

GREAT PURPOSES

by John J. Connolly¹

In the portrait of Roger B. Taney hanging in the Maryland Room of the Baltimore Bar Library, the Chief Justice is seated at his desk, pen in hand, paused in thought. The words he has just drafted are partially obscured and very faint, but nonetheless decipherable:



Baltimore Bar Library

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

This passage first appeared in a Supreme Court opinion delivered on February 7, 1849, the same year artist Miner Kilbourne Kellogg completed his Taney portrait, according to a signature line on the portrait. Although Taney's "great purposes" passage eventually became both renowned and constitutionally significant, in 1849 it was neither, and thus it is a bit mysterious why Kellogg thought to

highlight the passage.

Taney's words first appeared in *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849), better known as the *Passenger Cases*, in which the Supreme Court considered the constitutionality of state taxes imposed on the owners of ships arriving from foreign ports.² A Massachusetts tax applied to every "alien" arriving with the vessel, and a New York tax applied to all persons arriving from a foreign port. The Supreme Court struck down both laws by a 5-4 majority, but the justices in the majority could not agree on a controlling constitutional rationale. Eight of the nine justices issued separate opinions and the reported decision, including the arguments of counsel, occupies

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² The source of the quotation was discovered long ago (and well before electronic-searching capability) by James F. Schneider, a former Historian and Archivist of the Supreme Bench of Baltimore City and now a U.S. Bankruptcy Judge and member of the Library's board. See James F. Schneider, *THE STORY OF THE LIBRARY COMPANY OF THE BALTIMORE BAR*, at ff. 24 (1979).

nearly 250 pages in the *United States Reports*. The case today is significant chiefly for its many undeveloped theories of the negative Commerce Clause, theories that began to coalesce a few years later in *Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

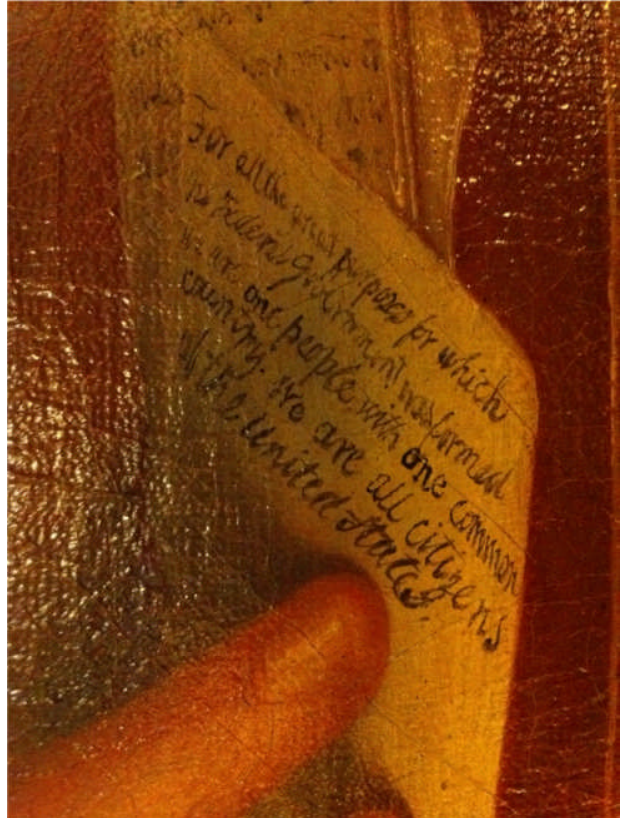
Chief Justice Taney *dissented* in the *Passenger Cases*. In Taney's view, the taxes were legitimate exercises of the reserved powers of two sovereign states, each of which had been inundated with immigrants during the mid-19th century. Taney's opinion mainly rebuts the majority's arguments that the states had ceded their power under one or more constitutional provisions, such as the Commerce Clause and the infamous Migration or Importation clause (which effectively prohibited Congress from banning the slave trade until 1808). Taney also rejected the argument that the challenged laws imposed "a tax on the captain of the vessel," and therefore violated the constitutional prohibition of state-imposed duties on imports and exports. Taney concluded that passengers were not "imports," and the states had a reserved power to impose a tax on immigrants to offset the heavy costs states incurred when waves of indigent and incompetent foreigners settled within their borders.

At the very end of his lengthy opinion, Taney pointed out that his analysis of the taxing power was aimed only at "the case of passengers from a foreign port." American citizens traveling from port to port within the United States posed quite a different question:

Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. And the various provisions in the Constitution of the United States — such, for example, as the right to sue in a federal court sitting in another State, *the right to pursue and reclaim one who has escaped from service*, the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties — all prove that it intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the Federal government was formed, we are one people, with one common country. . . .

48 U.S. at 492 (emphasis added).

Thus, the words included in the Taney portrait were hardly significant to the outcome in the *Passenger Cases*; not only did they appear in a dissenting opinion, the Chief Justice himself implied that they were dicta. But 18 years later, Taney’s reasoning became the foundation of a constitutional right to travel. In *Crandall v. Nevada*, 73 U.S. 35 (1867), the State of Nevada imposed a capitation tax of one dollar on every person leaving the state by railroad, stage coach, or other commercial means. A stage coach operator was arrested for refusing to pay the tax, and the case came to the Supreme Court on the operator’s argument that the state law was unconstitutional. The Court concluded that the law was not invalid under the commerce clause or the imposts and duties clause; instead, the Court relied on Chief Justice Taney’s dissent in the *Passenger Cases* for the proposition that citizens of the United States had a constitutional right to travel from one state to another. In essence, the Court held that a tax on interstate travel would enable states to infringe a citizen’s right to travel to Washington, D.C., for instance, to invoke “the supreme judicial power of the nation.” Conversely, the tax could prevent the federal government from calling citizens to aid in its service “as members of Congress, of the courts, of the executive departments, and to fill all its other offices.” The Court observed that the “principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice” in the *Passenger Cases*, and went on to quote the words that now appear in the Taney portrait.



The constitutional right to interstate travel has been reaffirmed many times over the years, although the basis of the right is not always clear. From time to time the Court has suggested that the right inheres in the privileges and immunities clause or the commerce clause, but Taney’s initial reasoning, which appears to place the right as an incident of national citizenship, is also invoked. The existence of national citizenship was a serious question prior to ratification of the Fourteenth Amendment in 1868,³ and Taney may have adapted his great purposes passage

³ See *United States v. Anthony*, 24 F. Cas. 829, 830 (C.C.N.D.N.Y. 1873) (during the trial of Susan B. Anthony for attempting to vote in a congressional election without a lawful right to do so, the court observed that prior to ratification of the Fourteenth Amendment “[i]t had long been contended . . . and had never been judicially decided to

from one of the congressional debates that touched upon the topic. In 1833, Congress considered a bill that would permit the federal government to enforce the collection of duties on imports, by military power if necessary. The act was aimed at recent South Carolina laws and ordinances that would have nullified the federal government's ability to collect duties, and it ignited a lengthy debate over the powers of the federal government. Senator John Tyler of Virginia argued that the states were sovereign, not the United States government that they had created. As such, there were no citizens of the United States government. "I am a citizen of Virginia, and I find in the constitution a provision, that, when I wend my way to New York . . . I should become, not a citizen of New York . . . but entitled 'to all privileges, and immunities' of the citizens of that state." Senator Tyler, who would be president within eight years, explained that he owed "obedience" to the United States government only because his state had commanded it; his "allegiance" he owed to Virginia.⁴

In response, Senator John M. Clayton of Delaware argued that there were "some thirteen millions of human beings within [the United States] who are . . . liable to the punishment of treason when levying war against them; all bound to consider their laws and their constitution as supreme; all indebted to their government for protection; all contributing to the support of that government; and compelled to obey it, both in peace and in war; forming, together, *for all the great purposes enumerated in their constitution, one people, and a single nation.*"⁵ Sixteen years later, Taney would reach a similar conclusion in the *Passenger Cases*, placing him firmly on the side of unionists before his decision in *Dred Scott* became one of the indirect causes of the Civil War.

Of course, Taney's decision in the *Passenger Cases* also foreshadows *Dred Scott* by predicating the right to travel in part on the need for "citizens" to travel from one state to another to "reclaim one who has escaped from service." Taney did not refer explicitly to slavery, but neither did the constitutional provision that he implicitly invoked,⁶ and race assuredly was the issue in 1849. Indeed, as he would make all too clear in *Dred Scott*, Taney did not believe the right to travel and other incidents of citizenship extended to blacks descended from slaves. But as slavery receded in the 20th Century, the right to travel would return with sublime irony. In *United States v. Guest*, 383 U.S. 745 (1966), the Supreme Court considered the dismissal of an

the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some state."); U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

⁴ NILES REGISTER – DEBATE IN THE SENATE 104 (Feb. 6, 1833).

⁵ NILES REGISTER – DEBATE IN THE SENATE 120 (Feb. 7, 1833) (emphasis altered).

⁶ U.S. Const. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."), *superseded* by U.S. Const. amend. XIII.

indictment against defendants who had been charged with a conspiracy to intimidate black citizens from the free exercise of their constitutional rights, including the right to travel freely to and from the state of Georgia. The Supreme Court reversed the dismissal of the indictment in part because the constitutional right to travel from one state to another “occupies a position fundamental to the concept of our Federal Union,” *id.* at 757, and in support of that proposition the Court cited both *Crandall v. Nevada* and Taney’s great purposes passage from the *Passenger Cases*.

But in 1849, all this was far in the future, and one wonders how Taney or Kellogg could have foreseen the significance of the great purposes passage. It is possible, of course, that either Taney or Kellogg admired the words in 1849, and thought they would make a nice addition to the painting. That seems unlikely. The decision was too recent; the words come from a dissent; the dissent wanders away from the issue. Although the decision was delivered from the bench in February 1849, it would not have been officially reported until some months later at the earliest.⁷ The great purposes passage was not quoted in any published decision for 18 years, and it probably did not become meaningful until the Supreme Court handed down *Crandall v. Nevada* in 1867. Taney himself did not quote the great purposes passage during the 15 years he served on the Court after the *Passenger Cases*. In short, the passage feels more like an epitaph than a prediction.

A second possibility is that Kellogg did not paint the Taney portrait in 1849. The Library has no record of when it acquired the painting; the earliest reference is an 1863 entry in board minutes identifying a “picture” of “Chief Justice Roger Brooke Taney[.]” as one of several in the Library’s collection.⁸ The 1849 date in the painting has its own peculiar history: the signature line was not discovered until the painting was cleaned in 1975. The restorer removed “layers of repaint” that had been applied over “most of the painting” and found a signature in the lower right corner reading “M.K. KELLOGG P. BALTIMORE 1849.”⁹ The left corner included a symbol that appeared to be a version of Kellogg’s initials. Could 1849 refer to the time depicted in the painting rather than the date of its execution? That possibility appears foreclosed by two references to the painting from 1850 and 1851; one identifies a painting of Chief Justice Taney

⁷ See G. Edward White, *The Internal Powers of the Chief Justice: the Nineteenth Century Legacy*, 154 U. PA. L. REV. 1463, 1481-82 (2006) (describing process during Taney era of opinion preparation and publication).

⁸ The Baltimore Bar held a memorial service for Chief Justice Taney on October 14, 1864, in the Superior Court. Bar Library minutes reflect that the Taney portrait was then on loan to the Superior Court. One of the speakers, William Schley, referred to “the life-like picture, which so appropriately occupies a place in this chamber.” PROCEEDINGS OF THE BENCH AND BAR OF BALTIMORE UPON THE OCCASION OF THE DEATH OF THE HON. ROGER B. TANEY 15 (Baltimore 1864). He did not mention text in the portrait, and no one spoke of the *Passenger Cases* or the great purposes passage.

⁹ Letter from Peter E. Michaels to Library Company of the Baltimore Bar (Oct. 20, 1975); see also James F. Schneider, THE STORY OF THE LIBRARY COMPANY OF THE BALTIMORE BAR, at ff. 24 (1979).

by Kellogg and owned by the “Law Library,”¹⁰ and the other suggests that Kellogg painted a portrait of Taney “for the Baltimore Bar.”¹¹ The 1849 date in the painting, therefore, almost certainly records the date Kellogg completed his work.

A third possibility, and the one that seems most likely to me, is that the legible text was added sometime after Kellogg completed his work, and I would guess long after. Besides the improbability of recognizing the significance of the great purposes passage in 1849, we know from the 1975 restoration that the portrait had “layers of repaint which had been applied over most of the painting at some previous time when the painting was restored.”¹² The 1975 restorer also observed that “many pictorial elements had been painted out . . . and other elements had been added such as yellow and green tints to the fringes on the chair.” So prior stewards of the portrait did not feel a need to preserve it in its original form. Although the restorer made no reference to repainting on or around the text, the script seems a bit cramped, unplanned, overprecise, and inartistic, at least to my untrained eye. And Taney’s friends, including some who served on the Library’s board, made sustained efforts to rehabilitate Taney’s reputation after his death.¹³

Toward the end of his life, the Chief Justice sat for a portrait by Emanuel Leutze, the painter of “Washington Crossing the Delaware.” Justice Scalia immortalized Leutze’s portrait in, of all things, his dissenting opinion in the 1992 abortion case:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d



*Courtesy of Historical & Special Collections,
Harvard Law School Library*

¹⁰ Catalogue OF PAINTINGS, ENGRAVINGS, ETC. AT THE PICTURE GALLERY OF THE MARYLAND HISTORICAL SOCIETY, THIRD ANNUAL EXHIBITION, 1850, at 9 (John D. Toy).

¹¹ Charles Cist, SKETCHES AND STATISTICS OF CINCINNATI IN 1851, at 123 (1851).

¹² Michaels Letter, *supra* n.9.

¹³ See Proceedings, *supra* n.8; see also T. Huebner, *Roger B. Taney and the Slavery Issue: Looking beyond – and before – Dred Scott*, 97 J. AM. HIST. 1, 14 (June 2010).

year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind.

Planned Parenthood v. Casey, 505 U.S. 833, 1001-02 (1992) (Scalia, J., dissenting).

In the Bar Library portrait, the Chief Justice is younger and somewhat more relaxed. He is in the 72nd year of his life (but looks much younger), the 14th of his Chief Justiceship. He is pensive but not brooding. The room is growing in shadow, but Taney's face and hands remain open to sunlight. He stares not at the viewer but into the distance. He has not yet written *Dred Scott*, but he can see it on the horizon.

As for the text before him, the most intriguing possibility by far is that my conclusion is wrong. For this must mean that Taney himself selected these two sentences as his message, if not his legacy. And it would suggest that Taney, as early as 1849, valued national unity above the divisive prejudices that would come to define him. Like some of his forebears in the founding generation, he has selected a phrase capable of transcending the corporeal imperfections of its author. It is perhaps too much to suggest that Taney sees not only *Dred Scott* on the horizon, but also *United States v. Guest*. But if Taney speaks to us through this magnificent and mysterious portrait, it is only to declare that we are one common country. He leaves us to decide who we are.