

It was Taney's misfortune to be Chief Justice when the slavery issue, many times postponed, came to the boiling point. His liberal views, his valuable contribution to the vexing problems of division of powers between state and nation have all been overlooked in the torrent of abuse that followed in the wake of the unfortunate *Dred Scott* decision.⁷

Chief Justice Hughes at the unveiling of a bust of Taney at Frederick in 1931 gave distinguished if tardy recognition to the character and learning of Taney, who had so long been misunderstood:

"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."

As a political interpretation of the tempestuous times antedating the Civil War, this volume is excellent and worthy of the finest traditions of American scholarship. Its treatment of the judicial career of Taney fails to attain the high standard of the earlier part of the volume dealing with his political experience, but nevertheless, Professor Swisher has made many valuable contributions for the student of our constitutional history. This volume will do much to substantiate the judgment of Chief Justice Hughes.

JOHN J. BURNS.*

ROGER B. TANEY: JACKSONIAN JURIST—by Charles W. Smith, Jr.
The University of North Carolina Press, Chapel Hill, 1936. Pp. xi,
242.

Rehabilitation of Taney's reputation would seem to be complete when more than a century and a half after his birth two substantial books devoted to his life and works can appear simultaneously and achieve popular appeal. The two books are complementary. Swisher's is a full-length biography, giving adequate, even preferred, space to Taney's political career, particularly his dramatic struggle, as Secretary of the Treasury and adviser to Jackson, with the second Bank of the United States. The present monograph treats biographical details only

⁷ *Dred Scott v. Sandford*, 19 How. 393 (1857).

* General Counsel, Securities and Exchange Commission.

summarily, and is restricted almost entirely to consideration of Taney's basic philosophical ideas.

There is much about Taney which should appeal, even carry its lesson, to us of the present day. If we apply modern labels, Taney was a great liberal judge. As such he had almost all the virtues of the great jurist and only perhaps to a limited extent the vices, if those things be vices which brought his illustrious predecessor, Marshall, eternal and abiding fame. And yet he is chiefly known and has been derided and contemned for the latter, only lately and tardily respected for the former. At a crucial time he and his colleagues tried to assume leadership in the solution of grave social and political problems. They failed because the country was not willing to abide juridical settlement of such issues. And so the *Dred Scott case* has come to be a synonym for judicial error, though it is but the logical outcome of what, through tradition now settled, we expect and must accept from our judges.

We are prone nevertheless to forget Taney's real contributions to law and government. He came to the Court at a time when democratic principles were regaining sway of men's minds and he furthered the trend away from interferences with legislative activities. To do this he had to break some of the shackles forged by the great Marshall. Almost his first judicial act was his opinion in the *Charles River Bridge case*,¹ limiting the theory of *Dartmouth College v. Woodward*² (that a corporate franchise was an imperishable contract) to the holding that the legislature could not be considered to have bartered away the public rights in perpetuity unless it had said so expressly. This decision, condemned by Story and Kent, was, it is now admitted, absolutely essential, not merely for the development of orderly governmental processes, but also for the advancement of industry, if it were not to be kept in straitjackets set by early monopoly grants. Taney developed also the idea of state police power as an attribute of sovereignty which limited property rights and which could not be bargained away. He stood for the rights of men against government in war time; he established a workable view of interstate commerce which would allow scope for proper state regulation not in opposition to federal control; and he asserted the supremacy of the national government against state nullification. He believed in the oper-

¹ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (1837).

² *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

ation of true democratic principles, with the people as ultimate ruler. He also upheld a *national* government as well as the rights of man, and the fears he expressed lest the country be dominated by large money interests might have been stated by either the elder or the later Roosevelt. In short had he not yielded to a desire, made wholly natural by our governmental set-up, of playing divinity in the rôle of judge, his fame would doubtless be secure.

Yet in a way Taney came to assume the Messianic rôle by chance. As is well known, the Court's first view was that the decision in the *Dred Scott case*³ should be limited to procedural issues. But a dissenting judge—a perpetual candidate for the presidency for over a quarter of a century—announced his purpose to make a full statement of views on slavery and the relation of South and North. So all the justices decided to settle once and for all these burning problems, and put the country at rest about them, even though the narrow judicial issues did not require it. So likewise have later justices felt that forthright pronouncements might settle disputes more weighty than those merely before the Court. Such at least has been contemporary criticism of the *Schechter case*,⁴ the *Railroad Retirement Act case*,⁵ or the *TVA case*.⁶ If one could eliminate the burning moral issues which had gotten inextricably woven into the problems of slavery and nullification, what the majority did in the *Dred Scott case* would not seem so strange. For they asserted the power of the national government through the Court to preserve the economic institution upon which they believed Southern prosperity to depend, until it was properly abolished by the people themselves. Taney always asserted the right of the people to change their form of government as set forth in the Constitution; nowhere does he make any appeal to any natural law, higher than that declared by the people. And the interpretation of the Constitution as protecting one important form of property was in the best Marshallian tradition.

As prophets, too, the justices of 1857 were not so far wrong. For the harsh way finally chosen to uproot slavery did destroy the civilization of the South and forced its rebuilding after long years of pain and anguish. Could slavery have been abolished

³ *Dred Scott v. Sandford*, 19 How. 393 (1857).

⁴ *Schechter v. United States*, 295 U. S. 495 (1935).

⁵ *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935).

⁶ *Ashwander et al. v. Tennessee Valley Authority et al.*, No. 403-4, Oct. Term, 1935, decided February 17, 1936.

in some more tempered way, the South might well have reached an economic adjustment to its abolition without the tragic ruin and desolation which it has had to suffer. The only thing the justices did not foresee was that in the long run judges will not and cannot be accepted as arbiters of the political destiny of nations.

The present volume, devoted as it is to an exposition of Taney's views, very well brings out many of the attributes of Taney's faith referred to above—his devotion to popular sovereignty and the democratic principle, his protection of the legislative power in general, his support of the rights of men. Taken with Swisher's longer biography, it affords an adequate picture of a real personage, interesting not merely because of the historic part he has played in our history, but also for a kind of obstinate and unflinching courage, having no regard for consequences, which betokens respect, if not affection. It is true that the book by itself gives only a half view, for a man's whole life and environment are of the utmost importance in considering his views as judge. Taney's Maryland background, leading up to his struggle with the Bank of United States, had a shaping influence on his career, and he never deviated from the views he early acquired. One understands his philosophy best in the light of this personal history. Thus the book runs some danger of falling between the two stools of the short critical essay and the extended biography. There is a considerable repetition of ideas, and even of specific quotations, as of Brandeis' recent use of Taney's language, in the several chapters. One sees a danger, too, in attempting to develop too rounded a philosophy from the mosaic of various judicial opinion. Thus the author, relying on Taney's solicitude lest state legislative power should be restricted, suggests that Taney might well have agreed with the later decision banning Congressional action against child labor. It seems to me the odds are rather the other way, for Taney supported the national power and only upheld state acts as filling gaps left in federal regulation of interstate commerce.

Notwithstanding some such doubts as to the complete success with which the author has accomplished his objective, one can well be grateful to him for demonstrating once again the paradoxes which under our governmental scheme our greatest judges present. The bitter tumult which followed the *Dred Scott case* seems to us but the echoes of a distant past. Is it, however? This morning I opened my newspaper to read the

remarks of a prominent industrialist that there was wanting only court approval of the basic TVA, the Soil Conservation Act, the Guffey Coal Bill, and the Social Security Act to pave the way to Socialism and Communism on the one hand and Fascism and Nazism on the other. Today many vocal people still look to the Court for leadership almost divine. History may demonstrate that a people cannot be driven into but must achieve righteousness; and yet it is only human to yield to so noble a call to duty. One can only urge, however, that the criticisms brought upon the Court have been of its own seeking, that its real greatness is shown most by judicial restraint from advancing into fields too far distant from the adjudication of the rights between man and man, and that a true respect for the Court lies in reiteration of these principles.

CHARLES E. CLARK.*

THE CATHOLIC TRADITION OF THE LAW OF NATIONS—by John Eppstein. Prepared under the auspices of the Catholic Council for International Relations and published for the Carnegie Endowment for International Peace by Burns Oates & Washbourne Ltd., London, 1936. Pp. 525.

It is a difficult and trying and, as the reader will doubtless see, an impossible task to write an adequate review of John Eppstein's *Catholic Tradition of the Law of Nations*. Neither the publisher in his statement to the general public nor the reviewer in his statement to a more restricted public can fully set forth the reasons why this volume should be on the desk of the historian, of the theologian and of the advocates of an acceptable law of nations. The only way to appreciate its value not only for today but for tomorrow and for the future is to read the book from beginning to end and to ponder it well, for between its covers lies what should be the international law of the future, if law is to be looked upon as a moral and spiritual concept instead of a brutal command.

The title of the work indicates its scope and its content. The Catholic tradition is a long one, and the law of nations, like the Catholic tradition, is universal. This mere statement reveals the difficulty which a reviewer has in dwelling in detail upon the various phases covered by Mr. Eppstein in his admirable treatise.

*Dean and Sterling Professor of Law, Yale University School of Law.