Lincoln and Chief Justice Taney Slavery, Secession, and the President's War Powers

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Review

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Testing Constitutional Limits

Taney and Lincoln

Of making Lincoln books there is no end. And after so many books about Lincoln, authors face the challenge of writing something that is new and fresh. In recent years, one approach taken by several authors such as James Oakes, Daniel Mark Epstein, and Brian Dirck is writing a dual biography that presents the parallel or intersecting lives of Lincoln and one of his contemporaries. When successful, this approach provides a different perspective on Lincoln and the Civil War era.

James F. Simon, a law professor at New York Law School and author of six previous books, has successfully paired Abraham Lincoln with Roger Taney to provide an accessible overview of the major legal issues presented by slavery and secession. Simon wrote this book for general readers (as indicated by the oddly asymmetric title, which suggests that Simon thought his audience would not recognize Taney without being further identified as chief justice). Most readers will enjoy immensely this crisply written, well-researched book. Simon tells a good story and tells it well. He does cover well-trodden ground though, and those who have read earlier works by Don E. Fehrenbacher (*The Dred Scott Case: Its Significance in American Law and Politics*, 1978) or Harold M. Hyman (*A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*, 1975) will not find much that is new here.

On the first page, Simon notes how Lincoln and Taney bitterly disagreed on three fundamental issues—slavery, secession, and Lincoln's constitutional authority during the civil war. Simon suggests that had Lincoln and Taney
known each other in less perilous times, they might have been friends, or at least respectful adversaries. The two men did have much in common: both were homely; both were well-respected lawyers (who both supported the property rights of slaveowners under state laws that protected slavery); and both shared center stage in the national debate over slavery.

Simon begins by presenting biographical sketches of Taney and Lincoln. Simon takes Taney's career up to the issuance of the Dred Scott opinion in 1857. He describes the justice as a Jacksonian Democrat suspicious of vested interests and centralized power. He points out how Taney manumitted his own slaves and as a legislator supported laws designed to protect free blacks. He also uses an 1819 case where Taney successfully defended an abolitionist preacher to conclude that Taney was opposed to slavery. Taney in his closing argument did speak about how slavery is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away. This speech may well have reflected Taney's personal views; however, lawyers in service of their clients do not necessarily present sincerely held beliefs in courtrooms. Simon's claim that Taney was a moderate who only later succumbed to sectional pressures in Dred Scott is further complicated by an opinion he wrote in 1831 as attorney general under Andrew Jackson. That opinion concluded that African Americans, whether slave or free, had no constitutional rights, presaging his Dred Scott opinion. Taney wrote that the African race in the United States even when free, are every where a degraded class.

Simon next presents a portrait of Lincoln's life and career up to his election to Congress. Although most of this material in this chapter will be familiar to many readers, he presents a solid account. Simon's account of the Matson case can be faulted in its particulars. Lincoln in 1847 represented Robert Matson, a Kentucky slave owner, in his unsuccessful attempt to regain possession of an African American woman named Jane Bryant and her four children. Simon refers to a three-judge panel; only two judges heard the case in the circuit court. He claims that the Black Laws of Illinois, which regulated free blacks, established that a slaveowner retained ownership of slaves if they entered Illinois temporarily; the Black Laws did no such thing—the right of transit was established by an Illinois Supreme Court decision in 1843. Simon also incorrectly suggests that Matson lost because the circuit court decided that Matson's annual migration of slaves did not comport with the Black Laws. While Matson had brought slaves annually to Illinois to harvest crops and then returned
them to Kentucky, Jane and her children had been left by Matson in Illinois for two years. The court based its decision upon that fact.

To establish the context for the Dred Scott opinion, Simon next covers the Compromise of 1850 and the Kansas-Nebraska Act of 1854, championed by Illinois senator Stephen A. Douglas. Re-entering politics after Kansas-Nebraska, Lincoln challenged Douglas over the notion of popular sovereignty in the territories. At the same time, under Taney's leadership, the United States Supreme Court was widely respected as an apolitical institution, with many calling for the court to resolve the contentious issue of slavery in the territories.

Simon chronicles the Supreme Court's unwise attempt to settle that issue in the Dred Scott case. Simon also presents Lincoln's and Taney's reactions in the period immediately preceding the Dred Scott case. If ever a moderate, Taney by 1856 believed that it would be better for the South to secede than to suffer more northern insult and aggression. Shortly after James Buchanan's inauguration, the Supreme Court issued its decision. Simon's impressive and clear analysis of *Dred Scott v. Sandford* is particularly timely as this year marks its 150th anniversary. Scott had sued for his freedom in Missouri, arguing that when he was taken by his former master to live in both Illinois and the Wisconsin Territory he had become free. Missouri precedent clearly supported his claim; however, the Missouri Supreme Court reversed course and held that Scott had reverted to slavery when he returned to Missouri. The controversy moved to the federal courts, where the argument centered on whether federal courts had jurisdiction to hear Scott's lawsuit. Taney ultimately decided that Dred Scott and all other African Americans were unable to sue in federal court because they lacked citizenship (their degraded status meant they had no rights which a white man was bound to respect). He next declared that the Missouri Compromise unconstitutional: Congress had no power to prohibit slavery from the territory. Simon does a good job pointing the flaws of Taney's reasoning; he concludes, on page 125, that Taney failed miserably when careful scholarship and political wisdom were desperately needed.

Taney's opinion helped shape the Lincoln-Douglas debates of 1858, as Simon ably shows. Lincoln famously questioned how Douglas could both support the Dred Scott decision and popular sovereignty, asking Douglas whether voters in a territory could exclude slavery before they applied for admission to the Union.
Lincoln gained national prominence from his debates with Douglas, and the nomination of the Republican Party in 1860. With his election, came secession and civil war. The last three chapters cover the legal issues raised by the country's fiery trial. Lincoln suspended the writ of habeas corpus for the area between Philadelphia and Washington and ordered military commanders to arrest and imprison suspected secessionists. John Merryman challenged his arrest with a petition for a writ of habeas corpus that was delivered to Taney. He held that Lincoln did not have the constitutional authority to suspend the writ; that power lay exclusively with Congress. Simon concludes that Taney wrote a formidable piece of judicial advocacy that showed the artistry of a partisan trial lawyer rather than the detachment of a judge (192-193). His order was ignored by Lincoln, who later asked whether all the laws, but one, to go unexecuted and the government itself go to pieces lest that one be violated? He later points out that Taney's position was vindicated by the Supreme Court in 1866 in Ex Parte Milligan, where the court held martial law could not exist when civil courts are open. The book next turns to such issues as the constitutionality of the Union blockade of Confederate ports. In his reading of the Prize cases, Simon again deftly summarizes complicated legal opinions. The last chapter addresses the military arrest of Democratic representative Clement Vallandigham. Simon finds Lincoln's constitutional position far less defensible than the earlier arrest of Merryman. Vallandigham, he notes, was arrested for his words while Merryman had been arrested for his actions.

In an epilogue, Simon offers his evaluation of Taney's legacy. He suggests that Taney's reputation has been bound to his Dred Scott opinion. While admitting that Taney's miscalculation in Dred Scott cost the nation and the Supreme Court, he seeks to rehabilitate Taney's image, stressing the contributions Taney made in his twenty-eight years on the bench. Ironically, Lincoln's place in American history depended upon Dred Scott. While Lincoln will be remembered as our greatest president, Simon concludes that his constitutional legacy is more ambiguous (280). But Lincoln compares favorably to other wartime presidents.

Simon's timely account of legal issues raised by slavery, secession, and civil war was written for a wide audience and richly deserves one.

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Illinois University Press, 2006).