

REVIEWS

History of the Supreme Court of the United States: Volume V, The Taney Period, 1836-64. CARL B. SWISHER. Macmillan Publishing Company, New York, 1974. Pp. xvii, 1041. \$30.00.

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The proportions of the Holmes Devise history of the Supreme Court become all the more apparent when one realizes that this 1041 page volume by Carl B. Swisher¹ may prove to be the most concise one in the series. It covers the entire twenty-eight year history of the Taney Court, whereas three volumes, each presumably of similar size, have been allocated for the thirty-five years of the Marshall Court. In the two volumes previously published in the series, Julius Goebel, Jr., devoted 864 pages to the rudimentary years before Marshall;² Charles Fairman, 1540 pages to the nine years of the Chase Court.³ On a pages-per-year basis, Fairman's book is about four and one-half times longer than Swisher's. Not that Swisher was unduly cramped, of course. In his account of the *Charles River Bridge* case, for example, he provides a contemporary pen portrait of Daniel Webster that takes up a whole page, and many of his more than 3500 footnotes are lengthened with quotation and comment. Nevertheless, Swisher's volume is the most disciplined and widely usable, though perhaps not the most original, of the three volumes published thus far.

Until now the principal general treatments of the Taney Court have been eight chapters in Charles Warren's classic history⁴ and a more recent work, begun by Charles Grove Haines and completed by Foster H. Sherwood, which was roughly handled by

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1. C. SWISHER, *THE TANEY PERIOD, 1836-64* (1974) [hereinafter cited by page or chapter number only].

2. J. GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801* (1971), *reviewed*, Flaherty, 40 U. CHI. L. REV. 460 (1973).

3. C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88: PART ONE*, (1971), *reviewed*, Benedict, 39 U. CHI. L. REV. 862 (1972).

4. C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1937) (this is a two volume set).

reviewers.⁵ Swisher himself had been over the ground twice before—in his textbook, *American Constitutional Development* (1943), and at greater length in his *Roger B. Taney* (1936). There are both advantages and disadvantages in assigning such a project to a veteran in the field. On the one hand, a certain standard of performance can be depended upon, and in Swisher's case the standard was high. His grasp, judiciousness, and professional integrity are all plainly visible in *The Taney Period*, and his style is characteristically crisp and clear. On the other hand, reworking a familiar subject is not ordinarily conducive to fresh insights. Swisher does offer much new information, particularly in specialties like maritime law, land law, and patent law.⁶ But his treatment of major themes and landmark decisions, though never failing in craftsmanship, is seldom adventurous and sometimes almost perfunctory.

This is a book, moreover, that makes little contact with recent scholarship. Swisher had completed work on the manuscript when he died in 1968, but the six years that elapsed before publication are only part of the total time-lag. The bibliography includes no more than a half-dozen books and articles published since 1960. One looks in vain for names like Stanley I. Kutler, R. Kent Newmyer, Arthur Bestor, Harold M. Hyman, Willard Hurst, and Maurice Baxter; for Robert J. Harris's influential essay on Taney and Frederick S. Allis's sparkling contribution to the historiography of the *Dred Scott* decision.⁷ Allan Nevins, significantly, is represented by *The Emergence of Lincoln* (1950), but not by *The War for the Union* (first volume published in 1959). Scarcely ever does Swisher engage in debate with other writers or evaluate their work. For the most part, he goes his own way, having mastered an enormous amount of printed source material and delved into

5. C. HAINES & F. SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835-1864* (1957).

6. See chs. 18, 20, 30, 31.

7. Cf. S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* (1968); S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971) [hereinafter cited as *PRIVILEGE*]; *THE DRED SCOTT DECISION: LAW OR POLITICS?* (S. Kutler ed. 1967); R. NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* (1968); Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine*, 54 J. ILL. HIST. SOC. 117 (1961); Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964); H. HYMAN & B. THOMAS, *STANTON: THE LIFE AND TIMES OF LINCOLN'S SECRETARY OF WAR* (1962); H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1973); W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); M. BAXTER, *DANIEL WEBSTER AND THE SUPREME COURT* (1966); Harris, *Chief Justice Taney: Prophet of Reform and Reaction*, 10 VAND. L. REV. 227 (1957); Allis, *The Dred Scott Labyrinth*, in *TEACHERS OF HISTORY* (H. Hughes ed. 1954).

more than sixty manuscript collections. His presentation is essentially narrative, but with a good deal of skillful elucidation that relieves the natural density of his subject matter. He keeps personal sympathies, such as his admiration for Taney, under tight restraint. He prefers to withhold judgment rather than force the evidence, and as a consequence sometimes leaves the reader hung up between conflicting explanations.⁸

Neither in outlook nor in method does the Swisher of the 1960's differ markedly from the Swisher of the 1930's. A political scientist seemingly little affected by the revolutionary changes in his discipline, he does not quantify, generate theory, construct models, or test hypotheses. He provides no diagrams of input and output. His generalizations are unfashionably concrete and comprehensible. He gives much attention to the political aspects and political context of judicial history, but he makes no sustained effort of his own to connect law with national culture and the "life of the mind."⁹ In explaining the origins of the codification movement, for example, he simply adopts the five-point conceptual framework set forth by Charles Warren in 1911.¹⁰ Swisher deals readily enough with problems and questions arising from his material, but he takes few questions to the material. He has nothing to say, for instance, about the significance of the *Dred Scott* decision¹¹ in the history of judicial review, and thus he never confronts the problem of how the doctrine of judicial review, still almost entirely untested at the level of federal law, could have survived such disastrous usage.¹²

The twenty-five pages devoted to the *Charles River Bridge* case¹³ are more or less typical of Swisher's approach to his subject.¹⁴ At some length he reviews the historical background of the case and describes the arguments of counsel. He then summarizes the decision itself in about three pages and follows with an account of public and professional reactions to the decision. A brief conclusion says little more than that the Court's ruling in favor of nar-

8. See, e.g., pp. 601 n.36, 618-19.

9. Cf. P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965). See also Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970).

10. Ch. 14; C. WARREN, *A HISTORY OF THE AMERICAN BAR* 508 (1911).

11. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

12. Cf. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972). There is no entry for "judicial review" in Swisher's index.

13. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

14. See pp. 74-98.

row construction of public grants has remained in good standing ever since, and that the decision was not a radically new departure in American constitutional history. There is no critique of Taney's opinion, no mulling over the significance of the case. The dissent of Justice Joseph Story receives short shrift and is treated as an old foggy's exercise in legal traditionalism. Did Taney and Story differ merely "over the means to the same end," as Kutler believes,¹⁵ or was their difference fundamental and irreconcilable, as Newmyer insists?¹⁶ Were the facts of the case entirely relevant to Taney's announced legal doctrine and social philosophy?¹⁷ Was the decision essentially a victory for *laissez faire* or positive government, for liberated capitalism or community rights? Such questions are neither answered nor even asked by Swisher.

Similarly, in a short chapter titled "Political Questions and Judicial Power," Swisher devotes ten pages to the background of *Luther v. Borden*¹⁸ and just one page to the opinion of the Court delivered by Taney.¹⁹ The decision, he says, "firmly entrenched the principle that certain kinds of questions deeply involving the activities of the political branches of government were to be treated as political and not to be inquired into by the judiciary."²⁰ But there is no theoretical discussion of judicial self-restraint and scarcely any indication of the importance that the doctrine of political questions would assume in the twentieth century. *Baker v. Carr*²¹ is cited in a footnote merely as a source of additional information on the subject. Furthermore, Swisher takes no notice of the extent to which the Court's political motivations in the case contradicted the very principle that it was enunciating. Neither does he point out the paradox that in this classic statement of grounds for judicial restraint, Taney's refusal to accept jurisdiction was accompanied by an extended discussion of the substantive issues in the case.²²

15. S. KUTLER, PRIVILEGE, *supra* note 7, at 100.

16. Newmyer, *Justice Joseph Story, The Charles River Bridge Case and the Crisis of Republicanism*, 17 AM. J. LEG. HIST. 232, 233 (1973).

17. Cf. S. KUTLER, PRIVILEGE, *supra* note 7, at 170.

18. 48 U.S. (7 How.) 1 (1849).

19. Pp. 515-27.

20. Pp. 526-27.

21. 369 U.S. 186 (1962).

22. See generally M. GETTLEMAN, *THE DORR REBELLION* (1973); W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972); CONRON, *Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEG. HIST. 377 (1967); Schuchman, *The Political Background of the Political Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEG. HIST. 111 (1972).

To speak of the "Taney Court" in the same breath with the Marshall Court is, of course, in some respects misleading; for Taney never equalled nor tried to equal Marshall in judicial leadership. A divided Court became normal during his tenure, and unlike Marshall he did not monopolize the role of spokesman in important cases. For one thing, he was not infrequently a dissenter. Swisher attributes the change in part to Taney's democratic inclination and a generous desire to share the limelight with his colleagues. "The Taney Court was to be genuinely a Court . . . and not a reflection of the ideas and the personality of the Chief Justice."²³ It seems just as likely, however, that Taney's physical frailty²⁴ was the principal reason why he so often delegated the work of writing opinions. As for the decline of consensus in his Court, that reflects perhaps a less masterful but at the same time a more inflexible temperament than Marshall's. In spite of his gentle demeanor, Taney was easily the more dogmatic of the two and thus the less capable of achieving consensus.

The complexity of divisions within the Court is well illustrated in Swisher's three chapters on the commerce decisions,²⁵ a relatively familiar story well told, and also in his chapter on "The Rights of Corporations."²⁶ As of 1840, corporations had been recognized as artificial persons but had been denied citizenship rights under the diverse-citizenship clause and under the privileges-and-immunities clause. Whether corporations could be litigants in federal suits depended upon the citizenship of their individual stockholders, and diversity had to be complete.²⁷ Then came the *Letson* case of 1844, in which, among other complications, diversity was incomplete.²⁸ The opinion of the Court, written by James M. Wayne, not only overruled two unanimous decisions rendered just four years earlier but went beyond all arguments of counsel to declare that a corporation was to be deemed a resident of the state in which it had been chartered and therefore "capable of

23. P. 98.

24. See pp. 264, 720-22. Taney was frequently pictured as on the edge of the grave. In 1843, Justice John Catron predicted that he would not live more than three years. P. 258. On Taney generally, see Winitsky, *Roger B. Taney: A Historiographical Inquiry*, 69 MD. HIST. MAG. 1 (1974).

25. Chs. 15-17.

26. Ch. 19.

27. *Commercial & R.R. Bank v. Slocumb*, 39 U.S. (14 Pet.) 60 (1840); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

28. *Louisville, Cin. & Charl. R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844).

being treated as a citizen of that State, as much as a natural person." The holding itself merely had the effect of embracing corporations in the diverse-citizenship clause, but Wayne's sweeping language seemed to make them citizens in all respects.

By the 1850's, the Court was beating a disorderly retreat from the *Letson* decision. Justices Peter V. Daniel and, it appears, John A. Campbell wanted to repudiate even the pre-*Letson* positions and separate corporations completely from the diverse-citizenship clause. A majority of members preferred, however, to repudiate the rationale of the *Letson* decision while preserving its effect. They believed that, in the interest of justice, corporations and their adversaries should have access to federal courts, but at the same time they were sensitive to Daniel's argument that (in Swisher's paraphrase) "if a corporation could be treated as a citizen for any purpose it might be so treated for all purposes, including the right to aspire to the Presidency."²⁹ Justice Robert C. Grier resolved the difficulty in 1854 when, as Swisher says, he "introduced an enormously important fiction"—namely, that the stockholders or directors of a corporation "may be justly presumed to be resident in the state which is the necessary habitat of the corporation, and where alone they can be made subject to suit."³⁰ By this neat trick of assuming that the persons in control of a corporation were *all* citizens of the chartering state, the Court could go on treating corporations *de facto* as citizens under the diverse-citizenship clause while solemnly insisting, as Taney did in 1862, that *de jure* such suits involved only "individual persons."³¹

Taney's participation in the subterfuge becomes all the more interesting when one compares it with his stern and unambiguous holding in the *Dred Scott* case that Negroes neither were, nor ever could be, citizens within the meaning of the diverse-citizenship clause.³² In reaching that conclusion, the Chief Justice adopted the same all-or-nothing formula used by Daniel in his attacks on the *Letson* doctrine. He assumed that if Negroes were acknowledged to be citizens in respect to one part of the Constitution, they must be regarded as citizens in every respect; the framers, he insisted, could never have intended to make such a dangerous concession.³³

29. Pp. 465-66.

30. P. 468, quoting *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1854).

31. *Ohio & Miss. R.R. v. Wheeler*, 66 U.S. (1 Black) 286, 297 (1862).

32. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 416-17 (1857).

33. R. NEWMYER, *supra* note 7, at 133.

In a total of seven chapters, constituting about one-fifth of the entire book, Swisher gives extensive coverage to the judicial aspects of the slavery controversy.³⁴ It is a clear and accurate survey that includes some attention to slavery cases tried at the circuit court level. The fifty pages or so on the *Dred Scott* decision and its "aftermath"³⁵ blend constitutional and political history in a lively narrative, but Swisher has nothing new to reveal and does not probe very far below the surface of events. It is a routine treatment of what ought to have been the climax of the volume. In summarizing the twenty-five year background of the case, for example, he routinely relies on the book by Vincent C. Hopkins, first published in 1951,³⁶ apparently never having seen Walter Ehrlich's unpublished but in some respects superior study of the same vintage.³⁷ The legal and political history of the case during its three years before the Supreme Court (1854-57) occupies some eighteen pages, rich in personality and incident. Less than half that amount of space is given to the decision of the Court and all of its nine separate opinions. Taney's opinion, surely one of the most famous documents in American constitutional history, is summarized in just three pages, with scarcely any analysis or criticism.

Thus, Swisher echoes Taney in asserting that one of the principal questions before the Court was whether "any Negro with slave ancestors could be a citizen of the United States within the meaning of the clause of the Constitution which gave jurisdiction to federal courts in cases involving diversity of citizenship."³⁸ Now the fact is that the clause involved only state citizenship (how else could there be any "diversity"?), but Taney virtually rewrote it by interpreting the words "between citizens of different states" to mean, in effect, "between citizens of the United States residing in different states." Then, in an astonishing passage, he went on to declare that a person might "have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State."³⁹ It is unlikely that one could phrase a more direct contradiction of the privileges-and-immunities clause.

34. Chs. 22-28.

35. Chs. 24-25.

36. V. HOPKINS, *DRED SCOTT'S CASE* (1951).

37. W. Ehrlich, *History of the Dred Scott Case Through the Decision of 1857* (unpublished Ph.D. diss., Washington University, 1950).

38. P. 623.

39. 60 U.S. (19 How.) at 405.

Similarly, there is no question raised about the accuracy of Taney's statement that at the time of the framing of the Constitution, *free* Negroes "had no rights which the white man was bound to respect."⁴⁰ Neither is there any discussion of his statement that "the right of property in a slave is distinctly and expressly affirmed in the Constitution,"⁴¹ nor of his bizarre interpretation of the territory clause, nor of his assertion that the government under the Articles of Confederation "had none of the attributes of sovereignty,"⁴² nor of the many other questionable uses of law and history with which the Chief Justice reinforced his opinion.⁴³

Granted, historians have as a rule neglected textual criticism of the *Dred Scott* decision. More surprising is Swisher's failure to examine the problem that has aroused the greatest amount of scholarly controversy—namely, what the Court "really" decided and, more specifically, whether Taney's ruling against the constitutionality of the Missouri Compromise was *obiter dictum*. Indeed, even Swisher's skill at clarification somewhat fails him here; for he does not adequately explain the confusion caused by the double-layered jurisdictional question and by the peculiar circularity of relationship between the jurisdictional question and the merits of the case. He gives no attention at all, moreover, to the problem of whether Taney, in some of his conclusions, spoke for only a minority of the Court.⁴⁴

There is a sense in which legal and constitutional history is a branch of intellectual history. *The Taney Period* proves to be most disappointing precisely in this respect. Judicial thought is briefed but seldom studied or evaluated. Swisher is content to be a reporter rather than a critic. But for anyone interested in the Court as a functioning institution and in the mixture of personalities constituting its membership, this is at once a book that can be read through with considerable pleasure and a useful reference work to be kept close at hand.

40. *Id.* at 407.

41. *Id.* at 451.

42. *Id.* at 434.

43. *Id.* at 436-41.

44. *Cf.* Allis, *supra* note 7.