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Reviewed by Mark V. Tushnet[2]

The time has come to blow the whistle on the *Holmes Devise History of The Supreme Court.* Paul Freund is a great constitutional scholar and an inspiring teacher,[3] but the three volumes of the history that have appeared to date show that he has not done the job that the general editor of the series should have done.[4] This volume by Carl Swisher on the Taney Period illustrates the problems with the collection, and Professor Freund's default is most readily apparent because the principal author died six years before the volume was published.

That Swisher's work is out-of-date is Professor Freund's responsibility; he ought to have appointed a new author to complete the work. That the work is basically misconceived is the joint responsibility of the author and the editor. The study of American legal history has flourished in the past decade. We now have an increased appreciation of the relationships between intellectual current, technical concerns, economic developments, and American law. It is, therefore, especially disappointing that the major history of the Supreme Court is turning out to be a traditional political history of the Court. In effect, Swisher has done little more than merely expand, to great length, Charles Warren's chapters on the Taney Court.[5] Indeed, this work bears no indication that it was published in the 1970's rather than the 1950's.[6]

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1. Carl B. Swisher, now deceased, was Thomas P. Stran Professor of Political Science at Johns Hopkins University during the preparation of this work.

2. Assistant Professor of Law, University of Wisconsin. B.A., 1967, Harvard University; J.D., 1971, Yale Law School.

3. Indeed, as a personal note, it was as a result of Professor Freund's undergraduate course that I decided to attend law school.

4. The other two volumes, C. FAIRMAN, 6 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 (1971), and J. GOEBEL, JR., 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971), were both published in 1971.

5. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1-357 (rev. ed. 1937).

6. It is significant that no more than 10 of the bibliography's 400 entries bear publication dates later than 1960 and, of these, none are periodical publications.

Swisher's somewhat dated political approach is revealed in the very structure of nearly every chapter. Each begins with a brief sketch of the political background of the issue to be addressed; Swisher relies heavily on the private correspondence of the Justices, especially that of Justice Catron, who, among a bench of Justices acutely sensitive to national politics, apparently maintained the most active contact with political leaders. Despite the seeming narrowness of his sources, however, Swisher does present an accurate, though abbreviated, account of the political context of the Court's cases. He then presents uniformly lucid summaries of the facts of the cases, followed by rather long-winded condensations of the Court's opinions. He concludes with contemporaneous evaluations of the decisions, drawn from leading newspapers identified by their political affiliations (*e.g.*, pp. 120, 129), and from prominent politicians. This pattern is broken only with regard to *Dred Scott v. Sandford*;[7] here, Swisher devotes a full chapter to the "aftermath" (pp. 631-52).

This structure is most effective in the quarter of the book that is devoted to the slavery controversy (pp. 528-713), which, on the level of the national government at least, was primarily a political dispute. Swisher's account of the Court's activities during this period is adequate though unimaginative. Here, as elsewhere, the book relies on judgments about the antebellum period that had become settled by the late 1950's, and that have become rather less settled since then.

Swisher's exhaustive research in private papers serves him well when he turns to anecdotal sketches of the Justices, prominent attorneys, and the business of the Court and its bar. Indeed, perhaps the best sustained essay in the book is the chapter on "The Judges and the Circuits" (pp. 248-74), in which Swisher discusses the work of the Justices as Circuit Judges, the harsh living conditions that circuit riding imposed on the Justices, and the political implications of proposals to alter the circuit system.[8]

Undoubtedly, there are strengths in a political history of the Supreme Court during this era, but they are not enough to support a work of 1,000 pages. Swisher's problems are of two sorts. First, he relies almost exclusively on contemporaneous evaluations of the Court's activities; thus, he does not assess the long-term meaning of the decisions, nor does he place them in a broad enough context. Second, Swisher's interpretations are, without major exception, purely political: he is concerned solely with the meaning of the decisions in terms of the conflict between states' rights and nationalist

7. 60 U.S. (19 How.) 393 (1856).

8. For another discussion of this facet of the Court during the same era, see S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 48-63 (1968).

views of the federal system, and even more narrowly, between Democrats and Whigs (*e.g.*, pp. 405-06). The effort to force every interpretation into this dichotomy leads to grave inadequacies.

For example, in his chapter on land claims from newly settled areas, Swisher begins by stating:

> One group [of the Justices] put emphasis on the sanctity of alleged grants, and the other on the right of settlers to acquire possession [*sic*; probably "title"] by entering upon unoccupied lands under the preemption laws of the federal government. . . . [T]he group leaning toward the rights of settlers included Chief Justice Taney and Justices Catron, Daniel, Nelson, and Woodbury, while the group more preoccupied with the rights of claimants under alleged grants included Justices McLean, Wayne, McKinley, and Grier. . . . The divisions, although of course involving points of law, reflected views of public policy regarding the nation's land heritage (p. 748).

This quotation illustrates three intertwined defects in Swisher's approach. First, and least important, it shows his attempt to group the Justices into two opposing factions. This personalization of the conflict is misleading in light of the fact that the Justices were substantially in agreement on many issues of public land policy.[9] Second, it illustrates Swisher's pervading effort to refrain from synthesis of apparently opposing views into a coherent set of ranked policies.[10] Yet, as Willard Hurst's work in the field of state law (for roughly the same period) has shown, one can discover, by a full and fair consideration of all the available material and not just those cases that present interesting anecdotes, priorities in public policy about the disposal and use of land.[11] The third defect shown by the quotation is the offhand manner Swisher employs when mentioning public policies other than states' rights and nationalism. As incredible as it may seem, nowhere in the 60 pages dealing with land cases that follow the above quotation does Swisher explicate in any greater detail what really were the "views about public policy regarding the nation's land heritage." This failure to attend to a context broader than a political party struggle, is the book's most serious defect.

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9. As Swisher himself admits, "Many [of the Louisiana and Florida land cases] were decided unanimously." (p. 748).

10. Another example of this trait can be found in the chapter entitled "Admiralty and Maritime Jurisdiction" (pp. 423-56), in which it was stated that the Court's decisions "with respect to admiralty jurisdiction followed a meandering course . . . . [marked by a] pattern of inconsistencies" (p. 455).

11. J.W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1865-1915 (1964).

Before examining the flaws induced by Swisher's narrow focus, it is worth mentioning another example of Swisher's reliance on dichotomy rather than synthesis. In discussing the sequels to *Swift v. Tyson*,[12] Swisher touches briefly on the role of corporations. He writes:

> It is to be remembered that during the 1840s and 1850s the people alternated between approval of aid to private corporations . . . and hostility to corporations which failed to do all that was expected of them or proved to be the enemies rather than the friends of the investing public (p. 335).

The concept of an alteration of attitudes is not helpful in this context, and indeed, Swisher's own phrasing suggests that public attitudes, while not simply for or against corporations, were fairly coherent. I mention this example not because the discussion that it introduces stands out in the book, but precisely because the discussion is too typically structured in an unnecessarily polarized manner.

Swisher's presentation of the material on corporations is typical in another way. It seems fair to say that the primary issues facing the Taney Court, at least until the mid-1850's were a blend of the political and the economic. The Court had to develop doctrines that would promote investment and growth without unduly hindering states from experimenting, at a time when experiments were plainly valuable, with alternative mechanisms for the promotion and control of economic growth. Clearly, the Court's cases did present a conflict between doctrines that would allow states wide latitude in regulating business and those that would impose stringent constitutional limitations on such regulations, making necessary an analysis that implicates questions of federalism. But a full analysis would also recognize that questions of economics—or, more precisely, questions about what Americans thought their economy should do—must also be addressed.

One example of this failure to take a broad view is found in an account of the Taney Court's cases which established the rule that corporations are, for purposes of diversity jurisdiction, citizens of the state of incorporation (pp. 457-70). To understand those cases it is important to know how many corporations had multistate directorates, how substantial prejudices were (and the fears of prejudices, directed particularly against out-of-state corporations), and how important investors would consider variations between local law and the federal law available under *Swift v. Tyson*. Perhaps the answers to all of these questions would cancel one another out, leaving only the purely political component as worth exploring, but I am reluctant to accept that on faith.

12. 41 U.S. (16 Pet.) 1 (1842).

Admiralty jurisdiction was also expanded under the Taney Court to include the inland waters for the first time (pp. 423-56). It would certainly expand one's understanding to know the extent, if any, to which substantive admiralty law favored investments in river transport over the various state laws which otherwise would have been applicable. *Swift v. Tyson* looms in the background here too, for an alternative to expanding the admiralty jurisdiction was to adopt the substantive content of admiralty law as the general federal common law applicable in diversity cases. The closest Swisher comes to mentioning these questions is his concluding paragraph of the chapter:

> The development of admiralty must be seen in light of the growth of the United States as a major commercial and industrial power. Expanded jurisdiction in admiralty during the Taney period made sense in the light of beliefs about our national destiny, as did the expansion of the commerce power in later decades (p. 456).

The statement is of course superficial, but, even more, it is stylistically a throwaway, serving not to summarize but only to introduce a new topic.

Perhaps the most glaring instance in which the narrowness of Swisher's political interpretation is quite costly is his presentation of *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*.[13] We are fortunate in having a major study of that case in Stanley Kutler's *Privilege and Creative Destruction*,[14] in which the author makes clear that the case involved extremely important questions of public policy regarding the promotion of productive enterprise. Indeed, Professor Freund's foreword to the Swisher book shows a deeper understanding of the case than do Swisher's 30 pages. Professor Freund writes:

> Property was not subordinated; rather, it was seen that two kinds of property interests were generally in conflict: those already secured and those reflecting new and competing enterprise. The contest was not so much over the vindication of property rights as over the conflict between the security of acquisitions and the security of transactions (pp. xv-xvi).

This is enormously subtle and acute. Swisher's banal conclusion, in which he attempts to move away from the "Jacksonian versus Whig" interpretation that pervaded the preceding chapter (pp. 90-93), provides an instructive contrast:

> If perchance announcement of the rule worked hardships as to grants previously made, it induced future applicants for corporate

13. 36 U.S. (11 Pet.) 420 (1837).
14. S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION (1971).

> privileges to specify more clearly the scope of the privileges sought. It protected the public against inadvertent loss of property and against privileges not clearly intended to be given. For all the distress of the critics of the decision, it would seem ultimately to have been salutary (p. 97).

As a final note, it is interesting that Swisher abandons the political approach in the final sixth of the book, dealing with the Court during the Civil War. As Swisher recognizes, this is partly the result of an unfortunate periodization (p. 961). During the Civil War, the primary arena of constitutional development lay in the other branches of government.[15] But Swisher's failure to impose a political interpretation on the Civil War material also shows that, as in the earlier portions of the work, his categories of nationalism and states' rights will not capture even the political dimensions of the conflict.[16]

Taken as a whole, the present volume is disappointing. Its strengths, while real, are not enough to sustain it through the banality of the political interpretations that Swisher offers and the parochialism of his emphasis on politics. Hopefully, we may still look forward to the remaining volumes of the Holmes Devise History, which will be published under the names of such sophisticated scholars as George Haskins, Gerald Gunther, Alexander Bickel and Professor Freund himself. It is unfortunate that Professor Freund did not lend the full measure of his sophistication to this volume.

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15. *See* H. HYMAN, A MORE PERFECT UNION (1973).

16. One senses that for Swisher, the conflicts between these viewpoints were properly resolved by the Civil War in favor of nationalism.