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# Book Reviews

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# BOOK REVIEWS

## The Myth of Civil Liberties in America

FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861. By Thomas D. Morris. Baltimore and London: The Johns Hopkins University Press, 1974. Pp. xii, 253 (with index). $12.50.

I

The recent death of Earl Warren reminds us, rather sadly, that the great Chief Justice and "his" Court have been subjected to withering and sometimes vicious and unfair criticism from within the academic circle.[1] The heart of the criticism (most charitably put) has been that the Warren Court hastily, simplistically, and even unnecessarily attempted to elevate egalitarianism into a high, perhaps the highest, social value and standard for constitutional and governmental decisionmaking. We like to think that we believe in a democracy free for all—that is the way we portray ourselves propagandistically to the rest of the world—but the truth is that most Americans would stop short of an attempt at the agonizingly difficult task of implementing egalitarianism in our land. How many times have I heard my friends, colleagues, and family conclude (sometimes openly, sometimes by inescapable inference) that a "real" democracy was something they neither wanted nor believed in. Thus the Warren Court critics accurately assess the inability and unwillinguess of most of the country to "accept" its rulings.

Much of the criticism is scholarly fluff, obscuring the heart of the debate: for surely the late Justice Harlan, the Warren Court's most conservative member,[2] was also its most articulate judicial activist and lawmaker,[3] and no one doubts that courts do and should

1. Good examples of this criticism are to be found in A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970). The Warren Court has of course also been praised, *see, e.g.*, A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968); A. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT (1971), and its critics have been ably criticized, *see, e.g.*, Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971); Beytagh, Book Review, 24 VAND. L. REV. 1053 (1971).

2. *See, e.g.*, Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443 (1974); Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

3. In the field of federal jurisdiction and procedure (especially apt to the volume under review), *see, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 398 (1971) (Harlan, J., concurring); Moragne v. States Marine Lines, Inc., 398

"make" law. Surely courts of every ideological leaning have written poorly and have been unable to express their holdings in suitably timeless or "neutrally principled" prose;[4] surely any fault with the implementation of just criminal procedures, properly representative legislative apportionment, and a government (if not society) free from discrimination based on racial and sexual grounds lies not with the Court that boldly reminded our nation of its moral commitments but with the other branches of government, notably the local police, the state legislatures, and the national executive.

The dilemma of the Warren Court is in many ways the dilemma of the author here under review, for both the Court and Thomas Morris in *Free Men All*[5] faced the necessity of writing about this rather neglected portion of our constitutional tradition—to wit, "freedom," the notion that human dignity and the proper functioning of government demand that all men be treated equally and that certain procedural and substantive protections be given to the liberty of each person within the jurisdiction of our courts. The Court's writings, of course, ranged across the whole spectrum of constitutional guarantees and safeguards, while Morris has chosen the story of the Personal Liberty Laws—legal guarantees advanced before the Civil War in the free states to free blacks and runaway slaves whose imminent committal or recommittal to slavery was threatened by an owner. The Court, though equally guilty of overstatement, vagueness, and failure to place the problem in proper perspective, has on the whole written much better than Morris. His effort is sharply lacking despite the poignance of his subject matter.

The values advanced by the Warren Court and the struggles chronicled by Morris are not foreign to American history or to the American dream. Earl Warren did not invent egalitarianism. It is just that we have elevated to the fore our probusiness, pro-property set of values, obscuring the values of personal freedom. Americans

U.S. 375 (1970) (Harlan, J., for the Court); Rosado v. Wyman, 397 U.S. 397 (1970) (Harlan, J., for the Court); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (Harlan, J., for the Court); Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); Henry v. Mississippi, 379 U.S. 443, 457 (1965) (Harlan, J., dissenting); Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (Harlan, J., for a plurality of the Court).

4. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Edward White has attempted in an ingenious fashion to argue that Wechsler and his fellow conservative-centrists did not mean what their arguments seem to imply. *See* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-94 & n.39 (1973), but White fails to give due consideration to Wechsler's ideology.

5. T. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861 (1974) [hereinafter cited as FREE MEN ALL].

have always professed belief in two essentially conflicting sets of values, and both these values are rooted in the very founding of the nation.

As Bernard Bailyn has shown,[6] the Revolution brought to a peculiarly American maturation many fundamental Enlightenment- and English-derived ideas of the nature of government and, in particular, of the place and worth of individuals as the atoms or phonemes of government and civilization. The Declaration of Independence proclaimed that "all men are created equal" and are "endowed" with the "unalienable" right to "life, liberty and the pursuit of happiness." The Constitution, designed to "establish justice" and to "secure the blessings of liberty," provided against suspension of the writ of habeas corpus, repudiated bills of attainder and ex post facto laws, required jury trials in all criminal cases, and disallowed religious tests for public offices under the national government.[7] The first ten amendments were quickly adopted to satisfy the fears of many that the Constitution had not been explicit enough in its guarantees of civil and political freedom.

But the Founding Fathers were not radical revolutionaries, and the Constitution expressed their pro-property values. The fifth amendment requires due process of law to protect against deprivation of "life, liberty, or property." Neither the national nor the state governments were established as pure or even as fully representative democracies. States were prohibited by the Constitution from making laws "impairing the obligation of contract."[8] Further, the meaning of the revolutionary commitment to the freedom and equality of all men was considerably muddied by placing the constitutional imprimatur upon the institution of slavery, in the taxation, slave-trade, and fugitive slave clauses.[9]

The Fathers were much more interested in working out the details of federalism than they were in thinking to logical conclusions the newly-formulated and still fuzzy concepts of man and his nature. Nor did conditions impel further refinement of "equal" and "men." The contrary was true: the southern states would not have entered the new union if slavery had been abolished. Jefferson's diatribe against slavery was removed from his Declaration by a

6. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). See also the excellent development of many of these ideas in G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1775-1787 (1969). And see Nash, *Radicalism and the American Revolution*, 1 REV. AM. HIST. 75 (1973).

7. U.S. CONST. art. I, §§ 9-10; art. III, § 2; art. VI.

8. *Id.* art. I, § 10.

9. *Id.* art. I, §§ 2, 9; art. IV, § 2; *see id.* art. V.

more "moderate" Continental Congress; the deep dichotomy between the rights gained by free whites of the new nation and the continued legal denial of freedom to blacks produced a psychological tension too painful to be endured.[10] Other problems of government were resolved more easily, and the uncertain and undefined nature of the nation's moral commitment to civil liberties and egalitarianism was left unresolved through lack of serious attention and debate.[11] A pragmatic, centrist notion of the nature of the republic was adopted (ironically enough during Jefferson's administration)[12] and a continuing and expanding interest in economic growth, with its attendant development of entrepreneurial and big-business capitalism, meant that, after 1820 or so, the property-oriented values embedded in the Constitution were emphasized almost to the exclusion of the people-oriented values.[13] Obscured for a century by prosperity on an enormous scale, by the horrible yet phantasmagorical experience of the Civil War, by selective isolation, by the continuing predominance of a small, wealthy, increasingly business-

10. *See* B. BAILYN, *supra* note 6, at 232-46; W. HORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812, at 315-85 (1968).

11. I by no means wish to imply that present-day concepts of equality or of the nature of man were or could have been held in the last 2 decades of the eighteenth century. As Calvin Woodward has brilliantly suggested, economic conditions made it impossible to conceive of the termination of poverty in 1800. *See* Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962). But current notions of humanitarianism and of the worth of human sensibility derive directly from kernels the most important parts of which were present during the time of the American Revolution.

12. *See* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).

13. On the business orientation of law and particularly of constitutional law, see P. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918-1969, esp. at 38-67, 128-69 (1972); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (paperback ed. 1969); F. RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955 (1955). *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973); J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); and, on legal education, Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968); Stevens, *Two Cheers for 1870: the American Law School*, 5 PERSPECTIVES IN AM. HIST. 405 (1971).

A particularly perceptive and balanced account of the increasing conservatism of the bar and the loss of Enlightenment values in the growth of American law may be found in the work of Morton Horwitz. *See, e.g.*, Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973); Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973). Support for the position advanced in the text may also be found in Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306 (1968); Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 AM. J. LEGAL HIST. 283 (1970); Pessen, *The Egalitarian Myth and the American Social Reality: Wealth, Mobility, and Equality in the "Era of the Common Man,"* 76 AM. HIST. REV. 989 (1971).

oriented elite,[14] and by a conservative-centrist intellectual tradition that emphasized only the many areas of ideological agreement shared by Americans[15]—punctuated dully by the failures of Populism in the late nineteenth century and of socialism (and even Henry Wallace and George McGovern) in the twentieth—the humanistic, individual civil rights, people-oriented side of the American political tradition has now come to the forefront of the American experience.

The question remains, whether these values will be actually integrated into American thinking. We have been told by our conservative-centrist historians that America's past has been characterized by an easy pragmatic compromise between property rights and personal rights. In fact, however, the compromise has been skewed far to the side of wealth, business, and elitism, as is painfully evident from the facts recounted in Morris' book and from the storm of criticism aroused by, and the difficulty of the most minimal implementation of, the rulings of the Warren Court. Environmentalists, consumers, blacks, Chicanos, women, and others alleging deprivation continue to lose what they have every right to believe is guaranteed to them by the Constitution. Property rights are also guaranteed there. I believe, with the Warren Court and with Morris, that egalitarianism and personal liberties ought to be given a greater social value than elitism and economic growth, and that our political institutions should at least weigh each conflict between the two carefully. Historically we have not actually attempted to work out the compromise; the results have been skewed sharply one way. Given the world's current ecological and economic mess, things are likely to get no better.[16]

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14. The predominance of the business elite and the business mentality is documented in, *e.g.*, G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); POLITICS AND POLICIES OF THE TRUMAN ADMINISTRATION (B. Bernstein ed. 1970); H. ZINN, POSTWAR AMERICA: 1945-1971 (1973). There are, of course, opposing views; for one of the most balanced see J. GADDIS, THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1941-1947 (1972).

15. Two of the hest examples of the conservative-centrist school that has predominated in American historiography since the discipline was invented are L. HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955), and 1-3 D. BOORSTIN, THE AMERICANS (1958, 1965, 1973).

> [T]he largest problem of all [is] the tendency of historians to function generally in American society as a conservative force upholding the status quo. In the realms of imperialism, capitalism, and nationalism as well as racism, most scholars working from minor progressive, liberal, or conservative variations of the national consensus have been the servants of power.

Crowe, *Historians and "Benign Neglect": Conservative Trends in Southern History and Black Studies*, 2 REV. AM. HIST. 163, 171 (1974).

16. The apocalyptic vision of Robert Heilbroner seems fairly accurate to me. R. HEILBRONER, AN INQUIRY INTO THE HUMAN PROSPECT (1974). I certainly can take no comfort in

## II

Following adoption of the Constitution, the institution of slavery presented an epitome of this entire problem, for slaves were both persons and property. The question was, in a conflict, which aspect was legally paramount? Free blacks, too, found this question vital since legal rights and abilities, even freedom itself, turned primarily on the presumptions attached to color. The presumption south of the Mason-Dixon line was, naturally enough, that blacks were unfree and under all the disabilities that such a status entailed, including the inability to testify against whites or to invoke most kinds of legal proceeding. This presumption was reversed in the laws of the free states.[17]

But what about slaves who escaped into free states? Could runaways forcibly be returned? If so, what processes, including what legal methods in the locale of capture, had to be used? What proof had to be presented of slavery, and to whom? What aid would be required of local officials and citizenry? Most importantly, would the law of the free state apply in any fashion to the recapture of a claimed escapee? A classic problem of federalism was thus presented, involving both the relationship of one group of states to another, and the relationship of each to the federal government. Also, a classic problem in the flexibility of American law was created, for, as Morris points out, the common law devices of jury trial and the writs habeas corpus and *de homine replegiando* had evolved "to secure the personal rights of one man as against another."[18] To what extent these devices were available to the runaway or kidnapped free black, and in what ways these legal devices were improved and developed, are important problems in legal history and formed important ingredients of the story.

The fugitive slave clause had been inserted into the Constitution at the instance of slaveowners, apparently to cover this very situation, but its language was ambiguous:

> No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.[19]

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Geoffrey Barraclough's mechanistic and irrational reliance on the Kondratieff Wave. *See* Barraclough, *The End of an Era*, THE N.Y. REV. OF BOOKS, June 27, 1974, at 14. At least civilization should not have to rely on mystical crackpottism.

17. *See* FREE MEN ALL at 1-22.
18. *Id.* at 8.
19. U.S. CONST. art. IV, § 2.

Did this preempt, in whole or in part, the free states from legislating in the area? Did it empower, or require, the federal government to enact supportive legislation? Did it mean that all of the trappings of slave-state law, such as the presumption of the slavery of blacks and the disabilities of blacks, were imported part and parcel into the law of each of the free states? What mode of inquiry into the status of the alleged runaway was permitted? The southerners, departing from their states' rights position, claimed that not only were the free states disabled from interfering by legislation with the recapture of slaves, but also that any judicial process questioning the black's status had to be undertaken in the slave state, after (or preferably before) recapture. The federal government alone, they claimed, was empowered to legislate in this regard, and, they further asserted, the clause contained a silent but obligatory requirement that northern citizens actually be forced to assist in the process of recapture when called upon by a slaveowner. The Constitution, they concluded, had written into fundamental law the slaveowner's common-law "right of recaption," allowing him to seize his property free from the hindrance of citizen or judicial process in the locale of recapture.

These conclusions were bitterly repugnant to many citizens of free states, including many who shared the general racist attitudes toward black people. The proslavery argument meant that southern law would pro tanto preempt the local law of each free state, abrogating in the process the time-honored and Revolution-secured rights of every man to jury trial, to habeas corpus, and to process in the locale. Indeed, the southern arguments seemed to contravene the very basis upon which the Revolution had been fought, allowing wholesale invasions of privacy and intrusions upon the public peace by citizens of far-off places or, more usually, their hired agents or professional slaverunners. Free black citizens were mulcted of their peace and kidnapped (maddeningly, Morris makes this argument time and again as a point in favor of the Personal Liberty Laws but he never cites any statistics).[20] Worst of all, southern arrogance, implacability, and paranoia combined to drive home the real sticking point: it was not the free states who predominated in the new union.

Perhaps not so surprisingly, the slaveowners won every major battle fought at the national level. The Fugitive Slave Act passed by Congress in 1793 authorized the slaveowner or his agent to seize

20. *See* FREE MEN ALL at 44, 86, 90, 122.

alleged runaway blacks; removal to slave territory could be had by obtaining a certificate from the federal district judge that the captured person was indeed properly held to service, and proof could be by "oral testimony or affidavit taken before and certified by a magistrate of any state or territory" including, of course, one obtained before the slaveowner left home. Willful obstruction of a slave-claimant and concealing a runaway were punishable by a 500 dollar civil penalty.[21] The Fugitive Slave Act of 1850, part of that year's "Compromise," expressly authorized claimants to exercise their common-law right of recaption. The claims could now be heard and determined "in a summary manner" by the judges, or by special commissioners appointed by them; the commissioners were empowered to appoint "suitable persons" to execute their warrants and processes. Judges, commissioners, and "suitable persons" could require the local citizenry to aid them. Further, satisfactory proof of servitude could be the affidavit of the owner or claimant, taken on the spot by the commissioner, or it could be "other satisfactory testimony" taken before officials in the state from which the escape allegedly occurred. The testimony of the alleged runaway was inadmissible. Issuance of the certificate would be "conclusive of the right" to remove the black, and all other judicial process—meaning habeas corpus and any claim the black might lay to jury trial—would be null and void. As Morris states, "The presumption of freedom, and the laws of the free states designed to secure the personal liberty of free men would not be allowed to defeat a claim that a man was a slave."[22] The penalties were increased to 1000 dollars civil damages per slave for obstructing or harboring, plus a criminal penalty of 1000 dollars fine plus six months' imprisonment. Federal marshals were required to protect slave property from local rescue attempts and could employ as many people as necessary to that end; they were to be held financially responsible for any escape.[23]

> The Fugitive Slave Law of 1850 was scarcely a compromise. Every effort by northerners to include some security for free blacks, particularly the trial by jury and habeas corpus, was defeated by a coalition of southerners and some northern Democrats. . . . Every guarantee, every security in the new law was for the "rights" of slave owners.[24]

The judiciary was even less kind. In 1842, speaking through Justice Story, who claimed to be an antislavery Jeffersonian Demo-

21. Act of Feb. 12, 1793, ch. 7, 1 Stat. 305.
22. FREE MEN ALL at 146.
23. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.
24. FREE MEN ALL at 146-47.

crat,[25] the Supreme Court in *Prigg v. Pennsylvania*[26] upheld the 1793 Fugitive Slave Act as constitutional and, somewhat gratuitously, held that the common-law right of recaption was thereby guaranteed to each slaveholder and that all state laws or processes which had to do therewith were unconstitutional and void. (Breaches of the peace and "illegal violence" could still be prosecuted.) Thus the southern slave laws were given extraterritorial effect, by an extraordinarily broad and probably unwarranted reading of the Constitution. Story accepted the southern reasoning that the fugitive slave clause of the Constitution was "a fundamental article, without the adoption of which the Union could not have been formed."[27] He later defended his decision as antislavery, since he believed that recaption could never work without supportive state legislation, which was now invalidated. He also claimed to believe that the national Congress, possessing newly unfettered powers with regard to slavery, would somehow reverse fifty years of history and legislate in favor of freedom.[28] It is just as likely that his attempt to be judiciously neutral and to find a compromise that would save the Union demonstrated how low in his scale of values he placed the freedoms and rights of black people—and in this he probably mirrored the views of most of his white fellow citizens. At any rate, the *Prigg* decision was disastrous to those working for a peaceful resolution of the slavery controversy.

In 1857 the Court handed down *Dred Scott*,[29] endorsing the proslavery attitude on the question of the constitutionality of slavery in the territories. And in March of 1859, in *Ableman v. Booth*,[30] the Court upheld that part of the Fugitive Slave Act of 1850 which seemed to prohibit the use by state judges of habeas corpus to inquire into the detention of one held because of a certificate issued under that Act. The certificate would be a full and sufficient return to a state habeas, and no further state inquiry would be valid. The breadth of the Court's holding emasculated the writ. The state court

25. For an excellent biography of Story, see G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970). The interested reader should also consult a good review that encapsulates the volume's shortcomings. *See* Bloomfield, *A Man For All Seasons*, 1 REV. AM. HIST. 213 (1973).

26. 41 U.S. (16 Pet.) 539 (1842).

27. *Id.* at 611-13.

28. Dunne calls *Prigg* "the bitterest decision of his [Story's] entire career." G. DUNNE, *supra* note 25, at 399. For Story's later justification and defense of his opinion see FREE MEN ALL at 103-04. Morris's analysis of *Prigg* is typically poor, *see id.* at 102-06, and will be commented upon at length below. *See* note 43 *infra* and accompanying text.

29. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

30. 62 U.S. (21 How.) 506 (1859).

below had found the Fugitive Slave Act unconstitutional in a habeas proceeding; in order to preserve the sanctity of this most valuable of common-law devices for inquring into allegedly illegal detention all the Court needed to do was to reverse the lower (Wisconsin) court on the constitutional question. The excess of the Court in *Ableman v. Booth* was typical of the actions taken by all branches of the federal government on the question of the recapture of alleged runaways. The implacable view of the slaveowning states was adopted:[31] the processes of justice in the free states could not be trusted to make fair findings of fact on the question, "slave or free?", and thus the antilibertarian presumption that freedom did not attach automatically to a black skin must be imposed upon the free states. The great principle of preservation of the union took precedence above the supposedly great principle of personal liberty for which the Revolution had been fought. Property rights and not civil rights triumphed, and the triumph was without compromise. At one point Morris lets us have a glimpse of one reason why the freedom of black people was given such short shrift:

> Webster [the God-like Daniel, speaking in favor of the southern position on the Compromise of 1850, a position which as usual rejected compromise] spoke for the conservative merchants and businessmen of the North who had a considerable stake in union with the planting class. For them union was far more important than securing the personal liberty of the few blacks who might become the victims of slave catchers.[32]

Unfortunately this sort of class analysis is one of many unused conceptual tools in *Free Men All*; it occurs infrequently and without the benefit of much thought.[33]

Faced with defeat at the national level of government, the antislavery forces, including both those who were opposed to the institution of slavery and those who wished to guarantee the liberty of free blacks and the peace of free states, waged a continuous struggle at the state level. Morris follows the developments in five free states (Massachusetts, New York, Pennsylvania, Ohio, and Wisconsin) in which "Personal Liberty Laws" were passed. These laws variously guaranteed a jury trial to a person who claimed to be free; extended habeas corpus to cover the claims to freedom of fugitives; required state procedures in addition to, or as an alternative to, the federal fugitive rendition procedures; punished state officials for perform-

31. Morris gives some examples of this implacability. *See* FREE MEN ALL at 39, 132-33, 144.

32. *Id.* at 135.

33. For further criticism of Morris in this regard, *see* notes 44 & 51-53 *infra* and accompanying text.

ing duties under the federal fugitive slave acts, or withdrew jurisdiction from state officials in such cases; denied the use of jails to house alleged runaways; provided counsel for blacks or persons claimed as slaves; and provided punishment for persons convicted of kidnapping.[34] Not all were in effect in any one state, and some were later repealed by prosouthern state legislatures. The most bold and threatening (the first three listed above) were ruled unconstitutional or void in *Prigg* and *Ableman v. Booth*[35] as conflicting with valid federal law. Many were still on state statute books in 1860 (indeed, no one doubted that states could close their jails and processes by withholding a grant of jurisdiction), even despite *Ableman v. Booth*, but their efficacy was in doubt. The continued assault upon these laws at the national level left state legislators very little room to maneuver in. Some counseled defiance or interposition, and some continued to attempt to create legal loopholes, at least to protect free blacks, but the spirit of antislavery was gone. Not one of the states Morris studies passed any new Personal Liberty Laws after 1859. Nor did any enact interposition.

Several conclusions are possible from this legislative history, especially since Morris hints at many but comes to none. The most plausible is that the continued federal assault on the states' Personal Liberty Laws and the continued support for the southern position given by northern businessmen had broken the backs of the moderates in the free states. Most of the moderates held black people in contempt anyway, and they finally were caving in, willing to give up the Revolutionary ideal of freedom, at least as it applied to persons with black skins. The radicals—those who opposed slavery as an institution and were increasingly ready to adopt any measure to achieve the desired result—were pushed into even more frenzied activity, and now had the whole field to themselves. They presented the only realistic alternative, after *Ableman v. Booth*. Nevertheless, given the support for the prosouthern legal position in the free states and the respect for property over person, it took the paranoid response of southern secession to bring the radical dream to fruition. It must be emphasized, however, that Morris does not present us with enough information or organized thought for these conclusions to be labeled anything more than tentative and preliminary.

34. A good summary of the types of Personal Liberty Laws, and what became of them, is in FREE MEN ALL at 195-99.

35. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), discussed at text accompanying notes 24-26 *supra*; Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), discussed at text accompanying notes 28-29 *supra*.

## III

The summary of the events covered in Morris's book has been inordinately lengthy, but it is an extremely important episode in our constitutional and legal history. There is no good history of the fugitive slave clause and acts,[36] and Morris's efforts are very meagre indeed, sufficing only to give some flavor of the problem. Morris chose an interesting and important topic, but this rather hastily produced dissertation does not do it justice. He writes with a jerky, unrefined style. Sometimes it is extremely unclear what he is talking about.[37] Moreover, he repeats an all-too-common failing of legal historians in that he does not place his subject into a usefully broad and deep social, political, and ideological context. For example, we are not given very good reasons why these five states were chosen.[38] Worse, there is little indication whether the experience delineated here was typical, and there is even little cross-analysis among these five states. Morris moves dully from one legislative action to the next, from one court case to another, without placing each legislature and each court into its historical and political context.[39] Which people of what backgrounds made up the majorities who voted for Personal Liberty Laws? In what manner did other disputes and political problems, especially local ones, affect the success or failure of the struggles to enact these laws? How did one legislature differ from the next within each state? Who were the judges, and what sort of sociological inquiry can be made of the make-up and actions of the state and federal courts? Worse still, Morris fails to include the background of national politics and of the continuing struggle to abolish slavery while placating the slaveholders. We are referred at times to these topics, but never sufficiently to grasp the overall philosophical disputes, the important larger issues, the real debates

36. *See* S. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 (1970); Gara, *The Fugitive Slave Law: A Double Paradox*, 10 CIVIL WAR HIST. 229 (1964); Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L.J. 161 (1921). Morris also cites 3 relevant dissertations. W. Leslie, The Fugitive Slave Clause, 1787-1842: A Study in American Constitutional History and in the History of the Conflict of Laws, 1945 (unpublished dissertation, University of Michigan); W. Shaw, The Fugitive Slave Issue in Massachusetts Politics, 1780-1837, 1939 (unpublished dissertation, University of Illinois); J. Yanuck, The Fugitive Slave Law and the Constitution, 1953 (unpublished dissertation, Columbia University).

37. Moreover, he makes such irresponsible generalizations as: "Throughout the 1820's the persistence of Jeffersonian ideas created considerable tension in the South." FREE MEN ALL at 59; *cf.* M. PETERSON, THE JEFFERSONIAN IMAGE IN THE AMERICAN MIND 1-111 (1960), for an indication of the complexity of the subject.

38. For his "reasons," see FREE MEN ALL at xi.

39. *See, e.g., id.* at 82-83, 89 (legislatures); *id.* at 43 (early federal bench).

over policies and values that form the natural setting for such a story.

Morris also fails in many ways to be a good legal historian in the narrower sense. For one thing, he uses legal materials to demonstrate social trends, but not to explain them.[40] For another, he has not taken the trouble to get more than halfway in his understanding of some important legal concepts and problems. In analyzing one case either he or the court has misused the term "res judicata;"[41] of course, it is possible that in 1834 the term did not have the precise meaning that it now does, but this should be explained and commented upon by the adequate legal historian, and Morris's failure leads one to suspect his understanding of the whole concept. He seems to understand that, under the pressure of the demand to free fugitives and free blacks from custody, a significant development in the law of habeas corpus took place: the writ came to be used to provide a basis for an independent judicial examination of the facts of detention (previously the return to the writ was conclusive on any issue of fact), and then to be used as a basis for investigation of the constitutional validity of the law cited to justify detention.[42] But, a few pages later in discussing the effect of *Ableman v. Booth* on the Personal Liberty Laws, he fails to note how the Court's decision tended to emasculate the whole concept of habeas corpus.[43]

Morris fails completely to place his material into the context of federal-state conflict, or federalism, a topic forming the basis of one of the most complicated, interesting, and important branches of the law, federal jurisdiction.[44] Finally, his analysis of the important Supreme Court decisions he discusses is quite poor. His usual method is to outline the various opinions of the members of the court, and then in scattershot fashion to collect secondary comment from other sources and to present it in condensed but completely

40. *See, e.g., id.* at 42. There is in FREE MEN ALL a good deal of evidence to substantiate William E. Nelson's thesis that, frustrated at every legal turn, antislavery advocates moved away from instrumentalism toward reliance on natural law; *see* Nelson, *The Impact of the Anti-slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). On instrumentalism generally see Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSPECTIVES IN AM. HIST. 287 (1971). Morris seems unaware that this reliance on a higher law was unusual or important. *See* FREE MEN ALL 105, 111.

41. *See* Jack v. Martin, 12 Wend. (N.Y.) 311, 327 (1834); FREE MEN ALL at 66.

42. *See* FREE MEN ALL at 153.

43. *Id.* at 179-80. *Ableman* is discussed at the text accompanying notes 30, 31 & 35 *supra*.

44. *See, e.g.*, FREE MEN ALL at 90, 175. For an indication of the complexity, breadth, and importance of the problems of federalism see H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973) (the standard federal jurisdiction casebook).

uncritical fashion. Morris does not indicate his agreement or disagreement with the commentary, and his own usually vague and feeble statements of opinion characteristically begin with a maddening "at any rate" disclaimer.[45] The failure to use, and seemingly to understand, any sort of analytical or philosophical context or tool is characteristic.

Admittedly, for Morris to have grounded himself in the relevant national and local history; to have done the necessary biographical, statistical, and sociological studies; to have become familiar with legal terms, concepts, and history; and to have gathered to himself a reasonably firm education in theory and philosophy would have been a long and demanding task. But this book is worthless to the intelligent reader without that essential groundwork. Morris set for himself a topic of extreme difficulty and should not have expected its accomplishment to be simple. He has essentially not accomplished the historian's task of giving some sort of coherent explanation for the events he recounts. Indeed, Morris's failure to make thorough use of any of the modes of analysis (such as class conflict or racism)[46] he refers to incidentally at one point or another, his apparent inability to generalize systematically or to make useful philosophical observations, and what appears to be a failure fully to understand the larger importance of his work, all lead one to conclude that he is in drastically over his head.[47] There is no justification for this study's having found its way into print; it can only serve to confuse and to waste the time of those interested in its topic.

## IV

The saddest thing about *Free Men All* is its vivid if somewhat inarticulate demonstration of the growth and continuance of the American retreat from and rejection of our Revolutionary heritage of egalitarian and democratic freedom. The compromise has in fact

45. For example, his discussion of *Prigg* in FREE MEN ALL at 102-06.

46. *See* notes 33 *supra* and 54-56 *infra* and accompanying text.

47. Morris's failure to have sufficiently thought through his problem is demonstrated in part by his inability to understand the broader implications of the terms "higher law" and "constitutionality." These would seem to he of the first level of importance for his work, but he is able to make statements such as: "It is by now a truism, because of the work of Edward S. Corwin, that the American Constitution and the state constitutions embody higher law precepts;" and "Constitutionality is a normative concept, but it is not an absolute. The answer to the question, 'Which of these laws are, or were, unconstitutional?' would depend upon what is chosen as the incontrovertible measure of constitutionality." FREE MEN ALL at 158, 195. Morris seems to be unaware of legal realism, but surely anyone who thought about the subject would need little help in discovering the normative nature of constitutional law.

been no compromise at all, but an acceptance of the probusiness and pro-property side of the dichotomy that has relegated the pro-people values to the status of myth. The psychic, moral, and ideological needs of capitalism have kept us professing our national belief in the values of personal liberty and individual freedom, but the professions of faith have not been backed up by any national, active commitment in times of crisis. As its aftermath showed, even the Civil War was fought to maintain the union and not to make black people free.[48]

This fact of American life is mirrored in Morris's book. Especially poignant is the failure of those who fought for the Personal Liberty Laws to find any solid base of support for them in the Constitution. The proslavery forces could rightfully argue that the fugitive slave clause was the price for union—that this form of property-holding was formally ratified into fundamental law. The antislavery argument skipped about from the vague guarantee of justice in the preamble, to strained arguments from the lack of any congressional enabling language in the fugitive slave clause (citing the ninth and tenth amendments), to the guarantee of habeas corpus, and most frequently to the procedural guarantees of the right to jury trial and the fifth amendment.[49] Rarely did their plea have the fundamental ring, appeal, and coherence of the other side's cry of "union," though an argument with such characteristics was always available: the essential humanity of slaves, and the fact that the Revolution had been fought and the union established in order to guarantee human freedom.[50] As Morris says,

> [These antislavery] efforts reflected a broad commitment to a pattern of civility measured by access to traditional legal guarantees of personal freedom . . . . But it was a commitment bounded not only by ardent unionism but by the imperatives and uncertainties of federalism, by a continued recognition of the lawful holding of persons as property, and by a sometimes short-sighted appraisal of social reality.[51]

As Morris does not say, most northerners were racists and had a commitment to the advance of human freedom that was so severely weakened by racism and by the general national failure to solve the conceptual and applicational problems about freedom and equality remaining after the Revolution,[52] that they could not find, for their

48. *See, e.g.*, L. GERTEIS, FROM CONTRABAND TO FREEDMAN: FEDERAL POLICY TOWARD SOUTHERN BLACKS 1861-1865 (1973).

49. *See, e.g.*, FREE MEN ALL at 42-53, 60, 79-84, 96, 136, 158, 161.

50. Such an argument was sometimes made. *See, e.g., id.* at 31, 64, 87.

51. *Id.* at 24.

52. *See* text accompanying notes 10-15 *supra*. In the very next sentence after the ones

side, the mighty constitutional bottom, the winning plea, of *equality for all.* They could not really accept blacks as people. A conservative Whig put it well, during the Pennsylvania constitutional convention of 1836-37: "Do not let us, by any false notions of humanity and because our ancestors went so far as to pass an act that the people of colour should be no longer kept as slaves, but restored to personal liberty, be induced to confer upon these people political rights."[53]

Morris's failure to use the paradigm of northern or national racism is conscious on his part. Leon Litwack's good study of the northern persecution of free blacks is cited sporadically, and the fact of prejudice as an element of the antiabolition riots of the 1830's is mentioned,[54] but nowhere is evidence or even the existence of this pervasive northern racism woven into the story of the Personal Liberty Laws (although it must have been the significant factor which blunted the edges of such laws, resulted in their repeal upon occasion, and caused their negation at the hands of the federal courts and legislature). Morris explains:

> It should always be borne in mind then that the Personal Liberty Laws are only one side of a very complex set of legal systems—systems which reflected both idealism and meanness. The focus of this study is on the idealism.[55]

But it is only part of the story to recite the passage of these laws. Racism is an inescapable thread of their history, and must be con-

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quoted in the text at note 51, *supra,* Morris contradictorily writes of "the genuine commitment to the advance of human freedom" that was "usually pursued without examining the social disabilities faced by black people." FREE MEN ALL at 24.

53. Quoted in *id.* at 84-85. Even today, historians caught up in quantification forget that it is human beings they study. The best (and most controversial) example is the recent work that claims to demonstrate that slavery was not so harsh upon the black person as has been asserted, but that fails to talk in terms of the psychological deprivations wrought upon the enslaved. *See* R. FOGEL & S. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974), reviewed, Lichtman, *A Benign Institution?,* THE NEW REPUBLIC, July 6 & 13, 1974, at 22; Woodward, *The Jolly Institution,* THE N.Y. REV. OF BOOKS, May 2, 1974, at 3. Many white Americans, shamefully, either still fail to conceive of blacks as fully human or accept the impersonal and unfeeling, falsely scientistic bias of our pro-property heritage, just as many historians continue the racist biases inherent in the conservative-centrist school. *See* Crowe, *supra* note 15, at 170:

> [R]acism has been an enduring and central part of the American 'mainstream' and . . . historians generally have been purveyors of racist opinions and attitudes. . . . [T]he time had surely come by the early seventies to accept the conclusion that the racism which sprang from both the general culture and its historical interpretators has permeated the presentations of events from the colonial era to the present . . . .

54. For a citation of L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961), see FREE MEN ALL at 63; for mention of the antiabolition riots, *see id.* at 62.

55. *Id.* at x.

sidered if we are to understand them. Its absence from the conceptual scheme of this book makes hollow and meaningless Morris's grand conclusion "that people in the North incorporated into law the presumption that all men are born free and should not be deprived of that freedom except by due process."[56]

The majority of Americans, or even the majority in the free states, did not in fact conclude that due process should extend to everybody. Nor do they today. The failure of civil libertarianism to take on real meaning in the United States even in a negativistic or protective sense is demonstrated by the existence of and widespread antipathy toward the ACLU and by the grumbling reaction, even among academics, to the Warren Court's emphasis on due process in criminal procedure. The mythic nature of American commitment to our Revolutionary ideals is even more shatteringly demonstrated by a glance at the history of the first amendment. Widespread and viciously blatant violations of the supposedly guaranteed freedom of speech were condoned, encouraged, and enacted into law by state and federal governments during and immediately after the First World War, and all of this was upheld by the Supreme Court.[57] Indeed, the "clear and present danger" test was coined first by Mr. Justice Holmes to mask and validate this abrogation of the first amendment and was then advanced by him to protest that abrogation only after the war was over; the protest was joined only by one other Justice (Brandeis).[58] It was easy for the country and for the Court to be so remiss about our "most valued of freedoms" because the country had no tradition or history of commitment; the difficult and agonizing process of balancing the right of a person to say what he or she likes against the group need of security had never been bothered with. The impersonal values of property were predomi-

56. *Id.* at xii.

57. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 36-325 (1941); D. JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION (1963); R. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920 (1955); H. PETERSON & G. FITE, OPPONENTS OF WAR, 1917-1918 (1957); H. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921 (1960). *See also, e.g.*, Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920).

58. *Compare* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J., for the Court), *with* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Commentators have in general taken a charitable view of Holmes's performance, refusing to recognize the inconsistencies. *See, e.g.*, P. MURPHY, *supra* note 13, at 21-30; Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech; The First Year, 1919*, 58 J. AM. HIST. 24 (1971). *But see* Mencken, *Mr. Justice Holmes*, in THE VINTAGE MENCKEN 189-97 (A. Cooke ed. 1955); Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pts. 1-2), 15 STAN. L. REV. 3, 254 (1962-1963).

nant, and the natural result was vigorous repression, a repression raised to the surface of national consciousness by the First World War experience and continued to the present time as the primary national response.[59] When the chips are down, when the freedom is most needed, Americans have responded with a repression of this freedom. "Freedom" is, at least as the value response of the American majority, a myth. We don't like to recognize our failures, and so it is perhaps typical that Morris focuses on the "success" of the "idealism" to the extent that he achieves nothing more than a psychologically soothing perpetuation of the myth.

What is necessary in order to rebalance the scales and to accept the meaning and heritage of the Revolution is to understand the rather simple truth glimpsed by the Fathers: that, psychologically, any condition other than equality is demeaning and offensive to the human spirit. Leaving aside our probusiness, elitist, conservative reinforcement of the good things about inequality (principally the joy of being victorious), equality is difficult to achieve or realize because of difficulties of judgment and measurement, and equality is difficult to maintain because it is psychologically easier to approach others from attitudes of dominance or worship. And then, we cannot really put aside our conservative heritage, for it too is based upon a valid perception of psychological reality: many people do not want to get ahead, to maintain their independence, to make as many of their decisions as possible in the social, economic, and political areas.[60] Many people will choose to be led blindly in some or all areas of life, just as many others will protest some or all intrusions into their realm of perception. The compromise of conflicting values in the Constitution is one that must be made. As we approach the second centennial of the Revolution, however, it is high time that we elevate the propeople values to their proper position and begin the difficult task of living under our Revolutionary ideals. What is likely, however, is that we will continue to repudiate them.

WYTHE HOLT*

59. *See generally* 1 T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d ed. 1967). *Compare* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) (arguing for freedom), *with* W. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957) (arguing that virtue and order are more important than freedom).

60. *See* F. DOSTOEVSKY, THE BROTHERS KARAMAZOV pt. 2, Book V, ch. 5 ("The Grand Inquisitor") (1948); E. FROMM, ESCAPE FROM FREEDOM (1941).

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# The Taney Equilibrium

THE TANEY PERIOD, 1836-1864 (THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V). Carl B. Swisher. New York: The Macmillan Company, 1974. Pp. xvii, 1041. $30.00.

This is the third published volume of the projected twelve volume Oliver Wendell Holmes Devise *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 Professor Swisher, former Professor of Political Science at Johns Hopkins University and author of the most authoritative biography of Roger B. Taney. Although Swisher completed the manuscript before his death in 1968, the past six years have been given over to a protracted final scrutiny by the editor in chief of the Holmes Devise *History*, Paul A. Freund, who assumed the responsibility for finally editing and shepherding the volume through the press.

Swisher's study of the Taney Court emerges as a useful addition to a remarkably diverse body of scholarship. The Maryland born and bred, slaveholding, Catholic jurist and the Court he presided over have proved susceptible to divergent historical interpretations. Many northern contemporaries dealt harshly with the Chief Justice, fastening on him the label of slaveocrat and southern sycophant and taking delight in comparing him with George Jeffreys, the English "hanging judge" of Monmouth's Rebellion.[1] Congressional Republicans, embittered by the Maryland jurist's performance in *Dred Scott*, refused on his death to appropriate funds for a commemorative statue. Taney and his brethren fared little better with turn of the century "Whig" historians, one of whom described the Chief Justice as "a vampire hovering in the dim twilight."[2]

Twentieth century historians and legal scholars, led by Edwin S. Corwin, Charles G. Haines, Foster H. Sherwood and Swisher have undertaken a broad reappraisal of the Taney Court. The results, however, have been less than harmonious. Corwin, Haines

1. W. LEWIS, WITHOUT FEAR OR FAVOR 477 (1965).
2. 5 J. SCHOULER, HISTORY OF THE UNITED STATES UNDER THE CONSTITUTION 375-76 (1891).

and Sherwood, joined most notably by Benjamin F. Wright, concluded that allegations of a southern slaveholding bias had obscured the contributions of the Taney Court in expanding national powers, strengthening the judicial power, and giving added protection to property, especially corporate property.[3] Corwin demurred in part from the nationalist theme, suggesting the Court's most important goal was an equilibrium of power relationships between state and nation.[4] In his carefully researched biography of Taney, Swisher agreed that the Chief Justice's Court did not break dramatically with its immediate predecessor under John Marshall, but viewed the Marylander as a determined Jacksonian Democrat who retained his states' rights and southern bias and was genuinely hostile to monopoly power. Swisher concluded that neither Taney nor his Court were willing to commit themselves to the broad nationalism of the Marshall era.[5] Subsequent scholarship proceeded along these two paths with the nationalist theme in the ascendancy, but with often conflicting explanations of the motivation and success of Taney and his colleagues. Regrettably, Swisher succeeds only partly in sweeping away the scholarly fog.

*The Taney Era* is a massive and detailed study of the Taney Court. The author examines not only the landmark decisions of the Court[6] but also some less well known but important litigation.[7] The *Dred Scott* decision,[8] which Swisher considers the pivot of the historical reputation of the Court, is given a full chapter. Approximately two-thirds of the thirty-seven chapters are devoted to a discussion of the prominent cases of the era, categorized by headings treating the commerce clause, admiralty and maritime jurisdiction, patent rights, contracts, property, and slavery. The remaining chapters explore the often neglected topics of appointments, the workload of the Court, the selection and internal administration of the Court's clerk and reporter, and the characteristics of the individual

3. C. HAINES, THE CONFLICT OVER JUDICIAL POWERS IN THE UNITED STATES (1909); C. HAINES & F. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-64 (1957); B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938); Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52 (1911).

4. E. CORWIN, TWILIGHT OF THE SUPREME COURT 11-12 (1934).

5. C. SWISHER, ROGER B. TANEY 588 (1935).

6. *E.g.*, The Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283 (1849); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

7. Such cases include Waring v. Clarke, 47 U.S. (5 How.) 441 (1847) and Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

8. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

Justices. All of this is displayed against a background of major and often dated generalizations about the Bank War, Jacksonianism, the sectional conflict, and the wartime administration of Lincoln's government. With a few notable exceptions much of the new material appears in the sections relating to nonjudicial and nonconstitutional matters.[9]

The author argues that on the whole the Taney Court was "peculiarly unphilosophical."[10] Unlike its immediate predecessor under John Marshall, the Taney regime, although treating substantive issues of federalism, the dimensions of state and federal powers, the rights of property, and the limits of governmental control, invariably concentrated on the specifics of litigation, scrupulously avoiding general assumptions and broad theoretical considerations. Such a limited perspective was almost mandatory, according to Swisher, because of the omnipresent threat of the "irrepressible conflict," the "settled nature" of government and law that emerged during the Marshall Era, and the diversity in regional representation, legal talent and political ambition[11] that brought conflict to a Court confronted by "the increasing pressures of day-to-day operations."[12] Accordingly, Taney and his often dissenting brethren settled for the narrow and certain rather than the broad and theoretical. As a result, the Court failed to synthesize the Federalist nationalism of John Marshall with the evolving state centered mercantilism of Jacksonian America. Swisher concludes that "the Taney Court and the Marshall Court, for all the seeming difference in emphasis, proved to be very much the same."[13] Threatened by the "grinding pressures of sectional conflict," the Justices conducted a judicial holding action by attempting to consolidate national and judicial powers[14] while simultaneously acknowledging state and nonjudicial powers.[15] Swisher asserts that the judicial balancing act collapsed and the Taney Court "fell on evil times," when as an institution

9. There is substantial new material in the discussions of Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. (13 How.) 518 (1851), *reconsidered in*, 59 U.S. (18 How.) 421 (1855), the Gaines Cases, the California land frauds, and patent rights.

10. C. SWISHER, THE TANEY PERIOD, 1836-1864, at 973 (1974).

11. Mr. Justice McLean was particularly active politically.

12. C. SWISHER, *supra* note 10, at 973.

13. *Id.* at 974.

14. *See, e.g.*, Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

15. *See, e.g.*, Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175 (1863); Piqua Branch of State Bank n. Knoop, 57 U.S. (16 How.) 369 (1853); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848); New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

committed to the application of law it collided with irreconcilable sectional and political interests that could not agree upon the existence of a "body of constitutional law binding on all the states and all the people."[16] In assessing the contribution of the Taney Court, Swisher has partially abandoned his earlier emphasis on the states' rights and southern aspects of the Court, for the nationalist and judicial balance arguments of Haines, Sherwood, and Corwin.

Swisher's perspective on the role of the Court and his mining of primary sources adds substantially to our understanding of the Taney era. Particularly important is the author's effort to relate the workload and duties of the Justices in Washington to their obligations on the circuits. Although the Justices increasingly abandoned the earlier practice of using charges to grand juries as a means of lecturing the public on proper political attitudes, their presence in the circuit courts continued to provide an important degree of authority to the actions of the lower federal courts. At the same time the burdens and the time consuming nature of circuit court litigation[17] made it impossible for the Justices to fulfill their obligations in Washington. Nevertheless, Swisher argues that while sitting on the circuits the individual Justices made substantial contributions to the development of American law, particularly in the areas of patent rights, maritime and admiralty questions, and land disputes.

Swisher further establishes that entirely nonideological differences contributed to the friction among the Justices in this period. Two of the reporters of the Court, Richard Peters and Benjamin Howard, proved surprisingly inept, often incorrectly attributing dissenting and concurring opinions to the Justices, providing only sketchy and inaccurate headnotes to cases, and playing favorites among the Justices by agreeing to return opinions or insert additional comments for some (especially Taney) but not for others. In addition, Court facilities in the basement below the old Senate Chamber were woefully inadequate and sufficiently unhealthy to lead one medical authority to conclude that "the death of some of our most talented jurists has been attributed to this location of the court-room."[18]

Swisher provides a much-needed and careful investigation of the California land cases that bulked so large in the litigation of the Court in the late 1850's. Because Congress failed to provide a work-

16. C. SWISHER, *supra* note 10, at 974.

17. Mr. Justice McKinely claimed he travelled 10,000 miles a year in the course of his circuit court duties.

18. C. SWISHER, *supra* note 10, at 715.

able scheme of land ownership and acquisition in California, the federal judiciary in that state and the Court were thrust into the breach. While "they shared the confusion with almost everyone else involved," the Court succeeded in unraveling complicated land disputes and, at least, blunting wholesale fraud and corruption.[19]

Although Swisher's achievement is substantial, the book, as a whole, must be judged something of a disappointment. Close scrutiny of the bibliography and the realization that the book was published some six years after the manuscript was completed provide some insight into its major shortcomings. The bibliography lists only four works published since 1960.[20] Swisher fails to take into account nearly a decade and a half of historical, legal, and constitutional scholarship, not only on the Taney period, but Jacksonianism, the sectional crisis, and the Civil War era. Important studies of Taney,[21] critical cases,[22] the nature of division in the Court,[23] implications of decisions for broader political issues,[24] and attitudes toward the post-*Dred Scott* Court[25] represent only a portion of recent scholarship untouched by Swisher. In fairness, many of Swisher's judgments parallel those set forth by later scholars, as in Kutler's study of *Charles River Bridge*. Moreover, Swisher's untimely death precluded consideration of post-1968 scholarship, but it need not have restrained the initiative of the editor in chief who might at least have taken bibliographical notice, in the six years he had the volume, of the evolution of Taney Court scholarship. More basically, Swisher's seeming unwillingness to join or acknowledge the on-going historical debate, apparently predicated on a desire to write a history of the Court *sui generis*, creates an interpretive lifelessness that leaves many of the important questions of Taney scholarship only partly resolved. The inexplicable delay in publication compounds the problem.

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19. *Id.* at 809.

20. One, another volume in the Holmes Devise History, the 1971 edition of Charles Fairman's *Reconstruction and Reunion, 1864-1888, Part 1*, is an obviously gratuitous insertion by the editor in chief.

21. *See, e.g.*, W. LEWIS, *supra* note 1.

22. *See, e.g.*, S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971); Burke, *What Did the Prigg Decision Really Decide?*, 93 PA. MAG. HIST. & BIOG. 73 (1969); Conron, *Law, Politics and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision*, 11 AM. J. LEGAL HIST. 377 (1967).

23. *See, e.g.*, Schmidhauser, *Judicial Behavior and the Sectional Crisis*, 23 J. POLITICS 615 (1961).

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

25. *See, e.g.*, S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

Some readers, moreover, will take pause with the essential analytical framework of the book. In an era when constitutional and legal history are experiencing a rebirth, directed at the impact of law and courts on society, and traditional narrative political history is being challenged by quantitative and sociological studies, Swisher's work exhibits a curiously antique quality.[26] In view of the evolving modern scholarship, Swisher's effort to set the Court against a backdrop of rancorous national politics seems to leave unanswered many of the inviting questions about the impact of the high Court. Even when Swisher moves from political considerations to economic and social problems, his reading of the role of the Court inevitably narrows to a consideration of the forces that operated on it, rather than an attempt to discern the consequences of the Court's decisions. His discussion of the cases involving bills of exchange fully displays Swisher's talents as an historical writer. Unfortunately, however, his narrow perspective on the relationship of the Court to the political, social, and economic context of ante-bellum America leads necessarily to the less than incisive conclusion that Taney and his colleagues were indeed "peculiarly unphilosophical."

*The Taney Era* will stand as a monument to Swisher's careful historical scholarship and his painstaking research in primary sources. In the genre of constitutional history predicated on broad-guaged generalizations about political and economic development, the book occupies a singular place in the catalog of Taney Court scholarship and ante-bellum history. It is to be lamented that Swisher did not live to see his work published and to provide his readers with an introduction and preface that would have illuminated his assumptions. It is also regrettable that those in charge of the Holmes Devise proved so tardy in bringing the book to press. Constitutional and legal scholars will appreciate the debt they have incurred to Professor Swisher, but they will also discern that despite these 975 pages of text the debate over Taney and his Court remains as rancorous, irritating, and important as it was over a century ago.

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26. *See* Shapiro & Shapiro, *Interdisciplinary Aspects of American Legal History*, 4 J. INTERDISCIPLINARY HIST. 611 (1974).

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