

University of Maryland Francis King Carey School of Law

DigitalCommons@UM Carey Law

Faculty Scholarship

Francis King Carey School of Law Faculty

1975

The Taney Period, 1836-64

David S. Bogen

University of Maryland School of Law, dbogen@law.umaryland.edu

Follow this and additional works at: https://digitalcommons.law.umaryland.edu/fac_pubs



Part of the [Constitutional Law Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

Digital Commons Citation

Bogen, David S., "The Taney Period, 1836-64" (1975). *Faculty Scholarship*. 725.
https://digitalcommons.law.umaryland.edu/fac_pubs/725

This Book Review is brought to you for free and open access by the Francis King Carey School of Law Faculty at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

On Review:

The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Volume 5, The Taney Period, 1836-64

By Carl B. Swisher

The MacMillan Company, New York: 1974.

Pp. 1041, including index.

Reviewed by David S. Bogen

In the fifth volume of the Holmes Devise History of the Supreme Court,¹ the late Professor Carl Swisher, Taney's biographer,² has written a history of the Court during Taney's tenure as Chief Justice. Roger Taney stands out in undistinguished surroundings. Justice Story, who served nine of his thirty-four years on the Court with Taney, seemed a relic of the past. "I am the last of the old race of judges," Story wrote.³ Justices Miller and Field, although appointed to the Court during Taney's last years, wrote their major opinions after his death. The most outstanding intellect on the Taney court may have been Benjamin Curtis, but he resigned and returned to private practice after only six years. Most of Taney's fellow justices remain in obscurity such as Justice McKinley of whom Swisher writes, "He made no significant contribution to legal thinking in any form."⁴

Roger Taney rose to prominence as Andrew Jackson's chief aide in opposition to the Bank of the United States. This leadership provided some basis for concern that Taney would exalt state power at the expense of the federal government. Indeed, he did take the position that

states had the power within their borders to regulate interstate commerce unless contrary to an express federal law. Thus the Chief Justice was relegated to a concurrence instead of writing for the Court when Curtis developed his theory that state power over interstate commerce in the absence of congressional action depended on the nature of the commerce.⁵

Roger Taney contributed much to legal thought. While he assigned his associates many more opinions on substantive matters than did Marshall,⁶ Chief Justice Taney still wrote most major opinions for the Court during this period. Where significant opinions were given to others, the Chief Justice was often in dissent.⁷

The first major case of the Taney court was *Charles River Bridge*⁸ where Taney said that state grants of exclusive privileges should be narrowly construed. Thus a charter to build a bridge and collect the tolls was not violated by a subsequent charter to another company to build a competing bridge adjacent to the first. Any fears that this decision presaged a general abandonment of respect for contract obligations were dispelled in *Bronson v. Kinzie*⁹ where Taney, writing for the Court, invali-

The most successful decisions
of the Taney court...
presented some interreaction
between the Court and the
other branches of
government.

dated an Illinois law as an impairment of contract.

Despite Taney's concerns over the reach of federal power, he continued Marshall's tradition of federal supremacy. In *Holmes v. Jennison*,¹⁰ decided by an evenly divided Court, Taney said that the governor of a state could not agree with the head of a foreign state to surrender fugitives because states were forbidden to enter into any agreement with a foreign power. In *Ableman v. Booth*,¹¹ Taney wrote that state courts could not order the release of persons held under federal authority.

Taney's creative imagination provided the foundation for modern admiralty law. In the *Genossee Chief*,¹² he surpassed even Story in extending federal jurisdiction in admiralty.

Under the traditional view, admiralty jurisdiction extended within a country only to waters affected by the tides. Taney argued for the Court that the concept of tidewater was appropriate in England because that small island nation's navigable waterways were all affected by the tide. That was not true in the United States where large bodies of water like the Great Lakes were major waters for shipping, but were not tidewaters. Thus, Taney introduced the concept of navigability as the basis for admiralty jurisdiction.

Patent law also owes much to Taney. Taney sustained most of Samuel Morse's claims for the invention of the telegraph in *O'Reilly v. Morse*,¹³ but he also announced that no patent could be given on a principle of nature as distinguished from a specific instrument exploiting a principle. *Morse and Gayler v. Wilder*¹⁴ (another Taney opinion) were milestones for American patent law.

The most successful decisions of the Taney court, however, presented some interreaction between the Court and the other branches of government. Taney won acclaim for his decision in *Luther v. Borden*,¹⁵ holding that the decision which government was the rightful government of a state was a political question committed to the executive and not the judiciary for decision. In the *Charles River Bridge Case*¹⁶ and *Bank of Augusta v. Earle*,¹⁷ the legislatures were forced to be precise and explicit where valuable rights were at stake, but they were permitted to act.

One virtue of Swisher's book is the way he demonstrates the interrelationship between disputes over state and federal power and the issue of slavery. Like the slave quarters behind Taney's house in Frederick, Maryland, slavery cast its shadow over the entire structure of law during this period. The constitutional scope of states' rights and federal power were questioned by Southern attempts to recapture escaped slaves, to bar free negroes from the state, and to reassert the slave status of former slaves who had lived in free territory but returned voluntarily to a slave state. Cases like *Prigg v. Pennsylvania*,¹⁸ *The Schooner Armistad*,¹⁹ *Groves v. Slaughter*²⁰ and *Strader v. Graham*²¹ are products of the slavery controversy, yet they helped shape the structure of federalism in areas far removed from that issue. But *Dred Scott v. Sandford*²² had the greatest impact.

The *Dred Scott* decision is not important for its influence on the outbreak of the war, but for leaving the Court powerless during the war. The decision that Scott was not entitled to his freedom could easily have been predicted on the basis of *Strader v. Graham*. In fact, Justice Nelson was originally assigned the opinion for the Court on the assumption that the decision of the Missouri Court finding that Scott was still a slave under Missouri law was determinative of his status. However, the dissenters discussed the right of negroes to sue in federal courts and the validity of the Missouri Compromise barring slavery from the territories. Since the issues had been raised, Justice Taney decided to confront them directly.

Taney may have hoped that by preventing negroes from using the federal courts to win freedom and by preventing the federal government from legislating prohibitions on slavery, the Court would relieve the Southern fears of abolitionism which were driving toward secession. In *Dred Scott*, the Court foreclosed compromise. Political compromise was impossible anyway. The Missouri Compromise treated in the decision had already been repealed by the Kansas-Nebraska Act. But *Dred Scott* made the Court, instead of political realities, appear the obstacle to compromise, so the Court itself became the target for abolitionist wrath.²³ This in turn left it powerless to deal effectively with problems arising out of the war. That debilitating effect on the institution of the Court gives *Dred Scott* its unique importance in history.

With the onset of the Civil War, the Court moved into the background of events. Legal questions on the war's conduct occasionally reached the Court, but only the *Prize*²⁴ cases which upheld presidential power to impose a blockade are notable. Taney did his best to protect dissent during the war. His opinion as circuit justice in *Ex Parte Merryman*²⁵ risked Lincoln's wrath to preserve habeas corpus unless suspended by congressional action. But Swisher chronicles the impossibility of enforcing the writ and the mechanisms used to avoid court tests, so that dissenters had to rely on presidential grace. Taney's opinions on civil liberties during the war were consistent with his lifelong opposition to abuses of power, but they were also consistent with his belief in secession and his friendship with persons who were jailed.

This review has indicated the importance of the Court's decisions during this period and the influence of its Chief Justice, but it does not capture the skill and vivacity with which Professor Swisher chronicles it. In telling the Court's story during the Taney period, Swisher has written the best of the three volumes so far in the Holmes Devise History of the Supreme Court.²⁶ He has used the correspondence, articles and speeches of the period to let the participants tell about the events. The total picture of the Court is here—quarrels with the Reporter,²⁷ maneuvering for appoint-

Taney's opinions on civil liberties during the war were consistent with his lifelong opposition to abuses of power, but they were also consistent with his belief in secession and his friendship with persons who were jailed.

ment,²⁸ even the living conditions of the Justices down to Justice Davis' assurances to his wife that he tasted only one of the several different wines served at a dinner party.²⁹ There is an extraordinary portrait of Taney near his death, writing to get more of his Spanish cigars, complaining about the breakage of bottles of wine sent him, facing financial difficulties and too feeble to make visits—writing that he and his daughter were “fit for no place but home and feel that we ought not to sadden the homes of our friends by bringing to them our daily aches and pains.”³⁰

The same bright and shiny objects which make *The Taney Period* such fascinating reading produce two objections. The first is the unnecessary repetition of attractive quotes. We know Story better for Lord Morpeth's statement that “when he was in the room few others could get in a word.”³¹ Justice Daniel's indignant letter protesting his Circuit Court duties is equally instructive: “I am here two thousand miles from home (calculating by the travelling route,) on a pilgrimage by an exposure to which, it was the calculation of federalist malignity that I would be driven from the Bench.”³² But in each case, once is enough.³³

The second criticism is both larger and more debatable. Swisher devotes space to colorful

cases that could be used to trace individual judges' intellectual development. For example, he devotes sixteen pages of one chapter³⁴ to Myra Gaines' suit to inherit land in the heart of New Orleans. The financial stakes were high and the stories of romantic liaisons and secret marriages are colorful indeed. But the Louisiana laws on illegitimacy were not yet ripe to make legal history,³⁵ so the case is preserved for its color and not its legal importance. To some extent the same is true of the almost forty pages³⁶ devoted to California land claims after the discovery of gold. Great names, great sums and great chicanery abounded, but great law did not. The substance of both chapters is essential to a true picture of the business of the Court, but they could have been condensed from the detailed treatment given.

Although both chapters are enjoyable reading, they have squeezed out discussion of Justice Curtis' development from slave-owner's counsel to his *Dred Scott* dissent. Curtis was on the Court partly because of his prominence in *Commonwealth v. Aves*³⁷ representing the owner whose slave accompanied him to Boston and who claimed the right to take her back to Southern territory as a slave. Curtis' defense of congressional power to enact the Missouri Compromise is not surprising, but his opinion

Great names, great sums and great chicanery abounded, but
great law did not.

Taney himself had emancipated all his slaves except for two, who were too old to provide for themselves, more than thirty years before the Dred Scott decision. He even made a speech in 1819 characterizing slavery as a blot on the national character.

that Dred Scott must be free on his voluntary return to slave territory needed explanation. Was Curtis converted by his teacher Story into an abolitionist along with his nationalizing view of common law? Was he influenced by his brother, George Curtis, who was one of the counsel for Dred Scott? Were his actions in *Aves* as an attorney contrary to his personal views? Did he change his mind or could he make his advocacy in *Aves* and his dissent in *Dred Scott* consistent? The questions arise naturally, but Swisher avoids conjecture.

These blemishes, whether real or in the eye of this beholder, are insignificant in comparison to the merits of the book. After many years of controversy, Roger Taney has many memorials. His bust is in the Supreme Court,³⁸ his old home in Frederick is a national shrine,³⁹ and even Professor Swisher's earlier book honors him. But this book places him accurately in the midst of his times and is his finest memorial. A memorial honors both the person and the artisan who builds it. This outstanding volume in the Holmes Devise History of the Supreme Court honors Chief Justice Taney, his associates, and its author, Carl Swisher.

FOOTNOTES

¹ C. SWISHER, 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64 (1974) [hereinafter SWISHER].

² C. SWISHER, ROGER B. TANEY (1935).

³ SWISHER at 93.

⁴ *Id.* at 67. McKinley, of course, was the least distinguished of all the judges, with little to show for his fifteen years on the bench except illness and complaints from his Circuit. Other justices were both more colorful and more acute, but their contributions to the development of constitutional law by their opinions are minor in comparison to Taney or more noted later judges.

⁵ *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299 (1852). This case is discussed in SWISHER at 404-7.

⁶ SWISHER at 98, 968.

⁷ See Smith Thompson's opinion in *Kendall v. United States*, 12 Pet. 524 (1838), ordering the Postmaster General to pay certain sums, with Taney dissenting on procedural grounds. See also the opinions of Justice Curtis in *Cooley v. Bd. of Wardens* and Justice Grier in the *Prize* cases.

⁸ *Charles River Bridge v. Warren River Bridge*, 11 Pet. 420 (1837). This case is discussed in SWISHER at 74-98.

⁹ 1 How. 311 (1843) is discussed in SWISHER at 147-52. The position of the Court in *Bronson* was accepted for nearly a century, but in *Home Building and Loan v. Blaisdell*, 290 U.S. 398 (1934), the Court expanded its view of the legitimate use of government power to protect debtors during times of emergency.

¹⁰ 14 Pet. 540 (1840) is discussed in SWISHER at 174-77.

¹¹ *Ableman v. Booth*, 21 How. 506 (1859), is discussed in SWISHER at 653-72.

¹² *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443 (1852), is discussed in SWISHER at 442-47. Story was fabled for his extensions of the admiralty power, so it was said "if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it." SWISHER at 425. Yet even Story clung to the concept that admiralty extended only to waters within the ebb and flow of the tide. *The Thomas Jefferson*, 10 Wheat. 428, 429 (1825). Story would have found jurisdiction to regulate traffic on inland waterways in the Commerce Clause, but it was Taney's aversion to extensions of federal power through the Commerce Clause that led him to base jurisdiction in admiralty.

¹³ 15 How. 62 (1854) is discussed in SWISHER at 488-504.

¹⁴ 10 How. 477 (1851) is discussed in SWISHER at 510-11. *Gayler* established the principle that a discovery which was never made public and finally was forgotten or abandoned would not prevent a patent for a person who later invented the same machine. Justice Nelson had so charged the jury below, but Taney wrote the Supreme Court's opinion.

¹⁵ 7 How. 1 (1849) is discussed in SWISHER at 515-27.

¹⁶ 11 Pet. 420.

¹⁷ 13 Pet. 519 (1839), where the Court held that foreign corporations were assumed to have the right to make contracts through their agents in other states unless such other state specifically prohibited it. The case is discussed in SWISHER at 115-21.

¹⁸ 16 Pet. 539 (1842), where it was held that the federal Fugitive Slave Law preempts state jurisdiction over kidnapping an escaped slave. The case is discussed in SWISHER at 537-47.

¹⁹ 15 Pet. 518 (1841), holding the Court will look into the underlying facts in a dispute over a treaty provision. It declared that persons who had been illegally enslaved and rebelled to take over the slave ship were not subject to the treaty with Spain which provided for restoration of ships and property seized by pirates or robbers despite the representations of both Spain and the executive branch of the United States government that the treaty applied and underlying facts should not be examined by the Court. The case is discussed in SWISHER at 189-96.

²⁰ 15 Pet. 449 (1841), where the Court held that a provision in the Mississippi Constitution forbidding importation into state for sale was not effective until an implementing statute was passed. Thus a debt contracted for the purchase of slaves before the statute was valid and could be enforced. However, the issue of the power of a state to forbid such commerce was argued in the case and produced great diversity of opinion. The case is discussed in SWISHER at 365-70.

²¹ 10 How. 82, 97 (1851), where the Court held that while in Kentucky the status of negroes was determined by Kentucky law and not by that of the free state where they had resided for some time or by the laws of the United States. Thus persons who aided their escape were liable to their owner in damages. This case is discussed in SWISHER at 556-58.

²² 19 How. 393 (1857) is discussed in SWISHER at 592-652.

²³ Chief Justice Taney did not enhance the Court's reputation by his statement that at the time of the adoption of the Constitution negroes were considered as "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as

those who held the power and the government might choose to grant them." *Dred Scott v. Sanford*, 19 How. 393, 404-5 (1857). But the ready attribution of Taney's understanding of the historical record to Taney's personal views was probably affected by outrage at the other aspects of the case. Taney himself had emancipated all his slaves except for two, who were too old to provide for themselves, more than thirty years before the decision. See SWISHER at 644. He even made a speech in 1819 characterizing slavery as a blot on the national character. See SWISHER at 740.

²⁴ 2 Black 635 (1863) is discussed in SWISHER at 877-900. Justice Grier delivered the opinion of the Court with Taney dissenting on the grounds that the blockade was not legal until authorized by Congress. However, all the judges concurred that the blockade was proper after the date when Congress ratified it. This decision received much attention in recent years, and Justice Taney's position on the illegality of war measures without a declaration of war by Congress was warmly supported by many opponents of American involvement in Vietnam.

²⁵ 17 Fed. Cas. 144 (C.C.D. Md. 1861) is discussed in SWISHER at 840-54. John Merryman was arrested in his home in Cockeysville. He was a prominent farmer and a member of the Maryland legislature. His father had attended Dickinson in the same period as Chief Justice Taney.

²⁶ J. GOEBEL, *HOLMES DEVISE HISTORY OF THE SUPREME COURT, VOL. I, ANTECEDENTS AND BEGINNINGS TO 1801* (1971), reviewed by this reviewer 4 MD. L. FORUM 77 (1974); FAIRMAN, *HOLMES DEVISE HISTORY OF THE SUPREME COURT, VOL. VI, RECONSTRUCTION AND REUNION, 1864-88 PART ONE* (1971), reviewed by this reviewer 3 MD. L. FORUM 20 (1972); and SWISHER, reviewed herein.

²⁷ SWISHER at 296-319.

²⁸ *Id.* at 205-47 and at 311-40.

²⁹ *Id.* at 836.

³⁰ *Id.* at 964-65.

³¹ *Id.* at 43.

³² *Id.* at 69.

³³ Morpeth's quote on Story is repeated at 263 of SWISHER; Daniels' letter reappears in full at 258.

³⁴ SWISHER at 756-72. The Gaines litigation reached the Supreme Court fifteen times on different issues. *Ex parte Whitney*, 13 Pet. 404 (1839); *Gaines v. Relf*, 15 Pet. 9 (1841); *Gaines v. Chew*, 2 How. 619 (1844); *Patterson v. Gaines*, 6 How. 550 (1848); *Gaines v. Relf*, 12 How. 472 (1852); and *Gaines v. Hennen*, 24 How. 553 (1861) were decided during Taney's term in office, but the litigation continued until 1891.

³⁵ Myra's claim depended upon a finding of legitimacy for under Louisiana law a father's property could not be passed by will to illegitimate descendants. After the adoption of the fourteenth amendment, Louisiana's law disadvantaging illegitimates came within constitutional scrutiny and has recently been the subject of a number of cases interpreting the Equal Protection Clause. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

³⁶ SWISHER at 773-810.

³⁷ 35 Mass. (18 Pick.) 193 (1836) is discussed in SWISHER at 554.

³⁸ SWISHER at 372. Senator Charles Sumner was for many years able to prevent the appropriation of money for such a bust, but it was appropriated without controversy in connection with appropriation for the bust of Taney's successor Salmon P. Chase.

³⁹ SWISHER at 973. The house, at 121 South Bentz Street, is maintained as a shrine not only to Taney but also to his brother-in-law Francis Scott Key.