Prelude to Civil War: A Snapshot of the California Supreme Court at Work in 1858

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Vast numbers of people from all over the United States joined the California Gold Rush, and not all of them came to try their luck with pans, shovels, rockers, and sluice boxes. "Of nearly two thousand passengers now between Chagres and Panama," a correspondent for the San Francisco *Alta California* reported on December 29, 1849, "there are about six hundred lawyers, and of them four hundred go out with the expectation of being returned to Congress, or the legislature, at least; seventeen are electioneering for the gubernatorial chair, and twenty-one embryo Senators are already calculating the savings to be made on the mileage allowed by Uncle Sam to Washington and back." Of course the reporter exaggerated for humorous effect. But he had a point. Political adventurers from each of the several states flocked to California in the 1850s, and they came at a time of rising sectional tensions. San Francisco attorney Henry A. Crabb, writing in 1853, observed that California's lawyer-politicians included roughly equal numbers of "Northern men and Southern men, freesoilers and secessionists, puritans and fire-eaters." The result was a form of sectional politics unique to the Golden State. Northerners and southerners back in "the states" screamed at one another across the Mason-Dixon line or, alternatively, counseled moderation and compromise. In California, however, northerners and southerners engaged one another face-to-face and hand-to-hand in political conventions, in legislative caucuses, and even in the weekly conferences of the California Supreme Court.[1]

Southerners had one big advantage in the ensuing clash of sectional loyalties, feelings, and ideologies. California was a Democratic state from the outset, and slaveholders controlled the national party's machinery during the administrations of Franklin Pierce (1853-1857) and James Buchanan (1857-1861). Slave-state natives with proslavery views—their leaders known as the Chivalry faction—garnered virtually all the state's federal patronage jobs; David C. Broderick, leader of the California Democracy's anti-Chivalry wing, described the Port of San Francisco as

a "Virginia poorhouse" in 1853. Nor was the Chivalry's monopoly of federal posts limited to appointive offices. Federal officials wielded so much influence in state nominating conventions that every California congressman elected in the mid-1850s grew up in a slave state. "We never send a man to Congress that speaks, acts, and votes with the North," Charles Washburn, editor of the *Alta California*, complained in 1855. "Does a man here from the North aspire to Congressional honors, he must first lay his belly in the dust and endure all the violent and aggressive measures which the South has ever attempted, or he is at once thrust aside to make way for one of chivalrous birth." Sectional politics also shaped the composition of the California Supreme Court. Until 1861, judicial aspirants stood before the voters on party tickets at general elections; of the seven justices who sat on the high court between 1852 and 1857, all but two came from the South. One of the northerners, Alexander Wells of New York City, had supported John C. Calhoun's bid for the presidency in 1844.[2]

Lawyers and politicians from the free states chafed in the Chivalry harness. Although "[w]e have no slavery here," San Francisco attorney Oscar L. Shafter wrote his Vermont family in 1856, "the State is and ever has been in bonds to the slave power." Violent altercations between northerners and southerners were not uncommon. "[I]f any man could be found who had the temerity to believe [slavery] was a bad system, and his opinion became known," John C. Conness recalled 30 years later, "he was proscribed, clubbed, or shot, according to the pleasure of the ruffians who dominated public opinion there." Conness, a United States senator during the 1860s, spoke from first-hand experience. Chief Justice Hugh C. Murray, a native of Missouri "whose mind was saturated with the teachings of John C. Calhoun," drew a bowie knife and chased him around a San Francisco barroom in 1853; three years later, Murray assaulted a Sacramento abolitionist "with a heavy bludgeon." Sectional animosities also generated duels. Broderick fought one with Caleb Smith, son of a former Virginia governor, in 1852. Congressman Joseph McCorkle, a native of New York, and Senator William M. Gwin, a native of Tennessee, duelled with rifles at 30 paces in 1853. And *Alta California* editor Washburn had an engagement on "the field of honor" with Benjamin F. Washington, a Chivalry wheelhorse from Virginia, in 1854. All escaped serious injury, but the duels merely fanned the flames of sectional discord in California. In July 1854, as the legendary

Broderick-Gwin fight for election to the Senate loomed increasingly near, the Democratic convention culminated with a brawl that nearly destroyed Sacramento's First Baptist Church.[3]

Momentous questions of constitutional interpretation lay just below the surface of California's tumultuous civic life. As sectional ideologies emerged and ramified in the antebellum era, David M. Potter once observed, the phrase *E pluribus unum* became "a riddle as well as a motto." What made it so, of course, was the endless debate on whether the American republic ought to be regarded as a perpetual union, "neither wholly federal nor wholly national," or a league of sovereign states, each of which retained the right to secede at its discretion. The Golden State's pioneer lawyers and politicians had no difficulty reciting the arguments of slave-state theorists and their free-state counterparts. But in California, as in the nation, no consensus materialized. "It is the odious nature of the question," John Quincy Adams remarked in 1831, "that it can be settled only at the cannon's mouth."[4]

Before the shooting started, however, the California Supreme Court had no choice but to adjudicate every case and controversy involving the nature of the union that appeared on its docket. What follows is an intensive study of how the justices performed in one nearly forgotten yet fascinating case, *Warner & Wife v. Steamer Uncle Sam*, decided in 1858.[5]

THE JUSTICES

Stephen Johnson Field, the principal architect of California jurisprudence in the nineteenth century, was the court's newest member in 1858. The son of a New England minister and a graduate of Williams College, Field came to California from New York in the stampede of 1849, settling in Marysville where he served as the village alcalde in 1850 and a Yuba County assemblyman in 1851. During his term in the state legislature he framed the Practice Acts, reorganized the judicial system, and established the jurisdictional basis for the development of far-western mining law. The extraordinary command of legal literature and conscientious attention to detail that he displayed in 1851 prompted one friendly journalist to call his achievements "the work of a mastermind." He brought the same skills to the California Supreme Court; over the course of six years on the state bench, the last four of them as chief justice, he greatly enhanced his reputation as the leading jurist on the Pacific slope.

Stephen J. Field (1816-1899)
Courtesy: The Bancroft Library

Field worked on a grand scale. Several of his treatise-like opinions ran to 70 printed pages or more, and he often followed a narrow holding with a series of comprehensive generalizations, thus, as he wrote, "plac[ing] our decision upon grounds which will furnish a rule in controversies of a similar character." Members of the bar and press corps repeatedly extolled his work. By producing opinions "in the style of a scholar," the San Francisco *Times* remarked late in 1859, he not only "[has] settled certain principles that were held in doubt" and "put an end to much unprofitable litigation" but also "elevated our standing abroad." "[M]ore than any other man," Joseph G. Baldwin wrote four years later, "Judge Field has given tone, consistency, and system to our judicature."[6]

Field cultivated such adulation. Shortly after his election to the bench in the Democratic landslide of 1857, he invited a number of friends to his Marysville home. Among them was Thomas Farrish, son of a local merchant and a fellow parishioner at St. Johns Church. "After some conversation," Farrish recalled many years later, Field said:

> "Tom, do you know I am paying the people of California over $40,000 a year for the privilege of serving them upon the supreme bench of the state?" Then he went on to say that the year previous he had received in fees some $47,000. Then he placed his hands over his face and soliloquized as follows: "Ambition! Ambition! Glory!! Glory!!" Then looking up cheerfully, he said "Well, well, I suppose it will teach me economy to live on $6,000 a year!"

Farrish's story, though perhaps apocryphal, accurately reflected Field's state of mind as he began a judicial career that ultimately spanned four decades. And the judgeship had cost him a great deal. Obtaining the Democratic nomination required him to downplay his antislavery pedigree and mend political fences with former Chivalry foes. As James O'Meara later observed, Field was "the only prominent Broderick man on the ticket" in 1857. Yet Broderick, infuriated by Field's calculated enlistment of Chivalry support, never spoke to him again, ending a friendly working relationship that had benefited both of them since 1851. Field also made what the *Democratic State Journal* called "the greate[st] pecuniary sacrifice . . . [ever] by a public officer in this State." In 1857 his income at the California bar was twice the sum his older brother, David Dudley Field, was earning in New York. But the prospect of glory overshadowed everything else. Perhaps never in American history had

a newly commissioned judge been so eager to begin the process of deciding great cases greatly.[7]

Field's many admirers took it for granted that he would dominate the court's other two members. Shortly after Chief Justice Murray died on September 18, 1857, the Sacramento *Spirit of the Age* reported that Justice David S. Terry, a native of Kentucky who had migrated to California via Mississippi and Texas, intended to resign because he was no match for the "eminent" Field. "There are not many jurists in this state who would willingly consent to occupy the position in which circumstances place Judge Terry," the editor declared. Other journalists reprinted the story, and the Marysville *Herald* applauded Terry's "sense of propriety," which, it said, "was strangely wanting" in 1855 "when he allowed himself to be placed in nomination for that exalted position." But the rumor had no foundation in fact. If Terry ever considered leaving the court, it certainly was not for fear of being intimidated. Terry's combativeness matched and may have exceeded that of his new colleague. During the succeeding two years, Field, the quintessential Jacksonian "barnburner," and Terry, a southerner of the Calhoun school, invariably reasoned from diametrically opposed premises and constantly clashed on questions of constitutional interpretation.[8]

The two men were opposites in every conceivable way. Chief Justice Terry was a massive man, standing well over six feet tall and weighing in excess of 220 pounds. "He was a rough fellow," a California lawyer recalled some years later. "[S]itting on the Supreme Court Bench, he would take out his pistol and lay it on the desk, and sit with his heels as high as he knew." James McClatchy even claimed that "Judge Terry lives more in the physical than in the mental." "In his case," the Sacramento editor remarked, "mind does not govern matter, but matter governs mind, and thus while he may be a gallant, he is a dangerous man—for without due consideration he leaps at conclusions, caring not where he may alight." Terry was also uncommonly direct. His opinions averaged about a page in length and responded serially to the arguments of counsel, supplying little or no guidance to the bar in subsequent cases. "Plain and simple in his habits of life, he despised pomp and display," his old friend A. E. Wagstaff wrote in 1892. "He decided the cases that were submitted to him, and did not attempt to write treatises, which should be published at the State's expense, in every decision which he rendered." Above all, Terry regarded African-American slavery as a just

and natural relation between black people and white people. "I was born and reared in a southern state, and believed in the doctrine of the ultra states rights men of the South," he confessed some years later.

> I desired to see the government of this State in the hands of those whose political opinions coincided with my own. . . . I [also] desired to change the Constitution of the state by striking out that clause prohibiting slavery and for several years entertained strong hopes of effecting this object or, failing in that, to divide the state and thus open a portion of California to Southerners and their property.

In time the two men acquired a grudging respect for the strengths of the other. Terry had a "generous nature," Field wrote in 1881, but his "southern prejudices and partisanship often affected his judgment." Terry was characteristically blunt: "Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew."[9]

Justice Peter H. Burnett, the well-meaning man in the middle, was a good deal older than his colleagues and far more experienced in public life. A staunch unionist from Kentucky, Burnett had served on Oregon's territorial court and as the first governor of California before opening a San Jose law office in 1851. When Justice Solomon Heydenfeldt resigned on Christmas Eve, 1856, Burnett agreed to serve on the California bench until a successor could be elected. Everywhere on the Pacific coast people regarded him as a venerable elder statesman; John Hittell reported that "no man in California has a higher reputation for kindliness and integrity." But he was not a very able lawyer. Burnett repeatedly tried to chart a course between the bastions of principle staked out by his colleagues, and more often than not he ended up at a cul de sac that made no sense at all. Until he resigned shortly after the election of Joseph Baldwin in 1858, however, Burnett voted with Terry every time the court was divided. In 1858 Field dissented six times, more than all members of the court combined during the previous eight years. Four of the dissents occurred in cases that posed questions of constitutional law. One of them was *Warner & Wife v. Steamer Uncle Sam.*[10]

The facts were relatively straightforward. Plaintiffs had libelled the *Uncle Sam* in a Solano County trial court for "malpractice" of a contract to transport Mrs. Anne Warner and an infant son from San Francisco to New York via San Juan del Sur, Nicaragua. The complaint stated that

the vessel had proceeded instead to Panama "on account of some private quarrel" between the captain and the Nicaraguan authorities. At that point Mrs. Warner had been forced to disembark and had been told, falsely, that another steamer had been engaged to pick her up at Aspinwall on the east side of the isthmus. The action had been filed to recover damages not only for breach of contract but also for Mrs. Warner's detention in Panama and the ensuing "trouble and inconvenience, and suffering by sickness, caused by the unwholesome climate."

The complaint contained two remarkable features. Although the action was for breach of contract made by the husband, the wife had been joined as a party so that additional damages might be claimed on what amounted to a tort theory. More important, however, was the fact that the suit had commenced in a state court. Joseph G. Baldwin, counsel for the plaintiffs, stood on chapter six of the Practice Act, which provided that "[a]ll steamers, vessels, and boats shall be liable . . . [for] non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees." It also provided that the action might be brought *in rem*, that is "directly against steamers, vessels or boats." Baldwin's opponent, a native of upstate New York named Delos Lake, argued that the court ought to strike down the act and dismiss the case for want of jurisdiction. In his judgment, the California statute violated section nine of the Judiciary Act of 1789, wherein Congress provided that federal district courts "shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction."[11]

BACKGROUND FOR DECISION

Several layers of history lay beneath the seemingly obvious conflict between the California law and the Judiciary Act. When Field framed the Practice Act in 1851, chapter six was unquestionably constitutional within its intended scope. Twelve other states, all of them with a brisk commerce on freshwater rivers and lakes, had enacted comparable statutes following the Supreme Court's decision in *The Thomas Jefferson* (1825). There a unanimous Court, speaking through Justice Joseph Story, held that "acknowledged principles of law" limited the exercise of federal admiralty jurisdiction to "waters within the ebb and flow of the tide," the standard demarcation of maritime authority in English jurisprudence. Not

surprisingly, the decision was unpopular among the shippers, suppliers, and sailors whose livelihood depended upon the burgeoning steamboat commerce of the inland rivers and lakes. Where admiralty remedies are available, persons with a legal claim against a vessel have the choice of proceeding *in rem* (by arresting the boat and making it the defendant without regard to the owner) or *in personam* (by personal action against the owner and attachment of his property). At common law plaintiffs have access only to the latter, often inferior form of process. Actions *in rem* are ordinarily quicker and cheaper because owners tend to reside at distant points. Admiralty remedies are also more complete. Ships attached at common law are subject to all existing liens and mortgages; but when a vessel is sold under an admiralty order, it gives title to the buyer against the whole world. Simply to state the relative advantages of admiralty forms and doctrine is to suggest why so many states enacted statutes opening their own courts to *in rem* suits against steamboats, barges, and other craft beginning in the 1830s. As long as *The Thomas Jefferson* remained good law, the authority of state governments to pass such measures was unassailable. The "exclusive" admiralty jurisdiction of federal courts conferred by the Judiciary Act ceased at the tidewater line. Disputes arising on nontidal waters posed questions of local law and might be resolved through whatever forms of action state legislatures deemed appropriate.[12]

None of the water-craft laws expressly limited the *in rem* jurisdiction of state courts to nontidal waters. Language to that effect would have been superfluous in the statutes of landlocked states such as Ohio and Missouri. In Alabama, Florida, Georgia, and Mississippi the state judiciaries apparently regarded the nontidal limitation on their jurisdiction to be implied. Until 1851 there were no reported cases of vessels being libelled in state courts when the dispute arose on the high seas or in tidewater bays. As Alexander Hamilton predicted in *The Federalist*, not even "[t]he most bigoted idolizers of state authority . . . [had any] disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." Nor is there any reason to suspect that Field intended to confer an *in rem* jurisdiction on the California courts larger than that vested in the tribunals of other states. In 1851 Field was a resident of Marysville, the economy of which

depended on river traffic; he understood the demand for access to *in rem* proceedings against river steamers, for he had authorized such an action while serving as the community's alcalde. Yet the first *in rem* proceeding to reach the California Supreme Court involved a collision of two vessels in San Francisco Bay during the fall of 1850. The court's jurisdiction in *Innis v. Steamboat Senator* was not challenged by counsel, and the controversy was decided on the merits without the court so much as acknowledging that the cause of action had occurred within the ebb and flow of the tide.[13]

The behavior of bench and bar in *Innis* apparently hinged on a tacitly shared assumption. Although the Judiciary Act vested federal courts with "exclusive" maritime jurisdiction, it could not be construed as affecting California jurisprudence until Congress had organized a federal court in the state and federal judicial officers had arrived on the scene. San Francisco had been one of the world's busiest ports since 1849, and California alcaldes had instinctively relied on admiralty forms and doctrines to settle maritime disputes prior to the creation of state courts in 1850. Before Ogden Hoffman opened California's first federal court on February 1, 1851, it would have been unreasonable for the state judiciary to renounce a jurisdiction that alcaldes had previously exercised with such breadth. What makes this theory so compelling, however, is the fact that the California bar immediately transferred maritime claims to the federal district court once it opened. Judge Hoffman maintained a crowded admiralty docket from the beginning; not until 1855 did the California Supreme Court hear another *in rem* action when the complaint involved tidewater commerce.[14]

Meanwhile, the constitutional configuration of the admiralty question in California changed for the third time in as many years: during its December 1851 term the Supreme Court of the United States overruled *The Thomas Jefferson*. Speaking for the Court in *The Propeller Genesee Chief v. Fitzhugh*, Chief Justice Roger Taney held that the federal judiciary's maritime jurisdiction extended to all navigable lakes and rivers. "[T]here is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit," he declared: "If it is a public navigable water . . . the reason for the jurisdiction is the same." Taney's major premise was that circumstances had changed since 1825. When the Marshall Court handed down *The Thomas Jefferson*, he

Steamship *Senator* in Sacramento, Winter of 1849
Courtesy: The Bancroft Library

declared, "the commerce on the rivers of the west and on the lakes was in its infancy, and . . . the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided." Although Taney did not say as much, the circumstances that had produced the state watercraft laws had changed too. Once the Court's *Genesee Chief* decision vested federal courts with jurisdiction over controversies arising on freshwater lakes and rivers, the original rationale for the state laws disappeared. Indeed, continued cognizance of *in rem* proceedings by state courts was likely to create vexing collisions between federal district judges exercising jurisdiction under the Judiciary Act and local magistrates claiming jurisdiction over the same vessel under the watercraft laws. Congress had made federal jurisdiction exclusive in 1789 for that very reason. Less than a year after its enactment, then, chapter six of Field's Practice Act had become superfluous and arguably unconstitutional.[15]

The history of the federal judicial power in California took an entirely different turn, however, in 1854. Speaking for himself and Chief Justice Murray in *Johnson v. Gordon*, Justice Solomon Heydenfeldt, a native of South Carolina, held that section twenty-five of the federal Judiciary Act, authorizing the Supreme Court to decide certain kinds of controversies on writ of error to state courts, was "not warranted by the Constitution" of the United States. As a result, Heydenfeldt declared, all state court decisions involving federal questions—construction of the Constitution, or acts of Congress, or treaties of the United States—were necessarily final. California journalists immediately dubbed *Johnson v. Gordon* "the late Nullification decision," and they did so for good reason. The self-styled Old Republicans of Virginia had framed an inchoate argument against the Supreme Court's appellate jurisdiction over state courts during the Age of Jefferson. But the argument, now reflected in Heydenfeldt's *Johnson* opinion, had been perfected by John C. Calhoun.[16]

Working from the premise that sovereignty was indivisible and had resided in the several states from the moment of independence, Calhoun claimed that the union was merely a league of sovereign states. It followed that the people of the several states, as parties to the constitutional compact of 1788, had the ultimate right to define the boundaries of the federal system. "Nullification" was the method, Calhoun proposed, by which the states might renegotiate the compact every time Congress

attempted to exercise powers that had not been expressly delegated by the Constitution. When a state convention nullified a federal law, it put everyone on notice that one party believed the compact's terms had been violated. The other states might clarify the matter in dispute by a constitutional amendment (a process that would give one-fourth of the states plus one a veto), whereupon the state that had nullified the law might choose to remain in the reconstructed league or, if it rejected the amendment, withdraw from the union. Section twenty-five of the Judiciary Act subverted this theory of the federal system; in Calhoun's judgment, it was unconstitutional.[17]

The Supreme Court had ruled otherwise in *Martin v. Hunter's Lessee* (1816). Speaking through Justice Story, the Court not only sustained the statute but declared that Congress "could not, without a violation of its duty, have refused" to enact it. "From the very nature of things," Story asserted, "the absolute right of decision, in the last resort, must rest somewhere." Article III of the Constitution established the Supreme Court as that final arbiter. But "southern rights" theorists rejected the Court's reasoning and refused to regard the question as having been settled. Article III of the Constitution, they pointed out, did not expressly authorize judicial review of state judgments in the Supreme Court. The power conferred in the Judiciary Act and sustained in *Martin* was an implied power at best. Moreover, they argued, Story had been mistaken in suggesting that the Constitution envisioned the Supreme Court as the final arbiter of controversies touching the scope of federal power. For Calhoun and his followers, "the absolute right of decision, in the last resort," lay instead with the parties to the constitutional compact—the people of each state gathered in convention. They conceded that their theory might prove inconvenient in practical application. Since state court decisions on federal questions would be final, different versions of the Constitution might be in force from time to time in each of the several states. But that was consistent with the overall Calhounite constitutional scheme. When clashing interpretations of the Constitution materialized in the several state courts, an authoritative judgment might be rendered through the process of constitutional amendment. Once the people of the sovereign states had thus renegotiated the constitutional compact, the constituent power of each state might decide, as in the case of nullification, whether to remain in the reconstructed league or to secede from it.[18]

Calhoun's constitutional theory had an immense impact on the mind of the South. Even there, however, a substantial minority believed that the response President Andrew Jackson expounded in his Nullification Proclamation (1832) was more compelling. Almost every northerner believed it to be unanswerable. Jackson, too, advanced a theory of the union and its origins; but he and his followers rejected Calhoun's view largely because it would render the American system of government unworkable. "[S]uch a nation," Jackson said, "would be like a bag of sand with both ends open." Since nullification and its corollary involving the federal judicial power comprehended state vetoes of federal law, it would also make a mockery of the Constitution's language in Article VI, proclaiming that "[t]his Constitution, and the laws of the United States made in pursuance thereof . . . shall be the supreme law of the land." Secession was another matter altogether. "Metaphysical subtlety, in pursuit of an impracticable theory," Jackson observed, "could alone have devised one that is calculated to destroy [the union]." Those who claimed a right to secede, he warned, not only "should recollect that perpetuity is stamped upon the [C]onstitution by the blood of our Fathers" but also should understand that secession must be regarded as "an offense against the whole Union."[19]

The nature and sources of the union was still a subject of almost daily debate when Heydenfeldt and Murray astonished Californians by unfurling Calhoun's state sovereignty banner in *Johnson v. Gordon*. The decision became the subject of hostile comment almost instantly. "Our Supreme Court," said the Stockton *Argus* in an incredulous, widely reprinted editorial,

> decides the Constitution and laws of the United States to be unconstitutional, reverses the uniform decisions of the United States Supreme Court, scoffs at the opinions of such men as Marshall, Story, Webster, Kent and all the great legal minds of the nation . . . and rules judicially that the metaphysical abstractions of John C. Calhoun are not only the true theory of Constitutional law, but that they are, *de jure et de facto*, the Constitution *and* laws.

"Even South Carolina," the Sacramento *Union* added, "has never gone so far as our Supreme Court has done. . . . The people should not be left to suffer from the political vagaries of men who happen to occupy high official station." The state legislature agreed. On April 9, 1855, it

enacted a statute designed to enforce the state court's compliance with the very act of Congress that Heydenfeldt and Murray had declared unconstitutional. The statute not only made it a misdemeanor for any clerk or judge to interfere with attempts to file writs of error but also provided that offenders would be peremptorily impeached. "This is as it should be," remarked the *Alta California* when the senate passed the measure by a vote of 25 to five. "[W]e never could entertain the idea that any respectable number of the people of California could ever so far forget their loyalty to the Constitution of the United States, and their attachment to the Union, as to endorse the nullification vagaries of the Supreme Court of California."[20]

But the California statute did not subdue the voices of Heydenfeldt and Murray any more than the Marshall Court had quieted Virginia's Old Republicans or Jackson's Nullification Proclamation had silenced Calhoun. In *Taylor v. Steamer Columbia* (1855), Heydenfeldt and Murray simply shifted the focus of their crusade against the judicial power of the United States. At issue was breach of a maritime contract for a voyage between Portland, Oregon, and San Francisco. In the court below counsel for the steamship company had demurred to the complaint, pointing out that Article III of the Constitution extended the federal judicial power to "all cases of admiralty and maritime jurisdiction" and that section nine of the Judiciary Act provided that the federal district courts "shall have exclusive original jurisdiction" of such controversies. Plaintiff appealed to the California Supreme Court when the local tribunal dismissed the suit for want of jurisdiction. Speaking again through Heydenfeldt, the court reversed the decision below on the ground that section nine of the Judiciary Act was unconstitutional. "[T]he States are original sovereigns with all powers of sovereignty not expressly delegated by the Federal compact," he asserted. "The States are not deprived by the Constitution of the United States, of the power to confer upon their own Courts all Admiralty and Maritime jurisdiction; consequently Congress has no power to make this jurisdiction exclusive to the Federal Courts."[21]

Although *Johnson* and *Taylor* were grounded on the same constitutional theory, the latter decision was less vulnerable to attack than the former. In *Taylor* the court did not merely deny the validity of a federal statute. It also applied chapter six of the Practice Act, a state law duly enacted by the California legislature. Nor was that all. In *Johnson* the

court had refused to follow an interpretation of the Constitution handed down by the U.S. Supreme Court in 1816 and reaffirmed on countless occasions thereafter. When *Taylor* came down, however, the Supreme Court had not yet considered a case explicitly involving the authority of state legislatures to confer admiralty jurisdiction upon their own courts. The state sovereignty doctrine enunciated in *Taylor* upset California's anti-Chivalry lawyers all the same. Some of them could hardly wait to reargue the question once Heydenfeldt had resigned and Murray had died. The opportunity arose when *Warner & Wife v. Steamer Uncle Sam* came to the court in 1858.

CACOPHONY IN THE COURT

The court had several options at its disposal in *Warner & Wife.* Counsel Joseph Baldwin (who himself would succeed Burnett on the high court later in 1858) proffered three options in his brief for the plaintiffs. The first option, of course, was to reaffirm *Taylor v. Steamer Columbia* unreservedly. But Baldwin had little sympathy for the state sovereignty dogmatism of his fellow southerners; consequently he did not press that option very hard. Alternatively, he argued, the court might sustain the holding in *Taylor* while abandoning Heydenfeldt's reasoning. This might be accomplished through a broad construction of the "saving clause" in the Judiciary Act. Section nine of the statute, he pointed out, vested federal courts with "exclusive" jurisdiction of maritime causes yet it also saved "to suitors, in all cases, the rights of a common law remedy where the common law is competent to give it." All agreed that the Warners might bring an action *in personam* on the contract of transportation, Baldwin declared.

> Therefore, the jurisdiction over the subject [of maritime agreements] was not taken away from the State Courts. They had it before [the 1789 Judiciary Act]; they have it now. That is all we want. As to the mode in which the State courts shall exercise their jurisdiction, this is wholly unimportant. We are discussing a question of jurisdiction, not a question of practice. The Constitution and the Acts of Congress deal with things, not forms.

Chapter six of the Practice Act, authorizing litigants to proceed *in rem* against vessels, contemplated "a mere change in remedy, which it was

always competent for the Legislature to make." According to Baldwin, then, the California statute "is within the saving clause of the Act of 1789."

Baldwin's third option amounted to a fallback position. Even if the court strongly believed that the state law was unconstitutional, he contended, it should resist the temptation to say so. The Supreme Court had not yet addressed the question, and section twenty-five of the Judiciary Act confined its appellate jurisdiction to cases in which state laws had been upheld in the face of a right claimed under the Constitution, laws, or treaties of the United States. Since state court decisions adverse to the validity of state legislation could not be carried to Washington on writ of error, they tended to subvert the principle of national uniformity in American federal-question jurisprudence. "It seems to me," Baldwin concluded, "that this Court would at least wait for an authoritative decision of the Supreme Court of the United States before it declared the act of the State Legislature unconstitutional, and reversed its own decision upon so important a matter to its citizens."[22]

Delos Lake's brief for the Pacific Mail Steamship Company was at once more persuasive and less politic. He thought Baldwin's third option missed the very point of the controversy. It was not surprising that the Supreme Court had not yet construed the "exclusive jurisdiction" clause in section nine of the Judiciary Act, he exclaimed. "From the time of the passage of that Act until the decision of the case of *Taylor v. Steamer Columbia*, by our Supreme Court, a period of sixty-five years, the exclusive jurisdiction of the Courts of the United States in admiralty and maritime causes was never disputed by any State court." The only plausible explanation for the absurd doctrine expounded in *Taylor*, Lake contended, was the obsession with defending Calhoun's theory of the Constitution that Heydenfeldt and Murray had displayed in *Johnson v. Gordon*, "the point of departure" for the admiralty ruling. In effect, the two decisions constituted a judicial declaration of secession from national authority. "It is not too late," he said, "to retire from a controversy which we submit was most needlessly commenced."

Lake professed to be equally dumbfounded by Baldwin's construction of the "saving clause." The only thing saved to suitors in state courts, he observed, was "a common law remedy." But the forms of action at common law were by definition *in personam*. The right to proceed *in rem* was peculiar to admiralty and entirely remedial in nature. How,

then, could access to *in rem* forms have been saved to state court litigants by the Judiciary Act? Baldwin's theory, Lake asserted, would enable state legislatures to vest their own courts with jurisdiction over the full range of maritime controversies, effectively nullifying the Judiciary Act's command. Nevertheless, Lake did supply the court with a way to avoid the constitutional question altogether. He strenuously argued that the wife had been improperly joined as a party in the pleadings. The action turned on the contract for transportation made by Mr. Warner, "the consideration for the promise moved from the husband, and the damages for any breach of the promise go to him." When the gist of the action was in contract, conventional rules of practice barred joinder of a second party who could recover for alleged injuries only on a tort theory.[23]

When the court took up *Warner & Wife* in its weekly conference, an extraordinary series of pairings emerged. The material in the opinions provides a fairly reliable picture of how the conference must have gone. Chief Justice Terry stood squarely on *Taylor*. Predictably, he thought section nine of the Judiciary Act was unconstitutional insofar as it conferred "exclusive" jurisdiction of maritime causes on the federal courts. "Jurisdiction in certain cases," including admiralty, "was given by the Federal Constitution to the United States courts," Terry explained in his subsequent opinion. "[B]ut the grant contains no words of exclusion, nor any evidence of an intention to take from the tribunals of the several States the powers which were vested in them." No jurisdiction that the Constitution treated as concurrent could be made exclusive by a mere act of Congress, for "[t]he several States of the Union are sovereign, and endowed with all the attributes and rights of independent States, except such as by the Constitution have been surrendered to the United States, or prohibited to the individual States." Neither Field nor Burnett could assent to such reasoning; moreover, both believed that Baldwin's construction of the "saving clause" had no merit. Yet they could not agree on how to construct a majority opinion. In the end Burnett voted with Terry and wrote a separate opinion. Field dissented.[24]

Field tried to mollify his staunchly unionist colleague so that they could stand together against Terry. In Field's view, chapter six of the Practice Act was unconstitutional. The act never should have been invoked in cases arising on the high seas; its application to causes of action occurring on the Sacramento River system had been superseded by *Genesee Chief*. But Field contended that the decision invalidating the

California statute ought to come from the Supreme Court of the United States. On that matter, at least, he thought Baldwin had made a telling point. The court's clear duty was to frame a measured opinion that would make *Warner & Wife* the subject of a writ of error. Field also had a very definite idea about how best to accomplish that duty. All the situation called for, he counseled in conference, was a brief majority opinion stating that the court felt compelled to keep the state law in force until overruled by the Supreme Court. By thus indicating that an authoritative decision reversing *Taylor* was imminent, he and Burnett could not only disassociate themselves from Terry's state sovereignty views but also encourage Lake to take his persuasive argument to Washington.

Burnett resisted Field's approach, in part because he already had devised a solution of his own. During oral argument Burnett had been struck by Lake's claim that *Johnson v. Gordon* marked "the point of departure" for the whole admiralty mess in California. The insight had some merit, but the theory Burnett derived from it bordered on the ridiculous. What the court ought to do in *Warner & Wife*, he told his colleagues in conference, was write a ringing affirmation of federal judicial supremacy under section twenty-five of the Judiciary Act. All the authorities, ranging from *The Federalist* to *Martin v. Hunter's Lessee* and beyond, might be assembled in such a way as to overrule *Johnson* and show that Article III of the Constitution mandated a uniform course of decisions on federal questions. Once that task had been accomplished, Burnett explained, it would no longer matter whether the admiralty jurisdiction of the United States was exclusive or concurrent. If the California court affirmed *Taylor* and held that state courts had concurrent jurisdiction over maritime causes, the Supreme Court could still maintain uniformity—an "invincible necessity" in the federal union—by hearing admiralty causes on writ of error. "The exercise of this original jurisdiction by the State Courts, subject to the supervisory power of the Supreme Court of the United States," Burnett declared in his subsequent opinion, "would seem to be compatible with the harmony and efficiency of the system, and beneficial in its practical effects."[25]

Field must have been in a state of shock by the time Burnett finished stating his views to the conference. In effect, his colleague proposed that the California Supreme Court reconstruct the judicial system established by the Founders. And there was no method to Burnett's madness. He

desperately wanted to defend section twenty-five of the Judiciary Act; at the same time he was prepared to subvert section nine of the same statute. Yet the architects of the federal judicial system had derived both provisions from a single theory of Article III. The Constitution did not expressly provide that the Supreme Court was to be final arbiter of all federal questions. Nor did it expressly state that federal courts should have exclusive jurisdiction of admiralty and maritime causes. Nevertheless, Congress had determined at the outset that both provisions constituted appropriate exercises of its enumerated powers to create courts and allocate "the judicial power of the United States" among them. On what grounds, then, did Burnett propose to hold that Congress had acted within its authority in enacting section twenty-five but not in enacting section nine? It might be true that the former was an "invincible necessity" in a federal system while the latter was not. But that determination was for Congress to make. John Marshall's classic commentary on Congress's implied powers in *McCulloch v. Maryland* (1819) spoke directly to the mode of constitutional construction Burnett recommended in *Warner & Wife*. "To employ the means necessary to an end," Marshall said, "is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[26]

Even if Burnett's constitutional theory were sound, the doctrine he espoused in *Warner & Wife* could not possibly have spawned the "beneficial . . . practical effects" he anticipated. His whole approach hinged on the existence of a "supervisory power" in the Supreme Court, without which the admiralty decisions of the several state courts would lack uniformity. But section twenty-five of the Judiciary Act did not authorize the Supreme Court to reach the merits of maritime controversies on writ of error to state courts. Only the question of jurisdiction could be thus decided. Moreover, this glaring deficiency in Burnett's theory was not the result of inadvertent omission on Congress's part. Since maritime causes often involve foreign ships, crews, or cargoes and therefore have foreign policy implications, the framers of the Judiciary Act had excluded state courts entirely from that branch of jurisprudence. If section nine of the statute was unconstitutional, then, the uniformity problem could be rectified only by another act of Congress amending section twenty-five to comport with a decision of the California Supreme Court. Did Burnett really think that Congress would remodel the federal

judicial system in response to such a ruling? The very idea was preposterous, and Field no doubt told him so. Nevertheless, Burnett stood his ground with a pertinacity deserving a better cause.

At that point in the conference, though perhaps before, Field pressed the joinder question. Since the wife's injuries "are alleged by way of special damage" and sounded in tort, he asserted, her case could not be linked with the husband's cause of action, which "is confessedly based upon the provision of the statute . . . render[ing] steamers liable for the non-performance of any contract." Field might have believed that this arguable deficiency in the pleadings was fundamentally important. A more likely explanation for his raising it, however, goes to strategy. Field wanted no part of the views expressed by his colleagues on the question of jurisdiction; he must have been reluctant to have the issue go up to the Supreme Court accompanied by such embarrassing opinions. Yet the constitutional issue might be buried, for the time being at least, if the case were dismissed on the pleading point. Whatever Field's motives, he was outvoted on the joinder question too; he eventually dissented on that ground. But Field added a brief paragraph to his opinion incorporating the kind of statement that he had advocated in conference. "[U]ntil the question of exclusive jurisdiction in the Federal Courts is directly passed upon by the Supreme Court of the United States, and the jurisdiction to the exclusion of all cognizance by the State Courts *is* affirmed," he wrote, "I think we should hesitate to declare the Act of the Legislature unconstitutional."[27]

EPILOGUE

"One of the most conclusive evidences of the incapacity, inefficiency and bias of the Supreme Court," wrote a Sacramento reporter shortly after *Warner & Wife* was decided, "is the fact that Stephen J. Field, a man whose intellectual attainments and conservative principles are only equalled by his probity, is compelled, thus far, to dissent so frequently from the decisions of his coadjutors." Field's own frustration verged on the unbearable in 1858. Yet he soon learned a lesson about the politics of appellate judging that he never forgot. By outlasting one's associates, a dissenting justice might eventually succeed in winning a series of momentous victories. With the election of Baldwin to his seat, Burnett—who was Field's first colleague to depart—left quietly on

October 2, 1858, and even abandoned the law for an appointment as president of the Pacific Bank of San Francisco. Terry's departure, on the other hand, ignited one of the most shocking, transformative events in California history. He wrote his letter of resignation on September 12, 1859, and fought a duel with David Broderick, California's junior United States senator, later the same day. Terry issued the challenge; Broderick chose dueling pistols at 10 paces. Between 60 and 70 witnesses accompanied the principals to the field of honor. Broderick fired first but only Terry's shot was true, and the anti-Chivalry leader died at a friend's home in San Francisco three days later. He had not yet celebrated his fortieth birthday. "They have killed me because I was opposed to a corrupt administration and the extension of slavery," Broderick was said to have uttered near the end. And the words attributed to him, with their overtone of a vast "slave power" conspiracy, reverberated across California for years.[28]

The process of casting Broderick as an antislavery martyr began at his funeral on September 18. Speaking before an immense crowd, Edward D. Baker called the duel "a political necessity, veiled under the guise of a private quarrel." The code of honor, he asserted, was "a delusion and a snare" that served as "a shield, emblazoned with the name of Chivalry, to cover the malignity of murder." Republican stump speakers magnified Baker's charges. Cornelius Cole claimed that the fallen statesman's demise had been "decreed by his enemies months ago and was not unexpected." John Dwinelle not only stated that "Broderick had been hunted to his death because he dared to resist the Slave Power" but linked a new dying declaration to the conspiracy theme: "Let my friends take courage in my example and, if need be, die like me."[29]

By the fall of 1860, "bleeding Broderick" had long since become a conventional image in the Republican appeal to California voters. It was also very powerful. Abraham Lincoln carried the Golden State by what he colorfully termed "the closest political bookkeeping I know of." Democratic electors loyal to Stephen A. Douglas, headed by veteran Broderick lieutenant John Conness, finished second. John C. Breckinridge came in third despite endorsements by Senators William Gwin and Milton Latham, Governor John Weller, and virtually all the federal officeholders. Yet, a year earlier, in the election of 1859, held just five days before the duel, the Chivalry ticket had rolled up 60 percent of the vote. Leland Stanford, the Republican candidate for governor, had been

named on fewer than 10 percent of the ballots. As an antislavery martyr, Broderick accomplished something in 1860 that he had never achieved as an active politician: the rout of the Chivalry.[30]

The fateful duel also ushered in a new era of California judicial history. When the court reconvened on October 3, 1859, Field took the center seat that Terry had deserted so suddenly. Joseph Baldwin flanked him on the right, Warner W. Cope on the left. While the state's politicians mobilized for the 1860 presidential campaign and then for the ensuing civil war, Field and his associates methodically reconstructed California jurisprudence. More than a dozen decisions handed down in the Murray and Terry eras were overruled; the Field Court severely qualified, or simply ignored, scores of other precedents. "In following the movements of our Supreme Court, we are forcibly reminded of . . . the thimble and the pea [i.e., the shell game]," the San Francisco *Bulletin* lamented in 1860. "On some of our most important questions, that tribunal has shifted position and changed its rulings so radically that none but those of the keenest vision can keep track of its quick transactions." But the new doctrinal formulations stood the test of time. John Norton Pomeroy exaggerated only slightly when, in 1881, he declared that Field had built the reputation of the California Supreme Court "in the estimation of the profession" to the point where it stood "second to no other State tribunal." Baldwin and Cope were very able men, and each wrote several significant opinions. "Yet it is admitted by all," Pomeroy added, that "in the fundamental principles adopted by the Court, in the doctrines which it announced, in the whole system which it constructed for the adjustment of the great questions . . . [it adjudicated], Field's controlling influence was apparent; his creative force impressed itself upon his associates, guided their decisions, shaped and determined their work." Richard Henry Dana, Jr., said essentially the same thing after a California sojourn in 1860. "The bench is honest, learned, and independent, and for the first time, has public confidence," he reported, "Chief Justice Field is the chief power."[31]

In the spring of 1863, while Burnett was making a mark on the San Francisco banking community and Terry was fighting at Vicksburg in the Confederate gray, Abraham Lincoln appointed Field to the Supreme Court of the United States. His opinion for the Court in *The Moses Taylor* (1867), one of his first, gave him enormous satisfaction. There the Court struck down the California statute authorizing *in rem* proceedings against

vessels and held that the "common law remedy" saved to suitors comprehended *in personam* proceedings only. "The Judiciary Act of 1789," Field proclaimed for a unanimous Court, "is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. . . . The constitutionality of these provisions cannot be seriously questioned."[32] Field did not acknowledge that, much to his consternation, the opposite rule had actually prevailed in California during the 1850s. He spoke, instead, as if *The Moses Taylor* merely declared what always had been the just, true, and natural theory of the federal judicial power. One suspects that Terry, back in the Golden State after the defeat of the Confederacy, read Field's opinion rather differently. The landmark Supreme Court decision, like the Thirteenth Amendment and the Reconstruction Act of 1867, underscored the truism that military victors make the rules, whether right or wrong.

NOTES

[1]San Francisco *Alta California*, December 29, 1849; Henry A. Crabb to John Wilson, June 12, 1853, Wilson Papers, Bancroft Library, University of California, Berkeley. See also Doris M. Wright, "The Making of Cosmopolitan California: An Analysis of Immigration, 1848-1870," *California Historical Society Quarterly*, 19:323-43 (1940).

[2]James O'Meara, *Broderick and Gwin* (San Francisco, 1881), 43; San Francisco *Alta California*, March 10, 1855. See also Roy F. Nichols, *The Democratic Machine, 1850-1854* (New York, 1923); David E. Meerse, "James Buchanan, the Patronage, and the Northern Democratic Party, 1857-1858" (PhD. diss., University of Illinois, 1969); David A. Williams, *David C. Broderick: A Political Portrait* (San Marino, 1969); J. Edward Johnson, *History of the Supreme Court Justices of California: Volume I, 1850-1900* (San Francisco, 1963), 43-64.

[3]Oscar Shafter to "Dear Father," September 19, 1856, in *Life and Letters of Oscar Lovell Shafter*, ed. Flora Haines Loughead (San Francisco, 1915), 186; John Conness, *Some of the Men and Measures of the War and Reconstruction Period* (Boston, 1882), 8; Edgar W. Camp, "Hugh C. Murray: California's Youngest Chief Justice," *California Historical Society Quarterly*, 40:369 (1941); San Francisco *Alta California*, January 21, 1853; Cornelius Cole, *Memoirs* (Glendale, 1908), 117-18. The duels are described in O'Meara, *Broderick and Gwin*, 30-32, 40-41; Oscar T. Shuck, *History of the Bench and Bar of California* (Los Angeles, 1901), 412. On the 1854 Democratic convention, see Williams, *Broderick*, 92-100.

[4]David M. Potter, *The Impending Crisis, 1848-1861* (New York, 1976), 479; Kenneth M. Stampp, *The Imperiled Union: Essays on the Background of the Civil War* (New York, 1980), 36 (quoting Adams).

[5]*Warner & Wife v. Steamer Uncle Sam*, 9 Cal. 697 (1858).

[6]Sacramento *Transcript*, March 15, 1851; *Teschemacher v. Thompson*, 18 Cal. 11, 21-21 (1861); San Francisco *Times*, November 18, 1859; Joseph G. Baldwin, "The Career of Judge Field on the Supreme Bench of California," Sacramento *Union*, May 6, 1863. See also William Wirt Blume, "Adoption in California of Field Code of Civil Procedure: A Chapter in American Legal History," *Hastings Law Journal*, 17:701-25 (1966); William Wirt Blume, "California Courts in Historical Perspective, Part One," *ibid.*, 22 (1970), 123-51; Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," *Law and Society Review*, 10:235-66 (1976).

[7]Thomas Edwin Farrish, *The Gold Hunters of California* (Chicago, 1904), 60; O'Meara, *Broderick and Gwin*, 207; Sacramento *Democratic State Journal*, October 15, 1857. See also Stephen J. Field, *Personal Reminiscences of Early Days in California*, ed. Wallace D. Farnham (New York, 1968), 70-71; Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, D.C., 1930), 68-72.

[8]Sacramento *Spirit of the Age*, reprinted with commentary in the Marysville *Herald*, September 30, 1857. See also A. Russell Buchanan, *David S. Terry of California: Duelling Judge* (San Marino, 1956). Field had been elected to Murray's seat, effective in January of 1858; but he agreed to serve out the rest of Murray's unexpired term as well, thus his tenure began on October 17, 1857. The term "barnburner," an epithet minted by their "hunker" enemies within the New York Democracy, referred to New York Democrats opposed to the extension of slavery into the territories acquired from Mexico during the 1840s. David Dudley Field had been a prominent "barnburner" leader; Stephen Field, who ran the law office while his brother attended conventions and delivered speeches, remained a very interested spectator until his departure for California. See Daun van Ee, *David Dudley Field and the Reconstruction of the Law* (New York, 1986), 113-29.

[9]Charles V. Gillespie Statement (Mss. in Bancroft Library), 10; [James McClatchy], "Terry's Big Blunder," *Los Angeles Times*, August 18, 1882 (reprinted from the *Sacramento Bee*); A. E. Wagstaff, *The Life of David S. Terry* (San Francisco, 1892), 139, 147, 294; Charles R. Boden, "David Terry's Justification," as quoted in Buchanan, *Terry of California*, 93; Field to John Norton Pomeroy, June 21, 1881, Pomeroy Papers, Bancroft Library; Field, *Personal Reminiscences of Early Days in California*, 101.

[10]John S. Hittell, *A History of the City of San Francisco and Incidentally of the State of California* (San Francisco, 1876), 271; William E. Franklin, "The Political Career of Peter H. Burnett" (PhD. diss., Stanford University, 1954).

Field's other dissents included *Ex parte Archy*, 9 Cal. 147 (1858) (rights of slaveholders in California under the privileges and immunities clause of Article IV, section 2) (Field did not participate but recorded an unofficial dissent in the Sacramento *Union*, February 18, 1858); *Boggs v. Merced Mining Co.*, 14 Cal. 279 (1858 & 1859) (rights of miners on patented Mexican claim) (vacated after reargument during the July 1858 term and reversed following another reargument in the January 1859 term); *Ex parte Newman*, 9 Cal. 502 (1858) (competence of legislature to enact Sunday-closing laws); *Fairbanks v. Dawson*, 9 Cal. 90 (1858) (construction of statute of limitations); *Belloc v. Rogers*, 9 Cal. 124 (1858) (rights of mortgagors).

[11]California, *Statutes*, Second Session (1851), 51; United States, *Statutes at Large*, I, 73 (1789).

[12]The Thomas Jefferson, 10 Wheat. 428 (U.S. 1825). For a convenient digest of the state water-craft laws, see "The Limits of the Exclusive Jurisdiction of Admiralty in the United States," *American Law Review*, 3:604n (1869). On the constitutional context, see Harry N. Scheiber, "The Transportation Revolution and American Law: Constitutionalism and Public Policy," in Indiana Historical Society, *Transportation and the Early Nation* (Indianapolis, 1982), 1-29.

[13]Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn., 1961), 538; *Innis v. Steamboat Senator*, 1 Cal. 443 (1851); *Bennett v. Steamboat Linda* (1850), Register of Suits Before the First Alcalde of Marysville (Yuba County Clerk's Office, Marysville), 12-13.

[14]On Hoffman's arrival and his docket, see Christian G. Fritz, "Judicial Style in California's Federal Admiralty Court: Ogden Hoffman and the First Ten Years, 1851-1861," *Southern California Quarterly*, 64:1-25 (1982). During the 1851-1854 period the California Supreme Court did hear a number of cases involving maritime disputes in which plaintiffs had proceeded *in personam*. For a valuable treatment of the case law that overlooks the procedural distinctions emphasized here, see Gordon M. Bakken, "Admiralty Law in Nineteenth-Century California," *ibid.*, 58:499-514 (1976).

[15]*The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 454, 456 (U.S. 1851). See also Carl Brent Swisher, *The Taney Period, 1836-64* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. V) (New York, 1974), 426-56.

[16]*Johnson v. Gordon*, 4 Cal. 368, 369 (1854); San Francisco *Alta California*, October 16, 1854.

[17]Calhoun's clearest statement of the theory came in the Fort Hill Address, July 26, 1831, in *The Papers of John C. Calhoun*, ed. Clyde N. Wilson (Columbia, S.C., 1978), XI, 413-40. See also Boyd Clifton Rist, "The Jeffersonian Crisis Revived: Virginia, the Court, and the Appellate Jurisdiction Controversy" (PhD. diss., University of Virginia, 1985); William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965), 159-73.

[18]*Martin v. Hunter's Lessee*, 1 Wheat. 304, 328, 345 (U.S. 1816); John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, ed. Richard K. Cralle (Columbia, S.C., 1851), 317-40, 383-84. Many of these constitutional issues had received a full and eloquent airing in the polemics by John Marshall and Spencer Roane of Virginia, conveniently collected in Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford, 1969).

[19]James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (Washington, D.C., 1905), II, 640-56; Jackson to Joel R. Poinsett, December 2, 1832, in *Correspondence of Andrew Jackson*, ed. John Spencer Basssett (Washington, D.C., 1926-35), IV, 493-94; Jackson to Martin Van Buren,

December 25, 1832, in *Correspondence*, 506. See also Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly*, 71:341-364 (1956); Kenneth Stampp, "The Concept of a Perpetual Union," *Journal of American History*, 65:5-33 (1978).

[20]Stockton *Argus*, quoted in Sacramento *Union*, March 10, 1855; *Union*, March 14, 1855; San Francisco *Alta California*, March 17, 1855; California, *Statutes*, Sixth Session (1855), 80. For a broad historical perspective, see Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," *American Law Review*, 47:1-34, 161-89 (1913).

[21]*Taylor v. Steamer Columbia*, 5 Cal. 268, 273-74 (1855). See also *White v. Steam-Tug Mary Ann*, 6 Cal. 462 (1856).

[22]*Warner & Wife v. Steamer Uncle Sam* (arg.), 9 Cal. 697, 707-10 (1858). For an exceptionally clear and concise discussion of the "saving clause," see Grant Gilmore and Charles Black, *The Law of Admiralty* (Brooklyn, 1957), 33-35. On the limited scope of Supreme Court jurisdiction under section twenty-five of the Judiciary Act prior to 1914, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, 1927), 190-98.

[23]*Warner & Wife v. Steamer Uncle Sam* (arg.), 9 Cal. 697, 705 (1858).

[24]*Warner & Wife*, 734 (Terry, C. J.). My account of what happened in conference here and in subsequent paragraphs has been inferred from the opinions. None of the justices' conference notes have survived.

[25]*Warner & Wife*, 713, 728 (Burnett, J.).

[26]*McCulloch v. Maryland*, 4 Wheat. 316, 413-14 (U.S. 1819).

[27]*Warner & Wife v. Steamer Uncle Sam*, 9 Cal. 697, 735 (1858) (Field, J., dissenting) (my emphasis).

[28]San Francisco *Alta California*, March 18, 1858; Johnson, *History of the Supreme Court Justices of California*, I, 64; O'Meara, *Broderick and Gwin*, 207-62; Buchanan, *David S. Terry*, 83-113, 123-27; Williams, *David C. Broderick*, 171-261.

[29]Edward D. Baker, "Oration Delivered Over the Dead Body of David C. Broderick, at Portsmouth Square, San Francisco, on the 18th of September, 1859," in O'Meara, *Broderick and Gwin*, 266, 268-70; Cornelius Cole to William Henry Seward, September 19, 1859, Cole Papers, UCLA; John W. Dwinelle, *A Funeral Oration Upon David C. Broderick* (New York, 1859), 16; Charles Allen Sumner, *Speech Delivered at a Republican Mass Meeting at Sacramento, on Friday Evening, September 7th, 1860* (n.p., [1860]), 25; Milton H. Shutes, *Lincoln and California* (Stanford, 1943), 47.

[30]See *inter alia* David A. Williams, "California Democrats of 1860: Division, Disruption, Defeat," *Southern California Quarterly*, 55:239-52 (1973); Gerald Stanley, "The Slavery Issue and the Election of 1860 in California," *Mid-America*, 62:35-45 (1980). For a shrewd contemporary's description of how the martyrdom myth luxuriated and an assessment of its probable political repercussions, see Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (New York, 1971), 49.

[31]San Francisco *Bulletin*, July 11, 1860; John Norton Pomeroy, "Introductory Sketch," in *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Judge of the Supreme Court of the United States*, ed. Chancey F. Black and Samuel B. Smith (San Francisco, 1881), 27-28; Richard Henry Dana, *Journal*, ed. Robert F. Lucid (Cambridge, 1968), III, 915-16. For a brief but thoughtful account of Field's career, see Jan S. Stevens, "Stephen J. Field: A Gold Rush Lawyer Shapes the Nation," *Journal of the West*, 29:40-53 (1990).

[32]The Moses Taylor, 4 Wall. 411, 429-30 (U.S. 1867).