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ON THE PERIPHERY*

Marvin Laurence Winitsky**

Professor Winitsky, while admitting the worth and magnitude of The Taney Period, outlines some critical flaws in Carl Swisher's recent contribution to the History of the Supreme Court of the United States. The author points out that Professor Swisher contents himself with mere description, when in-depth analysis would be more appropriate; particularly he faults Swisher for the characterization of the Taney Court as "peculiarly unphilosophical" while The Taney Period itself fails to contribute significantly to the "organic historiographical debate on the nature of Taney and his Court." Other points of criticism focus on internal contradiction, unsuggested conclusions and significant bibliographical omissions.

THE TANEY PERIOD is the third published volume of a projected 12 volume *History of the Supreme Court of the United States*. Funded by a bequest from Justice Holmes to the United States and supervised by the Library of Congress, the *History* constitutes an ambitious effort to subject the Court to a microscopic examination stretching from the origins of the Republic to 1941. The present volume is posthumous, published six years after the death of Swisher, a former Professor of Political Science at Johns Hopkins University, and the author of works on the Supreme Court including biographies of Justices Taney and Field. Although Swisher completed the manuscript before his death in 1968, presumably the past six years have been given over to a polishing, and a resulting assumption of responsibility by Paul A. Freund, editor-in-chief of the Holmes Devise series.

Swisher's contribution is the latest episode in a long and complex historiographical study that is far from complete. As principal author of the infamous *Dred Scott v. Sanford* decision,¹ Taney was attacked by many northern contemporaries who took sadistic and

* Review of HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD by CARL B. SWISHER. New York: Macmillan. 1974. Pp. xvii + 1041. \$30.00 cloth.

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1. 60 U.S. (19 How.) 393 (1857).

self-righteous delight in labelling him a slavocrat and southern sycophant, comparing him with George Jeffrys, the English "hanging judge" of Monmouth's Rebellion. These bitter characterizations lingered long after peace had returned to the divided nation, so much so that a turn of the century whig historian could still describe the Chief Justice as a "vampire hovering in the dim twilight."²

Twentieth century historians and legal scholars, including Edward S. Corwin,³ Carl Swisher,⁴ Charles W. Smith,⁵ Benjamin F. Wright,⁶ Charles Grove Haines and Foster H. Sherwood,⁷ John R. Schmidhauser,⁸ and Robert McCloskey,⁹ undertook a broad reappraisal of the Taney Court, but the results have been neither harmonious nor satisfying. Corwin, Haines and Sherwood, joined most notably by Wright, Schmidhauser, and to some extent by McCloskey, concluded that allegations of southern slaveholding bias had obscured the contribution of the Taney Court in expanding national power, strengthening the judiciary, and giving added protection to property, especially corporate property. Corwin demurred in part from the nationalist theme, suggesting that the Court's most important goal was an equilibrium of power relationships between state and nation.¹⁰ On the other hand, Swisher's biography and Smith's analysis of the Chief Justice's jurisprudence concluded that the Taney Court differed considerably from the broad nationalism espoused by the Court under John Marshall, and that Taney, a determined Jacksonian, retained a states' rights philosophy and southern bias, while maintaining a genuine hostility to entrenched property interests, especially monopoly power. Subsequent scholarship proceeded along these two paths, with the nationalist theme in the ascendancy, but often

2. 5 J. SCHOULER, *HISTORY OF THE UNITED STATES UNDER THE CONSTITUTION* 375-76 (1891).

3. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52 (1911).

4. C. SWISHER, *ROGER B. TANEY* (1935).

5. C. SMITH, *ROGER B. TANEY: JACKSONIAN JURIST* (1936).

6. B. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* (1938).

7. C. HAINES & F. SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1836-1864* (1957).

8. J. SCHMIDHAUSER, *THE SUPREME COURT AS THE FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789-1957* (1958).

9. R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

10. E. CORWIN, *TWILIGHT OF THE SUPREME COURT* (1934).

with conflicting and inadequate explanations of the motivation and success of Taney and his colleagues. Regrettably, Swisher's last effort does little, if anything, to alter or even advance preceding interpretations.¹¹

While *The Taney Period* has the general appearance of a massive and detailed study of the Taney Court, Swisher has not attempted to write a constitutional history per se. He felt that he was putting the Court into the much larger context of pre-Civil War political and economic history. Swisher has examined not only the landmark decisions of the Court,¹² but also some lesser known, but important litigation as well.¹³ The *Dred Scott* decision,¹⁴ which Swisher considers the pivot of the Court's historical reputation, is given a full chapter. Approximately two-thirds of the thirty-seven chapters deal with the prominent cases of the era, treating the commerce clause, admiralty and maritime jurisdiction, contracts, property rights and slavery. Swisher even includes such neglected areas of early nineteenth century legal history as the codification movement, patent rights, and land law. The remaining chapters are given over to other often neglected topics such as judicial appointments, the Court's work load, the selection and responsibilities of the Court's clerk and reporter, and the characteristics of various Justices. All of this is displayed against a background of major, often dated, or just plain inaccurate generalizations about the bank war, Jacksonianism, sectional conflict, and Lincoln's wartime administration. With a few notable exceptions, much of the new material appears in the sections relating to nonjudicial and nonconstitutional matters.¹⁵

11. For a comprehensive treatment of Taney historiography, see Winitsky, *Roger B. Taney: A Historiographical Inquiry*, 69 MD. HIST. MAG. 1 (1974).

12. See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *The License Cases*, 46 U.S. (5 How.) 504 (1847); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837); *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

13. Such cases include, *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861); *Gayler v. Wilder*, 51 U.S. (10 How.) 477 (1851); *Louisville Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844).

14. 60 U.S. (19 How.) 393 (1857).

15. See C. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD: 1836-64, at 408-21 (1974) [hereinafter cited as THE TANEY PERIOD] for Swisher's treatment of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), *rehearing* 59 U.S. (18 How.) 421 (1856). *Id.* at

If Swisher could be said to have a point of view about the Taney period, it appears at the point where he argues that “[t]he Taney Court was peculiarly unphilosophical. Theoretical assumptions lay always in the background for the determination of specifics, but the generalizations which illuminate assumptions and specifics were for the most part highly constricted.”¹⁶ However, such a limited perspective was almost mandatory, according to Swisher, because of the omnipresent threat of “irrepressible conflict,”¹⁷ the “settled nature” of government and law that emerged during the Marshall era, and the diversity of regional representation, legal talent, and political ambition which brought disharmony to a Court confronted by “the increasing pressures of day-to-day operations.”¹⁸

In a complete turnaround from his 1935 thesis, Swisher now argues that “the Taney Court and the Marshall Court, for all the seeming difference in emphasis, proved to be very much the same.”¹⁹ With this statement, and many others, Swisher has joined those historians who believe in an essential continuity between the Taney Court (excluding Justices McKinley and Daniel) and the Marshall Court, and concluded that partisans on both sides have seen more of what they wanted to see in the Court’s decisions than actually existed.²⁰ The only concession made to his former position is the statement that “with respect to the shaping of the federal system,” a decision granting states certain rights to the soil under their navigable waters, “represented the *moderate drift* in the direction of states’ rights that might have been expected of the Taney Court.”²¹

Swisher also claims that, threatened by the “grinding pressures of

756-72 for Swisher’s analysis of a series of California cases involving land fraud and patent rights: *Gaines v. Hennen*, 65 U.S. (24 How.) 553 (1861); *Patterson v. Gaines*, 46 U.S. (6 How.) 550 (1848); *Gaines v. Chew*, 43 U.S. (2 How.) 619 (1844); *Gaines v. Relf*, 40 U.S. (15 Pet.) 9 (1841).

16. *THE TANEY PERIOD* at 973.

17. *Id.*

18. *Id.*

19. *Id.* at 974. *See id.* at 1, 2, 89, 94, 97, 107, 148-49, 152-54, 202-03, 322-25, 356, 358, 413-15, 424-25, 473, 475-78, 486, 512-14, 525, 753, 849, 940.

20. However, despite his emphasis on continuity with the Marshall Court, Swisher made the confusing, unpursued and unsubstantiated remark that “for all his defense of state’s rights in other areas, [Taney] played a critical role in establishing admiralty jurisdiction . . .” *Id.* at 455.

21. *Id.* at 753 (emphasis added).

sectional conflict,"²² the Court conducted a "judicial holding action by attempting to consolidate national and judicial powers,"²³ while simultaneously acknowledging state and nonjudicial powers.²⁴ The author also asserts that this judicial balancing act collapsed and the Taney Court "fell on evil times,"²⁵ when, as an institution committed to the application of law, it collided with irreconcilable sectional and political interests which could not agree upon the existence of a "body of constitutional law binding on all the states and all the people."²⁶

Swisher's major contribution to an understanding of the judicial role in the period 1836-1864 is his effort to relate the workload and duties of the Justices in Washington to their obligations on circuit. According to the primary sources mined by Swisher, the Justices increasingly abandoned the earlier practice of using charges to grand juries as a means of lecturing the public on proper political attitudes; nevertheless, their presence on circuit continued to provide an important degree of authority to the actions of the lower federal courts, and had a substantial effect upon public and congressional opinion during the period. While the time-consuming nature of circuit court litigation and the enormous distances involved made it impossible for the Justices to consistently fulfill their obligations in Washington, Swisher contends that individual Justices on circuit made substantial contributions to the development of American law, particularly in the areas of patent rights, maritime and admiralty questions, and real property.²⁷ Moreover, Swisher is at his best when discussing the po-

22. *Id.* at 974.

23. *See, e.g.*, *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); and *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

24. Cases acknowledging such powers include *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863); *State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1853); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848); and *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

25. *THE TANEY PERIOD* at 974.

26. *Id.*

27. The bulk of Swisher's material on the California land cases comes from his earlier biography of Justice Field. *See* C. SWISHER, *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* (1930). In comparison to Swisher's treatment of such topics, Charles Warren's journalistic history of the Supreme Court contains no index entry on patents, and about three text pages each on admiralty jurisdiction and land claims during the Taney years. *See* C. WARREN, *THE SUPREME COURT IN UNITED STATES*

litical aspects of his topics (e.g., congressional and presidential infighting and maneuvering, the selection of Justices, and political problems regarding the circuits). It seems that what newspapers were to Charles Warren, the *Congressional Globe* was to Swisher.

Although Swisher's achievements in the above-mentioned subjects are substantial, the work as a whole is a disappointment for several reasons. First, Swisher seems unwilling to place himself in the ongoing historiographical debate on the nature of Taney and his Court. His avoidance of interpretation and overuse of description renders the work sterile, the period amorphous, and the Court unintelligible. In obvious ideological situations ripe for analysis, Swisher refuses to speculate (*Dred Scott*, notwithstanding), deduce, or correlate;²⁸ consequently, one finds no feeling of essential structural unity, and very little understanding of the period as a whole. Swisher aggravates this situation by consistently narrating case facts with considerably more detail than he does the opinions derived from those facts, and compounds the problem with woefully inadequate analyses of the opinions and their implications!²⁹ In an era when constitutional and legal history is experiencing a rebirth directed at the impact of law and courts on society,³⁰ Swisher leaves unanswered many inviting questions concerning the influence of the Supreme Court, but instead devoting his study, for the most part, to considerations of the forces acting upon the Court. This inadequacy, together with a narrow perspective on the relationship of the Court to the political, social and economic context of ante-bellum America, lead necessarily to the less-than-incisive conclusion that Taney and his colleagues were indeed "peculiarly unphilosophical."³¹

This philosophical issue provides a second ground for complaint. Swisher, in discussing Taney's opinion in *Charles River Bridge v. Warren Bridge*,³² argues that the Chief Justice, "cautious as he was

HISTORY (1924). Haines and Sherwoods' volume contain no entries on land claims and patents. See HAINES & SHERWOOD, *supra* note 7. Both authors devote little, if any, attention to district and circuit court matters.

28. Far too often, Swisher takes opinions running twenty or more pages in the reports, and paraphrases them in a few sentences.

29. For such analyses see THE IMPACT OF SUPREME COURT DECISIONS (T. Becker & M. Feeley eds. 1969).

30. *See id.*

31. THE TANEY PERIOD at 973.

32. 36 U.S. (11 Pet.) 420 (1837).

in such matters, could [not] avoid . . . going beyond precedents into theory of government”³³ Additionally, Swisher relates that when President Jackson asked Chief Justice Taney to comment on a bank charter bill, the latter answered with, among other things, a “significant statement of legal theory” on the nature of charters.³⁴ In *Kennett v. Chambers*,³⁵ a case arising out of the relationship of Texas and Mexico, Swisher admits that “Taney used the case . . . not merely to determine the controversy at hand but also to let filibustering Americans know where they stood with respect to the law [and] took occasion indirectly to answer a current argument about the responsibility of individuals as distinguished from the federal government in the field of foreign affairs.”³⁶ The author then submits a statement by Taney on the nature of not only the Union, but of government in general. Furthermore, in relating *Groves v. Slaughter*,³⁷ a case concerning the importation of slaves, Swisher states that the “prevailing feeling” of the Court, speaking through Chief Justice Taney, seems to have been that the law derived from an “abiding principle” which preserves the rights of property and promotes trade.³⁸

Other contradictions in Swisher’s thesis stand out even more strikingly. In summarizing chapter seventeen on the commerce power, the author claims that at the beginning of the Taney period, “the Court was concerned both with the specific and often highly charged facts of commercial conflicts *and with matters of constitutional theory*”³⁹ Moreover, in cases concerning slavery, even Swisher admits that the Court entered into broad philosophical and historical discussions of those volatile issues, which he feels should have been avoided at all cost.⁴⁰ Here Taney and his bretheren not

33. THE TANEY PERIOD at 973.

34. *Id.* at 105.

35. 55 U.S. (14 How.) 38 (1852).

36. THE TANEY PERIOD at 201-02.

37. 40 U.S. (15 Pet.) 449 (1841).

38. THE TANEY PERIOD at 334.

39. *Id.* at 422 (emphasis added).

40. See especially Swisher’s discussion of the following cases: *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), *id.* at 541-47. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), *id.* at 592-630; *Ableman v. Booth*, 62 U.S. (18 How.) 479 (1856), *id.* at 653-75.

only decided concrete issues, but also discussed at dangerous length the nature of the Union, the Constitution, the Negro, federalism, and especially judicial supremacy. Finally, no person even vaguely familiar with the Court's Civil War opinions could fail to perceive the attempt to affirm or fashion a constitutional theory that would not only explain decisions in immediate cases, but would also generally define the nature of civil war, the general government's relation to such conflicts, and the rights of United States citizens under wartime conditions.⁴¹

As a professor of political science, Swisher could not have failed to comprehend fully the nature of philosophy; perhaps, however, he was lulled into disbelief by the post-1836 Justices' inability or unwillingness to conform to the Marshall Court's style. Swisher actually cautions himself at one point about making Marshall the philosopher-jurist against whom the Taney Court would have to be measured: "As Justice Holmes said of Marshall as well as of Story, it was 'the mark of the time, a god-fearing, simple time that . . . had plain views of life . . . They were an innocent lot and didn't need caviar for luncheon.'"⁴² The author provides further insight by claiming that Taney appeared "[g]rounded to bedrock in the facts and law of his cases, he laid materials bare—in terms, of course, of the interests of his clients—and created the *impression of absolute clarity* in his presentation *Taney's capacity for capitalizing on lack of adornment in delivery in an era of great orators* and his ability to give a sense of deep conviction was a sharp challenge to his opponents."⁴³ Finally, in his discussion of *State Bank of Ohio v. Knoop*,⁴⁴ the Ohio bank tax case, Swisher indicates clearly (yet by implication), his problem in locating philosophical discussions in the Taney Court's opinions: "In writing the opinion, Justice McLean expressed the *dislike of general theory which characterized the Taney Court, but which it usually demonstrated only by example and not by critical statement*"⁴⁵

41. See generally *id.* at 841-960.

42. *Id.* at 327, quoting HOLMES-LASKI LETTERS (M. Howe ed. 1953).

43. *Id.* at 17 (emphasis added).

44. 56 U.S. (16 How.) 369 (1853).

45. THE TANEY PERIOD at 476 (emphasis added). Swisher never bothered (or thought?) to disagree with Justice McLean.

The final complaint concerns statements by Swisher which lack either substantiation or explanation. The most notorious include, *inter alia*, the authorship of Jackson's Bank Veto Message, Taney's relationship with his "pet banks," and the meaning of the *Luther v. Borden* opinion. In chapter two, Swisher claims that "when Jackson took action" by vetoing the Bank of the United States recharter bill, "he called Taney in to play a major part in drafting the veto message."⁴⁶ He later states, perhaps by way of qualification, that "Jackson called on Taney to aid in drafting a veto message. This he did, along with Amos Kendall and Levi Woodbury"⁴⁷ However, Swisher fails to acknowledge his previous caveat in his earlier biography of Taney that "there is no way of telling where Kendall's work ends and Taney's begins."⁴⁸ More important, he fails even to pay lip-service to a 1963 article which argued persuasively that Amos Kendall was in fact the primary author of the veto message.⁴⁹

Regarding Taney's relationship with his "pet banks," those state institutions he selected personally to replace the "monster," and whose activities, along with those of the Bank of the United States would affect his entire view of economic man and his financial dealings, Swisher devotes one paltry paragraph. He includes the following bit of intelligence: "Taney had occasion for disillusion with state banks as well."⁵⁰ Nowhere in the text or in the bibliography does Swisher refer to Frank Otto Gatell's substantial description and analysis of Taney's relationship with his "pets."⁵¹ A similar malady afflicts his treatment of Taney's *Luther v. Borden*⁵² decision. Swisher expresses the view of most historians, that Taney's opinion stood

46. *Id.* at 20.

47. *Id.* at 101.

48. C. SWISHER, *ROGER B. TANEY* 195 (1936).

49. Marshall, *The Authorship of Jackson's Bank Veto Message*, 50 *MISS. VALLEY HIST. REV.* 466 (1963). Marshall attributed much of the previous scholarly misconceptions to a single-minded acceptance of Taney's *BANK WAR MANUSCRIPT ACCOUNT*. Marshall claimed that Taney played down Kendall's role and thereby exaggerated his own out of vanity, and as a gesture to oblige his friend, Francis P. Blair. An enemy of Kendall, Blair asked the then eminent and respected Chief Justice to counter any possible self-aggrandizement on Kendall's part in his forthcoming biography of Jackson. *See id.* at 475 n.28.

50. *THE TANEY PERIOD* at 104.

51. Gatell, *Secretary Taney and the Baltimore Pets: A Study in Banking and Politics*, 39 *BUS. HIST. REV.* 205 (1965).

52. 48 U.S. (7 How.) 1 (1849).

as an exemplar of judicial continence: "With its decision in *Luther v. Borden*, the Supreme Court 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."⁵³ Unfortunately, as with the authorship of the Bank Veto Message, Swisher makes no effort to read between the lines for a possible reinterpretation of the opinion. For example, in a fascinating 1967 article, Michael A. Conron attempts to refute the judicial self-restraint theory. He argues that the Chief Justice merely disclaimed jurisdiction by holding the Rhode Island controversy purely political in order to protect himself from charges of meddling. Taney could then adroitly manipulate his opinion through obiter dictum so as to define the legal issue in terms of national sovereignty, designate the responsibilities of the political department, and prescribe the proper solution to the political question.⁵⁴

Close scrutiny of the bibliography and the realization that the book was published some six years after the manuscript's completion, provides some insight into its major shortcomings. The bibliography lists only four works published since 1960,⁵⁵ indicating, if the text itself does not, that Swisher fails to take into account at least the majority of nearly eight years of historical, legal, and constitutional scholarship, not only on the Taney period, but Jacksonianism, the sectional crisis, and the Civil War era. Recent studies of Taney,⁵⁶ critical cases,⁵⁷ the nature of division in the Court,⁵⁸ implica-

53. THE TANEY PERIOD at 526-27.

54. See CONRON, *Law, Politics and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377 (1967).

Another curiosity appears in Swisher's chapter on wartime curtailment of civil rights. Swisher states: "It was a matter of great concern, however, [to the Lincoln Administration] that cases should not be lost before Lincoln's own appointees." THE TANEY PERIOD at 924. Five pages later Swisher states: "But the Administration was not looking to the Court for comfort. It sought only to be let alone, while it went its way winning the war." *Id.* at 929.

55. Of the four, one is another work in the HOLMES DEVISE HISTORY series, of which THE TANEY PERIOD is a part, an obviously gratuitous insertion by editor-in-chief Freund.

56. W. LEWIS, *WITHOUT FEAR OR FAVOR* (1965).

57. S. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971); Burke, *What Did the Prigg Case Really Decide?*, 43 PA. MAG. OF HIST. & BIOG. 73 (1969); Conron, *supra* note 54.

58. Schmidhauser, *Judicial Behavior and the Sectional Crisis of 1837-1860*, 23 J. POL. 615 (1961).

tions of decisions for broader political issues,⁵⁹ and attitudes toward the post-*Dred Scott* Court,⁶⁰ represent only a portion of recent scholarship untouched by Swisher. In fairness, many of Swisher's judgments coincide with those of other scholars, such as Stanley Kutler in his book on the *Charles River Bridge* case.⁶¹ Moreover, Swisher's death precluded a personal consideration of post-1968 scholarship. However, that need not have deterred Professor Freund, with six years during which to gain perspective, from placing the work into some historiographical context in his introduction. In light of Swisher's *sui generis* approach, it would have been the only significant acknowledgement of a continuing historiographical debate in the entire book.

Most, if not all the major problems in the book can be traced, not to Swisher's death, but to his outlook while he lived. No untimely death and path-of-no-resistance editing can account for the work's interpretive stasis as convincingly as the statement Swisher makes in the second half of his book regarding slavery, the status and rights of free Negroes, commerce, sound currency, bankruptcy, and the handling of international crises: "*the judiciary operated only at the periphery . . .*"⁶² To put that statement into a work containing 975 pages of text on the judiciary, Swisher must have possessed amazing peripheral vision. This is the book's primary weakness, and it explains why one comes away with no feeling for the Court, its members, or its role in the period 1836-1864.

In the final analysis, with no summaries, syntheses, historiographical points, in-depth analyses or extrapolations, and no unifying thematic content short of Swisher's "periphery" notion, what can it all come to? What can emerge from the heterogeneity of 20 men, countless lawyers, and references to more than 500 cases? Can there be more than a grab bag of miscellaneous facts about the judicial system in a turbulent pre-Civil War America? And what of the man for whom Swisher named his era? What do we really know of Roger Taney by page 975? It is here that the "periphery" theory

59. Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, 54 J. ILL. ST. HIST. SOC'Y 117 (1961).

60. S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* (1968).

61. KUTLER, *supra* note 57.

62. THE TANEY PERIOD at 528 (emphasis added).

takes its most ruthless toll of our sensibilities, for not only does Swisher omit any but the most obvious and overgeneralized non-jurisprudential background material on the Chief Justice, but he also dissipates Taney's influence by failing to separate him significantly from the other members of the Court or from the rancorous national politics and chaotic material growth discussed at length in almost every chapter. To divest Taney of his jurisprudence deprives both the Court and the period of meaning. Much of the history of the ante-bellum Supreme Court and its Chief is a tragedy, and tragedy demands a hero of exceptional stature. If Taney is no more special than men of lesser talent, and even smaller motive, tragedy diminishes into commonplace narrative.

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