
James F. Simon provides scholars and general readers with an interesting and absorbing chronicle of the views and actions of Roger Brooke Taney and Abraham Lincoln on slavery, secession, and the president’s war powers during the Civil War and the preceding decades. Even though Lincoln’s life and actions are much more generally known, Simon’s careful dissection of his legal views on these three great issues is informed and valuable. The principal contribution, however, is with respect to Taney, who is much less well known.

Simon argues that Taney and Lincoln had much in common. Both were “tall, gaunt, slightly cadaverous figures, usually attired in drab, ill-fitting clothes. Each man believed in a divine design that guided him. . . . Both men were known for their personal integrity, fairness, and compassion for those less fortunate than themselves” (1). Possessing an “unrelenting will to succeed,” they became outstanding litigators in their respective states. And, early in their lives, both disapproved of the institution of slavery and believed that a strong national government was necessary.

Yet these commonalities were displaced by the hardening of sectional views during the 1850s. Taney came to believe that the South would be overwhelmed by the fast-growing North unless slavery was perpetuated in the South and extended to the territories. Lincoln, on the other hand, drew on the actions and statements of the Founders in rejecting the argument that territories should be free to perpetuate slavery. In his Peoria speech in 1858, Lincoln declared that slavery lacked moral justification because of its “monstrous injustice,” even if it had to be accepted in states in which it had already become established (87).

In the early 1850s the U.S. Supreme Court and Chief Justice Taney “enjoyed a prestige that members of the popularly elected branches of the federal government could not emulate” (99). The Court’s brushes with slavery issues in a series of cases had been handled with caution.
and resulted in limited decisions that dissatisfied only the extremists on both sides. This led many on both sides to believe that “the Taney Court was the last best hope for a peaceful resolution of the slavery issue and the preservation of the Union” (100). The *Dred Scott* case was Taney’s attempt, on behalf of a majority of five, to achieve this goal. However, its unnecessary declarations that black men were inferior beings with no constitutional rights and that the federal government had no power to bar slavery from the territories led to an enormous outcry in the North, which was fanned in part by Lincoln’s powerful attack on the decision in the Lincoln-Douglas debates of 1858.

Lincoln and Taney also differed on the law and policy of secession. In his inaugural address in 1861, Lincoln denied that a state had a right to secede. Taney, on the other hand, believed that secession was legal as well as preferable to civil war.

The third major disagreement has arisen again in today’s “war against terrorism”: the extent to which the president can curtail normal civil liberties in a time of war. Simon provides a historic perspective on the actions of presidents, acting as commander in chief, to do what appears necessary to protect the United States in wartime. He is careful to point out that Lincoln was faced not with an external war with another nation but with a quite different situation—a major internal rebellion. In 1861, after Lincoln suspended the writ of habeas corpus, Taney, in his capacity as a circuit justice, entertained a writ filed on behalf of John Merryman, a Maryland secessionist. Merryman had been convicted by a military court of destroying railroad bridges essential to the transportation of Union troops between Washington and the rest of the north. In *Merryman*, Taney held that the writ of habeas corpus could be suspended only by legislation and not by presidential order. (Congress subsequently provided such authority.) Simon criticizes Taney’s decision in *Merryman* as inconsistent with his own earlier decisions and with the liberal manner in which presidents have always interpreted their authority. In 1833, as attorney general, Taney’s legal opinion authorized President Jackson’s removal of U.S. deposits from the Bank of the United States, an action for which there was no explicit congressional authority. Later, as chief justice, Taney had upheld the use of martial law by the governor of Rhode Island to put down an armed insurrection. Lincoln’s actions in dealing with an extraordinary emergency were not granted the same contextual discretion that Taney had previously recognized.

Simon also criticizes Lincoln’s defense of the arrest and conviction of Clement Laird Vallandigham, a Democrat who criticized the administration’s prosecution of the war, arguing that such criticism
should have been viewed as protected speech. But Simon recognizes that today’s norms concerning protected political speech developed gradually during the twentieth century and that it is unfair to apply today’s standards to conduct of many years ago.

During the administration of President John Adams, when war with France loomed, a number of convictions were obtained under the Sedition Act of 1798, which made it a crime to say or print anything “false, scandalous, and malicious” about the federal government. And during World War I, one of our greatest justices, Justice Oliver Wendell Holmes, wrote for a unanimous Court in affirming the conviction of Eugene Debs, among others, under the Espionage Act of 1917. That act made it a crime to “wilfully obstruct” the military draft. In a speech to a socialist party group, Debs had praised young men who had resisted the draft. Simon is correct in concluding that these cases would not be decided the same way today. He draws the line, as I would, by distinguishing between overt acts such as the illegal destruction of vital transportation links and speech that is critical of a war or the president’s conduct of it.

In sum, Simon’s book provides an excellent review of the legal and political issues that were part and parcel of the nation’s great internal conflict.