the accretions of honest industry, and all the valuable emanations of the human mind shall hereafter constitute one common stock, in which the ignorant and the wise, the lazy and the industrious, the wicked as well as the moral, shall share alike and reap the benefits which result from the improvements that have been made in the world in its industrial, artistic, and economic progress.

It is true that there are differences in the degree and the length to which some of these suggested changes shall extend. Some sects propose to leave certain rights of property and certain principles of restriction still in force, but the ideas of all tend in the main to the same result. Mr. George and his followers content themselves mainly with an effort to reform the principles of the right of private ownership in land. Perhaps it would be more strictly correct to say that they seek to abolish this private right altogether, and propose to establish in its place the dogma that land, like air and water, is a common gift by the Creator to all his children. Under this euphe-

mistic and apparently benevolent idea they urge the proposition that no man can appropriate any particular piece of land to his own exclusive use; that it makes no difference what toil may have enabled him to convert the originally rugged soil to a state fit for the use of the agriculturist or the gardener; that it is of no consequence how many days of weary labor he may have spent, nor how many nights of aching pains he may have suffered before he was able to bring the naturally wild earth under subjection, that it might become his servant and contribute for him the means of ease and comfort. They assert that when he has accomplished this that he has only done it for the good of the whole community, not only that it may be of use to him and those for whom he may wish to provide, but that it shall inure equally to the benefit of every idle loafer and lazy vagabond who sleeps in some shed at night and wanders a beggar and robber by day. The legitimate consequence which follows from an adoption of their doctrines is that this outcast who has recklessly wasted his opportunity has an equal right to share in the use and product of this spot of earth which has been converted from its originally sterile condition by the hard work and diligent labor of the industrious man into a veritable Garden of Eden.

I take this example of the doctrines of these reformers, as they call themselves, in a mass, because it is probably the most attractive and at the same time the most likely to impose upon the better classes of people in this country; but it differs in essence not at all from the theories of the more ultra classes of

communists and socialists who believe that all the productions of the artisan, of the mechanic, or of the industrious laborer of any kind, cannot be endowed with the character of personal property, and that the fact that they have made them gives them no right to the exclusive possession or use of these products of their own labor, but that when created and existing in a community, all the individuals of which it is composed have an equal right to the use and enjoyment of these results of personal effort and exertion on the part of another.

Carried a little farther, it means that the man whose energy, thrift, close economy, hard work, skill, or intellectual superiority has enabled him to acquire what is called a "fortune," which implies a fine house, a carriage and horses, works of art and beauty, and who surrounds himself with all the comforts and luxuries of a happy home, is a robber, and an unjust oppressor of the poor and of those less happily situated, because he does not divide these things equally among all his neighbors, among his enemies and his friends alike, among the good as well as the evil, among the industrious and the lazy, and among the criminal and the pious. Indeed, the concrete result of all these theories in their logical sequence is that there shall be no private ownership of anything; that skill, industry, good habits, thrift, or wisdom shall avail nothing to the possessor of them, or to his wife and children, though he may by long continued labor and persistent self-denial have acquired the means for their support, protection, and comfort, except as they shall be equally distributed among the entire com-

munity of which he happens to be a constituent member.

It may possibly be conceived that a broad philanthropy in some Utopian age, founded on the theory that there is no selfishness in human nature, and that the happiness of the whole community is equally dear to every member of it as his own or that of his family, would be gratified by an adoption of some of the principles advocated by these reformers; but in their attempt at the establishment of these communistic doctrines they forget that no such race of human beings now exists, or ever has existed upon the globe, as that upon which their principles are formulated.

Man is essentially a selfish creature. The differences in the degree with which this is developed are infinite. Between the man who would rob or murder his neighbor for five dollars, and men who, like Howard, or those missionaries who devote themselves to the betterment of the most savage portions of our race, or those good women, like Florence Nightingale or her follower, Clara Barton, in all of whom the dominating purpose of life is to do good to humanity, the chasm is very wide indeed. But, without going into an ultimate analysis of the motives which direct human action, about which philosophers have so bitterly controverted one another, when we consider the working-out of the practical purposes of life in reference to the methods of controlling any aggregation of individuals as a body by means of laws or regulations, it must be admitted that there is a vast amount of selfishness and personal preference deeply imbedded in the nature of man, a strong desire to better

his own condition and that of those immediately connected with himself by ties of blood or affection, rather than that of the world at large. Indeed, there is no doubt that egoism, rather than altruism, is the controlling principle of human nature and the mainspring of its action as it exists at the present day.

Another principle of human nature which is ignored in the system of these philosophers is that man is by nature fond of ease and averse to labor. The conquests which he has made of the surface of the earth in converting it from a wilderness or a desert into fertile fields, yielding the means for his subsistence and comfort, and the victories which he has achieved over the beasts of the field, the fowls of the air, and the fishes of the sea, subjecting them to his support and sustenance and compelling them to minister to his pleasure, are the results of a necessity, and not of a willingness to encounter the necessary hardships and labors for the pleasure afforded by them. That which in the earlier ages of the world stimulated man to overcome the trials of his rude environment, which made him a fisherman, a hunter, and a tiller of the soil, still constitutes the motive power which drives him to continued improvements in the condition of the world. It inspires him to invention and discovery, and to all the progress which he has made in his methods of life and the various steps for the amelioration of the race which have lifted it from the lowest levels of degredation to the high plane upon which it moves forward to-day. It has not always, nor has it often, been the case that any of the great steps onward in the march of progress have been the

result of a pure philanthropy or of an unselfish love for humanity. They have not come from any moral instinct for doing good, or arisen from any natural spirit of industry or energy implanted in the human breast; but it has been for gain or profit to himself in some way, either by the acquisition of property or by the advancement in social position afforded by wealth to himself, to his wife or children, or to his father or mother, or others to whom he may be bound by ties of friendship or affection. For these objects men labor and spend their days in toil. These supply the motive which leads them to gather the products of their energy, and not the native love of the good of all mankind.

Why does the enterprising navigator or the traveler penetrate into the most bleak and inhospitable regions, circling the earth and opening up new countries and new peoples to the knowledge of civilization? It is not because he is, ordinarily, governed by any great love for humanity in the abstract, but rather to gratify a selfish curiosity for new objects and new faces, or to improve his condition by trading with foreign nations and tribes; and it is from this desire for gain, and to secure some pecuniary advantage, that springs the great progress which has been made in commerce, in navigation, and in the knowledge of other parts of the world. It has become an axiom of modern times that the progress of trade, the demands of wide-spread commercial relations, and the intercourse brought about by these incitements to human enterprise have done more to civilize the world, to push it forward, and to minister to the hap-

piness of mankind than all other instrumentalities put together. Indeed, he who believes that commerce and trade have at the bottom any other motive than the selfish desire for gain or personal aggrandizement is better fitted for the next world than for this.

The artist, if there were no public to look at, admire, and pay for his works, would doubtless sit down and smoke his cigar or read his novel in the hours which he now devotes to the finest productions of genius. The literary man fights for the pecuniary rewards of his labors as ardently and as energetically as the mechanic who works upon his job. The parson who ministers the consolations of religion to his congregation desires, or is stimulated by, his compensatory salary as much as other people.

It is no doubt true that the literary classes, the artists, the litterateurs, or the religious workers, expect, as a part of their reward, the applause of the public, and the honors and fame which may follow their labors, as well as the approval of their own consciences, for whatever they may have been able to do for the good of humanity. But in all this he must be indeed a visionary man who cannot see that the great motive for the best deeds and the best work of a human hand and brain is in the hope of some personal reward, and that without the stimulus of some kind of gain or profit or happiness which shall come to the individual who does the act, it would, in the great majority of cases, never be done. It follows as a conclusion which can not be escaped, that when you mingle together all the rewards which have been

earned by the industry and untiring exertion of individuals in one great common fund, in any particular neighborhood or community, that you strike down the motive power which is necessary to the continued improvement of society, that you destroy the stimulus to invention which produces the manufactured article or the products of the soil, and that you paralyze the mental effort of the human mind in all departments of intellect and artistic development by cutting off the motive which has always called them into action, and without which their existence would cease.

I have no doubt myself, and indeed it cannot be seriously questioned, that if the whole race, or any particular community or government, be reduced to one uniform level, in which each and all shall be equally interested in the production, in the distribution, and in the use of what man digs out of the earth, produces at the forge, eliminates from the raw material, or fashions by his inventive genius or the power of his intellect, you make a dead sea of humanity worse than that upon the plains of Sodom. You arrive, to be sure, at a perfect equality, but it is an equality of laziness, of indolence, and of the enjoyment of the labor of others where no provision is made, nor can be made, for the adequate or continued supply of the means for attaining human comfort and happiness. If you deprive the industrious man of the rewards appropriate to the effort which he puts forth, and make him but the drudge for a neighborhood or community in general, you take away from him his main incentive to exertion. This

is not only true of the laboring man who works with his hands, but it is also true of the genius whose bright thoughts flash through the darkness of human ignorance, and whose wonderful inventions and discoveries in science and art benefit the world.

The patent system of the United States is one of the most remarkable evidences that men of the highest genius and greatest talent work mainly for pecuniary reward, or for some other compensation which is equally stimulating in its effect.

This is not the place to comment upon the vast benefits that have been conferred upon the world by the inventions and discoveries which have been made in this country. The improvements in the steam engine with its many modifications, and most of the elements of the success of our railroad systems, with the varied applications of electricity to the telegraph, the telephone, and all of the numerous implements connected with them, have all been patented, and this protection has been sought and granted as the exclusive right of the men whose inventive genius produced these marvelous helps toward the lightening of the burden of human toil. But while this system gives to them as the reward of their labors the exclusive right to use or sell these patented productions, their benefits are always more or less conferred upon the whole human race. If any man can doubt that these inventions and discoveries mainly originate in the desire for personal and pecuniary profit or reward, he would not do so if he could have observed, as I have done during a period of twenty-five years of service in the courts of the United States, the in-

cessant litigation and the continuous struggle which has been, and is now, going on for these exclusive pecuniary rewards. Their authors never would have spent their nights in vigils, nor their days in toil, if they had known that they would reap no personal benefit, but that it would all inure simply to the public good.

I am not by nature inclined to think badly of the human race; on the contrary, I am convinced that there is in it vastly more of good than of evil, and my experience, now extended beyond the three-score years and ten allotted to man by the psalmist, has constantly fostered and strengthened in me a belief in the goodness of human nature. But I should be very false to that experience if I did not recognize the truth of the statement that the sources of the greatest achievements, even of those best calculated to promote the well-being of society, as well as the motives which lie at the foundation of the productions which have tended to its greatest good, are largely the personal and selfish interests which their authors have had in the results of their labors. And I have no doubt that the success of those principles regarding the conduct of society which seek to aggregate into one great mass, influenced by but one motive, all the physical elements of human welfare under the general ownership and control of that race, or the separate communities into which it might divide, presenting no stimulus for personal labor, no hope of individual aggrandizement, and no security for personal property, which must in the end lead to the destruction even of the marital relation, mak-

ing men and women common as well as property, would in a century or two reduce the race by its retrograde action into clans of robbers, murderers, and thieves, and would be utterly destructive of all social happiness.

After all, my main purpose in this address has not been so much to discuss the doctrines which these professed reformers are trying to impress upon society, or to point out to you the pernicious influence which they must exercise, as to warn you against the real danger which they conceal. The opinions which these men inculcate are naturally attractive to the great body of men who gain their living by daily toil, for it has always been considered a curse denounced upon man that he should earn his bread by the sweat of his brow, and any system of social order or conduct of life which promises to relieve humanity from that necessity is by the large mass of mankind eagerly welcomed.

The condition of the world at the present time, or at least of the more highly civilized portions of it, is very different from that of times past. The almost universal extension of education, at least to some degree, and the general diffusion of knowledge among the great body of those who were formerly unaccustomed to receive it, has fitted many of these radical apostles of the new dispensation with eminently persuasive powers. Many of them are learned in the highest sense of that term; many are filled with classical knowledge, familiar with poetry, and cultivated in all the amenities of social life. Trained in journalism, as some of them have been, and capa-

ble, as writers, of making the worse appear the better cause, they project themselves into the political and social world with something of a recklessness and audacity which to the ordinary mind is often astonishing. Many of them, it is to be hoped, believe in the doctrines which they preach; but this only makes them the more dangerous, as it adds earnestness and zeal to an honest purpose, which is always more calculated to make an impression upon those who listen.

The great increase of wealth in modern times, and its frequently unequal distribution, present an opportune field for their operations, predisposing large numbers of those who suffer from this inequality to adopt any system which may be supposed capable of affording relief. In the large cities of this, as well as all other countries, the palaces of the rich are surrounded by the hovels of the poor; the glaring lights of gas and electric lamps illuminating for the wealthy their hours of hilarity and festivity shine down upon the tenements of the lowly and the poverty stricken, and while the more favored few have all that is best in life in the way of pleasure and enjoyment, another and a much larger class of beings a few hundred yards away, or across the street, may be languishing in misery, burdened by poverty, and tortured by disease for which they have not the means to provide the remedy.

Undoubtedly these are not pleasant things for the lover of humanity to witness, and they certainly present the strongest inducement for the introduction of such real and genuine reforms in the fabric of our social life as shall tend to ameliorate the hardships of

want and to prevent all needless suffering; but the hasty and ill-considered suggestion that this must all be equalized at once, without any reflection as to what shall come after the accumulated means for the comfort and happiness of mankind have been dissipated, if carried out in any of the reckless methods which have been proposed, is likely to lead to a worse evil than that which is sought to be removed. Nevertheless, a comparison of these great differences which we see everywhere not infrequently disposes a large class of the community, and perhaps the most numerous, especially in our large cities, to accept the scheme which seems to offer immediate relief, at any cost, and without any regard to the ultimate consequences of such action.

It is in these places and under such circumstances that the socialist and the communist finds ready at hand the materials for the successful operation of his schemes; it is from the discontented, the unfortunate, and the poor that most of his converts are made. Many of those who are active in the leadership of these so-called reforms are but little understood in this country. Born and raised under the despotic and oppressive governments of Europe, forbidden to express their views in regard to the regulation of social or political matters, or to try to enforce them even by peaceable means, arrested whenever they speak out boldly, imprisoned, banished, followed from one country to another only to be objects of suspicion and police surveillance, they acquire in this way a love of a wandering life and a bitter antagonism towards all whose circumstances enable them to live

more happily than themselves. Many of them finally emigrate to this country, where the paradise of their hopes is supposed to be found. Here they can talk as much as they please without fear of punishment. They may address crowds collected upon the street corner, and in private or in public, by speeches or in the public prints, they can abuse, to their heart's content, all government in which one man may be found to be prosperous and another man poor, and even inveigh against all social order or governmental regulation. They come here and form clubs and associations; they meet at night and in secluded places; they get together large quantities of deadly weapons; they drill and prepare themselves for organized warfare; they stimulate riots and invasions of the public peace; they glory in strikes, and, whatever they may originally have been in the way of philanthropists, they rapidly degenerate into the haters of prosperity and happiness on the part of those who are more fortunate than themselves. If they incite a riot or break the laws which protect the public welfare, or resist an officer of the law in the discharge of his duty, and are imprisoned from one to twelve months, it is generally an improvement in their condition, for in the public prisons they are often better fed and better housed than they were when left free to depend upon their own resources. If these men were ignorant, they might be despised; but, as I have already said, their leaders are not only learned, but men of intelligence, speaking and writing many languages, familiar with the world, courageous and desperate.

I am addressing an audience mainly from the state of Iowa, which, beyond any other, has a people engaged in a prosperous agriculture, with more good farms and well-to-do farmers in proportion to its population than any state in the union, having no large city where the disorderly elements that seem to gravitate to such centres can gather and become formidable. It is a community where almost every man owns, or aspires to own, his plot of ground, and to produce out of that farm a comfortable subsistence for himself and family. Among this population are all the elements of happiness and prosperity, and good government and love of order are developed to as high a degree as anywhere in the world. It is not because I apprehend that the corrupting theories which I have been discussing are at all likely to succeed in your midst that I have taken this occasion to direct your attention to their dangerous and debasing tendencies, but for the reason that it is to those who live in this and the surrounding states, in which agriculture, with all its branches, forms the great business of the people, that we are to look for the final defence to be made against these agrarian and destructive doctrines.

I address myself, then, not only to the people of Iowa, but also to the intelligent citizens of this great northwestern section of our country, whose fields and flocks are the support of a virtuous population, and whose surplus helps to sustain the over-crowded kingdoms of Europe. And I wish especially to speak to the young men whom the state has assisted to educate here, who it is to be hoped have been grounded

in sound principles of political and social economy, and who start out in life with only its most roseate views before them, in order that I may warn them while it is yet time of the insidious danger which is gradually spreading and threatening the peace of the whole country. I desire to caution them against the subtle poison which is being instilled into society, and which if not counteracted will assuredly effect its destruction; to call upon them to guard and protect the inheritance received from their forefathers, and to impress upon their minds the fact that changes in the order and conduct of human institutions are not always a growth toward a better condition of things.

I do not mean to say that all things which are presented as tending to better the condition of humanity should not be examined and considered candidly and dispassionately, but I do say that when you have so examined and considered them, and you find that the new doctrines are utterly inconsistent with the good old-fashioned ideas of honesty, fair-dealing, industry, thrift, and a just regard for the security of the results of individual labor, you may be sure that they are wicked and dangerous in their tendency, and you should not allow them to sap your faith in the soundness of the elements upon which our old and well-tried social organization has been erected.

There is an honesty applicable to all the transactions of human life; this is not often difficult to ascertain. There is a justice between man and man, which, when candidly sought for by a fair-minded person, can always be discerned. There is, and ought to be, in every well-balanced mind a just regard for

the true relations which he sustains and the duties which he owes to social life, and there should be a firm purpose to do one's whole duty under all circumstances and in all conditions lying at the foundation of your conduct towards all men.

If in your progress through life you keep these aims and purposes fairly before your mind, if you remember always these old-fashioned notions in which you have been brought up, and do not yield or forsake them until you are convinced that you have discovered some better principles for your guidance through life, you may be assured that you will always be in the safe road, and upon that way which will the most certainly lead to the approbation of your own consciences, the approval of your fellow-men, and the advancement of the community in which you live.

APPENDIX D

APPENDIX D

A CALENDAR OF THE OPINIONS OF JUSTICE SAMUEL F. MILLER[1]

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*Trustees of the Wabash & Erie Canal Co. *v.* Beers.—2 Black 448.

Lindsey et al. *v.* Hawes et al.—2 Black 554.

Russell *v.* Ely et al.—2 Black 575.

The United States *v.* Chaboya.—2 Black 593.

Rothwell *v.* Dewees.—2 Black 613.

1863—December Term

Gaylords *v.* Kelshaw et al.—1 Wallace 81.

Burr *v.* The D. M. R. R. & Navigation Co.—1 Wallace 99.

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[1] This calendar of judicial opinions includes references to all cases decided in the Supreme Court of the United States in which Justice Miller's opinions are given from 1862 to 1890. It does not include the opinions written by Justice Miller in cases tried in the Circuit Court. These may be found in (1) a volume entitled, *Cases Determined in the United States Circuits for the Eighth Circuit. By the Hon. Samuel F. Miller. Reported by James M. Woolworth;* (2) Dillon's *Circuit Court Reports;* (3) McCrary's *Circuit Court Reports;* and (4) *Federal Cases* and *The Federal Reporter.*

* The cases marked with a star relate to Constitutional Law.

*Bridge Proprietors *v.* Hoboken Co.—1 Wallace 116.
Jones et al. *v.* Morehead.—1 Wallace 155.
Sweeny et al. *v.* Easter.—1 Wallace 166.
Insurance Companies *v.* Wright.—1 Wallace 456.
Rodrigues *v.* United States.—1 Wallace 582.
Blossom *v.* Railroad Company.—1 Wallace 655.
United States *v.* Vallejo.—1 Wallace 658.
United States *v.* Morillo.—1 Wallace 706.

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*Miles *v.* Caldwell.—2 Wallace 35.
Brooks *v.* Martin.—2 Wallace 70.
Marine Bank *v.* Fulton Bank.—2 Wallace 252.
Harvey *v.* Tyler.—2 Wallace 328.
Kutter *v.* Smith.—2 Wallace 491.
Levy Court *v.* Coroner.—2 Wallace 501.
Railroad Co. *v.* Soutter.—2 Wallace 510.
Minnesota Co. *v.* St. Paul Co.—2 Wallace 609.
Ex parte Fleming.—2 Wallace 759.

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Walker *v.* Transportation Co.—3 Wallace 150.
The Cornelius.—3 Wallace 214.
The Convoy's Wheat.—3 Wallace 225.
*Buck *v.* Colbath.—3 Wallace 334.
*United States *v.* Holliday.—3 Wallace 407.
The Mohawk.—3 Wallace 566.
United States *v.* Scott.—3 Wallace 642.
United States *v.* Murphy.—3 Wallace 649.
Dehon *v.* Bernal.—3 Wallace 774.

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United States *v.* Hoffman.—4 Wallace 158.
*Railroad Company *v.* Rock.—4 Wallace 177.
Leftwitch *v.* Lecanu.—4 Wallace 187.
Mayor *v.* Sheffield.—4 Wallace 189.
Rutherford *v.* Geddes.—4 Wallace 220.
The Hine *v.* Trevor.—4 Wallace 555.
United States *v.* Le Baron.—4 Wallace 642.
United States *v.* Weed et al.—5 Wallace 62.
Woodworth *v.* Insurance Company.—5 Wallace 87.
Ex parte the Milwaukee R. R. Co.—5 Wallace 188.
*Green *v.* Van Buskirk.—5 Wallace 307.
The Hampton.—5 Wallace 372.
De Groot *v.* United States.—5 Wallace 419.
Railroad Co. *v.* Soutter and Knapp.—5 Wallace 660.
Deery *v.* Cray.—5 Wallace 795.
Lee *v.* Dodge.—5 Wallace 808.
Ex parte the Milwaukee Railroad Co.—5 Wallace 825.

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*Crandall *v.* State of Nevada.—6 Wallace 35.
The Watchful.—6 Wallace 91.
United States *v.* Adams.—6 Wallace 101.
Rector *v.* Ashley.—6 Wallace 142.
Agricultural Co. *v.* Pierce Co.—6 Wallace 246.
*Barney *v.* Baltimore City.—6 Wallace 280.
Mussina *v.* Cavazos.—6 Wallace 355.
The Victory.—6 Wallace 382.
Foley *v.* Smith.—6 Wallace 492.
Gardner *v.* The Collector.—6 Wallace 499.

Clark *v.* United States.—6 Wallace 543.
Insurance Co. *v.* Hallock.—6 Wallace 556.

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Kendall *v.* United States.—7 Wallace 113.
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Mead *v.* Ballard.—7 Wallace 290.
Edmonson *v.* Bloomshire.—7 Wallace 306.
*Gaines *v.* Thompson.—7 Wallace 347.
Generes *v.* Bonnemer.—7 Wallace 564.
*The Floyd Acceptances.—7 Wallace 666.
Garrison *v.* United States.—7 Wallace 688.
*United States *v.* Speed.—8 Wallace 77.
Nailor *v.* Williams.—8 Wallace 107.
*Woodruff *v.* Parham.—8 Wallace 123.
*Hinson *v.* Lott.—8 Wallace 148.
*Gibbons *v.* United States.—8 Wallace 269.
Gibson *v.* Chouteau.—8 Wallace 314.
Gilbert & Secor *v.* United States.—8 Wallace 358.
Avendano *v.* Gay.—8 Wallace 376.
Bradley *v.* Rhines' Administrators.—8 Wallace 393.
Allen *v.* Killinger.—8 Wallace 480.

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Basset *v.* United States.—9 Wallace 38.
*United States *v.* Keehler.—9 Wallace 83.
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*Frisbie *v.* Whitney.—9 Wallace 187.
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Barney *v.* Schmeider.—9 Wallace 248.
Public Schools *v.* Walker.—9 Wallace 282.
*National Bank *v.* Commonwealth.—9 Wallace 353.
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*Litchfield *v.* Register & Receiver.—9 Wallace 575.
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Wise *v.* Allis.—9 Wallace 737.
Carpenter *v.* Williams.—9 Wallace 785.
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Railroad Company *v.* Reeves.—10 Wallace 176.
Deery *v.* Cray.—10 Wallace 263.

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Tappan *v.* Beardsley.—10 Wallace 427.
Yates *v.* Milwaukee.—10 Wallace 497.
*Liverpool Ins. Co. *v.* Massachusetts.—10 Wallace 556
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*Virginia *v.* West Virginia.—11 Wallace 39.
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*Tyler *v.* Defrees.—11 Wallace 331.
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*Kearney *v.* Case.—12 Wallace 275.
*Knox *v.* Exchange Bank.—12 Wallace 379.

*Northern Railroad *v.* The People.—12 Wallace 384.
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Walker *v.* Dreville.—12 Wallace 440.

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*Curtis *v.* Whitney.—13 Wallace 68.
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*Dooley *v.* Smith.—13 Wallace 604.
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*Kennebec R. Co. *v.* Portland R. Co.—14 Wallace 23.
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*Delmas *v.* Insurance Co.—14 Wallace 661.

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*Bradwell *v.* The State.—16 Wallace 130.
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*Ex parte Lange.—18 Wallace 163.
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*Heine *v.* The Levee Commissioners.—19 Wallace 655.
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*Stockdale *v.* Insurance Companies.—20 Wallace 323.

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*Sprott *v.* United States.—20 Wallace 459.
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*Cannon *v.* New Orleans.—20 Wallace 577.
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*Loan Association *v.* Topeka.—20 Wallace 655.
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*Chy Lung *v.* Freeman et al.—92 United States 275.
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*Pound *v.* Turck.—95 United States 459.
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*Wisconsin *v.* Duluth.—96 United States 379.
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