

## CHAPTER I

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### *The Background of the Taney Court*

**I**N THE HISTORY OF COURTS as of other institutions, transitions tend to come gradually. Accepted points of demarcation are apt to have been somewhat arbitrarily chosen. Although division of the history of the Supreme Court of the United States according to the terms of the Chief Justices provides a convenient mode of treatment, the separation of each period from its predecessor may be much less definite than it at first appears. As for the beginning of the Taney period, not even the date can be precisely stated. It is possible to choose the day in March, 1836, when the Senate confirmed President Andrew Jackson's nomination of Roger B. Taney for the office of Chief Justice; or the day later in the same month when in Baltimore Taney took the oath of office; or the day in the ensuing April when he began in Baltimore the circuit duties which at that time were required of all members of the Supreme Court; or the day in August when he went to Washington to perform prescribed duties at a vestigial August term of the Supreme Court; or, finally, the day in January, 1837, when he first presided over the Court which he was to head through a series of eventful years until his death in August, 1864.

Whatever the date selected to mark the beginning, telling the story of the Taney Court requires not merely an account of events beyond that point but some reference also to background items. Important was the body of tradition built up by the Court from the time of its establishment by George Washington and the first Congress. Important was the body of decisions, particularly of the third of a century ending with the death of Chief Justice Marshall in 1835, by which the work of the Taney Court was inevitably conditioned. Looming as a conditioning factor of a different kind was the Administration of Andrew Jackson, begun in 1829 and carrying through until shortly after the adjournment of the first term of the Taney Court, which brought vast changes in

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institutions and institutional behavior in which the Supreme Court was involved. Important also for a picture of the Taney Court in operation is some portrayal of Washington as the national capital during that period, and of the physical and atmospheric setting in which the Court performed its manifold tasks.

Concerning the background history of the Supreme Court, it is to be remembered that during its first decade, a decade partly of unsure beginnings, the Court had established itself firmly as a court of law and had refused to create a confused image of itself or to dilute its judicial performance by giving official advice either to the President or to Congress. The Taney Court, like the Court in succeeding periods, was to be the beneficiary of this initial strategy. Early in the Marshall period, furthermore, the Court had established in the face of political hostility the practice of inquiring into the constitutionality of Acts of Congress which it was called upon to enforce. Although not until 1857 did the Court for the second time exercise the power of striking down an Act of Congress found to be unconstitutional, it kept alive through the intervening years the practice of inquiry. At the beginning of the Taney period the practice was so thoroughly entrenched as to be relatively free from serious challenge. Thus the Court, which had limited its sphere to strictly judicial operations, had also established its authority as final interpreter of the Constitution in cases brought before it.

In a wide range of decisions, furthermore, the Marshall Court had defended broad exercise of the delegated powers of the federal government, asserted the doctrine of implied powers, and subordinated the states to the authority of the federal Constitution. It gave protection to property, and particularly to property in land, by enforcing against the states the superior authority of federal treaties and of constitutional provisions such as that forbidding impairment of the obligation of contracts. It included in the category of protected contracts those made by states as well as those made merely by private parties. It defined as contracts the grants made in charters of private corporations, affording federal protection which paved the way for development of so-called private enterprise in corporate form. Under the Commerce Clause it limited the power of states to regulate, and by implication confirmed broad regulatory powers in the federal government. In competition with state judiciaries, it asserted and exercised the right of the Supreme Court to review cases appealed from the highest state courts in which interpretations of federal law were involved.

Finally—or perhaps from a backward point of view it might be better to say initially—Chief Justice Marshall, at the beginning of his term, had led the Court to abandon the practice of its first decade

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whereby seriatim opinions had been handed down in important cases and to resort to an opinion of the Court in each case, written often, though not always, by the Chief Justice himself. The change had given the Court the appearance of the unanimity of an institution, almost of an organism, as against the earlier impression of a mere aggregation of judges making little attempt to achieve unanimity or synthesis.

The pattern of unanimity, it is true, was never completely established, and it crumbled somewhat during the later years of the Marshall period, with the Chief Justice himself on one important occasion writing a dissenting opinion on a constitutional question. Among his colleagues, dissenting and concurring opinions appeared with increasing frequency. Yet the ideal of unanimity, of institutional rather than individual spokespersonship, had become well entrenched in spite of some diversity of actual behavior. In this respect as in many others, the Taney period, for all its uniqueness, would evidence, to a high degree, continuation of the traditions and practices of the Marshall regime.

Yet it is also true that, for all its continuity with the past, the Taney period was to confront new problems and bring new approaches to their solution. For their comprehension it is necessary to look not merely at the Court and its personnel but also at the rapidly changing country as a whole. In a sense the American Revolution, proclaimed in 1776 and validated by war and by the Treaty of 1783, was still under way. The Revolution had broken the grip of monarchy, but it had by no means obliterated aristocratic tendencies in the former British colonies. There was still a broad assumption that the country was to be governed by the “best people,” with quality measured partly by heritage and partly by the ability to acquire and hold property. The early Federalists had no illusion that the voice of the masses was the voice of Deity. Even the Jeffersonians, for all their paternalism and dislike of tyranny, had no illusion that one man was as good as another—in fact, as distinguished from theory.

Yet the leveling movement which had begun with the Revolution continued decade by decade, through the country and particularly on the frontier. The stream of population moved across the mountains into the West where a man’s worth was measured far more by his current achievements than by his heritage, and where opportunity to earn a reputation and to acquire property was so widespread and diverse that class differentiation virtually disappeared. New states were formed without property qualifications for voting—which had its impact on federal elections, since under the Constitution the qualifications for voting for members of Congress in each state were those adopted for choosing the most numerous branch of the state legislature. Voting sentiments

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became more and more those of the undifferentiated masses, and the selection of candidates as well as campaign methods was adjusted accordingly.

With the admission of Missouri into the Union in 1821, the total number of states became twenty-four. The member states reached from Maine to Georgia and from Georgia westward to include Louisiana. Other than Louisiana, the only state west of the Mississippi was Missouri, although by the middle 1830s Arkansas was making a bid for statehood. The northwestern tier of states consisted of Ohio, Indiana, and Illinois, while still further northward Michigan was also seeking admission. In spite, however, of the expansion westward to the Mississippi and beyond, the weight of federal power and of benefits remained with the East. It is significant that at the death of Chief Justice Marshall only one of the seven Supreme Court Justices had a Western circuit. Justice McLean was assigned to the circuit which included Ohio, Kentucky, and Tennessee. Six Western and Southern states lay outside the seven circuits and had only such circuit services as could be provided by the district judges, of whom there was one in each of these six states.

More important than Circuit Court services from the point of view of national evolution was the fact that until 1829 all Presidents of the United States had come from east of the Appalachians. Virginia had provided three of them, with two terms each, and Massachusetts had provided two, each of whom had a single term. It is true that Andrew Jackson of Tennessee, the military hero of the Battle of New Orleans, had been a close contender in the election of 1824, as had Henry Clay of Kentucky, but when the decision was passed to the House of Representatives the choice fell upon John Quincy Adams of Massachusetts, the son of an earlier President from the same state, and a member of the hierarchy of advancement to the presidency in that he had served as Secretary of State. But in 1828 Jackson won over Adams at the polls, and for the first time, in 1829, a Western man became President.

Both symbolically and in reality, the election of Jackson marked a kind of revolution in the United States. The center of power had shifted, both regionally and in terms also of the kinds of people who would determine dominant sentiments within the government. Awareness of the depth of the change was revealed in the lamentations of the ousted elements, which resembled those of the Federalists at the election of Jefferson in 1801 and somewhat also those of the South at the election of Lincoln in 1860. From now on the West was to play its rightful part in the government of the Union, and the Jackson regime was to be the regime of the common man. The change in emphasis with the coming of Jacksonian democracy is not to be obscured by the fact that the great body of experienced political talent was still to be found in the East, was to be employed in the federal government, and was to

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become part of a new political aristocracy which sheltered under the leadership of Old Hickory and under the label of democracy.

No more than any other period in history does the Jackson period have a simple explanation. It was filled with crosscurrents and inconsistencies, and it is hard at any moment in the period to tell what manifestations are dominant and what merely represent spasmodic upsurges. Diversity and conflict can be illustrated, indeed, from the performance of Jackson himself. He regarded himself as the people's President and talked much about the soundness of popular judgment and the political wisdom of relying on it. He took a stand against favoritism in government based on wealth or class, accepted the theory of his supporting politicians that one man was as good as another and as valuable as another in government employment, and at least allowed the development of what came to be called "the spoils system." With the Westerner's distrust of strong government in Washington dominated by Easterners, he took a states' rights position with respect to federal financing of internal improvements—a position taken also by a South fearful of the federal government save as federal financing might aid projects particularly helpful to the South. For multiple reasons he challenged and defeated the banking interests that had brought a linkage between the federal government and a concentration of banking control in the Bank of the United States.

Yet Jackson is to be classified with the strong Presidents of the United States rather than with the weak. He met the threat of nullification in South Carolina with such despatch and firmness as to win the approval of even such usually harsh critics as Daniel Webster. In preventing the recharter of the Bank of the United States he defeated the most powerful concentration of interests in the country, and won approval and brought about his own reelection amid the struggle. His swift political moves kept his political enemies in Congress and elsewhere in confusion and, with notable exceptions in his own state, he ended his two terms with such political strength as to be able to name his successor. He exercised in the Presidency the vigor and firmness and sometimes the ruthlessness of a general on the battlefield. Outstanding among the innumerable characterizations of the man was the following, written at the time of Jackson's death in 1845, by John Catron of Tennessee, who in 1837 became a member of the Supreme Court on Jackson's nomination and who maintained friendship with Jackson over a long period of years:

One thing may be safely said of Genl. Jackson—That he has written his name higher on the temple of fame than any man since Washington, of those belonging to History in this country: And what is more remarkable in him than any American is, that he maintained his power

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from Seventy, to *Eighty*, when he had nothing to give. This he did by the force of will and courage, backing his thorough out-and-out honesty of purpose. In this lay his strength always. His intuitive faculties were quick and strong—his *instincts* capitally good. The way in which a thing should be done struck him plainly—and he adopted the plan. If it was not the best, it would still answer the purpose, if well executed: Then to the execution he brought a hardy industry, and a sleepless vigilance few could equal. But this was not the best quality he brought to the task. He cared not a rush for anything behind—he looked ahead. His awful *will*, stood alone, and was made the will of all he commanded; and command it would and did. If he had fallen from the clouds into a city on fire, he would have been at the head of the extinguishing hose in an hour, and would have blown up a palace to stop the fire with as little misgiving as another would have torn down a board shed. In a moment he would have willed it proper—and in ten minutes the thing would have been done. Those who had never worked before, who had hardly courage to cry, would have rushed to the execution, and applied the match. Hence it is that timid men, and feeble women, have rushed to onslaught when he gave the command—fierce, fearless, and unwavering, for the first time. Hence it is that for fifty years he has been followed, first by all the timid who then knew him—and afterwards by the broad land, as a matchless man—as one they were ready to follow wherever he led—who with them, never was wrong—and who could sweep over all opposers abroad or at home, terrible and clear as a prairie fire, leaving hardly a smoke of the ruin behind.<sup>1</sup>

From the point of view of the history of the Supreme Court, and apart from the judicial appointments he made—which will be discussed elsewhere—the important factor is not so much the particular activities and policies Jackson espoused. It is rather the seminal stirring that he brought to a country already in ferment, already at the forefront of tremendous change. A timid President, or even a courageous President who believed in caution, might conceivably have gotten through the 1830s by temporizing and conciliating measures. He could have permitted the construction of such internal improvements as Congress saw fit to finance, letting others worry about undue centralization of power. He could have permitted renewal of the charter of the Bank of the United States, recognizing the theoretical soundness of centralized banking and credit control and ignoring the growing political power of the banking establishment. He might conceivably have been able to persuade Congress to reduce tariffs resented by the South and perhaps have persuaded John C. Calhoun to stay his hand with respect to nullification, without vigorous assertion of Presidential authority. Had he come from

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<sup>1</sup> John Catron to James Buchanan, June 11, 1845.

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one of the Eastern states, he might have slowed somewhat the flow of power toward the West—or rather the dispersal of power which included the West in some considerable degree along with the East and the South.

But in any event, changes were coming, whatever the circumstances and whatever the personalities involved. Readjustments were in the offing in the relations between the federal government and the states, between the states and private economic interests, within the realm of money and banking, and between the North and the South on issues of race relations. These changes would have their effect on the operation of judicial institutions and on the developing pattern of American law. It was conceivable that another John Marshall, alive to the issues of his times, might channel the course of American constitutional development and keep the Supreme Court depersonalized save as it was personalized in his own name, but on the whole the maintenance of the approximate unanimity of the Marshall period seemed highly improbable. Beyond that, for all his own willingness to take command and to wield the lash of authority, it was to be doubted whether President Jackson would, intentionally at least, select for the Chief Justiceship a man likely to exert such sweeping influence.

In the 1830s the Supreme Court met in Washington, D.C., as it does today, but it was a very different Washington from the present city, and the conditions of meeting were vastly different. In the later years of the Marshall period the city was a sprawling collection of villages of some 20,000 persons or more, scattered over an area that resembled a geographical outline map, from which timber had only recently been cleared, with the Capitol and the President's House—(not yet customarily called the White House) standing out as landmarks amid the clutter of usually small and unattractive buildings. Modern pavement was unknown. It was only during this period that Congress provided for the macadamizing of the broad and dismal and always muddy or dusty Pennsylvania Avenue running between the Capitol and the President's House.<sup>2</sup> Other streets were almost without improvements. Sewer facilities were primitive or nonexistent. Open ditches connected with running streams throughout the terrain of the city, and wagons on regular tour collected "night-soil" from the central area. A principal stream was Tiber Creek, renamed "Goose Creek" by provincials who knew or cared nothing about Rome's historic river and preferred names more characteristic of America. During the 1830s it flowed southwestward to pass beneath a culvert under Pennsylvania Avenue near Second Street,

<sup>2</sup> Many books have been written on the founding and history of the capital city. Much of the significant material

is assembled in W. B. Bryan, *A History of the National Capital*.

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Carl B. Swisher

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where playing boys sailed their handmade boats and sometimes, in spite of problems of sanitation, dared go swimming “in the raw.” The stream wound onward toward the Potomac, whose tidewaters backed up far into the city, over a portion of the relocated Tiber, which became a canal for local transportation. During the early years, springs throughout the city provided an abundant water supply. During the 1830s extensive use was made of pumps at street corners, where neighbors met neighbors and drew water without concern as to possible pollution from open sewers or other sources. At night the city lay in utter darkness save for lights from windows or open doors or from lanterns carried by pedestrians or lamps of moving carriages.

Fanny Kemble, the noted English-born actress of the day who was married to Pierce Butler of Pennsylvania, and who played in Washington early in 1833, commented on the strange appearance of the fledgling capital city, remarking that “Washington altogether struck me as a rambling, red-brick image of futurity, where nothing *is*, but all things *are to be*.”<sup>3</sup> A Washington newspaper carried an item by another foreign observer to the effect that:

Everybody knows that Washington has a Capital; but the mistortune is that the Capital wants a city. There it stands, reminding you of a general without an army, only surrounded and followed by a parcel of ragged dirty boys; for such is the appearance of the dirty straggling, ill built houses which lie at the foot of it.<sup>4</sup>

Life in Washington had the unevenness of life in a summer or winter resort. During the summer only the executive branch of the government was in extensive operation there, and the President and department heads and employees got away as much as possible from the sweltering city. But around the first Monday in each December members of Congress came pouring in for their annual session. Along with them came lobbyists, reporters, entertainers, and service people of all kinds. It was not until the second Monday in January that members of the Supreme Court assembled for their annual sessions in the crowded city. As of the middle 1830s, it was seldom that either judges or legislators brought their families with them. The stability of social life depended therefore on the members of the executive branch and the relatively few permanent residents who had high social status. For a few weeks each year, therefore, hotels, inns, taverns, and boardinghouses did rushing business. A historian of the city found in the directory for 1834

<sup>3</sup> “Extracts from the *Journal of Frances Anne Butler*,” *St. Louis Commercial Bulletin*, May 20, 1835.

<sup>4</sup> The item is noted as “Extracts

from Captain Marryat, Written by an English Observer of the American Scene,” *Washington National Intelligencer*, Aug. 8, 1839.



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reference to thirty-four taverns where alcoholic beverages were dispensed at retail, and thirteen hotels, most of them on or near Pennsylvania Avenue.<sup>5</sup> Gadsby's, one of the most popular, was located on Pennsylvania at Four-and-a-Half Street. Fanny Kemble, harsh in her criticism of the "untidy hovels above" the Capitol and "the scattered, unfinished, red-brick town below," said of Gadsby's that it was "an inn like a little town, with more wooden galleries, flights of steps, passages, door-ways, exits and entrances, than any building I ever saw."<sup>6</sup>

The transient character of the city was indicated by the listing of seventy-three boardinghouses, mostly kept, it was said, by widowed ladies. Some of these places were specially designated as "Congress boardinghouses," to indicate the constituency desired. There were also "oyster houses," emphasizing the specialty of the region.<sup>7</sup>

A Northampton paper noted in 1837 that Washington was the most expensive place to live anywhere in the country. The people who kept boardinghouses and worked for strangers during the sessions of Congress expected to make in a few weeks money enough to support them throughout the year. Board and room at Gadsby's cost two dollars a day, with the additional cost of fifty cents for a fire in the room. With incidental expenses for laundry and the aid of servants, the cost ran to about twenty dollars a week. This was regarded as extortionate.<sup>8</sup>

More reasonable were the costs of local transportation. An omnibus line operated from Georgetown down Pennsylvania Avenue with fares at twelve and a half cents. Hacks roved the central streets in large numbers. It was said that "Oftentimes, fifty are seen on Pennsylvania Avenue, and for 25 cents any man can play the aristocrat for half an hour, with elegant coach and livery." The rates were low because they were fixed by the government. When the drivers could evade the law, however, they charged unmercifully, demanding two or three dollars for carrying a passenger forty rods to an evening party.<sup>9</sup>

During the Congressional season parties were numerous and social life was intense and exciting, infused as it was with the pressures and issues of politics. Of the Washington atmosphere a correspondent wrote in 1836:

The atmosphere of this city is perpetually filled with all sorts of idle and absurd rumors, as empty and as giddy as the wind clouds in a northern sky. Some of these rumors are mere gossip. Others are conjectures converted after two or three transmissions from one hand to

<sup>5</sup> S. C. Busey, *Pictures of the City of Washington in the Past*, 200.

<sup>6</sup> *Journal by Frances Anne Butler*, II, 85-86.

<sup>7</sup> Busey, *Pictures of the City of*

*Washington in the Past*, 200.

<sup>8</sup> *Northampton Courier*, quoted in *Delaware State Journal*, Mar. 17, 1837.

<sup>9</sup> *Ibid.*

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another into certainties. Others, again, are mere tricks, political devices, things set afloat for the purpose of feeling the public pulse, or acting upon the minds of particular individuals.<sup>10</sup>

Transportation into and out of Washington was both by water and by land. Construction of the “Long Bridge” across the Potomac from Washington, much to the disgruntlement of ferry operators and property owners in Georgetown, had long since given a land connection with Alexandria, but the advantages and conveniences of steamboat travel were such that Chief Justice Marshall and other visitors from the South preferred to come in by water. When Justice Duvall came from Maryland, however, as presumably other Justices did from the Northeast, he traveled by stagecoach. Of her trip over this line in 1833 Fanny Kemble wrote: “As for the road, we had been assured it was exceedingly good; but mercy on us! I can’t think of it without aching.”<sup>11</sup> The Justices riding circuit traveled over similar roads for hundreds of miles each year.

On the Baltimore line, however, better things were in sight. From Relay House a few miles outside Baltimore, a spur line of the Baltimore and Ohio Railroad was being built in the direction of Washington. So eager were passengers for transportation “in the cars” rather than by stagecoach that coach lines arranged to meet trains along the way at the various stages of the trip, for transportation the rest of the way to Washington. It was on August 24, 1835, that a train, carrying a load of dignitaries from Baltimore, first came puffing all the way into Washington to an improvised station at Pennsylvania Avenue and Second Street. The passengers were soon disillusioned, though, since the trains operated only from station to station and would not deliver them and their baggage to hotels and homes, and so for a time stage line service was resumed, only later to be permanently replaced by the iron horse.<sup>12</sup> In spite of depressions and wars and the resistance of competitors, railroad construction throughout the United States was to continue rapidly throughout the Taney period.

Although the Capitol building in which the Supreme Court began a new term on the second Monday in each January was the outstanding building in all Washington, it was by no means the huge structure that it is today—or that it became, indeed, before the end of the Taney period. Nonexistent were the two end wings now occupied respectively

<sup>10</sup> *Boston Daily Advertiser*, Mar. 1, 1836.

<sup>11</sup> *Journal by Frances Anne Butler*, II, 84–85.

<sup>12</sup> For one of the many sources see

Oliver W. Holmes, “Stagecoach Days in the District of Columbia,” *Records of the Columbia Historical Society*, 50:1, 1952.