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## Roger B. Taney (Book Review)

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## BOOK REVIEWS

ROGER B. TANEY. By Carl Brent Swisher. New York: The Macmillan Company, 1935, pp. xi, 608.

A half-century of reading and penning book reviews gives rise to the question—Why book reviews? It leads to the suggestion of a substitute—a solid black circle indicating the reviewer's judgment of lack of worth in the publication and stars numbering from one to four indicating the reviewer's evaluation of its relative worth. The symbols to be followed by the reviewer's name. This suggestion would, if adopted, tend to rid us of the pest who reads by proxy, and who, depending solely upon reviews, with wise-air glibly discourses on the contents of a book in praise or condemnation, echoing parrotlike, the judgment of a reviewer. It would, of course, deprive reviewers of the satisfaction that comes from indirectly conveying self-estimates of knowledge and craftsmanship superior to that of the author. It would, however, leave to a reader of books, the joy of a voyage of discovery, of uncovering errors of fact and of bringing lines of reasoning and conclusions to the test of his own independent judgment.

Evidently the demand for book reviews persists. Editors are not pioneering reformers. Theirs is the task of supplying demand. Therefore the request for this review, and the supine compliance with the request which the reforming spirit of the writer is not militant enough to turn aside.

If the substitute suggested were now in effect, the writer would award this book three stars and would be strongly tempted to award it four.

The author in 588 pages paints vividly and with scholarly skill a full length word-portrait of a man whose life spanned eighty-seven years, 1777-1864. He gives the portrait an adequate background of the times. His work evidences painstaking search for, and compensating discovery of, new materials. In his evaluation, interpretation and use of materials, old and new, he has succeeded in holding the scales of judgment even, in the main.

It was high time that this book was written. The heavy fog of unrestrained hatred, misrepresentation and calumny—a fog which historians added to, or did little to dissipate—which has hidden the real Roger B. Taney from general view, should long ago have been dispelled.

This book comes as a stirring of fresh currents of air, scattering the concealing mist. It lets the rays of the sun of truth break through. It reveals Taney as a man-honest; independent and courageous in thought; uncompromising in his convictions; at times perhaps too vehement and unpleasantly decisive in giving his views expression; a lawyer of high ability, with power of clear thinking and expression but imbued with the caution of that profession and the common inability of its members to sense public reaction.

Mr. Swisher's account of the "revolt of the masses," the rise and reign of Jackson, and the bitter party battles of that period, moves swiftly and stirringly. He discloses new materials bearing on the struggle over the Second Bank of

the United States and the removal of the deposits. He traces step by step the part that Taney played in this struggle as a member of Jackson's cabinet. Taney emerges, not as a servile tool supinely obeying the dictates of the domineering will of Jackson, but as a man whose convictions had been formed and whose ideas had been firmly established before he came under Jackson's notice. Taney appears as a leading spirit, shaping the administration's policies to accord with these convictions and ideas, framing the President's veto of the bill rechartering the bank and devising the strategy that made the removal of deposits possible.

It is to the pages devoted to Taney's career at the bar and on the bench that readers of this publication will first turn. Theirs will probably be a sense of disappointment. The author following, apparently, the line of his own chief interest, has placed greater emphasis on Taney's political career than on his career as lawyer and judge. Disappointment will be somewhat assuaged by the author's revealing treatment of the *Dred Scott* case.<sup>1</sup>

Taney early evidenced faith in our republican form of government. As a student at Dickinson College he rebelled, refusing to take down in his notes part of a lecture assailing that form of government. At the bar, though born and reared on a Maryland plantation, he faced a storm of adverse sentiment in defending an abolitionist, declaring that the right of free speech must be maintained as the price of a republican form of government.

In 1818 Jacob Gruber, a clergyman from Pennsylvania, attacked the institution of slavery at a Methodist camp-meeting in Maryland, where whites and blacks were assembled, and appealed to the Declaration of Independence proclaiming that all men were created equal and had certain inalienable rights, such as life, liberty and the pursuit of happiness. Gruber was indicted for attempting to incite slaves to insurrection and rebellion. Taney undertook his defense. He pleaded for acquittal on the ground of free speech as guaranteed by the Maryland constitution. A verdict of not guilty was returned.

Taney in addressing the jury boldly declared, "any man has a right to publish his opinion on that subject (slavery) whenever he pleases. It is a subject of national concern and may at all times be asserted."

Taney became Chief Justice of the United States in 1836 in succession to Marshall. The time was one of transition. Justice Story, representing the old order, sat by the side of the new Chief Justice, who represented, with associates now making a majority of the court, the new order. Story clad in knee-breeches and Taney in long pants.

Taney saw clearly the implications of Marshall's doctrine in the *Dartmouth College* case.<sup>2</sup> He recognized its threat of inviolable special privilege and its effect in tying the hands of the states and hampering them in freely providing for, and meeting, changing commercial and industrial conditions. In the *Charles River Bridge* case,<sup>3</sup> though Story bemoaned the passing of the Constitution, Taney's course was far from radical. He merely loosened the fetters which the

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<sup>1</sup> *Scott v. Sanford*, 19 How. 393 (U. S. 1856).

<sup>2</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819).

<sup>3</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (U. S. 1837).

doctrine of the *Dartmouth College* case<sup>4</sup> had clamped upon the states, by adjudging that grants of corporate charters—while constituting contracts, and creating obligations protected by the contract clause of the Constitution—should be strictly construed; that no grant of power, or undertaking of inviolable obligation by the state, must be assumed; that every claimed grant or obligation must find its source in legislative intent unmistakably manifested.

In this case and in cases to follow, Taney at least laid the groundwork for the concept of the police-power of the states—a concept that was to be developed fully after his passing from life's scene. Through recognition of this concept he pointed the way to harmonizing national and local interests in the exercise of the national power to regulate interstate commerce and in other spheres of national power. It was this concept that qualified Marshall's doctrines relating to property and contract rights. And it was this concept that helped prevent these doctrines from barring legislation which crystalized and strongly preponderating public opinion held to be greatly and immediately demanded in the general public interest.

Perceiving, as Taney did, the distinction between property and contract rights as compared with community rights, astonishment has been voiced that when, in 1837, the Illinois legislature to avoid hardship in a time of financial depression, limited the rights of mortgagees, Taney denied effect to the legislation as violating the contract clause of the Constitution. When one reads the act then before the court, and compares its provisions with those of the Minnesota statute which, enacted in similar times, was sustained against attack based on like grounds almost *a century later*, and keeps in view the marked change that had in the meantime been wrought in the course of "strongly preponderating public opinion" bringing with it a wide expanding of the concept of the police-power, astonishment grows less.

In *Ex parte Merryman*,<sup>5</sup> Taney defended "the reign of law as against arbitrary military rule." He declared that only Congress could suspend the writ of *habeas corpus*, and finding that civil administration was unobstructed in Maryland save by the military authority itself, he adjudged that under these circumstances the military had no right to supersede the performance of civil functions.

In *Ableman v. Booth*,<sup>6</sup> Taney, in "the most powerful of all his notable opinions," unqualifiedly asserted the power of the national government to enforce its laws without state interference.

These "high-spots" suffice to evidence that Taney's judicial record was in fact one of outstanding service.

What of the *Dred Scott* case?<sup>7</sup> The author devotes forty-seven pages to "Storm Clouds of Sectional Strife" and "Dred Scott and After." His explanation and defense of Taney's course is able. He opens the door to the conference room of the court wider than it has heretofore been opened. He takes the reader "behind the scenes." It would be unfair to take the edge off of the

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<sup>4</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819).

<sup>5</sup> *Ex parte Merryman*, Fed. Case No. 9487, Taney 246 (1861).

<sup>6</sup> *Ableman v. Booth*, 18 How. 479 (U. S. 1855).

<sup>7</sup> *Scott v. Sanford*, 19 How. 393 (U. S. 1856).

interest of one who may read the pages in which the story of the *Dred Scott* case<sup>8</sup> is told, by indicating the course the author takes or the conclusions that he reaches.

As the author says, "Taney's attempts as Chief Justice to protect human rights, or 'community rights' as against property rights, and to deviate from *laissez faire* doctrines to the extent of justifying state laws needed by local communities but opposed by conservative interests have gone largely unrecorded" by historians. In this book they are recorded by one who has pondered fruitfully on problems of government.

The book is a valuable contribution toward breaking down the barriers which have prevented understanding and appreciation of Taney.

FRANK H. SOMMER.\*

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LAWYER LINCOLN. By Albert A. Woldman. Boston: Houghton Mifflin Co., 1936, pp. viii, 347.

We will probably never be able to supply a real picture of "Lawyer" Lincoln unless we study the record, subpoena Lincoln and let him speak for himself.<sup>1</sup> We feel that he needs no interpreter; that his utterances need no

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<sup>8</sup> *Ibid.*

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<sup>1</sup> How successful we have been up to the present time in having an adequate and genuine appraisal of Lincoln's ability as a lawyer may be gathered from a footnote to an address by John M. Zane on "Lincoln as a Lawyer."

"I notice but five authors, although there are many more who have attempted to describe his legal abilities. Mr. Richards' book is valuable, founded upon adequate investigation, but it does not picture Lincoln in his legalistic totality, especially as a constitutional lawyer. Mr. Hill's book is interesting, if nothing more. Nicolay and Hay did not write as lawyers, though they give some legal information. Works such as those of Ida Tarbell or Rose Strunsky have no actual value, and state no new facts. Judge Wanamaker has no comprehension of Lincoln as a lawyer. Ludwig is absurd. Masters, in 'Lincoln, the Man,' is too much given to hurling the contumelious stone. His ignorance on matters of ordinary historical knowledge is astonishing. As an instance, he says that Jackson called the alliance of Clay and John Quincy Adams 'a combination of the Puritan and the black-leg.' Imagine Jackson quoting Fielding, from whom the words come. Every tyro knows that John Randolph applied the quotation and Clay and Randolph fought a duel over the aspersion. Yet Masters is not without value as showing the attitude of the Douglas Democrats in Illinois during the years from 1854 to 1860. He does not seem to be very well read in the historical courses for that period. Lord Charnwood in his book is wholly without understanding as to our constitutional law and seems to have no juristic conceptions whatever. No one of the authors examines Lincoln's constructive constitutional policy \* \* \* and many seem to think that he as President was constantly violating the Constitution, which is a wholly untenable position \* \* \*. A late book is 'Lincoln and His Cabinet' by an author named Macartney. It has no value for the legal aspect of the President. Another late book by Emanuel Hertz, shows very great insight as to some aspects of Lincoln as a lawyer \* \* \*. Mr. Beveridge in his unfinished