

Paul Finkelman, McKinley Distinguished Professor of Law and Public Policy, Albany Law School
“Hardly an Aberration: Taney, *Dred Scott*, and Slavery”

Abstract:

The classic work on Taney -- much of it quite old now -- by Swisher and others, argues that *Dred Scott* was an "aberration," and inconsistent with his life-long "moderate" position on slavery and race. This paper, part of a larger project on The Taney Court, argues that this is entirely wrong. Taney's views on race in *Dred Scott* were consistent with his views when he was Attorney General under Jackson. *Dred Scott* itself is consistent with the Court's overwhelmingly proslavery jurisprudence. The paper also argues that far from being an aberration, the logic of *Dred Scott* permeated a number of other Taney Court decisions (such as *NY v. Miln* and the *Passenger Cases*) which on their surface had nothing to do with slavery or race. To understand Taney and his Court, we must understand the justices' deep commitment to slavery and white supremacy.

Rachel Sheldon, University of Virginia

“The Taney Court and the Problem of Judicial Ethics in the Mid-Nineteenth Century”

Abstract:

In his 1858 "House Divided" speech, Abraham Lincoln famously accused Chief Justice Roger Taney, outgoing President Franklin Pierce, president-elect James Buchanan, and Illinois Senator Stephen Douglas of a conspiracy to perpetuate slavery in the United States. According to Lincoln, this conspiracy took form in the *Dred Scott* case, which excluded slaves from citizenship and declared that Congress did not have the right to legislate for the territories (invalidating the Missouri Compromise). From extensive research by historians such as Don Fehrenbacher, Paul Finkelman, and others, we now know that Lincoln was not far off in suggesting that members of all three branches of government had discussed the details of the *Dred Scott* case through correspondence and even in person. Yet, a closer look at the behavior of the Taney Court during the mid-nineteenth century demonstrates that such cross-branch discussion was fairly common in antebellum Washington; justices helped write bills for congressmen, dined with attorneys who tried cases before them (many of whom were sitting senators and representatives), or even lobbied for a presidential nomination.

Such behavior highlights the different standards for judicial ethics held by the legal community during the era of the Taney Court. With few written guidelines, justices and lawyers operated on a mutually-held honor system. Much of this honor system looks strange to us today; to use *Dred Scott* as an example, Benjamin Robbins Curtis felt comfortable hearing the case even though his brother served as one of *Dred Scott's* attorneys. Overall, I argue that because the legal community was small, personal relationships played a critical role in determining how the Court operated. Thus, understanding the dynamics of judicial ethics during this period sheds light not only on the Taney Court ideology, but also on the complex behavior of the legal community in the mid-nineteenth century.

Matthew Axtell, Princeton University

“Down the River with Roger Taney:

Steamboats, Slaves, and the Judicial Management of an Interstate Commons in *Strader v. Graham*”

Abstract:

This paper analyzes how the Taney Court subtly enclosed interstate rivers in the 1850s, attempting to prevent a “tragedy of the commons” in the riparian West. The mid-1800s were an era of territorial expansion in the United States. As the addition of each new western state and territory promised to work a revolution in the nation’s political geography, American courts based in the East struggled to craft legal rules applicable to transitory common spaces in the West. Rather than starting on the land, much of this judicial work centered upon disputes arising from the “Western Waters” of the Ohio-Mississippi-Missouri river system. As the most densely-populated and busiest waterway linking the East to the West and the North to the South, the Ohio River was the axis of the nation’s bustling steamboat economy during the 1850s. Since at least the time of the Marshall Court’s *Handly’s Lessee* (1820), Ohio River vessels were under uncertain legal management, with the river itself seen as an “inland sea” subject to several concurrent jurisdictions at once, while being under the effective control of none. During the 1840s, Marshall’s liberal administrative system began to fray, with antislavery agitation on Northern riverfronts, fatal steamboat boiler explosions, and over-competition between steamboat lines threatening to transform the river into a dangerous “fugitive waterscape” in the public eye.

Starting with *Strader v. Graham* in 1851, a case involving three Kentucky slaves that successfully boarded an Ohio River steamboat to flee their master, the Taney Court emerged as a reinvigorated adjudicator of this interstate commons. Today, historians remember *Strader* for its “invalidation” of the antislavery provisions of the Northwest Ordinance of 1787 and its *dicta* denying that a runaway slave’s status necessarily created a justiciable question in federal court. In contrast, this paper studies contemporary legal and business materials to argue that *Strader* was in its time more accurately a case that announced a new willingness among federal officials (particularly the Supreme Court) to use government power to allocate access to common resources in ways that were free from administrative chaos and safe for interstate commerce, even if this might come at the expense of the nation’s moral imagination, the safety of its minority populations, or the long-term integrity of its physical environment.