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Roger B. Taney's name is no longer "hooted down the pages of history" as Senator Sumner decreed it should be.[1] Charles Evans Hughes has recognized that Taney was "a great Chief Justice"[2] and competent legal scholars have amply glossed that text.[3] But the passing of the years has not dealt so impartially with Dred Scott's Case.[4] It still bears the stigma of the abolitionist cause which hides the reality that the most criticized exercise of the power of judicial supremacy did no more than give constitutional sanction to a position held long and persistently by most voters in the United States. If the judges were wrong so were "the people"!

The Missouri Compromise, that is, the principle of congressional interference with slavery in the territories as a political possibility for the solution of the slavery controversy, had been abandoned years before the Dred Scott Case held it unconstitutional. Nor is there evidence that, with or without the Dred Scott decision, anything other than popular sovereignty, the principle of congressional non-interference with slavery in the territories, was politically feasible at any time after 1848. Indeed congressional intervention was so generally recognized as impractical that Congress on two occasions immediately before the Dred Scott decision expressly conferred upon the courts jurisdiction over the slavery problem in the territories. The ultimate resort to war between the states proves not that the judiciary foreclosed political settlement of the slavery issue, but rather, if anything, that some issues cut too deeply to be solved either judicially or legislatively. The real misfortune of the Dred Scott Case is that, duly distorted, it served as a powerful weapon for the abolitionists—always a small extremist minority. The court's fault, if it can be called that, was its acceptance of the buck that Congress passed to it and its failure to anticipate the use which its efforts could be made to serve.

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1. Cong. Globe, 38th Cong., 2nd Sess. (1865) 1012.

2. Charles Evans Hughes, Roger Brooke Taney (1931) 17 A.B.A.J. 785.

3. See, for example, Swisher, Roger B. Taney (1935); Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937); Palmer, Marshall and Taney, Statesmen of the Law (1939).

4. Dred Scott v. Sanford, 60 U. S. 393, 15 L.Ed. 691 (1857).

Adequate perspective requires a tearing of the web of history at 1848 after the acquisition by the United States of the Mexican and Oregon Territories. The new American empire raised again the question of the extension of slavery. The obvious answer, the one sponsored by President Polk in a special message to Congress, was the extension of the old Missouri Compromise of 1820 which had served for the settlement of the same issue in the Louisiana Territory. But for the extremists on both sides that would not suffice. Congress was deadlocked between the Wilmots and the Calhouns. For some two years American settlers in the new territory were without law and government because Congress could not decide whether they should be with or without slaves.[5]

Finally in the great Compromise of 1850 the principle of congressional interference was rejected in favor of popular sovereignty for the new territories. The election of Franklin Pierce, an ardent anti-abolitionist, to the presidency in 1852 ratified the new settlement. For Pierce and the convention which nominated him unequivocally endorsed the Compromise of 1850. General Scott, the principal opposition candidate, remained silent on that crucial issue, while his party's strongest leaders had opposed the settlement in 1850 and denied renomination to Millard Fillmore, who as President had signed the measures in which it was embodied. As Professor Hicks puts it "The issue before the electorate was thus primarily Franklin Pierce and the Compromise, or General Scott and uncertainty."[6]

The Missouri Compromise was not only not extended in 1850, indeed it was completely abandoned by repeal in the Kansas-Nebraska Act of 1854. Thereafter congressional non-interference was the rule for the old Louisiana Territory as well as the new territories. President Pierce, who as presidential nominee had indorsed popular sovereignty, sponsored the Kansas-Nebraska Bill as an administration measure, and in his last message to Congress on December 2, 1856, indorsed the Dred Scott decision in advance. After reviewing the history of the slavery issue, he denounced the Missouri Compromise as conducive to sectional strife, and attributed the victory of James Buchanan in the presi-

5. 1 Morrison and Commanger, The Growth of the American Republic (1942) 495.

6. Hicks, A Short History of American Democracy (1943) 322. It is true that Scott's platform carried a nominal indorsement of the Compromise of 1850.

dential election of the preceding month to the determination of the people to have an end of that difficulty.

Clearly Buchanan's victory was a ratification of popular sovereignty and the Kansas-Nebraska Act.[7] His platform had held that "non-interference by Congress with slavery in State or Territory" was "the only sound and safe solution of the slavery question." His Republican adversary John C. Fremont had taken the opposite position that Congress could and should prohibit slavery in the territories.

In his famous inaugural address of March, 1857, Buchanan referred to the matter of slavery in the territories in the following terms "it is a judicial question, which legitimately belongs to the Supreme Court of the United States before whom it is now pending, and will, it is understood, be speedily and finally settled. . . . The whole Territorial question being thus settled upon the principal of popular sovereignty—a principle as ancient as free government itself—everything of a practical nature has been decided."[8]

Clearly the reference was to the Dred Scott Case then pending in the Supreme Court; clearly the treatment of slavery in the territories as a judicial question must have accorded with the views of most of Buchanan's contemporaries—else it would hardly have been used on such an occasion; clearly on the eve of the Dred Scott decision judicial determination of the slavery issue in the territories was not generally considered incompatible with "popular sovereignty."

Buchanan's usage and understanding of "popular sovereignty" and the role of the judiciary in the slavery controversy clearly accorded with the actions of Congress. The Compromise of 1850 and the Kansas-Nebraska Act of 1854 both expressly adopt the policy of congressional non-interference; Douglas, the champion of popular sovereignty, had pushed both through Congress; both contain clauses expressly referring questions of slave titles to the local courts with appeal to the Supreme Court. Two years

7. Millard Fillmore, the Know Nothing candidate, also ran on a platform advocating popular sovereignty.

8. These remarks are famous in connection with evidence now available which indicates that Buchanan had advance notice of what the Dred Scott decision was to be. On this aspect of the matter, see Swisher, op. cit. supra note 3, at c. 24. Advance notice or not, the thoughts expressed in that public utterance make it quite obvious that on the eve of the Dred Scott decision there was nothing unusual in the proposition that the constitutionality of legislative interference with slavery in the territories was a judicial question.

after the passage of the Kansas-Nebraska Act and before the Dred Scott decision Douglas declared in Congress "My opinion . . . has been well known in the Senate for years. . . . I told them it was a judicial question. . . . My answer then was and now is, that if the Constitution carries slavery there [into the territories] let it go . . . but, if the Constitution does not carry it there, no power but the people can carry it there. . . . I stated I would not discuss this legal question, for by the bill we referred it to the courts."[9] In 1860 Senator Judah P. Benjamin speaking in Congress of the Kansas-Nebraska Act said similarly: "Morning after morning we met for the purpose of coming to some understanding upon that very point (slavery in the territories); and it was finally understood by all, agreed to by all, made the basis of compromise by all the supporters of that bill, that the Territories should be organized with a delegation by Congress of all the power of Congress in the Territories, and that the extent of the power of Congress should be determined by the Courts."[10] Speaking of the same bill at the time of its passage Senator Brown of Mississippi declared "It leaves the question [of slavery in the territories] where I am willing it should be left—to the ultimate decision of the courts."[11]

It is significant that the Dred Scott *issue* was first presented to Taney's court early in 1851 in the case of *Strader v. Graham*[12] —and by it referred back, as is fitting in a democracy, when the people have not yet clearly indicated their wishes, to the people for an answer.[13]

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9. Cong. Globe, 34th Cong., 1st Sess. (1856) appendix, p. 797. The reference of the slavery problem to the courts was incorporated into the Compromise of 1850 (whence it was copied in the Kansas-Nebraska Act) upon the motion of J. P. Hall of New Hampshire—*an abolitionist*. Section 9 of the Kansas-Nebraska Act provided for territorial courts and writs in the same manner as from the federal circuit courts "except that in all cases involving title to slaves, the said writs of error, or appeals shall be allowed and decided by the said Supreme Court without regard to the value of the matter, property or title in controversy. . . ." and that a writ of error or appeal should be allowed to the Supreme Court "upon any writ of habeas corpus involving the question of personal freedom. . . ." Section 14 provided that the Missouri Compromise "is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, *subject only to the Constitution of the United States. . . .*"

10. Cong. Globe, 36th Cong., 1st Sess. (1860) 1966.

11. Quoted in Hockett, Political and Social Growth of the American People (1940) 682.

12. 51 U. S. 82, 13 L.Ed. 337 (1851).

13. The *Strader* case may be distinguished from the Dred Scott Case on the ground that in the former the negro based his claim to freedom on the ground that he had temporarily resided in a free state; Scott's claim was

This then is the background of the Dred Scott Case. The people had spoken directly at the polls and indirectly through their representatives in Congress and the White House. They had consistently rejected congressional interference and referred the issue of slavery in the territories to the judiciary as unequivocally and decisively as it is possible for a democratic majority to do.

When in 1856 Dred Scott first came before the Supreme Court, Taney and most of his assocates still preferred to follow the *Strader* precedent. Indeed a decision to that effect was written and agreed upon by a majority of the bench.[14] But the presidential aspirations of Mr. Justice McLean (spokesman for the abolitionists) would not have it so. McLean forced the question of the constitutionality of the Missouri Compromise into the Dred Scott decision.[15] Thus it was that Taney and his court gave constitutional sanction to the views of a majority of contemporary voters as expressed in the impasse of 1848-50, the Compromise of 1850, the election of 1852, the Kansas-Nebraska Act of 1854 and the election of 1856 (to say nothing of the intervening congressional elections).

The Dred Scott decision was a sincere effort to lay at rest in accordance with the expressed wishes of the people a disturbing and dangerous controversy.[16] But the abolitionists would accept

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based inter alia on his temporary residence in the Louisiana territory and so would come clearly within the spirit of the provision of the Kansas-Nebraska Act referring questions of slave titles to the judiciary. While it is true that Scott's case did not arrive in the Supreme Court by way of the jurisdictional route provided in either the Compromise of 1850 or the Kansas-Nebraska Act, it can hardly be denied that the Scott controversy was exactly the type which Congress on two occasions invited the court to settle. The repeatedly consistent stand which the people took after the first tentative step in the Compromise of 1850 explains the court's acceptance of the invitation in 1857 and its refusal in 1851.

14. For this aspect of the case see Swisher, op. cit. supra note 3, at c. 24.

15. Ibid. See also 2 C. & M. Beard, The Rise of American Civilization (1927) 18-19.

16. There is no reason to believe that Taney ever changed the views he expressed in the *Gruber* case: "A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily, or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually wiped away; and earnestly looks for the means, by which this necessary object may be best attained." Cited in Swisher, op. cit. supra note 3, at 98. The similarity of these views and those of Lincoln is striking. Taney's entire judicial career had been dedicated to the proposition that the courts should not interfere with or hinder the orderly settlement of political problems by the political branches of government. See, for example, his opinions in The License Cases, 46 U. S. 504, 12 L.Ed. 256 (1847); The Passenger Cases, 48 U. S. 518, 579, 12 L.Ed. 801,

the court's determination no more than that of the people. And Taney's opinion, distorted for their needs, became a powerful weapon for the abolitionist's cause.

It remains now to test the charge that in holding the Missouri Compromise unconstitutional Taney's court blocked the possibility of a political settlement which might have averted the Civil War. The evidence goes the other way.

Stephen Douglas had sponsored the Kansas-Nebraska Act in Congress. In a race for the United States Senate in Illinois in 1858 he stoutly defended the Dred Scott decision against Abraham Lincoln, who opposed both the act and the decision. No voters ever had the full implications of any issue more capably presented to them than the people of Illinois in the Lincoln-Douglas debates. Popular sovereignty and the Dred Scott decision were voted up and Lincoln was voted down—*in a northern constituency.*

At Edwardsville, Lincoln had charged: "Familiarize yourselves with the chains of bondage and prepare your limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teaching of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesed in by the people."

Lincoln took the position that popular sovereignty could not exist under the Dred Scott decision—the governmental powers of the organized territories being derivative from Congress could be no greater than those of Congress. Hence under Taney's decision the territories, like Congress, had no alternative but to accept slavery. At Freeport, attempting to place Douglas in a dilemma, he asked the fateful question: "Can the people of a United States territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a state constitution?"

Douglas' answer was devastating: "It matters not what way the Supreme Court may hereafter decide as to the abstract ques-

826 (1852); Bank of Augusta v. Earle, 38 U. S. 519, 10 L.Ed. 274 (1839); The Charles River Bridge Co. Case, 36 U. S. 420, 9 L.Ed. 773 (1837); Luther v. Borden, 48 U. S 1, 12 L.Ed. 581 (1848); Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U. S. 518, 579, 14 L.Ed. 249, 275 (1848).

tion whether slavery may or may not go into a territory under the Constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations . . . ." If a territorial legislature fail to enact protecting measures (black codes), slavery would be effectively excluded. The Dred Scott Case then had denied Congress nothing real—notwithstanding the claims of the abolitionists. For Congress could always invalidate any territorial enactment including, for example, black codes.

Douglas' "Freeport Doctrine" secured his seat in the Senate, made Lincoln's criticism of the Supreme Court gratuitous, and gave the lie to the abolitionists. By the same token Douglas alienated the Southern Democrats, split the Democratic party, and lost thereby the presidency in 1860. Douglas convinced the voters of Illinois as well as the Southern Democrats that Dred Scott plus popular sovereignty did not play into the hands of the South. That Douglas was correct had been amply demonstrated a few months after the Dred Scott Case by the rejection in Congress of the pro-slavery Lecompton Constitution of Kansas. Lincoln's question cost him a seat in the Senate, but by dividing the Democratic party won him the presidency two years later.

In the presidential campaign of 1860 Lincoln and Douglas maintained the positions they had taken in their famous debates in Illinois. Breckinridge, the nominee of the Southern wing of the Democratic party endorsed the Dred Scott Case warmly, but rejecting Douglas' popular sovereignty, demanded positive congressional action to protect slavery in the territories. This was the South's answer to the Freeport Doctrine. Lincoln received 1,866,452 votes, as against a combined total of 2,226,738 for Douglas and Breckinridge.[17] Lincoln's party obtained only a minority in each house of Congress. A majority still stood with Taney!

A few weeks later on the eve of Ft. Sumter Senator Crittenden—the successor to Henry Clay's seat in the Senate as fate would have it—proposed a settlement which would have written an extended Missouri Compromise into the Constitution. He could not even get it through a Senate committee! That approach to the slavery issue had not been politically feasible since the

17. John Bell of Tennessee ran on a platform recognizing "no political principle other than the Constitution of the country, the union of the states, and the enforcement of the laws." He received 588,879 votes.

impasse of 1848-50. The Supreme Court had blocked no politically workable approach to the slavery problem.

When at last the exclusion of slavery from the territories became a political possibility, that is, after the secession of the Southern states, Congress found no bar in the Dred Scott Case.[18] Constitutional power followed political power and was sufficient for its needs.

18. Congress overrode (reversed) the Dred Scott decision by statute on June 19, 1862, ending slavery in the territories. 12 Stats. 432.