The Two-Edged Sword: Slavery and the Commerce Clause, 1837-1852

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Between 1837 and 1852, the Supreme Court under Chief Justice Roger B. Taney was severely divided over the scope of national authority to regulate interstate commerce. Although the Taney Court decided only one case that directly involved the question of slavery and interstate commerce (*Groves* v. *Slaughter*), the purpose of this paper is to explore the Court's treatment of interstate commerce during this period and the influence of the growing slavery controversy on that treatment. The potential nationalizing power of the commerce clause--power that could restrict, prevent, or promote the interstate slave trade and transform slavery into a national, constitutional issue--was an important factor in the Taney Court's disjointed, divided treatment of interstate commerce during this period, when the issue of national authority was rendered politically dangerous by the slavery controversy. National uniformity through the congressional commerce power had the potential to both restrict and expand the "peculiar institution."

The commerce clause may have been the most effective constitutional instrument the Court had for allocating power between the states and the nation.[1] Three essential questions that arose over interstate commerce and slavery were: (1) Was federal authority exclusive? (2) Did commerce include transportation of persons? (3) Were slaves persons or property? The first two questions emerged in the Marshall-era commerce clause cases. The philosophy of commercial nationalism was victorious, if cautious, during these years, but new conditions, political and physical, were to bring this nationalism into question in the years ahead.

The latent power of national authority over interstate commerce was recognized and expressed by Chief Justice John Marshall in *Gibbons* v. *Ogden* (1824) and accorded an even greater scope of national exclusivity

[1]R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (Arlington Heights: Harlan Davidson, 1968), 101.

in *Brown* v. *Maryland* (1828). In *Gibbons*, Marshall avoided the question of congressional exclusivity over commerce by pointing to existing federal legislation (the Coastal License Act) that conflicted with a state-granted monopoly. In the opinion, however, Marshall implied that the "commerce power might have been sufficient to void the state act even without an actual conflict." Marshall also defined commerce as "every species of commercial intercoarse [sic]," thereby potentially extending commerce beyond the mere exchange of goods. Four years later, in *Brown*, involving state licensing of importers of out-of-state goods, Marshall voided the state license tax in the absence of concurrent federal legislation, stating that "the commerce power was foreclosed to the states just because it had been given to Congress."[2]

Looming in the background of *Gibbons*, however, was a case that sprang from the Denmark Vesey slave revolt conspiracy of 1817. Following the Vesey incident, South Carolina passed an act that, among other things, required the incarceration of free black seamen arriving in port from another state or foreign nation. This act also required the ship's master to pay the cost of incarceration. In *Elkison* v. *Deliesseline* (1823), decided in federal circuit court in South Carolina, Justice William Johnson declared the Nego Seamen's Act an unconstitutional interference with the commerce clause and the federal treaty-making powers. Johnson's opinion was published as a pamphlet and in the *National Intelligencer*, causing a states' rights backlash. As a result, Johnson became a "pariah in his home state" of South Carolina. Marshall discussed the violent reaction to Johnson's opinion with Justice Story in correspondence dated September 26, 1823. Marshall, despite his broad interpretation of the commerce power in *Gibbons* and *Brown*, had "avoided the constitutional issue (*The Brig Wilson* v. *United States*, 1820)" involving a similar Virginia law, by excluding passengers and crew from his definition of commerce. According to Marshall, "a crew member does not fall within its [the commerce clause] terms." Regarding the potential controversy that would be engendered by confronting the transportation of persons with the commerce clause, Marshall wrote Story that he was "not fond of butting against a wall in sport ."[3] This statement stands as an early example of the Court being politicized by the issue of slavery.

[2]Marshall quoted in Newmyer, *Marshall and Taney*, 50-52.

[3]Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of Cases* (Washington, D.C.: Library of Congress, 1985), 257; Irwin Rhodes, ed., *The Papers of John Marshall: A Descriptive Calendar*, vol. 2 (Norman: University of Oklahoma Press, 1969), 218, 179; quoted in R. Kent Newmyer, *Supreme Court Justice Joseph Story:* (Chapel Hill: University of North Carolina Press, 1985), 205.

The political conflict that surrounded cases such as those prompted by the Negro Seamen's Act produced a certain caution in even the most nationalistic Marshall Court commerce clause decisions. As noted above, Marshall avoided pronouncing outright federal exclusivity in *Gibbons* and avoided making broad pronouncements in *Brown*. In *Wilson* v. *Black Bird Creek Marsh Co.* (1829), Marshall stepped back from the *Brown* decision and allowed for concurrent state regulations in certain instances.

Between 1829 and 1837, President Andrew Jackson appointed seven new justices: John McClean (1829); Henry Baldwin (1830); James Wayne (1835); John Catron and John McKinley (both 1837); and Roger Taney as Chief Justice after John Marshall's death in 1835. President Jackson's democratic, states' rights, anti-national bank philosophy was in its ascendancy. John C. Calhoun had anonymously published the *South Carolina Exposition and Protest* in 1828, and 1832 saw the Nullification Crisis come to a climax. There was, as well, a renewal of the antislavery movement; publication of William Lloyd Garrison's *The Liberator* began in January, 1831, and the American Anti-Slavery Society was established in 1833. In this new atmosphere a delicate interpretation of the commerce power was needed, one which would please both North and South and, at the same time, would encourage national commerce.[4]

The first commerce clause case decided by the Court under Chief Justice Taney was *New York* v. *Miln* (1837). The case involved a New York law requiring ships' captains, upon arrival in a New York harbor, to supply personal information on all incoming passengers and pay the cost of caring for those sick and indigent. The question before the Court was whether this law involved a regulation of foreign and interstate commerce by the state of New York. The opinion of the Court, written by Justice Philip Barbour, took a radical states' rights position that avoided the commerce clause question. According to the Court, the New York law was intended as a police measure to control the influx of indigent and otherwise undesirable persons into New York. Going deeply into the realm of states' rights, Barbour asserted that "a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States." A state's police power was seen by Barbour as "unlimited."[5] According to constitutional historian Martin Siegel, "Philip Barbour moved in

[4]Newmyer, *Marshall and Taney*, 102.

[5]*New York* v. *Miln*, 11 Peters, 662.

the Virginia orbits of Judge Spencer Roane and . . . John Taylor." Barbour further possessed an "almost obsessive states rights doctrine" and was "able to align himself with conservative Eastern slave holders."[6]

The two remaining justices from the Marshall Court, Joseph Story and Smith Thompson, felt obliged to take up the commerce clause question. Justice Thompson's concurring opinion suggested that states had a concurrent power "until Congress asserts the exercise of the power." Justice Story dissented from the majority and upheld the old Marshallian exclusivity of national commerce powers. Story held that "if the regulation of passenger ships be in truth a regulation of commerce . . . the act in controversy is . . . an act which assumes to regulate trade and commerce."[7] The question of the status of passengers under the definition of "commerce" was, however, to remain open. Furthermore, Justice Barbour's "undeniable and unlimited jurisdiction" opinion created a controversy of its own in later cases.

The three essential questions--Was the power of Congress to regulate commerce exclusive? Did commerce include the movement of persons? Were slaves persons or property?--are all found in *Groves* v. *Slaughter* (1841). This case involved nonpayment of debt for slaves and the validity of the contract for payment. The conflict arose from Section 2d of the Mississippi Constitution, which read as follows: "The introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."[8] The attorney for Slaughter, Mr. Gilpin, argued that the amendment required enabling legislation, legislation that was never enacted. Therefore, the amendment had no force; the contract was legitimate, and Slaughter was entitled to payment.

Supporting Slaughter were Henry Clay and Daniel Webster. Clay argued that the regulation of commerce implied preservation and not annihilation; to prohibit the introduction of slaves as merchandise was to interfere with the Constitution of the United States. Webster, taking a traditional nationalistic tone, held that the Constitution recognized slaves as property, and as such they fell under the commerce clause. There was no ground, Webster insisted, for applying a different rule to property in slaves than to other

[6]Martin Siegel, *The Taney Court: 1836-1864*, vol. 3, *The Supreme Court in American Life*, ed. George J. Lankevich (Millwood, NY: Associated Faculty Press, 1987), 265-66.

[7]*New York* v. *Miln*, 668-70.

[8]*Groves* v. *Slaughter*, 15 Peters, 800.

property,[9] citing the nationalism of *Gibbons* v. *Ogden* to support his contention. Slaughter's defense thus came from quite different commerce clause interpretations and regional outlooks.

The attorney for Groves, Robert J. Walker, presented an argument of such length that it could not be included in the Court's report. Walker explicitly acknowledged the exclusive nature of Congressional power over interstate commerce. He then turned this argument on its head by making it a potential threat to free states should the doctrine be applied to slavery. After dismissing the "enabling legislation" argument, Walker argued that

> the history of the [C]onstitution of the Union shows that the wont of uniformity, as regards regulation of commerce, was the greater motive leading to the formation of that instrument . . . . The power to regulate commerce among the states is 'supreme and exclusive,' it is vested in [C]ongress alone; and if under it, [C]ongress may forbid or authorize the transportation of slaves from state to state, in defiance of state authority, then indeed, we shall have reached a crisis in the abolition controversy, most alarming and most momentous.[10]

While stating the case for constitutional nationalism and commercial uniformity, Walker showed that slavery could not, in fact, fall under the authority of this regulating power. He continued:

> But Massachusetts, it is said, may exempt herself from the operation of this power of [C]ongress, by declaring slaves not to be property within her limits; and if so, may not Mississippi exempt herself in a similar manner, by declaring, as she has done, that the slaves of other states shall not be merchandise within her limits.[11]

[9]Charles Grove Haines and Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics, 1835-1864* (Berkeley: University of California Press, 1957), 112.

[10]Robert J. Walker, "Argument of Robert J. Walker Before the Supreme Court of the United States on the Mississippi Slave Quesion," in *Southern Slaves in Free State Courts: The Pamphlet Literature*, series 1, vol. 2 of *Slavery, Race and the American Legal System, 1700-1872*, ed. Paul Finkelman (New York: Garland, 1988), 123.

[11]Ibid., 123-24.

Further, he questioned, "if [C]ongress possess [sic] the power to increase slavery in a state, why not also the power to decrease it?"[12]

Referring to Article I, Section 9, sixth clause of the Constitution ("No preference shall be given by any regulation of commerce . . . to the ports of one state over those of another"), Walker argued that a Mississippi law restricting slavery must have equal force to a Massachusetts law prohibiting the introduction of slaves, or "preference" is given to Massachusetts.[13] Implicit in this argument was the "two-edged sword": if Mississippi could not prohibit the introduction of slaves as merchandise, then, based on commercial uniformity and congressional exclusivity, neither could Massachusetts prohibit the introduction of slaves as merchandise. The only way around this potential conflict, according to Walker, was to conclude that slavery was outside the realm of interstate commerce.

As to why slavery was outside the reach of congressional regulation (already accepted in the argument as an exclusive power), Walker reasoned that the Constitution referred to slaves as "persons held to service." As such, slaves were not merchandise to be regulated, and "how far they shall be so bound [was] exclusively a question of state authority."[14]

In looking to the *Federalist Papers* for an interpretation of the constitutional status of slaves, as persons or as property, we find nothing definitive. Indeed, in "Federalist No. 54," James Madison wrote that

> the true state of the case is that they partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property . . . The Federal Constitution therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character.[15]

Madison therefore denied Walker's contention that slaves were viewed as persons by the Constitution and as property by the states. Madison showed that the Constitution's ambivalent view of the nature of slaves

[12]Ibid., 125.

[13]Ibid., 127.

[14]Ibid., 130.

[15]James Madison,"Federalist No. 54," in *The Federalist Papers* (1788; reprint, New York: Bantam, 1982), 276.

(embodied in Article I, Section 2, the "three-fifths" clause) was only an appropriate acknowledgment of the ambivalence of state laws. Madison's vaguely defined "mixt character" offered much leeway in defining a slave's status in specific situations.

Walker continued his argument by excluding persons from the reach of commercial regulation and taking an ironic shot at the abolitionists. He asserted that "it is the abolitionists who must wholly deprive the slaves of the character of persons, and reduce them in all respects to the level of merchandise, before they can apply to them the power of [C]ongress to regulate commerce among the states." Walker concluded his lengthy argument with another shot at the abolitionists: "when . . . all shall now be informed, that over the subject of slavery, [C]ongress possess [sic] no jurisdiction; the power of agitators will expire."[16]

The decision of the Court in *Groves* sidestepped the commerce clause question altogether by deciding, in an opinion written by Justice Thompson, that the Mississippi constitutional amendment prohibiting the introduction of slaves as merchandise required enabling legislation in order to have force. Slaughter was to be paid his due. Thus the overarching question raised by the case was reduced to a more specific and manageable subject. The justices were, however, unwilling to let the question of commercial regulation go unaddressed.

Abolitionist and perennial presidential aspirant Justice John McClean held forth on the commerce question even though, as he admitted, it is "not necessary to a decision of the case . . . yet, it is so intimately connected with it . . . I deem it fit and proper to express my opinion on it." McClean offered straightforward economic nationalism and held that "unless the power [over interstate commerce] be not only paramount, but exclusive, the Constitution must fail to attain one of the principal objects of its formation." Then, echoing Walker's argument, McClean asserted that if "a State may admit or prohibit slaves at its discretion, this power must be in the state and not in the Congress . . . By the laws of certain States, slaves are treated as property . . . [however] the Constitution treats them as persons."[17]

Thus we see the arguments of Robert Walker defending a slave state's constitution and paving the way for a defense of slavery against federal interference confirmed by an abolitionist justice's *obiter dicta*, in an apparent attempt to lay the groundwork to protect free states from slave

[16]Walker, "Argument of Robert J. Walker," 130, 162.

[17]*Groves* v. *Slaughter*, 821.

incursions.[18] Both Walker and McClean recognized the implications of national commercial uniformity as it applied to slavery.

The *obiter dicta* continued with Chief Justice Taney writing that "in my judgment the power over this subject [slavery] is exclusively with the several States." Taney did not offer a justification for this opinion. He instead revealed his political motivations for offering it: "I do not, however, mean to argue this question; and 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 . . . might be misconstrued."[19]

A third justice weighed in with a concurring opinion, "reluctant," but again feeling compelled to comment on the technically irrelevant commerce clause question. Justice Henry Baldwin, at once both a states' rights advocate and national tariff supporter, began with a bold statement of economic nationalism. He asserted that "the power of Congress to regulate commerce . . . is exclusive," but followed this with the statements that "I feel bound to consider slaves property," and "the Constitution recognizes and protects it [the right of property in slaves] from violation." The opinion of Justice Baldwin seems to be a prefiguring of the "substantive due process" of *Dred Scott* v. *Sanford* (1857).[20] Baldwin used national exclusivity and commercial uniformity as an argument for the constitutional protection of property in slaves.

Groves commands attention as the single case taken up by the Court during this period that directly involved both slavery and interstate commerce. In this case an abolitionist justice defended state power over slavery, a states' rights justice defended national exclusivity, and the Chief Justice made an unsupported, bald statement claiming exclusive state authority over slavery for fear of the potential political ramifications of his silence on the issue, all in a case where the majority opinion avoided the commerce clause/slavery question altogether. Divisions in the Court and the political dangers of a philosophy of economic nationalism--a philosophy that could cut both ways on the questions of slavery--that were revealed in *Groves*

[18]Finkelman, *Slavery in the Courtroom*, 35; an *obiter dicta* is an opinion offered, frequently for political reasons, which has no direct bearing on the substance of a case.

[19]*Groves* v. *Slaughter*, 822.

[20]Ibid., 824. "Substantive due process," as opposed to "procedural due process," is the doctrine that holds certain matters, particularly those concerning use of private property, to be outside the competence of legislative regulation regardless of the propriety of the procedures used to enact the legislation.

surfaced again in later commerce clause cases that did not relate directly to slavery.

The next major challenge involving interstate commerce to come before the Court was actually a combination of three cases (*Thurlow* v. *Massachusetts*, *Fletcher* v. *Rhode Island*, and *Peirce* v. *New Hampshire*), known collectively as *The License Cases* (1847). All three involved state attempts to license retailers of alcoholic beverages and the question of whether this involved state protection of public welfare or an interference with interstate commerce. The New Hampshire law was particularly questionable, in that it affected sellers of bulk liquor and violated John Marshall's "original package" rule in *Brown*. Cases involving licensing of liquor sales would seem an unlikely place to find arguments over slavery. But in an atmosphere where the critical question was whether, and to what extent, congressional power over commerce embraced persons,[21] the slavery question found its way into any case involving national authority over commerce.

As these cases involved the issues of state police powers and reform legislation versus national commerce power, lawyers for the plaintiff in *Fletcher* v. *Rhode Island* referred to the relevant opinion in *New York* v. *Miln*. Ames and Whipple, attorneys for Joel Fletcher, argued that the licenses, as police power, were unconstitutional. Referring to Justice Barbour's extreme states' rights opinion in *New York* v. *Miln*, the attorneys asserted that "a supremacy over the Constitution . . . was claimed for every, even the most petty, police law of a state or even a town or city." At this point, Justice James Moore Wayne declared that "he had no recollection that such language was in the opinion of the [C]ourt in that case at the time it received his concurrence." Indeed, it appeared that Justice Barbour added the more extreme states' rights language to the majority opinion after it was received by the other justices. Justice Wayne, a southern slave holder and Jackson appointee, was nonetheless (as an associate of John Marshall) "the most high-toned Federalist on the Bench."[22] Wayne opposed Barbour's *New York* v. *Miln* opinion as it stood and raised the issue of Barbour's subterfuge again in *The Passenger Cases* (1849).

Ames and Whipple continued their attack on the Barbour opinion in language that revealed the underlying current of hostility over the slavery issue:

[21]Newmyer, *Marshall and Taney*, 123.

[22]*Fletcher* v. *the State of Rhode Island*, 5 Howard, 274; Siegel, *The Taney Court*, 261.

> [I]f any persons really held the doctrine in question upon the supposition that it was necessary for some of the States, which, though guaranteed by the Constitution, were at war with its whole spirit as well as with the principles of the Declaration of Independence, which the Constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of a 'blunder.'[23]

The attorneys here attributed the state police power doctrine of the Taney Court to a proslavery avoidance of the commerce power in order to protect the peculiar institution. Chief Justice Taney stepped back from the heated attack by Ames, Whipple, and Justice Wayne on the Barbour opinion, saying only that "no opinion was expressed upon it [the commerce clause] by the Court because the case [*New York* v. *Miln*] did not necessarily involve it."[24] The opinion of the Court in *The License Cases* upheld the state license laws as a proper exercise of police powers. The Court, however, remained divided on the scope of the commerce power, and its position on police powers drew fire as a proslavery ruse.

In the cases known collectively as *The Passenger Cases* (*Norris* v. *the City of Boston* and *Smith* v. *Turner*, 1849), the controversy over the scope of the commerce power reached an apparent climax. The individual cases involved Massachusetts and New York laws taxing immigrants arriving at their ports, but the questions of authority over slavery and the movement of free blacks and fugitive slaves were addressed in a larger sense. Southerners were concerned over the fate of these laws, as they were analogous to southern laws for inspecting vessels and checking the immigration of free blacks.[25] These laws involved the taxing of ships' masters for the support of the ships' indigent and sick, making the case similar to *New York* v. *Miln*. Antislavery forces supported state police power as a weapon against fugitive slave laws. Southern states opposed the northern use of a police powers doctrine against slavery but supported police powers to uphold their own laws against the immigration of free blacks into slave states.

Attorney John Davis appeared for the city of Boston in the first of *The Passenger Cases*. He argued that the law did not serve to regulate

[23]*Fletcher v. the State of Rhode Island*, 274.

[24]Ibid., 277.

[26]Newmyer, *Marshall and Taney*, 104.

commerce, as "goods are the subject of commerce; persons are not, nor do they belong to commerce." Furthermore, he denied that the Massachusetts law conflicted with any federal legislation. Davis then introduced the subject of state laws prohibiting the importation of slaves: "Nearly all slave states have laws upon this subject, forbidding the introduction of slaves as merchandise under penalties. The free states go farther, and so do some of the slave states, and emancipate the slaves thus brought in, in violation of law."[26] Davis asserted that if states could regulate and prohibit the introduction of slaves, then surely states had the authority to regulate the immigration of the diseased, the indigent, and the insane. By using this analogy, he introduced the northern states' rights position regarding fugitive slaves and tied it to southern laws prohibiting the importation of slaves as merchandise.

Arguing for the plaintiff, Prescott Hall contended that a state had the right to police but not to tax foreign or interstate commerce. Even more pertinent for the issues of slavery and the commerce clause was Daniel Webster's argument for the unconstitutionality of the Massachusetts law. It was not published in the Court Reports since the trial grew too lengthy, with court reporter Howard noting that "it is impossible to report all these arguments. If it were done these cases alone would require a volume." Indeed, just the reported arguments, when combined with the five concurring and four dissenting opinions, took roughly one hundred and twenty pages of the Supreme Court Reports. But the substance of Webster's argument was published in the *Baltimore American*: "Mr. Webster spoke powerfully of the sanctity of the decisions of the Supreme Court, in reply to a remark of the opposite council [sic] that the people were beginning to forget the life tenure of the Judges, in consequence of the infusion of popular sentiment into the decisions of the courts." Webster was apparently commenting on a popular perception (one that may have been accurate if Chief Justice Taney's comments in *Groves* are any indication) that the Court had become politicized. Thus he deemed it necessary to defend the dignity of the Supreme Court:

> Authorities were quoted to show that commerce extended to persons as well as to things . . . . Mr. Webster incidentally alluded to the question of domestic slavery, which had been made prominent by counsel upon the other side. It was, he

[26]*Norris* v. *the City of Boston*, 7 Howard, 720.

> said, a peculiar institution, the existence of which was recognized by the Constitution . . . There it was placed by those who framed its existence, and he did not wish to disturb it, nor should he lift his finger to do so. It belonged not to him, but to those alone who had power over it.[27]

Webster, having made a strong stand for commercial nationalism that extended to persons as well as goods, then exempted domestic slavery from this system and declared it a "peculiar institution" purely under state authority. This argument presaged Webster's refusal, as expressed in a later speech of March, 1850, to acknowledge the legitimacy of, or participate in, the perceived sectional crisis. It contradicted, however, his argument eight years earlier in *Groves* that there were no grounds for separating slaves from other persons under the Constitution. This shift reflected the heightened tensions and the need for compromise in the years leading up to the Compromise of 1850.

The decision of the Court in *Norris*, written by Justice McClean, was powerfully nationalistic: "A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution." McClean, in an apparent response to Davis's contention that the Massachusetts law did not conflict with any federal law, gave an interesting interpretation of Marshall's *Wilson* v. *Black Bird Creek Marsh Co.* decision of 1829, asserting that while the absence of relevant federal regulation was necessary for a state law to be constitutional, it did not guarantee constitutionality; a state law might still violate the Constitution in such circumstances.[28]

Justice Wayne, in a concurring opinion, again took the opportunity to blast Justice Barbour's police power decision in *New York* and to claim, as he did in *The License Cases*, that the more radical states' rights language of the opinion had been added after his concurrence. Justice McKinley, whose views were those of popular southern orthodoxy,[29] also concurred with the nationalist opinion, but insisted that slaves were excluded from the commerce power.

In dissent, Chief Justice Taney felt it necessary to comment on what he thought to be the logical result of extending exclusive national authority over

[27] *Baltimore American* quoted in Haines and Sherwood, *Supreme Court*, 154-56.

[28] *The Passenger Cases*, 7 Howard, 749-50.

[29] Siegel, *The Taney Court*, 272.

immigration of persons. He asserted that "if the States have granted this great power in one case [immigration], they have granted it in the other; and every state may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the State and however earnestly it may desire to prevent it." This was obviously hyperbole, as the foreign slave trade had been banned by act of Congress in 1808 as authorized by the Constitution. It appears that Taney made this comment for political intention--that of the extension of slavery in the territories. Justice Peter Daniel, known for his eccentric and anachronistic dissents and predictable proslavery, sectional opinions,[30] concurred with Taney's dissent.

Although a New Englander, Justice Levi Woodbury demonstrated a dedication to strict construction of the Constitution and state sovereignty that made southerners feel they had a friend on the high court.[31] Indeed, it was Justice Woodbury who offered the most inflammatory and threatening comments in his concurrence with Taney's dissent. As in Justice Baldwin's comments in *Groves*, we again find a prefiguring of the *Dred Scott* substantive due process opinion. Justice Woodbury, commenting on the consequences of national authority over the movement of passengers, boldly held that national exclusivity and commercial uniformity cut both ways in regard to slavery:

> If Congress, with or without a coordinate or concurrent power in the state, can prohibit other persons as well as slaves from coming into states, they can of course allow it, and hence can permit and demand the admission of slaves as well as any kind of free persons . . . and enforce the demand . . . however obnoxious to the habits and wishes of the people of a particular state.[32]

It is difficult to say whether Justice Woodbury was attempting to defend New England's states' rights antislavery position or southern rights to protect property in slaves, or to maintain the status quo by protecting both positions. In any event, the mutual danger to both positions of a strong, consistent, commercial nationalism took on the quality of mutually assured

[30]*The Passenger Cases*, 782; Siegel, *The Taney Court*, 275.

[31]Siegel, *The Taney Court*, 281.

[32]*The Passenger Cases*, 811.

destruction and continued to render the Court incapable of offering a clear application of congressional commerce powers.

When Justice Woodbury died in 1851, President Fillmore appointed Massachusetts Whig Benjamin Curtis to the Court. The next year, Curtis wrote a consensus-building opinion in *Cooley* v. *Board of Wardens of the Port of Philadelphia, et al.* In what became known as the "Cooley rule," Justice Curtis presented the view that exclusivity "must be intended to refer to the subjects of that power and to say they are such a nature as to require exclusive legislation by Congress." He further contended that "either to affirm, or deny, that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part."[33]

To this Justice McClean dissented, upholding national exclusivity. Justice Daniel concurred but, true to form, wrote that state power was "original and inherent" and not merely to be "tolerated or held to the sanction of the federal government."[34] With only one dissent and one concurring opinion, the flexible pragmatism of Justice Curtis brought about a distinct improvement over the fractured, argumentive atmosphere of *The Passenger Cases*. The Court now had a non-doctrinaire "doctrine" to apply to the commerce clause. Although the Cooley rule could not define what was to be subject to national authority and what was to be subject to state authority, it did allow for the flexibility needed in the heated atmosphere of the times. The rule changed the focus from the nature of the commerce power to the nature of the subjects of the commerce power and thus diffused the conflict over congressional exclusivity for a time.

Cooley v. *Board of Wardens* ends this survey of the Taney Court's tempestuous battle over the commerce clause. Between 1837 and 1852, conflicting interests and opinions regarding slavery and the status of slaves under the Constitution are found in the arguments of lawyers and in the opinions of justices, often in cases that touched upon slavery only in the most tangential way. The hostile and politicized exchanges found in the Court Reports of the cases involving the commerce clause appear to support the interpretation that there was not a single important case after 1819 in which the deployment of power in the federal system was at issue where slavery did not silently influence the deliberation of the

[33]*Cooley* v. *Board of Wardens of the Port of Philadelphia et al*, 12 Howard, 1005.

[34]Ibid., 1008.

justices.[35] It should be added, based on the material in the Taney Court commerce cases, that the influence of slavery was often more than silent.

Obviously there were issues other than slavery that complicated the Court's treatment of interstate commerce. The need to protect local interests from national business interests in a growing economy was an important factor. But the sources clearly show that the constitutionally vague definition of the status of slaves, the conflict between national uniformity and local interests, and the uncertainty over whether "commerce" extended to persons contributed to the political problems faced by the Court.

As the slavery question percolated upward from local to national politics and finally to the national judiciary, it became an increasingly difficult subject to manage. As the introduction of the slavery issue into all cases involving national authority over commerce indicates, the Constitution, because of the vague nature of the compromise over "persons held to service," was in fact unable to manage the slavery question, and the Court itself became increasingly politicized.

Much of the rhetoric about how commercial uniformity might alternately destroy or extend slavery was probably just that--rhetoric, for political purposes. The conflicting constitutional interpretations of the nature of slavery and the resulting politicization of the Court, however, represented the very real dilemma that slavery presented to a nation which saw commercial uniformity as, in some sense, essential to nationhood. The commerce clause, the "effective instrument" of national uniformity, was only effective to the extent that national uniformity could realistically exist. On the question of slavery, national uniformity could be seen as a "two-edged sword"; after *Dred Scott*, that sword divided the Union.

[35]Newmyer, *Justice Joseph Story*, 367.