TANEY'S INFLUENCE ON CONSTITUTIONAL LAW

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THE hundredth anniversary of the elevation of Roger Brooke Taney to the post of Chief Justice of the Supreme Court affords a fitting occasion to review the significance of his judicial services to the nation and to American constitutional law. A re-examination of his life work in the perspective of history indicates how unwise it often is to form rigid judgments on men and events in the excitement of contemporary emotion, for the harsh opinions which Taney evoked by his decisions on the slavery question have been tempered in the detached light of reason. The historical cloud under which his name so long rested because of his views on the constitutional issues arising out of slavery, has diverted popular though not professional attention from the distinguished judicial service he rendered the country in other matters over a period of twenty-eight years as Chief Justice. Learned, profound, objective and by nature a just man of impeccable character, he represents the finest traditions of the American judiciary. Though gentle, courteous and kindly, he was vigorous and convincing in the assertion of his legal positions and, in the light of a century of perspective, remarkably sound and prophetic. The brilliance and vigor of the Jackson Administration derived substance and spirit from the powerful mind of Taney, Jackson's Attorney General and Secretary of the Treasury. Taney's attack on the United States Bank was conceived in no narrow bias, but was founded on broad but determined views of public policy. And if, in the partisanship of that contest, his first appointment as Associate Justice of the Court was rejected by the Senate, Taney lived to see himself confirmed as Chief Justice over the opposition of political enemies, and had the satisfaction of receiving an apology and retraction from one of their leaders, Henry Clay, who manfully admitted that his opposition had not been well-founded.

Taney came to the Court after many of the guiding lines

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of constitutional development had already been laid out by Marshall. Taney had been a Federalist himself, and saw no objection to strong federal power when this seemed necessary in the interests of national unity. He was less politically partisan than Marshall in this respect, because he had become a Jeffersonian Democrat and was perhaps better able to appreciate the necessities of state power and of limitations on federal control. While devoted to the constitutional philosophy of inalienable individual rights—except for Negroes—to be protected against the government and the official hierarchy by safeguards expressly incorporated in the earlier Amendments, he nevertheless recognized the necessity for governmental control of private activity in a growing industrial society. While his most striking constitutional decision was overruled at Appomattox and while he lived before the great industrial expansion which tested mightily a people's and a Court's capacity to adjust a written Constitution to the needs of a dynamic society, nevertheless some of the fundamental principles of government control, if not of the social struggle, were hammered out in the period during which Taney presided over the Supreme Court.

Although Taney's background as a country gentleman and landholder identified primarily with agricultural interests is supposed to explain his hostility to the growth of corporations and the influence of urban capital, a decision like that in *Bank of Augusta* v. *Earle* [1] confutes the theory of a deep-seated prejudice. Coming after the great Federalist Marshall, at a time when industry and population were beginning to grow and with them the necessity for police power regulation, it is perfectly natural that he should have perceived the propriety of limiting private liberty and property in the public interest. His democracy was genuine and his interest in public welfare that of the liberal. It was therefore consistent, in the light of such state decisions as *Baker* v. *Boston*,[2] recognizing the necessity of public encroachment on theretofore unrestricted private interests, that Taney should sustain the State's police power in such cases

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[1] 13 Pet. 141 (1840) (permitting a corporation to migrate and do business outside the state of its creation, assent thereto by the new state being assumed unless expressly denied).

[2] 12 Pick. 184 (Mass. 1831); *cf.* Commonwealth *v.* Alger, 7 Cush. 53 (Mass. 1851).

as *City of New York* v. *Miln*,[3] in the *Passenger Cases*,[4] the *License Cases*[5] and the *Warren Bridge case*.[6] If this is conceived as a predilection for State's Rights, it was a healthy reaction from the centralizing tendencies of Marshall which perhaps proceeded too rapidly.

But at that time the principal federal limitations on state police power were the interstate commerce and the contract clauses, and Taney was notoriously averse to evolving a subjective limitation out of his own conscience under the title of natural law, later so commonly wrapt in the phrase "due process of law" of the 14th Amendment.[7] If Taney manifested a disposition to support the theory of concurrent power over interstate commerce until Congress took over the field,[8] he was in the best tradition of the modern Court which also respects the right of the states to control their internal affairs until it becomes plain that the national power must be unhampered by local restrictions. It is safer to err on the side of the concurrent power, for if Congress thinks the power should be exclusively federal, it is simple so to provide. Probably Taney would have joined the dissenting minority in *Di Santo* v. *Commonwealth of Pennsylvania*[9] and in *Southern Pacific Co.* v. *Jensen*[10] and would have been sustained by much professional opinion in so doing. Taney's opinion in the *New Hampshire License*

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[3] 11 Pet. 102 (1837). New York regulations to prevent the settlement of immigrants likely to become public charges. Thompson, J., was designated to write the opinion, but on a division as to the commerce power, Barbour, J., assumed the task. Parts of the opinion were objectionable to some of the judges.

[4] 7 How. 283 (1848). Taney dissented from the Court's opinion holding invalid a New York law which imposed a tax on incoming foreign passengers to maintain a marine hospital, and a Massachusetts law requiring the master to file a bond that the passenger would not become a public charge. The nine judges wrote eight opinions, indicating the confusion. The Court divided, five to four. Taney's opinion is striking.

[5] 5 How. 573 (1847) (that the states had the right to regulate the sale of liquor even though coming from another state).

[6] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 (1837).

[7] *Cf.* decision of Taft, C. J. in Truax *v.* Corrigan, 257 U. S. 312 (1921).

[8] *Cf.* opinion in Cooley *v.* Port Wardens, 12 How. 299 (1852), in which Taney was one of the majority judges.

[9] 273 U. S. 34 (1927).

[10] 244 U. S. 205 (1917). The unhappy progeny of this case has seriously impaired the rights of longshoremen and harbor workers, who even under the federal Act are threatened with the necessity of litigation over an issue of jurisdiction, state or federal.

case,[11] had it been followed and not overruled by the *Bowman case* in 1888,[12] would have made unnecessary the Wilson Act, the Webb-Kenyon Act and the Reed Amendment, which practically brought the law back to the point where Taney would have left it, and then went beyond in enlarging state control over the liquor traffic.

Taney's Court had no occasion to deal with the acute problem as to how far the Federal Government may legislate for the economic welfare of the country under the interstate commerce power. The cases before the Court involved the extent to which the commerce clause limited the state's right to regulate by legislation matters which it considered necessary for its own protection. No dogmatic formula could decide this issue and in the solution of particular case problems the judges differed greatly. Possibly the fear of federal aids to business, or of federal control of the slave traffic and slavery, impelled the Jackson appointed judges to lean to the support of state power unless it conflicted with federal legislation. At all events, Taney, who was not averse to the public control of business, did not feel it necessary strictly to limit state legislation by virtue of the commerce clause. Even into this problem there was injected the embittered issue of slavery, for when Mississippi sought in 1832 to prevent the further importation of slaves, the members of the Court in vigorous dicta expressed divergent views on the state's power thus to interfere with interstate commerce.[13]

But if Taney was merely a State's Rights man, how can one account for such powerful federalizing opinions as *Ableman* v. *Booth*,[14] a landmark in constitutional law, denying the state's power to interfere with the jurisdiction of the federal courts over a federal prisoner; as *Holmes* v. *Jennison*,[15] affirming the exclusive federal power over extradition; as *Dobbins* v. *Erie County*,[16] denying the state's power to tax the compensation of a federal officer; as *Almy* v. *California*,[17] denying the state's

[11] 5 How. 577 (1847) (sustaining the state's power to control the liquor traffic).

[12] Bowman *v.* Chicago and N. W. R. Co., 125 U. S. 465 (1888) (holding that liquor remains in interstate commerce until its arrival in the state and its sale in the original package).

[13] Groves *v.* Slaughter, 15 Pet. 449 (1841), described in SWISHER, ROGER B. TANEY (1935) 396-399.

[14] 21 How. 506 (1858).

[15] 14 Pet. 540 (1840).

[16] 16 Pet. 435 (1842) (Taney concurred).

[17] 24 How. 169 (1860).

power to tax commodities leaving the state. Even in the first of the *License Cases* [18] he had shown an excellent appreciation of the line between federal and state power over interstate commerce, and denied the right of a state to prevent the importation of liquor from other states.

In the *Genesee Chief* [19] Taney sustained the federal power over all navigable waters, and breaking with the narrow view of Marshall and Story in *The Thomas Jefferson* [20] that ebb and flow were the criterion of the admiralty jurisdiction, had no difficulty in extending widely the jurisdiction of the national government. He also manifested an engaging willingness to overrule an earlier decision, when it was found to be unsound or out of harmony with new conditions, a tradition since then most usefully developed by the Court.[21]

If Taney is known as an upholder of the state's police power in its encroachment on individual privilege, is he inconsistent in his apparent respect for the rights of the individual against invasion by government officials? In his defense of free speech,[22] in his defense of private property against government confiscation or official transgression,[23] in his refusal to permit even the President to suspend the writ of *habeas corpus* and foreclose judicial redress of a person arrested by the military,[24] he sustained the rights of the private individual in their most dramatic and difficult setting. In spite of his supposed sympathy for public control of private interests, he respected property rights, especially real property, and was not willing to permit mortgagees to be deprived of their rights, after the panic of 1837, by legislation cutting down the contract rights of creditors for the benefit of debtors.[25] And yet, so flexible was his mind, that I venture to believe he would have joined

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[18] 5 How. 554, 576 (1846).

[19] Genesee Chief *v.* Fitzhugh, 12 How. 443 (1851).

[20] 10 Wheat. 428 (1825).

[21] See dissenting opinion of Brandeis, J., in Washington *v.* W. C. Dawson & Co., 264 U. S. 219, 235 (1924).

[22] See the account of Taney's defense of Reverend Gruber, an Abolishionist, in SMITH, ROGER B. TANEY: JACKSONIAN JURIST (1936) 178; SWISHER, *op. cit. supra* note 13, at 95, 414.

[23] United States *v.* Guillem, 11 How. 47 (1850); Mitchell *v.* Harmony, 13 How. 115 (1851).

[24] *Ex parte* Merryman, Fed. Cas. No. 9487 (C. C. D. Md. 1861).

[25] Bronson *v.* Kinzie, 1 How. 311 (1843). Taney thought that control over the currency and the banks was a better method of protecting debtors from the burdens of the business cycle. Probably this was hardly justified.

the majority in upholding the Minnesota Moratorium legislation of 1933.[26]

Nevertheless, so strongly was he convinced that Government may also be imposed upon, especially by corporate interests who usually draw their own charters, that he was averse to any bargaining away of the police power, the power of eminent domain or the taxing power.[27] The burden of proving the derogation from the public right was thrown on the private interest, and while a clear contract for good consideration for exemption from taxation, for example, would be upheld,[28] it had to be made exceptionally clear that the exemption was adequately paid for and that no supervening right of the public was impaired. Thus, he had no great difficulty in finding, contrary to a vociferous public opinion, that the charter of the Charles River Bridge Company must be strictly construed against the private interest and broadly in favor of the public, and that the failure expressly to grant the Charles River toll bridge a long-term monopoly debarred it from claiming a legal impairment of its rights by a competing concession to the Warren Bridge, a free bridge. "While the rights of property are sacredly guarded," said Taney, "we must not forget that the community also have rights, and the happiness and well being of every citizen depends on their faithful preservation." That compromise represents a general principle which has been continually applied to a constantly evolving economic scene. By thus weakening the effect of the *Dartmouth College case*,[29] which seemed to make a property or contract right impregnable against legislative change, Taney gave a fruitful and indeed conservative value to the term "vested rights." The rigidity of Marshall's view might have led to violent overthrow; the flexibility of Taney's helped to produce a better-balanced relationship between the private and the public interest, by safeguarding the essence while subjecting to modification under the police power or the reserved power of change in charters, rights that require public control. It represented statesmanship of a high order.

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[26] Home Building and Loan Association *v.* Blaisdell, 290 U. S. 398 (1934). The dissenting judges relied on Taney's views in Bronson *v.* Kinzie.

[27] Ohio Life Insurance Co. *v.* Debolt, 16 How. 416 (1853).

[28] Piqua Bank *v.* Knoop, 16 How. 392 (1853).

[29] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

All this has been said to indicate how difficult and vain is the attempt to give so emancipated a mind as that of Taney a definite classification. As a judge, Taney cannot be considered a member of any particular school of economic or political thought. But for the question of slavery, the period in which he presided over the Court would have been anything but the Tragic Era. It was marked by territorial expansion and by the beginning of large-scale industrial enterprise. The coming struggle for social control had not yet reached the Court, as it did later under what the Marxians call monopoly and finance capitalism. Hence the Court, though closely watched by both conservative and liberal, was less concerned with the struggle between economic classes which today marks the most crucial activity of the Court, than with the political balance between conflicting interests of state and federal government, of corporate assumption of public privileges and franchises, of governmental interference with individual initiative. Again, except for the issue of slavery, the economic system, individualism, and *laissez faire,* as vehicles of social progress, were not seriously questioned. It was in the balance between the departments of the government that the protection of the individual was deemed to lie. The modern function of the Court, as a stabilizer of social forces in the face of immense economic power, had not then arisen or been clearly sensed. But nevertheless the beginnings of this economic struggle were even then discernible, first, in the abortive and disastrous struggles over slavery as a social policy, and then in the effort of corporations to obtain control of economic processes against the restrictive efforts of state legislatures and popular and individual protest.

Taney was purely a pragmatist, and though occupied mostly with the question of political rather than social distribution of power, nevertheless realized both the dangers involved in the unlimited scope of corporate control and the necessity of public regulation. The Federalists had considered that a state could not deny a foreign corporation the privilege of doing business, and preferred to regard the corporation as a person and citizen with the constitutional protection accorded private individuals. Taney took a different view, which for decades became the law of the Constitution. While eschewing artificial barriers to corporate expansion beyond the state of incorporation, he nevertheless supported the state's power to exclude a foreign corporation from intrastate commerce, as well as the state's power

of regulation; and as against the state itself, the narrowest construction of corporate charters. If in the course of time foreign corporations have gradually been saved from exceptional discrimination by an expansive interpretation of the equal protection of the laws clause, and the more recent doctrine of unconstitutional conditions, the fundamental principles of Taney's compromise between the unlimited right to do business abroad and the unlimited right of the state to exclude still stands. The lamented Gerard Henderson, in his excellent work on Foreign Corporations [30] says of Taney's opinion in *Bank of Augusta* v. *Earle:*

> "The opinion in those cases, rendered in Chief Justice Taney's best vein, has generally been looked upon as the original fountain head of the law of foreign corporations in America. The terse and quotable style of the opinion, its philosophical flavor, and its clear-cut reasoning combined to give even the dicta of the Chief Justice an authority which was to stand unquestioned for half a century."

Notwithstanding Taney's fears of the dangers of corporate wealth to the private citizen and to the community, he nevertheless accepted corporations as part of the instruments of commercial life and would not deprive them of judicial protection for what he conceived their legitimate claims. Taney approved the trail-blazing decision of the Court, enabling a foreign corporation to remove a case from a state to a federal court when litigating with citizens or corporations of states other than that of its creation.[31] While this conclusion was violently objected to, then and since, and at the present day has given rise to a formidable campaign to prevent removal from the courts of states in which the corporation does business, it still remains the law.

Taney's support of contracts, even in the form of a charter between the corporation and the state, led him to protect corporate privileges in a way which subsequent Courts found it convenient to follow. After 1868, they no longer had to rely on the contract clause, but successfully invoked the due process and equal protection clauses of the 14th Amendment as bulwarks against legislative interference with property and con-

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[30] POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW (1918) 42.

[31] Louisville, Cincinnati & Charlestown R. R. Co. *v.* Letson, 2 How. 497 (1844).

tract, corporate or individual. Whether the "liberal" belief that this has been a public disadvantage is sound or not, it may be said that in spite of Taney's objection to corporate control of the country's wealth, the decisions of his Court laid the foundations of the doctrines which protect it.

A number of Taney's opinions in various departments of constitutional law deserve special attention because of the continuing influence they have exerted. Taney contributed greatly to a better understanding of the scope of the judicial power by two significant decisions: *Lord* v. *Veazie*[32] and *Gordon* v. *United States*.[33] In the former, in an opinion which cites no previous authority, he laid down the fundamental line demarking the boundary between justiciable and non-justiciable controversies, so far as concerns the necessary legal and adverse interest in judicial relief of the parties litigant. That case still stands as a landmark in the discussion of the issues involved in the moot case, the advisory opinion, and the justiciable controversy, which so greatly has occupied the Supreme Court in recent years. In the latter case, evoking the last opinion Taney ever wrote, and adopted by the surviving members of the Court after his death, he defined the necessity for finality of the judgment as a criterion of the constitutional exercise of the Supreme Court's judicial power. He refused, for the Court, to take jurisdiction over an appeal from a decision of the Court of Claims, when the Supreme Court judgment was to be itself subject to review by Congress or an administrative officer and was thus left in the character of a recommendation only.

In recent years the Supreme Court has gone much beyond the limitations suggested by Taney in refusing to perceive a plaintiff's concrete interest or the adversity of interest in a litigation before the Court, and has therefore declined jurisdiction in a number of cases which the writer believes were appropriate for judicial determination.[34] While the Court nec-

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[32] 8 How. 251 (1850).

[33] 117 U. S. 697 (1865) printed in 1885. See also Taney's opinion in United States *v.* Ferreira, 13 How. 40 (1851) to the effect that the award of a claims commissioner to a Spanish subject under the Treaty with Spain of 1819 was not the decision of a court from which an appeal lay to a federal District Court or the Supreme Court. Such a commissioner's award on a claim against the United States may be made reviewable by an Executive officer, but not by a United States court. Except for Hayburn's Case, 2 Dall. 409 (1792), no authority is cited.

[34] New Jersey *v.* Sargent, 269 U. S. 328 (1925); Liberty Warehouse *v.*

essarily avoids the adjudication of cases in which its judgment would be inconclusive,[35] there seems little justification for refusing jurisdiction over cases in which the plaintiff has a clearly economic or tangible interest which would be definitely affected by the decision rendered, and where the defendant has an equally clear interest adverse to that of the plaintiff. Nor is the issue non-justiciable because two governmental units, such as the federal and the state governments, litigate the issue of their respective jurisdictions over a concrete *res*. In other federal governments, such as Australia and Canada, this is a frequent subject of litigation. While the Court has necessarily built a number of defenses against the attempt to invoke an inappropriate exercise of judicial power, such as the category called "political questions," there seems no important reason to exceed fundamentally the internal technical limitations on justiciability laid down by Taney.

Taney also realized the inadequacy of judicial power in settling many of the issues that divide men. Possibly if he had foreseen that the slavery question was to become an emotional and moral issue, he might have found it preferable to avoid passing on the constitutionality of the Missouri Compromise, as a political question, and have thus greatly limited the hostility aroused by the Dred Scott opinion. In *Luther* v. *Borden*[36] he wisely declined to assume jurisdiction over an issue which required the Court to decide whether the Dorr Government or the Charter Government of Rhode Island was the lawful government of the state. He adduced a variety of cogent reasons why the assumption of such jurisdiction would be impractical, for it would produce chaos if the Court were to sustain as lawful a government that had been ousted or hold unlawful a government that wielded all the powers of administration. These questions, said Taney, were committed to political agencies like Congress, and the people, and the state, and could not usefully become the subject of judicial enquiry. That decision had much influence on the refusal of the Court to examine into the constitutionality of the Reconstruction Acts and the weighty polit-

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Grannis, 273 U. S. 70 (1927); Willing *v.* Chicago Auditorium Association, 277 U. S. 274 (1928); United States *v.* West Virginia, 295 U. S. 463 (1935).

[35] *Cf.* Factor *v.* Laubenheimer, U. S. Marshal, 290 U. S. 276 (1933) in which no extradition was ever accomplished.

[36] 7 How. 1 (1848).

ical powers exercised thereunder by the President and executive officials. Taney even thought it improper for the Court to venture to decide a boundary controversy between Rhode Island and Massachusetts [37] on the ground that it involved an issue of political jurisdiction and sovereignty and not merely rights of property; but his dissent to that effect has fortunately not been sustained and this potent field of dispute has been brought constantly to judicial cognizance. To the writer it emphasizes the fact that the milder disputes between administrative officials as to the boundaries of their respective jurisdictions in a concrete case are *a fortiori* subject to judicial determination and that *United States* v. *West Virginia*,[38] however correct on the question of original jurisdiction of the Supreme Court, should not, it is believed, have been considered to involve a non-justiciable controversy.

An example of Taney's caution and wisdom is found in *Kentucky* v. *Dennison*,[39] where the State of Kentucky sought to mandamus the Governor of Ohio for refusing to surrender in interstate rendition a fugitive from justice. The fact that the indictment was for enticing a slave to escape might be supposed to have enlisted the support of Taney and some of his colleagues. Kentucky relied on the Act of Congress of 1793 which declares that "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and delivered to the agent of the demanding state. Realizing as a philosopher the limitations of power and the unwisdom of its exercise against large groups or public bodies, Taney remarked:

> "The words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution." [40]

It can readily be imagined what difficulties would have been created had the Court given the word "duty" a mandatory connotation and undertaken to enforce the duty by the exertion of

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[37] 12 Pet. 657, 752 (1838); 4 How. 591, 639 (1846).

[38] United States *v.* West Virginia, 295 U. S. 463 (1935).

[39] 24 How. 66 (1860).

[40] *Id.* at 107.

federal force. Taney might have cited the testimony of Hamilton and Madison on the impracticability of seeking to coerce a state and to expect from coercion useful results. Madison remarked that "the practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." [41] Hamilton characterized it as "one of the maddest projects ever devised . . . little less romantic than the monster-taming spirit attributed to the fabulous heroes and demi-gods of antiquity." [42] Yet today a system of international relations is founded on the theory that independent nations of the world can be coerced by punitive measures called "sanctions" and that pacifying results can thereby be produced. If we are the heir of all the ages in the foremost files of time, how sadly has our intellectual heritage been squandered. Those who see in the Kellogg Pact an effective commitment and who, more especially, so blithely urge the propriety of passing on alleged breaches and of exerting retaliatory measures on such judgments are evangelically toying with war in a romantic cause ideally calculated to produce general disorder.

The war with Mexico and its antecedents brought before the Court several cases in which Taney had occasion to demonstrate a wide and profound acquaintance with international law in its relation to constitutional law. In one of these, *Kennett* v. *Chambers*,[43] Kennett, an American citizen, had lent money in 1863 to a Texas General, Chambers, to promote the revolution of the Texas territory against Mexico. The consideration was an agreement by the General to convey certain real property in Texas to Kennett. The suit was for specific performance of this agreement. Although Texas was subsequently recognized as independent by the United States, Taney, in an analytical opinion, evolved from the wealth and strength of a resourceful mind rather than from authority, concluded that the contract was void as against public policy and the avowed neutrality of the United States, and that while such a contract of loan in a war between two independent states might not be open to attack, Texas at the time was a part of Mexico, under the treaties, laws and declared policy of the President of the United States, and notwithstanding Texas' declaration of independence, the contract

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[41] 2 FARRAND, Records of the Federal Convention, 8-9. (Constitutional Convention, July 14, 1787).

[42] 16 FEDERALIST (Scott, 1894) 90.

[43] 14 How. 38 (1852).

was for an American citizen void and illegal, unenforceable either at law or in equity. Without tintinnabulary professions of high morality, Taney nevertheless enforced on American citizens the highest standards of correct conduct in the matter of foreign relations. The opinion has found its way into the casebooks.

In *Fleming* v. *Page*,[44] Taney examined the legal position of territory in Mexico under occupation by American military forces, and decided that such territory was not part of the United States in a constitutional sense, although internationally American authority temporarily prevailed there. He thus justified the collection of duties on goods shipped, during the American occupation, from Tampico to the United States, and took occasion to delimit the powers of Congress and the Executive in dealing with foreign territory under American military occupation. The opinion has remained an authority and was extensively invoked in the decisions in the Insular Cases. The opinion is again built up on reason alone, for not a single authority or precedent is cited. Taney's studies on the relation of the Executive to Congressional power in time of war were later drawn upon in his vigorous opinion on circuit in *Ex parte Merryman*,[45] denying the President the power to suspend the writ of *habeas corpus* and to subject a citizen to military trial when the civil courts were still functioning, a conclusion for which Taney received complete vindication after the Civil War in *Ex parte Milligan*.[46]

Taney's opinion in *Jecker* v. *Montgomery* [47] afforded him a splendid opportunity to deal with the legal position of prize courts under the Constitution, the relation of the Executive to them, the function they performed and the legal effects of capture and condemnation. His command of the materials of international law is that of a master. This was also evidenced in his opinion in the case of *Ardrey* v. *Karthaus* [48] on circuit, in which he anticipates the precise ground of the award in the later *"Alabama"* claim against Great Britain, by saying:

> "A neutral power is not at liberty to decide according to her convenience, whether she will perform her neutral obligations or not; she

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[44] 9 How. 603, 614 (1850).
[45] Fed. Cas. No. 9487 (C. C. D. Md. 1861).
[46] 4 Wall. 2 (1866).
[47] 13 How. 498 (1851).
[48] Fed. Cas. No. 511 (C. C. D. Md. 1836).

> is bound to perform them, and if she fails to do so, she becomes herself responsible for the injury which she ought to have prevented."

In a number of cases which have since become leading, Taney laid down principles of what is now called administrative law, concerning the relations of the state or its officials to private citizens. In the opinion in *Beers* v. *State of Arkansas*,[49] he pointed out without leaning on prior authority that the suability of a state depends upon its own consent, and that even though once given, that consent is not a contract and may be withdrawn or limited without impairing the contract clause. He did not take the position more recently and unjustifiably assumed in dicta of the Court, that no government permits itself to be sued in tort and that the state is above the law. This doctrine for some time delayed the enactment of statutes enabling the citizen, injured by the tortious operation of the administrative machinery of government, to sue for his injury; and while many states have now opened themselves to suit in tort, notably New York, we still await the passage of the Federal Tort Claims bill, now under consideration and refinement for over a decade.

In the two cases of *Kendall* v. *Stokes*,[50] and *Decatur* v. *Paulding*,[51] Taney's Court worked out the principles underlying the distinction between the ministerial and discretionary duties of executive officers of the Federal Government, the position of the courts of the District of Columbia and the proper court to issue a writ of mandamus to federal officials, determinations which are still authoritative. Although Taney dissented in the first case, on the power of the Circuit Court of the District of Columbia (now the Supreme Court of the District) to issue mandamus, he accepted the decision in the second case as conclusive and wrote one of his excellent original opinions on the scope of the discretionary power of a Cabinet officer and its uncontrollability by the judiciary.

Taney's significant judicial service to the nation became overshadowed by the controversy over slavery. Perhaps it is not important now to rehearse his position as a judge in dealing with this question. But it seems clear that he was not a slaveholder, was a thorough humanitarian, deplored slavery as an

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[49] 20 How. 527 (1857).

[50] 12 Pet. 524 (1838); second case, 3 How. 87 (1845) (by Taney, C. J.).

[51] 14 Pet. 497 (1840).

institution, and hoped, like Jefferson, to see it abolished by gradual peaceful efforts. Unhappily, zealots prevented so wise a solution. In the slavery issues that came before the Court, Taney was as objective and as judicial as he was in his other cases. He did believe as a lawyer that the status of persons as free or slave was a matter of state law, that the Federal Fugitive Slave Act was constitutional, and that no state could interfere with the recovery under it of an escaped slave. In the division of authority between state and nation, he upheld the rights of each in their respective spheres. But unhappily he was tempted by Judge McLean, dissenter in the *Dred Scott case,* to decide more than was necessary for the adjudication of the status of Dred Scott, and held not only that he was not a citizen but could not become one, and that Congress had no power to prohibit slavery in the Territories. Taney possibly believed that a judicial decision could settle the bitter conflict; and while the people of the United States have commendably trained themselves to accept from judicial tribunals more vital decisions than the people of any other country, Taney over-estimated the power of a court to settle issues that have become or been made by evangelists, moral and political. Taney thought the issue merely legal, and wrote accordingly. Historically and legally, his decision was probably sound, though it was unfairly misconstrued and misrepresented and he himself disgracefully villified. But for the Abolitionists, whose excessive virtue could not withstand the exigencies of caution, patience and tolerance, the issue might have been settled by time or by constitutional methods. Inquirers into the origins of war and devotees of the theory of "enforcing peace" will do well to study the psychology and practices of the Abolitionists and the consequences of irritation and of inflaming opinion as a way to peace. That the Court was able to withstand the attacks made upon it is an evidence of its integral and impregnable place in American political life. A volatile people, without those factors of stability like monarchy or age-old tradition which some foreign peoples possess, needs and should cherish a Court which by and large has performed its functions with extraordinary ability and sagacity. Yet the fact that it has become by adventitious circumstances and by judicial inflation of the due process clause the arbiter of social policy and hence a third political chamber should induce the Court, in its own interest and for the perpetuation of the Constitution, to refrain from the narrow judicial dialectics which

overturn legislatively declared policies of the elected representatives of the people. Limitation, not expansion, of power, will be the best guaranty of the longevity of the Court. Among the architects of its jurisprudence and of the constitutional framework under which we live, few judges have erected to themselves greater monuments than the pioneering opinions of Chief Justice Taney.