The War Between The Stats: An Introduction to Taney’s Regrets

Peter J. Aschenbrenner, Purdue University

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AN INTRODUCTION TO TANEY’S REGrets  
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PETER J. ASCHENBRENNER  
Department of History, Purdue University  
paschenb@purdue.edu

ABSTRACT.  
The decade of the 1850’s, leading up to Dred Scott v. Sandford, 60 U.S. 393 (1857), saw Americans debate the ‘war between the states.’ OCL presents the third in its series of articles analyzing the mathematical logic of new state-making. Taney’s focus on the war between the states explains Dred Scott, OCL suggests, as much as his inveterate racism, and, therefore, grounds any scholarly explanation of the coming war between the states.

KEY WORDS: Territories. Nascent states. Dred Scott

A. INTRODUCTION. How bleak was the situation of the south as of Dred Scott, considering the math associated with that region’s political power in the federal system? Historians bracket the decade with Calhoun’s death-bed appeal to the Senate and the nation (1850)[1] and the Crittenden amendments (1860)[2]. The general reader can feel the desperation in Taney’s opinion in Dred Scott as the clock runs out on southern aspirations to enjoy co-regional equality with the remaining states.

B. BENCHMARKS. Texas (1845) was the last southern state admitted to the union. Yes, it joined through an annexation resolution [3], but the fact remains that it was the last.  
Second, consider the means of restoring equivalent political power (by achieving or blocking) between the regions: why not admit more southern states? There were none. There were no future states in inventory. (OCL calls them nascent states.)

Third: Whatever remedy the south might consider to alleviate or avoid this coming catastrophe, risk and reward would have to measure up to what was already lost.

On Taney’s account (and that of Calhoun) the union was born in sin. The problem according to Taney was that the federal government was exercising the power of a state within territories acquired through treaties. Calhoun added that the federal system should have been arranged with blocking powers assigned to regions.

Imagine this solace for Taney’s regrets. More racial sin. Where was the wide-spread reliance on family gulags to supply free and forced labor? Why weren’t non-southern families tempted to enjoy the benefits of racial sin?

C. LOSS OF BLOCKING POWER. Fourth: when you go to $\frac{1}{2} + 1$ non-southern states then you lose the power to block the admission of new states. At 20-11, after the admission of California, it’s obvious that nibbling at the margins of the coming non-southern super-majority – through seniority, patronage, like-mindedness, feelings for the southern way of life, political traditions – does not deliver the confidence to block new-state admissions.

Fifth: that explains the hysteria. The south was not just losing the war between the stats. It was losing the war-within-the-war to keep the tide from turning at an ever increasing rate against the south.

This was not a situation in which the south-as-region was hanging on; it had lost the battle for equality. It was facing an apocalypse in which the north could expel southern states and colonize them, if the north cared to afford even that measure of affection for their (former) southern partners in the union.

Sixth: To recap the previous points. The loss of the power to block new states (at the proverbial tipping point of $1/2 + 1$) presaged loss of the power to block new constitutional amendments in Congress ($2/3 + 1$) and loss of the power to block ratification of new constitutional amendments by state legislatures or conventions ($3/4 + 1$).

D. THE SOUTH AND THE NOT-SOUTH. One point remains to be plumbed. Why couldn’t the south count on the not-south to be fractured?

Let’s say that Americans outside of the south were fractured by three or four different passions. This is what the south needed. The south needed the not-south to be something other than the
north. The south needed to be united and it needed the north to be divided. That is, if the north couldn’t be tempted with the racial corruption of home gulags.

Mainers yearn for their Aroostock irredentia. New Yorks launch a thousand ship on the shores of Lago di Champlano.

Utahans are inspired to ‘plunge the hand that held the dagger’ Nevada-wards.

Did not Indiana lose the Upper Peninsula to Michigan?

And was not the American flag torn down in Telegraph Creek, thanks to the corrupt arbitration of 1904?

Surely every American state outside the southern eleven may conjure the grief of lost soil, lost counties, and, most frequently, the loss of that land-beyond-the-riverbend and disobedience to the whims of the watergods.

So why couldn’t eleven states take these regrets to the bank?

E. The South and Smith. What you want to do if you’re on target to become really, really despised – we’re not talking philosophy, we’re talking ‘losers’ – is to turn things around by getting others (not-you) to get ginned up about something else other than hating you.

The problem is Adam Smith.

The nineteenth century fell in love with Adam Smith.

This is the way things usually work out:

Writer thinks brainy thoughts in century x.

Century x+1 thinks hers are the hottest thoughts since Bananas Foster.

Adam Smith said that if you could unleash each man (and woman’s) inner business owner, the nations’ wealth (cue Wealth of Nations, pub. 1776) was sure to increase.

Everyone outside the south rushed out to build a company, or buy stock in one, or to sell goods and services to one. Or all. And so forth.

Southerners thought it was a really cool idea if everyone else cleaned house, cooked the meals, tended the garden, or picked cotton.

Activity vs. passivity.

Investment vs. divestment.

Responsibility for what you do vs. fascination with what you don’t do.

Whinging about mistakes you make vs. weenering about others.

It’s really a simple lesson in time and motion. If you can’t/don’t do the work that you hire others to do, then you can’t maximize productivity.

Enterprise is everything.

F. Sociology Loses to Maths. You can say that antebellum is all about the life-style. The mintjuleps. The received pronunciation. The fine tailoring.

It’s really all about the mathematics.

The launching of the United States – four score and seven years ago will do for a count – is all about relentless, inexorable mathematics. And mathematical logic is all about the working-out of the constitution (considered as text and non-text) in real time.

In short, it’s all about the willingness of Americans, indeed – and this is OCL’s account – their eagerness to recognize that states are administrative units of the nation. Business owners first and then the general public sought to reap the economic benefits of a national economy by subordinating state responsibilities to national progress. Rights got lost in the whirlwind of the Industrial Revolution, if ever states’ or regions’ rights had a chance.

G. A Choice, Not an Echo. ‘States rule and govern,’ Taney said of the states in OCL’s paraphrase, ‘at their pleasure.’ [4] If it pleased eleven states to treat African-Americans as lacking rights a white man was obliged to honor, then that was state power. Raw, naked, real. Power taken as a commodity pleasurable to spend.

And there was more: If Pennsylvania disenfranchised its black population or Indiana barred the entry of free blacks within its borders, that was state power exercised to satify popular will and an act of state pleasure.

States could please themselves; they operated with no constraints in this area of private arrangements. They had the exclusive right to act as they might wish, disposing of a family’s enslaved labor and its fruits and profits as the state’s non-enslaved electorate might wish.

(Does anyone of Austrian inclination notice that enslaving humans to free labor – with the aim of maximizing (or enabling) profits for family businesses – is only possible with massive public subsidies? Government funding of private and money-losing businesses through a state-wide police state that slavery required for its survival?)
And even these subsidies could not tempt families to test their business models in White Pine or Mendocino Counties.)

It could not be the case, Taney believed, that Congress had the right to exercise its will in this matter. On this prong of his argument territories, acquired and ruled in gross and formed into nascent state-territories, could not drag into the constitutional narrative their history as administrative units – or colonies – of the nation.

It was unnatural. And unconstitutional. So, precisely, what went wrong with the nation fighting and winning wars, making treaties and acquiring land in the process? Or just buying your neighboring nation’s excess land?

H. TANEY’S MISSING LINK. If states do regulate the movement, manumission, settlement and emigration of enslaved persons – it’s an historical face that the southern states did that – then without analysis of the source of their authority to do so, one would have to conclude that a state has that authority. It is certainly the case that a fair reading of the opinion is that states do have the powers listed above as well as ancillary or incidental powers.

This is the point where Taney stuttered, barely able to frame the issues at this level of a very targeted abstraction, and then unable to follow the historical evidence to conclusions he was disinclined to credit.

The people were assured by their most trusted statesmen 'that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic,' and 'that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere.' Still, this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore, that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution?” 60 U.S. at 511.

I. JEFFERSON’S THIRTEENTH. A measure of how lacking in support Taney’s argument plays out against the record: the first citation (after the quote) refers the reader to Thomas Jefferson’s rejected constitutional amendment (1803).

In five versions – which OCL has inspected at the Library of Congress – Jefferson wrote a proposed constitutional amendment which would have declared that "the province of Louisiana is incorporated with the United States and made part thereof … ;“, an elocution which raises more questions than it solves.

For proof of this point, read one of Jefferson’s second thoughts: “Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations.” See also The Insular Cases, starting with Downes v. Bidwell, 182 U.S. 244, 253 (1901)[Congressional power to establish and maintain colonies approved].

If anything, Jefferson made matters immeasurably or, if you are cheeky, measurably worse for Taney. Citizens in territories “stand, as to their rights and obligations, on the same footing as other citizens in analogous situations.” But other citizens in territories like the Southwest Territory (out of existence by 1796) or the Indiana Territory (still in existence in 1803) enjoyed the rights and duties granted to them by Congress, which governed/s these territories directly and through subordinate territorial legislatures, exercising all the powers that a state would exercise.

This is key to Taney’s failure as a constitutional historian. He knew he had to prove that Congress could not exercise the power of a state in the territories it acquired and managed and
yet, indisputably, it did. And, to gall a slave-owner, the north understood how new state-making would remake the nation in its image because southerners would not chain their slaves to the back of the family wagon and move west.

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N. References.
[2] Proposed December 18, 1860 by Senator John J. Crittenden of Kentucky. Information about Senator Crittenden may be found in his biography at ANB.org; a copy of his proposed amendment/s may be found at Avalon.law.yale.edu.
[3] The joint resolution of annexation is dated March 1, 1845. Texas formally attained statehood on December 29, 1845.
[4] Dred Scott v. Sandford, 60 U.S. 393, 446 (1857)[Congress couldn’t rule colonies at pleasure; this style of public law is the exclusive prerogative of states]. It may be footnoted that Taney found himself a tiger too big to tackle and to mean to ignore. If colonies did not exist, Taney would hardly have been obliged to put the Supreme Court to the task of dismantling them; if a federal system of colonies did exist how was a court going to take them apart? Think about Brown v. Board of Education, 347 U.S. 483 (1954) and consider the problems of a court system dismantling a single (African-Americans only) school system. In this light, Taney had thrown the court into difficulties impossible to navigate. If some litigants had no rights, what were they doing in court? Why was the court having to decide what they were doing there? And if a colony system did exist, but shouldn’t, how could the court persuade anyone to start taking it apart, or converting it to something constitutional, or even giving the land back to Napoleon. The reader is reminded that in 1857 there was a Napoleon Bonaparte on the throne, nephew to Thomas Jefferson’s original bargaining partner; whether the Emperor would have been happy with a forced retrocession of the Louisiana Territories is a matter for conjecture.