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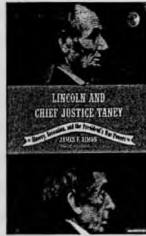
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Book Review II

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

By James F. Simon



Reviewed by Joseph Baker '10

It would have been difficult in a time of peace to find much difference between Abraham Lincoln and Roger B. Taney. Both were self-made men, and each rose to the highest levels of American democracy out of immense natural talent and driven by strong convictions. Yet on almost every fundamental issue of debate surrounding the Civil War one would be assured to find Abraham Lincoln and Chief Justice Taney in staunch and irreconcilable opposition to one another. In *Lincoln and Chief Justice Taney*, James F. Simon, professor of law at New York Law School, attempts to grab onto the roots of this epic clash, using Lincoln and Taney's battles over slavery, the Union, and the war-time authority of the chief executive, as a vehicle to explain their more fundamental differences. Rather than mere ideology, Simon aims to show that it was how both men responded to the personal and national crisis of sectionalism and war that truly made the gulf between them unbridgeable.

By 1856, Roger B. Taney had established himself as the well-respected Chief Justice of a nonpartisan, highly restrained and rather prudent Supreme Court. Even when dealing with potentially incendiary issues such as the constitutionality of the Fugitive Slave Law, the Taney Court had expertly avoided aggravating the sectional crisis that was smoldering throughout the country. Yet the tide of those sectional passions could not be avoided forever, and with one explosive opinion – *Dred Scott v. Sanford* – the Chief Justice plunged the court headlong into the political fires, as he authored an uncharacteristically activist opinion emasculating the federal government's authority to outlaw slavery in the territories.

Even though the Chief Justice had always believed that slavery was an issue to be left to the legislatures of individual states, the trademark judicial restraint that had characterized his earlier decisions was absent in his *Dred Scott* opinion. His once reasonable constitutional argument was now conflated to extreme activism with his unbridled political passions. The Maryland democrat was pressured by the sectional struggle into a defense of the Southern culture and its institutions, with the consequence of stoking the fires of an already raging inferno. What Simon calls the "judicial discipline

and political wisdom” (126) seen in Taney’s opinion in the earlier Fugitive Slave Law case, suddenly withered under the heat of sectional unrest.

Taney had compromised his judicial convictions in the face of crisis, either unable or unwilling to see the ramifications of his actions. It was a personal flaw that would reveal itself many times over the course of the war – this inability to see the larger picture, to see the nation in the dire situation that it was in. Simon points to Taney’s beliefs on the constitutionality of Southern secession and the war-time authority of the executive to further make this point. Taney forsook the Union in favor of what he believed would be a peaceful separation of the nation - a naiveté underscored by his refusal to vacate the Court at the outbreak of war along with almost all other Southerners in Washington. Simon further maintains that the Chief Justice paid no heed to the dire context of the war when he authored his landmark *Merryman* opinion demanding the release of an imprisoned Southern saboteur. In choosing to engage in a narrow and selectively textualist reading of the Constitution - reminiscent to his analysis in *Dred Scott* - Taney attempted to greatly limit the very presidential power for which he had argued so forcefully on behalf of Andrew Jackson during the bank war. This judicial tendency of Taney to relax his once admirable judicial convictions and revert to sectionalism in the face of crisis – what Simon describes as the “artistry of a partisan lawyer rather than the detachment of a judge” (193) - became a defining characteristic of the war-time Chief Justice.

In contrast to Taney’s partisan driven detachment from the realities of Union peril, through the issues of slavery, the Union, and civil liberties, Simon shows Abraham Lincoln in a much different light. Similar to the way in which the *Dred Scott* opinion set the tone for Taney’s later positions, it was Lincoln’s response to that fateful decision in his senatorial debates with Stephan A. Douglas that cemented his permanent opposition to the Chief Justice. While Lincoln had agreed with Taney on the constitutional right of the South to maintain its institution of slavery, his position in regards to the spread of slavery into the territories was quite different. This divergence sprung from the forces which drove Lincoln’s view of slavery. Whereas Taney viewed slavery as merely a constitutional concern and an area off limits to federal regulation, Lincoln’s position was driven by clear, unshakable moral conviction and a belief in the primacy of the federal government.

It was Lincoln’s maintenance of this immutable moral conviction in the fundamentally un-American nature of slavery and the primacy of the federal government that would place him forever at odds with the Chief Justice. After Lincoln’s election to the presidency in November of 1860 and the ensuing secession, Lincoln’s ability to withstand the pressure of crisis became his defining trait. From the first day of his presidency to his final hours, Lincoln’s belief in the perpetual nature of the Union was severely and constantly tested. Nearly all of Lincoln’s decisions as commander in chief - most especially in regards to emancipation and civil liberties - were buttressed by his convictions and assessed in the context of ever-evolving crisis.

Lincoln’s handling of the pressures and temptations of crisis in contrast to that of Chief Justice Taney was at its peak when interpreting the Constitution. While Taney interpreted the document with an academic detachment from the realities of the war around him, Lincoln’s interpretation was based on what Simon call’s “the argument of necessity” (250). Whether it was the raising of the army, funding the war effort, or

suspending the writ of habeas corpus, Lincoln always addressed these extra-constitutional measures in the context of necessity. In contrast to the aforementioned partisan artistry utilized by Taney in his arguments - in which long-standing convictions were skirted under the polarizing pressure of crisis - Lincoln was able to "blend his talent as a skilled trial lawyer with his conviction as commander in chief" (266) to deal with the threats faced by the nation.

It is this vivid contrast between the crisis-time characters of these two powerful men that forms the basis of Simon's book, by providing the framework for an analysis of the fundamentally unbridgeable differences between them. While this book focuses on the constitutional disputes between Lincoln and Taney, they are merely the means by which a much more polarizing divergence can come into view. This is, in a sense, the principle asset of *Lincoln and Chief Justice Taney*. By approaching the differences between the two figures from an angle of constitutional law, something which Simon's legal background allows him to do so expertly, the ideological divisions between Lincoln and Taney can be separated from their character differences. Simon's keen analytical eye allows him to assess the opposing arguments of the President and the Chief Justice, showing where matters of constitutional interpretation were weaved with character - where Taney's judicial belief in states' rights and judicial restraint was infused with partisan passion and academic naiveté, or where Lincoln's belief in the primacy of the federal government was strengthened by unshakable moral convictions.

In no case is this approach more successful in supporting Simon's thesis than in the book's detailed analysis of Taney's incendiary *Dred Scott* opinion, dissecting the opinion in such a way as to turn abstract legalese into a vivid portrait of the compromising Chief Justice. One can imagine Taney as just another one of Simon's law students, subject to criticism by a keen analytical mind and its incessant probing for the slightest hint of argumentative weakness. Yet it is more than this ability to criticize that makes Simon's analysis so convincing, but rather his ability to draw substantial conclusions from the logical holes that he finds. It is the filling in of these holes which Simon sees in Taney's *Dred Scott* opinion that allows him to paint an unbiased portrait of the Chief Justice and his response to pressure. Taney's opinion is not merely dismissed as "the tirade of a southern zealot" (126), but rather shown as a once thoughtful, restrained, and careful legal analysis of the slavery issue driven to uncharacteristic extremity and illogic by the sectional passions of the times. It is an approach that works very well for the purposes of Simon's thesis, and is also expertly utilized in assessing Lincoln's careful defense of extra-constitutional military arrests during the war, specifically the President's deft response to the "Albany Resolves".

Further aiding in the poignancy of Simon's thesis is his ability to relay the importance of the Lincoln-Taney divergence on the rest American society. Simon never loses sight of the fact that this was an epic clash of arguably the two most powerful men and minds of the Civil War era. This ability to frame the contrasting ideologies and characters of the President and the Chief Justice in the broader context of the war and U.S. history adds greatly to the uniqueness of this historical analysis. It raises issues that transcend 19th century American history and speak to the fundamental nature of the American system.

For instance, perhaps Taney's incessant agitation of Lincoln, his academic detachment and refusal to infuse morality into Constitutional debate, was what the

founders imagined when they established an independent Court removed from the political process. Certainly, while Taney could not be called an entirely neutral arbiter by any stretch during the war years, his battles with Lincoln over civil liberties and other war-time powers kept the executive power, no matter how correct, on its toes. In an executive, moral conviction and the ability to respond to crisis is an asset. Were the founders willing to say the same of the judiciary? Simon raises these questions through the way in which he analyzes the fundamental rift between Lincoln and Chief Justice Taney, in which it is not merely two ideologies, but two men, two characters, and two institutions, fundamentally at odds.

As a whole, James F. Simon's thorough analysis of the Lincoln-Taney divergence found in *Lincoln and Chief Justice Taney* is an undeniable asset to the study of the Civil War and the history of American governance. Through keen, detailed probing into the minds of these two intellectual behemoths, Simon shows us the extent of their unmistakable rift. While it was their ideological and institutional differences that placed them on opposite sides of many issues, it was their character and response to crisis that truly made their differences irreconcilable. When convictions were pressured under the heat of crisis, Taney withered and Lincoln steeled.

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