SLAVERY IN THE TANEY COURT

An Examination of the Personal Views of the Justices and Their Influences on the Justices' Opinions

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For most Americans, the Constitution is our "holy book," the divinely ordained document handed down by the Founding Fathers to provide the final answer to any and all questions regarding rights or laws. Unfortunately, America does not have an immortal group of Founding Fathers to continually interpret the Constitution, so we are forced accept mere mortals as our high priests, the Supreme Court Justices. Their interpretations provide a fleshing out of the Constitution, so their decisions carry as much weight as any law passed by Congress. While they have always been respected, learned men, the decisions of these mortals can often be affected by their political inclinations, backgrounds, or the standards of their time. During the era of the Taney court, there were thirteen of these high priests (including Taney) who were called upon to interpret the supreme law of the land with regard to the massively polarizing issue of slavery, and their decisions seemed to have a stronger connection to their personal opinions than to the divine will of the Founding Fathers.

Those thirteen Justices had to interpret the Constitution in a nation divided, so understanding their backgrounds is central to understanding the major decisions of their day. Due to the convention of the time, wherein presidents selected Supreme Court Justices from the circuit they would oversee, the Court always consisted of four Northern Justices and five Southern Justices. During the period from 1836-1864, when Taney served as Chief Justice, there was considerable turnover on the Court, but only thirteen of the Justices made a true impact on the issue of slavery. Those thirteen Justices, whose backgrounds will be examined

with respect to slavery, are as follows, in order of their appointment: Joseph Story, Smith Thompson, John McLean, Henry Baldwin, James Moore Wayne, Roger Brooks Taney, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert Grier, Benjamin Curtis, and John Campbell. With a thorough examination of their pre-Court lives and Circuit court opinions, their personal views on slavery and their opinions of its constitutionality take shape, and after examining the cases these distinguished men decided on the Court, another thing becomes clear: many of them chose, at times, to set aside their personal opinions on slavery in favor of judicial analysis. With all the attention paid to the spectacularly partisan opinions rendered in *Dred Scott*, many historians disregard prior cases like *Prigg v. Pennsylvania* and *The Amistad* in which the court rendered careful, balanced compromise opinions. Each of these thirteen Justices has their own story, some better documented than others, and only by examining their respective stories can their decisions on the Court be fully understood.

I

For thirty-four years before Taney ascended to the Chief Justiceship, the U.S. Supreme Court was led by John Marshall, a man who was deeply committed to upholding and expanding the power of the Federal government. He was successful in case after case, effectively expanding the power of the government while simultaneously strengthening the role of the federal judiciary. One aspect of that strengthening came when he "led the court to abandon the practice of its first decade whereby seriatim opinions had been handed down in important cases and to resort to an opinion of the Court in each case."[1] Marshall wanted the Court to present a united front on contentious issues, so he endeavored to form consensuses and write generally acceptable majority opinions. By the end of his tenure on the court, "the ideal of unanimity, of institutional rather than individual spokesmanship had become well entrenched in spite of some diversity of actual behavior."[2] This was the Court Justices Story, McLean, Baldwin and Thompson came from, and the difference between the Marshall Court and the Taney Court was a source of great suffering for Justice Story during the last nine years of his time on the bench.

1. Carl Brent Swisher, *History of the Supreme Court of the United States: The Taney Period 1836-1864* (New York: Macmillan Publishing Co., Inc., 1974), 2-3.

2. Ibid., 3

II

The other aspect of the Federal Judiciary which must be understood before one can delve into the world of the Taney Court is the formation of the judicial circuits. At the time, "by custom, each circuit was represented on the Court by one of its residents," so the states that made up a circuit effectively limited the candidates for each opening on the Supreme Court.[3] In 1801, the first six circuits were established, creating a balance between the Northern and Southern states. Then, in 1807, the expanding United States created the seventh circuit to serve Tennessee, Ohio, and Kentucky, essentially creating a "swing circuit" wherein the Justice could be from the North or the South.[4] The circuits then remained the same until 1837, when the addition of new states again necessitated the creation of more circuits, the eighth and ninth. Carl Swisher offers a telling analysis of the way these circuits were created:

> The states hitherto excluded from circuits were Alabama, Missouri, Louisiana, Arkansas, Missouri, Illinois, Indiana, and Michigan. These states would seem to divide into two circuits, one in the North and the other in the South. But with the passing years regional divisions were becoming more and more sensitive matters, and Southern statesmen were, of course, not averse to collecting both Supreme Court judgeships.[5]

Instead of simply dividing the new circuits between the North and the South, Congress took the "swing circuit," the seventh, which was already represented by the Northern Justice John McLean, and drastically changed it, retaining only Ohio so that it consisted of Illinois, Indiana, Michigan, and Ohio. Then both the new circuits became Southern, with the eighth consisting of Kentucky, Missouri, and Tennessee and the ninth of Alabama, Arkansas, Louisiana, and Mississippi.[6]

While an argument can be made that the reasons for the circuits being structured the way they were stemmed from the vast distances Sothern circuit justices would have to traverse in the course of their

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3. Earl M. Maltz, *Slavery and the Supreme Court, 1825-1851* (Lawrence: University Press of Kansas, 2009), 33

4. Federal Judicial Center, "The Federal Judicial Circuits." http://www.fjc.gov/history/home.nsf/page/admin_02.html

5. Swisher, *History of the Supreme Court of the United States*, 58.

6. "The Federal Judicial Circuits

duties (for example, the ninth as it was created covered approximately 10,000 miles), the courts seem to have been created with partisan purposes in mind. The five Southern circuits contained only 8,307,332 people total, while the four Northern circuits contained 9,654,865, more than a million more.[7] Logically, one would expect more people to produce more cases, thereby creating a larger need for judges. Instead, in this case, two separate political purposes dovetailed neatly to create the legislative majority necessary for the Judiciary Act of 1837. During the years before the Judiciary Act passed, "Westerners, a powerful enough constituency to facilitate or forestall legislative action, were simply looking for the plan that promised them the greatest influence and most meaningful representation."[8] Southern legislators embraced the Westerners' non-discriminating desire to gain more voices on the Supreme Court, using it to pass an act maximizing the Southern voice on the Court.

III

On the Taney Court, this Southern majority was helped further by the Democratic Party's success in presidential elections. Andrew Jackson had the opportunity, in part because the Judicial Act of 1837 created the need for two new justices, to appoint six people to the Court, including the new Chief Justice. Then, for the rest of the years of the Taney Court, the White House only saw two Whigs hold office, and the only Justices the party was able to appoint were Benjamin Curtis and Samuel Nelson. Democratic dominance of the White House allowed the appointment of "doughface" Justices like Henry Baldwin, who during his term in Congress "had been one of the northerners opposed to attempts to pass anti-slavery provisos for the territories, as well as conditional admission of new states."[9] To get judges on the Court, however, presidents still had to get them past a Senate which cared deeply about the composition of the Supreme Court.

During the time of the Taney Court, Supreme Court Justices were often appointed from positions other than the judiciary, so when

7. http://lwd.dol.state.nj.us/labor/lpa/census/1990/poptrd1.htm

8. Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development (Princeton: Princeton University Press, 2012), 126*

9. Leon Friedman and Fred L. Israel, ed. *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, Vol. I (New York: Chelsea House Publishers, 1969) 574.

they were seeking confirmation they did not have the veil of judicial independence with which many appointees cover their political inclinations today. In fact, in the mid-1800s the opposite was the case—most appointees were loyal political supporters of the presidential incumbent. Such party stalwarts could often be rejected by a Senate held by the opposition party, however, as occurred in the process which ended in the appointment of Joseph Story. More specific, issue-based litmus tests were also frequently applied to nominees. Justice Wayne had to pass the tests of his views on nullification, Native Americans, and most importantly the national bank.[10] George Woodward, who was nominated for the seat Grier eventually occupied, was rejected because of his "nativist leanings."[11] Over time, slavery too became a central part of this judicial litmus test. In attempting to replace John McKinley, Millard Fillmore's nomination of Senator George Badger was defeated "in part because Badger had supported the Wilmot Proviso."[12] An 1846 letter from several of Maryland's representatives in the House to President Polk supporting Justice Grier's nomination is equally telling on how important slavery had become to judicial confirmation:

> I am urged by several letters from my constituents to call your attention to the importance, especially to the citizens of Maryland, of filling the vacancy on the bench of the Supreme Court, occasioned by the death of Judge Baldwin, with a gentleman who acknowledges the constitutional guarantees of the right of the master to his slave and will enforce it irrespective of the clogs from time to time attempted to be thrown around it by state legislation.[13]

Clearly, then, appropriate views on slavery had become one of the foremost tests of potential judges by the mid-1840s. The manner in which the judicial circuits were formed, the presidents who had the opportunity to appoint justices, and the Senate's standards for the worthiness of the judges combined to create the Taney court which passed proslavery decisions like *Dred Scott*, *Prigg vs. Pennsylvania*, and *Groves V. Slaughter*. One of the foremost Justices in the early years of the Taney Court, though, was appointed in a time when proslavery

10. Swisher, *History of the Supreme Court of the United States*, 53-54.
11. Friedman, *The Justices of the Supreme Court*, 874.
12. Maltz, *Slavery and the Supreme Court, 189.*
13. Quoted in Swisher, *History of the Supreme Court in the United States*, 232

leanings were not a veritable prerequisite for judicial appointment.

IV

Justice Joseph Story, who served over thirty years on the Supreme Court, was a man of the Marshall court. In fact, "he was 'a solitary relic of former doctrines,' the 'only survivor of the old Court.'"[14] Despite his origins as a Democratic-Republican, a party which did not support a centralized government, he broke with party doctrine early in his career when he "not only defended the Massachusetts Federalist bench against the assaults of his co-partisans, but actually counterattacked in successive efforts to raise the judiciary's power and prestige."[15] He was the last remnant of the strongly nationalistic court of the Marshall era, so when the Supreme Court he loved became an institution of states' rights advocates, he began to feel out of place, constantly considering resigning. Instead, he stayed on the Court until his death in 1845, exiting the world as one of the most renowned judges of his day. While he was often in the minority during his later years on the court, Story never relinquished the measured judicial philosophy which he had exercised throughout his time on the bench. The Constitution always came before his personal views, as he explained when he said, "I shall never hesitate to do my duty as a judge, under the Constitution and laws of the United States, be the consequences what they may. The Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure. [Although] I have ever been opposed to slavery…I take my standard of duty *as a judge* from the Constitution."[16]

However, his personal feelings on slavery did shine through any time he felt it constitutionally acceptable to display them. While serving on a circuit court, Story, in a charge to the jury, said, "The existence of slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification."[17] On principle, he firmly opposed it, and showed his passionate opposition in that "he had made up his mind that it was

14. R. Kent Newmeyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 306.

15. Friedman, *The Justices of the United States Supreme Court*, Vol. I, 437.

16. Quoted in Maltz, *Slavery and the Supreme Court*, 36.

17. Story, William. *Life and letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane professor of law at Harvard University* (Boston: Little and Brown, 1851), 336.

his duty, judicially and morally, to exert his utmost powers to procure the annihilation of the trade, and nothing availed to check him."[18] As the slave trade no longer had protection under the Constitution, Story passionately pursued its demise in any case that came before him. For example, in the 1822 circuit case *La Jeune Eugenie*, he ruled in strong antislavery language that a ship participating in the slave trade can be prosecuted even if it does not, at that point, have any slaves on it.

Privately as well, he opposed slavery. In fact, slavery was the only issue ever to persuade Story to set aside his belief that justices of the Court should never involve themselves in politics. Thanks to an article in the newspaper *Cabinet* which was published after his death, the nation knew that:

> When the Missouri question was agitating the country, Judge Story, notwithstanding his high office, attended a town meeting in his native village of Salem, and made an elaborate speech *in favor of the absolute prohibition of slavery, by express act of Congress, in all the Territories of the United States, and against the admission of any new slaveholding state, except on the unalterable condition of the abolition of slavery*.[19]

Antislavery forces might have wished he had survived long enough to participate in *Dred Scott*, but at least the eminent jurist's personal opposition to slavery is clear. Unfortunately for abolitionists, "unlike some opponents of slavery, Story's willingness to act on such sentiments was circumscribed by a deep suspicion of threats to the established order."[20] Justice Story was forced to choose between his personal opposition to slavery and his love of the Constitution and judicial integrity, so his opposition to slavery had to be set aside.

Despite his clear abhorrence of the institution of slavery, Story was certainly no abolitionist, even in his private thought. Instead, he embraced the spirit of compromise which had created the Constitution he "celebrated as the bulwark of American liberty," saying "he who wished well to his country will adhere steadily to these compromises as fundamental policy which extinguishes some of the most mischievous

18. Ibid., 348

19. "Judge Story on Slavery Extension," *Cabinet*, July 15, 1856.

20. Maltz, *Slavery and the Supreme Court*, 36

sources of all political divisions."[21] Speaking on the fugitive slave clause in *Prigg v. Pennsylvania*, Story declared that any law limiting the right "of the owner to the immediate possession of his slave" was a defiance of the "positive and absolute right" of a master to his slaves.[22] How, then, to reconcile the justice declaring slavery an unshakable right with the man who deemed it an institution repugnant to the natural rights of man?

Making sense of Story's position requires a return to his interpretation of the beliefs of the Founding Fathers. Rather than join the early abolitionists of his day, "he followed the intentions, or rather, the hopes, of the framers, who believed that non-extension would doom the institution itself."[23] He was a committed gradualist on the issue of emancipation, condemning abolitionists "with a passion otherwise reserved for Thomas Jefferson and Andrew Jackson" just as he condemned slavery.[24] These views, combined with his national stature, made him seem the perfect man to write for the majority in both the *Amistad* case and in *Prigg v. Pennsylvania*. The man appointed twelve years after Story, Smith Thompson, did not have as storied a career, so he has never garnered the same attention from historians as Story. However, each of the justices on the Court had an equal vote and voice, and he too contributed to the major decisions of the day.

V

Smith Thompson, appointed from the second circuit by James Monroe, brought "a states' rights mercantilism tempered with a humanitarian overlay" to the Supreme Court.[25] He was a prominent New York Republican, and so did not find the shift to the states' rights-dominated Taney Court as odious as Story. Thompson also differed from Story in his commitment to the Court. While Story dedicated his life to judicial pursuits, Thompson remained involved in politics, aspiring

21. Newmeyer, *Supreme Court Justice Joseph Story*, 344; Joseph Story. *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adaption of the Constitution, vol. II* (Boston: William Hillard, 1833), 211.

22. Quoted in Maltz, *Slavery and the Supreme Court*, 100.

23. Newmeyer, *Supreme Court Justice Joseph Story*, 350.

24. Ibid., 351

25. Friedman, *The Justices of the Supreme Court, Vol. I*, 477.

to move from his seat on the Court to the presidency.[26] On the issue of slavery, he resembled many other men of the day in that "although in 1819 he described the slave trade as 'inhuman and disgraceful, Thompson d[id] not seem to have had strong feelings about the issue of slavery more generally."[27] His abhorrence of the slave trade showed in his most important circuit case respecting slavery, when he had to preside over *the Amistad*. Despite "declaring that 'my personal feelings are as abhorrent to the system of slavery as those of any man here,'" Thompson maintained judicial objectivity when addressing the case. In the end, he was able to rule in favor of the slaves, ordering them returned to Africa, and while the Supreme Court did not support that order, his decision was confirmed when *The Amistad* went before the Court. The next judge to join the Court, John McLean, shared Thompson's political ambitions, although he had stronger views when it came to the question of slavery.

VI

Over the course of his time serving on the Court, Andrew Jackson's first appointment, John McLean, presumably disappointed the man who appointed him with his judicial nationalism and fervent abolitionism. While he began his tenure as a moderate, he "shifted to a more nationalistic position than he had adopted in his early years on the Court" and remained there for the rest of his thirty years.[28] Earl Maltz, distinguished professor of law at Rutgers University, even goes so far as to describe him as "one of the strongest judicial nationalists on the Taney Court," which presumably contributed to McLean's close friendship with Joseph Story.[29] Unlike Story, however, McLean was willing to sacrifice his devotion to the national government for the sake of a fight he deemed more important. In an opinion during his second year on the bench, McLean moved beyond what was necessary for his opinion to make that point that "he would incline toward granting freedom to all slaves 'according to the immutable principle of natural justice.'"[30] During his time on the Ohio Supreme Court, he even went so far as to say "viewing the question abstractly, I could not hesitate to

26. Ibid., 479.

27. Maltz, *Slavery and the Supreme Court*, 37.

28. Friedman, *The Justices of the Supreme Court, Vol. I*, 541.

29. Maltz, *Slavery and the Supreme Court*, 39

30. Friedman, *The Justices of the Supreme Court, Vol. I*, 539.

declare that a slave in any state or country, according to the immutable principles of natural justice, is entitled to his freedom."[31] McLean's interpretation of the Constitution also evidenced far more of the view espoused by abolitionists, as evidenced by a 1853 circuit opinion where he said "that slavery was a local institution which 'could not exist without the authority of law,'" and "had elaborated this view by asserting that legality need not be 'created by express enactment' but might arise 'from long recognized rights, contravened by no legislative action.'"[32] McLean believed in the exercise of judicial restraint as well, though, saying judges "[could not] consider slavery in the abstract" and that "if they disregard[ed] what they conscientiously believe[d] to be the written law in any case, they [would be] act[ing] corruptly, and [would be] traitors to their country."[33]

Despite these fine words, some historians find cause to question how truly he held to the principle of judicial restraint during his pursuit of the presidency from the bench. McLean seemed more concerned with the path he could take to the White House than the principles he would be expected to hold when he got there, allying himself in early life with Jacksonian Democrats, then with the fledgling Republican party later in his career. Just before the Republican national convention in 1856, McLean allowed the publication of "an exchange between McLean and Lewis Cass in which McLean defended the authority of Congress to ban slavery from the territories. At the urging of his supporters, he followed up with another letter."[34] It is clear that as he began to pursue the Republican nomination more seriously, McLean's opinions in slavery cases began to adopt stronger rhetoric, as will be shown in his *Dred Scott* dissent. The next Northerner to join the Court, Henry Baldwin, adopted strong rhetoric in his opinions as well, although he had little else in common with his fellow Northern justices.

VII

It is difficult to know how Justice Henry Baldwin would be remembered had his service on the bench not been marred by considerable personal instability, culminating in his absence on year due to mental

31. Maltz, *Slavery and the Supreme Court*, 39.

32. Francis Phelps Weisenberger, *The Life of John McLean: A Politician on the United States Supreme Court* (Bloomington: De Capo Press, 1971), 190.

33. Quoted in Ibid., 193.

34. Maltz, *Slavery and the Supreme Court*, 232.

health issues, but with those problems he is remembered as a fanatically proslavery, states' rights judge whose erratic behavior alienated many of his fellow justices. As a response to Story's *Commentaries on the Constitution of the United States*, Baldwin published his own book, *General View of the Origin and Nature of the Constitution*, which explained his constitutional philosophy. From the outright, he says "by taking it as the grant of the people of the several states, I find an easy solution of all questions arising under it; whereas in taking it as the grant of the people of the United States in the aggregate, I am wholly unable to make its various provisions consistent with each other, or to find any safe rule of interpreting them separately."[35] This fundamentally states' rights position dovetailed neatly with his view of the powers of the courts, which he believed should be as limited as possible. As with the courts, he believed the federal government's role in slavery should be limited: it should help recover fugitives, no more.

Baldwin put his proslavery bias on display in an 1833 circuit court case, wherein he told the jury "if this is unjust and oppressive, the sin is on the heads of the makers of laws which tolerate slavery…to visit it on those who have honestly acquired and lawfully hold property, under the guarantee of the laws, is the worst of all oppression, and the rankest injustice towards our fellow man."[36] In saying this, he does not acknowledge the humanity of the slaves, treating them as a form of property like any other, while simultaneously affirming his passionate support of their masters. During his time on the bench, "Baldwin did not care if no other Justices agreed with him. Slaves were property, and the right was anterior to the Constitution, which merely recognized and protected certain aspects of the right to hold property in slaves."[37] He even took the support of slavery a step further, asserting that slaves were a higher form of property, political property, due to their three-fifths contribution to the political power of the state in which their owner resided. Clearly, then, he deserved his reputation as a doughface. The next justice appointed eventually garnered the opposite reputation—James Moore Wayne's decision to stay in Washington upon the outbreak of the Civil War earned him the enmity of the South.

35. Henry Baldwin. *General View of the Origin and Nature of the Constitution* (J.C. Clark, 1837), 1

36. Ibid., 41

37. Friedman, *The Justices of the Supreme Court*, 579.

VIII

Wayne was a southern justice who placed the union above all else, making him one of the foremost nationalists on the Court, although his belief in the Southern right to own slaves allowed him to retain Southern support for most of his tenure on the Court. He established his commitment to a strong central government early, taking such a strong view in favor of national power that Benjamin Curtis called him one of the "most high-toned Federalists on the bench."[38] When the Civil War broke out, that same commitment to the national government probably contributed to his decision to remain in Washington, losing all of his possessions in Georgia. His commitment to the national government kept him from truly picking a side as the conflict developed, as despite "more and more Americans accepting polar positions regarding slavery, Wayne tried to maintain his Unionism."[39] When it came to slavery, however, Wayne held true to the values of the South. While serving as an Alderman in Savannah, he supported legislation outlawing schools for blacks, and viewed them as inferior creatures. Wayne did own slaves, although "as late as 1854 he denounced slavery as fundamentally evil, expressed the hope that Southerners would gradually emancipate their bondsmen, and advocated action by the Federal Government to encourage the return of all African Americans to Africa through a program of colonization."[40] He set that personal distaste aside on the court, though, and "found no difficulty reconciling to his own satisfaction the doctrine that the federal government was omnipotent where foreign or interstate commerce was involved with the doctrine that it was impotent wherever such commerce concerned slavery."[41] Like many more moderate Southerners he did oppose the slave trade, but when it came to the institution of slavery itself he contributed to the Court's reputation as a pro-slavery body, as did his Chief Justice.

IX

Roger Brooks Taney, Chief Justice of the Supreme Court for 28 years, represented all the beliefs of a staunch Jacksonian Democrat—he was a states' rights man who participated in the fight against the bank, and he was firmly in favor of the institution of slavery. Taney was born

38. Quoted in Ibid., 605.

39. Ibid., 609

40. Maltz, *Slavery and the Supreme Court*, 44

41. Alexander A. Lawrence, *James Moore Wayne, Southern Unionist* (Westport: Greenwood Press, 1943), 97.

to Michael Taney, who "owned good landed estate on which he always resided, and slaves."[42] Due to his family's secluded life in the country, he did not have much access to education, so he was eventually educated at home, by tutors, as was often the practice of the day, until he went to college. After graduating college, Taney says in the autobiographical portion of his memoir, "in the spring of 1796, I went to Annapolis, to read law in the office of Jeremiah Townley Chase, who was, at that time, one of the Judges of the General Court of Maryland."[43] Chase, after his service on the Continental Congress, had opposed the Constitution because it lacked a Bill of Rights, but once the Bill was added became a Federalist. His political opinions seem to have been passed on to his mentee, Taney, although Taney would shed them later in life.

While he started life as a Federalist, by the prime of his political career Taney had subscribed passionately to the Jacksonian view. On slavery, he had a dichotomy even greater than that of Story between his private and professional views. Privately, Taney's behavior implies that he was passionately opposed to slavery. Fairly early in his life he manumitted all of his slaves, and he served as councilor to an organization formed to protect free blacks who were captured as "fugitive slaves." He even went so far as to advance a free black the price of his family so that he could free them from slavery.[44] At the beginning of his political career he even opposed slavery in the public sphere, opposing a resolution by the Maryland senate which demanded that Missouri be admitted as a slave state.[45] His anti-slavery credentials were further strengthened in the case of *Maryland v. Gruber*, where Taney would defend a minister named Jacob Gruber who was accused of sedition and inciting slaves to rebel for an abolitionist speech he made in Maryland. During his masterful defense, Taney said "a hard necessity indeed, compels us to endure the evil of slavery for a time…it cannot be easily or suddenly removed. Yet, while it continues, it is a blot on our national character; and ever real lover of freedom…hopes it will…be…gradually wiped

42. Samuel Tyler, *Memoir of Roger Brooke Taney, LL. D., Chief Justice of the Supreme Court of the United States* (Baltimore: J. Murphy, 1876), 20

43. Ibid., 56

44. Carl Brent Swisher, *Roger B. Taney* (New York: The MacMillan Company, 1936)

45. Robert H. Baker, *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution* (Lawrence: University Press of Kansas, 2012) 133.

away."[46] Despite those feelings, though, he believed that "the problems of slavery were so intricate and so peculiarly local as to require local handling," so as attorney general he felt obligated to "interpret the law so as to leave the control of the subject in local hands, even though some negroes suffered thereby."[47] The difference in Taney's opinions seems more than that, though.

It is difficult to reconcile the man who freed his slaves and helped others buy their freedom with the attorney general who wrote, in an unpublished opinion of the Attorney General's office which was originally intended as part of a response to South Carolina's Seamen Acts:

> The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of 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 may enjoy at their mercy.[48]

These words may seem far more familiar to people who recall Taney's opinion in Dred Scott than his denunciations of slavery in *Maryland v. Gruber*. He reinforced the point in a circuit court opinion in 1840, where he again reiterated his belief that blacks were not citizens. For all his efforts on behalf of the enslaved population in private life, his ever-hardening judicial views did more damage to the cause of free blacks and slaves than his positive efforts ever worked good. When Taney became chief justice, his Court still lacked two of the members who would contend with the first major cases on slavery.

X

As a result of the Judicial Act of 1837, two more Southern justices joined the Court. John Catron of Tennessee remains partly shrouded

46. Swisher, *Roger B. Taney*, 97.

47. Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 159

48. Quoted in Swisher, *Roger B. Taney*, 154.

in mystery, as few records remain of his youth, but his voice on the Court sounded in favor of a moderate states' rights position and, of course, protection of the institution of slavery, although in that respect too his views were moderate compared to some of his fellow justices. Catron subscribed to the positive good view of slavery, saying in his opinion in the case *Fisher's Negroes v. Dobbs*, "the slave, who receives the protection and care of a tolerable master, holds a condition here, superior to the negro who is freed from domestic slavery….the freed black man lives amongst us without motive and without hope."[49] Like James Moore Wayne, though, Catron put the health of the union before slaveholding interests. A friend said of him, "his feelings are with the South, yet he clings to the hope that the Union may possibly be preserved, or a reconstruction may take place as many other good citizens of his age still hope for, and that a revolution will occur in public opinion at the North, when they will concede to the South all they ask."[50] He again displayed his preference for the maintenance of the Union when he advocated for extending the Missouri Compromise line out to the Pacific in an effort to put the territory issue to rest for good.[51] Despite being part of the proslavery majority, then, Catron was not a particularly partisan justice, and he certainly contributed more to the doings of the court than the other beneficiary of the Judiciary Act of 1837.

XI

John McKinley, the first Supreme Court Justice from Alabama, is primarily remembered by historians for his prodigal capacity to complain about his circuit responsibilities and his minimal contributions to the doings of the Court. He did subscribe to Southern judicial philosophy, providing a states' rights, pro-slavery voice on the Court when present, but in neither respect was his voice particularly strong. McKinley "has been described as a man who was 'out of his depth' on the Court and 'made no significant contribution to legal thinking in any form.' During his fifteen years of service on the Court he wrote only twenty-two opinions."[52] While he did indisputably have the largest circuit to cover, and therefore far more to keep him away from D.C., his minimal contributions to the doings of the Court grant him a marginal role at best

49. Quoted in Maltz, *Slavery and the Supreme Court*, 45.

50. Lawrence, *James Moore Wayne*, 181.

51. Maltz, *Slavery and the Supreme Court*, 254.

52. Ibid., 47

in the history of the Court.

Despite being a federalist early in his life, a toast McKinley gave later shows where his philosophy had gone in the years before he joined the court: "The Constitution of the United States: The Compact of sovereign and independent States, instituted for national purposes only; limited and specific in its powers but supreme within the prescribed sphere of its action. The powers not delegated belonging to the states exclusively."[53] His final speech in the House of Representatives likewise displays his views on slavery. In it, he "warned against accepting petitions for the abolition of slavery in the District of Columbia. McKinley said he would take his property where he wished within the Union; Congress had no right to interfere."[54] His assertion that he would take "his property where he wished" seem to support the theory that he was a slaveowner, as do his interest in the cotton crop and records of his way of life, although there are not concrete records to prove or disprove it as there are for the other Southern justices. These eight justices, plus Phillip Barbour of Virginia (who would die during the cases), made up the Court who would decide on *The Amistad* and *Groves v. Slaughter*, although one more justice would join them before *Prigg v. Pennsylvania* was decided.

XII

Personal relationships between the justices had a role to play in how effectively the Court would be able to perform its duties, and during the Taney years their relationships became more strained than they had ever been under Marshall. The Court's divisions even became physical, as the tradition of maintaining one large "mess" where all the justices lived was broken during Taney's tenure. Smith Thompson was the first to leave the mess, although his decision appeared to be motivated more by a desire for space with his wife than any animosity towards his fellow judges. Greater evidence for division lies in Justice McLean's words, when "in 1843 McLean suggested to Story that their two families take quarters apart. 'I do not believe you will enjoy yourself with our brother judges,' he dryly added."[55] In fact, by 1844, the justices "were not so

53. Steven P. Brown, *John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest*. (Tuscaloosa, The University of Alabama Press, 2012), 86.

54. Friedman, *The Justices o the Supreme Court, Vol. I*, 773.

55. John P. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* (Cambridge: Harvard University Press, 1964), 172

congenial to each other as they had formerly been, and no longer did they live in the same house."[56] Partisan divisions could also be seen in 1843, when Baldwin, Wayne, Catron, and Daniel, on a day Justice Story was absent, banded together to remove Richard Peters, the fifteen-year court reporter and Story's close friend, and give the job as a "spoil" of their victory to General Benjamin Howard.[57] The four Jacksonians clearly served as a bloc who would vote together to further their own interests.

Clearly the gravity of the issues they faced and their great differences of opinion were straining the justices' relationships, although the differences may not have been as vast as their separation made them appear. Despite their ideological differences, in the wake of Story's death Taney wrote a letter in which he lamented Story's passing, saying "what a loss the court has sustained in the death of Joseph Story! It is irreparable, utterly irreparable in this generation."[58] The two strongest minds on the early Taney Court maintained a close friendship outside of their legal duties, one quite analogous to the relationship of Antonin Scalia and Ruth Bader Ginsburg today. Amongst the other justices, Story and McLean maintained a close friendship, while Story and Baldwin quietly feuded after Baldwin wrote *General View of Origin and Nature of the Constitution* to oppose Story's *Commentaries on the Constitution*. As seen in the removal of Richard Peters the Jacksonian jurists banded together, serving in most cases as a strong, partisan voting bloc. Those relationships could be seen in the major cases the men decided.

XIII

As a public event, *The Amistad* case was one of the most prominent faced by the Taney Court, commanding a packed courtroom who anxiously awaited the Court's ruling on the rights of enslaved Africans to fight for their freedom. While the Court was without a doubt predominately proslavery, the issue of the institution of slavery was held to be separate from that of the slave trade at the time. Many Justices, like James Moore Wayne, actively supported the former while opposing the latter. Viewed through this lens, the 6-1 decision (Barbour died during oral arguments and McKinley was absent) to free the Africans is a perfectly understandable result for the Taney Court, especially given

56. Weisenberger, *The Life of John McLean*, 220

57. Frank, *Justice Daniel Dissenting*, 171

58. Tyler, *Memoir of Roger Brooke Taney*, 290.

the moderate terms with which the decision was rendered. Justice Story, the passionate opponent of the slave trade, was chosen to give an opinion, and he did so in far softer terms than he had on circuit in *La Jeune Eugenie* almost a decade earlier. In the *Eugenie* case, Story denounced the slave trade in ringing terms, saying it "is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."[59] Such powerful rhetoric condemning the slave trade was, by necessity, conspicuously absent from Story's *Amistad* opinion, sacrificed for the sake of judicial unity. If he had tried to proclaim, for example, that the natural right of all men to freedom gave the Africans the right to revolt and free themselves, the proslavery justices on the Court would have been up in arms, arguing vehemently against the point. Instead, he prefaced his decision by saying "If these negroes were, at the time, lawfully held as slaves under the laws of Spain and recognized by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants."[60] Only because they were kidnapped Africans did the defendants have the right to win back their freedom. Had they been born slaves in Cuba, they would have been promptly shipped back to Spanish control.

With those limiting factors in place, it is difficult to see a reading of the law wherein they could be deemed slaves, and therefore easy for proslavery justices to sign onto the opinion. In the words of H. Robert Baker, "*Amistad* was a lesson in how the narrow construction of legal issues could avoid controversy, achieve consensus, and accommodate both moderate antislavery and proslavery interests."[61] The lone dissenter, proslavery Pennsylvanian Justice Henry Baldwin, remained silent, offering no reasons for his disagreement. All told, *The Amistad* represented the spirit of consensus forming which had embodied the Marshall Court. In order to get a near unanimous decision, the antislavery justices refrained from soaring antislavery rhetoric and limited the scope of the decision, while the proslavery justices joined in a decision that was, despite its narrow scope, a loss for slaveholders.

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59. Quoted in John R. Vile, David. L Hudson Jr., Ed., *Encyclopedia of the Fourth Amendment* (CQ Press, 2012), 668.

60. U.S. v. The Amistad, 40 U.S. 593

61. Baker, *Prigg v. Pennsylvania*, 131.

Such consensus forming would not occur in the next major slavery case the Court faced.

XIV

Groves v. Slaughter was a case from Mississippi which came to bear on the question of a state's capacity to legislate on the inter-state slave trade, and it divided the Supreme Court in a manner that would not be seen again until Court had to deal with *Dred Scott*. In the case, a man bought slaves and then tried to avoid paying the slave trader because of a constitutional restriction in Mississippi on the inter-state slave trade. The questions facing the Court were twofold: first, did states have the power to legislate on what forms of commerce could be introduced to their territory? And second, was Mississippi's constitutional rejection of the slave trade self-enforcing, or did it need a law to render it meaningful? Answering no to either of those questions would be enough to decide the case.

While the Court handed down a 5-2 majority opinion (Catron was ill, Barbour was still dead and had yet to be replaced), within those five votes were several different opinions. The official majority opinion, handed down by Justice Smith Thompson, simply avoided the explosive issue of a state's freedom to reject the inter-state slave trade and determined the case purely by saying Mississippi's constitutional restriction on the internal slave trade was not self-enforcing, which meant the defendant did have to pay the trader what was owed. McLean was not satisfied with such a narrow opinion in this case, so he added a concurrence stating that he believed states did have the power to regulate their involvement in the inter-state slave trade. In addition to that statement, he added a point which provided a fascinating precedent for future judges, arguing:

> But if slaves are considered in some of the states as merchandise, that cannot divest them of the leading and controlling quality of persons by which they are designated in the. Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities; but the Constitution acts upon slaves as persons, and not as property.[62]

In asserting that by the Federal Constitution slaves are persons rather than mere property, McLean found the opportunity to display his

62. Groves v. Slaughter, 40 U.S. 507.

antislavery sentiments and, simultaneously, supported the abolitionist argument against the beliefs of southern states that the Constitution treated slaves as property.

After McLean made clear his intentions with his own opinion, it opened the Pandora's box of internal rancor that existed on the court. Chief Justice Taney began his opinion by saying that while he had not intended to express an opinion on states' capacity to legislate on the inter-state slave trade "as my Brother McLean has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine."[63] After delivering his opinion that the right to rule on issues of the inter-state slave trade belonged exclusively to the several states, he again made clear his reasons for speaking out on the question, saying "I state my opinion upon it, on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the Court has delivered his opinion, might be misconstrued." His balanced view of the issue showed both his commitment to states' rights and his legal support of the institution of slavery. As McLean was the voice of the antislavery citizens of the United States, Taney felt obligated to represent his proslavery compatriots, a dynamic which is telling in terms of the Court's relations. A similar compulsion brought Baldwin to write his far broader opinion, in which he argued that the power over inter-state commerce of any form rested exclusively with the Federal Government, as was said in the commerce clause. Most of his opinion, however, is devoted to establishing that:

> I feel bound to consider slaves as property, by the law of the states before the adoption of the Constitution, and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create, but recognizes and protects it from violation, by any law or regulation of any state, in the cases to which the Constitution applies.[64]

Baldwin, the doughface Pennsylvanian, rather than Taney, served as the true voice of Southern interests on the case, but the wide differences in opinion within the majority showed just how weak the Court's

63. Ibid., 508.

64. Ibid., 513.

capacity for unity on slavery was despite their successful resolution of *The Amistad*. Justices Story and McKinley dissented, although like Baldwin in *The Amistad* they refrained from issuing an "opinion that would potentially have inflamed the political situation."[65] Despite the divisions, then, the Supreme Court held to its commitment to avoid exacerbating the sectional conflict of the day, an effort they made again a year later in *Prigg v. Pennsylvania*, although there was one more voice on the Court by that time.

XV

Peter Vivian Daniel was arguably the most extreme voice on the Taney Court for many years, as he was the last true Jeffersonian, agrarian voice the Court would see. Described by John Frank as "an intransigent, indefatigable, stubborn outpost of eighteenth century thought in nineteenth century United States," Justice Daniel was indisputably one of the most passionately Southern voices on the Court.[66] In private life, he "was extraordinarily sensitive to the pain in those around him, even his slaves," but in public he was "a vigorous defender of slavery and Southern rights." Additionally, he was a passionate proponent of states' rights, although if states' rights and southern interests "came into conflict, Daniel often gave preference to the protection of Southern interests," as he did in fugitive slave cases where it proved necessary to empower the national government in order to protect the rights of slaveowners.[67] His feelings on race and slavery displayed that violent partisanship, as when he wrote on the Missouri Compromise issue that Congress "had no power to 'deprive one person of the United States or of the citizens of the United States, of that which belongs to the United States collectively, and as a whole, and is arbitrarily bestowed upon another and favored portion of the union, or of citizens of the Union."[68] While that opinion was commonly shared, Daniel took a spectacularly narrow view of the Constitution which few other justices joined. For example, in a taxation case, he dissented against a ruling that the government could construct roads in saying "that neither Congress nor the Federal Government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been

65. Maltz, *Slavery and the Supreme Court*, 80.

66. Frank, *Justice Daniel Dissenting*, VIII.

67. Ibid., 64; Maltz, *Slavery and the Supreme Court*, 50

68. Frank, *Justice Daniel Dissenting*, 165.

called internal improvements, within the limits of the states."[69] His strong convictions, combined with his Constitutional views, left him dissenting alone an incredible forty-six times, twenty-five more than McLean, who as an abolitionist voice on a proslavery court was bound to be on the other side of many cases.[70] Daniel also became one of the most sectional voices on the Court, as "beginning in the late 1840s, Daniel associated all things Northern with the antislavery movement, and hated the North with an obsessive fury that he had hitherto reserved for his Whig political enemies. He refused even to venture north of the Delaware River and became indifferent to the preservation of the Union itself."[71] Clearly, then, Daniel's appointment did not affect the balance of power on the Court, but he did add another strong voice to the mix.

XVI

In another deceptively divisive case, *Prigg v. Pennsylvania* showed a similar trend to *Groves v. Slaughter* in that it, too, created a divided majority, this time over the question of whether states could place restrictions on slave catchers sent to pursue fugitives within their borders. The case dealt with a slave catcher who had been charged with kidnapping in Pennsylvania for entering the state and catching a slave without following procedures outlined by a Pennsylvania statue. As he had already said in his *Commentaries on the Constitution* that "under and in virtue of the Constitution, the owner of a slave is clothed with the entire authority in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence," Justice Story was the obvious choice to give a Northern voice to the proslavery ruling.

While the majority ruling indisputably dismisses states' claims to the right to limit the recapture of fugitive slaves, historians differ on whether Story sacrificed his abolitionism for the sake of his Constitutional beliefs or subtly struck a blow against slavery in his majority opinion. He was certainly aware of the case's import, saying from the start, "Few questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large, may be presumed to feel a more profound and pervading interest."[72]

69. Quoted in Ibid., 215.

70. Ibid., 237.

71. Ibid., 246

72. Prigg v. Pennsylvania, 41 U.S. 610.

Story clearly acknowledged the point he made in *Commentaries on the Constitution*, reasserting the unqualified right of the master to reclaim his slave, but then he clarified another point which some historians have interpreted as a grand triumph for freedom. In an expression of his belief in Congressional exclusivity, he argued that states have no power to pass any law affecting the reception of slaves or any responsibility to contribute to the fugitives' rendition. Fugitive slaves were a wholly federal matter. Clearly this is a small triumph for states like Pennsylvania—while they were not allowed to punish slave catchers as kidnappers, they at least did not have to help said slave catchers, and such a result would certainly mesh with Story's anti-slavery sentiments. Other historians, like Dr. R. Kent Newmeyer, take a less rosy view of Story's opinion, arguing that

> To believe that Story consciously designed his opinion to make freedom triumphant, one must believe that he deliberately introduced a doctrine that would vitiate the right of recapture that he had plainly stated in the most absolute terms, a right he had also defined in his *Commentaries*, and that, if intent means anything, the framers themselves had established. Had Story set out to write an opinion for freedom he would have had to recant his earlier admonition to all patriots to uphold the slavery compromise of 1787; he would have had to deliberately encourage *judicial* circumvention of positive law.[73]

Newmeyer's point is by far the stronger—throughout his life, Story had put his antislavery feelings second to his love of the Constitution and the Union, so it is inconceivable that he would have sacrificed those deeply held beliefs to ease impact of *Prigg* on abolitionists. Despite the unlikeliness of his exercising antislavery intent in his opinion, the "loophole" he opened elicited opinions from several other justices, with only Wayne concurring fully with Story's opinion.

Chief Justice Taney felt compelled to state his objections to Justice Story's assertion that states are prohibited from involving themselves in fugitive slave rendition at all, even to support the rights of the masters. In his opinion, the Constitution "contains no words prohibiting the several states from passing laws to enforce this right. They are in express terms forbidden to make any regulation that shall impair it. But there the

73. Newmeyer, *Supreme Court Justice Joseph Story*, 377.

prohibition stops."[74] Justice Daniel joined Taney on the point, adding nothing further to the discussion. Smith Thompson, in his concurrence, took up the question of whether the fugitive slave clause was self-executing. He argued that while an owner's right to recover his slave required no legislation to support it, "the delivery of the person of the slave to the owner" was not self-executing, so it required Congressional legislation to have any effect. Justice Baldwin, in yet another disagreeing concurrence, argued that both aspects of the fugitive slave clause were self-executing, and that any legislation passed to support them on a state or Federal level was unconstitutional.

Amongst all these concurrences, John McLean's dissent still stood out for the vastly different perspective it brought to the questions in *Prigg*. In the dissent, he argued that "in a State where slavery is allowed, every colored person is presumed to be a slave; and on the same principle, in a non-slaveholding State, every person is presumed to be free, without regard to color."[75] From this premise, McLean argued against the elevation of the masters' rights over those of the sovereign states, pursuing a states' rights argument which defied his normal judicial inclinations for the sake of his abolitionist sentiments. He believed states had the right to protect anyone within their borders from kidnapping, a right which permitted the limiting of a master's rendition of his slave. While it was unable to influence the outcome of the case, McLean's dissent conflates perfectly with the image developed of him above—a nationalist for whom antislavery sentiments transcended all other commitments. McLean's behavior in the aftermath of *Prigg* is also quite telling, though—in several fugitive slave cases on circuit he upheld Story's ruling despite his own disagreement with it, showing that judicial integrity came before even his moral abhorrence of the South's peculiar institution. McLean would dissent again when the Court took the issue of slavery up once more fifteen years after *Prigg*, although he would be one of only five justices remaining from the Court who decided *Prigg v. Pennsylvania*.

XVII

The Court's first casualty during the inter-case years was Justice Smith Thompson in 1843, so a replacement had to be found from the second circuit. After a long selection process, President Tyler settled on

74. Prigg v. Pennsylvania, 41 U.S. 627.

75. Ibid., 669.

Samuel Nelson, a very moderate proslavery justice from the New York Supreme Court whose views on the states' rights vs. nationalism debate are difficult to decipher. He displayed strongly nationalist leanings in the 1834 case *Jack v. Martin*¸ saying on the Fugitive Slave Clause that "if [enforcement is] left to [the states], the great purpose of the provision might be defeated."[76] Clearly on the vital issue of slavery he did not trust the states to preserve the rights of masters, preferring the exclusive power of a strong national government to enforce the slaveholders' needs. Nelson was heavily criticized in the Northern papers for being a "New York Democrat of the perishing school" who, when confronted by the opinions of Southern Judges, "had not sufficient virtue to boldly stand up against their heresies."[77] On the issue of the slave trade, he did not share even the moral opposition some Southern justices displayed, as "his circuit opinions were notable for an apparent lack of zeal in enforcing the federal prohibition on the slave trade."[78] Smith Thompson, the consummate moderate, was replaced by a moderately proslavery justice, adding a soft voice to the proslavery majority. The next justice appointed would only have strengthened that majority in *Dred Scott* had he survived long enough to sit on the case.

XVIII

After the death of Joseph Story, Levi Woodbury ascended to the Court for five years before being replaced by Benjamin Robbins Curtis, a moderate Whig appointed by Millard Fillmore who put the health of the Union before any partisan considerations. Curtis resembled his predecessor on the first circuit in a number of ways, not least of which was his commitment to upholding the law despite his personal beliefs. That is why, when serving on the Massachusetts Supreme Court in *Commonwealth v. Aves*, Curtis argued that slaveholders should be able to retain possession of a slave brought into Massachusetts on a temporary sojourn.[79] His moderate views also made him a popular choice to defend the Fugitive Slave Act of 1850, in defense of which he said "whatever natural rights they have, and I admit those natural rights to their fullest extent, *this* is not the *soil* on which to free them." Regardless of his views on slavery, however, his highest priority was

76. Maltz, *Slavery and the Supreme Court*, 91.

77. Quoted in Friedman, *Justices of the United States Supreme Court, Vol. II*, 824.

78. Maltz, *Slavery and the Supreme Court*, 144.

79. Ibid., 184

the Union. That is why "when the sectional dispute over slavery broke out, he stood at Daniel Webster's side as a staunch nationalist and conservative—both prepared to defend the Constitution and the Union in fair weather and foul."[80] Curtis was renowned for his intellect, and seems to have been a worthy successor to Joseph Story. Unfortunately, he would not remain on the Court long enough to leave a truly enduring legacy. Robert Cooper Grier, on the other hand, would eventually serve more than twenty years on the bench after the death of Henry Baldwin.

XIX

Justice Grier was another Pennsylvanian who supported the Southern right to own slaves, although in his mind the law came before any partisan interests. Over the course of his career, "Grier's circuit court decisions did not disappoint his proslavery supporters. When presented with issues related to fugitive slaves, he made no secret of his own sympathies. At the same time, Grier also demonstrated his fidelity to the principle of the rule of law." [81] In 1847 on circuit duty, Grier's charge to the jury in *Van Metre v. Mitchell* made very clear where his loyalties lay on the slavery question. His charge was so biased that local anti-slavery men protested the result, arguing that the jury's finding was radically affected by Grier's partisan charge.[82] Grier demonstrated his commitment to the law above all else four years later, though, when he presided over *U.S. v. Hanaway*, a case in which people were being charged with treason for refusing to aid in the capture of fugitive slaves. This time he defended the rights of slavery's opponents, making very clear in his jury charge that refusing to aid in fugitive slave rendition in no way constituted treason.[83] Despite adding to the proslavery voices, then, Grier's appointment shifted the court's voice as a whole to a slightly more moderate stance, as the third circuit was no longer represented by the radical voice of Henry Baldwin. The appointment of John Archibald Campbell from the ninth circuit made for a similarly large shift, although in Campbell's case the change came in the form of a greater commitment to his judicial responsibilities than his predecessor.

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80. Friedman, *Justices of the United States Supreme Court*, Vol. II, 899.

81. Maltz, *Slavery and the Supreme Court*, 146

82. Friedman, *Justices of the United States Supreme Court*, Vol. II, 877

83. Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Washington: Library of Congress, 1985), 98.

XX

In 1852 John McKinley died, and after a year with many failed appointments he was replaced by John Archibald Campbell, an Alabama Democrat with fairly moderate views on both slavery and the relationship between the Federal government and the states. As Carl Brent Swisher explains it, "although on the Supreme Court Justice Campbell stood as a defender of the rights of the states and proslavery interests, he was no such agrarian extremist as Justice Daniel."[84] While Justice Campbell owned many slaves, he "did not deny slavery could be an exceedingly cruel institution."[85] He even claimed, in a letter to Justice Curtis to have "voluntarily liberated all of my slaves before the war some years." A close study of documents in the Mobile County Probate Court disprove his claim, but his effort to make the claim at all show a certain degree of shame at continuing to hold slaves.[86] At the very least, his private life did show some efforts to limit the damage slavery caused to the world around him, like in 1847 when he proposed maintaining slave families rather than breaking them apart for sale.[87]

Despite his dislike of slavery, however, on an institutional level he believed "gradual emancipation voluntarily undertaken by Southerners was the only method whereby slaves could gain their freedom without a subsequent destruction of Southern society."[88] Campbell's first loyalty was to the South, although he did not support the more radical proslavery elements. For example, sitting on circuit in New Orleans, he vigorously attacked 'filibustering' expeditions designed in part to add slaveholding territories such as Cuba to the United States. Most interestingly, when it came to the issue of Congress's right to legislate on slavery in the territories, he said in a letter to John C. Calhoun, "I think Congress has the power to organize inhabitants of a territory of the U.S. into a body politic, and to determine in what manner they hall be governed. As incident to this power, I think Congress may decide what shall be held and enjoyed as property in that territory and that persons should not be

84. Swisher, *History of the Supreme Court of the United States*, 244.

85. Robert Saunders Jr., *John Archibald Campbell, Southern Moderate, 1811-1889* (Tuscaloosa: The University of Alabama Press, 1997), 58.

86. Ibid., 66-67

87. Friedman, *Justices of the United States Supreme Court, Vol. II*, 934.

88. Saunders Jr., *John Archibald Campbell*, 65.

held as property."[89] Clearly, then, Campbell added another moderate voice to the Court, although he would reverse himself when it came time to decide *Dred Scott*.

XXI

Going into 1857 and the *Dred Scott* decision, then, the Supreme Court consisted of McLean, Wayne, Taney, Catron, Daniel, Nelson, Grier, Curtis, and Campbell. It was a court that had grown ever more sectional since the already divided days of *Prigg v. Pennsylvania*. In the words of Justice Catron, "I find that political tendencies are just as strong on all constitutional and political questions as they are in any other department of the government."[90] Justice Campbell offered a very different view of life on the Court, saying "deliberations were usually frank and candid. It was a rare incident…when the slightest disturbance, from irritation, excitement, passion, or impatience, occurred."[91] The events surrounding *Dred Scott* and its aftermath seem to prove Catron the more accurate reporter of the relations on the Court, although Campbell's opinion does hold merit as evidence of how pleasant service on the Taney Court could seem to a proslavery southerner. After Senator Hale introduced an amendment during the debates over the Compromise of 1850 which was "designed to ensure access to the Court in all cases involving the legal status of slavery" with no minimum-property-value requirement, the stage was set for the most divisive Supreme Court case of the Taney Period.[92]

XXII

Dred Scott v. Sanford was the case which embodied, in the minds of many, the image of the Taney Court as a bastion of proslavery sentiments. Scott, a slave who had gone with his master first to live in Illinois, then to serve at Fort Snelling in Wisconsin, was suing for his freedom by the argument that his time in free states had made him a free man. The case brought a number of questions before the Court: Was Dred Scott a U.S. citizen, with the right to sue for his freedom in Court? Had his time in Illinois earned him his freedom? Or did his time in Wisconsin merit freedom as a result of the Missouri Compromise?

89. Quoted in Ibid., 76.

90. Swisher, *Roger B. Taney*, 427.

91. Henry G. Conner, *John A. Campbell* (Boston: Houghton Mifflin Company, 1920), 19.

92. Fehrenbacher, *The Dred Scott Case*, 171.

All of these questions faced the Court, and with the exception of Wayne and Grier, who merely concurred wholeheartedly with the opinions of others, every justice, whether concurring or dissenting, offered different views on at least one of the questions.

At first, the Court intended to follow the same principles they had in the early 1840s cases, offering as narrow an opinion as possible to avoid inflaming sectional tensions. Justice Nelson was assigned to write one, in which the Court would simply rule that Dred Scott remained a slave because the Constitution's comity clause required other states and territories to respect Missouri's laws with respect to Scott's status as a slave, thereby avoiding a ruling on the Missouri Compromise. While the opinion would still have been inflammatory, and in the mind of Don Fehrenbacher "within the limits that he had set for himself, Nelson leaned toward slavery at every opportunity," *Dred Scott* might not have been the nationally explosive issue that it became.[93] Unfortunately, a limited opinion was not to be, as justices McLean and Curtis had other designs in their respective dissents.

Upon learning that Curtis and McLean intended to address the Missouri Compromise question in their opinions, Chief Justice Taney took the majority opinion on himself, and fulfilled the wishes of the Justices who "wished to strike a blow against the North."[94] In it, he issued his infamous decree that blacks were outside the scope and protection of the Constitution, saying, "It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else."[95] The U.S. Constitution was for white people only, and the power it guaranteed was the exclusive domain of white males. Making a historical argument for why blacks did not merit inclusion as citizens, Taney claimed that for more than a century, blacks had been so inferior that they "had no rights which the white man was bound to respect."[96] Taney's final argument for the exclusion of blacks from the rights of citizens rings even more hollow. He said:

93. Ibid., 390.

94. Maltz, *Slavery and the Supreme Court*, 243.

95. *Dred Scott v. Sanford*, 60 U.S. 406.

96. Ibid., 407.

> But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and, flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Essentially, he seems to be arguing that because it would be inconceivable to him for the framers of the Constitution to be hypocrites, African-Americans could not have been included in the meaning of the Declaration of Independence's fine language. After proving to his own satisfaction (as his opinion is thoroughly dismantled in Don Fehrebacher's *The Dred Scott Case*), Taney should have stopped, having proven Scott had no right to sue in federal court as he could not have been a citizen. Instead, he moved on to addressing the question of slavery in the territories, proving his hardened commitment to strengthening the cause of slavery as much as possible. While Taney had always believed in and supported the institution of slavery, this newfound dedication to it shows how much the sectional crises of the mid-1800s had hardened his views on the issue—it clearly did not concern him that none of the slaves he freed in his private life would gain citizenship from their freedom.

On the issue of slavery in the territories, Taney attempted to prove that the territory clause, granting Congress the capacity to legislate as necessary in the territories, only applied to land held by the United States in 1789. Such a narrow interpretation of the Constitution might be believable from Justice Daniel, but from Taney it seems to be a deliberate disposal of his own judicial opinions to support the cause of slavery. After spending nearly twenty pages attempting to establish the invalidity of the Missouri Compromise, Taney simply states the Southern interpretation of the Constitution: "the right of property in a slave is distinctly and expressly affirmed in the Constitution."[97] It is a bold assertion, especially given that at no point is the word slave even used in the Constitution. After dismissing the Missouri Compromise question, he finally treats the potential for Scott having gained his

97. Ibid., 451.

freedom in Illinois as a mere afterthought, citing his own opinion in *Strader v. Graham* and saying "as Scott was a slave when he was taken into the State of Illinois by his owner, and was held there as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, not Illinois."[98]

Even disregarding the flawed reasoning employed by the normally brilliant Taney, the majority opinion he wrote provides a grim picture of the Supreme Court. Despite all his personal opposition to slavery, and his earlier efforts to free and help slaves, Taney had hardened by this point into a passionate proslavery jurist, twisting the Constitution to suit the needs of the South.[99] Carl Swisher offers a different interpretation of Taney's opinion, citing a quote from Taney in which he says "every intelligent person whose life has been passed in a slaveholding state and who has carefully observed the character and capacity of the African race, will see that a sudden and general emancipation would be absolute ruin to the negroes, as well as to the white population."[100] Even if granted the dubious belief that Taney was attempting to help African-Americans by denying them citizenship and ensuring they could remain slaves anywhere, Swisher's interpretation still does not protect Taney from the accusation that he set aside traditional Constitutional interpretation in an attempt to put his own beliefs into this opinion. Only Justice Wayne was willing to concur fully with Taney's opinion, with Nelson, Daniel, Campbell, and Catron each writing separate concurrences.

Nelson, despite the changes in everyone else's opinions, chose to simply publish the opinion he had written when the Court still intended to make a maximally limited decision on *Dred Scott*. He asserted the importance of the comity clause, and "avoided the two big issues of Negro citizenship and the constitutionality of the Missouri Compromise restriction."[101] Grier followed Nelson, merely agreeing with Nelson's opinion and supporting Taney's opinion with respect to the Missouri Compromise. After the first three justices' opinions, Justice Catron took a very different tact, in that he disagreed wholeheartedly with Taney's decision to move past the issue of citizenship and into discussion of the Missouri Compromise. Despite that disagreement, the Missouri

98. Ibid., 452.

99. Feherenbacher, *The Dred Scott Case*.

100. Quoted in Swisher, *Roger B. Taney*, 517.

101. Fehrenbacher, *The Dred Scott Case*, 390.

Compromise was the primary focus of his concurrence. Catron took an interesting perspective, arguing that the Missouri Compromise represented a defiance of treaties entered into by the government. He said:

> If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree – that is, due west from the city of New Orleans – and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.[102]

In his mind, then, to give Congress the capacity to legislate on whether slavery was permissible in the territories would be a gross violation of the power of treaties. It is an interesting argument, one that fits neatly within Catron's moderate views, and it has the merit of not altogether dismissing the territory clause of the Constitution. His view looks especially moderate in the face of Peter Daniel's passionate agrarianism.

Justice Daniel's opinion was equally true to his nature. In it, he first attempted to offer further support to Chief Justice Taney's claim that blacks had no right to citizenship, saying, "It is difficult to conceive by what magic the mere surcease or renunciation of an interest in a subject of property, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation.."[103] Essentially, he is arguing that once someone is a slave, he or she is always a slave, as there is no power which can alter the essential character of a slave. The statement, while seemingly outrageous in the face of universal acceptance of manumission and emancipation, does fit Daniel's racism, showing that in this case his heart and his Constitutional views go hand

102. 60 U.S. 525.

103. Ibid., 477.

in hand. To oppose the Missouri Compromise, Daniel turned to the doctrine of common property, "declaring that Congress as mere agent or trustee could not discriminate against part of the American people in its administration of the territories."[104] His narrow view of the powers and purpose of the federal government inclined Daniel naturally to limit its place in the slavery question, so in this case he was able to hold true to his judicial views while still supporting his beliefs. Justice Campbell, in the last concurrence, did not do quite as well.

Remember, if you will, the letter from Campbell to Calhoun in which he asserted that Congress had the power to organize a territory as it willed, including property rights within said territory. Now, in *Dred Scott*, he asserted the opposite point. While Robert Saunders, Jr. asserts that his opinion changed naturally over the course of the sectional conflicts faced by the Court, it seems unlikely that a clear constitutional interpretation could have changed except in terms of Campbell's willingness to put aside the Constitution in favor of his support for slavery. A slightly kinder view of his narrow interpretation of the territories clause and his assertions that slaveholders have the same rights as holders of other forms of property could argue that he simply succumbed to the pressures of being an Alabama justice on the Supreme Court as it rendered a decision on the issue closest to the hearts of many people in the South. It is impossible to know his reasoning, as he did not leave any records behind to indicate it, but Campbell's decision seems to be a direct movement against his earlier beliefs in favor of his status as a Southern man who defended slavery, showing where his priorities lay in 1857. Despite Campbell's willingness to sacrifice his opinions and the 7-2 ruling in favor of Sanford, there was little unity in the majority. The two dissenters, on the other hand, presented a fairly united front.

Curtis and McLean's dissents "displayed a fundamental agreement on the major issues that contrasted sharply with the heterogeneity of the majority's reasoning."[105] Both men argued from the belief that Scott's stay in Illinois had been long enough for him to become a permanent resident, and both turned to historical precedent to establish black rights to citizenship. Curtis's argument is stronger, directly opposing Taney's assertion that black men had never merited respect in the United States by providing evidence of five states in which there were free black

104. Fehrenbacher, *The Dred Scott Case*, 399.

105. Ibid., 414.

citizens before the Constitution was signed. In doing so, he effectively defeated part of Taney's argument. Finally, both men agreed on a broad, Republican interpretation of the territory clause which would have allowed Congress to legislate on the issue of slavery. Despite their common agreements, Curtis's opinion is generally accepted as the stronger of the two, and there are questions regarding McLean's true purpose in writing the opinion.

There is some consensus among historians that McLean's opinion was colored greatly by his presidential ambitions. He had allied himself with the Republican Party, and needed to prove beyond all doubt that he shared their abolitionist values. Because of this, McLean's dissent is not as respected as that of Justice Curtis, but it does still show how he was able to stay true to his judicial values in the opinion. By taking the position that Congress could bar slavery from the territories, McLean held true to his judicial nationalism while still confirming the higher priority in which he placed his presidential aspirations over his judicial responsibilities. At other parts, however, he put aside judicial impartiality to make partisan appeals to the Republican voter base he attempted to woo, like when he asserted that "a slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man."[106] Such sectionalism only served to worsen the divides on the Court. Nothing was more divisive, however, than Chief Justice Taney's reaction to Curtis's opinion in the case.

After hearing Curtis's opinion read, Taney resolved to strengthen his own before publication specifically to defend against the criticisms levied by Curtis. In the course of doing so, he and Curtis began to argue, and the argument grew so fierce that Curtis was eventually forced from the Court. Beyond personal disagreement, however, Curtis's opinion itself became a point of sectional contention. In the eyes of Earl Maltz:

> The language chosen by Curtis was nothing more or less than an open invitation for those who disagreed with *Dred Scott* to defy the authority of the Court itself. The fact that such a call issued from the pen of a man such as Benjamin Robbins Curtis speaks volumes about the deterioration of sectional relations in the 1850s and the impact that deterioration had on the functioning

106. 60 U.S. 550.

of all national institutions.[107]

If Benjamin Curtis, moderate as he was, could render an opinion so sectionally charged that it roused the animosity of the entire Southern contingent on the Court, then the environment had clearly become so openly sectional that the justices' differences could not be resolved.

XXIII

Dred Scott quickly defined the legacy of the Supreme Court under Taney, tarnishing the legacies of many of the justices who served during those twenty-eight years. During the Taney period of the Court, justices great and mad served, each bringing his own perspective to the legal issues the Court faced every day it was in session. Some, like Joseph Story, never allowed their personal convictions to overcome judicial reasoning. Others, unfortunately, were not so strong, and even the venerable Chief Justice Roger Taney eventually placed his support of slavery before both his private opposition to it and an impartial reading of the Constitution. By the time the Civil War broke out, the conflict was reflected in the hallowed halls of the Court, with North turning against South on the bench and the collegial judicial environment of the Marshall era quickly fading into a distant memory.

While many of its most prominent cases were wiped from significance by the post-Civil War amendments, the legacy of the Taney Court maintains its significance as a case study on the humanity of the Justices who serve on our Supreme Court. Ideally, it would be the home of impartial, wise arbiters of the law, immune to the influences of the politics around it and devoted wholly to the Constitution. Unfortunately, that will never be the case. The men and women who serve on the Supreme Court bring with them not only differing interpretations of the Constitution, but also different political agendas and beliefs regarding the appropriateness of exercising those agendas from the bench. From the madness of Justice Baldwin to the brilliance of Justice Story, the men of the Taney Court displayed some of the best and worst of what the Supreme Court can offer, but no matter how great, every man among them made clear the profound humanity of the high priests America relies on to interpret the Constitution that guides our country.

107. Maltz, *Slavery and the Supreme Court, 265.*

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