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

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Lincoln



and
Chief Justice



Taney

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President's War Powers

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Chapter One

"A MOONLIGHT MIND"

Roger Brooke Taney* was born on St. Patrick's Day, 1777, in a three-story white clapboard house set on the crest of a gentle hill overlooking the Patuxent River in southern Maryland. Taney's birthplace had served as home to five generations of Taney's, beginning with the first Michael Taney, who had immigrated from England in 1660. Michael I, as he was known in Taney family lore, initially worked the land as an indentured servant. After paying off his debt, he acquired a small plot of land and gradually expanded his holdings to several thousand acres. The land was fertile and particularly conducive to the growth of tobacco, which found an eager market in Great Britain. Michael I prospered, befriended other leaders in the colony, including Lord Baltimore, and was pleased to be referred to as "Michael Taney, Gentleman."

The flourishing tobacco economy of southern Maryland transformed the Taney's into members of that region's landed aristocracy. Slaves labored in their fields and served them in their plantation home. Succeeding generations of Taney's rode to hounds, entertained neighbors on a grand scale, and married other members in their high social class. Michael II inherited the estate overlooking the Patuxent and married Dorothy Brooke, a descendant of Robert Brooke, who traced his family roots to William the Conqueror. Sometime between the first and fourth

* The name is pronounced "Taw-ney."

generation, the Taney family, who were originally members of the Church of England, converted to Catholicism.

Michael V, the future Chief Justice's father, was educated at a Catholic English school at Saint-Omer in France before assuming his position as gentleman planter and leader of the prominent Taney family. But Michael V's boisterous personality and restless nature were not well suited to his designated aristocratic station. He was a loud, hard-drinking sportsman who was happiest fishing, shooting wild geese, and fox-hunting. And he had a volcanic temper. In 1819, Michael stabbed another man to death in an argument over the honor of a woman. He fled to Virginia; a year later, he was thrown from a horse and died.

It was said that Roger Taney inherited his father's temper but little else. He was a frail, bookish boy, who appeared to be greatly influenced by his mother, Monica Brooke Taney. She possessed a kind, sensitive nature, which her son lovingly recalled. "She was pious, gentle, and affectionate, retiring and domestic in her tastes," he wrote. "I never in my life heard her say an angry or unkind word to any of her children or servants, nor speak ill of any one." As an adult, Roger would emulate his mother in his compassionate treatment of his own children and the family's slaves.

Roger's older brother, Michael VI, was destined to inherit the family estate. Education, therefore, became particularly important for Roger, so that he might acquire the knowledge and skills necessary to fulfill his father's ambition that he should become a lawyer. As small boys, Roger and his older brother walked three miles to a tutor whose qualifications were limited to a modest ability to read and write. Later, the two boys boarded at a grammar school ten miles from the Taney estate. But the teacher was delusional and drowned in the Patuxent River after acting upon his misguided belief that he could walk on water. Finally, Roger came under the excellent tutelage of Princeton-educated David English, who instructed the boy until he was sent away at the age of fifteen to Dickinson College in Carlisle, Pennsylvania. For the next three years, Roger took classes in ethics, metaphysics, logic, and criticism with the brilliant head of the college, Dr. Charles Nisbet, a Presbyterian minister from Montrose, Scotland. He also studied languages, mathematics, and

geography with other members of the faculty. At graduation, Roger was chosen to make the valedictory address, an honor that he modestly devalued, pointing out that his selection was based neither on grades nor the faculty's judgment, but rather on the vote of his fellow students.

Taney returned to the family estate in 1796 and spent the winter days fox-hunting and eating lavishly. In the evenings the Taney men and their male neighbors gathered around the fireside to swap stories, frequently about the courtroom triumphs of two of the state's legendary trial lawyers, Luther Martin and William Pinckney. These anecdotes were particularly welcomed by Michael V, who made no secret of his desire to have his intense, intellectually gifted son, Roger, study law. Later that year, at the age of nineteen, Roger was dispatched to Annapolis to read law in the chambers of Jeremiah Chase, one of the three judges of the General Court. For the next three years, Taney pored over law books for twelve hours a day. And when he was not studying, he sat in court taking notes on the techniques and arguments of the leading trial lawyers.

After Taney was admitted to the bar in 1799, he anxiously prepared to try his first case in Annapolis's Mayor's Court. His client was a man charged with assault and battery in a fistfight in which neither combatant was severely hurt. For Taney, the details of his legal argument were the least of his problems. He was paralyzed with terror at the thought of his first courtroom argument, his fright compounded by consuming concern over his fragile health. His hands shook uncontrollably and his knees trembled throughout the ordeal of the trial. Taney, nonetheless, won the case.

Even as an experienced litigator, Taney never completely overcame a chronic panic when he rose to speak in court. "[M]y system was put out of order by slight exposure," he recalled, "and I could not go through the excitement and mental exertion of a court, which lasted two or three weeks, without feeling, at the end of it, that my strength was impaired and I needed repose." His worries about his health were unrelenting, and so were his courtroom successes.

After a brief time in Annapolis, Taney moved to Frederick, Mary-

land, where he built a thriving law practice. He married Anne Key, the sister of Taney's close friend Frank Key (who became famous later as Francis Scott Key, the composer of the national anthem). Anne Key Taney embodied many of the attributes of Roger's adored mother. She was gentle and kind, and appeared, over the years, to moderate her husband's dark moods and quick temper. Together, they raised six daughters, all in Anne's Episcopal faith. Once, when a local priest visited the Taney family to press his case for Catholicism on the Taney children, Roger abruptly interrupted, informing the clergyman that religious debate was not allowed in his home.

Michael V expected Roger to distinguish himself in state politics as well as law. Toward this end, he persuaded his son to become a candidate for the Maryland House of Delegates shortly after he had settled in Frederick. Roger ran as a member of the Federalist Party, to which the Taney family as well as virtually all other members of the landed aristocracy in southern Maryland belonged. He won the election, primarily because of his father's influential contacts—and despite his own lack of the natural politician's rapport with a crowd. He was defeated for reelection two years later.

The election defeat did not discourage Taney from taking an active role in Federalist politics, and he soon became a state leader of the party. Taney took forceful positions on controversial issues, none more important than his dramatic split with Federalist Party regulars over the War of 1812. No sooner had the bankers and merchants in the northeastern states, the backbone of the Federalist Party, denounced the war than Taney declared his support for it. After he was viciously attacked by Federalist Party regulars in Maryland for his position, Taney unleashed a blistering rebuttal, suggesting that his critics had placed their property interests above the nation's honor.

Taney's attack on the mercantile class was not so radical as it first might appear. The Taney family and other members of the planter aristocracy in southern Maryland had always been suspicious of the merchants and bankers who had served as middlemen between the tobacco planters and their foreign markets. Taney's support for the War of 1812, and, implic-

itly, Republican president James Madison, allowed him to vent his hostility toward the Federalists' mercantile class that opposed it. In so doing, Taney sounded more like a Jeffersonian Republican than a Federalist in his support for the masses against the vested commercial interests of urban America. It was a theme that Taney would strike again and again, first as a member of President Andrew Jackson's cabinet and later as Chief Justice of the United States.

In 1816, Taney ran successfully for a five-year term in the state senate. During his legislative term, Taney acted publicly on behalf of free blacks and privately to improve the lives of his slaves. He supported state legislation to protect free blacks from unscrupulous whites who seized them for sale as slaves. He also became voluntary counsel to an organization that fought the kidnapping of free blacks and their imprisonment for lack of papers to prove their freedom. With his friend Frank Key, Taney served as an officer of a colonization society that worked to send free blacks to a colony in Africa. And Taney quietly manumitted most of his own slaves and took personal financial responsibility for supporting his older slaves, giving them wallets for small silver pieces that he replenished every month.

As a practicing attorney in Frederick, Taney was opposed to slavery and made his views known most dramatically in 1819 in his successful defense of an abolitionist preacher, the Reverend Jacob Gruber. At an early age, Gruber had left his family in Bucks County, Pennsylvania, to preach the Methodist gospel throughout the countryside of the mid-Atlantic states, from New York to North Carolina. Dressed in a somber gray suit and broad-brimmed hat, Gruber exhorted the faithful to fear God and lead a righteous life. He detested alcohol, cigars, and high fashion, taking special exception to men's walking sticks and women's exposed petticoats. But he saved his harshest judgments for those who strayed from basic Methodist tenets, among them, the church's belief that the institution of slavery was immoral.

On August 16, 1818, Gruber preached to three thousand men and

women, including several hundred blacks, at an evening camp meeting of the Methodist Society in Hagerstown, Maryland, located in the western part of the state near the Pennsylvania border. Gruber spoke for slightly more than an hour on the subject of national sin, enumerating the obstacles to a righteous life, which included intemperance, profanity, and infidelity. Finally, he devoted the last fifteen minutes of his sermon to what he called the national sin of slavery and oppression.

"Is it not a reproach to a man to hold articles of liberty and independence in one hand and a bloody whip in the other, while a negro stands and trembles before him with his back cut and bleeding?" Gruber asked. What he termed "this inhuman traffic and cruel trade [in slaves]" had torn apart the most tender familial bonds. "That which God has joined together," the preacher thundered, "let not man put asunder." He condemned the slaveowners in his audience who had disregarded this divine injunction, and asked, "Will not God be avenged on such a nation as this?"

There was much grumbling among the slaveowners who attended Gruber's sermon, and rumors quickly spread that the preacher would be jailed for his inflammatory ideas. A few weeks later, a grand jury returned a true bill charging that Gruber "unlawfully, wickedly, and maliciously intended to instigate and incite diverse negro slaves, the property of diverse citizens of the said state [of Maryland], to mutiny and rebellion." After the indictment, Gruber was assured by a fellow Methodist clergyman that he would be represented by the finest legal counsel available in western Maryland—"Lawyer Taney, the most influential and eminent barrister in Washington and Frederick [counties]."

Taney's first official act as Gruber's attorney was to successfully petition to have the trial moved to a courtroom in his hometown of Frederick, away from Hagerstown, where, according to Taney, "great pains had been taken to inflame the public mind against him." In his opening statement at the trial, which took place in March 1819, Taney reminded the three-judge panel that freedom of expression was protected by the Maryland Constitution, even a discussion of that most controversial subject, slavery. "No man can be prosecuted for preaching the

articles of his religious creed," said Taney, "unless his doctrine is immoral, and calculated to disturb the peace and order of society." With that simple opening, Taney suggested to the judges the high legal standard they should apply to find his client guilty: the Reverend Gruber could only be convicted if his words were "immoral," and *calculated* to disturb the peace.

With sure, lethal blows, Taney then proceeded to destroy the prosecutor's case, first noting that the indictment had not accused Gruber of "immoral" speech. That left the single charge that the preacher had intended to incite the slaves to riot. But his client was no calculating incendiary, Taney insisted. No one in the crowd, he maintained, could have been surprised that Gruber, a member of a religious sect that believed slavery was a sin, would preach on the evil of the institution. If a slaveholder feared the effect that the Reverend Gruber's words would have on his slaves, he could have kept them on the plantation. "Mr. Gruber did not go to the slaves; they came to him. They could not have come if their masters had chosen to prevent them." Based on the facts, the judges were bound to conclude, as Taney did, that the intentions of the Reverend Gruber were pure and entirely consistent with both his religious calling and the laws of Maryland.

Had Taney rested his case there, his presentation would have been no more remarkable than that of scores of his other superb courtroom arguments. He had laid out his case to the judges in a spare, direct narrative that clung tightly to the facts and relevant law. But in this case, unlike any other that Taney tried during his distinguished career, the future author of the Supreme Court's *Dred Scott* opinion chose to speak with uncharacteristic passion about the institution of slavery:

A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly

looks for the means by which this necessary object may be best attained. And until it shall be accomplished, until the time shall come when we can point without a blush to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.

Despite his peroration at the Gruber trial, Taney remained true to his heritage as a member of the planter aristocracy of southern Maryland. While he deplored slavery at the abolitionist's trial in 1819, he never advocated forcible elimination of the institution. For Taney, the evil of slavery could only be eliminated gradually through state laws that were supported by the voters, presumably including some of the slaveowners who had perpetuated the system. Though the record is not conclusive, Taney appeared to have opposed the Missouri Compromise in 1820 because he did not believe Congress had the authority to determine whether future states carved out of the Louisiana Territory would be slave or free.

Taney left Frederick in 1823 to establish a law office in Baltimore, and his reputation as an outstanding advocate rapidly expanded beyond Maryland's borders. With Massachusetts senator Daniel Webster as his co-counsel, Taney made an important argument before the U.S. Supreme Court in 1826, representing Solomon Etting, a prominent Baltimore merchant. Etting had endorsed a security bond of the Baltimore branch of the Bank of the United States, unaware that the branch's cashier, James McCulloch, had been systematically plundering the bank's reserves. When Etting learned about McCulloch's illegal practices, he indignantly refused to pay, declaring that the bank had effectively voided the contract by concealing the fact of McCulloch's fraudulent conduct until the security was provided. The bank sued Etting and won in the lower courts.

Taney and Webster appealed to the Supreme Court, where Associate Justice Joseph Story eagerly anticipated their oral argument. The case

promised relief for the justices who, according to Story, "have had but little of that refreshing eloquence which makes the labors of the law light." Story expected Taney and Webster to illuminate the complex issues of what he called "a great case of legal morality." Webster was well known to the justices, but Story wrote that his co-counsel, Taney, was also "a man of fine talents." Taney and Webster's arguments persuaded three members of the Court, including Story, that the bank had engaged in "a positive deceit by acts though not by words." But unfortunately for Solomon Etting, an equal number of justices, led by Chief Justice John Marshall, refused to hold the bank legally responsible for its cashier's acts. The lower court judgment, therefore, remained in effect.

While practicing law in Baltimore, Taney reached middle age, and his frayed appearance reflected the wear and responsibility of the years. His tall frame and loosely fitting clothes would later invite comparisons with Abraham Lincoln. But Taney lacked Lincoln's physical energy. His broad, stooping shoulders seemed to support his lank body tenuously. And yet when Taney spoke to judge or jury, he commanded their complete attention, an improbable feat given the fact that he spoke in a low, hollow voice, without gesture, literary illusion, or highly charged oratory.

William Pinckney, a superb trial lawyer himself, said that he could match the logic of Taney's arguments, but there was no adequate response to "that infernal apostolic manner of his." With grudging admiration, Pinckney concluded that Taney, above all other members of the Maryland bar, made the most difficult legal problems seem clear. Taney was a man with "a moonlight mind," said Willard Wirt, who would later serve as U.S. Attorney General, explaining that "like moonlight of the arctics," Taney "gave all the light of day without its glare."

In 1827, Taney was appointed Attorney General of Maryland, a position that offered meager remuneration but enormous prestige—implicit recognition by the state of the officeholder's superior achievements in the legal profession. Taney acknowledged that a large measure of his satisfaction in serving as state attorney general derived from the fact that his predecessors included Luther Martin and William Pinckney, giants of

the state bar whom Taney had attempted to emulate all of his professional life.

Taney began to take admiring notice of General Andrew Jackson after Jackson became a candidate for president of the United States in 1824. The crowded field of presidential aspirants included not only Jackson, the military hero of the Battle of New Orleans in the War of 1812, but also Massachusetts's John Quincy Adams and Henry Clay of Kentucky. Jackson impressed Taney as honest and independent, qualities that Taney believed would allow Jackson, if elected, to make decisions free of sectional prejudices or pressures from powerful commercial interests. During the campaign, Jackson clinched Taney's support when he denounced the Federalist regulars who had opposed the War of 1812, a position that Taney himself had publicly taken many years earlier.

Jackson won the popular vote, but that did not make him president. When no candidate could claim a majority of the electoral votes, the contest was sent to the House of Representatives for resolution. There a deal was reputedly made between representatives of Adams and Clay. The result was that Clay electors switched their support to Adams and, subsequently, President-elect Adams appointed Clay Secretary of State. This left Jackson's supporters, including Taney, feeling helpless and bitter, but resolved to win the presidency for Jackson outright in 1828.

The nation was divided along sectional lines in the presidential campaign of 1828. The incumbent, Adams, was unbeatable in the northern and eastern states. But Jackson, the Democrat, was wildly popular in the western and southern states. Taney took a leadership role in Jackson's campaign in Maryland, which, as a border state, was the scene of furious activity by both presidential camps. Although Maryland's electors split almost equally between the candidates, Taney's strong efforts helped neutralize Adams's advantage of incumbency and the spoils of office. He was elated when returns across the country gave Jackson a decisive victory in both the popular and electoral vote.

President-elect Andrew Jackson arrived in Washington on a giddy

wave of populist enthusiasm. The white-maned, ramrod-straight Jackson promised to decide issues of national policy fearlessly and without favor to any special interest. His pledge delighted the rank-and-file farmers and small-town merchants in the West and South, but made the large banking and corporate interests in the East exceedingly nervous, an anxiety that would intensify throughout Jackson's presidency.

Midway through his first presidential term, Jackson appointed Taney Attorney General of the United States. Jackson's selection of Taney, like so many fateful political appointments in American history, owed as much to happenstance as to Taney's obvious talents as a lawyer. From the very first days of the Jackson administration, the president presided over a dysfunctional cabinet whose most prominent members displayed both personal and professional animosity toward each other. Finally, Jackson demanded the resignations of his original cabinet, including Attorney General John Berrien, who was replaced by Taney.

Over the next three years, Taney became Jackson's indispensable ally in the president's monumental fight with the powerful Bank of the United States. But before that confrontation between Jackson and the bank erupted, Taney was asked to provide a wide range of legal opinions to the administration. Taney's reasoning in one of these early unpublished advisory opinions, on states' rights and slavery, would be stored like a time bomb, to be detonated more than a quarter century later in *Dred Scott v. Sandford*.

Taney's opinion was written in response to a request from Secretary of State Edward Livingston for a legal opinion on the apparent conflict between U.S. treaty obligations with Great Britain and state laws, with particular attention to a South Carolina statute protecting slavery. Taney was also asked by Livingston to determine if slaves on colonial vessels flying the British flag were protected by the flag while in northern ports of the United States, or whether, upon disembarking, they became free under abolitionist laws of the states.

The South Carolina law provided that free blacks employed on foreign vessels that entered the ports of the state should be seized and held in prison while the vessel was in port. Upon the departure of the vessel,

the blacks were released if the master of the vessel paid the costs of their imprisonment; otherwise, they were sold to recover these costs. A British diplomatic officer in the United States had objected to South Carolina's seizure of members of a British crew, who were free blacks and subjects of the king, as a violation of U.S. treaty obligations with Great Britain.

In his response to Livingston's inquiries, Taney contended that neither U.S. treaty obligations nor federal law could interfere with laws of the individual states. A slave state like South Carolina had the legal right to enforce its laws, Taney wrote, even if those laws deprived British subjects who happened to be free blacks of their freedom. Applying the same states' rights interpretation in the northern case, Taney suggested that neither an international treaty nor a federal statute could protect the property interests of slaveowners. If their slaves disembarked in a free state, they became free under the relevant state law.

In an analysis later repeated in his *Dred Scott* opinion, Taney insisted that the southern states had not surrendered their right to protect slavery when the Constitution was adopted. Nor could this right be abrogated by federal laws or treaties. The Constitution made treaties the law of the land, Taney conceded, but no treaty could undermine the reserve rights of the states under the Tenth Amendment.* He denied that African Americans, whether free or slave, had any constitutional rights. The framers, according to Taney, never intended for blacks of any status to have rights protected by the document. "They were not looked upon as citizens by the contracting parties who formed the Constitution," he wrote, and "evidently not supposed to be included by the term *citizens*."

In blunt, uncompromising language, the future Chief Justice relegated African Americans to the status of a permanent underclass in the United States: "The African race in the United States even when free, are every where a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of

* The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy."

Had Attorney General Taney's opinion been made public, it would undoubtedly have inflamed opponents of slavery in the North. That was surely a reason that the opinion was left unpublished. But on another divisive issue, the federal government's challenge to the authority of the Bank of the United States, Taney's opinions were both public and controversial and would place him at the epicenter of the greatest political storm of Jackson's presidency.

The Bank of the United States had been the original idea of Alexander Hamilton, who had envisioned the institution to be a mutually beneficial alliance between the private business community and the federal government. As Secretary of the Treasury in President George Washington's first cabinet, Hamilton had recommended the creation of the National Bank, modeled on the Bank of England, that would instantly provide fiscal credibility and economic might to the fledgling republic. Under Hamilton's plan, the government could borrow large sums from the bank, which would also serve as the exclusive depository of federal funds.

Even in 1791, the concept of a national bank was controversial and the subject of an intense debate within President Washington's cabinet. Secretary of State Thomas Jefferson adamantly opposed the creation of the bank for both political and constitutional reasons. Jefferson feared that the bank would become Hamilton's ready instrument to centralize power in the federal government, sapping the authority of the individual states. On the constitutional level, Jefferson argued that nothing in the Constitution authorized Congress to charter a national bank. He conceded that Congress, under Article I, could use all "necessary and

proper" means to achieve legitimate constitutional goals.* But Jefferson insisted that the framers meant the "necessary and proper" clause to be interpreted narrowly to preserve the rights of the states. The bank could only be deemed "necessary," he argued, if it were indispensable to achieve an express congressional objective. Since the bank was not essential to any of the nation's basic objectives, Jefferson maintained, its creation by Congress was unconstitutional.

Hamilton countered that the bank was vital to ensure the nation's economic growth. He argued further that the framers intended the Constitution's "necessary and proper" clause to be interpreted much more broadly than Jefferson had suggested. So long as the bank was a "convenient" or "useful" means to achieve Congress's express goals under Article I, Hamilton contended, it must be considered constitutional. And Hamilton had no doubt that the bank would facilitate several of Congress's goals, including raising and collecting taxes, borrowing money, and regulating commerce.

President Washington sided with Hamilton in his debate with Jefferson, and the Bank of the United States was born. Jefferson never overcame his hostility to the bank, nor was he ever convinced that, under his strict interpretation, it was constitutional. The bank, nonetheless, became an integral part of the nation's economic life, so much so that Jefferson's successor and close Republican ally, James Madison, supported the creation of the Second Bank of the United States in 1816. Three years later, Hamilton's argument in favor of the bank's constitutionality became the law of the land when Chief Justice Marshall, in his opinion in *McCulloch v. Maryland*, adopted the first Treasury Secretary's broad interpretation of the "necessary and proper" clause to justify the establishment of the bank.

Only eleven years after the Court's *McCulloch* decision, President Andrew Jackson challenged the authority of the bank, which he viewed

* Under Article I, section 8, Congress is given the authority to tax, regulate commerce, borrow money, and raise and support armies, among other powers, and "to make all laws which shall be necessary and proper" to implement those powers.

as a symbol of concentrated and unaccountable economic power. In an address to Congress, Jackson fired the first shot in what would be known as the Bank War. He proposed that a new Bank of the United States be established with strictly limited responsibilities. Under Jackson's plan, the bank would operate as a branch of the Treasury Department and would no longer be able to make loans or issue notes.

The Jackson proposal held obvious appeal to the president's states' rights supporters in the West and South as well as for state banks throughout the nation. But it chagrined Nicholas Biddle, the urbane, supremely confident president of the Bank of the United States. Under Biddle's shrewd, autocratic leadership, the bank had developed into a formidable national political and economic powerhouse that no officeholder, not even the president of the United States, could afford to ignore. From his well-appointed office on Chestnut Street in Philadelphia, Biddle ran his institution as a private corporation completely independent of the federal government, even though government deposits represented one fourth of its capital and federal officials composed one fifth of its directors.

Since Biddle had become president of the bank in 1823, he had assiduously courted the most powerful politicians in Congress. After Jackson announced his proposal to curb the bank's authority, Biddle demanded that his congressional supporters meet the president's challenge head-on. Pro-bank members of Congress were instructed by Biddle to support a bill to renew the charter of the bank with its existing authority intact, even though the charter was not due to expire for several years. To champion the bank's cause, Biddle enlisted the services of Henry Clay and Daniel Webster, two of the Senate's most influential members, who also served as private counsel to the bank. And when Biddle learned that President Jackson's Secretary of the Treasury, Louis McLean, might favor the bank's position, he arranged for bank officials to open confidential discussions with McLean to gain his support with the ultimate objective of discouraging the president from opposing the recharter bill.

On the basis of early cabinet discussions on the bank controversy, Taney had the impression that he alone opposed the renewal of the

bank's charter. He, nonetheless, did not hesitate to attack the bank's bill. And later, in the privacy of his office, he wrote a memorandum to Jackson urging him to veto the bill if Congress passed it, boldly arguing that the president should declare the legislation unconstitutional. Even if the bank was once "necessary" to conduct the nation's business, as Chief Justice Marshall had concluded in his 1819 *McCulloch* decision, Taney contended that the institution run by Nicolas Biddle in 1832 could no longer sustain that constitutional argument.

In addition to challenging the constitutional orthodoxy of Chief Justice Marshall, Taney expressed his long-standing hostility to concentrated economic power. There was no justification, wrote Taney, for "subjecting the people of this country to the evils and abuses which great moneyed monopolies have always occasioned." The president should declare the bank legislation unconstitutional, regardless of the opinion of Congress or the Supreme Court. That was Jackson's constitutional prerogative as the nation's chief executive, he concluded.

A week after the bank's recharter bill was passed by Congress, Jackson sent a veto message condemning the bank's concentration of economic power in the hands of a few men unresponsive to the people. In declaring the legislation unconstitutional, the president's words reflected the audacious opinion of his attorney general. "The opinion of the judges [of the Supreme Court] has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both," Jackson wrote. "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

After delivering his veto message, Jackson returned to his Tennessee home. "The veto works well everywhere," he reported. "[I]t has put down the Bank instead of prostrating me." But Jackson's opponents disagreed with his assessment, and immediately acted to turn the president's defiant veto message to their advantage. Daniel Webster, stately and severe in appearance, rose on the floor of the Senate to denounce Jackson's action. In his booming baritone voice, he charged that the president's veto

message was dangerous demagoguery, which "wantonly attacks whole classes of the people, for the purpose of turning against them the prejudices and resentments of other classes."

Webster also scorned Jackson's constitutional argument, which he recognized as Taney's legal handiwork. He ridiculed the notion that the bank, whose constitutionality had been proclaimed by the great Chief Justice Marshall, could later be challenged. Since the Marshall Court had declared the bank constitutional, Webster maintained that all of the features that might normally belong to it were constitutional. Later, in a private letter to Justice Joseph Story, Webster dismissed Taney's constitutional argument as "trash."

Webster's Senate speech attacking Jackson was quickly converted into a widely distributed campaign document for Henry Clay, the presidential nominee of the National Republicans (later known as Whigs) who opposed Jackson in the 1832 election. Clay, fifty-five years old, had commanded a national following for two decades and had already made one serious run for the presidency. He was tall and thin, with twinkling gray eyes, and could dazzle a crowd with his casual charm or oratorical brilliance. Clay's platform for election was his American System, a three-pronged commitment to a strong federal government: high tariffs, internal improvements, and an unwavering endorsement of the Bank of the United States.

The Clay-Jackson presidential campaign in the fall of 1832 was tense and bitter, with each man's supporters conjuring up apocalyptic visions of the consequences of the victory of their opponent. Clay was portrayed by the Democrats as a tool of the National Bank and other vested corporate interests, while Jackson was seen by the National Republicans as an unprincipled demagogue pandering to the masses. Though the election in many states was tightly contested, in the end Jackson won by a decisive electoral vote margin, 219-49.

Attorney General Taney rejoiced when he heard the news of the president's reelection, not only because the victory was vindication for

Jackson's Democratic principles, but also for his own resolute opposition to the Bank of the United States. Taney now rivaled the ambitious Treasury Secretary, Louis McLean, as the president's most influential cabinet member. McLean hoped to enhance his standing in the cabinet as well as his presidential credentials by becoming Secretary of State, replacing the scholarly but passive Edward Livingston. He discussed his plan with Vice President Martin Van Buren, who pledged his support. But McLean recoiled at Van Buren's suggestion that Taney should succeed him at Treasury. The president acceded to McLean's wishes, agreeing to appoint McLean Secretary of State and replace him at Treasury with McLean's friend, William Duane, rather than Taney. The new appointments appeared to diminish Taney's role in the cabinet. But Jackson's renewed challenge to the Bank of the United States once again made Taney a crucial presidential adviser.

Soon after his second inauguration, Jackson met with Taney to discuss several possible assaults on the bank, including the removal of government's deposits and opposition to the recharter. Taney responded in a memorandum to the president opposing the recharter of the bank under any circumstances. He accused the bank of a breach of the public trust, citing statistics showing that Biddle had consciously manipulated its loan policy to curry political support during the fight over the recharter bill. He also reminded the president that the bank had been a powerful supporter of Jackson's presidential opponent, Henry Clay. On constitutional grounds, he repeated his earlier argument that the bank was not an institution that could be justified as "necessary" for the nation's economic health. Far from being an indispensable national institution, he contended that the bank was a menace to democratic government.

With Taney's strong support, Jackson attacked the bank's economic base by removing all federal government deposits and having them redistributed to selected state banks. The president instructed his new Treasury Secretary, William Duane, to implement the new policy. But Duane, a friend of Biddle, first equivocated and then balked at Jackson's order. Jackson was astonished at Duane's stubborn refusal to obey. The presi-

dent issued an ultimatum: Either obey my order or resign. When Duane refused to act, Jackson fired him.

The president immediately appointed Taney to replace Duane. His new Treasury Secretary "unites with me heart in hand to meet the crisis," Jackson wrote Vice President Van Buren "Mr. Taney is commissioned, sworn into office, and the business of the Treasury is progressing as though Mr. Duane had never been born."

In October 1833, only three days after he had been sworn in as acting Secretary of the Treasury, Taney carried out the president's order, announcing that federal government deposits would no longer be made in the Bank of the United States. Effective immediately, he said, all federal funds would be distributed in selected state banks. He anticipated, and relished, the coming battle with Biddle's bank. "We have a fiery contest before us," he wrote Andrew Stevenson, the Speaker of the House of Representatives, "but we shall conquer the mammoth, with all of the allies that are coming to its aid." In his report to Congress, Taney denounced the bank in uncompromising terms. "It is a fixed principle of our political institutions," he declared, "to guard against the unnecessary accumulation of power over persons and property in any hands. And no hands are less worthy to be trusted with it than those of a moneyed corporation."

Biddle was eager for the showdown with the president and his Treasury Secretary. Even before Taney had withdrawn the federal government's deposits from the bank, Biddle had begun to flex the bank's muscle, demanding that vulnerable state banks present their notes for redemption, reducing their discounts and calling in their loans. While demonstrating the economic might at the bank's disposal, Biddle also deployed his heaviest political guns to attack the president.

Before a packed gallery in the Senate, Henry Clay, mellifluous and passionate, castigated Jackson's decision to withdraw government deposits from the bank as a brazen step toward dictatorship. "We are in the midst of a revolution," Clay warned, "hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one

man." Only Congress stood between the American people and tyranny. "If Congress do not apply an instantaneous and effective remedy," Clay declared, "the fatal collapse will soon come on, and we shall die—ignobly die—base, mean, and abject slaves; the scorn and contempt of mankind; unpitied, unwept, unmourned."

Despite Clay's protestations, it was Biddle rather than Jackson who appeared consumed with the power of his office during the Bank War. After reducing the bank's loans by more than \$18 million between August 1, 1833, and November 1, 1834, in an obvious attempt to manipulate the nation's economy, Biddle reversed course and, over the next five months, increased its loans by more than \$14 million. Ultimately, Biddle's efforts were self-defeating. His heavy-handed policies alienated many of his traditional allies in the mercantile community who became increasingly uneasy with his unbridled efforts to control the nation's financial markets.

Having failed to reverse the president's policy to withdraw funds from the Bank of the United States, Biddle's political allies in Congress were determined to exact some measure of revenge against the administration. Their target was Jackson's tough, combative Treasury Secretary. Although Taney had shown vigor and decisiveness in his new cabinet position, his recess appointment still required confirmation by the Senate. Bank forces in the Senate, led by Clay and Webster, vowed that Taney would pay for his aggressive opposition to the bank with the loss of his office.

Aware of the threat to Taney, Jackson tried to protect him by withholding his nomination from the Senate until the last week of the session. But to no avail. On June 24, 1834, the Senate, without debate, defeated Taney's nomination, 28–18. A disgusted President Jackson wrote Edward Livingston, "Nicholas Biddle now rules the Senate, as a showman does his puppets."

Taney's rejection as Secretary of the Treasury did not end the president's efforts to appoint his trusted adviser to high public office. Jackson's next opportunity occurred after Associate Justice Gabriel Duvall of the U.S. Supreme Court, eighty-two years old, decrepit and virtually deaf,

resigned. Jackson sent Taney's nomination to the Senate on January 15, 1835, as Duvall's replacement. But Taney and Jackson's Senate enemies were ready, once again, to punish them. Even though Taney had support among respected conservatives, including Chief Justice Marshall, his nomination languished. By midnight on the last day of the Senate session, still no action had been taken on the nomination. With silky efficiency, Webster moved that it be postponed indefinitely, a motion tantamount to defeat. A vote was taken, and again Taney was rejected.

Taney's career of public service appeared to be finished. Within the space of a year, Jackson's nominations of Taney to be Secretary of the Treasury and Associate Justice of the U.S. Supreme Court had been defeated by the Whig-Bank coalition in the Senate. If the defeats weren't humiliating enough, those who led the opposition to Taney gloated over their victory. At a public dinner in Salem, Massachusetts, shortly after the Senate had rejected Taney as Secretary of the Treasury, Senator Webster excoriated Taney as "a pliant instrument" of President Jackson, suggesting that he lacked both integrity and sound judgment.

At the time of Webster's attack, Taney had returned to Maryland to resume the private practice of law. He was usually content to absorb insults from his enemies in silence, but Webster's assault stirred him to retaliation. The occasion was a dinner in Taney's honor in Elkton, Maryland. In his remarks, Taney not only delivered a spirited defense of Jackson's bank policy, but also took Webster's taunt that he was a "pliant instrument" of the president and hurled the phrase back at his assailant: "Neither my habits nor my principles lead me to bandy terms of reproach with Mr. Webster or any one else. But it is well known that he has found the bank a profitable client, and I submit to the public whether the facts I have stated do not furnish grounds for believing that he has become its 'pliant instrument,' and is prepared on all occasions to do its bidding, whenever and wherever it may choose to require him."

Like Taney, the president was enraged over his Senate rejections. But Jackson would have yet a third chance to return Taney to the highest

echelons of the federal government. Six months after Chief Justice John Marshall died in office on July 6, 1835, Jackson nominated Roger B. Taney to succeed him. This time, Jackson was confident that the Taney nomination would succeed, largely because the fall congressional elections had given the Democrats a comfortable majority in the Senate. The president was also buoyed by the fact that Taney's appointment would be considered in an open-ended session, which prevented last-minute tactics by opponents, such as Webster, that had doomed Taney's earlier nomination to the Court.

Webster and Clay again led the Senate opposition to the nomination. Clay later recalled that "[t]here was hardly an opprobrious epithet which . . . he failed to use against the nomination." Despite Clay's and Webster's denunciations of the nominee to the very end, Taney was confirmed on March 15, 1836, to be the nation's fifth Chief Justice of the United States.

Associate Justice Joseph Story grimly prepared for the first session of the Taney Court. "I confess my hopes are subdued, my confidence shaken, and my zeal chilled," Story wrote Francis Lieber, the editor of the *Encyclopedia Americana*, to which Story contributed articles on legal topics. "It seems to me that the spirit of party (which is always the spirit of selfishness) is become irresistible." A devout Whig, Story feared the imminent invasion of Jacksonian democracy into the sacred sanctuary of the Court, where Chief Justice Marshall had written so many unanimous opinions favoring the federal government over the states and protecting private property rights.

The Whig press viewed the ascendancy of Chief Justice Taney with a mixture of apprehension and disgust. "The pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney," sneered the *New York American*. Just as predictably, Democrats celebrated the Taney appointment. "The accomplished Taney has succeeded against the vengeance of his foes and is now Chief Justice of the United States," exulted the *Richmond Enquirer*. Taney himself privately expressed gratitude for his appointment to President Jackson. "I owe this

honor to you," he wrote Jackson, "to whom I had rather owe it than any other man in the world."

On January 2, 1837, Chief Justice Taney and his judicial colleagues entered the chamber in the basement of the Capitol Building that served as the official home of the U.S. Supreme Court. For this first term of the Taney Court, a fresh carpet had been laid and new furniture purchased to give the room a stately appearance. Still, nothing could disguise the fact that the Supreme Court's residence was strikingly inferior to that of its two co-equal branches of the federal government. Both houses of Congress, which were located on the first floor of the Capitol Building, as well as the White House at the other end of Pennsylvania Avenue, exhibited a modest grandeur that their subterranean judicial neighbor could not match.

But official appearances were deceiving. Thanks to the magisterial opinions of Chief Justice John Marshall over the thirty-four years he had presided at the Court, the judicial branch had achieved parity with the other co-equal branches in authority, if not in accouterments. The Chief Justice's seminal opinions began in 1803 with *Marbury v. Madison*, the decision in which the Court struck down an act of Congress as unconstitutional. Marshall's opinion for the Court in *McCulloch v. Maryland* recognized the implied powers of Congress to pass far-reaching legislation and, at the same time, insulated the federal government from state taxation. The Marshall Court also established the supremacy of the Supreme Court's appellate authority over state supreme court decisions in interpreting federal laws. And the Chief Justice with his brethren consistently endorsed the sanctity of private contracts, protecting them from intrusive state laws.

When he took the center chair on the Court's bench, Chief Justice Taney created a minor stir by wearing trousers under his black robe rather than the knee breeches favored by his predecessor. Would this sartorial gesture to the common man be followed by a rash of opinions championing Jacksonian democracy? Whigs, like Associate Justice Story, were particularly nervous because Taney would preside over the seven-member Court with four fellow Jackson appointees.

Story, as the senior justice, sat to the right of Taney. At fifty-seven

years old, he was two and a half years younger than Taney. He was of medium height, wore rimless spectacles, and carelessly allowed his fair, receding hair to curl over the collar of his robe. Though appointed by Republican president James Madison in 1811, Story had become a loyal adherent of Chief Justice Marshall's nationalistic opinions (and was Marshall's choice to be his successor). He wrote one of the Marshall Court's most important opinions, which rejected the claim of Virginia that its state supreme court's judgment on the interpretation of a federal treaty was final. Story, who had inexhaustible intellectual energy, was not only fully engaged in the Court's work but also taught law at Harvard and wrote a series of legal treatises, ranging from equity pleading to constitutional law.

The seat to Taney's left was occupied by Smith Thompson, who had been appointed to the Court by President James Monroe in 1823. Small in stature and slightly emaciated, the sixty-nine-year-old Thompson had recently taken a much younger wife and gallantly escorted her to parties around the capital. He had served as chief justice of the New York Supreme Court as well as Secretary of the Navy under Monroe before his Court appointment. Thompson's judicial philosophy was not so easily categorized as Story's. He occasionally dissented from Marshall Court opinions but also endorsed broad constitutional authority for the federal government. He was not a Jackson supporter and particularly deplored the president's attack on the Bank of the United States.

The first Jackson appointee was John McLean, an Ohio native with stern, craggy features and a pronounced moral fervor. A former member of the Ohio Supreme Court, McLean was a peculiar choice for Jackson, since he had served as U.S. Postmaster General in the administration of President John Quincy Adams (though he did not support Adams's reelection bid). Once on the Court, McLean bragged that he did not vote for Jackson and quickly gravitated toward the strong nationalistic views of Justice Story. Though he enthusiastically embraced Whig politics, McLean's intense presidential ambitions did not limit him to a single party's policies. Increasingly, he became an outspoken opponent of slavery and expressed his strong views on the subject in his judicial opinions, even when they were not essential to the decision of the Court.

Yale-educated Henry Baldwin of Pennsylvania vigorously supported Jackson for the presidency in 1828 and was appointed to the Court by Jackson in 1830. He possessed a logical mind, but was also emotional, often showing an unpleasant petulance. Addicted to black Spanish cigars, Baldwin became noticeably restless when deprived of them during long Court sessions. Unfortunately for Baldwin, his judicial tenure was marred by mounting financial debts, which led to increasingly irrational behavior. On the bench, Baldwin was neither a doctrinaire states' rights judge nor a follower of Justice Story.

Justice James Wayne of Georgia was equally adept at politics and law. A graduate of Princeton, Wayne practiced law in Savannah, served as the city's mayor and in the state legislature before his election to the House of Representatives. He was a states' rights Democrat, but also a supporter of the Union, who rejected John C. Calhoun's nullification doctrine which insisted states could declare an act of Congress unconstitutional. Perhaps most important, Wayne supported Jackson and Taney in their struggle against the Bank of the United States. He was appointed to the Court in 1835.

The appointment of Phillip Barbour, fifty-three years old, was confirmed in the same congressional session as Taney's. A Virginia country gentleman, Barbour lived on a spacious estate with a large herd of cattle and many slaves. He had served in the Virginia House of Delegates and in the U.S. House of Representatives, where he was Speaker until he lost the office to Henry Clay. He opposed every Whig policy, from internal improvements financed by the federal government to support for the Bank of the United States. His ardent states' rights philosophy put him radically at odds with Story's nationalism.

As if choreographed for judicial history, the Taney Court, in only the third week of its first term, heard oral arguments in a case guaranteed to produce a collision between the old and new Court orders. In the Charles River Bridge case, the justices were forced to choose between two competing constitutional values: protection of private contracts versus promotion of the general welfare. In political terms, the Charles

River Bridge case pitted private corporate interests, defended by the Whigs, against the Jacksonian Democrats' demands that the public's needs superseded private profit. The case, moreover, was freighted with far-reaching economic consequences for the westward development of the nation.

In 1785, the Massachusetts legislature had chartered a company to build the Charles River Bridge, which linked Boston with Charlestown. To entice private investors, the legislature granted the company the right to collect tolls for forty years, which was later extended for an additional thirty years. With the steadily increasing population in the Boston area, the Charles River Bridge prospered. Shares of Charles River Bridge stock having a par value of \$333 sold for \$1,650 in 1805 and \$2,080 in 1814. The original capitalization had been \$50,000; in 1823, the company claimed a value of \$280,000. Despite complaints from the public and pressure from the state legislature, the company refused to reduce tolls or improve its bridge service.

The state legislature in 1828 responded to mounting public protests over the practices of the proprietors of the Charles River Bridge by chartering another company to build a second bridge less than 100 yards from the older bridge. As soon as tolls on the new bridge, the Warren Bridge, paid for the costs of construction, the bridge would become state property and toll-free. No one doubted that the public would choose the new, eventually toll-free Warren Bridge over the old and expensive Charles River Bridge.

To prevent the public from making that choice, the proprietors of the Charles River Bridge sued in the Supreme Judicial Court of Massachusetts to stop construction of the Warren Bridge. They argued that its charter gave it exclusive rights to operate a bridge over the Charles River. When that argument was rejected in the state court, the company's most prominent legal counsel, Daniel Webster, appealed to the U.S. Supreme Court.

After the case was first argued before the Court in 1831, Chief Justice Marshall and Associate Justices Story and Thompson were ready to reverse the state court decision and rule in favor of Webster and the

Charles River Bridge. But the ailing Justice Gabriel Duvall had been absent from the session and other members of the Court were in sharp disagreement with Marshall, Story, and Thompson. The case was therefore put over to the next term. But, again, one justice was absent, and the other justices were evenly divided on the outcome.

In an effort to persuade a fourth justice to adopt his view, Story drafted an opinion that broadly interpreted obligations under the Constitution's Contract Clause* to protect the Charles River Bridge's charter from later competition. When Story's draft opinion failed to attract the necessary fourth vote for a Court majority, the case was again postponed. By the time of reargument of the case before the Taney Court, the Warren Bridge had been built and was indeed toll-free (the early tolls had paid off construction costs); the public overwhelmingly used it rather than the older Charles River toll bridge.

The justices listened to arguments for a full week, beginning on January 19, 1837. During the three days that Daniel Webster was scheduled to make his argument on behalf of the Charles River Bridge, the Court's visitors' gallery was filled to capacity with fashionable ladies wearing fine plumed hats, members of Congress, and foreign dignitaries. Webster was noticeably moody and uneasy waiting to argue before the new Chief Justice, whom he had labeled "a pliant instrument" of Andrew Jackson. Despite his initial discomfort in appearing before Taney, Webster quickly recovered his composure once he stood to address the justices.

Webster began his argument by describing the scene of the controversy on the Charles River in elegant painterly detail. After providing the Court with his version of the facts, he made the constitutional argument that had been successful for him in past appearances before the Marshall Court. Contracts between private investors and a state legislature were inviolate, Webster maintained, and could not be undercut by later legislation. The charter granted to the proprietors of the Charles River Bridge by the Massachusetts legislature was such a contract and

* Article I, section 10, provides that no state shall pass any law "impairing the Obligation of Contracts."

implicitly forbid the state legislature from authorizing the construction of a second bridge that would compete, and drain profits, from the first.

Webster insisted that the terms of the Charles River Bridge charter must be read to give the private company exclusive rights to operate a bridge over the Charles River. Otherwise, private investors would be forever vulnerable to pressures for new legislation from the masses, and the obligation of contract would be meaningless. Without constitutional protection of contract, state legislatures would be free to take money out of the hands of private property owners, as he insisted had been done in the Charles River Bridge case, and give it to the public. Webster's summation, according to Justice Story, was extraordinarily effective, though it exhibited "a little too much of *fierte* here and there."

Defense attorney Simon Greenleaf conceded that the Charles River Bridge's charter was a contract. But nowhere in the document, Greenleaf quickly added, did the charter provide for the corporation's exclusive right to build a bridge across the Charles River. Where the public's welfare is at issue, a contract must be construed narrowly, Greenleaf argued, and therefore no rights were granted to the Charles River Bridge that were not explicitly provided for in the charter. If the Charles River Bridge had a legitimate legal grievance, it must be taken to the state courts where the private investors could argue that they had been unjustly (but not unconstitutionally) deprived of future profits.

After arguments in the Charles River Bridge case had been completed, Webster wrote to Jeremiah Mason, a prominent Massachusetts attorney, that he expected the case to be decided wrongly, that is, against his client, the proprietors of the Charles River Bridge. Webster then provided Mason with what turned out to be accurate descriptions of the individual justices' positions, suggesting that one member of the Court—presumably Webster's friend Joseph Story—had provided him with inside information. The Court had been revolutionized, Webster declared, and the justices in the majority, led by Taney, were motivated by crass political considerations. "Taney is smooth and plausible, but cunning and jesuitical, and as thorough going a party judge as ever got onto a bench of justice," Webster noted. "He is a man who wears his

robes for the purpose of protecting his friends and punishing his enemies."

Two weeks after Webster had dismissed the Chief Justice as a Democratic Party lackey, Taney entered the courtroom with his colleagues to announce the *Charles River Bridge* decision. Once he had sat down, Taney began to read aloud his opinion for the four-member Court majority (Taney, Baldwin, Barbour, and Wayne). The Chief Justice's conclusion was, as Webster had anticipated, that the Charles River Bridge charter did not grant the company exclusive rights to operate a bridge between Boston and Charlestown.

While the Court must respect the rights of private contract, Taney wrote, it must also be sensitive to the public interest. And where there is an apparent conflict between the general welfare and a private contract, the contract must be interpreted narrowly. In the *Charles River Bridge* case, this meant that only the express terms of the charter were binding. It was contrary to law and sound public policy, the Chief Justice declared, for a state charter to give implicit monopolistic rights to a company providing services to the public. Such an expansive judicial interpretation of private contract would not only stifle competition but severely constrict the nation's economic development.

Taney's opinion was written in an understated manner reminiscent of his arguments as a trial lawyer. His prose was spare and unemotional, characterized by the "apostolic simplicity" that had maddened, and impressed, his courtroom adversaries. If charters such as that of the *Charles River Bridge* were interpreted to grant monopolies, Taney warned, then the old turnpike corporations would soon inundate the courts with claims that they, too, could prevent public transportation improvements. "The millions of property which have been invested in railroad and canals, upon lines of travel which have been before occupied by turnpike corporations, will be put in jeopardy," Taney wrote. "We shall be thrown back to the improvements of the last century, and obligated to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those im-

provements which are now adding to the wealth and prosperity, and the convenience and comfort of every other part of the civilized world."

A distressed Justice Story wrote his wife: "A case of grosser injustice never existed." But Story's opinion not only represented the minority view on the Court, but in the nation at large. The Taney Court's *Charles River Bridge* decision provided an important antidote to the Marshall Court's overly solicitous protection of private property. It was particularly welcomed at a time of unprecedented westward expansion. After the decision, entrepreneurs ready to invest in improved roads, canals, and railroads no longer were inhibited by fear of lawsuits from hidebound monopolistic interests. To be sure, Taney's opinion reflected the Chief Justice's Jacksonian hostility to powerful corporate interests. But it also provided broad constitutional protection for aggressive commercial development at a critical time in the nation's history.

Two other decisions in 1837 further signaled the new constitutional direction of the Taney Court. As in the *Charles River Bridge* case, both lawsuits had previously been argued before the Marshall Court without resolution. The first, *New York v. Miln*, appeared to challenge one of John Marshall's most important opinions, *Gibbons v. Ogden*. In *Gibbons*, the Chief Justice had written for the Court that Congress had broad authority to regulate interstate commerce. The challenged New York statute in *Miln* required masters of incoming ships to report information on all passengers they brought into the country, including age, health, and their last legal residence. Did the state statute undercut Congress's authority to regulate commerce? Or, as New York claimed, was the law a police measure, fully within the authority of the state to keep out undesirable immigrants?

The Taney Court majority framed the constitutional question as New York had wanted. The control of immigration into New York was within the state's police power, wrote Justice Barbour for a six-member Court majority (Story alone dissented). Since the New York statute could be justified under the state's police power, the Court dismissed the argument that it violated Congress's authority to regulate commerce, and that it conflicted with Marshall's opinion in *Gibbons v. Ogden*.

In a third notable decision by the Taney Court during its first term, the justices rejected a challenge to the constitutionality of a commercial note issued by a Kentucky bank, abandoning a Marshall Court precedent in the process. Justice Story's long dissent accused the majority of judicial gimmickry and the unforgivable sacrilege of defacing the principled earlier opinion by the great Chief Justice Marshall. The name of the late Chief Justice was "never to be pronounced without reverence," Story wrote. Since Chief Justice Marshall could not speak for himself, he continued, "I have felt an earnest desire to vindicate his memory from the imputation of rashness, or want of deep reflection."

Story overestimated the devastation of the Taney Court's rulings, not just in the bank decision but also in *Charles River Bridge* and *Miln*. In truth, the Taney Court, led by the new Chief Justice, had ruled cautiously in all three decisions, though not in the manner favored by Story and the late Chief Justice Marshall. In the *Charles River Bridge* decision, Taney had endorsed the Court's long-standing protection of private contract rights. But he had refused to recognize rights that were not expressly set out in the terms of a private contract, particularly when the claimed implicit rights conflicted with the public interest. In *Miln*, the Court had not challenged Marshall's opinion in *Gibbons v. Ogden* that Congress had broad power to regulate interstate commerce; it had ruled only that a state could act under its police powers where there was no conflict with federal authority. And in the bank decision, the Court could hardly be accused of a reckless states' rights rampage when the opinion supporting the state bank was written by an outspoken nationalist, Justice McLean, and based on the argument made by Henry Clay, the Whig Party's presidential aspirant, who represented the Kentucky bank in the case.

All three decisions foreshadowed much of the later work of the Taney Court, but not in the way that its critics, like Justice Story and Daniel Webster, charged. The majority was more sensitive to states' rights arguments and local community interests than the Marshall Court, which had consistently supported broad federal authority and individual property rights. But the decisions were not, as Webster claimed, the work of revolutionaries. The Court rulings reflected the pragmatic

judicial approach of the Chief Justice, who was, at the same time, a Jacksonian Democrat suspicious of vested private interests and centralized government power. Just like the president who appointed him.

The Whigs' initial negative opinion of the Taney Court had, within a remarkably short time, turned benign. Primary credit was due to the Chief Justice's quiet leadership and determined pragmatic approach to constitutional law. No better example could be offered than a Taney commercial law opinion for the Court during the 1839 term. The case involved the issue of whether an out-of-state banking corporation could engage in bills of exchange business in Alabama.

The Court challenge was closely watched by corporations throughout the nation since bills of exchange were a critical means of commercial exchange between regions with no common currency except gold and silver. After the financial Panic of 1837, gold and silver were in short supply. Recently appointed Justice John McKinley,* a states' rights Alabamian, had written the circuit court opinion in the case declaring in unadorned absolutes that out-of-state corporations had no constitutional right to do business in Alabama. McKinley's decision, Justice Story wrote Charles Sumner, a young lawyer and future U.S. senator from Massachusetts, "frightened half the lawyers and all the corporations of the country out of their proprieties."

Two broad themes in McKinley's lower court opinion—a stalwart defense of states' rights and an intense suspicion of large corporate interests—appeared to be perfectly pitched to Taney's Jacksonian Democratic principles. But the Chief Justice, in writing the Supreme Court's opinion reversing the circuit court decision, rejected McKinley's doctrinaire pieties in favor of a practical, carefully reasoned judicial solution. Out-of-state corporations, like foreign corporations under the international

* The Supreme Court was expanded to nine members after its 1837 term. President Martin Van Buren appointed two Democrats, McKinley and John Catron of Tennessee, to fill the new seats.

law of comity, Taney wrote, were entitled to do business in other jurisdictions so long as the state (or nation under international law) did not explicitly forbid it by law. Since the Alabama legislature had not passed a law expressly prohibiting the out-of-state banking corporation from doing bills-of-exchange business in the state, its operations in Alabama were constitutional.

Had the Taney Court upheld McKinley's lower court decision, the justices would have effectively erected a "No Trespassing" sign at every state's border, applicable to any bank, manufacturing, or insurance corporation with interstate commercial ambitions. At a time when the nation was still reeling from the Panic of 1837, Justice Story instantly recognized the wisdom of Taney's opinion. He wrote the Chief Justice that his opinion "has given very general satisfaction to the public, and I hope you will allow me to say that I think it does great honor to yourself as well as to the Court." The Whigs' *National Gazette* also approved of the decision, reassured "that patriotism may still find 'a tribunal high above the destructive and depraving influence of party.'"

The Taney Court's growing reputation for non-partisanship made it a natural destination for resolution of the nation's most divisive issue: the institution of slavery. When the framers had met in Philadelphia in 1787, representatives from the northern and southern states knew that no constitution could be ratified if either region dictated the terms concerning "the peculiar institution" of slavery. The document, therefore, made vague but unmistakable references to slaves and the rights of slave-owners in the southern and border states to maintain their human property.*

After the ratification of the Constitution, the first serious political attempt to solve the nation's slavery problem emerged in the form of the Missouri Compromise in 1820. The legislation's chief sponsor, Henry Clay, had successfully proposed that Missouri enter the Union as a slave

* Under Article I, section 2, slaves were counted as "three fifths of all other Persons" in determining taxation and apportionment for the House of Representatives; the slave trade could not be prohibited by Congress before 1808. Article IV provided for the recovery of fugitive slaves.

state but that slavery be prohibited from all future states carved from the Louisiana Territory above Missouri's southern boundary.

By 1840, the slavery issue, rather than gradually disappearing from national political debate, had returned with a fresh virulence. The United States under President-elect William Henry Harrison was a very different nation from the one formed when the Constitution was ratified in 1789 or that existed when the Missouri Compromise was enacted. In the founding fathers' time, slave states enjoyed parity with the northern states both in wealth and population. But much had changed in the succeeding fifty years. With rising industrialization and massive westward migration, non-slave states in the North and West far exceeded slave states in both economic power and voters. Where slavery proved ill-suited to the multifaceted economies of the northern and western states, it became the indispensable staple of the southern agrarian economy. Extremists on both sides sharpened the debate and deepened the divide. Abolitionists preached their anti-slavery doctrine with rising fervor. Southern defenders of slavery were no less certain of the moral correctness of their cause as well as its economic necessity.

Within a period of thirteen months in the early 1840s, the Taney Court was confronted with three separate legal challenges that involved the slavery issue. In 1841, the justices were asked to decide what to do with cargo on the Spanish schooner *Amistad*, which had been intercepted by a U.S. naval brig off the coast of Connecticut. What made the case a national *cause célèbre* was the fact that the *Amistad's* cargo included more than fifty black Africans who had been kidnapped by Spanish merchants and sold in Havana as slaves (in violation of Spanish law). While the blacks were being transported from Havana to another Cuban port, they mutinied, murdered the captain, and ordered their kidnappers to return them to Africa. The Spanish merchants, ostensibly obeying orders, navigated the *Amistad* to the United States.

Pro- and anti-slavery forces quickly aligned themselves on the competing sides of the legal contest. The northern press urged the Court to free the blacks, since they had been illegally seized and forced into slavery in violation of what they considered the laws of humanity and jus-

tice. But the *Charleston Courier* deplored the pressure exerted on the Taney Court by the northern abolitionist press, expressing confidence that the justices, unaffected by such fanaticism, would honor U.S. treaty obligations to Spain and return the blacks to their Spanish owners.

The *Amistad* case inspired the seventy-four-year-old former president, Massachusetts congressman John Quincy Adams, to make his first argument before the Court in thirty-two years. A man of ardent abolitionist sentiments, Adams worried that he was too agitated to make a persuasively coherent oral argument to free the blacks. Adams's argument extended for more than twelve hours spread over three days. After hearing it, Justice Story, a fellow abolitionist, suggested that the former president's wide-ranging diatribes against slavery might more effectively have been made on the floor of the House of Representatives than under the stricter limitations imposed by legal argument. Adams's argument had been extraordinary, Story conceded—"extraordinary, I say, for its power, for its bitter sarcasm, and its dealing with topics far beyond the record and points of discussion."

It was left to Joseph Story, writing for the Court majority, to bring together the disparate strands of the arguments of the four lawyers, including Adams, who had presented the case to the justices for eight days. Rejecting Adams's invitation to condemn slavery, Story concentrated on the specific legal issue before the Court: whether the Spanish merchants could, under a treaty between the U.S. and Spain, demand the return of the rebellious blacks. Story answered emphatically that they could not. U.S. treaties with Spain only provided for the return of slaves who had been legally held. The blacks on the *Amistad*, however, had been kidnapped in Africa and claimed as slaves in violation of both Spanish and international law. Once he had decided the case on its strictest legal terms, Story became expansive, declaring that "upon the eternal principles of justice and international law," the United States was forbidden from making a treaty with Spain or any other nation that deprived free blacks of their liberty.

Chief Justice Taney joined Story's opinion, but left no written record of his views on the *Amistad* case. Presumably, he supported the Court's

narrow reasoning—that the blacks had been illegally seized and could not, therefore, be claimed by the Spanish merchants as their property. But Taney must have exercised severe self-restraint in not responding to Story's dictum announcing "the eternal principles of justice." As Andrew Jackson's Attorney General, Taney had expressed his conviction that all legal issues concerning slavery were governed by state law, and that there could be no legitimate appeal to federal laws, international treaties, or "eternal principles of justice."

For Taney, the line between morality and constitutional law was carefully delineated. On moral grounds, he freed his slaves and hoped that slavery, which he considered evil, would eventually disappear from the United States. But on constitutional grounds, he was convinced that the framers had accepted slavery as a choice to be made by the individual states, and that it could only be eliminated by the laws of those states.

In a second case involving slavery decided during the 1841 term, Taney again joined a majority opinion that was limited to a judicious analysis of the relevant law, therefore avoiding an open-ended discussion of the volatile race issue. The Court found that a state constitution's prohibition of the importation of slaves was not self-executing, but required a supporting statute. When the decision was announced, Associate Justice John McLean, an outspoken opponent of slavery, unexpectedly pulled a written concurrence from his pocket and read it to his surprised colleagues. Denouncing slavery in emotional terms, McLean declared that every state had a fundamental right to exclude it from its borders.

This time, Taney refused to remain silent. The regulation of the institution of slavery, he emphasized, was the business of the states, not the federal government. Just as McLean's home state of Ohio could exclude slavery under the constitutional compact, the Chief Justice implied, so states in the South could, by law, perpetuate it.

A year later, the Taney Court heard a third case raising the issue of slavery, and this time the justices could not avoid confronting the issue directly. The challenge in *Prigg v. Pennsylvania* focused on the constitutional right of slaveowners to recover their runaway slaves in non-slave states. The Constitution had sanctioned the recovery of fugitive slaves,

and Congress in 1793 had passed the Fugitive Slave Law providing statutory support for the constitutional obligation. But as abolitionist sentiment gained force in the northern states, non-slave states, like Pennsylvania, passed laws that required rigorous proof of ownership before blacks could be returned to slaveholders claiming ownership of fugitive slaves. The laws, in part, were passed to protect free blacks from unscrupulous whites trying to force them into slavery. But the laws were also encouraged by abolitionists who, regardless of a slaveowner's claim, wanted to ensure a black's freedom.

Edward Prigg had been hired to pursue a runaway slave, Margaret Morgan, who had crossed Maryland's northern border to reside with her children in the free state of Pennsylvania. After capturing Morgan, Prigg appeared before a state judge to swear that Morgan and her children were fugitive slaves. When the judge balked at granting the required certification, Prigg seized Morgan and her family and returned to Maryland. Law enforcement authorities in Pennsylvania issued a warrant for Prigg's arrest for kidnapping. After much negotiation between high-level officials of the two states, it was decided that Prigg would test the constitutionality of the Pennsylvania law. He agreed to return to Pennsylvania, where he was found guilty of kidnapping, a conviction that was eventually appealed to the U.S. Supreme Court.

The question before the Taney Court in 1842 was whether the Pennsylvania law imposing detailed legal procedures on a slaveowner before he could recover his runaway slaves was an unconstitutional impediment to the enforcement of the federal Fugitive Slave Law. To the consternation of his fellow abolitionists, Justice Story wrote the majority opinion that struck down the Pennsylvania statute. The state law was unconstitutional, Story wrote for a unanimous Court, because its provisions interfered with the mandate of the federal statute that imposed a legal obligation to recover fugitive slaves.

Before he was finished, Story had roiled both pro- and anti-slavery forces by going well beyond the facts of the Pennsylvania case to declare that *all* state fugitive slave laws were unconstitutional. The state laws were void, Story wrote, because the jurisdiction of the federal govern-

selected more abundantly able to wear the ermine which Chief Justice Marshall honored."

Taney reportedly responded to Clay's conciliatory words with grace and appreciation. Behind Taney's polite demeanor, however, lay a political partisan who did not easily forgive the attacks of opponents of Jacksonian democracy. Only months after he had written the fine, carefully balanced opinion for the Court in the Charles River Bridge case in 1837, for example, Taney expressed to Andrew Jackson his utter disgust with the recharter efforts of the Bank of the United States and its supporters. "The Bank of the United States is nothing more than the concentrated power of the whole class of the moneyed aristocracy who have so long struggled to get possession of the government," Taney wrote, "carried along . . . [by] the numerous army of greedy speculators and ambitious politicians who hope to profit from its aid." In 1842, Taney condemned the Whigs' "disgraceful buffoonery of coonskins and hard cider . . . received under the auspices of Mr. Clay." And he savored the victory of the Democrat, James K. Polk, over Clay in the 1844 presidential election, writing the president-elect: "We have passed through no contest for the presidency more important than the one just over; nor have I seen any one before in which so many dangerous influences were combined together as were united in support of Mr. Clay. Your triumphant success gives me increased confidence in the intelligence, firmness and virtue of the American people; and in the safety and stability of the principles upon which our institutions are founded."

Fortunately for Taney, the Court, and the nation, his highly partisan comments in his private correspondence were not known to the public. During the decade of the 1840s, the Chief Justice of the United States was perceived to represent the interests of all Americans—Democrats and Whigs, southerners and northerners—at a time when the slavery issue had called into question the very notion of Union. In a dissenting opinion written in 1849, Taney gave eloquent testimony to his belief in a strong Union.

The Taney opinion was written in response to a majority decision declaring New York and Massachusetts laws that taxed foreign passengers