

Book Reviews

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Book Reviews

Without Fear Or Favor: A Biography Of Chief Justice Roger Brooke Taney. By Walker Lewis. Houghton Mifflin Company: Boston, 1965. Pp. 556. \$7.50.

The ordinary citizen knows Roger Brooke Taney as the Jackson stalwart of the Bank War and as the Chief Justice who read the *Dred Scott* decision.¹ This much — or this little — he gets from history texts which hardly give a balanced view of the man and his work. Of course, to lawyers and students of constitutional history Taney is also the justice of the *Charles River Bridge*² case, the long list of cases that refined the doctrine of federalism, and finally, *Ex parte Merryman*.³ On this showing Taney emerges as a larger figure, a truer Taney, but still short of the full stature of the man. The present biography seeks to paint the full portrait with detail and background as well as highlights.

Without Fear or Favor follows the pattern of a "life and times" from the birth of Roger Brooke on March 17, 1777, in the first year of the American War for Independence, to his death on October 12, 1864, the last year of the Civil War. After a boyhood in southern Calvert County, young Taney went to Dickinson College in the spring of 1792 for three years of study that brought him the Bachelor of Arts degree in 1795. One winter at home in a round of fox-hunting, preceded by eggnog before breakfast, proved enough for Taney. Just before his twentieth birthday, he quit the country for Annapolis to prepare for a legal career by the traditional apprenticeship. Reading law in the office of Jeremiah Townley Chase, Taney came into personal contact with a brilliant galaxie of legal lights: Luther Martin, William Pinckney, Thomas Johnson, Samuel Chase, and Gabriel Duvall, the last three of whom were early appointees to the United States Supreme Court.

From the end of his apprenticeship in 1800 to his death, Taney's life was a compound of law and politics; in both he scored important successes. Between the year 1801, when he settled in Frederick to practice, and 1823, when he moved to Baltimore, Taney laid the foundations for his later reputation. As an active Federalist in politics, he managed himself so skillfully in that faction-ridden party that he went to the state senate for a five year term in spite of determined enemies who controlled the party. Instructive as the sharp in-fighting of a decaying party was to him politically, his law practice brought him greater laurels and vastly more income. By the time he relocated in Baltimore, he had become a champion who could stand up to William Wirt, Attorney General of the United States and leader of the Baltimore bar.

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1. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).
 2. *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837).
 3. 17 Fed. Cas. No. 9487 (1861).

The move to Baltimore was a watershed in Taney's life. Previously a state figure, he rapidly became a national personage. The moribund Federalist party had finally died, and Taney came into the Jackson camp of the Democratic-Republican party. Successively he occupied the offices of Attorney General of Maryland — "This was the only office I ever coveted," he wrote later — then Attorney General of the United States, Secretary of the Treasury, and finally Chief Justice of the Supreme Court. An interim Secretary of the Treasury, Taney plunged into the political whirlpool when he carried out Jackson's famous removal of deposits during the Bank War. The Senate promptly punished him by rejecting his nomination. That was in June of 1834. A year later the death of Chief Justice Marshall opened the way to an even more important post, and Jackson took the opportunity to reward Taney, at the same time removing him from active politics. This time the Senate ratified the nomination to install Taney for the last twenty-eight years of his life as the nation's first judicial figure.

It was as Chief Justice that Taney made his most important contribution to the nation. Quite rightly Mr. Lewis devotes over half of his engrossing study to the Supreme Court years,⁴ which began with the *Charles River Bridge*⁵ case and ended with *Ex parte Merryman*,⁶ both milestones in constitutional history. Between these two terminal points of the "Taney court" lie the less celebrated but equally important cases that spoke to questions of commerce (*City of New York v. Miln*),⁷ admiralty jurisdiction (*The Genessee Chief*),⁸ judicial self-restraint (*Luther v. Borden*),⁹ and federal-state powers (*Cooley v. Board of Wardens*).¹⁰ The period was as fertile in judicial battles as in partisan politics. Taney spoke some two hundred fifty times either for a majority of the court or in dissent.

As the author shows, Taney hoped to keep the court clear of party politics, a task that proved difficult during the Jackson period and impossible during the hectic years of the slavery controversy. It is a tribute to his powers that he was able to steer around most political shoals with confirmed politicians like John McLean on the bench beside him. It is the crowning irony that when Taney did, after twenty years as Chief Justice, consent to speak to the supreme issue of the day, slavery, his opinion brought down upon him the fury that so long eclipsed his great judicial record. No summary of the eighty pages in Mr. Lewis's biography would do justice to his skillful handling of the complexities of the Dred Scott case:¹¹ the tenaciously held positions of opposing forces, the strong pressure for judicial settlement of the constitutional issue, the disagreements among the justices themselves between the conference on February 14, 1857, and the reading

4. Part III, To the Supreme Court, pp. 227-346. Part IV, Slavery and the Dred Scott Case, pp. 349-429. Part V, The Civil War, pp. 433-74.

5. *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837).

6. 17 Fed. Cas. No. 9487 (1861).

7. 36 U.S. (11 Pet.) 102 (1837).

8. 53 U.S. (12 How.) 443 (1852).

9. 48 U.S. (7 How.) 1 (1849).

10. 53 U.S. (12 How.) 299 (1851).

11. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

of nine separate opinions¹² on March 6 and 7, and finally, the unhappy aftermath. Historians have not been kind to Taney's opinion, and changes in American outlook have outdated his premises. Mr. Lewis puts this episode in the context of the times and treats it with the utmost objectivity. At last, after more than a century, Taney's relationship to the institution of slavery is described with the same justice that is meted out to contemporaries who held similar views.

Quite plainly Mr. Lewis admires Taney for his political and legal ability and for his human qualities as well. But his treatment never becomes an apologia. It is enough for him to explain Taney. As he does, the reader generates sympathy and affection for a great, and commonly misunderstood, man. Mr. Lewis' book does something to refurbish the image of one of Maryland's greatest sons.

*Aubrey C. Land**

Duke University School Of Law: Conference On Securities Regulation. Edited by Robert H. Mundheim. Commerce Clearing House, Inc.: Chicago, 1965. Pp. 232. \$12.50.

This book will prove to be a surprise and perhaps a disappointment to most lawyers, who have come to expect a Commerce Clearing House publication to be an intensely practical tool. As Robert Mundheim says in his Foreword, the focus is not on "how to do it type questions, but rather on where are we going type questions."¹

The book is a transcript, somewhat edited, of a two-day conference on securities regulation held under the auspices of the Duke University School of Law in November, 1964. The timing was apt, because the conference followed by only three months the enactment of the Securities Acts Amendments of 1964,² which in turn were the outgrowth of the most thorough examination and evaluation of the federal securities regulatory system ever undertaken. The participants in the conference were a diverse group of 17 experts, including regulators, lawyers, financial executives and professors.³ Each member

12. Taney, Chief Justice; Wayne, Daniel, Catron, Nelson, Grier, Campbell, Curtis, and McLean, Justices.

* Professor of History, University of Maryland.

1. Page vii.

2. Pub. L. 88-467, Aug. 20, 1964. 15 U.S.C. § 78 *et seq.* (1964).

3. The panel members were: Manuel F. Cohen, Chairman, Securities and Exchange Commission; Dr. Irwin Friend, Professor of Economics and Finance, Wharton School of Finance and Commerce; Harry Heller, Simpson, Thatcher & Bartlett; Richard W. Jennings, Cofroth Professor of Law, University of California, Berkeley; Thomas A. O'Boyle, Shearman & Sterling; Donald T. Regan, Executive Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc.; Charles E. Rickershauser, Jr., Commissioner of Corporations, California; Marc A. White, Vice President and General Counsel, National Association of Securities Dealers, Inc.; Fred E. Brown, President, Tri-Continental Corporation, Broad Street Investing Corporation, National Investors Corporation and Whitehall Fund, Inc.; Charles W. Buek, President, U.S. Trust Company of New York; Gordon D. Henderson, formerly Special Counsel to the Securities and Exchange Commission on Investment Company Act Matters; Frank J. Hoenemeyer, Jr., Senior Vice President, The Prudential Insurance Company of America; Leon T. Kendall, Economist, New York Stock Exchange; Dr. Roger F. Murray, S. Sloan Colt Professor of Banking and Finance, Graduate School

of the panel spoke on an assigned topic, with comments from other panel members usually following the prepared presentation.

In a general way, the past, present and future of government regulation of the investment community is the topic of the book. Perhaps ironically, or perhaps inevitably, the investment community — the most inherently individualistic of our institutions — finds itself at the same time subject to the most ubiquitous, if not the most restrictive, government regulation. To a considerable extent such regulation has been beneficial to the securities industry because it has restored its public image. On the other hand, the fear exists that further proliferation and intensification of regulation may do more harm than good. More specifically, the discussion focuses on the roles of the securities broker-dealer and the institutional investor, the two channels through which individual money comes into the market. Although in a sense they both perform the same function, they do it in quite different ways. One day at the conference was devoted to each of these organizations in an effort to clarify and define its role in the securities market place as a basis for appraising the need for further regulation.

The first day's topic was the exploration of the plight of an industry which does business under the tension of a fundamental conflict of interest. To a large extent the securities broker or dealer is in a merchandising business, the profitability of which is dependent in the last analysis on the volume of securities transactions. On the other hand, the industry has long aspired to public recognition as a profession. It now appears that Congress and the Securities and Exchange Commission are taking the industry at its word and are beginning to formulate concepts of professionalism which may prove to be unpalatable to industry and perhaps inhibit it in carrying out its merchandising function. The Securities Acts Amendments of 1964 and recent S.E.C. decisions both indicate that the Commission is assuming important roles in areas traditionally occupied by the self-regulatory agencies and the states and raise some serious questions as to the future of what the panel refers to as the "three-pronged system of regulations."

Traditionally, the philosophy of the federal securities laws has been to assign to the S.E.C. the primary responsibility for coping with fraud and only the secondary responsibility for coping with the less clearly definable problems of business conduct. The latter was left to the National Association of Securities Dealers, Inc., and the stock exchanges, self-regulatory agencies which are responsible to the S.E.C. but governed by the securities industry. Completely outside of the federal regulatory framework are the paternalistic powers enjoyed by most state regulators to restrict entry into the securities business and to regulate the quality of securities sold. This makes for a rather nicely balanced system with not too much serious overlapping, at least in the main areas of regulatory concern. Recent developments

of Business, Columbia University; and Frank Weeden, President, Weeden & Co., Inc. The moderator was Robert H. Mundheim, Visiting Professor of Law, Duke University and Associate Professor of Law, University of Pennsylvania.

may have changed this. The Securities Acts Amendments have made it clear that the S.E.C. and the N.A.S.D. are to develop rules restricting entry into the securities business to persons who meet appropriate standards with respect to training, experience and other qualifications.⁴ In addition, the S.E.C. has been given the power to impose minor punishments,⁵ certainly a Congressional invitation to the Commission to supervise business practices which do not necessarily involve fraud. Commissioner Cohen,⁶ Mr. White⁷ and Commissioner Rickerhauser⁸ explore the uncertainties which these innovations have caused, and in doing so leave at least this reader with the feeling that the N.A.S.D. and the states can look forward to diminishing areas of primary responsibility in the regulation of brokers and dealers.

Aside from these recent legislative mandates, the Commission has made some disturbing pronouncements regarding business conduct in recent decisions.⁹ These decisions have suggested that a broker owes its customer what may amount to a legal duty to have sufficient knowledge about the securities it is selling to support whatever opinion it expresses. In addition, the Special Study encouraged the Commission to place "greater emphasis" on "the concept of suitability".¹⁰ This concept, heretofore expressed only in an N.A.S.D. rule,¹¹ requires a broker to have reasonable grounds for believing that any recommendation it may make to a customer be suitable for the customer based upon the facts that the customer may disclose to the broker. Messrs. Heller¹² and O'Boyle¹³ are sharply critical of what they believe to be indications of the Commission's willingness to develop such indefinite standards into legal duties. If these rules of conduct are made legal duties, they fear that the door may be opened to civil recovery by a disappointed purchaser in almost any securities transaction.

The second day's discussion delved into the role of another kind of professional in the market — the institutional investor. The panel agreed that there is a trend toward investing through institutions, and as a result institutions now hold an amount approaching 40% of all the shares of stocks listed on the New York Stock Exchange. This somewhat alarming statistic suggests several questions: Has the

4. 78 Stat. 572 (1964), 15 U.S.C. § 780(b)(8) (1964); 78 Stat. 574 (1964), 15 U.S.C. § 780-3(b)(5) (1964).

5. 78 Stat. 571 (1964), 15 U.S.C. § 780(b)(5) (1964). Prior to the enactment of the Securities Acts Amendments of 1964 the S.E.C. had the power to revoke the registrations of broker-dealers or to suspend such registrations pending the outcome of revocation proceedings but had no power to suspend registrations as punishment or to censure registrants. The addition of these latter two alternatives gives the S.E.C. more flexibility in dealing with registered broker-dealers.

6. "Broker-Dealer Regulation at the Federal Level", pp. 3-13.

7. "Self-Regulation", pp. 23-24.

8. "State Regulation of Broker-Dealers", pp. 14-22.

9. *E.g.*, *Alexander Reid & Co.*, S.E.C. Securities Exchange Act Release No. 6727 (Feb. 8, 1962); *Heft, Kahn & Infant, Inc.*, S.E.C. Securities Exchange Act Release No. 7020 (Feb. 11, 1963).

10. *Report of Special Study of Securities Markets*, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, ch. III, p. 329 (1963).

11. N.A.S.D. Rules of Fair Practice, Art. III, § 2, N.A.S.D. Manual, p. D-5.

12. "The Boiler Shop Cases and the Reasonable Basis Rule", pp. 68-93.

13. "Suitability", pp. 94-106.

institution proved to be an effective manager for the individual investors whom it represents; is the institution dominating the management of companies whose securities it holds; and is the traditional conservatism of the institutional investor diverting money away from investment in more speculative ventures?

These are serious questions. Somewhat surprisingly, however, they developed very little controversy at the conference. A major reason for this was the dominant role played on the panel by executives of institutions, who could hardly be expected to be alarmed at their own success, and the absence of anyone who was willing to assume the role of "Devil's Advocate." Notwithstanding the lack of divergent views, the exposition of the institutional philosophy and the definition of the ground rules according to which the various types of institutions operate is interesting and enlightening.

A fourth question, whether the auction market conducted by the stock exchanges is suited to the large transactions of the institutional investor, inspired the most interesting exchange of views of the day. Here, of course, the discussion focused on the much discussed, but badly understood, "Third Market."¹⁴ Frank Weeden's clear explanation¹⁵ of the operations and aims of the firms that make the Third Market does much to dispel the aura of mystery that seems to surround this part of the securities industry.

There is much to be said for the book. It would hardly be possible to assemble a more distinguished or more articulate panel. The attitude of responsibility and awareness of mutual problems on the part of all the participants is evident throughout. Particularly impressive in this regard are the regulators themselves. To the extent that the purpose of the discussion was to define the roles of the various members of the investment community, it was a successful venture.

On the whole, however, it seems to this reviewer that the program does not quite come off. A conference, by definition, requires an exchange of views. The presentation of a subject by means of a conference sacrifices depth in favor of a mutual testing of opinions and points of view. When controversy fails to materialize, the presentation becomes a series of loosely related short speeches. While the comments of the panel on the prepared texts of the speakers are pertinent and helpful, it is disappointing that they were not more aggressive. The first day's discussion of the enforced professionalism of the brokerage community produced no answers, but defined some interesting questions through controversy. This level was not, and probably could not be, sustained throughout the rest of the conference, with the result that although some questions were asked, the problems involved were never very clearly defined.

*Decatur H. Miller**

14. The "Third Market" is a special segment of the over-the-counter market in which broker-dealers make principle markets in stocks listed on the New York Stock Exchange and deal directly in the purchase and sale of such stocks with other broker-dealers and institutional investors. Pp. 171-72.

15. "The Third Market", pp. 171-90.

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