Historic Clashes Between PRESIDENT and SUPREME COURT

Chief Justice Roger B. Taney, who headed the Supreme Court when it handed down the famous Dred Scott decision.

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THE lively struggle over President Roosevelt's proposals for judicial reform invites a search for precedents, if any, and for recent practices of the judiciary which may have led to the proposal for such a change.

Theodore Roosevelt once spoke of "the immense part played by the Supreme Court in the creation, not merely the modification, of the great policies through and by means of which the country has moved on to her present position."

"Theoretically they do not say what the law ought to be," says a current authority; "they merely proclaim the Constitution as it is. Practically the matter is not so simple, for the language of that document is very general in some parts. Phrases such as 'necessary and proper,' 'due process of law,' and 'privileges and immunities,' may be interpreted in many ways according to the theories, prejudices, and preconceptions of the judges. . . . Inevitably their adverse rulings awaken political resentments."

It is largely because of these resentments that several of the presidents of the United States have clashed with the Supreme Court over the use of its so-called judicial veto—that is, its assumed right, which is nowhere specifically bestowed in the Constitution, to declare laws unconstitutional.

Thomas Jefferson, for instance, was deeply shocked when the judicial veto was first used against a federal law, in the Marbury vs. Madison case of 1803.

He felt that the Constitution had committed suicide; "for," said he, "intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. . . ."

Holding these beliefs, President Jefferson might have been expected to attempt drastic changes in the judicial branch. The new chief justice, John Marshall, presumably had a long career before him, and his opinions on the Constitution were perfectly well known to Jefferson. The thing to do to carry out his theories was to get rid of John Marshall and the other judges of the Supreme Court, or to neutralize their power.

Jefferson, however, refrained from attempting anything of the sort, perhaps because he feared that his administration was not strong enough to carry through any drastic measure.

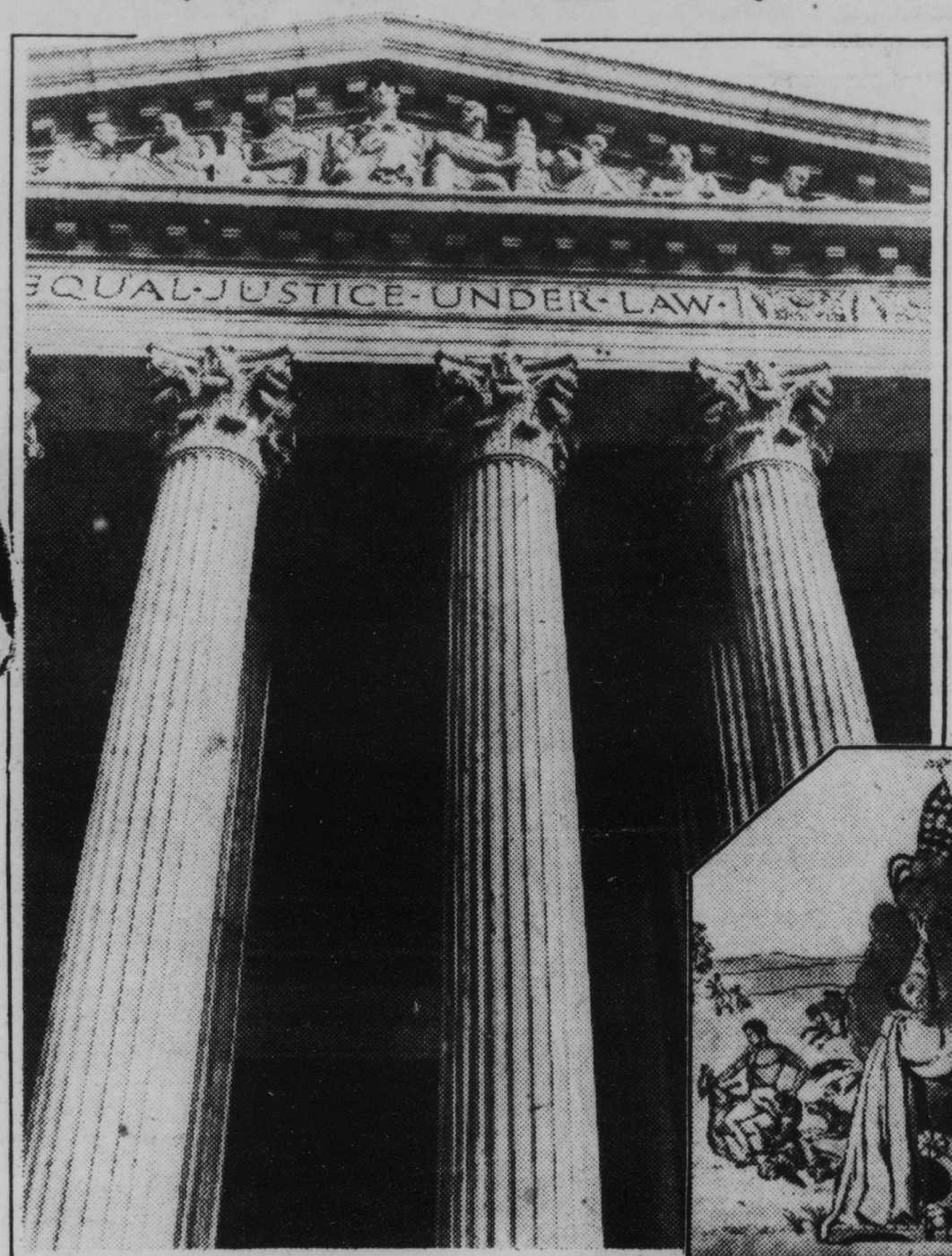

Photo by Margaret Bourke-White.

The facade of the Supreme Court's palatial new building in Washington.

ANDREW JACKSON'S clash with the Supreme Court seems to have been considerably exaggerated, and his open defiance of it at least doubtful.

"It is rumored," wrote Henry Clay concerning the court's decision in the case of Georgia against the Cherokee Indians, "that the President has repeatedly said that he will not enforce it, and that he even went so far as to express his hope, to a Georgia member of Congress, that Georgia would support her rights."

It was a Massachusetts congressman who reported Jackson's oftquoted remark about the same case, "Well, John Marshall has made his decision, now let him enforce it."

"It is a matter of extreme doubt," writes a recent historian of the Supreme Court, "whether Jackson ever uttered these words. He certainly did not in fact refuse aid in enforcing the court's decision."

Nevertheless, Andrew Jackson abhorred the constitutional doctrines and decisions of John Marshall, and was a party to something like a "packing" of the court at the very end of his second administration.

From 1821 on, Congress repeatedly tried to weaken the Supreme Court, or at least Marshall's influence therein; and by the act of March 3, 1837, the court was enlarged by two additional justices. Marshall himself was now dead, but the measure guaranteed that the members who had survived him, and whom he had presumably indoctrinated, should be in a safe minority.

The Dred Scott decision, in 1857,

John Marshall, under whom the Supreme Court first asserted its right to use the "judicial veto."

aroused a tempest of criticism and opposition, though not from President Buchanan, whose placid submission won him vigorous condemnation from the Republican press.

LINCOLN spoke moderately against it at first. Later he spoke more sharply.

"Familiarize yourselves with the chains of bondage," he exclaimed, "and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of

A cartoon of the late 1850's, showing King Slavery enthroned, resting his elbow on the fugitive slave bill, with Daniel Webster at right announcing his support of the law. The robed figure in front, not labeled, bears a marked resemblance to Chief Justice Taney.

history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Whether President Grant "packed" the Supreme Court when, in 1870, he appointed Justices Bradley and Strong on the same day that the court handed down its adverse decision on the constitutionality of the legal tender act, is somewhat in dispute. It is the fact, however, that both these justices did help in reversing this decision later, and that Grant had very much desired them to do so.

In Cleveland's administration the Supreme Court came under fire on account of its five to four decision against the income tax law. Not President Cleveland, but his antagonist within the Democratic party, William Jennings Bryan, led the attack and caused critical planks to be placed in the 1896 party platform.

There remains space here to consider one other aspect of this continuing struggle over the judiciary. That is the increasing frequency in recent years of the use of the judicial veto.

Whereas before the Civil War acts of Congress had been invalidated thus in only two cases, nearly 40 such cases have occurred since 1890.

Between 1920 and 1930 the court invalidated more state legislation than during the 50 years preceding. Between 1920 and 1932, inclusive, the judicial veto was used against 22 acts of Congress; between 1934 and the end of 1936, against 13.

What F. D. R.'S Predecessors Did

JEFFERSON, who was deeply shocked when the judicial veto was first used against a federal law, might have been expected to attempt a drastic change in the judiciary, but he didn't—perhaps because he was afraid he couldn't carry it through.

Jackson's clash with the court seems to have been exaggerated, although he abhorred John Marshall's doctrines and decisions.

Buchanan was lambasted editorially for placidly submitting to the Dred Scott decision—something which Lincoln did not do.

Whether Grant "packed" the court is somewhat in dispute, but he at least came perilously close to it.