Volume 1
Number 1 *Fall 1966*

*pp.*170-185

Fall 1966

Loren Miller: The Petitioners: The Story of the Supreme Court of the United States and the Negro

Burton D. Wechsler

BOOK REVIEWS

THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO. By Loren Miller. New York: Pantheon Books. 1966. Pp. xv, 461. $8.95.

It is impossible even to speculate what American legal history might have been like, had that Dutch ship not landed in Virginia in 1619 with chained blacks in its hold, followed somewhat later by a stream of other vessels bearing the same pathetic cargo.

The institution of slavery became the infrastructure of the planting economy of the South, bringing with it, almost ineluctably, the Civil War and leaving in its wake a one-hundred-year tale of internalized colonization and tenacious racism.

As in all societies, the planting South required a *weltanschauung* supportive of its institutions. The myth of the inherent inferiority of the black man—the societal conception of him as a thing and not a person—evolved into the philosophical *sine qua non* underpinning and justifying the institution of involuntary servitude. This outlook was an integral and inseparable part of the prevailing antebellum southern culture for slaveholder and non-slaveholder alike, extending itself to a lesser degree and in modified form to the North. The sudden emancipation of the slave from his bonds did not work a concurrent separation of the master from his myth. For myths die hard and are prone to survive the institutions that spawn them. So it was that the Negro was legally declared to be free but no permanent passport was issued to him to enter the mainstream of American life.

Today the Negro is still knocking at the door. He has not been admitted. Of late, however, as he has mustered his forces and knocked louder, someone on the other side of the door is finally answering, "Who's there?"

In this story of black travail the role of the Supreme Court until the 1930's, according to Loren Miller, was a very unsalutary one. The early Court did not assail the myth of Negro inferiority but at times expressly reaffirmed it. This is not to say that the Court always abided by the public will and simply reflected current mores. In important respects it thwarted that will as expressed in constitutional amendments and congressional enactments. Miller's thesis is that the Supreme Court first took the Negro under its wing. The Court became the guardian and the Negro the

ward. When that relationship was firmly established, the guardian then complacently informed its ward that it was helpless to protect him.

In the middle of the last century when Congress found it increasingly more difficult to reach compromises concerning slavery, the Court was encouraged to assist. This it did. Three years before the Civil War it declared in the *Dred Scott Case*[1] that Congress had no authority to prohibit slavery in the territories. Moreover, a freed Negro was not a "person" under the Constitution; therefore, although he may have been a citizen of a particular state, he was not a citizen of the United States with all the benefits granted to citizens under the Constitution. For the majority of the Court, Chief Justice Taney said:

> They [Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . .[2]

It took the 1954 school desegregation cases[3]—almost a hundred years later—to match the furor evoked by the *Dred Scott* decision.

Then came the Civil War which, according to most texts on the subject, the North supposedly won. Passage of the thirteenth, fourteenth and fifteenth amendments following that conflict vested the Negro—or so some thought—with that entire paraphernalia of rights which mark and protect a free man in a free society. Miller sides with the body of thought which insists the Court emasculated those amendments, severely narrowing their sweep in an unhappy series of decisions beginning with the *Slaughter House Cases* of 1873.[4] In these cases, Miller contends that the Court disinterred the concept (enunciated in the *Dred Scott* decision) of dual state and national citizenship, a distinction which he is convinced the fourteenth amendment had buried. The Court then virtually reduced to minor significance the concept of privileges and immunities which attach to United States citizenship. The decisive thrust of the opinion was in these terms: it was "not the purpose of the Fourteenth Amendment . . . to transfer the security and protection of . . . civil rights . . . from the states to the federal government. . . ."[5]

Pursuing the rationale of *Slaughter House,* the Court struck down

1. Dred Scott v. Sandford, 19 How. (60 U.S.) 393 (1856).
2. *Id.* at 407.
3. Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).
4. 16 Wall. (83 U.S.) 36 (1873).
5. MILLER, THE PETITIONERS 104 (1966) [hereinafter cited as MILLER].

the Civil Rights Act of 1875.[6] That law had been passed to assure equal enjoyment of public accommodations. But the fourteenth amendment, the Court ruled, was inapplicable to discriminatory conduct of individuals; it only proscribed state action. Redress of grievances could not be had from Congress; the Negro "may presumably be vindicated by resort to the laws of the State for redress."

To refer the Negro to the largess of southern legislatures was an ironical jest, for within a short time after the Civil War the Negro was not represented in those legislatures because he dared not vote. He dared not vote because his life was imperiled. His life was imperiled because of mob action. And the Court refused to permit Congress to protect him against mob action. The circle was complete. It was not until 1964 that the Negro could eat his bowl of chili in the local beanery.

Even if the Negro had the incredible temerity to brave whip, stake, tree limb and noose, the polls—with indirect judicial sanction, Miller notes—were effectively closed to him. The Court ruled the fifteenth amendment did not give the Negro the right to vote; it only interdicted state interference with that right on racial grounds. The author demonstrates what followed was perfectly predictable; a plethora of laws calculated to keep Negroes off the voting rolls: poll taxes, literacy tests, intricate registration statutes—the whole gamut of cynical devices familiar to the most casual student of American history—became the order of the day. In a two year period Negro registration in Louisiana fell from 130,334 to 1,324, a drop of 99 percent.

From the author's vantage point, the justices were in the main concerned less with the human spirit than with a rapidly expanding economy. Given the milieu in which they had developed and thrived prior to donning their robes, their natural proclivities were to encourage economic growth, and shelter it, if need be, from social dislocation.

> The great business and industrial need of the latter half of the nineteenth century was for legal devices that would expedite growth and development of corporations and free them of crippling state restrictions. Successive appointments of successful corporate lawyers to the Court after the Civil War created a climate of judicial opinion in which the problems of growing business found a sympathetic audience. Slowly, subtly, but surely, the Fourteenth Amendment was transformed into a charter to protect economic interests, chiefly of corporations. . . .

6. Civil Rights Cases, 109 U.S. 3 (1883).

> [T]he Compromise of 1876 attendant on the Hayes-Tilden election was more than a bargain between the Democrats and the Republicans, by which the political rule of the South was resigned to Democratic control with a Republican warrant to pursue nationalizing economic policies. . . . It signalized the restoration of the union on terms acceptable to the South. The tremendously powerful judicial arm of the national government, the Supreme Court of the United States, had a vital role to play in making the compromise effective. . . .
>
> [This] called for an expansive interpretation of the amendment in the area of economic interests and a restrictive interpretation in the sphere of civil rights. That is exactly what the Court did, and we need not cry corruption or charge cynicism to explain its actions. We need only see it in its proper historical perspective as a court of men, predominantly successful corporation lawyers, conservative in outlook, predisposed to the businessman's point of view, tragically mistaken but patriotic within their lights, and convinced that the destiny of the nation lay in giving free rein to the doctrine of laissez-faire economics. It was as easy for these men to tolerate the evils of the burgeoning Jim Crow system as it was for the Founding Fathers to accommodate themselves to the evils of human slavery. And for the same reason: both had blinded their eyes with visions of other goals.[7]

Against that background it is readily understandable that the Court decided as it did in the *Slaughter House* and *Civil Rights Cases;* that it also declared Congress could not legislate to protect the Negro against mob violence unless that violence had been sanctioned by the state; and that it could not protect his vote unless the state itself directly interfered with it on racial grounds. And even then when the voting registration statutes were rigged against the Negro, the Court would not intervene. The Court refused to hold the complete and prolonged absence of Negroes from trial and grand juries justified the conclusion that they had been intentionally excluded. Finally, the Court enunciated the pernicious "separate but equal doctrine"[8] which effectively sealed off the Negro from the rest of the society like a pariah for half a century. The results of that case will no doubt plague us for more than another half century.

---

7. MILLER 114-16.
8. Plessy v. Ferguson, 163 U.S. 537 (1896).

For some time now (since the *Scottsboro Cases*[9] in the early thirties, Miller states) the Court has been steadily undoing its previous handiwork—a "judicial revolution in race relations"—which reached a crescendo in the school desegregation cases of 1954.[10]

The Court no longer feels bound by a state court's determination that there was no discrimination in the selection of juries, hence reversing the trend initiated in the *Slaughter House Cases* that supervision of civil rights will be left to the states. Between 1935 and 1965 the Court heard twenty cases involving the exclusion of Negroes from juries. In eighteen of them it found discrimination where the state trial and appellate courts had found none. Virtually every facet of Negro existence elicited the Court's interest and protection, from the refusal to enforce racially restrictive covenants to the right to counsel; from invalidation of the white primary system to the refusal to permit state investigating committees to meander through NAACP membership lists.

The techniques utilized by the Court to reverse its field were varied. Some decisions, such as the one invalidating the white primary, were specifically overruled. Others met a different fate. For unpublished reasons of its own, the Court never expressly overruled *Plessy v. Ferguson*[11] which had initiated the doctrine of "separate but equal." The Court simply immolated the credo and laid it everlastingly to rest. The public accommodations section of the 1875 Civil Rights Act differed little from its successor, the 1964 Civil Rights Act. The earlier act failed when the Court refused to acknowledge that Congress was empowered to prevent discrimination by individuals. In his approval of the recent act, Mr. Justice Clark in his majority opinion did not trifle with that notion; he adopted an easier course and hung his judicial hat on the commerce clause.

How does Miller account for the Supreme Court's rather remarkable reversal in attitude toward the Negro? He never really confronts this issue head on, only tangentially. He is obviously intrigued by the reasons for the Court's attitude in the period from roughly 1857 to 1930. Yet the reversal of that attitude commands less of his attention, and he makes only scattered references to it. In his defense, it is axiomatic that the past is much easier to read than the present. Miller does not attribute the changing juridical tide to the composition of the Court, for he is at pains to point out earlier in the book that the civil libertarian-

9. Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935).
10. Cases cited note 3 *supra*.
11. 163 U.S. 537 (1896).

ism of Holmes and Brandeis was not reflected in their judicial response to civil rights.

Miller does allude, however, to the steady trek of the Negro from country to city, his urbanization, the rise of the black bourgeoisie and the strengthening of its chosen instrument, the NAACP. "Vast changes," he adds, "far from the ability of any man to foresee in 1930, were to sweep over the United States, and the world, in the area of race relations, in the swift moving decades after 1930. Old ideas perish, and new and revolutionary concepts replace them."[12] There is no elaboration of this point. Perhaps the author will favor us with an extended analysis of it in a future work.

This book is not distinguished by legal research intensely focused on one very fine point, characteristic of much legal writing. No light, startlingly new, is shed by the author on any one case. He borrows liberally from the prolific material unearthed by a host of other scholars. Yet his contribution is substantial, and the book is splendid and often exciting reading. Miller is concerned with history's sweep and its significance to man. He does not view one case in grand isolation from the next; nor the totality of the cases—the emergence and direction of the law—as merely the child of rigorous logic, remote and unrelated to the economic forces operative in society.

To his material the author brings a profound compassion. The lowliest litigants, whose names are immortalized in some of the most eminent cases in American jurisprudence, are treated with gentle respect. The agonizing facts which gave rise to the litigation are described in sympathetic detail. This is not a dull recondite tome; the exposition of the cases is not an arid exercise. There is a human dimension to this book. In *Plessy v. Ferguson,* Mr. Justice Brown wrote: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races. . . ."[13] To which the author replies: "This facile generalization entirely neglected the very obvious truth that Mr. Plessy, whose colored blood was not discernible, was not 'distinguished from the other race' by color."[14]

Then there is Bird Gee. Who in heaven's name is he? Oh just an escaped slave, contentious enough to be one of the prosecuting witnesses

12. MILLER 260.
13. 163 U.S. at 543.
14. MILLER 168.

in the famous *Civil Rights Cases* of 1883 when a waiter refused to serve him in a Kansas City restaurant. In fact, he died only a couple of years ago. Incidentally, one of Bird Gee's grandnephews is still carrying on the tradition, a fellow named Loren Miller.

BURTON D. WECHSLER†

---

† Lecturer in law with rank of Professor, Valparaiso University.