

Attorney General Taney & the South Carolina Police Bill

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ALTHOUGH THE SYSTEMATIC preservation of the opinions of the Attorneys General of the United States began with Attorney General William Wirt (1817-1829), they were not publicly available until the House of Representatives published a collection in 1841. In July 1850, the House called on President Millard Fillmore to make available the opinions written since 1841, and Fillmore asked a distinguished lawyer named Benjamin F. Hall to undertake the task. Hall went beyond the House request and edited a two-volume compilation, with headnotes and indices, that included opinions from 1791-on. In 1852, Robert Farnham published Hall's work on a commercial basis as the *Official Opinions of the Attorneys General of the United States*.¹ Hall did a generally good job of locating and presenting the opinions, although he missed or omitted some early opinions of great interest, including Edmund Randolph's 1791 discussion of the great question of the constitutionality of a

national bank. In addition, as Farnham obliquely acknowledged in the "Advertisement" introducing volume one of the *Official Opinions*, the collection was not intended to be complete: it contained "all the opinions which, in view of the public interests, have been deemed proper for publication." Hall and Farnham, it would seem, knew of some opinions that they did not think it consistent with the public interest to publish.

The Hall/Farnham collection did not include what was perhaps Attorney General Roger Brooke Taney's most interesting opinion on issues of constitutional law. The opinion, which Taney issued to Secretary of State Edward Livingston on May 28, 1832, and followed up with a supplementary memorandum on June 9, 1832, addressed an 1822 South Carolina statute (henceforth, "the Police Bill") which provided that seamen of African descent on board a ship entering a South Carolina port were liable to arrest and

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¹ See Homer Cummings & Carl McFarland, *Federal Justice* 91-92 (1937).

confinement until the ship's departure, and required the ship's captain to reimburse the state for its expenses in doing so on pain of a fine and of the sailor being sold into slavery.² For a decade after its enactment, the British government made repeated protests over the Police Bill's application to British mariners of color, which the British authorities saw as a violation of a commercial convention between the United States and the United Kingdom first agreed to in 1818. The American response to these protests was mixed: Justice William Johnson held the Police Bill unconstitutional in an 1823 circuit opinion, and Attorney General Wirt reached the same conclusion the following year, while in 1831 Attorney General John McPherson Berrien sustained its validity and denied that it contravened the treaty.³ Of greatest interest to the British was the fact that South Carolina continued enforcing the Police Bill without regard to the controversy it was thereby creating.

It is unclear today whether Hall and Farnham decided not to publish Taney's opinion on the Police Bill because they thought it inappropriate to do – an entirely plausible scenario in the politically charged atmosphere of the early 1850s; because the extant copies both of the main opinion and of the supplement are drafts; or because Hall somehow overlooked it.⁴ In fact, although Taney's opinion is well-known to historians working in the period, it has never before been published. The Green Bag's invitation to prepare the opinion for publication is a

welcome one, both for its intrinsic interest as an historical document and because of the light it sheds on antebellum constitutional thought. This essay consists of three sections: section I provides an introduction to the context of the opinion; section II presents the texts of the main opinion, the supplement, and the cover letter that accompanied the supplement as well as information about this edition; section III briefly comments on Taney's reasoning.

I. THE CONTEXT OF TANEY'S OPINION

Personalities & politics

The presidency of Andrew Jackson was a period of intense political and constitutional controversy. Old Hickory was himself a source of controversy, and he also acted as a lightning rod to which many of the cross-cutting currents of the era were drawn. Jackson was elected in 1828 as the candidate of reform and Republicanism, elevated (as he saw it) by the people to cleanse government of the elitist corruption and crypto-Federalist heresies of the administration of John Quincy Adams. Jackson, and it would seem most of his supporters, saw in this a return to the principles of Thomas Jefferson, who had similarly delivered the Republic in the election of 1800 from the elitist, corrupt and avowedly Federalist administration of the elder President Adams. (Perhaps fortunately, Jackson was unaware that Jefferson may actually have

² "An act for the better regulation and government of free negroes and persons of colored, and for other purposes," 1822 S.C. Acts chap. 3 § 3. I follow the convention adopted in the published attorney general opinions and refer to the South Carolina act as "the Police Bill."

³ See *Elkison v. Delieesseline*, 8 F. Cas. 493 (No. 4355) (C.C.D.S.C. 1823) (Police Bill violates exclusive federal powers and the supremacy clause); *Validity of the South Carolina Police Bill*, 1 Op. Att'y Gen. 659 (1824) (same); *Validity of the South Carolina Police Bill*, 2 Op. Att'y Gen. 426 (1831) (Police Bill constitutional and consistent with the commercial treaty).

⁴ See Carl Brent Swisher, Roger B. Taney 152-53 (1936). Swisher thought it likely that the opinion's contents seemed too controversial.

thought him a violent military man personally unfit for the presidency.)⁵

Jackson's problem was that Jefferson's very success in defeating and ultimately destroying the Federalists had turned Jeffersonian Republicanism into an all-embracing tent in which virtually all national politics found a home in the 1820s. Jackson therefore numbered among his supporters advocates of widely divergent and often contradictory policies, and the task of conducting his administration according to consistent principles without alienating important parts of his Democratic party was a difficult, and at times impossible, task. He was deeply suspicious of banks, and eventually developed a visceral hatred for the second Bank of the United States, but many of his close allies (including most of his cabinet after April 1831) supported the Bank. As a Jeffersonian, Jackson was rhetorically committed to a small federal government and to a "states rights" interpretation of the Constitution, but Jeffersonianism had long before developed a strain of optimistic nationalism that was as much at war with doctrinaire anti-nationalism as Federalism had ever been. Friend and foe alike saw Jackson as an opponent of any form of aristocracy, and his election as the triumph of the People (or the mob), but any administration that depended for its survival on the votes of urban industrial workers, Deep South planters and Western frontiersmen could not but find it difficult at times to decide what popular democracy should mean in practice.

Roger Brooke Taney was not originally a

Jeffersonian at all: his father Michael was a member of the predominantly Federalist Maryland gentry and as a young man Taney was active in Federalist party politics. But neither Michael nor Roger was inclined to follow blindly a party line, and the younger Taney in particular held a mix of opinions not all of which would have been congenial to Alexander Hamilton. The Taney family blamed banks, and the mercantile interests with which banks were intimately associated, for their economic woes, and Taney's political experience and legal practice alike fostered in him a dislike of the Bank of the United States akin in its vehemence to Jackson's.⁶ Like many other Federalists in an era of Republican domination of the national government, Taney came to hold quite un-Hamiltonian views on the sovereignty of the states, but (once again like Jackson) in the 1820s and 30s Taney distinguished allegiance to states rights from opposition to the Union. Indeed, he later attributed his detachment from the Federalist party to New England Federalism's flirtation with disloyalty during the War of 1812.

For while the enemy was in the midst of us [Marylanders] assailing our cities, and burning our houses, and plundering our property, and the citizens of the State, without distinction of party, were putting forth their whole strength and blending in its defence, those with whom the Maryland Federalists had been associated as political friends in the Eastern States, and whom they had regarded and treated as the leaders of the party, were holding the Hartford Convention, talking about disunion ... They were moreover using every exertion in their

⁵ This description of Jackson and the challenges his administration faced is drawn chiefly from Robert Remini's magisterial biography of Jackson. See Remini, *Andrew Jackson and the Course of American Freedom 1822-1832*, at 156-202, 230-56 (1981). Volumes two and three of the Remini biography contain chronologies of the events in Jackson's life on which I have relied in subsequent paragraphs of this introduction. Dumas Malone discusses Jefferson's view of Jackson in Malone, *The Sage of Monticello* 436-37 (1981).

⁶ See Walter Lewis, *Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* 89 (1965).

power to destroy the credit and cripple the resources of the general Government, feeble as it then was, and leaving us to defend ourselves as well as we could by our own resources.

It will readily be imagined that after this the Federalists of Maryland would hardly desire to continue the party association ...⁷

When the 1824 election generated a presidential contest among four (five until John C. Calhoun dropped out to become the successful vice presidential candidate) Republican claimants to the legacy of Jefferson, Taney at first took a rather detached view: he was “a good deal inclined to go with ... Old Hickory” because he thought Jackson “is honest ... is independent, is not brought forward by any particular class of politicians, or any sectional interest,” although he showed a noticeable lack of enthusiasm about Jackson.⁸ This soon changed, with the publication, in May 1824, of correspondence Jackson had exchanged with James Monroe in 1816 and 1817, in which Jackson denounced the Hartford Conventioners as a “kind of men, although called Federalists, are really monarchists, and traitors to the constituted authorities”: “had I commanded the military department where the Hartford Convention met, if it had been the last act of my life, I should have punished the three principal leaders of that party.” Jackson’s denunciation of the very group that had

alienated Taney from his political roots, and no doubt Old Hickory’s comment in the same letter that “there are men called Federalists that are honest and virtuous,” sealed Taney’s transformation into a Jacksonian Democrat.⁹

By 1828, Taney was one of the two or three premier members of the Maryland bar, attorney general of the state, and General Jackson’s leading supporter in the state – Taney served as chairman of the Jackson Central Committee during the election. Although after consideration Taney was initially passed over for federal attorney general in 1829, in the spring of 1831 Jackson approached him through his brother-in-law, Francis Scott Key. The occasion stemmed from Old Hickory’s successive decisions earlier in the year publicly to drive Vice President Calhoun out of the Democratic party and then to replace virtually his entire cabinet, in both cases because Jackson had concluded that his administration had suffered from the disloyalty and misconduct of his subordinates.¹⁰ After an exchange of letters in which Key assured Taney that Jackson had a high view of his abilities and opinions, Taney agreed to become attorney general, and took office in July 1831. Within a month, Secretary of State Livingston (responding to renewed British protests over South Carolina’s interference with British seamen), asked Taney for his opinion on the validity of the South Carolina Police Bill. Taney declined to reply at first,

7 Taney, Memorandum (n.d.), quoted in Samuel Tyler, *Memoir of Roger Brooke Taney*, LL.D. 158-59 (1872).

8 “Jackson is not indeed the man I would name for President, if it rested with me to choose from the whole United States.” This quotation and the ones in the text are from Taney’s letter to William M. Beall (Apr. 13, 1824), quoted in Swisher, *Roger B. Taney*, at 121.

9 Jackson, Letter to Monroe (Jan. 6, 1817), 2 *Correspondence of Andrew Jackson* 272-73 (John Bassett ed. 1929); Remini, *Course of American Freedom*, at 71-73; Tyler, *Memoir*, at 158. For the rest of the correspondence, see Jackson, Letter to Monroe (Oct. 13, 1816), Jackson, Letter to Monroe (Nov. 12, 1816), and Monroe, Letter to Jackson (Dec. 14, 1816), in 2 *Correspondence of Andrew Jackson*, at 261, 263, 266.

10 Jackson’s anger at Calhoun was largely personal, based on his discovery that Calhoun had misled him about his opinions of Jackson when Calhoun was Secretary of War and Jackson a general in the U.S. Army during Monroe’s administration. On the changes in the cabinet, see Remini, *Course of American Freedom*, at 301-20.

possibly because any answer was politically risky.¹¹ For whatever reason, Taney temporized until November 1831, when another inquiry from Secretary Livingston posed a different question about American federalism and the treaty with Britain.

Livingston's new issue, posed him by a Philadelphia merchant, was whether the treaty guaranteed British West Indian slaveowners' property rights in slaves serving as mariners on British vessels stopping at American ports in free states, some of which had laws freeing slaves introduced into the state in defiance of state law. In an opinion dated December 6, 1831, Taney replied that since an American master could not assert property rights over a slave introduced into England (Taney's language makes it clear he had Lord Mansfield's famous decision in *Somerset's Case* (1772) in mind), the treaty could not reasonably be construed to interfere with the free state laws in question.¹² Taney's December opinion is sometimes seen as a clever maneuver by which the Attorney General was able to indicate his pro-South Carolina views on that state's controversial act without the burden and risk of doing so expressly.¹³ If so, Taney was unsuccessful: North Carolina's enforcement of a law parallel to the South Carolina Police Bill prompted renewed demands by the British chargé d'affaires in Washington that the federal government take action to see that states with such laws "repeal their obnoxious enactments" at once.¹⁴ This time, Taney took the bull by the horns.

The problem(s) of opining on the Police Bill

As with many other controversies that plagued the Jackson administration, the question Livingston posed Taney was tightly, and confusingly, interwoven with many others. In his 1823 decision on circuit, Justice Johnson had concluded that the South Carolina Police Bill was clearly unconstitutional: indeed, he thought its "utter incompatibility with the power delegated to congress to regulate commerce with foreign nations and our sister states" was so clear "that it will not bear argument." Johnson also concluded that the law was "an express infraction of the treaty" with Great Britain and thus invalid under the supremacy clause. In response to the argument that the power to regulate the entry of persons of color was necessary to a slave state's internal safety, and thus was constitutionally reserved to the states, Johnson exploded.

Where is this to land us? Is it not asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand.

Taking such a position, Johnson warned his fellow South Carolinians, "necessarily compromises the public peace, and tends to embroil us with, if not separate us from, our sister states; in short ... it leads to a dissolution of the Union, and implies a direct attack upon

11 In his May 28, 1832, opinion, Taney referred to "the circumstances which were supposed to render it unnecessary to reply to [Livingston's] letter of August last," although I do not know what those circumstances were. I discuss the political and constitutional difficulties Taney faced shortly. One of Taney's biographers suggested that Taney was also concerned about addressing an issue involving slave state control over people of color because of the Nat Turner rebellion, which had just taken place and raised white Southern fears to a fever pitch. Swisher, Roger B. Taney, at 147-49.

12 *Slaves on British Vessels Trading to United States*, 2 Op. Att'y Gen. 475, 476-77 (1831).

13 See Swisher, Roger B. Taney, at 149-51; Marvin L. Winitsky, *The Jurisprudence of Roger B. Taney* 89-91 (UCLA Ph. D. dissertation 1973).

14 Charles Bankhead, Letter to Edward Livingston (May 14, 1832), quoted in Swisher, Roger B. Taney, at 151.

the sovereignty of the United States.”¹⁵

Strong words, and unpleasantly relevant to the situation in which Taney found himself, for the validity of the South Carolina Police Bill came up in middle of a potentially even graver confrontation between federal prerogatives and state power: the nullification crisis. In 1828, before Jackson’s election as the states rights candidate for president, Congress enacted a protective tariff that many Southerners thought unfair and inequitable because it protected Northeastern industry at the expense of the agricultural South. By February 1829, on the eve of Jackson’s inauguration, five Southern state legislatures had adopted resolutions formally protesting the “tariff of abominations.” South Carolina, however, had gone further: along with resolutions of protest, its legislature had printed and distributed a document, secretly drafted by Vice President Calhoun, which asserted that the tariff was unconstitutional, and that the state could, if it chose, nullify the federal law within its borders. Eager not to eliminate himself as a contender for president, Calhoun played both sides of the issue as long as he could by publicly refusing to take a position on nullification, but his options had become diminishingly small by mid-1831: purged from the national Democratic Party by Old Hickory, he found himself in danger of alienating his political base at home by further equivocation. On August 3, he published over his own name a speech, the Fort Hill Address, which forthrightly asserted the power of nullification (or “state interposition” as he preferred to call it).¹⁶

Old Hickory’s opinion of nullification and nullifiers was isomorphic with his wish that he

could have hung the leaders of the Hartford Convention: defiance of federal law was simply treason to the Union. In Jackson’s mind this did not contradict his commitment to states rights. “I draw a wide difference between State Rights and the advocates of them, and a nullifier. One will preserve the union of the States. The other will dissolve the union by destroying the constitution by acts unauthorized in it.”¹⁷ But this distinction, however clear it might be to the president, was a complicated one to apply in practice. Taney’s predecessor as attorney general, John McPherson Berrien, had given the president an opinion on the South Carolina Police Bill in the spring of 1831 which concluded that, contrary to the views expressed earlier by Johnson and Wirt, the Police Bill did not contravene the treaty with Britain. The conclusion was a useful one, in that it avoided any necessity to take action that would further inflame South Carolina opinion, but Berrien’s strained reasoning reflected the difficulty of reconciling the nationalist and the localist themes in the president’s world view. The congressional power over foreign commerce is exclusive, Berrien wrote (agreeing with Johnson and Wirt), and the Police Bill (obviously) affects foreign commerce. At the same time, “the power to regulate their own internal police” is “clearly reserved to the respective States,” and the federal government “cannot control the exercise of this reserved power,” unless, that is, doing so is necessary “to the efficient exercise of the commercial power.” On the question of who decides constitutional disputes, one which the controversy over nullification had brought to the forefront (not that it is ever far from center stage in constitutional

15 *Elkison v. Deliesseline*, 8 F. Cas. 493, 494-96 (No. 4355) (C.C.D.S.C. 1823). Attorney General Wirt’s 1824 opinion came to the same conclusion, in somewhat less flamboyant language. See *Validity of the South Carolina Police Bill*, 1 Op. Att’y Gen. 659, 660-61 (1824). Both Johnson and Wirt believed the Police Bill in conflict with various federal statutes governing navigation as well.

16 See Merrill D. Peterson, *The Great Triumvirate 189-94* (1987).

17 Jackson, Letter to Robert Y. Hayne (Feb. 6, 1831), quoted in Remini, *Course of American Freedom*, at 332-33.

law), Berrien informed Jackson that “the legislature of South Carolina is the exclusive judge of th[e] necessity” of legislation such as the Police Bill, “except where the operation of the act may interfere with rights existing under the commercial laws or conventions of the United States.”¹⁸

It is doubtful that either nullifiers or nationalists would have been satisfied with this exercise in giving with one hand and taking with the other, and Berrien himself eventually worked his way around to answering Jackson’s question by denying that the South Carolina Police Bill violated the treaty at all. The treaty’s guarantee to British vessels of free and secure entry into American ports was expressly made subject to the laws of the United States and an 1803 federal statute had forbidden ship captains from bringing persons of color into any port in violation of state law. South Carolina’s law, in other words, was valid because Congress had exercised its (exclusive) power over commerce to make it so. Berrien was able to reach this happy conclusion only by ignoring Chief Justice John Marshall, to be sure – in 1820 Marshall held on circuit that Congress did not intend its statute to apply to mariners¹⁹ – but although that might not have troubled Jackson unduly had he known it, Berrien’s opinion clearly was not seen as settling the issue.

Secretary Livingston’s request for an opinion on the South Carolina Police Bill intersected with a second major controversy in which the administration was embroiled – the Bank of the United States. Jackson’s dislike of the Bank was public knowledge: in his first annual message to Congress, in December 1829, he had reminded the legislature that the

Bank’s charter would expire in 1836, and that it was not too soon to begin considering the long-standing Jeffersonian objections to the constitutionality of a national bank as well as what Jackson called the Bank’s complete failure “in the great end of establishing a uniform and sound currency.” Jackson’s annual message the following year was even sharper, and put the policy objections to the Bank in terms closer to the president’s private conviction that the Bank was a corrupt and corrupting political monster. “Nothing has occurred to lessen in any degree the danger which many of our citizens apprehend from that institution as at present organized.” However, in 1830 as in 1829, Jackson did not call overtly for the elimination of a national bank altogether, but only suggested its reform so “as to obviate constitutional and other objections.”²⁰ By the time Jackson reconstituted his cabinet in April 1831, however, he had no remaining personal hesitations about the need for a radical solution. As the General explained to an old friend, “the great task of Democratic reform in the administration of our Government” required a militant “struggle against the rechartering of the U. States Bank The corrupting influence of the Bank upon the morals of the people and upon Congress are to be met and fearlessly met.”²¹ Nevertheless, the administration’s public position remained ambiguous: the president’s third annual address in December 1831 stated that he “[e]ntertain[ed] the opinions heretofore expressed in relation to the Bank of the United States as at present organized,” but a day later, with Jackson’s permission, Secretary of the Treasury Louis McLane issued a report

18 Validity of the South Carolina Police Bill, 1 Op. Att’y Gen. 426, 435-38 (1831).

19 *The Wilson v. United States*, 30 F. Cas. 239 (C.C.D.Va. 1820).

20 Jackson, First Annual Message to Congress (Dec. 8, 1829), 2 James D. Richardson, *Messages and Papers of the Presidents* 1025 (1897); Jackson, Second Annual Message to Congress (Dec. 6, 1830), *id.* at 1091-92.

21 Jackson, Letter to Hugh Lawson White (Apr. 29, 1831), in 4 *Correspondence of Andrew Jackson*, at 272.

supporting recharter of the Bank on condition that its financial structure was radically restructured.²²

Unlike Secretary McLane, the new Attorney General was an absolute opponent of the Bank, and a considerable amount of Taney's energy in his first year in office was spent in what amounted to an intra-cabinet fight with McLane and Taney over what public position the president would eventually endorse. In early January 1832, Taney's position was greatly, if inadvertently, strengthened when the Bank petitioned Congress, four years early, for a renewal of its charter. This act stiffened Old Hickory's determination to destroy the monster, but many issues remained unsettled, some of them of a constitutional nature. If Congress passed a renewal bill, would it be legitimate for the president to veto it on constitutional grounds, particularly in light of the Supreme Court's 1819 decision in *M'Culloch v. Maryland* upholding the Bank against constitutional challenge? Even if Jackson did not want to be bound by *M'Culloch's* holding on the Bank, it must have been quite unclear that the president would welcome a repudiation of *M'Culloch's* attack on state sovereignty and reserved powers reasoning, given his deep devotion to the Union and to national authority (and in light of the ongoing nullification controversy).

Behind Jacksonian-era debates over tariffs, nullification, the power of Congress to charter a national bank, and the validity of state police laws affecting commerce was, of course, the issue of slavery. From the beginning, the defenders of slavery had recognized that a national government vested with extensive powers could pose a threat to the institution when and if a national political majority wished it to do so. That time had not arrived in Andrew Jackson's first term, but the implications for the preservation of slavery of any

position he took on the South Carolina Police Bill would not have escaped the Attorney General.

II. THE DOCUMENTS

There are three documents preserved in the Carl Brent Swisher Collection of Research Material on Roger B. Taney (Box 21), in the Manuscript Division of the Library of Congress.

(1) A draft of the main opinion, of May 28, 1832, in Taney's own handwriting, with many deletions, corrections, and additions, also in Taney's hand.

(2) Taney's handwritten cover letter of June 9, 1832, to Secretary of State Livingston.

(3) A draft of the supplement to his main opinion that Taney sent Livingston on June 9. This document is in a much neater secretarial hand, with some corrections and additions by Taney himself.

The draft of the main opinion is by far the most difficult document to read and edit, due in part to Taney's at times hurried handwriting, and in part to the occasional uncertainty that the draft's many changes create. In two places, Taney crossed out substantial passages: these I have removed to footnotes with an indication in the text of where the passages stand in the manuscript. In five instances, Taney wrote substantial additional passages after he completed the draft; these I have inserted in the text at the places Taney indicated; pointing fingers numbered in accordance with Taney's original indicate the beginning (#) and end (↵#) of each insertion. As with most antebellum writers, Taney's use of capitalization and punctuation conforms to no modern system, and indeed appears to be somewhat random. I have omitted without indication many dashes that we would now consider superfluous, e.g.,

22 See Remini, *Course of American Freedom*, at 336-40.

after a period, and have retained Taney's erratic use of capital letters. Words I have supplied for reasons of syntax or meaning are enclosed in

[square brackets]. Words in the text that Taney did not strike but which appear to be clearly superfluous are enclosed in {braces}.



The main opinion

Attorney General's Office

May 28, 1832

You are aware of the circumstances which were supposed to render it unnecessary to reply to your letter of August last, in which you requested my opinion on the constitutionality of the act of assembly of South Carolina relative to free people of colour coming into that State on board of a merchant vessel. The renewed application on this subject from the Charge D'Affaires of Great Britain which occasioned your note to me of the 19th inst, seems to render any further delay inexpedient & requires the government to come to a definite conclusion on the subject. I proceed therefore to express my opinion [on the] question you have proposed to me.

So far as the British government is concerned I think the answer is obvious and satisfactory. They are allowed by the Treaty freely and securely to come with their ships & cargoes & to remain & reside in any part of the territory where other foreigners are permitted to reside – but this permission is in express terms made subject to the laws and statutes of the country. The act of assembly in question has been passed by the proper Legislative body of South Carolina. It has been hitherto regarded and obeyed, as a law not only by the people of that state, but by the citizens of every state of the Union. No judicial tribunal of competent authority has pronounced the law to be unconstitutional. Here then is a law which has been enacted by the regular legislative power of the place, which has been submitted to by the citizens

of the United States & recognized & obeyed by them as valid and obligatory. While it is thus acknowledged and enforced as a law upon our own citizens & has not been declared void by any judicial decision, can a foreign nation be allowed to call its validity into question upon the ground that it is contrary to our own Constitution? I think not. Any enactment by a regular legislative body which is received and obeyed by the people of the U. States as a law, must be so treated and acknowledged by {this} every foreign nation – and no foreign government can be allowed in its negotiations with the U. States to question the interpretation given to the constitution of the U. States by our own people & our own proper authorities. The British Government therefore have no right to complain of this act on the ground that it is unconstitutional. And if they are bound to regard it as a law of the place they cannot complain of it as an infraction of the Treaty. The right to trade is expressly by the treaty itself made subject to the laws of the place. If any individual British subject is unwilling to submit to this law, & supposes it to be unconstitutional and void it is in his power to bring the subject before the judicial tribunals of the country for decision. But surely the British Government have no right to ask for its subjects an exemption from the operation of the municipal laws of a state which are enforced against the citizens of the other states of the Union. No fair interpretation of the Treaty can lead us so to construe it so as [to] entitle the coloured subjects of Great Britain or British merchant vessels & mariners to greater privileges in Charleston than

are allowed to the coloured citizens of Massachusetts or to merchant vessels & mariners from that state. This view of this subject appears to me to be a sufficient & satisfactory answer to this complaint preferred by the British Charge d'affaires & renders it unnecessary to enter into any discussion with him upon the constitutionality of the law in question.

But as this point is one of much interest & delicacy and I have formed my opinion upon it, it will perhaps be more agreeable to you that I should state it now rather than reserve it for a future occasion.

My two immediate predecessors in the office of attorney general of the U. States have as you know differed in opinion on this question. It cannot therefore be regarded as a settled point. Nor free from difficulty. And it is impossible to foresee how it may ultimately be decided in the Supreme Court. But in my opinion South Carolina or any other slaveholding state has a right to guard itself from the danger to be apprehended from the introduction of free people of colour among their slaves – and have not by the constitution of the U.S. surrendered the right to pass the laws necessary for that purpose. I think this right is reserved to the states & cannot be abrogated by the U. States either by legislation or by treaty. And if by a fair construction of the Treaty with England it came in conflict with the law of South Carolina it does not by any means follow that the law must yield to it. The Constitution it is true has declared that a Treaty shall be the supreme law. But in order to make it so the stipulations must be within the Treaty making power. A Treaty would be void which interfered with the powers expressly delegated to Congress. So it would be void if it came in conflict with rights reserved to the states. 1 For example if it ceded a portion of her acknowledged territory without her consent – or stipulated that she should adopt a particular form of government inconsistent with the wishes of the people of

the State, it is very clear that such stipulations would be void & would not be the supreme law in the state whose rights it invaded. And the same may be said of any other provision in a treaty which comes in collision with a right reserved to the state. 2 And altho the nonfulfillment of such a Treaty would give just ground of complaint to the other party & the U. States would be bound to make reparation for the breach of it, yet it would not be the supreme law here & could not lawfully be carried into execution by the Government of the U. States. If therefore the Treaty were susceptible of the interpretation claimed for it by the British Government, still it could not be enforced if South Carolina had a right to prohibit the introduction of free people of colour within her limits.

I have said that in my opinion South Carolina has the right to prohibit the introduction of free people of colour within her limits. She had unquestionably power to do so before the adoption of the Federal constitution. By what article has she surrendered it? In what article can the slave holding states who assisted in forming the constitution and who afterwards adopted it be supposed to have contemplated the relinquishment of this power? The words ought to be clear & express or the implication necessary & unavoidable which should lead us to such a conclusion. For we have every reason to believe that if the proposition had been distinctly made to them, they would as soon have surrendered their own lives as parted from a power absolutely necessary for their own safety. And I cannot think that any general terms or ambiguous phrases in such an instrument as the Federal constitution can justifiably be expounded to mean what we are perfectly sure from the situation of the parties to the compact & from their habits & feelings, they could not & did not intend.

The African race in the United States even when free, are every where a degraded class – & exercise no political influence. The privileges

they are allowed to enjoy, are accorded to them as a matter of kindness & 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, & are permitted to be citizens by the sufferance of the white population & hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the constitution. They were evidently not supposed to be included by the term *citizens*. And have not been intended to be embraced in any of the provisions of that constitution but those which point to them in terms not to be mistaken.

This view of the subject is illustrated by that article of the constitution which gives to *citizens* of each State the “privileges & immunities of *citizens* in the several States[.]” Was this intended to include the coloured race? Did the slave holding states when they adopted the constitution intend to give within their own limits to a free coloured person residing in Massachusetts or Connecticut all the rights and privileges which they allowed to the white citizens of those states? The article has never been so construed. A white citizen from either of these states has a right under the constitution to come into a slave holding state whenever he pleases. He has a right to remain as long as he thinks proper – and while he continues there he is entitled to the same protection from the laws & the same legal presumptions in his favour as the citizen of the state; & he may if he chooses keep arms in his house or room for his defense or carry them about him. But this is not the case with the coloured population. Every slave holding State

it is believed has prohibited their migration & settlement within their limits, and in the absence of evidence of their freedom presumes them to be slaves & subjects them to imprisonment without any offence being charged against them – and has forbidden all persons of that colour from keeping or carrying arms. Did the slaveholding states mean to surrender their right to enact such Laws? It is impossible to imagine they could have so intended, and the uniform course of their legislation since the adoption of the Federal Constitution shows that they did not so understand that instrument. The slave holding states could not have surrendered this power, without bringing upon themselves inevitably the evils of insurrection & rebellion among their slaves, & the non slave holding states could have no inducement to desire its surrender. 2☞ On the contrary as members of the union & interested in promoting the common welfare, they had every reason to wish that the slave holding states should retain a power which is obviously essential to their safety, & necessary to the preservation of peace & order within their limits. ☞2

We are therefore irresistibly led to the conclusion, that when they were stipulating in the constitution, about the rights which the citizens of each state should enjoy in the other states, none of the parties to the compact contemplated the African race & did not design or desire to deprive each other of the absolute & unlimited power of Legislation so far as regarded them. Our constitutions were not formed by the assistance of that unfortunate race nor for their benefit. They were not regarded as constituent members of either of the sovereignties & were not therefore intended to be embraced by the terms *citizens of each State*. If they cannot be considered as included in this specific stipulation, (which would perhaps embrace them if a technical and literal interpretation were given to the words used, regardless of the plain object & intention of the parties) how can

they be supposed to have been in the contemplation of the parties when general terms are used in the constitution upon other subjects? How can the states be supposed to have intended to surrender or limit their right of Legislation over this description of people by the general Terms in which they have granted the power to regulate commerce and to make Treaties? And if by a fair & just construction of the constitution according to its obvious spirit and meaning they did not mean to surrender or limit their own power on this subject by the grant of the Treaty making power or any other general power to the Federal Government, then the absolute and unlimited right to Legislate over them in as

full and ample a measure as they possessed it before the constitution was formed, was reserved to the States, & the law of South Carolina in that case is valid even if the Treaty contained an express stipulation to the contrary.²³

3☞ Indeed independent of the principle which requires us in the present state of things to regard the law of South Carolina as a good and valid one the considerations just stated are sufficient to show that by a fair and just interpretation of the treaty it cannot be construed to embrace the coloured subjects of Great Britain & give to them the right of entry & trade & residence etc mentioned in the first article. Great Britain is not only aware of the

23 At this point, Taney crossed out the following material from his original text.

This consideration above stated in relation to the word citizen in our constitution appear[s] to me also to shew, that if the word "subjects" of Great Britain used in the treaty, would in its most extended & general meaning include persons of the African races who are subjects of his majesty, yet this word cannot be regarded as having been used in that extensive sense by the parties to the contract. That unfortunate people came into the dominions of Great Britain not as aliens coming to settle among them & whose descendants would be free born British subjects, but as slaves; whose posterity it was then intended should always {to} remain so. The privileges there granted to some of them, are rather favors than rights inherent in British subjects, & they are there as here a distinct & degraded race. They are not intended to be included when the British people or British subjects are spoken of – And as this is their situation in Great Britain – & they were bound to know and did actually know the light in which they were regarded here they had no right to suppose that the U. States designed to include them in the general terms used in the Treaty & if they desired or intended to make a stipulation in relation to them, it ought to have been proposed {it} in specific terms. They cannot justly claim for the words used a meaning & construction which they were bound to know the U. States did not & could not intend they should bear.

But what appears to me to show conclusively that the parties did not use the word "subjects" in the sense now contended for by G. Britain is that the article in question would not be reciprocal according [to] that interpretation. The slaves in the British West India islands are subjects of Great Britain according to the most extensive meaning of that word. The slaves in the U. States are in no sense of the word 'citizens' and if the construction claimed by them is admitted they would have rights for their slaves in our ports, which they have not granted to our slaves in theirs. This could not have been the intention of the parties to the Treaty – and it shows that the word "subjects" was used in a restricted sense & not in its most enlarged one – and if it is construed to have been used in a restricted sense, it ought to be restrained to its ordinary & familiar meaning by which this peculiar race would not be included. They have never been looked to or considered as forming any part of the body politic either in this country or Great Britain.

In this view of the Treaty the British Government would have no right to complain even if the Government of the U. States had the undoubted authority to make and execute such an engagement. The persons to whom the wrong is supposed to be done are not & were not intended to be embraced in the Treaty.

condition of the African race in the U. States but that unhappy people hold in her own dominions the same relation to the white population that they hold in this country. In both nations the great body of them are doomed to slavery & the number that are admitted to the privileges of freedom form but a small proportion. In both countries therefore the African race are generally spoken of & regarded as slaves who form no part of the body politic. They ought not therefore to be considered as embraced in any general stipulations made by treaty in favour of the people of the two nations. We never contemplate the British nation as in part made up of the African race, nor do they so regard the people of this country. They had therefore no right to suppose that the few emancipated coloured persons, who form an exception to the general character and legal condition of the race, were intended to be included in any general provisions made in favor of the people of the two countries. And if they desired to include their emancipated coloured population they ought to have brought them into view in the negotiation [and] required a specific provision on the subject. The Treaty is to be expounded according to the real meaning of the parties & a literal interpretation at war with the obvious intention ought not to be given to it. And I am persuaded that no one can believe that either those who negotiated the treaty or ratified it, thought at the time of the few coloured persons who enjoy a sort of degraded freedom, as a portion of the people of either country. ¶3

It may be said however that the law of S. Carolina is more severe and oppressive than is necessary for its own protection. Upon examining its provisions I am ready to admit that milder measures would I think have secured the object and would have created less dissatisfaction. But if a state has reserved the power to guard itself from the danger to be apprehended from the introduction of free people of colour

among them, it appears to me that such a reservation carries with it the right to judge the means required to accomplish effectually the purpose. What means are sufficient must of necessity be a question of Legislative discretion. It may like any other power where discretion is to be exercised in the mode of carrying it into execution, be oppressively exercised and thereby abused. The power for example of regulating commerce plainly gives to Congress the right to impose a tariff for the protection of domestic industry. This power may be oppressively exercised so as to throw an unjust & unequal burthen on one portion {of} in order to enrich another. Yet the law would I apprehend be constitutional & valid – & every body bound to obey it – because the constitution has given the power and left the mode of exercising it to the discretion of Congress. So a Judge having a discretion to inflict a greater or lesser punishment for a certain offence, might when there were many mitigating circumstances and the punishment ought to be the lightest oppressively inflict the heaviest in his power. Yet the sentence would be a legal one & those who are subject to the authority of the Court would not only be justified in obeying the judgment but would be bound to carry it into execution. And whenever a discretion is given the tribunal which is to exercise it must judge of the manner & extent to which it is to be used. In this case what tribunal could constitutionally decide that less oppressive means would guard the state from the evil she apprehends? The courts could not do it – because a judicial tribunal cannot revise a matter of legislative discretion, & point out to the legislature the manner in which it shall carry into effect a power which it is admitted to possess.

4¶ This point was distinctly decided by the Supreme Court in the case of *McCulloch vs. The State of Maryland* & that case turned upon it. Indeed the principle is an obvious one & founded in the nature of judicial power. For

if it undertook to review the exercise of legislative discretion, it must itself exercise a legislative function & not a judicial one. And it is immaterial whether the legislative discretion be vested in a state or the U. States, it is equally from the nature of the power beyond all judicial control.

It may be asked what is to be done where a legislature abuses it[s] power & exercises it for the purposes of oppression or for any other purpose than the one for which it was given? Is such a case without remedy? I answer no. The remedy is in the people who elect the body & the responsibility of the representative is, in this respect, in his constituents. The power & the discretion is given, & there is no other tribunal but that of the people which can call them to account for the exercise of a power committed to their hands. In passing a law forbidden by the constitution they exercise a power not conferred on them & hence the judicial tribunals are not bound by it & may declare it void. But it is a very different case when they abuse a power actually conferred on them & from error or improper motives enact laws needlessly oppressive.²⁴

This question must not be confounded with another class of cases where the general & state governments have both a right to legislate over the same subject & the laws passed by them respectively come in collision with each other. In cases of that description the Supreme Court have said that the law of the State is void so far as it conflicts with the law of Congress.

Such a case is one clearly for judicial decision. Because neither Legislature transcends the power given to it, and the court being authorized to interpret the law of congress & to carry it into effect it necessarily becomes a question for them to decide whether a state law standing in its way can limit its operation. So as to the Treaty making power. If the right was conferred on the General Government to restrain the power of the States over the people of colour within their respective territories and stipulations were contained in a Treaty which came in collision with State laws on that subject, the state laws must yield to & the Treaty would prevail. But in my view of the subject there is no power conferred by the constitution on the U. States, to restrict either by Legislation or Treaty the absolute & unlimited power of legislation by the several states in relation to people of colour coming within their limits. The reasons which lead me to that conclusion have been already stated. And regarding the matter in that light, if the provisions of the treaty were at war with those of the act of S. Carolina, it would not be a case of powers admitted to be possessed on both sides coming in their exercise, into conflict with one another, but would be an exercise of power by the U. States not given by the constitution – and the stipulations in the treaty would be inoperative & void and would not impede or limit the operation of the law of the state. This case therefore cannot be subjected to judicial examination & decision on the ground of a conflict between the State and

24 At this point, Taney crossed out the following material from his fourth note.

Thus as in the case before put of the Tariff, it is very clear that the purpose for which it was imposed – the motive which induced the Legislature to pass the law – is not a subject for judicial examination. It is a regulation of commerce & {have} the power to regulate it being given by the constitution, the law is an exercise of constitutional power & no other tribunal but the people of the U. States who elect the Legislative body can call them to account for it. No judicial tribunal & no state & no body of men but people of the U. States acting by their representatives can call them to account for it. Will it be said that this check is not sufficient? I answer what better can be provided? It is the only one that a representative Government can have & to deny its sufficiency is to assert the unfitness [...]

General Government, in the exercise of powers possessed by both of them.

The Executive branch of the General government certainly could not declare a state law inoperative because a power reserved to the states had been improperly or oppressively exercised. If the law produced an inconvenience or embarrassment the President might remonstrate with the state authorities & appeal to their justice & patriotism to correct the evil which improper legislation had produced. But he could do nothing more. ¶4

There is no tribunal therefore competent to decide that the law in question is null & void on the ground that the power reserved to the state has been oppressively exercised & that milder measures would accomplish the same object. The Legislature of the state is the only body to which such an appeal can be made, and which [is] competent to review & annul [that] which has already been done. And there appears to be no other tribunal known to our institutions, which can constitutionally review its judgment where the means to be employed are necessarily matters of Legislative discretion.

5¶ Nor do I perceive that any great evil is likely to arise from the exclusive control over this subject which belongs to the states. Any unnecessary embarrassment to trade & commerce would be more injurious to the people of the state which enacts the law than to any other persons. It may therefore be safely assumed that if error has been committed they would on reconsideration correct it. There can be no motive to pass laws which injure their own commerce, or to produce inconveniences in the case before me, beyond the bounds which are absolutely necessary to make them feel assured of their own safety. ¶5

While I express my own decided opinion that the power to guard themselves on this point is reserved to the states and cannot therefore be controlled by the Treaty making power, conferred on the General government, I am not insensible of the conflicting

opinions entertained on the construction of the constitution of the U. States, upon questions which arise on the relative powers of the states & of the Federal Government. And I am aware that the Supreme Court of the U. States have maintained doctrines on this subject to which I cannot yield my assent. And differing as I do most respectfully from that high Tribunal upon the rules and principles by which the constitution of the U. States ought to be construed, I am aware that the opinion I have expressed may not be sanctioned by that Court. Indeed judging from the past I think it highly probable that the Court will declare the law of S. Carolina null & void if contrary to the stipulations in the Treaty whenever the question comes before it. And believing that such is likely to be the case it is my duty to apprise you of it. It is unnecessary now to say what in that event ought to be done. But whatever may be the force of the decision of the Supreme Court in binding the parties and settling their rights in the particular case before them, I am not prepared to admit that a construction given to the constitution by the Supreme Court in deciding in any one or more cases fixes of itself irrevocably & permanently its construction in that particular & binds the states & the Legislative & executive branches of the General Government, forever afterwards to conform to it & adopt it in every other case as the true reading of the instrument although all of them may unite in believing it erroneous. If the judgment pronounced by the court be conclusive it does not follow that the reasoning or principles which it announces in coming to its conclusions are equally binding & obligatory. It will however be time enough for the Executive to determine this point when a case shall arise which compels it to decide. The case before me as it now stands does not call for a decision of this question. I advert to it because it being my duty to state

what I suppose may possibly be the decision of the Supreme Court on the law of S. Carolina it became necessary to explain why I do not advise the Executive to adopt in advance the construction which I think may be given by the Court. I cannot regard it as the true construction. And whatever may be proper to be done if the Court should hereafter declare the law in question to be void, yet until that shall happen I am very clear that it ought to be regarded by the Executive as a valid law passed by competent

authority, & consequently a law which according to the Treaty every subject of Great Britain is bound to observe. The British Government therefore have no right to complain. The law is acknowledged and submitted to as obligatory by our own citizens, & there is nothing in the treaty which gives them a right to be exempted from the operation of any municipal law of this country while it is admitted to be binding on ourselves & obeyed by our own citizens & enforced against them.



The supplement's cover letter

June 9, 1832

My Dear Sir:

I send you a supplement to my *Essay* on the S. Carolina law. You will see by the content of the notes to what portion of the argument they are intended to apply – As I have no copy of

what I before sent you, some things are probably repeated – And when I return from the Maryland Court of Appeals I hope to have the benefit of your notions on this subject and to put the whole matter in proper form.

I am very respectfully yours

R.B. Taney



Taney's supplement

note 1.

The African race has never been regarded as a portion of the people of this country & have never been considered as members of the body politic. In our most solemn & public acts where we speak of a people as our citizens they are never intended to be included and this is so well understood that it has not been deemed necessary to qualify general principles or stipulations made in general terms in cases where it is evident they were not intended to be embraced.

Our Declaration of Independence we know was drawn by a distinguished citizen of a slave holding state. And when it was asserted in

that instrument “that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;” – no one ever supposed that the African race in this country were entitled to the benefit of this declaration, nor did any one imagine that they had a right to claim the extension of that great principle to themselves. Yet the words are as general in their import as the language of the treaty which is said to include them.

note 2.

It may be said that the distinction I have

taken between the exercise of a power not granted by the Constitution & the abuse of a power admitted to be given is not well founded. And that if the Legislature of a state or the U. States exercise a power which is given to it in an oppressive manner or to accomplish objects different from those which the constitution contemplated – such acts must be unconstitutional & that the distinction taken is one of words only. I think otherwise. But if I am mistaken in this respect, it will not alter the conclusion to which we must come. For the true question in this case is can the judicial power declare the law of South Carolina unconstitutional and void? It matters not as to this enquiry whether we call the law an abuse of power or call it unconstitutional. In either case it turns upon the exercise of Legislative discretion, it does not rest with the judiciary to revise it, and limit the bounds beyond which it shall not pass. Legislative power is of necessity an exercise of discretion. The power to exercise a discretion cannot exist without the power of abusing it. And when the Legislative body have the power to attain a particular object, they may use means, which while it attains that object, are also intended to accomplish other objects not committed to their care. But if they are to attain a certain end, it follows always that they must judge of the means, and a judicial tribunal cannot revise their judgment and decide that other means would be sufficient & more constitutional & proper. The case of *McCulloch vs. The State of Maryland* before referred to is an illustration of this principle. That case is generally said to be a decision in favor of the constitutionality of the present Bank of the United States. I do not so understand it. It is a decision that the judicial power cannot revise such an act of Legislation and declare it unconstitutional and void. And in this view of the decision it is free from many of the objections urged against it. The principles on which the decision rests may be summed up in a few words. The court say[s]

that under the power to lay & collect taxes & to apply them to the objects contemplated by the Constitution, the U. States must possess the power to establish fiscal agents whenever it pleases to effectuate the objects intended to be accomplished – that this fiscal agent may be either a single individual or a body of individuals associated as a corporation; that the Legislature must have the power of determining which is the better & more efficient instrument & to select the one which in their judgment is most likely to attain the object & it must be a matter equally within their discretion to decide with what powers and faculties it is necessary to clothe this agent whether the one preferred be an individual or a corporation. But the court admit[s] that Congress cannot confer on it any powers forbidden to the U. States or in violation of rights reserved to the several States, and insist that within these limits it is purely a matter for the Legislature to consider whether it shall be a legal entity or a natural person & what powers & faculties the public interest requires to be given to it. And being subjects of Legislative discretion the judiciary cannot revise their decision & say that a natural person would be better or that powers and faculties less comprehensive & dangerous would have been sufficiently effectual to attain the end authorized by the constitution. If therefore it be true that Congress may create a bank for the purposes of making it the agent of the government, the judiciary could not on either of these grounds above stated decide the law to be unconstitutional. Before they could have come to this conclusion, it would have been necessary for them to look at the subject as Legislators & to enter on the examinations & reasonings & to take into consideration the subjects which belong exclusively to Legislation and not to the judiciary. This it is evident a court from the nature & character of its functions cannot do & therefore it had not the right to say that the law establishing the Bank

was a violation of the constitution. But it does not follow that this entire law was warranted by the constitution. For example, if instead of creating a corporation & clothing it with the powers necessary for the fiscal operations of the General Government, other faculties & powers were conferred on it for other purposes and to accomplish objects not committed to the care of Congress, it would be very clear that the power to create the fiscal agent would not authorize such a violation of the principles of the constitution. Suppose Congress, for the purpose of counteracting the republican principles on which our institutions are founded, and to vest more power in the hands of a monied aristocracy, should under the name of a mere fiscal agent establish a vast monied monopoly with a capital infinitely beyond its wants as a Treasury agent, & give to it powers & capacities which enabled it to exercise a controlling influence in elections, in Congress, in the courts & over all the operations of the Government & to bring ruin on any portion of the community which should venture to oppose its wishes? Nobody would say that the power to create such a corporation for such purposes was intended to be given by the constitution. Nobody would say that the people of the U. States intended to give Congress the power to alter the ruling principle of the Government. But could the Judiciary declare such a law to be unconstitutional & void? Could the courts undertake to define what amount of Capital was necessary & what powers & privileges were required to enable the fiscal agent to collect and distribute the revenue? In the case of *McCulloch vs. The State of Maryland* before referred to the Supreme Court have said that the judiciary has no such a power & that the Legislature are the only judges of the means necessary to be used to accomplish the object. And the inability of the Court to correct an evil like the one above supposed grows out of the nature of judicial power. For if the Court should undertake to say

how much capital and what capacities and powers were necessary they would exercise a Legislative and not a judicial function. If they could say that too much has been given, they must be able to say precisely how much would suffice. They must be able to fix certain defined limits over which the Legislative body could not pass either in the amount of capital or in the powers and privileges to be given to this agent of the Treasury. It is obviously not always possible for the Legislature to do this with absolute certainty, with all its means of knowledge and latitude of inquiry and [it is] perfectly impossible for a judicial tribunal. And it is moreover evident that the enquiries and considerations which are necessary to lead to a just conclusion are in their nature Legislative & not judicial.

Here then is a case of manifest usurpation and whether we call it the abuse of a power granted or an unconstitutional exercise of power, it is in either case equally beyond the reach of correction by the judicial tribunals.

The same principles apply with equal force to the Legislative act of South Carolina & prove that it is impossible for the judicial power to ascertain and decide whether milder measures would not have been sufficient to secure their citizens from the apprehended danger. And as no tribunal but a judicial one can pronounce the law of the state to be unconstitutional & void and the judicial power cannot reach this case it follows that the Legislative action of the state on this subject cannot be controlled by any Branch of the General Government. For it will not be contended that the Legislative or the Executive branches of the Federal Government could constitutionally declare the law of a State to be null & void on any grounds.

If it should be asked where then is the remedy for such an abuse of power by Congress as is above supposed? I answer that the remedy is in the hands of their constituents from whom they derived their Legislative

authority. It is in the hands of the people of the U. States who are represented in the House of Representatives – in the Senate who represent the States, and the President who is chosen by the combined power of the States and the people. They are all made responsible to their constituents after a certain period of service and if they have abused the Legislative power conferred on them & used it for unauthorized purposes, others may be chosen who will annul & declare void the acts of usurpation or abuse committed by their predecessors. Every Legislative body may review every act of legislation passed by those who preceded them. They may determine whether the Legislative discretion & power has been exercised for the purposes contemplated by the constitution, or abused in order to accomplish objects never intended to be submitted to their judgment. And the Legislative body like all other tribunals consisting of more than one person must in coming to their decision be governed by the will of the majority. And where the Legislative acts of Congress are to be reviewed, no one District and no one state can exercise this power in opposition to the will of the majority any more than a single judge in the Supreme Court in a question of judicial cognizance could declare a law to be unconstitutional in opposition to the opinions of the other six judges who with him constitute the tribunal of revision.

It may be said that this will not be found to be a sufficient safeguard against such abuses of Legislative discretion as are beyond the reach of judicial power. But the answer is obvious. The Constitution has provided none other & we cannot engraft on it a new principle nor can its defects be amended except in the mode prescribed by the instrument. And if it could be demonstrated that the responsibility I have stated is inadequate and nugatory, it would by no means follow that such a state of things

would justify an usurpation of power by any branch of the Government or by a single state.

But it is evident from the nature of representative Legislative power that no other tribunal can be devised to which the power of revision can be safely committed. For if it is entrusted to any other hands, it puts an end to republican representative government. And moreover the safeguard against abuse above insisted on is abundantly sufficient and is placed in competent & proper hands. For to deny the sufficiency and safety of this tribunal is to question the political axiom on which the General and State Governments of this country are all founded. The delegated power expires after a limited period in order that the proper constituent body may select other agents to correct any evil produced by the error or misconduct of their former representatives – and may delegate Legislative power to more competent & trustworthy hands. The very power of selection presupposes the capacity to judge the conduct of the agent selected. And experience as well as theory proves that no tribunal can be formed so likely to come to just conclusions on all questions of Legislative discretion as the great body of the people themselves. I am sensible that I have extended this discussion more than the particular point on which my opinion is called for necessarily requires. But you will readily perceive that the questions of constitutional power & of Legislative and judicial power upon which I have presented my views are all intimately connected with the enquiries to which the law of South Carolina has given rise. And they are not only questions of the highest importance but they are the exciting topics of the day. I have therefore felt anxious to make myself fully understood and to state with precision and with proper limitations the principles which I believe to be correct and the reasons by which they are sustained.



III. COMMENTS

Attorney General Taney's argument about the South Carolina Police Bill²⁵ was complex and, as far as we know, he never had the opportunity to "put the whole matter in proper form" as he indicated he hoped to do in his June 9 cover letter. In addition, while the existing copy of the June 9 supplement seems to reflect Taney's final edits, the extant draft of the May 28 main opinion does not reflect any changes Taney might have wished to make after reading a clean copy of that document. We must be hesitant, therefore, about putting excessive weight on details. That said, taken together the main opinion and supplement present a coherent response to Secretary Livingston's enquiry, one that reflects both Taney's position in President Jackson's party and administration, and Taney's own particular views. In this section I shall present an outline of Taney's argument, and then address briefly some issues of particular interest.

Outline of the argument

- I. Introduction.
- II. The answer to be given to the British government: the Police Bill is consistent with the treaty.
 - A. The commercial freedom guaranteed by the treaty is expressly subject to the municipal laws of each country.

- B. Under the treaty, British subjects have no exemption from any law being enforced against U.S. citizens and not yet held invalid by a court with jurisdiction.²⁶

- C. The British government has no standing to object that an American statute is unconstitutional, although a British subject can raise the issue in a legal action.

III. Taney's answer to Livingston on the constitutional question: the Police Bill is constitutional because it is the exercise of a power reserved to the states.

- A. The treaty power is subject to constitutional limitations and cannot be used to interfere with the states' ability to exercise reserved powers.

- B. The power to regulate free people of color without federal limitation is a power the states reserved to themselves.

1. Given the importance of this power to the security of slaveholding states, only the most express constitutional language could properly be construed as a surrender of it. There is no such language in the Constitution.
 2. African Americans neither were nor are part of the sovereign people, and general constitutional

²⁵ Interestingly, Taney never mentioned the North Carolina statute that was the immediate cause of the most recent British protest.

²⁶ Taney simply ignored Justice Johnson's decision in *Elkison v. Dellesseline*, 8 F. Cas. 493 (No. 4355) (C.C.D.S.C. 1823). That Taney was unaware of *Elkison* is highly implausible and his failure to mention it seems difficult to defend. It is possible that he thought the decision lacked authority because it was not reviewed by the Supreme Court, or because there had been serious questions about the circuit court's jurisdiction to order relief for the plaintiff. (Justice Jackson had conceded that the Judiciary Act did not give the court the power to issue a writ of habeas corpus to a person in state jurisdiction, although he concluded that he did have the authority to issue a common law writ of *de homine replegiando*. *Id.* at 496-98.)

language about “citizens,” etc., cannot properly be construed to encompass them. Note 1 in Taney’s supplement further expands on this argument, with particular attention to the general language of the Declaration of Independence.

excursus: Great Britain views Africans in the same manner and for that reason and because of British awareness of the American view, the general language of the treaty cannot properly be construed to encompass seamen of color.

- IV. A different objection answered: the question of whether the Police Bill is excessive or unnecessarily harsh is one exclusively for the South Carolina legislature.
- A. The means employed in exercising a constitutional power are a matter on which the legislature must exercise its discretion.
- B. The Supreme Court’s decision in *M’Culloch v. Maryland* endorses and illustrates this principle, and shows that the power of judicial review does not extend to invalidating legislation on the ground that it is unnecessary or oppressive.
- C. What then is the remedy for oppressive legislation? (Note 2 in Taney’s supplement is an extensive elaboration on various aspects of this question as well as an amplification of the earlier discussion of *M’Culloch*.)
1. A statute that is the exercise of a power not delegated to the legislature which enacted it is subject to judicial review and invalidation.
 2. In situations where Congress and a state legislature have each exercised a power properly belong to itself, and the statutes conflict, the conflict is subject to

judicial resolution and, if necessary, the state statute must give way to the federal.

3. A statute that is an oppressive abuse or misuse of a power delegated to the legislature which enacted it is not subject to judicial invalidation or executive suspension. The remedy in such a case lies with the people, who can elect new representatives to undo the mischief. Until and if the people do so, the law is binding.
 4. Recognizing a state legislature’s discretion to enact laws such as the Police Bill poses no political danger since self interest will prevent a legislature from interfering with commerce more than it deems absolutely necessary.
- V. What about the Supreme Court?
- A. The Court holds views of constitutional interpretation that Taney believes erroneous and is, as a result, likely to invalidate the Police Bill if it should come before the Court.
- B. Nevertheless, the executive should not adopt in advance the Court’s probable position since it is erroneous.
1. A Supreme Court decision may bind the parties before it but does not fix the construction of the Constitution for other constitutional actors.
 2. The executive may and should reserve judgment over what to do if the Court were to invalidate the Police Bill.

The opinion & nullification

One need not put in question the sincerity with which Attorney General Taney held the views he presented to note that his opinion reached constitutional conclusions relating to

the tariff of abominations and nullification that accorded nicely with the political position of the Jackson administration. On a practical level, by concluding that the South Carolina Police Bill did not contravene the British treaty, and that if it did it would be valid as a domestic law, Taney avoided any need for the administration to take actions with respect to a side issue (the Police Bill) that would further inflame public opinion in that volatile state. As a matter of constitutional principle, furthermore, Taney readily conceded the nullifiers' traditionally Jeffersonian points that a federal statute such as a tariff can be an abuse of power, because it bears more heavily on one region, or a misuse of congressional power, because Congress's real object was to address matters over which the Constitution was not meant to give it power. But Taney parted company with Calhoun and his allies over the issue of remedy. The solution, and the only solution, for a case involving the abuse or misuse of a power delegated to Congress lay not in the actions of individual states but in the national political process.

I answer that the remedy is in the hands of their constituents from whom they derived their Legislative authority. It is in the hands of the people of the U. States who are represented in the House of Representatives – in the Senate who represent the States, and the President who is chosen by the combined power of the States and the people. ... And where the Legislative acts of Congress are to be reviewed, no one District and no one state can exercise this power in opposition to the will of the majority.

The tariff of abominations might be “unjust & unequal,” but until it was repealed, “the law would I apprehend be constitutional & valid – & every body bound to obey it – because the constitution has given the power and left the mode of exercising it to the discretion of Congress.” President Jackson, in short, was right, and nullification a constitutional fantasy that, if acted on, would be treason.²⁷

A Jacksonian reading of *M'Culloch v. Maryland*

Attorney General Taney wrote his opinion on the South Carolina Police Bill as the political battle over the rechartering of the Bank of the United States entered its final stages. The Bank bill passed the Senate only two days after Taney sent Secretary Livingston his supplementary notes; on July 3 the House approved the bill and sent it to Jackson. Old Hickory was generally expected to veto it – indeed, the anti-Jackson forces in Congress beat off an attempt by pro-Bank Democrats to delay consideration of the bill precisely because the president's opponents saw a veto as their best campaign issue in the fall elections. Much would depend, electorally and otherwise, on the grounds Jackson presented for his veto, a fact of which the president and his advisors were well aware. “The bank,” Jackson told Martin Van Buren on July 4, “is trying to kill me, but I will kill it.”²⁸

The politically safest basis for a Bank veto was to rest it on the president's duty to uphold the Constitution, and for this reason Jackson's opponents were eager to deny him that ground. The Supreme Court upheld the Bank's validity

27 Jackson's subsequent proclamation denouncing nullification (Dec. 10, 1832) went further than Taney approved, however, at least as he remembered events years later. Taney, Memorandum (July 1861), quoted in Tyler, *Memoir*, at 188-89: “I was at Annapolis attending Court, when General Jackson's proclamation at the time of the South Carolina nullification was prepared, and never saw it until it was in print, and certainly should have objected to some of the principles stated in it, if I had been in Washington.”

28 See Remini, *Course of American Freedom*, at 364-67 for the events and the quotation, originally published by Van Buren in his autobiography.

in *M'Culloch v. Maryland*, they argued, and the issue was settled. Taney's initial instinct seems to have been to minimize any comments in his opinion for Livingston that might bear on the Bank controversy, and his May 28 opinion did not mention the Bank at all and referred to *M'Culloch* only briefly. By June 9, Taney had changed his mind, and by far the larger of the two supplementary notes he sent Livingston on that date used the issue of legislative discretion as an opportunity for a significant commentary on the Bank and *M'Culloch*.

No one reading the June 9 document would have any doubt about Taney's view of the Bank. Under the transparent veil of a hypothetical, Taney repeated the accusation of anti-democratic corruption that was at the heart of his and Jackson's hatred for the Bank.

Suppose Congress, for the purpose of counteracting the republican principles on which our institutions are founded, and to vest more power in the hands of a monied aristocracy, should under the name of a mere fiscal agent establish a vast monied monopoly with a capital infinitely beyond its wants as a Treasury agent, & give to it powers & capacities which enabled it to exercise a controlling influence in elections, in Congress, in the courts & over all the operations of the Government & to bring ruin on any portion of the community which should venture to oppose its wishes?

"Nobody would say that the power to create such a corporation for such purposes was intended to be given by the constitution." On this view of the Bank, its unconstitutionality was clear. But what about *M'Culloch*, "generally said to be a decision in favor of the constitutionality of the present Bank?"

"I do not so understand it," Taney wrote boldly, and then proceeded to explain that

M'Culloch was a decision not about federalism but instead about the separation of powers between the political branches and the judiciary. Once the Court had decided that the taxing and spending powers authorize Congress "to establish fiscal agents whenever it pleases to effectuate the objects" of those powers, *M'Culloch* was an easy case. The issues of whether to incorporate the government's "fiscal agent" and of what powers to give it, were strictly ones for legislative judgment, and thus beyond the competence of the Court. Even if the Bank was in fact intended as an engine of oppression, the Court could not reach such a conclusion judicially.

Before they could have come to this conclusion, it would have been necessary for them to look at the subject as Legislators & to enter on the examinations & reasonings & to take into consideration the subjects which belong exclusively to Legislation and not to the judiciary. This it is evident a court from the nature & character of its functions cannot do & therefore it had not the right to say that the law establishing the Bank was a violation of the constitution.

Rather than undermining the legitimacy of a veto, when read properly *M'Culloch v. Maryland* made it clear that the president was entitled and indeed obligated to reach his own independent judgment about the constitutionality of the Bank! *M'Culloch* was a decision about the limitations on judicial power in a "republican representative government," not an emancipation of the government from constitutional constraints. Where those constraints cannot be enforced by the courts, by necessary implication (one acknowledged by Chief Justice Marshall in the Court's opinion²⁹) they are to be enforced by the political branches, which are

29 Marshall, it should be remembered, never argued that the issue of the Bank's necessity was simply non-constitutional; instead, he insisted that "the decree of its necessity, as has been very justly observed, is to be discussed in another place." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

themselves in turn controlled by the voters.

One month after Taney sent Livingston his analysis of *M'Culloch*, President Jackson vetoed the Bank bill. His veto message, in the drafting of which Taney was intimately involved, clearly drew on the thinking Taney had already done on the meaning of the Supreme Court's decision, and on the authority of the Court's decisions more generally. Jackson followed Taney's argument about the Court's actual holding: "Under the decision of the Supreme Court ... it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* ... or *unnecessary* and *improper*, and therefore unconstitutional."³⁰

The authority of Supreme Court decisions

One of the enduring legends of American constitutional history is the assertion that President Jackson stated, in the wake of the Supreme Court's decision in *Worcester v. Georgia*: "John Marshall has made his decision, now let him enforce it."³¹ The kernel of truth in this fiction is that Jackson held a traditionally Jeffersonian view of the significance of judicial review. Jefferson never denied that courts may decline to enforce statutes (or executive action) that they believe unconstitutional, and his successor Madison expressly affirmed the executive's duty to enforce judicial decrees, but at the same time Jefferson at least clearly rejected any claim that the reasoning of a

Supreme Court decision binds the other branches of government.³² Jackson's 1832 veto of the Bank bill restated this position forcefully: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."³³ As Taney's attorney general opinion shows, he was in complete accord with Jackson. A Supreme Court decision does not fix "of itself irrevocably & permanently" the correct interpretation of the Constitution, Taney wrote, "whatever may be the force of the decision of the Supreme Court in binding the parties and settling their rights in the particular case before them." Taney therefore rejected any suggestion that "the Executive [should] adopt in advance the construction" of the Constitution "which I think may be given by the Court," in other words by declaring the Police Bill unconstitutional on its own accord.

Some language in Taney's opinion (leaving open "whatever may be proper to be done if the Court should hereafter declare the law in question to be void") could be read to advance a further, and more radical proposition, that (as the apocrypha about Jackson quoted above suggests) the executive branch need not enforce a judicial decision if it thinks the Court in error. In the context of the entire opinion, however, I think this is an unnecessary and indeed unlikely interpretation of Taney's meaning. One of the premises of Taney's argument that the Police Bill was currently binding on American citizens and thus, by virtue of the

30 Jackson, Veto Message (July 10, 1832), 2 Richardson, Messages and Papers, at 1146.

31 Decided in early 1832, *Worcester* upheld the supremacy of federal statutes and, in dictum, treaties dealing with Native American nations over contrary state legislation. See 31 U.S. (6 Pet.) 515 (1832). Like the notion that *Marbury v. Madison* invented judicial review, this bit of folklore is a hardy perennial that has survived any number of burials. For a recent effort by an historian expert in the period see Charles F. Hobson, *The Great Chief Justice* 179 (1996): "There is no proof that Jackson ever uttered this statement; indeed, there is no evidence that he ignored his constitutional duty to enforce the Court's judgment even though from the beginning he bitterly resented the judiciary's interference in the Cherokee business."

32 On the positions of Jefferson and Madison, see Jefferson Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* 158-60, 249-55 (1991).

33 2 Richardson, Messages and Papers, at 1145.

treaty, on British subjects as well, was his assertion that “[n]o judicial tribunal of competent authority has pronounced the law to be unconstitutional.” Taney’s subsequent discussion repeatedly assumed that the validity of the Police Bill would be subject to challenge in court. All his reservation of judgment about the future course of executive action needs to have meant was that the executive branch had no current reason to determine what steps, if any, it would take in the wake of a judicial decision holding the Police Bill unconstitutional *beyond* enforcing the court decree against the parties.

It is unclear that Taney adhered to this Jeffersonian understanding of the Supreme Court’s authority by the late 1850s and it is, at the very least, a controversial position today. Perhaps ironically, its most distinguished adherent in addition to Jefferson, Jackson and Taney was Abraham Lincoln. It was Lincoln, of course, who in response to Chief Justice Taney’s opinion in the *Dred Scott Case*,³⁴ rejected the argument that the Taney Court’s views on slavery and the Constitution bound the nation, although he conceded without hesitation that the Court’s judgment was conclusive on the parties before it.³⁵

African Americans & citizenship

Most modern interest in Attorney General Taney’s 1832 opinion has focused on the two passages, one in the May 28 main opinion and the other making up “note 1” of the June 9 supplement, that clearly foreshadow Chief Justice Taney’s infamous opinion in the *Dred Scott Case*. In 1832, Taney described African Americans as “a degraded class” that “has never been regarded as a portion of the people of this country.” He asserted that “no one ever supposed that the African race in this country were entitled to the benefit of th[e Declaration of Independence], nor did any one imagine that they had a right to claim the extension of that great principle to themselves.” Each of these remarks is picked up and elaborated in 1857 in *Dred Scott*.³⁶ The repellant views Taney expressed in that case were not created out of whole cloth: they developed out of ideas he had expressed a quarter century before. As Don E. Fehrenbacher wrote in his great book on *Dred Scott*, “Taney, in 1832, formulated the same harsh racial doctrine that he would proclaim from the bench” in 1857.³⁷

There was, however, a slight difference between Taney’s two statements of his “racial

³⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³⁵ I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit At the same time . . . if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Lincoln, First Inaugural Address (Mar. 4, 1861), 5 Richardson, Messages and Papers, at 3210.

³⁶ African Americans

are not included and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

60 U.S. (19 How.) at 404-05.

³⁷ Fehrenbacher, *The Dred Scott Case* 70 (1978).

doctrine.” As attorney general, Taney never flatly stated that African Americans cannot be citizens of the United States. The facts (as Taney claimed them to be) that African Americans were not members of the bodies politic that adopted the Constitution and had never been viewed as part of the American people were, in 1832, aids to construing the Constitution and the treaty with Great Britain. They did not, in and of themselves, necessarily exclude the possibility that free African Americans might be, or become, citizens of the United States, even if citizens with sharply curtailed rights. Indeed, this latter possibility may have occurred to Taney: in a passage dealing with the construction of the British treaty that he crossed out, Taney commented that “slaves in the U. States are in no sense of the word ‘citizens,’” which may imply a concession that in some sense free African Americans were.³⁸ The issue was a hotly debated one in the pre-*Dred Scott* period; in 1843, an attorney general concluded that for the purposes of a federal land statute free

African Americans were entitled to be treated as United States citizens.³⁹ By 1857, however, Taney was determined to eliminate any ambiguity about the issue of African American citizenship, and his ugly “racial doctrine” had become not merely a tool of interpretation but a rule of complete racial exclusion.



From a contemporary perspective, Attorney General Taney’s 1832 opinion reflects with striking clarity the complexities of Jacksonian Democratic thought, and perhaps of American democracy generally. Taney’s racial attitudes, and for many of us his sectionalistic loyalties, seem of another (and morally unattractive) time. At the same time, I believe that Taney’s robust faith in electoral democracy as the only legitimate form of American government, and his belief that it is government’s duty to safeguard its own proper subordination to the democratic political process, are constitutional principles that we neglect only at our peril. *JP*

38 The crossed-out section, see note 23 above, argued that the British interpretation of the treaty was incorrect because it would afford a privilege to British West Indian slaves (who were in a broad sense British “subjects”) not ensured to American slaves (who were not United States “citizens”). Taney’s deletion of the argument may reflect his awareness that the British Parliament was on the brink of abolishing slavery in the West Indian colonies. Parliament actually passed the Emancipation Act on July 31, 1833, but the final debate over the measure began in May of 1832.

39 *Pre-Emption Rights of Colored Persons*, 4 Op. Att’y Gen. 147 (1843). The author of this opinion, Hugh Swinton Legaré, was (ironically enough) a South Carolina slaveholder.