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Feature Essay

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Murray, Robert Bruce *PERSPECTIVES FROM AFIELD AND AFAR: Legal Cases of the Civil War*. Stackpole Books, \$29.95 ISBN 811700593

Trials and Tribulations

Two Books offers insight into court cases

From the Compromise of 1850 through the Civil Rights cases, the Civil War era brought contentious jurisprudential issues to the Supreme Court. Litigation arose over Civil War measures, military justice, Reconstruction, and the three constitutional amendments. Meanwhile the enduring issues of contract, property and personal liberty acquired a new intensity as both private and public law became politically entangled in the war and Reconstruction. Consequently judicial decisions acquired a political patina derived from competing ideologies. Journalists, politicians and the general public regarded the Civil War era Supreme Court and its justices as partisans in war and its aftermath rather than as judicial philosophers.

Two new books re-examine the jurisprudence and politics of this crucial period. In **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era**, Michl A. Ross studies a key figure of the court in the social and political contexts of his life. Robert Bruce Murray recounts in **Legal Cases of the Civil War** both arguments and decisions in most of the Civil War cases. The two books overlap in subject but not in intent, as Ross writes legal and social history while Murray deals with case analysis, giving different views of similar materials.

Abraham Lincoln appointed Justice Samuel Freeman Miller to the Supreme Court on July 16, 1862 to represent the new trans-Mississippi circuit. Living in Iowa, at the time of his appointment, Miller was a small-town lawyer, an enthusiastic supporter of the war, and an important state Republican politician. He held generally Whiggish opinions, and was attracted to the Republican Party

by its stand on the issues of free labor and free soil. Miller brought with him a small-town enthusiasm for economic growth and vitality and for internal improvements. He believed in a fluid society that allowed an able man to rise through hard work, and he was generally optimistic regarding social and economic progress. Miller, hostile to pre-war slavery and post-war racial oppression, belonged to the liberal wing of the Republican coalition and supported the war, emancipation, constitutional amendments and Congressional Reconstruction. He also favored western debtors over eastern bond holders, an attitude that would carry him into the minority on the court and away from the general drift of the Republican Party into the Gilded Age.

Miller participated in several landmark decisions while on the bench, some dealing with the war and its consequences relative to civil liberty. For example Ex parte Milligan, 71 U.S. (1866), (which is discussed at length in both books), involved habeas corpus and the jurisdiction of military tribunals over civilians. Lambdin P. Milligan, a Copperhead Democrat, was arrested in Indiana on October 5, 1864, by a military tribunal, tried for treason, convicted the same month, and sentenced to be hanged. He filed for a writ of habeas corpus. The case came to the Supreme Court in March 1866. The government argued that Milligan's arrest had been justified by martial emergency, that the Fourth, Fifth and Sixth Amendments were suspended due to the declaration of that emergency, and that Milligan was a prisoner of war to whom habeas corpus did not apply. Milligan asserted that he was a civilian who was arrested in violation of the government's own procedures. He argued that he was not in a war zone, but in a state where the civilian courts and constitutional procedures had operated unimpeded from the time of his arrest to the present, and that the usual procedures, courts and constitutional protections should prevail. And they did prevail. In a unanimous decision, the court on April 3, 1866 found for Milligan and granted habeas corpus. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration (Ex parte Milligan, at 126-127).

Civil liberties considerations had triumphed over those beguiling doctrines of national security and administrative necessity. But Milligan had been lucky as well as on the side of the angels of liberty. Between his arrest and the scheduled date of his hanging, postponed by litigation, the war had ended and the emergency, viewed increasingly from a distance, no longer seemed so dire. Justice Davis acknowledged this in his opinion: Then, considerations of safety

were mingled with the exercise of power. Now, that the public safety is assured, this question can be discussed and decided without passion. (Id., at 109).

Miller's most celebrated opinion came in the Slaughter-House Cases, 83 U.S. 36 (1873). In New Orleans, butchers had habitually slaughtered animals, exposed carcasses to heat and vermin, and disposed of the reeking refuse by throwing it onto the streets throughout the city. In response to the resulting public health menace, the Reconstruction government passed legislation in March 1869 relegating butchering to a single location across the river at the new Crescent City Slaughter-House, where the meat would be inspected and the health problems contained. New Orleans was a city celebrated for stench, disease and filth; the Slaughter-House Cases were a Victorian attempt at municipal reform, aimed to change that reputation.

The butchers took the matter to court, and it reached the Supreme Court in February 1873 after four years of litigation in both state and federal tribunals. The butchers claimed that the new slaughter-house and the monopoly it created deprived them of a constitutionally protected right to practice their profession, a right newly protected by the privileges and immunities clause of the Fourteenth Amendment.

The court, however, was not of this opinion. Miller's majority opinion affirmed Louisiana Supreme Court's holding that the state could create a private corporate monopoly for legitimate reasons of police, health and safety. Moreover, the butchers, who had not lost the opportunity to practice their craft, were not covered by the clause since their rights came under state law. The ruling implied that the Fourteenth Amendment did not automatically extend the Bill of Rights to cover all activity by the states.

There were two significant dissents. Justice Stephen Field argued that the privileges and immunities clause extended national judicial authority over all state enactments, giving citizens the protection of the Bill of Rights and rights formed in natural law, including the right to practice a craft. This was a huge leap in contemporary jurisprudence, and it led to the creation of the doctrine of liberty of contract (Lochner v. New York, 198 U.S. 45 [1905]). A second dissent, this by Justice Joseph Bradley, also incorporated the Bill of Rights and natural law into the privileges and immunities clause, but suggested that the Louisiana legislation also violated the due process clause. Bradley argued that the Fourteenth Amendment authorized examination of the substance of all

legislation (substantive due process), an opinion that proved even more of a leap beyond contemporary constitutional interpretation.

Ross's analysis of the Slaughter-House Cases sets them in their social, legal, and historical context, and is entirely persuasive. At the time, the Slaughter-House Cases were not a test of substantive due process; instead, the issue was municipal reform of a significant health menace. Since the butchers had been affected only at the level of convenience, the Fourteenth Amendment did not apply. The butchers had an imaginative basis for their complaint, and the dissents were certainly creative legal thinking, but Miller's majority opinion reflected both the facts of the case and current thought.

Both of these books add measurably to the increasingly rich tapestry of Civil War era legal history. Murray divides the Civil War cases into their appropriate legal categories, and presents the material about each case in necessary detail for the reader. **Legal Cases of the Civil War** is not an historical treatise, but an examination of jurisprudence. Ross writes legal history, balancing narrative and context. They complement each other nicely.

James D. Hardy, Jr. is associate dean of the Honors College at Louisiana State University and has published several books on both history and literature, including one on baseball.