BOOK REVIEW

THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES. VOLUME V: THE TANEY PERIOD 1836-64. By Carl B. Swisher. The MacMillan Publishing Co., Inc., New York, N.Y., 1974. Pp. 975. $30.00.

The biggest compliment I can pay to this 975-page volume is that it was sufficiently interesting to keep me reading until I finished it. Not that there was much of a mystery as to how the story would end; other historical writings had provided more than a clue. Nor was the volume light reading. A chapter, or at most two, at a sitting was all that I could manage, particularly in evenings after work. But the illumination of probably the least known period in our national judicial history was fascinating. For this was the time in which the controversy over slavery came to affect a large part of the Court's work even in seemingly unrelated areas, culminating in the thunderbolt of *Dred Scott v. Sandford*,[1] which largely sapped the Court's prestige and authority, at least in the North, until after the Civil War.

This third published volume of the Oliver Wendell Holmes Devise History of the Supreme Court is the work of the late Professor Carl B. Swisher of Johns Hopkins University, who fortunately was able to complete the manuscript before his death in 1968 and who had previously written perhaps the most authoritative biography of Chief Justice Taney.[2] Professor Paul A. Freund, the editor of the entire History, brought the volume to publication after Professor Swisher's death. The extent of his personal contribution will probably never be disclosed. In his words, "the volume will stand as the ultimate monument" to Professor Swisher, "the testament of a deep-ploughing scholar" who had long familiarity with the history of the period he was describing.

Although the volume covers the years in which Roger B. Taney was Chief Justice (1836-1864), it relates not merely to the Chief Justice, but to the history of the Supreme Court during that period. Nevertheless, it enables the reader to appraise the contribution of Tan-

1. 60 U.S. (19 How.) 393 (1857).
2. C. SWISHER, ROGER B. TANEY (1935).

ey to the Court and to the nation and to determine for himself whether Taney's overall performance overcomes the disrepute attached to him after the *Dred Scott* ruling in 1857.

THE JUSTICES OF THE TANEY PERIOD

If modern lawyers are asked—and I have asked a number of them—whether they can identify members of the Court during the middle third of the last century, the almost uniform answer is "no" as to all except Taney himself and Justice Story. Story, who sat from 1812 to 1845 and who is better known for treatises on a number of subjects on which he lectured at the Harvard Law School than for his judicial opinions, was a holdover from the Marshall regime. Few recall or have ever heard of Justices Smith Thompson, John McLean, Henry Baldwin, James M. Wayne, Philip P. Barbour, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Levi Woodbury, Robert Grier, Benjamin R. Curtis, John A. Campbell, and Nathan Clifford. The four Lincoln appointees in 1862 and 1863—Swayne, Davis, Miller, and Field—are primarily associated with the post-Civil War period during which Miller and Field, in particular, played prominent though different roles.

It is not surprising to learn that Supreme Court appointments during those years reflected the policies of the presidents. All but one of the justices appointed during the pre-1862 Taney period were chosen by Democratic presidents beginning with Jackson. Since the justices spent the major portion of their time trying cases on circuit, it was obviously reasonable to assign justices to the areas in which they lived. Thus, appointments were largely treated as belonging to a particular circuit, and Congress, which was also controlled by the Democrats, determined the geographical boundaries of the circuits.

Perhaps because of this, five of the nine circuits[3] were composed of slave states, the 11 states that seceded and the border states, and were filled by justices from Maryland, Virginia, Georgia, Alabama, and Tennessee. Indeed, Congress was slow to create any circuits for the newer states west of Ohio. And except for Justice Curtis of Massachusetts, appointed by Whig President Fillmore in 1851, even those appointed from the Northern circuits were chosen largely because of their known sympathy with Southern positions.

Thus, after Story's death, only Justice McLean from Ohio, appointed by Jackson in 1830 before the slavery issue came to the fore,

3. In 1863, a 10th circuit was created for California, which none of the other justices could cover.

and Justice Curtis, who served from 1851 to 1857, represented even a moderate Northern viewpoint. This changed, of course, with Lincoln's four appointments in 1862 and 1863 and his selection of Chief Justice Chase as Taney's successor in 1864. It was doubtless not by happenstance that the first president from the Midwest appointed justices from Ohio (Swayne and Chase), Iowa (Miller), Illinois (Davis), and California (Field).[4]

It is difficult to tell from the book which of these justices were outstanding lawyers. The general impression is that most were regarded as among the able lawyers in their respective circuits at the time of their appointments, although some did not seem to amount to much as justices.

Chief Justice Taney, born into the Southern landed aristocracy in 1777, had served in the Maryland legislature and as President Jackson's Attorney General and Secretary of the Treasury. In the latter positions, he played an important role in Jackson's successful campaign to prevent the renewal of the charter of the Bank of the United States. His service to Jackson was undoubtedly responsible for his Supreme Court appointment. Nevertheless, he had been at the top of the Maryland bar and had argued many cases before the Supreme Court. Justice Story once described him as "a man of fine talents."[5] Though unimpressive in appearance and voice, his arguments were thoroughly prepared, simple, clear, and impressively sincere—which still are the traits most likely to win cases. In addition to being an able lawyer, he was known as "a courteous gentleman of high integrity."[6]

Jackson's first attempt to appoint Taney to the Court as an associate justice in 1835 was narrowly blocked in the Senate by the Bank and Whig forces, even though Chief Justice Marshall supported the appointment. Later in 1835, after Marshall's death, Taney was nominated to fill his place. By that time the Senate contained more friends of the Jackson administration, and in 1836 Taney, then 59 years old, was confirmed by a wide margin.

Two events in Taney's personal life throw light, though in different directions, on the Southern sympathies manifested in his later decisions. Though once a slave owner, he freed his slaves early in life. Second, in 1855, a son-in-law asked if Taney's youngest daughter, Alice, could join his family vacationing in Newport, Rhode Island instead

4. Miller, who served for 28 years, is regarded as one of the great Supreme Court justices. Field, whose tenure of 34 years has been exceeded only by Justice Douglas, was one of the most conservative members of the Court.

5. C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. V: THE TANEY PERIOD 1836-64, 16 (1974).

6. *Id.* at 23.

of going with her parents to Old Point Comfort near the mouth of Chesapeake Bay in Virginia. Taney's letter in reply stated that he had "not the slightest confidence in superior health of Newport over Old Point, and look[ed] upon it as nothing more than that unfortunate feeling of inferiority in the South, which believes every thing in the North to be superior to what we have."[7] Accordingly, Alice went to Old Point, where she and her mother died of yellow fever.

Justice Story, who had been appointed in 1812 at the age of 32, lamented the passing of the old order after Marshall's death. He was never reconciled to the Jacksonian era. Perhaps the outstanding intellect on the Court at the time, he wrote voluminously, both in opinions on circuit and in his famous commentaries and treatises, but not many opinions for the Court. His best known opinion was *Swift v. Tyson.*[8] *Swift* was a landmark decision holding that the provision of the Judiciary Act of 1789 that the federal courts shall be bound by "the laws" of the states extended only to state statutes and not to judicial decisions, at least with respect to commercial matters. This was overruled in 1938 in *Erie Railroad v. Tompkins.*[9] A visiting Englishman once described Story in words which might have been equally apt for another Harvard law professor on the Court a century later: "[W]hen he was in the room few others could get in a word; but it was impossible to resent this, for he talked evidently not to bear down others, but because he could not help it."[10]

Though appointed by Jackson in 1830, John McLean of Ohio was Story's closest associate on the Court. An able but not a great justice, McLean "flirted" with every political party's nomination for the presidency. He was the only abolitionist on the Court. He carried a heavy load of circuit work, and by 1856, his Midwest circuit had a heavier caseload than the total for the five Southern circuits each of which had its own justice. As senior associate justice, he also bore more than his share of Supreme Court duty, presiding during Taney's frequent illnesses. At the age of 76, while dining with President Buchanan, he was told that the President was considering removing Major Robert Anderson for defending Fort Sumter too vigorously. He emphatically asserted, " 'You dare not do it, Sire' . . . [and the President] did not."[11] A few weeks later, shortly after Lincoln's inauguration, McLean died, after having served 31 years on the Court, and was replaced by another Ohioan, Justice Swayne.

7. *Id.* at 719.
8. 41 U.S. (16 Pet.) 1 (1842).
9. 304 U.S. 64 (1938).
10. C. SWISHER, *supra* note 5, at 43.
11. *Id.* at 727.

The services of Justices Wayne of Georgia and Catron of Tennessee were substantially contemporaneous with that of Chief Justice Taney. Both were strong Jackson supporters and strong unionists as well, though by no means opposing slavery. Both stayed on the Court during the Civil War, Catron striving to keep Tennessee from seceding. Wayne was an influential member of the Court. Catron retained an active interest in politics, serving as adviser to several presidents, including Buchanan, and as the Court's representative in dealings with Congress. He died in 1865, Wayne in 1867.

Justice Daniel, who served from 1841 to 1860, was noted for his staunch loyalty to Virginia, slavery, and states' rights. As a result, he took an extreme position on many subjects. Justices Grier of Pennsylvania and Nelson, a former chief justice of the highest court of New York and a member of a slaveowning family, were undistinguished justices of long tenure—chosen by Southern presidents who would not have been disappointed with their records.

The careers of Justices Curtis of Massachusetts and Campbell of Alabama, both men of great ability, were strikingly similar despite their differences on major issues. Both were appointed at the age of 41 and served only a few years. Curtis resigned in 1858, largely because of inability to stomach Taney's behavior after the *Dred Scott* decision. Campbell resigned in 1861 to return to the South to become the Confederacy's Assistant Secretary of War and eventually to serve a term in prison as a result. Both became distinguished and active members of the Supreme Court bar, Campbell until 1889. Curtis was succeeded by Nathan Clifford of Maine, a pedestrian appointee of President Buchanan.

The Functioning of the Court

The lawyer accustomed to appellate court structures of this century finds difficulty in conceiving of a Supreme Court whose members spent most of their time traveling through several states trying cases. Before the days of superhighways, air flight, and even fast trains, this was an immense burden to impose on distinguished and usually elderly justices. A trip to Washington from Texas or Minnesota—not to mention California—was in itself long and difficult. The Supreme Court met in Washington for a few months beginning in December, but the rest of the time the justices were on circuit.

On occasion, justices trying cases on circuit were too busy to get to Washington until the term of the Court was well underway. On circuit, the jurisdiction of the Supreme Court justices to a substantial extent overlapped that of the district judges, who indeed handled the calendar out of necessity when the circuit justice was not available. Often

circuit justices and district judges sat together. In certain types of cases, there was no appeal unless the two judges certified to the Supreme Court that they were unable to agree. It came to be accepted practice for such a certificate to be submitted when the two judges, acting in complete harmony, believed that Supreme Court review was called for. And, strangely enough by modern standards, the circuit justice sat as a member of the Supreme Court reviewing his own decision.

As a result of the burden of riding the circuits, the Supreme Court for the first time began to fall behind in its own work, even though its calendar was small compared to that of modern courts. A resolution allowing the Court to appoint a clerk to do reserach for the justices and copy opinions—which, before typewriting, were handwritten and often not very legible—was ridiculed in Congress, with Representative, later Justice, William Strong leading the attack. It was said that the clerk researcher would "doubtless in many cases control the judgments of the Court,"[12] a complaint heard in more recent years but not taken seriously.

As early as 1845 there was a proposal to create intermediate courts of appeals, such as was finally approved 46 years later. A less drastic suggestion, which was made in 1854, called for the appointment of separate circuit judges to try cases in each circuit in addition to the Supreme Court justice. This proposal was finally accepted in 1869.[13] Congressmen reiterated, in the words of Senator Stephen A. Douglas, that " 'judges should be required to go into the country . . . and mingle with the local judges and with the bar.' "[14] It was feared that if they did not sit in various localities, gaining the feel of the country, they would exercise concentrated power. This has a bit of truth to it, but the highest court of a nation, which had grown from 4 to over 30 million people, was having its hands full acting as the only appellate tribunal for the entire federal system—let alone as the only appellate court for federal question cases coming from state courts. All of which proves, as seems still to be true, that judicial reform is a slow process, with few initiators of needed reform living to see the fruition of their handiwork.

THE COURT'S DECISIONS

Significant Developments

Most of the Court's work during the pre-Civil War years consisted of diversity cases not presenting issues of federal law, although

12. *Id.* at 289.
13. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.
14. C. SWISHER, *supra* note 5, at 290.

under *Swift v. Tyson*[15] the Court was free to determine many common law issues for itself. Many cases presented questions of contract or property law. There was little federal regulatory legislation and not many federal crimes. The fourteenth amendment, which vastly enlarged the scope of constitutional limitations upon the states, was still beyond anyone's imagination. Thus, only a few of the decisions of the Taney Court have more than historical interest now.

The familiar decisions of the Marshall era had determined the structure of the government. The Taney Court, though mainly of the opposite political persuasion, did not undermine the Marshall Court to any great extent, and it did perform the useful function of clarifying and narrowing sweeping statements that proved impractical when applied to unanticipated circumstances.

This does not mean that the turnover in personnel was of little consequence. The *Charles River Bridge* case,[16] a famous decision under the contract clause, was first argued in 1831, but remained on the docket until 1837 because of inability to obtain a majority for any position. In 1785, Massachusetts had authorized a private company to construct a toll bridge over the Charles River between Boston and Charlestown. The bridge turned out to be highly profitable, as well as inadequate for the growing traffic, and by the 1820's there was a public demand for a competing toll-free bridge. At issue was whether such a bridge would impair the charter of the original bridge company which was not expressly exclusive and which made no mention of other bridges. A second bridge, paralleling the first, was authorized by the Massachusetts legislature in 1828. The effect of the free competing bridge was to force the original bridge to close.

Marshall, Story, and Thompson would have found the new bridge a violation of the contract clause of the Constitution. By the time a full bench could sit, however, Taney and Barbour of Virginia had replaced Marshall and DuVal. The case was argued for 7 days, by four lawyers, including Daniel Webster for the old bridge company and Simon Greenleaf, Story's colleague on the Harvard law faculty, for the opposition. Finally, in 1837, the Court, speaking through the new Chief Justice, held that public grants must be construed strictly in favor of the public and that an exemption from competition should not be implied when it had not been written into the contract. The emphasis was on the interest of the public, not merely that of the private parties involved. Despite a violent dissent by Story, this first leading decision of the Taney Court has stood the test of time.

15. 41 U.S. (16 Pet.) 1 (1842).
16. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

The legality of a bridge across the Ohio River at Wheeling, Virginia, now West Virginia, also came before the Supreme Court several times. Virginia wanted to make what is now Interstate 70 a main route across the country and Wheeling a main riverport. This required building the bridge at Wheeling. Pennsylvania strongly opposed competition with what is now U.S. 30 which crossed the Ohio River at Pittsburgh and made that port the main upstream terminal for Ohio River traffic.

With Congress unable or unwilling to act because of the disagreement between the states, Virginia proceeded to construct the bridge over the river. The bridge was 93 feet above the river, lower than the stacks of some, but not most, river steamers. Relying in part on a congressionally-approved interstate compact stating that navigation of the river "shall be free . . . to the citizens of the United States,"[17] the Supreme Court held, despite the absence of any specific federal statute, that the bridge was an obstruction to navigation and ordered that it must be raised to 111 feet or removed.[18] Only Taney and Daniel dissented. Virginia then turned to Congress, which declared the existing bridge a lawful structure. Shortly thereafter the bridge was blown down by a storm, but when reconstruction began Pennsylvania attacked the validity of the federal statute. The Supreme Court held by a vote of 6 to 3 that the commerce power allowed Congress to determine what obstructions to navigation should be permitted.[19]

Important to the banking and business interests of the country was *Bank of Augusta v. Earle*,[20] which held that corporations chartered in one state could do business in other states as a matter of comity, except to the extent specifically forbidden by state law. Only Justice McKinley, whose ruling on circuit was reversed, dissented. Although the decision seemed to allow the states great leeway, its immediate effect was to permit out-of-state corporations to discount bills of exchange in Alabama. As a result, the case was regarded as a victory for commercial interests and a blow to states' rights. Both positions seem in retrospect to have been highly exaggerated. This was only a first step by the Court in dealing with the problem of the extent to which states may regulate, burden, or discriminate against extrastate enterprises.

Several other significant areas of the law were touched by the Taney Court. In a series of cases, the Court finally concluded that for

17. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 565 (1852).
18. *Id.* at 578.
19. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856).
20. 38 U.S. (13 Pet.) 519 (1839).

purposes of determining diversity of citizenship and the consequent right to sue and be sued in federal courts, corporations should be treated as citizens of the states in which they were incorporated or did business without regard for the citizenship of their officers or stockholders.[21] After years of litigation, patents on Samuel Morse's telegraph were sustained and found infringed,[22] but in *McCormick v. Talcott*,[23] Cyrus McCormick's reaper was held not to have been infringed. In the *Genesee Chief*,[24] the jurisdiction of the federal courts in admiralty was finally extended to inland lakes and rivers and not merely to tidewater, overruling earlier decisions.

The political question doctrine was used—indeed invented—to avoid judicial determination as to which of two legislatures was the lawful government of Rhode Island. The Dorr Rebellion of 1841 had challenged the state government, which still rested upon a charter granted by Charles II in 1663. Under that charter, the legislature had limited suffrage to landowners and created districts which were grossly malapportioned. Dorr was convicted of treason against Rhode Island and sentenced to life imprisonment, but was soon amnestied. Dorr challenged the constitutionality of the government which had prosecuted and convicted him. By the time of the 1849 Supreme Court decision in *Luther v. Borden*,[25] the rebellion was long over, and Rhode Island had adopted an improved constitution. The time had thus long passed when a judicial determination would have been consequential. The Court, avoiding judgment on the merits, found that determination of which legislature was legal was committed to the political departments of the government and that it had no jurisdiction. The political question doctrine thereafter had substantial growth up to *Baker v. Carr*,[26] which provided a judicial remedy for malapportionment of legislative districts, and more recently has had vitality in connection with judicial reluctance to determine the legality of the Vietnam War.[27]

The Commerce Clause

Despite an original diversity of views among the justices, the Taney Court made a major contribution to commerce clause doctrine. The Marshall Court's broad pronouncements in *Gibbons v. Ogden*[28] as to the scope of the commerce power of Congress still underlie modern

21. C. SWISHER, *supra* note 5, at 464-70.
22. O'Reilly v. Morse, 56 U.S. (15 How.) 62 (1854).
23. 61 U.S. (20 How.) 402 (1858).
24. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852).
25. 48 U.S. (7 How.) 1 (1849).
26. 369 U.S. 186 (1962).
27. *See* Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971).
28. 22 U.S. (9 Wheat.) 1 (1824).

commerce decisions, but they did not offer much guidance as to how far states could regulate commercial matters having an interstate effect. *Gibbons v. Ogden* could be and was interpreted as making the power of Congress both exclusive and nonexclusive. Subsequently, in *Willson v. Blackbird Creek Marsh Co.*,[29] Marshall recognized that in the absence of congressional action, a state could place a dam across a navigable creek. Nevertheless, some justices still took the broad position that the power of Congress was exclusive and that all state legislation with respect to commerce was precluded. Others, including Taney, took the opposite position that since the Constitution by its terms merely gave Congress power to regulate, it did not deprive the states of any power except to the extent that Congress had acted.

The Taney Court at first adhered closely to the Chief Justice's position. In *City of New York v. Miln*,[30] it sustained a New York law requiring masters of vessels carrying passengers to New York to make detailed reports on each passenger to state officials, to post a bond for each, and to remove anyone who was found likely to become a public charge, although the last two provisions were not strictly before the Court in the case. At the first argument before the Court in 1834, Marshall thought the statute unconstitutional. In 1837, after Taney succeeded Marshall, six justices held otherwise, with only Story dissenting; the basic theory was that the law was "a regulation not of commerce but of police," an unhelpful formula which endured for many years. But Justice Barbour's opinion for the Court went further and declared, amazingly, that goods, not persons, were the subject of the commerce power—a statement which might have been motivated by a desire to keep Congress from meddling with the problems of slavery. A subsequent opinion by Justice Wayne in the *Passenger Cases*[31] stated that this language was included in the opinion without due consideration by other members of the Court and that only Justice Barbour and Chief Justice Taney agreed with it at the time.[32]

In 1849, the *Passenger Cases*[33] discarded the dictum as to the commerce power not applying to the movement of persons. In response to the flood of immigrants landing in New York and Boston—hundreds of thousands per year by that time—New York and Massachusetts had enacted laws requiring masters of vessels to pay a tax for each person landed and, in Massachusetts, to post a bond to insure that "lunatics" and the "maimed, aged, or infirm" did not become public

29. 27 U.S. (2 Pet.) 245 (1829).
30. 36 U.S. (11 Pet.) 102 (1837).
31. 48 U.S. (7 How.) 283 (1849).
32. *Id.* at 429-34.
33. 48 U.S. (7 How.) 283 (1849)

charges. These cases were thrice argued and resulted in separate opinions by eight justices covering 180 pages. By a vote of 5 to 4, with Southern-Unionist Wayne writing the principal majority opinion and Taney in dissent, the laws were held unconstitutional. As in *Groves v. Slaughter*[34] and the *License Cases*,[35] decided in 1841 and 1847 respectively, the justices expressed varying views as to whether the power of Congress over commerce was exclusive or concurrent and as to the extent of state police power. Some justices in the majority relied on the exclusivity of congressional power, some on a conflict with a federal statute, and others on both. All of this left the law as to the interrelation between federal and state power over commerce in complete confusion, as must have been obvious to the Court itself.

The advent of a fresh mind in 1851, that of Justice Curtis of Massachusetts, managed to bring the Court together in *Cooley v. Board of Port Wardens*.[36] The Board of Wardens of the Port of Philadelphia provided pilots for vessels using the port. A Pennsylvania statute required vessels refusing to employ the pilots to pay one-half of the pilotage fee "for the relief of distressed and decayed pilots" and their families. Thus, in *Cooley*, the Court was presented with a state regulation of interstate and foreign commerce, but in a local setting. The Court upheld the Pennsylvania law, rejecting the position of Justices McLean and Wayne in dissent that the federal power was exclusive, and the extreme states' rights views of Justice Daniel in concurrence. The majority of five[37] concluded that in some circumstances the power of Congress should be exclusive, while in others it should not be. The distinction was between those subjects which "are in their nature national, or admit of only one uniform system, or plan of regulation, [and thus] may justly be said to be of such a nature as to require exclusive legislation by Congress," and those which were essentially local in nature in which diversity of regulation was appropriate.[38]

This formula, though indefinite, was pragmatic, sensible, and manageable. It indicated what factors should be given weight in future

34. 40 U.S. (15 Pet.) 449 (1841). In this case, the question was whether an 1831 Mississippi constitutional prohibition against the bringing of slaves into the state for sale, which would have undermined the local slave market, was barred by the commerce clause. If it was not, the slave seller would not have been able to collect from Mississippi buyers. The Court avoided the issue by holding that the Mississippi constitutional provision was not self-enforcing and was thus ineffective until the passage of a Mississippi statute after the sale involved in the case.

35. 46 U.S. (5 How.) 504 (1847).

36. 53 U.S. (12 How.) 299 (1852).

37. Justice McKinley was ill.

38. 53 U.S. (12 How.) at 319. On the basis of Taney's failure to cite *Cooley* in subsequent cases, then Professor Frankfurter speculated that Taney "certainly did not become a convert" to the views expressed in *Cooley* and that he must have joined in the majority opinion for unknown reasons not relating to its merits. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 57 (1937).

cases. Because of its inherent reasonableness, it has stood the test of time. Thus in 1945, the Court, citing *Cooley*, invalidated an Arizona law limiting the length of freight and passenger trains because the subject was one requiring national uniformity.[39] Indeed, the *Cooley* case was cited and its doctrine applied in two cases decided by the Court in 1973.[40]

In another area, the Court's interpretation of the commerce clause was not so enduring. There had long been disagreement, usually along party lines between Democrats and Whigs, as to whether Congress had authority to build what were then called "internal improvements," such as highways, canals, and railroads within a state, though as a part of a national transportation system. President Monroe in a famous veto message had declared that Congress had no such power without a constitutional amendment. Nevertheless, Congress continued sporadically to authorize such projects, of which the Cumberland Road, now U.S. 40 from Maryland through Ohio, was the best known.

The issue did not reach the Court for years, although Justice Daniel had personally stated that such departures from "principle and public integrity" constituted a "greater calamity than would be actual war."[41] He managed to incorporate his views in a unanimous opinion in *Veazie v. Moor*,[42] which held that Maine could grant to a single company exclusive navigation rights on a river running only through that state to the sea. The opinion broadly stated, however, that the power to regulate commerce did not include "the control over turnpikes, canals, or railroads, or the clearing and deepening of water-courses exclusively within the States, or the management of the transportation upon and by means of such improvements."[43] This remarkable statement—that the commerce power did not extend to improving the principal means of interstate transportation because the different segments thereof were located within individual states—has subsequently been neither cited nor expressly overruled; it has simply been forgotten and ignored.[44]

It is difficult to see how at any time the commerce clause could have been so narrowly construed, even on the basis of a strict literal reading of its words. Certainly *Gibbons v. Ogden*[45] had embodied a

39. Southern Pac. v. Arizona, 325 U.S. 761, 767 (1945).
40. Goldstein v. California, 412 U.S. 546, 553-54 (1973); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 625 (1973).
41. C. SWISHER, *supra* note 5, at 400.
42. 55 U.S. (14 How.) 568 (1853).
43. *Id.* at 574.
44. *See* Wickard v. Filburn, 317 U.S. 111, 121 (1942) (limiting less sweeping statements in *Veazie*).
45. 22 U.S. (9 Wheat.) 1 (1824).

far different approach. Perhaps, as with Justice Barbour's statement in *City of New York v. Miln*[46] that the commerce clause did not extend to passengers, the other judges may never have concentrated on Justice Daniel's dictum. Since only a local intrusion on commerce was concerned, the *Veazie* decision could simply have rested on the *Cooley* doctrine announced the year before without going further. On the other hand, no matter how outlandish it may seem to the modern lawyer, perhaps in 1853 the statement would not have seemed unusual and should be taken at face value as representing the views of the justices of that era.

FUGITIVE SLAVES, *Dred Scott*, AND THE CIVIL WAR

Most of us have long forgotten that the Constitution contained a clause requiring the return of fugitive slaves to their owners.[47] The Fugitive Slave Act of 1793[48] permitted slaveowners to take a fugitive before a state or federal judge who on satisfactory proof was to order his return. Since elected state magistrates in the North had little enthusiasm for enforcing the act, a heavy burden fell on the federal circuit justices and district judges in the Northern states to which the fugitives were fleeing. They could not possibly handle the flow. The Compromise of 1850, which allowed California to join the Union as a free state but which in general favored the Southern position, included an agreement to strengthen the Fugitive Slave Act. The revised act of 1850[49] empowered the circuit courts to appoint commissioners with authority to return fugitive slaves. A commissioner was to receive a fee of $10 if he issued a certificate of removal, but only $5 if he did not. The alleged fugitive was not permitted to give testimony. United States marshals were made personally liable if they refused to execute warrants or if fugitives escaped.

In their capacity as circuit justices, the Northern members of the Supreme Court attempted conscientiously to enforce these harsh provisions. Nevertheless, a substantial portion of the population of the North would not accept the new law. Not only would Northern officials not cooperate, but rebellious Northern mobs would often free the fugitives and send them on to Canada. Federal judges and marshals were impotent to stop them.

46. 36 U.S. (11 Pet.) 102 (1837).
47. Article IV, section 2, clause 3 of the Constitution, as originally adopted, provided: "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."
48. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.
49. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

In Wisconsin, a mob headed by Sherman Booth freed a fugitive, and when Booth was arrested for aiding in the escape and held by the federal judiciary, the Wisconsin supreme court ordered his release on habeas corpus. After Booth's federal conviction, the state court again granted a writ of habeas corpus freeing Booth on the ground that he was unlawfully detained. Thus, a Northern state was asserting the superiority of state over federal law, as South Carolina had done 25 years before. A unanimous Supreme Court, speaking through the Chief Justice, upheld the supremacy of federal law in a case which was then highly significant,[50] although the point now seems pretty obvious. Thus, 6 years after the fugitive had reached Canada, Booth actually was imprisoned for a short time before being pardoned.

During the Booth controversy, the case of *Dred Scott v. Sandford*[51] reached the Supreme Court. Scott was a slave who had been taken by his owner north of the line drawn by the Missouri Compromise of 1820 between free and slave territories. After his master took him back to Missouri, which permitted slavery, Scott, relying on prior Missouri decisions, brought suit to establish his freedom because he had been taken to territories in which slavery was forbidden. The Missouri supreme court, however, reversed itself. Barred from a direct appeal to the United States Supreme Court by a recent decision,[52] Scott's attorneys invoked the diversity jurisdiction of the federal circuit court in Missouri, suing the administrator of his prior owner's estate, a citizen of New York, for trespass. After losing at the trial level, Scott appealed to the Supreme Court.

By this time, over the violent objection of Northern abolitionists, the Missouri Compromise had been superseded by the Compromise of 1850. This, combined with other measures, allowed the people of each territory or state to decide for themselves whether slavery should be permitted and led to a prolonged and violent struggle in Kansas and Nebraska.[53] Southern strategists, who had not, however, planned Scott's litigation, hoped that the Supreme Court would settle one source of contention by declaring the Missouri Compromise unconstitutional

50. Abelman v. Booth, 62 U.S. (21 How.) 506 (1859).
51. 60 U.S. (19 How.) 393 (1857).
52. Strader v. Graham, 51 U.S. (10 How.) 82 (1851).
53. The Compromise of 1850 rejected extension of the Missouri Compromise line to new territories gained from Mexico. It also rejected the Wilmot Proviso which would have forbidden slavery in these territories. Instead, it allowed the new territories to determine for themselves their slave or free status. In 1854, the Kansas-Nebraska Act completely repealed the Missouri Compromise line, substituting the notion of "Popular Sovereignty" in the Louisiana Purchase territories to which the compromise had originally applied. *See* 1 A. NEVINS, ORDEAL OF THE UNION 219-315 (1947); 2 A. NEVINS, *supra* at 78-160; J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 78-100 (1969).

on the ground that Congress could not prohibit slavery in any of the territories.[54] Horace Greeley, in the *New York Tribune*, objected violently to submitting this question to a Court composed of five slaveholders and three other proslavery men.

Greeley's predictions proved correct to within one vote. Although each justice submitted an opinion of his own, Taney's principle opinion for the majority of seven—the five Southern justices and Justices Nelson and Grier—held that the federal courts lacked jurisdiction because: (1) a Negro, even though free, could not be a citizen of a state for purposes of invoking the diversity jurisdiction of the federal courts; (2) Congress lacked power to prohibit slavery in the territories since the territories were held for the benefit of the people of the states and their property rights; the grant to Congress of power "to make all needful rules and regulations respecting the territory . . . belonging to the United States" was held inapplicable to territory acquired after the Constitution was adopted, thereby invalidating the Missouri Compromise; and, (3) the Missouri courts were not bound to give effect to Scott's status while in Illinois.

If the Court had rested its decision on the third of the above grounds alone—that a slave state to which a slave returned with his owner need not recognize the status which he acquired in free territories—it probably would not have caused much commotion. But the majority sought to settle once and for all the power of Congress over, and the rights of slaveowners in, the territories. For if most of the large areas acquired from France in 1803 and from Mexico in 1848—most of the United States west of the Mississippi—became free states or free territories, the South feared, and with good reason, that its power in the federal government would decline and that its vital institution might be endangered.

Justice McLean, who favored abolition, and Justice Curtis, who was no extremist in that direction but "primarily a lawyer" without partisan interest, wrote long dissenting opinions which had wide circulation in the North. Curtis, in particular, "adduced an enormous amount of evidence to show"[55] that at the time the Constitution was adopted Negroes had been regarded as citizens in a number of states, thereby undermining Taney's first premise. And the approval by the first Congress of the Act of August 7, 1789,[56] confirming and continuing in effect the Northwest Ordinance of 1787, a provision of which prohibited

54. At least in its later stages, the litigation may have been of a "friendly" character, since Scott's owner (by inheritance) had married a New England abolitionist and then transferred title to her brother, a New Yorker.

55. C. SWISHER, *supra* note 5, at 628.

56. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

slavery in the then Northwest Territory,[57] as well as the Missouri Compromise of 1820, prohibiting slavery in other territories north of a specified line, demonstrated that there was no basis in contemporaneous understanding for reading into the Constitution a limitation on the power of Congress to regulate the territories, which clearly could not be found in the words used by the framers.[58]

Although the Court majority and the Buchanan administration, which had been informed as to how the case would be decided, may have hoped or believed that a Supreme Court ruling would have been accepted by the public, thus calming the intersectional controversy, the effect was quite the opposite. The decision, of course, did not settle anything, at least for many Northerners.[59] When Senator Stephen A. Douglas supported the majority opinion, Abraham Lincoln relied on the dissents in his famous debates with Douglas in Illinois in 1858, which, though unsuccessful in electing Lincoln to the Senate, propelled him into national prominence and eventually the presidency. Since Lincoln's election caused the South to secede and commence hostilities by seizing Fort Sumter, *Dred Scott* was at least a factor in bringing on the Civil War.

Dred Scott discredited the Supreme Court in the North for many years—creating what Chief Justice Hughes called "a self-inflicted wound" of great severity,[60] and it was the only decision which took a war to overcome. Thereafter, the North regarded the Court as controlled by Southern sympathizers and, until the war was over, paid little heed to it, at least insofar as matters relating to the basic conflict between the sections of the nation were concerned.

With respect to Taney, there was good reason for the Northern attitude. Although not attached to the institution of slavery, he had been born and raised in a Southern environment and regarded himself as a Southerner. His unpublished writings show that he believed the South had a right to secede. A son-in-law served in the Confederate Army, and although no case had brought the matter before him, he wrote a draft opinion, apparently published long after he died, stating that Congress had no power to raise an army by compulsory conscrip-

57. *See* 60 U.S. (19 How.) 393, 616-17 (1857).

58. A result of Curtis' dissent was to goad Taney into modifying his opinion after it was announced to meet Curtis' review of the historical evidence. When Taney refused to let Curtis see the changes until after the revised opinion was published, a bitter correspondence ensued, which induced Curtis several months later to resign from the Supreme Court.

59. It also did not settle anything for Dred Scott, who was freed by his owner and died shortly afterwards. C. SWISHER, *supra* note 5, at 652.

60. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1936).

tion because that would invade the powers of the states.[61] For a judge to write an opinion on a matter of great importance which has not come before him and upon which he has heard no argument is highly unusual and unjudicial, to say the least, and only can be explained by a strong emotional involvement.

In an actual case, *Ex parte Merryman*,[62] Taney issued a writ of habeas corpus releasing a prominent Marylander whom the federal army had locked up for participating, as a lieutenant in a secessionist cavalry company, in the destruction of railroad bridges in order to prevent Union troops from reaching Washington from the North. Because of the Southern rebellion, Lincoln had suspended the writ of habeas corpus, but Taney held that only Congress had authority to do so, a point which was certainly arguable. The army, with Lincoln's support, refused to allow Taney's marshal to enter Fort McHenry to free the prisoner, who in substance was a prisoner of war, though Taney chose to treat him as a civilian. Taney's decision has been highly praised as an assertion of civil authority over the military, and undoubtedly he was acting courageously and conscientiously. But his ruling may hardly be said to be untainted by his personal predilections as to who should prevail in the oncoming struggle. In the context of that time, after *Dred Scott* and in the light of actual military necessity, should Lincoln have honored the orders of a judge reasonably believed to be sympathetic to the Southern effort to destroy the Union? Compare the internment of Japanese-Americans to prevent a Japanese invasion of California in 1941-42, which certainly had far less justification in military necessity than the actual obstruction of the Union army in Maryland in 1861, but which was nevertheless upheld by the Supreme Court.[63]

The other Southern justices, Wayne and Catron, remained loyal to the Union and seem to have avoided Taney's clashes with the military.

On October 12, 1864, while General Sherman was in Georgia sealing the fate of the Confederacy, Taney died at the age of 87.[64] His life spanned that of the nation from one year after the Declaration of Independence. He served substantially longer as chief justice than any

61. C. SWISHER, *supra* note 5, at 951.
62. 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
63. Hirabayashi v. United States, 320 U.S. 81 (1943). With the advantages of hindsight, this decision is no longer highly regarded, to put it mildly, but the Court, including Justices Black and Douglas, was unanimous at the time.
64. The absence of any program for paying pensions to Supreme Court justices if they retired may have been a reason for Taney's remaining on the Court to such an advanced age, despite ill health which often kept him from sitting. The law allowing justices to retire at full pay at 70 after 10 years of service was enacted in 1869, Act of Apr. 10, 1869, ch. 22, 16 Stat. 44, largely to induce Justice Grier, then 75 and showing such signs of senility as falling asleep on the bench, to retire.

person except John Marshall. And of the associate justices, only Holmes served to a greater age, 90, with Hugo Black being next at 85. Catron died in 1865 and Wayne in 1867. Grier and Nelson retired in 1870 and 1872, respectively.

With the appointment of Chase—not a very good chief justice[65]—as Taney's successor, Lincoln's appointees from the North comprised a majority of the Court. The war soon came to a close. The thirteenth, fourteenth, and fifteenth amendments overturned *Dred Scott* and produced a new set of judicial problems not remotely foreseen at the time and over which Lincoln's appointees and their successors have continued to divide for over a hundred years.

APPRAISAL OF THE TANEY COURT

How should Taney, the Taney Court, and Swisher's volume be appraised? The Taney Court, to the surprise of some of its contemporaries, did not overturn John Marshall's interpretations of the Constitution, though it leavened some of them in large part as a practical response to new problems. It had a stronger feeling for states' rights than Marshall's Court and less for national power, but it did not go overboard in either direction. It was not as concerned with the rights of corporations, which were largely dominated by Northerners. Taney himself came from a predominantly rural area, and his instincts were to oppose financial interests, as evidenced by his struggle against the Bank of the United States before his appointment to the Court, but not property rights as such.

The Taney Court was essentially pragmatic and unphilosophical. In areas not affected by the sectional conflict, its decisions were on the whole sensible, and most of its members competent, although few—Taney, Story, Curtis, Campbell, and perhaps Wayne—seem to have been brilliant or outstanding. The Court lost prestige during this period in which the rule of law was superseded by the rule of force, in large part because the public believed that the judgments of its members were swayed—as has been true on other occasions—when issues arose to which they had deep personal commitments. The reaction of most of the Taney Court to such issues was predictable because their views on these very matters had been responsible for their appointments by Southern or Southern-sympathizing presidents. The growing and continuing moral abhorrence of slavery, which finally prevailed in the nation as a whole, did not leave in high repute a judicial body whose members did not share it.

65. C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, pt. 1, 1479-81 (1971).

What has been said of the Court applied to Taney himself. Former Justice Curtis, after Taney's death, attested to his power of analysis, his ability as a lawyer, his good practical sense, and his traits of dignity, gentleness, and courtesy. Even during the war, those who came to know him personally, such as Lincoln's Attorney General Bates, became friends and admirers. Chief Justice Hughes[66] and then Professor Frankfurter[67] years later spoke highly of his contribution to many fields of law and sought to revive a reputation which they thought had been unduly affected by the *Dred Scott* episode.

My own reading of Swisher's book, however, leaves me with the impression that, while Curtis was on the whole right, the eulogies were somewhat exaggerated, as eulogies often are, and that Taney was an able but not a great chief justice, even apart from matters relating to slavery and the sectional conflict. And I see no reason why his response to the latter should be disregarded. *Dred Scott* was one of the most disastrous Supreme Court decisions in every sense, and not merely because the South lost the Civil War. It seems to me appropriate to give Taney's reaction to slavery, as exemplified in *Dred Scott*, and his sympathy and support for the effort to destroy the Union substantial weight in evaluating the career of a Chief Justice of the United States.

Although there may be room for differences of opinion as to the quality of Taney's overall performance, there can be none as to Carl Swisher's. The book is a magnificent contribution to American history, not just to legal history. It flows smoothly, capturing and holding the reader's attention. Unfortunately, its length and price will undoubtedly discourage readership. Accordingly, this review has endeavored to bring to the attention of persons who will not read the book the highlights of the Taney period. That is the justification for a review of this length, although obviously a great many matters of importance necessarily were omitted to keep the review shorter than the original volume. If this review induces some of its readers to read the entire volume, it will have accomplished its ultimate purpose.

*Robert L. Stern**

66. C. SWISHER, *supra* note 5, at 973.
67. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 46-73 (1937).

* Partner, Mayer, Brown & Platt, Chicago, Illinois. A.B. 1929, Williams College; LL.B. 1932, Harvard University.