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Robert J. Harris

CHIEF JUSTICE TANEY: PROPHET OF REFORM AND REACTION

ROBERT J. HARRIS*

GENERAL THEORIES OF THE CONSTITUTION

Roger Brooke Taney's judicial career began and ended in controversy.[1] His appointment as Chief Justice in 1836 came not long after his nomination to be Secretary of the Treasury had been rejected and his nomination to be an Associate Justice of the Supreme Court had been indefinitely postponed because of his role as a central figure in the great controversy between the Jackson administration and the Bank of the United States.[2] These successive nominations of Taney to high position evoked a flood of partisan invective against him in an age which was hardly characterized by restraint. In the course of time, however, Taney was able to win for himself a strong position in the esteem of his fellow citizens, but he lost this position as a result of his opinion in the unfortunate *Dred Scott* case.[3] After this decision he was denounced with every opprobrious epithet which malignant righteousness could contrive.[4] The fluctuations in Taney's public reputation continued even after his death, but a century after the decision of the *Dred Scott* case his position in American constitutional history was secure.

Taney's standing as a Chief Justice is second only to that of Marshall, and this standing is due to a number of factors. First, Taney served for a very long time as Chief Justice, twenty-eight years, longer than any other save Marshall. Second, Taney's immediate successors as Chief Justice, Chase, Waite, and Fuller, were at best mediocre, both as presiding officers of the Court and as jurists or statesmen. Subsequent successors, with the possible exception of Chief Justice Hughes, because of brevity of tenure or lack of talents, or both, have not made any permanent imprint upon the Court as an institution because of their office as Chief Justice; although two of

* Professor of Political Science, Vanderbilt University.

1. The best biography of Chief Justice Taney is SWISHER, ROGER B. TANEY (1935). A useful account of Taney's judicial opinions and political and constitutional theories is found in SMITH, ROGER B. TANEY: JACKSON JURIST (1936).

2. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 285 (1924).

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

4. 3 WARREN, *op. cit. supra* note 2, at 25. After Taney's death Charles Sumner declared: "The name of Taney is to be hooted down the pages of history. . . . He administered justice at last wickedly, and degraded the judiciary of the country, and degraded the age." SWISHER, ROGER B. TANEY 581-82 (1935). Sumner was opposing a bill to provide for placing a bust of Taney in the Court room. It was finally placed there after the death of Chief Justice Chase when Congress authorized an appropriation for the busts of the two Chief Justices.

them, White and Stone, must be reckoned with, but largely in their capacity as Associate Justices. Third, during the twenty-eight years he was Chief Justice, Taney was the dominant figure of a Court which included such personalities as Joseph Story whose views became eccentric with the reconstruction of the Court, John McLean whose obsequiousness to presidential ambition led him to turn Whig and then Republican, James Moore Wayne, the Georgia nationalist, and John Catron, the Tennessee Democrat, to mention only some of the more outstanding of Taney's associates. Finally, as the chief of a comparatively homogeneous Court, despite fairly frequent dissents and separate concurrences, Taney had a clear-cut theory of government and the role of the Court in it which he was able to an impressive degree to imprint upon the Constitution and the Union in important contributions, some of which have proved comparatively permanent.

To a great extent Taney's constitutional views had been formed prior to his becoming Chief Justice at the age of fifty-nine. Though a Federalist originally, he was inclined toward agrarianism as befitted a member of the landed gentry of Maryland. His ideal of the good society was that he had known in Maryland which was founded upon an agricultural economy nurtured by slavery and supplemented by light industry and exchange. His ideal form of government was that which he regarded as existing under the constitution of 1789, a confederation or union of sovereign states bound together by a written constitution which was binding upon the states regardless of its nature as a compact. The general government he regarded as one of limited and express powers. The important units of government were those of the states which had not only the right but the duty to govern men and things within their dominion in such a way as to advance the welfare of all. He was skeptical of all concentrations of power and especially of economic power. These views, to be sure, were something of a paradox for even an agrarian Federalist who accepted neither the constitutional nationalism of Hamilton, Marshall, and Webster nor the particularism of the men of the Hartford Convention. Accordingly, as his party died of inanition, Taney found a congenial political home in the Jacksonian Democracy.

As Attorney General and Secretary of the Treasury in Jackson's cabinet Taney had opportunities on a number of occasions to give official expression to his views on the Constitution, national and state power, and the relationship of government to the economic order. Although he personally deprecated the institution of slavery, he accepted it as a necessary fact of social existence, and contended in opinions rendered while Attorney General that slavery and the status of slaves were matters exclusively within the powers of the

states, even transcending the treaty power. In this respect, indeed, he stated his views on the social and legal status of negroes in a manner almost parallel to those enunciated in the *Dred Scott* case twenty-five years later.[5] As architect of Jackson's policy on the Bank of the United States Taney was articulate in his condemnation of the Bank's great powers over creditors, other banks, and government itself, powers "with which no corporation can be safely trusted in a republican government."[6] And in a letter to the President, designed to encourage a veto of the bill to renew the Bank's charter, he contended that "the continued existence of that powerful and corrupting monopoly will be fatal to the liberties of the people."[7] In other ways he demonstrated an antipathy to bank currency closely similar to those of that states rights agrarian and Jeffersonian publicist, John Taylor of Caroline.

The age of Jackson and of his coadjutors and successors was an age both of reform and reaction. On the side of reform a great variety of state legislation looked to the regulation of business corporations, banks, insurance companies, issues of stock, the amelioration of labor, the emancipation of women, the prohibition of intoxicants, and the further democratization of government through the extension of the suffrage and the popular election of state executive and judicial officials. However, the ominous rumblings of the slavery controversy cast a long and deepening shadow over the land, particularly after the Nat Turner slave insurrection in 1831, and a pall of reaction descended upon many of the slave states in the form of legislation repressive of slaves, free negroes, and whites. These in turn were accompanied by fugitive slave laws, personal liberty laws in the North, and the rising tide of abolitionism, all of which tended to create an atmosphere of unreason and to tear asunder not only the party of Jackson and Taney but the Union as well. In the meantime, in one way or another, many of the issues pertaining to reforms and slavery were to come to the Supreme Court of the United States for adjudication on constitutional questions, and it fell to the lot of Taney to play a paradoxical role as the spokesman for the Jacksonian Democracy on the issues of reform and the voice of reaction on the questions arising out of slavery. Regardless of the apparent inconsistency of these roles Taney was able to bring to the resolution of perplexing questions a consistent body of constitutional theory.

First of all Taney and his Court, though not overtly reversing Chief Justice Marshall's conception of implied federal powers and liberal constitutional interpretation, were inclined to take a more literal view

5. SWISHER, ROGER B. TANEY 150-55 (1935).
6. *Id.* at 166.
7. *Id.* at 228.

of the Constitution and national powers than that prevailing during the tenure of the great Chief Justice. In the *Dred Scott* case[8] Chief Justice Taney declared that changes in public opinion regarding the unfortunate status of negroes should not induce the Court to give the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was adopted. The way to change the Constitution is through amendment and until altered "it must be construed now as it was understood at the time of its adoption." Then he went on to say of the Constitution: "It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States."[9]

Any other rule of interpretation, he contended, would abrogate the judicial character of the Court and render it a mere reflex of public opinion and popular passion. However, the question arises, how are the intent and meaning of the framers to be determined? Taney's answer is that they are to be determined by recourse to the language of the Declaration of Independence and the Articles of Confederation, the plain words of the Constitution, state and congressional legislation, preceding, contemporaneous with, and following the adoption of the Constitution, and uniform action of the executive department. All this, of course, is a considerable departure from Marshall's sentiment that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[10]

Equally remote from Marshall's conception of the Constitution as the product of the whole people of the United States, is Taney's view of it as the work of thirteen sovereign states. This view rests upon the historical fiction enunciated in *Martin v. Lessee of Waddell*[11] that when the Revolution succeeded "the people of each State became themselves sovereign" and succeeded to all the rights, privileges, and powers of the British Crown. Nor did they cease to be sovereign upon the ratification of the Constitution. With the exception of the powers

8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

9. *Id.* at 426.

10. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

11. 41 U.S. (16 Pet.) 366, 410 (1842). The dicta in this case and Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), were heavily relied upon by California, Louisiana, and Texas in the cases involving the ownership and control of oil in the *Tidelands Oil* cases. United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

surrendered by the Constitution "the people of the several states are absolutely and unconditionally sovereign within their respective territories" with full power to tax persons and things within their respective territories.[12] These statements, to be sure, are little more than obiter dicta hardly necessary to the points actually decided, but they do manifest an overriding solicitude for states rights even though they more nearly resemble the Madisonian conception of divided sovereignty than Calhoun's league of sovereign states.

Taney's conception of dual sovereignty and dual governments operating within the same territory permeated his constitutional theory generally and his ideas on federalism in particular. In Taney's outlook federalism was hardly harmonious in that it involved frequently recurring conflicts between angry and rival sovereignties mitigated by the benign influence of adjudication by a judicial system that was the creature of neither sovereignty and hence above the strife and conflict of jealous governments in their competition for power. As the arbiter between the Nation and the states it was equally the duty of the Court to maintain national supremacy in its proper place and to protect the states in turn from federal encroachment upon their powers which by their own force limited federal powers and national supremacy in this *bellum omnium contra omnes* between sovereignties.

Courts and Judicial Power

Chief Justice Taney's conception of judicial power and the role of the courts flowed naturally from his doctrine of a truculently competitive federalism. Unlike Marshall who looked upon the federal judiciary and the Supreme Court in particular as an organ for maintaining national supremacy, expanding national power, and restraining state authority, especially when it adversely affected the vested interests of property, Taney regarded the Supreme Court as an impartial umpire between the rival sovereignties of state and nation which existed outside and beyond the national government. This conception of the role of the Court is well articulated in the great case of *Ableman v. Booth*[13] which, despite its nationalistic overtones, is strictly in the tradition of dual federalism. Here he sustained for a unanimous Court the power of the Supreme Court of the United States to review proceedings of state courts and held that a state court has no authority to release on habeas corpus proceedings a prisoner held in federal custody or to assume final authority to pass upon the validity of an act of Congress in language that is reminiscent in part of the opinions of Story and Marshall respectively in *Martin v. Hunt-*

12. Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1854).
13. 62 U.S. (21 How.) 506 (1859).

er's Lessee[14] and *Cohens v. Virginia*.[15] Though sovereign within its limits, Wisconsin's sovereignty, he declared, is limited by the Constitution of the United States. "And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independent of each other within their respective spheres."[16]

The main purpose of the Constitution, he declared, was "to secure union and harmony at home," and to do this it was necessary that many rights of state sovereignty be ceded to the Union, and that in its sphere of action "it should be strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities." The supremacy conferred upon the national government "was clothed with judicial power, equally paramount in authority to carry it into execution" and afford a uniformity of judicial decisions upon cases arising under the Constitution, laws and treaties of the United States.[17] Had Taney stopped here he would have been following the reasoning of Marshall and Story rather closely, but he went on to assert that the judicial power was indispensable not merely to national supremacy "but also to guard the states from any encroachment upon their reserved rights by the general government." Because internal tranquility between the nation and the states was regarded as impossible without "such an arbiter" as the Supreme Court every precaution was taken to fit it for its high duty. Accordingly, he asserted:

> It was not left to Congress to create it by law; for the states could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government without any participation on their part. . . . This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal government, but by the people of the states, who formed and adopted the government. . . . And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.[18]

The net effect of the Taney Court's theories of federalism and the conception of the Court as an arbiter between clashing sovereignties

14. 14 U.S. (1 Wheat.) 304 (1816).
15. 19 U.S. (6 Wheat.) 264 (1821).
16. Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1859).
17. *Id.* at 517.
18. *Id.* at 521. See Tarble's Case, 80 U.S. (13 Wall.) 397 (1872), for a similar attempt by the Wisconsin courts to challenge federal power.

was to increase the judicial power and especially that of the Supreme Court, for it meant that in addition to enforcing national supremacy the Court would police the no-man's land between the nation and the states and apply the Tenth Amendment inflated beyond its historical significance to alleged federal encroachments upon states rights. In other ways, too, Chief Justice Taney and his Court contributed to the expansion of federal judicial power. This is notably true of *Propeller Genesee Chief v. Fitzhugh*[19] in which Taney rendered one of his better opinions. Here in a bold and creative stroke the Court rejected the restrictive English rule of admiralty jurisdiction in favor of one more suited to the geography of the United States, technological developments in transportation and the growing commerce on inland waters. In so doing the Court reversed its ruling announced by Marshall in the case of *The Thomas Jefferson*[20] where admiralty jurisdiction was confined to the high seas and upon rivers as far as the ebb and flow of the tide extended in conformity with the English rule, and upheld an Act of Congress of 1845 which extended the admiralty jurisdiction of the federal courts to the inland navigable waters of the United States beyond the ebb and flow of the tide. In justifying this result Chief Justice Taney pointed to the differences between English and American geography which rendered the principle of the ebb and flow of the tide adequate for England and the original thirteen states but inapplicable to the United States as it had grown territorially with its vast stretches of rivers and lakes comparable to inland seas as a result of the invention of the steamboat which overcame the resistance to upward passage of unchanging currents. Moreover, admiralty jurisdiction was found necessary both to the safety and convenience of commerce and the administration of the laws of war. Finally, as a concession to the states, in an opinion which significantly expanded national legislative and judicial powers, Chief Justice Taney found the new rule necessary to the preservation of the principle of state equality, for without a change in the rule the newer inland states would be denied the benefits of admiralty jurisdiction enjoyed by the coastal states. The opinion and reasoning of the Chief Justice in the *Genesee Chief* represent the judicial process at its best in the fusion of legal history and principles with the raw materials of national needs, environmental factors, and subsequent political developments in national and commercial expansion in a manner that was both creative and conservative, bold and yet traditional.[21]

19. 53 U.S. (12 How.) 443 (1852).
20. 23 U.S. (10 Wheat.) 428 (1825).
21. The result in the case of the *Genesee Chief* was anticipated in part in Waring v. Clark, 46 U.S. (5 How.) 441 (1847), where the Court qualified the rule in *The Thomas Jefferson* by holding that the admiralty jurisdiction of the federal courts was not limited by English rules of admiralty. This

Two other cases expanding the federal judicial power during the Taney period are worthy of notice. In *Swift v. Tyson*[22] Justice Story, for a majority of the Court and with Taney's silent concurrence, rendered an opinion which held that in commercial matters in diversity of citizenship cases the federal courts were not bound by state court decisions, but rather by the general principles of jurisprudence. This holding, which was designed to produce a uniformity of decisions on matters of a commercial nature, resulted in even greater diversity and confusion and represented a considerable increase in federal judicial power because in the absence of congressional legislation it meant that the federal courts would formulate the rule of decision in cases of a commercial nature loosely and broadly construed.[23] Later Chief Justice Taney opposed the extension of the formula in *Swift v. Tyson*.[24] Taney was ill during most of the 1844 term and did not participate in the hearing and decision of *Louisville, C. & C. R.R. v. Letson*.[25] The case is important both as an extension of federal jurisdiction and as illustrative of the ability of the Taney Court to accommodate itself to the exigencies of corporations. An earlier case[26] had ruled that the citizenship of a corporation for purposes of diversity jurisdiction followed that of the individual shareholders. This rule combined with that of another case[27] to the effect that in diversity proceedings all the persons on one side of the suit had to be citizens of different states from all persons on the other side was making it progressively more difficult for corporations to docket cases in the federal courts at a time when corporations were becoming more important as economic units in the national economy and the dispersal of stock owners on an interstate basis was becoming more general. The *Letson* case reversed the rule governing the citizenship of corporations and established the principle that the citizenship of a corporation for diversity purposes is to be determined by the state of incorporation and thereby opened the federal courts to corporate refugees from hostile state courts.

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case extended admiralty jurisdiction to a boat collision on the Mississippi River ninety-five miles above New Orleans. Taney's intense interest in federal admiralty jurisdiction is reflected by his dissent in Taylor v. Carryl, 61 U.S. (20 How.) 583, 600 (1858), where he argued that the principle of judicial comity should not be extended to a conflict between a federal court sitting in admiralty and a state court on the ground that the admiralty power was superior. In respect to admiralty jurisdiction, Taney was a pronounced nationalist and was as solicitous for admiralty jurisdiction in the United States as Lord Stowell was in England.

22. 41 U.S. (16 Pet.) 1 (1842). For an excellent account of the consequences of *Swift v. Tyson*, see WENDELL, RELATIONS BETWEEN FEDERAL AND STATE COURTS 113 (1949).

23. *Ibid.* See also THE CONSTITUTION OF THE UNITED STATES ANNOTATED 604-05 (Corwin ed. 1953).

24. Lane v. Vick, 44 U.S. (3 How.) 464 (1845).

25. 43 U.S. (2 How.) 497 (1844).

26. Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

27. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

Not all of the decisions of the Taney Court had the effect of expanding judicial power. By expanding the "political question" concept Chief Justice Taney indeed prepared the way for removing many issues from judicial determination and for placing some clauses of the Constitution beyond the power of the court to read. In doing this he created, so to speak, a kind of judicial *index librorum prohibitorum.* The first great expansion of the political question concept came in the leading case of *Luther v. Borden*[28] where the Chief Justice delivered the opinion of the Court holding that the question of the lawful government in Rhode Island and the corollary issue of what is a republican form of government as a consequence of Dorr's Rebellion were political questions for Congress and the President, and not for the courts to determine. Chief Justice Taney referred to the difficulties of courts in obtaining testimony upon which to decide such issues, the possibility of conflict with the President, and the ensuing anarchy which would result. On such issues, the courts, he concluded, were therefore bound to take notice of the decisions of the political branches of government and to follow them. In two other cases in which Taney spoke for the Court the concept of political question was extended to the recognition of foreign governments[29] and the effect of written declarations annexed to a treaty at the time of ratification.[30] Similarly, in his dissent in *Rhode Island v. Massachusetts*[31] he took a restrictive view of the Supreme Court's original jurisdiction and contended that a boundary dispute between two states which involved sovereignty and jurisdiction as distinguished from property was a political question.

By a vigorous and technical construction of the term "cases and controversies" Chief Justice Taney contributed not only to a contraction of the federal judicial power but also to a prolonged confusion concerning the types of proceedings the lower federal courts could hear and the Supreme Court could review. Building upon the foundations laid in *Hayburn's Case*[32] which held that the federal courts cannot perform non-judicial functions and another principle to the effect that they cannot render advisory opinions, Chief Justice Taney as spokesman for the Court in *United States v. Ferreira*[33] went farther to hold that the duty imposed by an act of Congress upon a territorial court to examine and adjudicate claims of Spanish subjects against the United States and to report its decisions and evidence thereon to

28. 48 U.S. (7 How.) 1 (1849).
29. Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).
30. Doe *ex dem.* Clark v. Braden, 57 U.S. (16 How.) 635 (1854).
31. 37 U.S. (12 Pet.) 657, 752 (1838). See also his dissent in the last installment of Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591, 639 (1846).
32. 2 U.S. (2 Dall.) 409 (1792).
33. 54 U.S. (13 How.) 40 (1852).

the Secretary of the Treasury who was to pay the claims if satisfied that they were just and within the terms of the treaty with Spain was non-judicial and hence beyond the power of the Supreme Court to review upon appeal. Although he regarded the duty imposed upon the Court and the Secretary as judicial in nature, it was not judicial "in the sense in which judicial power is granted by the Constitution to the courts of the United States." Had the Chief Justice stopped here, he would have done no more than confirm the existing law, but he went on to declaim that "the duties to be performed are entirely alien to the legitimate functions of a judge or courts of justice" and to imply that an award of execution is an essential element of the federal judicial power.

In Taney's last judicial utterance, *Gordon v. United States*,[34] this implication was expressed with dogmatic finality. The case involved the act creating the Court of Claims which provided for appeals to the Supreme Court after which final judgments in favor of claimants were to be referred to the Secretary of the Treasury for payment out of any general appropriation made by Congress for the payment of private claims. Because the act made execution of the judgment of the Court of Claims and of the Supreme Court dependent upon future action of the Secretary and Congress, Taney regarded it as nothing more than a certificate of opinion to the Secretary and in no sense a judicial judgment. Congress was accordingly without authority to require the Court to take appeals from an auditor and to express an opinion upon a case in which its judicial power could not be exercised, in which its judgments would not be final and conclusive upon the parties, and in which processes of execution could not be awarded to carry judgments into effect. "The award of execution," he concluded, "is a part and an essential part of every judgment passed by a court exercising judicial powers. It is no judgment in the legal sense of the term without it."[35] This confusion of finality of judgment and an award of execution was incorporated into many subsequent Supreme Court decisions,[36] and until 1927 consequential relief was regarded as an essential element of judicial power so as to render declaratory proceedings in state courts unreviewable by the Supreme Court and to withdraw significant types of proceedings entirely from the jurisdiction of the federal courts. In *Fidelity Nat'l Bank v. Swope*[37] the Court finally took the position that an award of execution "is not an indis-

34. The case as finally decided in 1865 after Taney's death is reported in 69 U.S. (2 Wall.) 561 (1864). Taney's opinion was published as an appendix in 117 U.S. 697 (1886).

35. Gordon v. United States, 117 U.S. 697, 702 (1886).

36. See, *e.g.*, *In re* Sanborn, 148 U.S. 222 (1893); Frasch v. Moore, 211 U.S. 1 (1908); Muskrat v. United States, 219 U.S. 346 (1911); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

37. 274 U.S. 123, 132 (1927).

pensable adjunct to the exercise of the judicial function" and thereby cleared a constitutional path for the Declaratory Judgment Act of 1934. Chief Justice Taney's Puritanical conception of the judicial function also led him to excoriate a feigned controversy designed to elicit a Supreme Court opinion in *Lord v. Veazie*.[38]

State Power and the Contract Clause

The outstanding contribution of Chief Justice Taney and the Court over which he presided was the emancipation of state power from the shackles forged for it by the Marshall Court in defense of vested interests of property and contract. This emancipation was begun during the first term of court over which Taney presided in his great opinion in *Charles River Bridge v. Warren Bridge*.[39] Here the Court held that authorization of the construction of a bridge across the Charles River which ultimately was to become a free bridge while the charter of a toll bridge nearby had many years to run was no impairment of the obligations of a contract in reasoning which lashed at monopoly and special privilege. With a degree of contempt appropriate to a member of the landed gentry toward trade he quoted approvingly an English case[40] to the effect that in "a bargain between a company of adventurers and the public . . . any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public," and the adventurers can claim nothing that is not clearly given.[41] In other words franchises, grants, and charters will be strictly construed and special privileges will not be deemed to be conferred by implication. This is so because "the object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."[42] He then pointed to the United States as a country which was "free, active, and enterprising, and continually advancing in numbers and wealth" so that new channels of transportation and communication were necessary. Progress in communication and transportation should not be obstructed by legal rules vesting exclusive privileges in existing facilities. Otherwise we should be "thrown back to the improvements of the last century" and obliged to stand still until the claims of turnpike companies are satisfied and they are ready to permit

38. 59 U.S. (18 How.) 25 (1850). Despite his tendency to exalt judicial power Taney lent his concurrence to the decision in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845), which upheld a broad power of Congress to regulate the jurisdiction of the federal courts.

39. 36 U.S. (11 Pet.) 420 (1837).

40. Stourbridge Canal Co. v. Wheeley, 2 Barn. & Adol. 792, 109 Eng. Rep. 1336 (K. B. 1831).

41. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 544 (1837).

42. *Id.* at 547.

the states "to avail themselves of the lights of modern science and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."[43]

This faith of Chief Justice Taney in reform and material progress was paralleled in *West River Bridge Co. v. Dix*[44] where Justice Daniel in the opinion of the Court in which Taney silently concurred declared that "the tenure of property is derived mediately or immediately from the sovereign power of the political body" and there is "nothing peculiar to a franchise which can class it higher, or render it more sacred than other property." All property, he continued, is held subject to "the paramount power and duty of the State to promote and protect the public good." The principles of the *Charles River Bridge* case were subsequently applied by Taney to hold that a state's taxing power was unaffected by the consolidation of two corporations because one of them enjoyed the privilege of tax exemption[45] and to refuse to extend privileges of tax exemption conferred upon banks to insurance companies.[46] In this latter ruling Taney made his customary obeisances to state sovereignty, took the position that no legislature could deprive its successors of the taxing power, asserted that since the company's charter contained no grant of a tax exemption it could not be implied, and declared that every contract in a charter presupposes that some consideration is given by the corporation that the community may benefit.

Sweeping as these assertions are of state power unrestricted by the contracts clause, they did not by any means destroy the utility of that clause as a protection to contractual rights. In *Bronson v. Kinzie*,[47] for example, Chief Justice Taney as spokesman for the Court, invalidated as applied to previous contracts an Illinois statute giving mortgagors the right to redeem property within twelve months from its sale by repaying the purchase money with ten per cent interest. Moreover, the opinion was written in terms which would have won for the most part the applause of John Marshall. To be sure the statute involved contracts between private persons, but Taney concurred in the result in the *State Bank of Ohio* case[48] where the Court invalidated an Ohio tax on banks because it was different from a semi-annual tax of six per cent on the net profits of banks in lieu of all other taxes as provided by the general banking act. Because the bank had been chartered under the earlier statute the tax provisions were regarded as a con-

43. *Id.* at 554.
44. 47 U.S. (6 How.) 507, 534 (1848).
45. Philadelphia, W. & B. R.R. v. Marvland. 51 U.S. (10 How.) 376 (1850).
46. Ohio Life Ins. Co. v. Debolt, 57 U.S. (16 How.) 416 (1854).
47. 42 U.S. (1 How.) 311 (1843).
48. State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854).

tract. Finally, Taney recognized that state court reversals of earlier decisions in exceptional situations could impair the obligations of contract as effectively as a statute.[49]

The tenor of other decisions of the Taney Court affecting corporations demonstrate that the Chief Justice and his brethren were far from being aggressively hostile toward corporations. Among these decisions are those defining citizenship for purposes of diversity jurisdiction,[50] attempting to create a general commercial law for the whole country,[51] and extending the admiralty jurisdiction of the federal courts to all of the navigable waters of the United States,[52] all of which are discussed elsewhere in this essay. One of the more significant cases revealing the alertness of Taney to the needs of the business community is his opinion in *Bank of Augusta v. Earle*.[53] Although Taney and a majority of the Court refused to accord to corporations the privileges and immunities of interstate citizenship and admitted on the other hand that the laws of a state creating a corporation could have no extraterritorial operation, with the result that a corporation could "have no legal existence out of the boundaries of the sovereignty where it is created," they went on to hold that a corporation chartered in one state could engage in business in another in the absence of clear and express prohibitions to the contrary. This conclusion was based upon the assumption that the comity of nations bound the sovereign states of the Union under the Constitution to a greater degree than it could be presumed to bind foreign nations. The decision, to be sure, left the states free to ban foreign corporations at their discretion and in this respect was in keeping with the theme of state sovereignty so often propounded by the Taney Court.

State Power and Interstate Commerce

One of the most persistent and troublesome questions which confronted the Court from 1824 until 1851 was whether the power of Congress to regulate interstate commerce was exclusive of state power; and, if not, to what extent the states could regulate such commerce. The issue was avoided by the Marshall Court in *Gibbons v. Ogden*[54] where the New York statute creating a steamboat monopoly was invalidated as being in conflict with an act of Congress rather than being void per se under the commerce clause over the protest of Justice Johnson who argued that the power of Congress to regulate commerce was exclusive. In *Gibbons v. Ogden,* too, Marshall referred

49. Ohio Life Ins. Co. v. Debolt, 57 U.S. (16 How.) 416 (1854).
50. Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).
51. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
52. Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852).
53. 37 U.S. (12 Pet.) 519, 588 (1839).
54. 22 U.S. (9 Wheat.) 1 (1824).

to the "immense mass" of state legislative power to enact police legislation. The question was avoided again by the Marshall Court in *Willson v. Blackbird Creek and Marsh Co.*[55] by the holding that Delaware could authorize the construction of a dam across a small navigable creek in the absence of an act of Congress designed to control navigation over small navigable streams. By the time Chief Justice Taney ascended the Court, the conflict between the power of Congress to regulate interstate commerce and the police power of the states had been complicated by the lengthening shadows cast by the controversy over slavery, and it is no exaggeration to say that the outlook of the Taney Court in handling commerce cases was consciously or unconsciously conditioned by considerations of the possible impact of its decisions upon slavery even in those cases in which slavery was not involved.

The first case to reach the Taney Court invoking the commerce clause and the police power was *Mayor of New York v. Miln*[56] where the Court, with Taney's silent concurrence, sustained a New York statute regulating ships coming into New York City in a manner designed to discourage the immigration of paupers on the ground that the statute was an internal police regulation and that persons were not a subject of commerce. Justice Barbour, who spoke for the Court, went on to invoke what he called the "undeniable and unlimited jurisdiction [of a state] over all persons and things within its territorial limits" unless restrained by the Constitution and to assert that "all those powers which relate merely to municipal legislation or . . . internal police, are not thus surrendered or restrained . . . ."[57] In other words, there is an area of state power which the commerce power cannot control and into which it cannot intrude. Ten years later the Court was again confronted with the issue in the *License Cases*[58] where the Court sustained statutes of Massachusetts, New Hampshire, and Rhode Island providing for the regulation of the sale of intoxicating liquors under license. Although the Court had no difficulty in agreeing upon the result, the judges could not agree upon the reasons for it and there were six separate opinions. Taney's opinion expressly assumed the existence of an internal traffic within each state which is separate from and independent of interstate commerce, and hence within the power of the state to regulate at its discretion and beyond the authority of Congress to control. Although a state may "prevent the introduction of disease, pestilence, or pauperism from abroad," these are not articles of commerce. Spirits and distilled liquors are articles of commerce,

55. 27 U.S. (2 Pet.) 245 (1829).
56. 36 U.S. (11 Pet.) 102 (1837).
57. *Id.* at 139.
58. 46 U.S. (5 How.) 504 (1847).

and since Congress authorizes their importation, no state can prohibit their introduction. However, he argued, the statutes in question did not purport to prevent the importation of liquors except insofar as the New Hampshire statute operated upon an import from another state while still in the hands of the importer for sale and thereby subject to federal control. Even so "the mere grant of power to the federal government cannot . . . be construed to be an absolute prohibition to the exercise of any power over the same subject by the States." Hence, a state may "for the safety or convenience of trade or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its territory; and such regulations are valid unless they come in conflict with a law of Congress."[59] In other words, the states have a concurrent power to regulate commerce and may exercise it not only in the absence of federal regulation, but also in conformity with existing federal regulation. If a state regulation of commerce conflicts with an act of Congress, then such regulation must yield to the supremacy clause in Taney's view.

The inability of the justices of the Supreme Court to agree upon a solution to the problem presented by the conflict between state power and the commerce clause presented itself even more dramatically in the *Passenger Cases*[60] where the Court by a vote of five to four invalidated statutes of New York and Massachusetts levying taxes upon immigrant aliens coming into their ports. Of the two statutes that of Massachusetts was the more stringent in that lunatics, idiots, paupers, and maimed, aged, and infirm persons could land only under bond as security against their becoming public charges. The New York statute also taxed at a lower rate American citizens from other states landing in the state from vessels employed in the coastal trade. Justice McLean argued that the commerce power of Congress was exclusive and should be reaffirmed. Justices Wayne, Catron, McKinley, and Grier in separate opinions thought such reaffirmation unnecessary. In dissent Taney was joined by Justice Nelson, and Justices Daniel and Woodbury dissented in separate opinions.

Taney's dissent in the *Passenger Cases* represents an extreme assertion of state authority at the expense of national power and national supremacy. As regards aliens he contended that "the several States have a right to remove from among their people, and prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion. whether the danger does or does not exist, free

59. *Id.* at 579.
60. 48 U.S. (7 How.) 283 (1849).

from the control of the general government."[61] The power of Congress to regulate interstate commerce did not in his view prevent the states from regulating it within their own territorial limits unless in conflict with an act of Congress. Taney pointed to the selection of immigrants by ship owners or masters, in many cases foreigners, and their possible disposition to bring in the worst and most dangerous elements of the population. He invoked the specter of a "mass of pauperism and vice" flooding a state with "tenants from their almshouses or workhouses, or felons from their jails" if Congress had the power attributed to it by the Court. Although Congress in his opinion could regulate the transportation of passengers in foreign vessels, it could not compel a state to receive or retain persons who were regarded as dangerous to its peace or the health of its citizens, or a burden upon its industrious citizens. In any event, passengers were not imports and could be taxed. Despite these grandiose assertions of state power, Taney thought the New York tax on American citizens unconstitutional, and he even made a concession to nationalism. "For all the great purposes for which the federal government was formed," he declared, "we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[62] This right he based upon the general rights of citizens of other states as members of the Union, a firmer ground than the Court has on occasion taken.[63]

The question of the exclusive nature of congressional power over interstate commerce was partially resolved in *Cooley v. Board of Port Wardens*[64] where Justice Curtis devised a formula which was approved by a majority of the Court including Taney. Under Curtis' formula emphasis was shifted from the nature of the power exercised to the nature of the subject matter regulated so that matters requiring uniform national regulation were subject to the exclusive power of Congress to regulate commerce and those not requiring it were subject to state regulation in the absence of congressional action. To be sure, the Taney court could not always agree upon those matters requiring uniform and those subject to diverse regulation as manifested by the decision in *Pennsylvania v. Wheeling and*

61. *Id.* at 467.

62. *Id.* at 492. In his opinion for the Court in Almy v. California, 65 U.S. (24 How.) 169 (1861), Chief Justice Taney pronounced invalid a California tax on bills of lading for shipment of gold and silver outside the state. The tax was regarded as a tax on exports and was held to be indistinguishable from the tax on imports in Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

63. Reference is made to the bizarre opinion of Justice Byrnes in Edwards v. California, 314 U.S. 160 (1941), where the right of an American citizen to enter a state is rested upon the commerce clause rather than upon the privileges and immunities of interstate or United States citizenship.

64. 53 U.S. (12 How.) 299 (1852).

Belmont Bridge Co.[65] A majority of the Court held invalid a Virginia statute which authorized the construction of a bridge across the Ohio River. The bridge obstructed navigation to the harassment of Pennsylvania which had expended large sums of money in canals and railroads and which saw its investments jeopardized. Chief Justice Taney and Justice Daniel dissented in separate opinions. The Chief Justice reiterated his customary theme that in the absence of congressional regulation of the subject matter Virginia's authorization of the bridge was a valid exercise of state power. Moreover, if the authorization were an evil it could easily be corrected by Congress. The failure of Congress to act did not in his belief warrant the judicial power to "step in and supply what the legislative authority has omitted to perform."[66]

From Taney's doctrines concerning the commerce power a number of propositions are explicit or implicit. First of all, there is the principle, for a time followed by the Court, that the existence of the states as political units possessed of reserved powers is a limit upon the power of Congress to regulate interstate commerce. Second, there is the assumption that there is a judicially definable line between what is interstate or foreign commerce and what is purely internal commerce as distinct and separate entities. This assumption in turn envisages commerce in terms of movement which has a beginning and an end, before and after which the states, and the states alone, may regulate.[67] Finally, even in the restrictive area of national power the states have concurrent powers to regulate interstate and foreign commerce in the absence of any conflict with an act of Congress. In other words the commerce clause of its own force does not preclude state action. Such theorems, it is unnecessary to state, not only exalted state power at the expense of national authority, but some of them rested upon a narrow and technical conception of commerce inconsistent with the grand purposes of the commerce clause and totally at variance with the realities of the economic order in Taney's own age.

Taney's emphasis upon state power with the result either of weakening constitutional limitations or of minimizing national power is shown in other opinions in which he spoke for the Court, concurred,

65. 54 U.S. (13 How.) 518 (1852).

66. *Id.* at 581. Approximately two months later Congress enacted a statute which set aside the decision in this case by declaring the bridge in question to be no obstruction to navigation. The validity of this statute was challenged in Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). The Court upheld the act as a valid regulation of commerce, and Taney was with the majority. Justice McLean protested that Congress had no power to annul a judgment of the Court. Justices Grier and Wayne agreed with him on this issue, but concurred in the result reached.

67. For a good treatment of the tenth amendment as a limit to the commerce power, see CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1936).

or dissented. During the first term he presided over the Court he joined the majority to sustain the power of Kentucky to authorize a state chartered bank to issue notes despite the prohibition in the Constitution against the emission of bills of credit by the states on the technical ground that the notes were not issued upon the credit of the state.[68] The effect of the decision was obviously to vest in the states a power to authorize a bank to do something they could not do themselves. In dissent Justice Story invoked the memory and views of Marshall in vain. In a brief concurring opinion in *Groves v. Slaughter*[69] Taney averred that the power over slavery and the introduction of slaves into their territory resided exclusively with the states and their action upon this subject could not be controlled either by virtue of the commerce power or any power conferred by the Constitution. Taney's tendency to look upon the grant of federal power as no prohibition of action by the states and to regard the union of states as possessing an international character is illustrated by his concurring opinion in *Cook v. Moffat*[70] where he reiterated the rule contended for earlier by Justice Johnson,[71] to the effect that the power of Congress to enact uniform bankruptcy laws is not exclusive. He then proceeded to declare that bankruptcy laws of the states have no force beyond their boundaries other than the respect and comity which the established usages of civilized nations extend to the bankrupt laws of another. How far such comity should be extended in his opinion was exclusively a matter for each state to determine for itself in the absence of any authorization by the Constitution to the federal courts to control them in this particular. Moreover, federal courts when administering state law were bound to follow the bankruptcy laws of the state in which they were sitting. A similar solicitude for state power is shown in *Mager v. Grima*,[72] where a unanimous Court speaking by the Chief Justice sustained a Louisiana tax on legacies when the legatee was not a citizen of the United States or domiciled within the state. The tax in question, he reasoned, was nothing more than an exercise of the power possessed by every state and sovereignty to regulate the manner and terms of inheritance. Because every state or nation could refuse to permit aliens to inherit property within its limits Louisiana could subject inheritance by aliens to specified conditions. Seven years later this decision was followed in *Prevost v. Greeneaux*[73] where the same tax was sustained on the ground that a subsequent treaty of 1853 with France accorded French nationals the right to take or own property in the United

68. Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).
69. 40 U.S. (15 Pet.) 449, 508 (1841).
70. 46 U.S. (5 How.) 295, 309, 311 (1847).
71. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 271 (1827).
72. 49 U.S. (8 How.) 490 (1850).
73. 60 U.S. (19 How.) 1 (1857).

States if the laws of the states permitted it. Of greater significance than the ruling is Taney's comment that a subsequent treaty could not divest the state of rights of property under a tax law even if it conveyed such an intention. In other words the power of the states to regulate the holding or taking of property limits the treaty power and the power of Congress to provide minimum standards of justice for the treatment of aliens.

National Power

Despite its preoccupation with preserving state power in any conflict with federal authority there are cases in which the Taney Court sustained national supremacy. In many of these, to be sure, federal power was sustained in a parsimonious manner in qualified language so that the Court's enthusiasm for national power was hardly infectious. Even in *Ableman v. Booth*[74] federal judicial supremacy was asserted in terms of dual sovereignty. In a few cases, however, Taney was unqualifiedly on the side of federal power and national supremacy. In *Holmes v. Jennison*,[75] for example, the Court was evenly divided on the question of whether the Governor of Vermont could surrender a fugitive charged with murder to Canadian authorities. Joined by the nationalists, Story, McLean, and Wayne, Taney asserted that the power exercised by Vermont was a part of the foreign relations of the United States and particularly of the treaty power. The grant of power to the national government to conduct foreign relations and to make treaties when combined with the prohibition against the states' entering into any agreement or compact with a foreign power effectively rendered the national treaty power exclusive. Accordingly, any delivery of a fugitive to a foreign state would constitute an agreement or compact under the doctrine that the constitution has regard to substance and not form. He concluded by pointing to the confusion and disorder which would flow from state rendition of fugitives to foreign authorities and to the lack of any advantage that would accrue to the states. Similarly, Taney gave his tacit assent to Justice Wayne's opinion for a unanimous Court that a Pennsylvania county could not levy a tax upon the office of a captain of a federal revenue cutter on grounds of national supremacy.[76]

The relatively unimportant question of whether Tampico became a part of the United States within the meaning of the customs laws as a result of its conquest and occupation during the Mexican War arose in *Fleming v. Page*.[77] This afforded Chief Justice Taney an opportunity to discuss the nature of the war power and the powers

74. 62 U.S. (21 How.) 506 (1859).
75. 39 U.S. (14 Pet.) 540 (1840).
76. Dobbins v. Erie County, 41 U.S. (16 Pet.) 434 (1842).
77. 50 U.S. (9 How.) 603 (1850).

of the President as commander-in-chief of the armed forces. The "genius and character of our institutions are peaceful," he said, "and the power of Congress to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement," but to enable the general government to enforce its own rights or those of its citizens by arms. Accordingly a war declared by Congress "can never be presumed to be waged for the purpose of conquest or acquisition of territory." Although the United States may extend its boundaries by conquest, it can do so only by the exercise of the treaty power or legislative authority. The President cannot annex territory as commander-in-chief, because his powers in this respect are purely military and relate only to the direction and employment of the armed forces in such a way as he may deem most effectual to harass and conquer the enemy.[78] This restrictive conception of the war and his respect for private property converged in *Mitchell v. Harmony*[79] to lead Taney and a majority of the Court to limit the powers of military commanders to seize private property by holding that an army officer cannot plead in his defense in a civil suit the illegal order of a superior. Although admitting the power of the military to seize private property to keep it from falling into the hands of the enemy or to take it for public use with full compensation, in all cases "the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay," and is not justified just "to insure the success of a distant and hazardous expedition." It is the duty of the Court to determine the circumstances in which private property may be taken by a military officer in time of war, and the law does not permit it "to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake."

In *Jecker v. Montgomery*,[80] a third case arising out of the Mexican War, Chief Justice Taney spoke for the Court which unanimously held that neither the President nor any military officer could establish a prize court in a conquered country and authorize it to adjudicate the claims of the United States or of private persons in prize cases or to administer the law of nations. The decision was based upon the principle that every court of the United States must derive its jurisdiction and power from the Constitution or laws of the United States under the clause in Article III which vests the judicial power of the United States in one Supreme Court and such inferior courts as Congress may ordain and establish. Accordingly, a tribunal created in Monterey by a naval commander and sanctioned by the President was held to be no more than an agent of the military power

78. *Id.* at 614.
79. 54 U.S. (13 How.) 115, 134 (1852).
80. 54 U.S. (13 How.) 498 (1852).

and in no sense a court of the United States with authority to adjudicate prize cases.

With such conceptions of the war power and the authority of the President as commander-in-chief, it was inevitable that Taney would privately question the assumption of war powers by President Lincoln during the Civil War and that he would officially challenge the exercise of presidential power when the issue was properly presented in a case. On April 27, 1861, as a consequence of disorders in Maryland Lincoln ordered General Scott to suspend the writ of habeas corpus if in his judgment the public safety required it. Soon afterwards an active secessionist, John Merryman, was arrested upon military orders and confined to Fort McHenry. A petition for his release in habeas corpus proceedings was presented to Taney who issued the writ directing General Cadwalader to bring Merryman before him for a hearing. Cadwalader refused to do this until so ordered by the President, whereupon Taney directed that an attachment be issued against him, but then the military authorities refused to permit the marshal to enter the fort in order to serve the writ. Taney then wrote his opinion in *Ex parte Merryman*[81] where he contended that only Congress could suspend the writ of habeas corpus and strongly denounced the President's action on the ground that the civil administration of justice in Maryland was unobstructed save for the intervention of the military who in the circumstances could not lawfully supersede the civil authorities. The principle that only Congress can suspend the issue of the writ of habeas corpus and then only in those areas where the civil courts are not open and functioning was accepted by the Court soon after the Civil War ended when guided by the afterthought that springs from the wisdom of hindsight a majority of the justices celebrated the ritual that the Constitution obtains in war as well as peace, once the war is ended.[82] In other ways Taney expressed his opposition to what he regarded as an arbitrary military despotism and looked forward to a peaceful separation of North and South as "far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished."[83]

Late in his career the Chief Justice wrote the opinion for the Court in

81. 17 Fed. Cas. 144, No. 9487 (C.C.D. Md. 1861).

82. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946).

83. SWISHER, ROGER B. TANEY 554 (1935) (Letter to Franklin Pierce, June 12, 1861). Interestingly enough is Taney's tacit concurrence with Justice Grier's opinion in the Prize Cases, 67 U.S. (2 Black) 635 (1863), which sustained the President's power to meet force with force in the Civil War and to institute a blockade of Confederate ports in the absence of a declaration of war by Congress. Taney did dissent to the Court's decision concerning one of the vessels condemned as prize of war.

Kentucky v. Dennison[84] which is representative of his views on national power as mitigated by the federal principle. The case involved the refusal of the Governor of Ohio to surrender a fugitive from Kentucky under the extradition clause of the Constitution as implemented by an Act of Congress of 1793. The language of the Constitution and the statute is as imperative as the force of words can be, but Chief Justice Taney held that the duty of a governor upon whom a demand is made for the rendition of a fugitive from justice, though mandatory, is a moral and not a legal obligation and hence unenforceable either judicially or legislatively. The reasoning of the opinion is interesting. It begins with a historical account of extradition proceedings in the American colonies, under the Articles of Confederation and the Constitution of 1789. In this account Taney lays down as historical truth the propositions that the thirteen colonies became separate and independent sovereignties by virtue of the Declaration of Independence and that the states preserved their sovereignty under the Articles of Confederation and the Constitution. Moreover, the extradition clause in Article IV is regarded as a compact among these independent sovereignties and the Act of Congress of 1793 as providing no means for compelling a state to perform the moral duty of surrendering fugitives from justice upon the requisition of other states. Nor does the Constitution arm the federal government with this power. "Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state."[85]

All this seems to be a circuitous way of saying that the governor of a state cannot refuse to surrender a fugitive from justice in extradition proceedings, but if he does, nothing can be done about it. Such a line of reasoning not only runs counter to the "necessary and proper" and "supremacy" clauses of the Constitution, but in rendering the extradition clause totally impotent, it ran counter to one of Taney's own cherished canons of constitutional interpretation. This doctrine was that in expounding the Constitution "every word must have its due force and appropriate meaning; for it is evident that no word was unnecessarily used or needlessly added."[86] The

84. 65 U.S. (24 How.) 66 (1861).
85. *Id.* at 107.
86. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570 (1840).

opinion, however, did conform to his conception of dual sovereignties operating through the malfeasance of circumstance in only one geographical area.

SLAVERY

Disasters of the magnitude of the *Dred Scott* case are neither born of immaculate conception nor produced through spontaneous generation. Indeed, as regards the *Dred Scott* opinion, events and Supreme Court decisions in some ways seemed to have been marching in step to an inexorable tragic dénouement. In the disposition of constitutional issues arising from slavery Chief Justice Taney and his Court brought to bear doctrines expounded in decisions having no direct relation to the "peculiar institution," although references to slavery in some of these opinions[87] lend partial support to the conclusion that the Court devised such contrivances as dual federalism for the purpose of handling slavery cases presented to it. In any event the doctrine of state sovereignty which the Taney Court had used so effectively to permit the states to embark upon social and economic reforms was equally potent as an instrument for the protection of slavery and the advancement of reaction.

In *Groves v. Slaughter*[88] the opinion of the Court by Justice Thompson held that a provision of the Mississippi constitution prohibiting the importation of slaves as merchandise after 1833 was not self-executing and that in the absence of implementing legislation contracts to bring slaves into Mississippi for sale were valid. However, the anti-slavery McLean, ever eager to decide issues arising out of slavery on a broader basis than the case necessitated, wrote a concurring opinion in which he pointed to the exclusion of slaves from the operation of the commerce clause by the compromise concerning the slave trade and concluded that the power of slavery being local in character belonged to the states. Such a power was necessary to them in order to protect themselves against "the avarice and intrusion of the slave dealer" and to guard its citizens "against the inconveniences and dangers of a slave population." The right to exercise this power he placed "higher and deeper" than the Constitution and rested it upon the law of self-preservation.[89] This provoked Taney into writing a brief concurrence in which he asserted that the power over slavery was exclusively vested in the states and that slavery could not be controlled by Congress under the commerce clause or any other provision of the Constitution.

One of the more troublesome issues arising out of the slavery controversy was the question of national and state power over the

87. Notably, Taney's opinion in the Passenger Cases, 48 U.S. (7 How.) 282, 464, 474 (1849).
88. 40 U.S. (15 Pet.) 449 (1841).
89. *Id.* at 508.

capture and return of fugitive slaves. In *Prigg v. Pennsylvania*[90] the Court invalidated a Pennsylvania statute relating to fugitive slaves, and by implication all other statutes thereon, because the power of Congress to enforce the provisions of the Constitution providing for the surrender of escaped slaves was held to be exclusive and by its own force to prohibit state action on the subject. In his opinion for the Court Justice Story also intimated that it might be unconstitutional to impose upon the states the obligation to enforce the duties of the federal government. The nationalistic opinion of Story evoked protests from a strong minority of the Court who concurred in the result. Taney objected in particular to those portions of the opinion holding the power of Congress over fugitive slaves to be exclusive and implying that state officials were absolved from any duty to protect an owner's right to fugitive slaves. Justices Thompson, Baldwin, and Daniel also took exception to the opinion. Justice Wayne concurred altogether with Story, and Justice McLean differed on only one point, that concerning the lack of any obligation of the states to enforce the fugitive slave law. Justices Catron and McKinley tacitly concurred in Story's opinion. The plethora of opinions in the *Prigg* case and the divergent reasoning expounded in them provoked the acidulous John Quincy Adams with usual exaggeration to characterize the opinions as "everyone of them dissenting from all the rest, and everyone coming to the same conclusion, the transcendent omnipotence of slavery in these United States, riveted by a clause in the Constitution."[91]

One fact that the *Prigg* decision did indicate was that the Court was sharply and almost hopelessly divided over the issues arising out of the slavery controversy whenever it went beyond the bare necessities of the case to decide questions on a broader basis. The case could readily have been settled upon the basis, which Story himself discussed, that the Fugitive Slave Act superseded all state legislation on the subject; and had that been done the Court undoubtedly would have been less divided despite the nationalistic tendencies of McLean and Wayne to hold the powers of Congress generally exclusive and hence prohibitory of state action. Whether considerations of this nature influenced the Court is a matter of rank speculation, but eight years later the Court achieved a remarkable unity in a slavery decision with only two brief concurring opinions. The case was *Strader v. Graham*,[92] involving the status of slaves who occasionally were carried by their masters into Ohio temporarily and then returned to Kentucky. Speaking for the Court, Chief Justice Taney pointed to the "undoubted right" of every

90. 41 U.S. (16 Pet.) 539 (1842).
91. Quoted in 2 WARREN, *op. cit. supra* note 2, at 359.
92. Strader v. Graham, 51 U.S. (10 How.) 82, 93 (1851).

state "to determine the status, or domestic and social condition of the persons residing within its territory," except insofar as state power may be limited by the Constitution. He found nothing in the Constitution to control the law of Kentucky upon this subject, and concluded that the status of the negroes depended altogether upon the laws of Kentucky after their return to the state. The *Strader* decision by virtue of its confinement to the narrow issues presented in the case pointed to a moral, but the justices either did not comprehend; or if they comprehended they did not heed, with tragic consequences to the country and the Court.

In most relevant respects the *Dred Scott* case resembled *Strader v. Graham.* Like the slave musicians who had been taken to Ohio the previously anonymous Dred Scott had also been taken by his master from a slave state, Missouri, into free territory, first to Illinois for approximately two years and then to Fort Snelling in the Territory of Upper Louisiana for approximately two more years after which his master returned to Missouri with Scott and his family. Ultimately the Scotts were sold to Sanford who was close to the abolitionist movement and consented to the bringing of friendly proceedings in the state courts to determine Scott's status. The Supreme Court of Missouri ruled that Scott was still a slave under the laws of the state. Scott then brought a suit in the United States Circuit Court in Missouri which decided his case in the same way. The only differences between Dred Scott's case and *Strader v. Graham* were: first, that Scott had been removed to free territory for a longer period of time than the minstrel slaves, and once into a territory of the United States in which slavery had been prohibited by the Missouri Compromise; and, second, that he had brought suit subsequently in a federal circuit court and thereby raised the issue of his citizenship. Neither of these differences was sufficient to warrant a departure from the manner used in disposing of the *Strader* case, but after a second hearing the Court decided to determine the broader issue of Scott's citizenship and the constitutionality of the Missouri Compromise.

The reasons for the Court's singular action in deciding the merits of the *Dred Scott* case over which it had no jurisdiction are well known, are outside the domain of constitutional law, and need no detailed recapitulation. Suffice it to say that as the slavery controversy grew in bitterness and intensity, it increased the hazards to the political life expectancy of statesmen in and out of Congress. Accordingly an effective majority in Congress supported by ambitious politicians outside was more than eager to shift the settlement of the slavery dispute and the responsibility for it to the Supreme Court under a policy of congressional non-intervention which was in-

corporated into law by the Great Compromise of 1850[93] and the Kansas-Nebraska Act of 1854.[94] A few years later that uneasy and inept politician, James Buchanan, as President-elect of the United States was corresponding with two justices of the Supreme Court in an effort to induce Justice Grier to join with other judges to settle the slavery issue and take it out of politics.[95] Moreover, Justice McLean whose flaming presidential aspirations were never snuffed by lack of air in the judicial sanctuary made it known that he and Justice Curtis would discuss the merits of the case in dissents, and thereby in a sense provoked the other judges to answer them. It is most probable, too, that Taney and his brethren actually believed they could settle a political question within the framework of judicial procedure. Finally, the action was perhaps but a logical culmination to what had been an overweening solicitude for property in the form of slaves even to the evisceration of national power. But whatever the reasons, the majority of the Court abandoned its original plan to dispose of the case on narrow issues and what was to have been Justice Nelson's opinion for the Court based on *Strader v. Graham* became only one in a series of six concurring opinions following that of Chief Justice Taney's opinion for the Court.

In reaching the conclusion that Dred Scott was still a slave, despite his nomadic wanderings as the servant of an army officer, Chief Justice Taney laid down three propositions any one of which was more important than the status of Dred Scott. The first was that the negro was not a citizen of the United States or of any state and could not become a citizen under the Constitution. In the second place, Taney ruled that Congress had no power to regulate slavery in the territories under a very narrow interpretation of congressional authority over territories generally. Finally, he dragged in the due process clause of the fifth amendment by the scruff of the neck to assert without further support that an act of Congress which deprived a person of his liberty or property because he came or brought his property into a territory of the United States "could hardly be dignified with the name of due process of law."[96] Aside from noting

93. 9 STAT. 446, 453 (1850).

94. 10 STAT. 277 (1854). The various proposals in Congress to leave to the Court the settlement of the issue of slavery in the territories is well told in Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1953). See also 2 WARREN, *op. cit. supra* note 2, at 481-98; MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 513-14, 520-22, 525-26, 540-50 (1935).

95. Catron wrote a letter to Buchanan suggesting that he "drop Grier a line" concerning the necessity of settling the agitation over slavery. Buchanan apparently did so, and Grier wrote to Buchanan a detailed account of how the judges were to treat the case and showed it to Wayne and Taney. These letters are reproduced in 3 WARREN, *op. cit. supra* note 2, 16-19. In his inaugural address on March 4, 1857, Buchanan, who already knew what the Court's decision would be, pronounced the issue of slavery in the territories "a judicial question."

96. 60 U.S. (19 How.) at 450.

that this was the first time that an official opinion of the Supreme Court of the United States expressly held the due process clause to be a limitation upon legislative power no other comment is necessary. The first two propositions are worthy of analysis because of the labyrinthine reasoning underlying them.

To support his conclusion that a negro was not an could not be a citizen of a state or of the United States Taney emphasized citizenship in terms of those persons who were citizens at the time of the adoption of the Constitution. This led him to make the frequently distorted and misunderstood assertion 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."[97] Taney then invoked English law, colonial legislation, and early state statutes to argue that the negro was not a citizen of the United States or of any state at the time of the adoption of the Constitution. Much of the legislation cited bore little or no relevance to citizenship including as it did prohibitions against miscegenation, requirements for the registration of free negroes, prohibitions against the education of negroes, and exclusion of negroes from the militia and the suffrage. He also appealed to the texts of the Declaration of Independence, the Articles of Confederation, and the Constitution. The spurious nature of these arguments was not neglected by the dissenters. Justice Curtis' dissent is particularly relevant: first, for its emphasis upon the rule prior to the Fourteenth Amendment that state citizenship was primary and national citizenship secondary so that native born citizens of a state were also citizens of the United States; and, second, for his citation of laws showing that negroes were citizens of five states[98] and therefore citizens of the United States at the time of the adoption of the Constitution.

Having determined that Dred Scott was not a citizen and the federal courts had no jurisdiction of the suit under that clause of the constitution extending the judicial power to suits between citizens of different states, Taney might have concluded his opinion; but he and a majority of the Court were men with a mission. Hence, they were dangerous, as men with a mission sometimes are when they miscalculate the consequences of their acts. And lawyers and judges, of all people, insist most upon the principle that a man intends the consequences of his acts. Accordingly, Taney proceeded with even more spurious reasoning to decide the delicate issue of the power of

97. *Id.* at 404-05.
98. *Id.* at 572-89. The states were Massachusetts, New Hampshire, New Jersey, New York, and North Carolina.

Congress to regulate slavery in the territories, an issue which most judicious and ambitious politicians had avoided out of temerity, prudence, or both.

To substantiate the conclusion that Congress has no general power of legislation in territories of the United States Taney construed most narrowly the power of Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This power, Taney argued, had no connection with the general powers of legislation delegated to the Federal Government, but was associated with a specified power over movable property. Moreover, he argued that the term "rules and regulations" was employed in contrast to general powers of legislation and therefore conferred no power upon Congress to prevent a citizen from taking his property into a territory of the United States. From this argument Taney proceeded to declare that Congress had no constitutional power to acquire and maintain colonies to be ruled at its own pleasure and no authority to enlarge its territorial limits in any way except by the admission of new states. Hence citizens of the United States who migrate to a territory of the United States could not be treated as colonists. Whatever territory the federal government annexes "it acquires for the benefit of the people of the several States who created it. It is their trustee, acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted."[99] The power to acquire territory, Taney grudgingly conceded, carried with it the power to establish a government for it, and with respect to the form of government he conceded to Congress a broad discretion. However, when territory is acquired "the Federal government enters into possession in the character impressed upon it . . . with its powers over the citizen strictly defined, and limited by the Constitution"[100] in terms of express prohibitions, delegated powers, and the character of the Union as a federation "of States, sovereign and independent within their own limits . . . and bound together by a general government, possessing certain enumerated and restricted powers."[101]

In the process of his argument Taney quoted but misconstrued Marshall's opinion in *American Ins. Co. v. Canter*[102] where it was made clear that whatever the source from which Congress derives

99. 60 U.S. (19 How.) at 450. The argument that territory can be acquired only for the purpose of forming one or more states was perhaps not wholly consistent with the aspirations of pro-slavery imperialists to acquire territory that would have required long tutelage to become a state if indeed it ever would have; but after all there was little consistency in the constitutional arguments of either side in the agitation over slavery.

100. *Id.* at 449.

101. *Id.* at 447-48.

102. 26 U.S. (1 Pet.) 511, 542 (1828).

the power to govern territories it is unquestionable. However, as regards federal authority Marshall and Taney had their own different definitions of the power to govern; and with respect to territory Taney used his cherished concept of dual sovereignty to limit federal power to acquire it and to govern it afterwards. In any event he limited the war and treaty powers as sources of power to acquire territory by what Justice Holmes once called the "invisible radiation from the general terms of the 10th amendment"[103] and emasculated the power of Congress to govern territories which in the last analysis is as broad within a territory as that of a legislature is within a state. In so doing he ignored Marshall's admonition against construing the Constitution as though it were a deed or a contract and repudiated some of his own conceptions of governmental power and the adaptation of the Constitution to the growth of the country and technological developments. The consequences to the Court over which he presided were disastrous. To protect slavery, Taney performed an act of judicial immolation from which the Court did not recover until approximately a quarter of a century later when it aligned itself with the rising industrial oligarchy as the guardian of the kind of property Taney would have liked least.

Conclusion

Two major themes characterize Taney's constitutional opinions. One has to do with the power and duty of government, primarily the state governments, actively to legislate for the health, happiness, and welfare of all the people. The other is the theme of dual sovereignty with emphasis upon a limitation of national power. The first theme has such corollaries as beliefs in progress, in the adaptation of law to new conditions, in the limitations of the judicial power to decide issues of social policy, and hence in the competence and power of the legislature. The second theme with its emphasis on a precise line of demarcation between national and state power subject to judicial determination under an unchanging Constitution has as its corollaries conceptions of inactive government at the national level, of a static and conceptualistic jurisprudence, of the omnicompetence of the federal judiciary, and of a Congress of narrowly contracted powers. The first theme was and in a real sense continues to be a prophecy of reform; the second for a long time was a prophecy of reaction as regards judicial interpretation and continues to be such in a political context.

As a judicial spokesman of Jacksonian reform Taney laid the foundations of the police power and the welfare state. As a spokesman of reaction he contributed to the erection of a superstructure of constitutional limitations which long after his death was to obstruct

103. Missouri v. Holland, 252 U.S. 416, 434 (1920).

Congress in its efforts to regulate the national economy characterized by clusters of concentrated economic power greater than that ever possessed by the United States Bank,[104] and to hamper national attempts to mitigate the conditions of labor.[105] Moreover, by infusing the due process clause with a substantive content as a limit upon congressional power he contributed in part to the conversion of due process into an instrument for the judicial veto of state legislation enacted in pursuance of the police power.[106] To be sure Taney could hardly have anticipated the consequences of his doctrines, and if he had he would hardly have approved of some of the uses to which they were put. After all, Taney, in emphasizing states rights, did believe in the active exercise of state powers and in this respect was intellectually remote from those antagonists of governmental power who later used the tenth amendment to constrict national power and, simultaneously, the fourteenth to restrict state power over the same subject matter. His basic error in this respect was his confidence in the capacity of the state governments to control large segments of economic power which like the Bank challenged the authority of all government, national and state. In relying upon state power for executing most of the great tasks of government Taney lacked the tough realism which was characteristic of his thought on the Bank and corporate charters.

To say that Taney was a prophet of reform and reaction is to speak in terms of paradox; but Taney's life and career were in many respects a paradox, both personally and officially. As a Catholic educated at a Presbyterian college, he imbibed the tenets of each religious faith, and his political beliefs reflected the influence of each. However, in his belief in material progress, his lack of sympathy, except in an abstract way, for paupers, slaves and other submerged persons, he was closer to the man from Geneva and the Puritan than to the Catholic ethic. Similarly, his lack of concern for the natural law was not Catholic. Emphasis upon the positive law led in turn to a neglect of natural rights and personal liberty. Taney's only concern for personal liberty is reflected in his opinions on Lincoln's conduct of the Civil War by the exercise of what he regarded as despotic military powers and his fear of the Bank as a threat to the liberty of the

104. The more notable dual federalism cases limiting congressional power to regulate the economy under the commerce and taxing powers are: Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

105. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918).

106. Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923), and the line of cases following it; Smyth v. Ames, 169 U.S. 466 (1898), and its progeny of cases, among others.

people in a political context. Moreover, liberty like the right of property, and other rights, was founded on the positive law. Physically Taney combined extremely frail health with excessive longevity, and physical frailty contributed to an asceticism in his private life and his judicial utterances. As a descendant of an indentured servant he did not care to have many more like his ancestor enter the country. As a man of a reticent and retiring nature he lived much of his long life in the spotlight of public controversy which he did not relish, but from which he did not shrink.

As a jurist he made significant innovations in constitutional law without destroying its continuity and he supplemented Marshall's work in such a way that much of constitutional law ever since has been based upon the respective foundations laid by these two Chief Justices, sometimes the foundations of Marshall, sometimes those of Taney, and sometimes those of each in combination. Although it would be oversimplification and even exaggeration to say that constitutional interpretation after 1937 has been nothing more than a blend of Marshall's and Taney's views on national power and social legislation respectively, it is true that since 1937 the Court has generally followed Marshall in its conceptions of national power and Taney when he spoke as the prophet of reform. Marshall and Taney were great Chief Justices in their separate ways, but each lived long enough to corroborate at least partially Justice Holmes' harsh dictum that "all society rests on the death of men."[107]

107. 1 HOLMES-LASKI LETTERS 431 (Howe ed. 1953).