1894

Justice Miller as an Expounder of the Constitution

David F. Marchett
Cornell Law School

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JUSTICE MILLER AS AN EXPOUNDER OF THE CONSTITUTION.

Presented for the Degree

of

Bachelor of Laws

by

David F. Hatchett A. B.

Cornell University

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CHAPTER I.

INTRODUCTION

Samuel Freeman Miller was a native of Kentucky. He was born August 5, 1816. In his veins was mingled the blood of the North and of the South. His father had migrated from Pennsylvania and his mother from North Carolina. His boyhood was passed on a farm. His education was restricted to the common schools. From the farm he went to the village drug store; from there to the medical department of Transylvania University where he took the degree of M. D. He disliked the practice of Medicine and began the study of law, making up for the deficiency of his earlier training by taking advantage of privileges offered in a debating club conducted in the town in which he then resided. He was admitted to the bar at the age of thirty one. He was an ardent opponent of human slavery. When Kentucky failed to provide for emancipation in the Constitution of 1850, he removed to Iowa. He took his slaves with him and there gave them their freedom. In politics he was at first a whig; but
afterwards became a Republican. He was always intensely partizan. Indeed it is said that during the first administration of Mr. Cleveland he expressed the sentiment that his one desire was to be permitted to live until he might know that a Republican president would nominate his successor. As a lawyer he soon rose to eminence at the Iowa bar and his practice extended into Illinois, where he formed the acquaintance and became the fast friend of Lincoln who, after his election as president, upon the recommendation of the entire bar of the West, appointed Mr. Miller associate Justice of the Supreme Court, in 1862. The years which followed were eventful as any in the history of our Republic. The calendar of the Supreme Court was crowded with cases, the decision of which required the solution of momentous questions. The power of the Nation to conduct a war for its own existence and the questions growing out of that war; the rights of the emancipated slave, the changes wrought in our Constitution by the three last amendments; and after these the vast changes in methods of industrial production and distribution adding to the complexity of questions arising under the most complex system of government that has ev-
er existed — all these have, during the past thirty years, placed upon judges of our Federal courts most grave responsibility.

To record some parts of the work done by Mr. Justice Miller in the solution of these grave questions is the purpose of the following pages.
"No Bill of Attainder or Ex Post Facto Law shall be passed. (Art. I. Sec. 9 Clause 3, U. S. Constitution)

A most interesting case on this subject is that of Ex Parte Garland, the facts of which were as follows:—

On the 24th of June, 1865, Congress passed an act extending to all persons applying for permission to practice laws in Federal Courts the provisions of a prior act relating to persons appointed or elected to Federal offices. This prior act required every such person before assuming the duties of his office to declare under oath that he had never borne arms against the United States; nor given aid and encouragement to persons hostile thereto; nor held any office under any authority or pretended authority, which was hostile to the United States. In 1860 Mr. Garland was an attorney and coun-

(a) 4 Wall. 382.
seller in the Federal courts. He had afterwards cast his lot with the seceding states in the war of the Rebellion and had served both as representative and Senator in the Confederate Congress.

In July, 1865, President Johnson had granted him a full pardon upon certain conditions and with these conditions he had complied. He afterwards petitioned the Supreme Court for restoration to the privileges of a practitioner of law, one ground of his prayer being that the Act of Congress was, as to him, an ex post facto law and therefore void.

Few cases have been so ably presented. Mr. Garland appeared in his own behalf with A. A. Carpenter and Reverdy Johnson; while Attorney General Speed for the United States was assisted by Messrs. Stanbery as special counsel.

The opinion of the Court, holding the law in question void, was written by Mr. Justice Field. It held that, while the Act of Congress neither attempted to define crimes nor inflict punishment, its effect was to do that very thing; that to deprive a person of the power to hold offices and trusts or of the privilege of pursu-
ing the ordinary avocations of life was to inflict punishment; that the exclusion or admission of attorneys by the courts is not an exercise of ministerial power, but rather judicial — in short, that admission to the bar is a right which can be taken away only for moral or professional delinquency. Justice Miller, with whom concurred three other members of the court, wrote a vigorous dissenting opinion. The position taken was that ex post facto laws could only apply to proceedings of a criminal nature; that the law in question referred to proceedings wholly of a civil nature; that admission to the bar is an act of grace and favor to which no one can claim an absolute right. Hence to refuse the privilege of practising law could not be considered as an infliction of punishment.

The classification of ex post facto laws enumerated in Calder v. Bullwere quoted which, omitting the second, as practically obsolete is as follows:—

(1) "Every law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes such act.

(a) 2 Dallas, 383.
Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender."

To the laws thus classified Justice Miller thought neither expounder nor commentator on the Constitution had added any other. That classification was them to be regarded as complete. No one of these classes did the Act of Congress in question belong. It could not therefore be regarded as ex post facto.

Section 10 of Art. i, of the Constitution provides "No state shall pass any Bill of Attainder or Ex Post Facto Law." Under this clause, at the same time as Ex parte Garland, was decided the case of Cummings v. Missouri (a). A new constitution, adopted by that state required teachers, ministers of the gospel, attorneys and voters, to take an obligation called the "oath of loyalty," the requirements of which were similar to those

(a) 4 Wall. 277.
of the Act of Congress but more searching in their character. Any one exercising any one of these privileges without first having subscribed to the oath was liable, upon conviction, to fine and imprisonment. Cummings was a priest of the Roman Catholic church, having performed his duties as a priest without first taking this oath, he was arraigned, tried, convicted and sentenced. This sentence of the state court was on appeal reversed, the questions involved being similar to those decided in Ex parte Garland. From this decision Mr. Justice Miller also dissented.

In after years he seems to have modified his views in regard to the completeness of the classification of Ex Post Facto laws in Calder v. Bull. He himself, in the case of Kring v. Missouri(a) wrote an opinion adding another class to the list there named. Kring had been indicted in the Criminal Court of St Louis for the crime of murder in the first degree and pleaded not guilty. The history of his case is remarkable. He was tried by a jury four times and was once sentenced on a plea of guilty in the second degree. This plea he claimed was en-

(a) 107 U. S. 221.
tered under an agreement with the District Attorney that he should be sentenced for only ten years. The court however, gave him a term of twenty-five years. He appealed to the Supreme court of Missouri and a new trial was granted. Upon being again arraigned, Kring refused to withdraw his plea of guilty in the second degree. The court ordered a plea of not guilty to be entered.

At the time the crime was committed the Constitution of Missouri provided that the conviction of such an offence in the second degree should be considered an acquittal of that crime in the first degree. This provision had been repealed before Kring was last placed on trial. Convicted of murder in the first degree and sentenced to death, Kring appealed to the Supreme court on the ground that the repeal of this provision of the Constitution of Missouri was, as to him, an ex post facto law and therefore void. The appeal was sustained by a majority of the court, Justice Miller in the prevailing opinion asserting that the classification of ex post facto laws in Calder v. Bull was not intended to be complete. The decision was put on the broad ground that any law passed after the commission of an offence which
in relation to that offence or its consequences alters
the situation or the accused to his disadvantage, is as
to him, ex post facto.

As to what changes in a law will amount to an in-
crease of punishment so as to render it void under this
clause of the constitution as to crimes previously com-
mitted, the case of In re Medley(a) is of considerable
value. The facts were these:— On the 29th day of No-

vember, 1889, Medley was convicted under the laws of the

state of Colorado of the crime of murder in the first de-
gree. By order of the court he was remanded to the cus-
tody of the sheriff, to be by him within twenty four
hours to be delivered to the warden of the state pen-

tentiary, by whom he was to be kept in solitary con-
finement until the fourth week of the month of December,

and on a day to be named thereafter by the warden, execu-
ted within the walls of the penetentiary. The statute
under which this sentence was passed became a law July
19, 1889. The murder was committed on the 13th day of
May of the same year.

Medley petitioned the Supreme court of the United

134 U. S. 160.
states for an order that he be released alleging that the law under which he was sentenced was ex post facto in that it inflicted a severer punishment than was annexed to his crime at the time it was committed. Both the new statute and the old inflicted the death penalty for this offence, but the court held that the later statute increased the punishment by death in two particulars. First, the new statute, unlike the old, provided for solitary confinement previous to execution. The extent and degree of this confinement was limited only by the discretion of the warden and even that discretion was limited. He might not admit any person except members of the family of the condemned man, his spiritual advisers, his counsel and the prison attendants. Of this solitary confinement the court said, speaking through Justice Miller;—"It remains of the essential character of that mode of prison life as it formerly originated was prescribed and carried to mark prisoners as examples of the just punishment of the worst crimes of the human race." The court held this solitary confinement to amount to a material increase of punishment. Second, the new law, unlike the old, provided that the time of execution should
should be unknown to the condemned man. This too, was held to amount to additional punishment. Six judges concurred, but Justices Bradley and Brewer dissented. Of the opinions mentioned I shall have something to say in another chapter.
CHAPTER III.

DECISIONS RELATING TO THE COMMERCE CLAUSE
OF THE CONSTITUTION

"The Congress shall have power to regulate commerce
with foreign nations and among the several states
and with the Indian tribes." (Art. I., Sec. 8, Const.)

Some of the ablest opinions ever written by Justice
Miller have been expositions of this clause. Prior to
the time when Congress began to legislate in the way of
controlling immigration, a few states on their own au-
thority attempted to assume control. Out of such an at-
tempt grew the case of Henderson v. New York (a) the
facts of which were these:— By statute of that state the
master of every vessel arriving at the port of New York
was required within twenty four hours of arriving to re-
port in writing to the mayor of the city the names, plac-
es of birth and last residence as well as previous oc-
cupation of every passenger not a citizen of the United

(a) 92 U. S. 259.
States. It was made the duty of the Mayor to require from the owner or consignee of the vessel a bond conditioned against the state being compelled to incur any expense for the relief or support of the passenger named in the bond for the space of two years. A bond was required for each immigrant. In lieu of this bond, one dollar and fifty cents might be paid. The enforcement of the statute being resisted the question of its validity came before the Supreme court where Justice Miller, speaking for the court held, first, that within the principle of The United States v. Milha that part of the statute requiring the report of the names, places of birth etc. of the passengers was valid as an exercise of the police power on the part of the state. Second, that the other requirements of the statute, although police regulations, were of such a nature that the state might not enforce them because the subject matter to which they related was by the Constitution confided exclusively to the discretion of Congress. "Such a statute" said the opinion, "is void no matter under what class of powers it may fall or how closely allied the powers conceded to belong to

(a) 11 Pet. 103.
A similar statute enacted by the legislature of California was declared unconstitutional in the case of Chy Lung v. Freeman (a) The California statute however, differed from that in New York in three particulars. First, it applied only to certain classes of immigrants, amongst them lewd and debauched women to which class it was claimed the appellant belonged. Second, the price per immigrant to be paid in lieu of bond was not fixed but left to the discretion of the state commissioner of immigration. Third, the only immigrant who might not be held for examination were public functionaries arriving in their official capacity. These distinguishing features of the statute the court considered made it more objectionable than the New York statute; and, while not denying the right of a state, in the absence of legislation by Congress to protect itself from criminals and paupers, held that such a right could arise only out of vital necessity and that its exercise was limited only by that necessity. This limit the California statute went far beyond and was therefore void.

Another attempt to levy a tax on immigration was de-

(a) 92 U. S. 275.
Acision in People v. Campagni Co. (a) statute of New York levied a tax of one dollar on each immigrant landed to be collected on the transportation company landing him. The tax was collected ostensibly to pay expenses incurred in carrying out the inspection laws of the state. Such a law having been passed three days earlier requiring the inspection of immigrants to determine if any of them were habitual criminals. The enforcement of the statute was resisted and the question coming before the Supreme court of the United States, it was held that the authority given to the states as to inspection laws by the Constitution(b) referred only to laws providing for the inspection of property and that the question was void under the rule laid down in Henderson v. New York.

Congress finally legislated on the subject of immigration and in the Head Money Cases (c) an act of Congress imposing upon the owners of steamers a tax of fifty cents for every alien passenger landed was held to be a valid regulation of commerce.

Attempts by states in one form or another to levy

(a) 107 U. S. 59.
(b) Art. I. Sec. 10, Clause 3 U. S. Const.
(c) 112 U. S. 580.
taxes on Commerce between the states have frequently fur-
nished the occasion for cases requiring exposition of this clause of the constitution.

Under this class I think may be mentioned the Case of Crandall v. Nevada (a) although the decision was distinctly put on another ground. A statute of that state provided for the collection from every person or company engaged in the business of transporting passengers, the tax of one dollar for every person carried who was leaving the state. It was required that each month the number of persons so transported and the payment of the tax therefor should be reported under oath. A penalty was provided for non-compliance with the statute. Crandall, who was the agent of a stage company, refused to make the required report and when arrested and placed on trial pleaded that the statute in question was contrary to the constitution of the United States and void. The decision of the state court having affirmed the validity of the tax an appeal was taken to the Supreme court of the United States where the decision of the state court was reversed. The reversal was put upon the ground

(a) 6 Wall. 35.
that the taxes was contrary to the correlative right of
the United States government and its citizens, and incon-
sistent with the object for which the government was
formed.

In State Tax on Railway Gross Receipts (a) Justice
Miller dissented from the decision of the court which
held that the state of Pennsylvania could levy a tax on
the gross receipts of a corporation of that state which
was engaged in inter-state commerce. In this dissent he
said:— "I lay down the broad proposition that by no de-
vice nor evasion, by no form of statutory words can a
state compel the citizens of other states to pay to it a
contribution or toll for the privilege of having their
goods transported through that state by the ordinary
channels of commerce."

The doctrine of the exclusive right of Congress to
control commerce between the states and that until Con-
gress should legislate that commerce must be free, re-
ceived added strength from a decision which he rendered
in the case of Wabash Ry. Co. v. Illinois. (b) In that

(a) 15 Wall. 284.
(b) 118 U. S. 557.
case the railway company appealed from a decision of the Supreme court of Illinois affirming the judgment of a lower court holding the company guilty of unjust discrimination. The facts were undisputed that the company had charged one firm 15 cents per 100 for the transportation of goods from Peoria Illinois to New York city, while on the same day and for similar goods another firm in a city 86 miles nearer New York city was charged 25 cents per 100 for transportation to that place. But counsel for the company urged that this business was inter state commerce, the regulation of which was wholly within the discretion of Congress. The state court had held that the penalty annexed to the statute should be applied on the theory that the statute was a binding regulation as to that part of this business transacted within the jurisdiction of the state. This decision was reversed and it was held, that while as to contracts for transportation to be carried on wholly within the state the statute was valid; yet as interpreted by the state court it was an unwarranted regulation upon inter-state commerce and therefore void. The decisions in
which the United States court had seemed to express a contrary opinion (a) were declared to have been argued and decided on other grounds. That while "the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make to the exclusion of the state was presented it received but little attention at the hands of the court."

This exclusive right of Congress to control commerce between the states was reasserted in Fargo v. Michigan (b). A statute of that state provided that the gross receipts of railway companies carrying passengers or freight from without into or from within to without the state should be subject to a tax. Fargo, as President of the M. D. & T. Co., a corporation organized under the laws of the State of New York, in which state its principal office was located, filed a bill in equity praying that the Auditor General of Michigan be enjoined

(a) Munn v. Illinois, 94 U. S. 113-5; State Tax on Gross Receipts, 15 Wall 293;
R. & Q. Co. v. Iowa, 94 U. S. 155;
Peake & Q. Co. & N Ry. Co. 94 U. S. 177-8
(b) 121 U. S. 230.
from collecting this tax from the corporation. The state court held the tax valid and an appeal was taken.

Justice Miller, writing the opinion of the court, distinguished the facts in this case from those in State Tax on Gross Receipts where, it will be remembered, he dissented on two grounds: first, the Pennsylvania corporation was organized under the state laws of Pennsylvania, this was a foreign corporation. Second, the tax in that case was levied on money already in the treasury of the corporation and upon property within the state which had ceased to hold its distinctive character as compensation for freight; in this case the property to be taxed was not within the state and probably never had been there. The decision of the State court of Michigan was therefore reversed. The same principle was again considered in the case of Batterman v. W. U. Tel. Co. (a). That case came before the Supreme court by a certificate of division from a Federal court sitting in the state of Ohio. The particular question presented was whether a tax levied on receipts of a corporation in that state, such receipts being derived partly from com-

(a) 127 U. S. 411.
merce carried on wholly within the state and partly from inter-state commerce, but upon which the tax was assessed in gross and without separation or reapportionment of the receipts, was wholly invalid or invalid only as to that part levied on receipts derived from inter-state commerce. The tax was held only partly invalid and the decision of the Circuit court enjoining the collection of only this valid part, sustained.

The states, however, are not left without power to subject corporations engaged in inter-state commerce to just taxation. This doctrine was declared by the decision in W. W. Tel. Co. v. Mass(a). The telegraph Co. was a corporation organized under the laws of the state of New York. Its line extended into every state of the Union. Under authority of a statute passed for that purpose the Treasurer of Massachusetts assessed a tax upon the corporation. Following the directions of the law the amount of the tax was computed as follows:—taking the sworn statement of officers of the company as to its financial condition, he deducted from the entire capital stock proper credits. This gave the total valuation of stock liable to taxation. Ascertaining the to-

(a) 125 U. S. 545.
tal number of miles of line owned by the company in all the states and territories and the total number of miles of line within the state of Massachusetts the amount of tax was computed by this formula:—

Rate times the Total Valuation of Stock times Number of Miles of Line Within the State divided by the Total number of Miles of Line equals the Amount of the tax.

The company resisted payment and carried its case to the Supreme Court where the validity of the assessment was affirmed on the ground that it was essentially an excise on the capital stock of the corporation within the state.
DECISIONS RELATING TO LAWS WHICH IMPAIR
THE OBLIGATIONS OF CONTRACTS.

"No state shall pass---- any law impairing the ob-
ligations of contracts.(Art.I, Sec. X., U.S.Con.)"

The decision of the Dartmouth College Case(a) held that the charters of corporations were contracts between the states granting the charters and the corporations to which these charters were granted. The privileges granted in these instruments are therefore protected by this clause of the Constitution. Such a contract was considered in the case of University v. Rouse (b). The statute of Missouri, by which the University was incorpo-
ratted, provided that its property should be exempt from taxation. A constitution of the state, subsequently ad-
opted, authorized the legislature to provide for the levy of a tax on property belonging to such institutions. In pursuance of this authority the Legislature did pro-

(a) 4 Wheat. 518.
(b) 8 Wall. 439.
vide for the levy of a tax on property belonging to corporations. The University resisted its collection. The state courts affirmed its validity and the University appealed. A majority of the Supreme court held that these facts showed a contract by which it was agreed that the University should not be taxed; that the legislature of the state had power to make this contract in behalf of the state, and that the state was bound thereby. From this decision Chief Justice Chase and Justices Field and Miller dissented. Justice Miller, speaking for the minority said; "No legislative body, sitting under a state constitution of the usual kind has the right in any way to divest the state of its taxing power. Questions of such a character, however great the authority by which they are supported can never be considered by the decisions of any court." Had the question been before the court for the first time the opinion of the minority would probably have prevailed. Undoubtedly the tendency of the court is to restrict as far as possible the doctrine laid down in the opinion of the majority.

Thus in Memphis Gas Co. v. Shelby Co. (a) a gas com-

(a) 109 U. S. 395.
pany had been incorporated by the legislature of Tenness-
ec. The charter was silent on the question of taxation. 
Afterwards a license tax of $250 per year having been 
laid on the franchise of the corporation its collection 
was resisted on the ground that it was so heavy as to a-
mount to a destruction of the privileges granted. It 
was urged that the state was bound by an implied contract 
not to take away those privileges. The decision of the 
state court was adverse to the corporation. It appealed 
but relief was denied. The court remarking "The surren-
der of the right of taxation must be clear and explicit."

Agreements in charters granted to corporations by 
which the legislature attempts to divest the state of 
its police powers are void and hence not protected by 
this clause of the constitution. This question is dis-
cussed by Justice Miller in Butchers v. Crescent Slaugh-
tering Co.(a) The case is interesting in a historical 
way as the sequel of the famous Slaughtering House Cases. 
It will be remembered that the legislature of Louisiana 
created a corporation to which was given the exclusive 
right to slaughter animals intended to be used as food

(a) 111 U. S. 746.
(b) 16 Wall. 16.
in a large area of territory which included the city of New Orleans. The privileges were conferred for twenty-five years. Before that time had expired the state constitution was so amended as to place the business under the exclusive control of the police department of the state. It also provided that no monopolies in the business should be granted and abolished those then existing. The slaughtering company existed claiming the protection of this clause of the constitution. The case was fought to the Supreme Court which decided against the claim of the original company, holding that the legislature had no power to contract away the police power of the state where the public health or morals were affected thereby.

Keith v. Clark (a) was a case growing out of the war of the rebellion. The charter of the Bank of Tennessee, granted in 1838, provided that bills and notes of the bank should be receivable for taxes at their face value. May 6, 1861, Tennessee seceded from the Union. In 1865 the constitution, so amended as to provide that bills and notes of the bank issued after the secession

(a) 97 U. S. 454.
should not be received in the manner before provided. The plaintiff, for taxes due, tendered bills of the bank issued on the dates named in the amendment of the constitution, worth at that time about 25 cents on the dollar. The tender being refused he paid his taxes and sued the defendant who was tax collector for money paid under protest. The suit was defended on the theory that bills of the bank issued after Tennessee had succeeded were issued for the purpose of aiding the war of the Rebellion, that the consideration thereof was immoral and illegal and the contracts which they represented void. The question coming before the Supreme court it was discussed at length, the court holding that the attempts of the state to secede was a nullity; that it was during all the years of the war an organization essential to the existence of society; that during those years its legislation, not in conflict to the laws or constitution of the United States was valid; that before any of its legislation would be declared invalid the fact that it violated a law of the United States or was done in aid of the Rebellion should be affirmatively shown; that this had not been done, and
that the bills, therefore, were a valid tender and the amendment void as violating the obligation of a contract.
"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law." (Amend. XIV., Sec. 1.)

The great leading case construing this section of the amendment was the Slaughter House Cases (a). The cases arose in Louisiana. The legislature of that state granted to a corporation created for that purpose the exclusive right to land keep and slaughter any cattle, beehives, calves, sheep or swine which were to be killed for

(a) 13 Wall. 36.
sale within a certain district in that state containing more than one thousand square miles. Any person exercising any of these exclusive privileges was liable to a penalty. The corporation was to be paid a fixed price for the use of their slaughter house. It was liable to a fine in case it refused to anyone the privilege of slaughtering, or failed to provide ample privileges for all desiring to use the house for slaughtering purposes. An inspector was to be appointed whose compensation was fixed at a given price per head. The butchers resisted the enforcement of this act and carried their cases to the Supreme court urging that the monopoly was void as against common right; that it abridged their privileges and immunities as citizens of the United States; deprived them of their property without due process of law, and denied to them the equal protection of the laws.

On account of the grave questions involved the cases were given great consideration and the decision was not rendered until December, 1872. The prevailing opinion, written by Mr. Justice Miller, is considered his masterpiece and it is the production which of all others he was accustomed to regard with most satisfaction. I

First, to the argument of counsel for the butchers
drawn from the case reported by Coke, holding a monopoly void as against common right, the opinion replied that that principle held good only as to monopolies granted by the crown, not as to those granted by the Parliament, that a state legislature had powers analogous to those of Parliament and might grant to a corporation or to any of its citizens such exclusive privileges as might be deemed wise. Second, two hitherto doubtful questions had been set at rest by this amendment. Contrary to the views of Calhoun it provided that persons might be citizens of the United States without being citizens of any particular state. It overruled the Dred Scott decision by declaring that all persons within the United States and subject to its jurisdiction are citizens of the United States. There was, then, in the opinion of the court, a clear distinction between citizenship of a state and citizenship of the United States: Peculiar and distinct privileges and immunities attach to each class. Only the privileges and immunities belonging to persons as citizens of the United States, as distinguished from those privileges and immunities to

(a) 11 Coke's Rep. 85.
which such persons were entitled as citizens of the state are protected by this section of the Amendment. The privileges incidental to citizenship of the state were declared to be those which are fundamental. The rights here claimed were of this nature. Hence their protection must be given by the state. Third, The appellants had not been deprived of their property without due process of law. The phrase, it was said, was a peculiar one. It was used in the fifth amendment. It occurred in most of the state constitutions. It had been often construed, but under no admissible construction could it be held to apply to the cases in hand. Fourth, neither had the appellants been deprived of the equal protection of the laws. That phrase was held to have been inserted in the amendment for the protection of the newly enfranchised negroes. Doubt was expressed whether any case not involving a discrimination against these people could ever be held covered by this provision. The opinion concluded:—"Whatever fluctuations may be seen in the history of public opinion on this subject during the period of our natural existence, we think it will be found that this court, so far as its functions required, has always held with a steady and e-
ven hand the balance between state and Federal power, and we trust that such may continue to be the history of its relations to that subject so long as it shall have duties to perform which demand of it a construction of the constitution. From this decision four judges most earnestly dissented, denying every proposition there laid down.

At the same term was decided the case of Bradwell v. State, (a) Mrs. Bradwell, because of her sex, had been refused admission to the bar of Illinois. She appealed from the decision of the state court on the ground that her privileges as a citizen of the United States were abridged. It was held that the right to practice law in a state court was not one of the privileges attaching to citizenship of the United States and her appeal was denied. Three of the judges who dissented from the decision in the Slaughter House cases concurred in this opinion but were careful to put their concurrence off the ground that there were fundamental differences between the fundamental rights of the sexes.

The phrase "due process of law" received careful consideration from Mr. Justice Miller in Davidson v. New

(a) 16 Wall. 130.
Orleans. (a) In that case real estate belonging to the appellant had been heavily assessed for the purpose of draining swamps near the city of New Orleans. The tax having been held valid by the state courts Davidson appealed on the ground that he was deprived of his property without due process of law. The opinion of the court held that this phrase was equivalent to "The law of the land" as used in Magna Charta, that it had never been satisfactorily defined; that the policy of the court would be to determine its meaning by the gradual process of inclusion and exclusion as new cases should arise; but that it did not necessarily require a regular proceeding in a court of justice. As to the case in hand, these propositions were advanced:— "Whenever by the laws of a state or by state authority, a state tax, assessment servitude or other burden is imposed on property for public use, whether it be for the whole state or some limited portion of the community and the laws provide for a mode of confining or controlling the charge thus imposed in the ordinary courts of justice with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judg-

(a) 96 U. S. 97.
ment in such a case can not be said to deprive the owner of his property without due process of law however obnoxious it may be from other objections." As the case was covered by these propositions the appeal was denied. This decision was in accord with the doctrine of the previously decided case of McMillan v. Anderson (a) where it was held that the selling of goods for taxes under a statute which required ten days notice to the owner did not deprive him of his property without due process of law. In Kelly v. Pittsburgh (b) the appellant owned land which he desired to use for agricultural purposes exclusively. In pursuance of an act passed by the legislature of Pennsylvania the corporate limits of the city of Pittsburgh was so extended as to include this land. As a result the taxes thereon were extraordinarily increased. Kelly asked relief from the Federal court on the ground that he was deprived of his property without due process of law. The court replied that the act of the legislature whereby it was made possible to extend the corporate limits of the city was wholly in its own discretion, and that while the tax was exceedingly un-

(a) 95 U. S. 37.
(b) 104 U. S. 72.
just the court could not judicially say that the owner received no benefits from the purposes for which the tax was levied.

It is a curious fact that in all the opinions of Mr. Justice Miller in which he explained and construed the XIV. amendment, in but a single one did he ever hold that the rights claimed in the case at bar were protected by the provisions of this amendment. Here he was surely a strict constructionist.
CHAPTER VI.

DECI SIONS CONSIDERING PRIVILEGES OF REPRESENTATIVES?,
EXTRADITION AND THE IMPLIED POWERS OF CONGRESS.

I. "... and for any speech or debate in either house they shall not be questioned in any other place. (Art. I. Sec. 6, Const.)

II. "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers; and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof". (Art. I. Sec. 8 Clause 18, Const.)

A very learned opinion as well as interesting is that of Kilbourn v. Thompson. (a) Kilbourn was, by order of the speaker of the House of Representatives, sent to jail for contempt in refusing to answer questions before an investigating committee appointed by the house, and Thompson was Sergeant at Arms took him into custody. He afterwards sued Thompson and the members of the House.

(a) 103 U. S. 167.
who, procured his arrest, for unlawful imprisonment. The case reached the Supreme court by a writ of error to the highest court of the District of Columbia. That court had decided that, because of the privileges of the House of Representatives, Kilbourn could not maintain his suit. The Supreme court discussed the questions involved at great length. It was unanimously held that the Constitution conferred no express power on either house of Congress to punish for contempt, and that the power could not be implied from the fact of its exercise by the House of Commons because there it is derived from customs of the times when Bishops, Lords, Knights and Burgesses all met in the same body and exercised judicial functions as the "High Court of Parliament".

The committee before which Kilbourn refused to testify had been appointed for the purpose of investigating a real estate pool with which Jay Cooke was supposed to be connected, Cooke being at the time a creditor of the government and his affairs in process of adjudication by a Federal court. The action of the House in appointing such a committee at this time was declared to be an unconstitutional encroachment on the rights of the Judicial
department of the government and the resolutions of the House together with the warrant of the Speaker under which Kilbourn was imprisoned was held null and void.

However, it was further held that the members of the House who instigated the arrest were protected from a suit for damages by the constitutional provision that for words spoken in the House in debate members would not be questioned in any other place. That provision was held to protect the members of Congress not only as to words spoken in actual debate but as to written reports of committees made; resolutions offered and votes taken— in short to anything done by members of the House in relation to the business before it. In accord with these views the decision of the lower court denying Kilbourn's right to maintain his action was sustained as to the members of the House but reversed as to the Sergeant at Arms.

United States v. Rauscher (a) came before the court on certificate of division from a circuit court sitting in New York. Rauscher had been extradited from England on the charge of murder for which he had been indicted. Instead of proceeding against him under this indictment he was arraigned, tried and convicted on the

(a) 119 U. S. 407.
charge of having inflicted cruel and unusual punishment. The opinion of the Supreme court was asked as to whether, under these circumstances, the lower court had jurisdiction to try him for this second offence. The reply of the court discussed the subject of extradition at length holding that the exercise of the power rests exclusively with the National government and not the states; that an extradited person cannot be tried for an offence other than that for which he was extradited, until he has been released and given a reasonable time to return to the country from which he was taken. It was further held that this view must control in the case under consideration although the evidence on which the extradition of Rauscher was secured was precisely the same evidence as that on which he was indicted for the second offence. The case was undoubtedly well decided. Any other rule would be extremely unfair to a nation delivering up a fugitive from justice.

One of the most powerful opinions ever written by Mr. Justice Miller was rendered in his dissent to the decision of the court in Hepburn v. Griswold. (a) That case marked the beginning of the famous struggle as to whether

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(a) 8 Wall. 603.
Congress had power to make the noted and obligations of the government a legal tender in payment of debts. The facts were these; in June of 1860 Mrs. Hepburn gave to Griswold her note for $11250. At that time only gold and silver were legal tender. Five days after this note matured Congress passed an act making notes of the United States legal tender for all debts, public and private, with one or two exceptions not necessary to be mentioned here. The note of Mrs. Hepburn remaining unpaid and Griswold having brought suit thereon, she finally tendered the full amount due, both principal and interest, in United States notes which had been issued under the said act of Congress. The tender was refused. After different decisions by the state courts, the case was finally carried to the Supreme Court where, after a long and careful consideration, the Court having heard arguments from more than 15 of the ablest constitutional lawyers in the country on the question involved, the tender was declared invalid in an opinion written by Chief Justice Chase, with whom four other judges concurred, the Court at that time being composed of eight members.

The argument of Chief Justice Chase was remarkably clear. It was held: First, that the intent of Congress
as expressed in the words of the statute was to make United States notes a valid tender for the payment of debts contracted before as well as those contracted after the enactment of the statute. Second, that the power to do this was not conferred on Congress by any express grant in the Constitution. Third, neither could authority for the exercise of this power be found in that provision of the Constitution granting to Congress power to make necessary and proper laws for carrying into execution the express powers granted. Fourth, the powers of Congress being limited to such as were expressly granted or necessarily implied from those powers expressly granted, it followed that the act of Congress was ultra vires and therefore void.

The greater part of the prevailing opinion was given to the statement of the argument that the validity of the legal tender act could not be sustained under the theory of implied powers. This argument was based on the famous canon of construction laid down by Chief Justice Marshall in McCullough v. Maryland (a) as follows:3 "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate

(a) 4 Wheat. 421.
which are plainly adapted to that end, which are not pro-
hibited, but consistent with the letter and spirit of the
Constitution are constitutional". With the propositions
laid down in this canon as premises, the argument pro-
ceeds to show that neither to the powers of Congress to
borrow or coin money nor to issue notes, nor to carry on
war was this act making noted of the United States a le-
gal tender for pre-existing debts a means appropriate or
plainly adapted. Doubt as expressed as to whether the
legal tender qualities of the notes added anything what-
ever to their value. It was pointed out that the noted
first issued without being made legal tenders circula-
ted freely and without discount. It was urged, moreover,
that the act in question was inconsistent with the rule
laid down by Marshall because inconsistent with the let-
ter and spirit of the Constitution. It violated the car-
dinal principle of that instrument — the establishment of
justice by impairing the obligations of contracts.
It was contrary to the spirit of the provision of the
Constitution forbidding private property to be taken for
public use without just compensation. It violated that
cause of the Fifth Amendment, providing that no person
should be deprived of his property without due process of
law.
In the dissenting opinion by Mr. Justice Miller, with whom concurred Justices Swain and Davis, after pointing out the fact that Congress was not expressly forbidden either to make the notes of the government legal tender nor to pass a law impairing the obligations of contract, and conceding that in the powers granted to coin money, to regulate its value and to punish counterfeiting could not be found sufficient warrant for the exercise of this power, proceeded to argue the question whether the legal tender act could be sustained by the law necessary and proper at the time it was enacted, for carrying into execution any of the powers expressly granted. After quoting at length from the discussion of the implied powers by Chief Justice Marshall in the case of (a) The United States v. Fisher and McCullough v. Maryland the opinion continued:— "I have cited at unusual length these remarks of Chief Justice Marshall because, though made half a century ago, their applicability to the circumstances under which Congress called to its aid the power of making the securities of the government a legal tender as a means of successfully prosecuting a war which

(a) 2 Cranch, 258.
without such aid seemed likely to terminate its existence and to borrow money which could in no other manner be borrowed and to pay the debt of millions due to its soldiers in the field which could by no other means be paid, seems to be almost prophetic. —— the power to declare war; to suppress insurrection, to raise and support armies; to provide and maintain a navy; to borrow money on the credit of the United States; to pay the debts of the Union, and to provide for the common defence and welfare are all distinctly and specifically granted in separate clauses of the Constitution —— We were in the midst of a war which called all these powers into exercise and taxed them severely. —— all the ordinary means of rendering efficient the several powers of Congress above mentioned had been enlarged to their utmost capacity —— a general collapse of credit, of payment and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the Rebellion would have triumphed, the states would have been divided and the people impoverished. The National government would have perished and with it the constitution which we are called upon to construe with such nice
and critical accuracy." I have quoted so freely from this opinion simply because it seemed impossible by any analysis to do justice to the magnificent argument which it contains; and because, in my own opinion, it illustrates the manner and powers of reasoning of Mr. Justice Miller better than any other opinion he ever penned.
CHAPTER VII.

REMARKS ON THE WORK AND CONSTITUTIONAL OPINIONS
OF MR. JUSTICE MILLER.

Mr. Justice Miller has universally been conceded high rank as an expounder of our Constitution. The regard in which he is held is limited to no section of the country and to the followers of no one political party or creed. All grant to him due honor as a judge who was fearless; whose private life was spotless; whose sincerity and intellectual ability was unquestionable. His, I think, was genius in the rough. He lacked the polish of the schools; but he had that for which, when lacking, the schools can never compensate—a large degree of common sense. His style of reasoning reminds us of a brawny Kentuckian mauling rails. He always sent the wedge home. His cumulative sentences are in striking contrast with the polished ones of Bradley; in analysis he was equalled by Field; in legal lore he was probably excelled by Gray; he could not put so much meaning into a single sentence as Gaines; but he excelled them all in that highest form of judicial reasoning—judicial in-
tuition. Therein was his power. He was somewhat careless of precedent. The facts once before him and in a flash he reached a conclusion in consonance with justice. To the bar of justice he would have summoned sovereignty itself. The doctrine that the king can do no wrong found little favor at his hands. (a)

As to particular opinions various views are entertained. With the dissent in Ex parte Garland I cannot agree. Neither can I agree with the view of Professor Pomeroy (b) that the doctrine of that dissent would be correct if applied to the cases of these, who, unlike Garland, had not previously acquired a "vested right" to practice law. In either case the act of Congress did essentially propose to inflict punishment. That there is a clear distinction between the rights of one already admitted to the bar and an applicant for admission is not denied. But it at by no means follows that to deprive one already admitted to the right to practice would amount to punishment while to deprive another, not admitted of his capacity to be admitted would not amount to punishment. The constitution itself prescribes disqualification from ever holding any office of profit or trust.

(a) U. S. v. Lee, 106 U. S. 196.
(b) Pomeroy on Const. Law, p. 434.
as a punishment for certain crimes. (a) Surely it will not be asserted that this does not inflict punishment; but I have yet to see the man who is hardy enough to assert that he has a "vested right" to hold office in the future under the government of the United States. In In re Cooper (b) a case in which Professor Dwight appeared as counsel, it was held that in admitting attorneys to the bar the court acts judicially, and that every qualified applicant has a substantial right to be admitted. Can we say that a law which, for past offenses takes away substantial rights, inflicts no punishment?

True, as the dissenting opinion urged, ex post facto laws are, or should be, enforced only in criminal proceedings. True the re-admission of Garland was a proceeding which was, or ought to have been, wholly civil in its nature. But can Congress be permitted to avoid this safeguard of the Constitution merely by providing that its otherwise inhibited decrees shall be carried out and its otherwise inhibited punishment inflicted in a proceeding of a nature wholly civil? Indeed, the most o-

(a) Art. I., Sec. 3 Clause 7 U. S. Const.  
(b) 22 N. Y. 67.
diousness feature of the law in question was in the fact that it essentially provided for the punishment of an of-

fender in a proceeding of a civil nature where persons could be compelled to give testimony against themselves and where no one of those peculiar and sacred safeguards which experience has proved to be necessary for the protection of persons accused of crime could be invoked.

In no other case in which Mr. Justice Miller was called on to expound this clause of the Constitution did he give it such a narrow meaning. In Kring v. Missouri and in In re Medley he favored a very liberal rule of construction in the opinion of some too liberal to be consistent with the safety of society. In the first of these last mentioned cases he adopts views of the majority in Ex parte Garland and adds another to the then recognized classes of ex post facto laws --- an addition which, in this dissenting opinion, he asserted had never been attempted by any commentator on or expounder of the Constitution.

I do not wish to be understood as criticising these later opinions. Ex post facto laws are so obnoxious from an ethical standpoint and so closely interwoven with many of the darkest legislative crimes that blot the pages of English history that I have come to believe every
law of a retrospective nature should be jealously regarded by the courts and this provision of the Constitution most liberally construed although at times a Kring or a Medley should thereby escape just punishment.

Of his decisions maintaining the exclusive right of Congress to control commerce between the states and between the United States and foreign nations it can be truly said that they deserve high commendation. The doctrines laid down in Gibbons v. Ogden (a) and Brown v. Maryland (b) were always so far as his influence went, fearlessly applied and extended to meet new conditions and circumstances (c). The doctrine is not without its disadvantages. Leisy v. Hardin (d) was its logical and necessary result but even should this doctrine have resulted in the destruction of the interesting experiments of the prohibitionists in regard to the control of the liquor traffic it would have been more than compensated for in the blessings of a commerce unrestricted by the dictates of local prejudices and unfettered by the decrees of state legislatures.

(a) 9 Wheat. 1.
(b) 12 Wheat. 419.
(c) Clinton Bridge Case, 1 Woolworth, 150.
(d) 135 U. S. 100.
The dissenting opinion in Washington University v. Rouse lays down a doctrine which aside from stare decisis ought undoubtedly to control. No power is more essential to the existence of sovereignty than that of taxation. The police powers, the administration of justice, support of public institutions — in fact every purpose for which government is instituted, depends on the exercise of this power. In our theory of government under written constitutions the legislature is but the agent of the sovereign power. When going beyond the authority expressly granted it presumes to barter away the power essential to the existence of the state itself. I can see no reason why the familiar rule of agency that contracts made by an agent without the authority of his principal are, as against that principal, unenforceable, should not be rigorously applied.

Of the dissent in Hepburn v. Griswold, it has been well said:— "It presents adequately and in full force the arguments and principles which must constitute the sole defence of the legal tender acts"(a) To discuss the questions involved would require an entire volume rather

(a) 18 Am. Law Review, 414.
than the few words I can give it here. Clearly under no express provision of the Constitution can authority for this legislation be found. The plain meaning of the words used must be distorted; the history of the formation of the Constitution disregarded; the authority of such eminent constitutional lawyers as Webster and Story trampled under foot before we can assert that the Constitution by express grant or by inference, gives Congress authority in times of peace to make notes of the United States a legal tender in the payment of debt. Is Congress granted that power by inference in time of war? I believe that the dissenting opinion in this case directly holds this to be so, and that the argument were advanced, drawn from the necessities of the government in the dark hours of the rebellion, remains unanswered and is unanswerable. Beyond that opinion I do not think the courts should ever have gone. In Julliard v. Greenman(a) must always stand as a sad illustration of Federalism gone mad.

Writing of the decision in the Slaughtering House Cases in 1875, Professor Pomeroy expressed the opinion that it could hardly be regarded as final; that the de-

(a) 110 U. S.
cision might have been put on other grounds, and that in his opinion the views of the minority would in time come to be accepted. This prophecy has not been fulfilled. The relation of the states to the Federal government remains unchanged (a).

It was pardonable pride, when speaking before the law students of the National University at Washington, Mr. Justice Miller himself said:— "Although this decision did not meet the approval of four out of nine of the judges on some points on which it rested yet public sentiment as found in the press and in the universal acquiescence which it received, accepted it with great unanimity; and although there were intimations that in the legislative branch of the government the opinion would be reviewed and criticized unfavorably, no such thing has occurred in the fifteen years which have elapsed since it was delivered. — The necessity of the great powers conceded by the Constitution originally to the Federal government and the equal necessity of the autonomy of the states and their power to regulate their domestic affairs remain as the great feature of our complex form of government". (b)

(a) In re Kemmler, 136 U. S. 436.
(b) Miller on the Const. of the U. S., p. 412.
These words were spoken in the spring of 1890. In the Autumn of the same year the kind hearted but brave and fearless jurist who uttered them passed to his reward. This great decision remains his fitting monument; for it is not too much to say that because of it our government remains an "indestructible union of indestructible states."  

O.J. Wattcett.
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