Nebraska Law Review

Volume 54 | Issue 4 Article 6

1975

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Recommended Citation
James A. Lake Sr., *Book Review: History of the Supreme Court of the United States: The Taney Period, 1836–1864 by Carl B. Swishert*, 54 Neb. L. Rev. 756 (1975)
Available at: https://digitalcommons.unl.edu/nlr/vol54/iss4/6

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Book Review

History of the Supreme Court of the United States, The Taney Period, 1836-1864—by Carl B. Swisher†

*Reviewed by James A. Lake, Sr.**

In 1955 Congress established a permanent committee to administer projects funded by a bequest from Justice Oliver Wendell Holmes.[1] The Act established as a first priority the preparation of "a history of the Supreme Court of the United States . . ." by "one or more scholars of distinction . . . ."[2] When completed that history will include twelve volumes, each covering a specific period of the Court's history. The volume being reviewed is the third volume published. The first two volumes, published in 1971, covered respectively the years from the Court's beginning to 1801 and the years 1864-1888. Thus, the volumes are not appearing in chronological order and the major part of the pre-Civil War history (the "Marshall" period, 1801-1835) has not yet been published.

Unfortunately, the distinguished political scientist and legal historian who authored this third volume died in 1968 before the volume was published, but the manuscript was then complete and others were able to oversee the publication. The scholarly credentials of the author are of the highest order, and this product of his craftsmanship is a fine example of the scholar's art. His raw material included judicial records, official and private correspondence, diaries, legislative and executive documents, contemporary newspapers and journalistic commentaries. One may rest assured that this volume is based upon all the relevant and creditable evidence discoverable by extensive and intensive research.

As this history of the nation's highest Court has slowly unfolded, I have harbored a skepticism, which probably descends to the undignified status of a bias, or a prejudice, against parcelling out parts of the story to several individuals to research, outline and

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† New York, N.Y.: MacMillan Publishing Co., 1974. $30.00.

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1. 69 Stat. 533 (1955). The Committee is composed of the Librarian of Congress, *ex officio*, and four other members appointed by the President.
2. *Id.* § 4(a).

relate, and starting and ending some volumes to coincide with the tenure of some of the Court's Chief Justices.

My first bias stems from a fear that readers will not gain as much knowledge, understanding and appreciation of an important issue by reading part of its history here, and part there, as would be gained by reading the complete story of an issue from beginning to end. Admittedly this bias applies to history in general, as well as history of the Supreme Court, and bores into the pedagogics of teaching history at many age levels. It may be that my personal preferences, which contribute to my ability to understand, are peculiar to me, but I would prefer to see some experimentation along the line of my eccentricities. Such writing and teaching techniques might well alter some attitudes against history—an attitude I find prevalent among many students of constitutional law at the present time. When all twelve volumes of the Court's history are published, I suppose I can follow doctrines and issues from first appearance to contemporary resolution (since I doubt that any issue is ever "finally" solved) by searching the indices of the twelve volumes.

It is interesting to note that many major issues covered in this volume neither appeared first, nor received a definitive answer, during the "Taney" years. For example, the effect of the commerce clause itself, unaided by congressional legislation, upon state power was a problem almost from the beginning of the new Constitution. The Marshall Court had something to say about it in the "Steamboat" case[3] and in *Blackbird Creek Marsh.*[4] The Taney Court contributed the *Cooley* doctrine[5] which turned commerce clause cases from a theoretical discussion to a pragmatic approach trying to accommodate regulation of the nation's growing transportation network with the free trade and common market philosophy behind the constitutional language.

The *Cooley* test did not give concrete answers for a host of issues arising in the future such as rate regulation[6] and safety laws.[7] The Taney years *License Cases*[8] involved the power of the state to ex-

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3. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
4. Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).
5. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).
6. *Compare* Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886) *with* Houston & Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).
7. *Compare* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) *with* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).
8. Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847).

clude liquor introduced from a sister state.[9] This issue reappeared.[10] The right of a citizen to move freely from state to state was involved in the *Passenger Cases*[11] and it brought forth from Taney's pen a stirring declaration which has a modern ring for, of course, both the source and scope of the right of interstate travel bothers the Court today.[12]

Other areas of law appeared during the 1836-1864 period, but they remained for later Courts to deal with. The accommodation of the contract clause and state moratoria laws appeared in 1843,[13] but received no decisive answer until 1934.[14] Although no cases involving the issue arose, the power of the federal government to tax federal judicial salaries naturally interested the Justices and this volume relates an interesting opinion held by one of the members of the Court on that issue,[15] but full treatment of the issue was postponed until much later.[16]

In several instances, the author attempts to round out the entire story by stating what had occurred before, or peeking into the future with a preview.[17] Helpful as these excursions are, they are not a complete or satisfactory substitute for a full unfolding of a doctrine, theory or history.

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9. A distinct rule for liquor, because it was liquor, did not seem to be in the minds of the Justices.
10. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).
11. Smith v. Turner, 48 U.S. (7 How.) 283 (1849).
12. *Id.* at 492. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941); Dunn v. Blumstein, 405 U.S. 330 (1972).
13. Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843).
14. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
15. When the government withheld a federal income tax from the salary of Chief Justice Taney, he wrote a letter of protest to Secretary of the Treasury Chase condemning the act as unconstitutional. C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD, 1836-1864, 941-42 (1974) [hereinafter cited as SWISHER].
16. *Compare* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939). The case involved an attorney employed by a federal corporation, and thus not protected by the language of Article III of the Constitution which prohibits diminishing federal judges' salaries. Taney also objected to the "greenbacks" which the government used to pay its debts. He pronounced the paper money "miserable trash which soon will be utterly worthless. . . ." SWISHER at 942. He thus pinpointed another issue which had a long judicial history. *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871); Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935). *See* J. HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970 (1973).
17. For example, see the material at the beginning of Chapter XV, "The Control of Commerce," reviewing the prior cases in the area, and the material at the end of the volume which hints at future problems.

Another possible disadvantage of the plan for preparing this history is that the pieces of the story have different authors. This may result in varying choices of themes, emphasis, raw material sources and interpretation of events. There has not been a sufficient number of volumes published to enable a reviewer to assess the continuity and interlocking nature of the several authors' creations. This is emphatically true in view of the fact that the history of the very important Marshall years has not been published. Without doubt scholars in charge of the various volumes will choose the same main threads for scrutiny just as a hundred scholars would find general agreement in an area with which they are already knowledgeable.

I am not inclined to be overly concerned about the continuity point just mentioned. In fact, I am more inclined to value the individual author's selection of minutiae which surrounds the central themes of the Court's history, and to be more concerned that a conscious attempt to produce volumes with more similarity would place the authors in an unfortunate straight-jacket.

I found much of the detailed exposition in this volume extremely interesting. It made the Justices, and other persons as well, appear more human, their roles more appreciated and sharpened my appreciation of the role of the Court in American history. Other readers might wish to strike as irrelevant many of the small details which interested me, but I found interesting facts such as these:

Justice Campbell, after resigning from the Court in 1861, served as Assistant Secretary of War in the Confederate government, and was imprisoned for a time after the war. Still later he was a distinguished practicing member of the Court's bar.[18]

Chief Justice Taney, addicted to smoking long black cigars, fretted about the war interrupting his sources of supply. His personal income from investments in the southern states was cut off by a Virginia law legislating against payments to security holders in the non-seceding states, but he refused his blessing to efforts to create an exception for him.[19]

Before ascending the bench Justice Catron camped out while traveling circuit as a bar member. He was thus prepared for the rigors circuit riding demanded of a Supreme Court Justice.[20] On the other hand, Justice Daniel complained about his accommodations (near the boiler) on an Ohio River boat. He was shifted to the "Lady's Cabin" when the captain of the Wheeling based steamer

18. SWISHER at 244.
19. *Id.* at 963-64.
20. *Id.* at 265.

discovered that his passenger dissented in the first Wheeling Bridge case[21] and thus supported Wheeling commercial interests over those of Pittsburgh.[22]

After reading this volume my second revealed bias—that we lionize the great and ignore the contributions of lesser lights—still remains, but my reading did not give me another exhibit to prove my point. I commenced reading with the suspicion that since the author had previously written a biography of Taney,[23] I would find the Chief Justice the main actor and everyone else in a minor, supporting role. My fears were unfounded. Although the book is entitled, "The Taney Years," and the Chief Justice is there (as he must be), he does not upstage all others. The associate justices get their fair share of attention; the court's clerk and reporter appear on stage; and others who did, or said, something relevant to the story play their parts. Neither do all appear as shining knights. The book, however, is not often devoted to sermonizing. I have no real feel for whether the punches thrown are fair, nor whether others should have been thrown, because the raw material would have to be read in order to make this judgment. It will be interesting to watch as volumes covering the more recent history appear to see if they contain critical comments.

No matter how much one loses himself in interesting details, the volume develops what I expected would be the major themes of the Court's history for this period. But I gained new insights into these expected stories.

First, for probably the first time, I fully grasped the significance, good and bad, of circuit riding duty. I had not previously assessed the rigors and dangers it occasioned, and the overall impact it had upon the Court's role of keeping federal law uniform in application and supreme in the face of attack. The author does a good job of showing the value of circuit riding as a means of keeping justices aware of conditions and the thinking in all parts of the country. One may certainly make a good argument that this was necessary in the days before wire services, radio and television. At first reading it appeared to be a great waste of talent to find the Chief Justice of the United States instructing the jury in a diversity case brought in a federal circuit court by injured passengers alleging that the driver negligently (he was "drunk") overturned the coach.[24] On second thought it was not too great a waste in view of the fact

21. Pennsylvania v. The Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 593 (1851) (dissenting opinion).
22. SWISHER at 259.
23. C. SWISHER, ROGER B. TANEY (1935).
24. SWISHER at 398.

that the Chief Justice performed the job so ably that the case was affirmed by the Supreme Court and was widely cited for many years.[25] The whole story made the Chief Justice a little more human, varied his diet of cases, and, although no one can prove it, the experience may have made him a better overall judge.

We are prisoners of our own times, and a contemporary reader of this volume will be very interested in the relationship between judicial duties and non-judicial activities (or "judicial ethics," if you prefer). A few examples will suffice. Some of them shock us today, but as events of the last several years prove, ethics change. Justice Field gave advice about how a Presidential pardon would be received in California;[26] the President was kept informed about the progress of the *Dred Scott* case, both the time when the decision might appear and its holding;[27] Taney sought from President Polk a United States attorneyship for his son-in-law;[28] Justice Story, at the request of a congressional committee, drafted a bill extending federal admiralty jurisdiction over all the lakes and rivers of the United States;[29] opinions were sometimes revised after the decision and original opinion were released;[30] and sometimes Justices first published their opinions in non-official publications.[31]

One is hard pressed to judge these events from the vantage point of 1975. There is little in the volume to fit these events into the general ethical standards of the period, nor to attempt a guess about the motivations that spawned the actions. For example, I wonder if the rather loose treatment of the opinions, and the idea that they were "private property" of the authors, arose from a basic conception of the role of the Court, or a failure to realize the true importance of the Court's pronouncements upon people, business and the other organs of government, state and federal. The Court apparently thought its major, or only, role was to decide the case for the benefit of the litigants, and to ignore the fact that after the winner had been declared, the case was a precedent on an important point.[32]

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25. Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181 (1839).
26. SWISHER at 959. It appears the advice was followed and that it was correct.
27. SWISHER at 615, 617.
28. *Id.* at 223.
29. *Id.* at 429. *See* Cox v. Louisiana, 379 U.S. 536, 585 (1965) (Justice Clark commenting that "members of this Court" wrote a section of the federal criminal code—18 U.S.C. § 1507 (1970)).
30. SWISHER at 633.
31. *Id.* at 893.
32. The exact role which the Court plays is a very important point. Whether the Court's role is mainly to decide a winner, or whether it

Another subject of contemporary interest appearing in this volume is the press of judicial business upon the federal judicial system.[33] In 1839 Justice McKinley reported 2,700 cases awaited trial in the Circuit Court of Mississippi—too many to permit the judges to handle with thoroughness.[34] Judicial review was slow. An 1843 Illinois Supreme Court decision finally received review in 1853, nine years later.[35] Several justices urged the Chief Justice to do something about the long-winded arguments of counsel with the hope that the Court's docket would not slip into a backlog situation. When Taney failed to act, Justice Story, in the Chief Justice's ab-

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is to declare policy (albeit within the confines of the limits of judicial power) surfaces currently in the debate over the retroactivity of new decisions of constitutional law. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975). The *Taylor* case accorded the litigant the benefit of a new constitutional doctrine; the *Daniel* case, holding the new rule not to be retroactive, denied its application to a litigant whose case was pending on the docket at the time the *Taylor* case was decided.

These two cases will not satisfy many. Refusing to give the litigant whose efforts establish the new rule the benefit of the rule runs into the argument that the Court may only declare law in a case and the feeling that a winner ought to win something for his efforts. Perhaps the present state of the law adds a gambling quality to appellate review, but in the process raises doubts about the enforcement of equal protection and may in the end undermine respect for the Constitution and for the Court as its guardian and interpreter.

A full retroactivity doctrine is difficult to accept because such a rule exacts a high price in an area such as enforcement of the criminal law where the results of past action linger on for many years because of long sentences. One may even be concerned that full retroactivity might cause some Justices to hesitate to declare the right *for the future*. Half a loaf of progress may be better than no progress. *See generally* Williams v. United States, 401 U.S. 646, 675 (1971) (Harlan, J., dissenting); Mishkin, Foreword: *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964).

33. *See, e.g.*, FEDERAL JUDICIAL CENTER REPORT ON THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).
34. SWISHER at 131, 253.
35. *Id.* at 588. One interested in the speed of modern litigation may examine the history of such cases as: England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966), which ended with a denial of a rehearing by the United States Supreme Court, 385 U.S. 890 (1966), after a full opinion; Henry v. Mississippi, 379 U.S. 443 (1965) which ended with a federal district court decision, 299 F. Supp. 36 (N.D. Miss. 1969), after a full opinion, and for Nebraska readers, the well-known efforts of Henry Hawk which ended only with his death. The course of Hawk's effort is summarized in P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1490 (2d ed. 1973).

sence, suggested to the bar that its cooperation in this matter might assist. When this failed, the Court promulgated a rule limiting oral argument to two hours in the average case.[36]

Some of the suggestions made during this time of burgeoning court dockets all along the line of the federal court structure sound familiar today. Justice Catron proposed the creation of an intermediate set of appellate courts—courts where he thought the great mass of cases would end.[37] Partial or total relief from circuit riding was suggested, but not enacted until later.[38] A Senate Resolution, possibly instigated by the Court itself, sought the creation of an "investigating clerk" to do copy work and to "make . . . researches . . . ."[39] One member of the House ridiculed the plan as one to provide "auxiliary brains"[40] for the Justices, and it was eventually tabled.[41] Congress could not be persuaded to extend the Court's term, but the Court did so itself, apparently not violating any adjournment date since Congress had provided none.[42] Congress did permit Circuit Justices more freedom in moving district judges around in the circuit. However, outside of the term extension and assignment of district judges within a circuit, nothing was really accomplished before the Civil War to attack congestion. And, of course, the post-Civil War flood of cases, and the 1875 Act granting federal courts general federal question jurisdiction in 1875 opened the flood gates still more and the crisis finally prompted action.[43]

Now a few concluding comments about themes which one would assume to be in this volume—sectionalism, slavery and *Dred Scott v. Sandford*.[44] Many people associate Taney with one decision and a "wrong" decision at that! For those who see the Taney tenure and the years 1836-1864 in this light the present volume should place the Chief Justice and the Court during that period in proper perspective.

One is tempted to turn immediately to the part of the book dealing with sectionalism and slavery, but those doing so miss a great part of the story concerning the central theme of slavery. The implications of the *Dred Scott* case should have been foreseeable to

36. SWISHER at 278-79.
37. *Id.* at 280. See the creation of the Circuit Courts of Appeal in 1891, 26 Stat. 826 (1891).
38. SWISHER at 282.
39. *Id.* at 287.
40. *Id.* at 288.
41. *Id.* at 287-89.
42. *Id.* at 284.
43. Act of March 3, 1875, 18 Stat. 470 (1875).
44. 60 U.S. (19 How.) 393 (1857).

the Justices. They rode circuit, and this gave them a fair opportunity to gauge the explosiveness of the issue. The author tells us, however, that the Justices did not foresee that the decision would become the "self-inflicted wound" which others later characterized it to be.[45] One wonders why the Court's vision was so myopic. Did it misread public opinion? Did public opinion crystalize very rapidly—maybe after the decision was made public? Or is this another piece of evidence that the Court simply did not perceive its role as extending beyond declaring a winner in the cases brought before it, and that it could not concern itself with the "fall-out" which accompanied the performance of that task? This period of the Court's history antedated notions about "discretionary" jurisdiction and the Justices may very well have thought themselves forced to decide the case. This would not explain why they didn't duck and dodge a little. Marshall had certainly shown the value of this technique at a time when the Court was probably in very grave danger.[46]

We learn from this work that *Dred Scott* was *not* a "test" case—that no one orchestrated it to an ambush conclusion.[47] It appears that the litigants, the lawyers and the Court played it "straight" all the way. It might have been better for the Court if it had been a trap of which the Court was aware. It might then have ducked and dodged a little more.

If one expects to find anything new about the case in this volume, he is doomed to disappointment. For, as the author says, the story "has been told again and again . . . ." but "remains much as it has been told on many occasions."[48] His account is brief and to the point, but it is still a fascinating story for persons interested in "great" cases—great for the moral issue involved and in the impact the event had upon people and the history of the United States.

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45. SWISHER at 631.
46. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
47. SWISHER at 599.
48. *Id.*