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Review of “Roger B. Taney,” By Carl Swisher

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ture from the viewpoints of del Vecchio and Kelsen, but proceeds independently to the conclusion that anything short of a total revolution leaves the institutions of the country nominally under the tutelage of the existing fundamental laws, but actually the processes of revolution tend, like any other events, to create a variant and hypothetical unwritten constitution which serves as the real fundamental law until the old constitution is amended through the ordinary legal channels. The new political regime may be legitimated either by international recognition (the normal method, since international sanctions are of a higher order of rational, if not of constituted, authority) or by national sanction, through the voluntary adjustment of other continuing institutions (including the courts and the constitution) to the newly developing unwritten constitution. Thus, in reality, the author views revolution merely as a normal, though unusual and non-parliamentary, method of revising constitutions and of changing the order and personnel of governments. That his views will not receive unanimous approval goes without saying, but his viewpoint seems to be growing.

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ROGER B. TANEY. By *Carl Brent Swisher*. The Macmillan Company. New York, 1935. Pp. x, 608.

Successively, each invalidation by the Supreme Court of the more bold of the New Deal measures has been branded, by the more indignant of the critics of the Court as "another Dred Scott decision." Current controversy relative to the practicability of the American doctrine of judicial supremacy is more heated now than at any time since that decision and such generally related decisions as *Ableman v. Booth* and *Ex Parte Merryman* aroused in the North a profound antagonism towards and distrust in the Supreme Court. Historically, the parallel is striking. Mr. Roosevelt's opinion that the *Schechter* decision returned the nation to the "horse and buggy age" is quite comparable to President Lincoln's statement, in his inaugural address, that if the policy of the government upon vital questions is to be irrevocably fixed by the Supreme Court, "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Similarly one need not draw the long bow in comparison to detect a clear resemblance between Horace Greeley's statement that the Dred Scott decision was entitled only to the weight to be given to the judgment of the congregation in any Washington barroom and Secretary Wallace's condemnation of the Supreme Court's order for the return of the impounded processing taxes as "a steal." History has indeed repeated itself. No more opportune time for the appearance of a really satisfactory biography of the most criticized judge in American history could well be conceived.

The worth of Roger Brooke Taney as a politician and as a judge has been wholly reestimated by modern historians. Associated as he was with

the traditions of the South, remembered primarily for only two features of his long career, the struggle over the United States Bank, and the Dred Scott and related decisions, Taney was long accepted as deserving of the estimate with which Charles Sumner welcomed his demise:—

“The name of Taney is to be hooted down the page of history. Judgment is beginning now; and an emancipated country will fasten upon him the stigma which he deserves. . . He administered justice at last wickedly and degraded the judiciary of the country, and degraded the age.”

In the perspective of the years, Taney appears a wholly different figure. Re-analysis of his career and achievements has been thorough. Claude Bowers, writing from his usual Jacksonian bias, nevertheless stated a good case in his *Party Battles of the Jackson Period*, in refutation of the view long accepted by such leading historians as Bassett and Channing that Taney was the mere “pliant instrument” of Andrew Jackson in the latter’s supposed vengeful struggle against Nicholas Biddle and his Bank of the United States. Perhaps typical of modern treatment of Taney is the statement of Charles Warren in his masterful *Supreme Court in United States History*: “In the calm light of history it is now seen that the attacks upon Taney on political grounds had little reasonable basis.” Such books as *Daniel Webster*, by Claude M. Fuess, have adopted a similar viewpoint as to Taney’s political conduct and judicial achievement.

As the result of the research of historians writing long enough after the event to have lost most of the prejudice held towards Taney, his real achievements are well-recognized. It was most fitting that Chief Justice Charles Evans Hughes, in 1931, should have paid this tribute to his illustrious judicial ancestor:

“With the passing of the years and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice.”

Mr. Swisher has written a scholarly biography, which Taney’s historical importance has long called for. The first and “authorized” biography of the great Chief Justice, by Samuel Tyler, was so consciously laudatory as to deserve the characterization of a contemporary reviewer that it was “a panegyric rather than a biography.” Bernard C. Steiner’s *Life of Roger B. Taney*, published in 1922, is faulty in that it lacks true analysis of the part which Taney’s decisions during his long period of service, played in reshaping the doctrines of American constitutional law. Mr. Swisher has written a friendly biography, but one which presents Taney’s decision and political activities in the strong light of their consequence in American constitutional law and history.

The early chapters of Mr. Swisher’s biography give enough of Taney’s background and early political activity to enable the reader to appreciate the influences which affected Taney throughout his political and judicial career. The democratic sympathies which led him from his early Federalist

position to an understanding of and cooperation with the Jacksonians are clearly presented.

In his treatment of the Bank War, Mr. Swisher has used much of that critical discrimination which lends distinction to the process of research. In the light of the evidence, Taney appears, not the "pliant instrument," currying the favor of the vengeful Jackson, but a man who had profound convictions, traceable to his agrarian background and sympathies, against the concentration of economic power in the rising mercantile class, towards whom Taney had a fundamental distrust. Moreover, in the operations incident to the removal of the deposits from Biddle's Bank and the re-depositing of them in the state banks, Taney, as Secretary of the Treasury, appears to have acted with discernment, tact, and fortitude.

As the successor of the mighty Marshall, Taney was faced with the necessity of participating in and influencing the decision of cases of great formative influence in American constitutional law. Marshall's interpretation of the constitution had written into the fundamental law the ideology of the propertied class. Although his decisions are famed as the basis for a strong Federal government of wide powers, the great majority of Marshall's classic decisions had merely decided that the States lacked the power to pass legislation adverse to the interests of property. The point needs no elaboration: *Martin v. Hunter's Lessee*, *Gibbons v. Ogden*, *Dartmouth College v. Woodward*, and cases of that type are all cases of the limitation of State power to affect adversely the security of property. Taney's decisions, written from a different point of view in which distrust of the mercantile interest was dominant, considerably re-directed the current of constitutional interpretation.

Mr. Swisher classifies the decisions of the Court during Chief Justice Taney's long service, into three groups. The first group involve the construction of the rights of corporations, whether corporate charters should be interpreted broadly or limited to the express grants contained in their provisions. *Charles River Bridge v. Warren Bridge*, in which "the godlike Daniel" met with defeat for the first time in seeking to impress his economic ideas upon the court, sufficiently indicates the narrow interpretation which the Supreme Court, under Taney's leadership, gave consistently to corporate charters. Story's dissent, in that case, seems now the lament of one who realized that the old order had changed.

The second group into which the author classifies the decisions of the period is with reference to the commerce clause of the Constitution. Here the leading case of *Cooley v. Board of Wardens of Philadelphia*, established as a principle the formula of Mr. Justice Curtis that in essentially local matters, the States might legislate on interstate or foreign commerce, until Congress exercised its prerogative and provided regulation. Although the decisions throughout Taney's Chief Justiceship remained in a state of considerable confusion as to the interpretation of the commerce clause, the decisions show a marked change of attitude from the decisions of the Marshall-dominated Court, prohibiting State action of any kind in matters of interstate and foreign commerce.

The third group of decisions deals with property in its connection with slavery. The limited space proper to a book review prohibits more than a suggestion of the treatment which Mr. Swisher has made. Taney, naturally, possessed the Southern bias upon the issue of slavery. Although kind in his personal relationships towards the oppressed Negro race, as shown by his early manumission of his own slaves, the attitude of the Chief Justice held no sympathy for abolitionist method or objective. Always he was tender of the "peculiar institution" of the South. Suspected rightly of possessing slave-holding prejudices, Taney met an intolerable opposition during the last years of his life. His despairing effort in the Dred Scott case to avert civil strife by writing a comprehensive opinion, broader than the facts demanded, which might settle once and for all the controversies between North and South, merely inflamed the old animosities and drew upon the head of the ageing Chief Justice the hatred and distrust of the North. Everywhere in the North, Taney was misquoted as having said that the Negro possessed no rights which the white man need respect. Finally, after seeking to minimize the harshness of military rule during the early years of the Rebellion by upholding the power of habeas corpus, Taney met the concentrated execration of the North.

Nevertheless, the old Justice stuck with his post, dying in harness in 1864. Few in the North were fair to his memory. The Seward comment, quoted above, indicates the nature of his obituaries. Unhonored he went to his grave, considered by all in the North as the most subtle of traitors. It has remained for contemporary historians to reappraise the career of a truly great Chief Justice. This able biography is by far the most fitting recognition of his greatness.

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ERRATA

Vol. 21, p. 40, footnote 21 should read as follows: *Supra*, note 1. What appears as footnote 21 should be 22; footnote 22 should be 23, etc.