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John McLean: Moderate Abolitionist and Supreme Court Politician

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John McLean: Moderate Abolitionist and Supreme Court Politician

*Paul Finkelman**

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Unlike almost all early Supreme Court Justices, John McLean came from extraordinarily humble origins. He was born in New Jersey in 1785.¹ His parents, Fergus and Sophia Blackford McLean, were farmers who moved to Virginia in 1789, Kentucky in 1790, and finally Ohio in 1796. Like many children of the frontier, the future Justice had no formal education for most of his boyhood.²

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1. The biographical and factual material relating to Justice McLean's political career appearing in the introductory part of this Article and in Part I, if not otherwise cited, is taken from FRANCIS P. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN OF THE UNITED STATES* (1937).

2. By contrast, Chief Justices and Associate Justices John Jay, John Rutledge, John Marshall, Roger B. Taney, Bushrod Washington, Brockholst Livingston, and John Blair all came from wealthy, and often politically powerful, families. Oliver Ellsworth and William Paterson graduated from Princeton (then known as the College of New Jersey). William Cushing and Joseph Story were solidly middle class graduates of Harvard University. Samuel Chase was educated by his father, an Anglican priest. For basic biographical information on the Justices of

Finally, at age sixteen, McLean studied classics in a local school. At nineteen, he was an apprentice in the Hamilton County Court of Common Pleas and studied law under Arthur St. Clair, Jr., the son of the former territorial governor. McLean then edited a newspaper in Lebanon, Ohio, practiced law, and worked for the federal land office. In 1812, Ohio gained five new congressional seats; the twenty-eight-year-old McLean won one of these seats and served in Congress until 1816, when, at age thirty-one, he took a seat on the Ohio Supreme Court. He left the court in 1822 when President James Monroe made him Commissioner of the General Land Office. In 1823, Monroe brought him into his cabinet as Postmaster General, and he held that position until 1829, serving three successive Presidents: James Monroe, John Quincy Adams, and Andrew Jackson. Shortly after taking office, President Jackson appointed McLean to the Supreme Court, where he sat from 1829 to 1861. When he died on April 3, 1861, the eve of the Civil War, he was the last surviving member of the administrations of Monroe and Adams, serving as a living link between the founding and the secession crisis. One minister eulogized that his death was a portent of the "dark cloud" that had "been gathering over this nation" and of the "approaching evil" the nation faced.³

When McLean went to the bench in 1829, he was considered a likely presidential candidate for the next election in 1832.⁴ Indeed, from 1832 until 1860 he was "in play" in every presidential campaign *except* 1840. In 1832, the new Anti-Masonic Party offered him the chance to run for President, but he declined. Various groups and parties put forward McLean's name as a presidential candidate in 1836, 1848, 1852, 1856, and 1860. He was not a candidate in 1840, however, because a fellow Ohioan, William Henry Harrison, was the Whig candidate. In 1844, some delegates at the Whig Convention proposed naming him the vice presidential candidate. In 1856, he sought the nomination of three different parties, and in 1860 he received votes at both the Republican Convention and the Constitutional Union Party Convention.

the Supreme Court, see Oyez, U.S. Supreme Court Media, Browse Justices, <http://www.oyez.org/courts/>, and entries on the Justices in AMERICAN NATIONAL BIOGRAPHY, available at <http://www.anb.org/articles/home.html>.

3. WILLIAM B. SPRAGUE, A DISCOURSE DELIVERED SUNDAY MORNING, APRIL 7, 1861, IN THE SECOND PRESBYTERIAN CHURCH, ALBANY, IN COMMEMORATION OF THE LATE HON. JOHN MCLEAN, LL. D., ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 17 (1861) (on file with the Vanderbilt Law Review).

4. Michael A. Kahn, *The Appointment of John McLean to the Supreme Court: Practical Presidential Politics in the Jacksonian Era*, 18 J. SUP. CT. HIST. 59, 66-70 (1993).

His thirty-two years on the Supreme Court make him one of the twelve longest serving Justices in history.⁵ At the time of his death, he was the third longest serving Justice in the history of the Court,⁶ and he is sixth in length of service among all Justices who served before the twentieth century. He wrote about 240 majority opinions and about sixty separate concurring and dissenting opinions.⁷ Yet he is about as obscure a Justice as there has ever been. Few Justices have worked so hard for such a long period of time, and yet had so little impact on the Court.⁸

How do we appreciate the “underappreciated” John McLean? It cannot be through his majority opinions—even the handful of majority opinions he wrote in important cases, such as *Wheaton v. Peters*,⁹ *Briscoe v. Bank of Kentucky*,¹⁰ *The Passenger Cases*,¹¹ and *Pennsylvania v. Wheeling Bridge Co.*,¹² are relatively insignificant. These cases are famous for the political, economic, and constitutional issues that brought them to the Court, but not for the jurisprudence or the reasoning of their majority opinions. Rather, McLean’s importance comes from three aspects of his career: 1) his unusual political

5. McLean’s length of service on the bench seems to be in dispute. Most scholars assert he was there for thirty-two years, dating from his confirmation on March 7, 1829. *E.g.*, Paul Finkelman, *John McLean*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 293 (Melvin I. Urofsky ed., 2001); Kahn, *supra* note 4, at 65. This dating is supported by the fact that McLean’s successor as Postmaster General, William T. Barry, was confirmed on March 9, 1829. *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774–1996*, at 6 (Joel D. Treese ed., 1997). On the other hand, the U.S. Supreme Court’s official website lists him as taking office on January 30, 1830 and serving until his death on April 4, 1861. Supreme Court of the United States, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Feb. 23, 2009). However, the Court has a note appended to these dates declaring the dates are from an “authority that is questionable, and better authority would be appreciated.” *Id.* This confusion underscores his ambivalent legacy. Perhaps the Supreme Court website promotes McLean from among the most underappreciated to among the most insignificant, if the Supreme Court itself cannot determine when he actually served. See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 469 (1983) (discussing indicators of insignificance).

6. At the time, only Justices John Marshall and Joseph Story had served longer. Supreme Court of the United States, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Feb. 23, 2009).

7. SUPREME COURT OF THE UNITED STATES, 1789–1980: AN INDEX TO OPINIONS ARRANGED BY JUSTICE 75–84 (Linda A. Blandford & Patricia Russell Evans eds., 1983).

8. Among long-serving Justices, he is surpassed in obscurity only by Gabriel Duvall (twenty-four years on the bench), Nathan Clifford (twenty-three years), and Thomas Todd (nineteen years). See Currie, *supra* note 5, 466 (1983) (discussing the relative “insignificance” of Supreme Court Justices); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 481 (1983) (responding to Currie’s article).

9. 33 U.S. (8 Pet.) 591, 654 (1834).

10. 36 U.S. (11 Pet.) 257, 259 (1837).

11. 48 U.S. (7 How.) 283, 392 (1849).

12. 54 U.S. (13 How.) 518, 557 (1852).

aspirations and activities while serving on the bench; 2) his support for a national commerce power and a flexible approach to economic development that contrasted with the states' rights anti-nationalism of Taney and a majority of the antebellum Court; and 3) his moderate antislavery jurisprudence, which he combined with a defense of northern interests on a Court dominated by Southerners and northern supporters of slavery.

I. THE STRANGE POLITICAL CAREER OF A MINOR JACKSONIAN JUSTICE

McLean was Andrew Jackson's first appointment to the Supreme Court, and the circumstances of his ascension to the Court were somewhat bizarre. On August 25, 1828, Justice Robert Trimble died.¹³ President John Quincy Adams did not immediately nominate a replacement, and in fact, he procrastinated until after Andrew Jackson had defeated him in the election of 1828. Adams's delay in nominating Trimble's successor is inexplicable and illustrative of his lack of political judgment. After the election, the lame-duck Adams offered the position to Charles Hammond from Ohio, who declined the appointment, and then to Henry Clay of Kentucky, who also declined. In December, Adams nominated John C. Crittenden, a former senator from Kentucky. This nomination, however, was doomed by Adams's lame-duck status and the emerging Jacksonian majority in the Senate. In March, Andrew Jackson became President.

The Post Office, with employees everywhere in the country, was the largest agency in the national government. Indeed, it was the only federal agency that could be found at the local level throughout the nation. Because of its size and national scope, and because all postmasters were patronage appointees, the Post Office was also considered a critical agency for organizing voters and helping elect presidential candidates. Because it had huge budgets to build post roads and build or rent space while postmasters received substantial amounts of cash in their day-to-day operations, the Post Office was easily corrupted. McLean had been an enormously competent Postmaster General, and he cleaned up a great deal of corruption in contracting for facilities and the construction of post roads. John Quincy Adams, who came to dislike McLean and believed him disloyal, nevertheless conceded that McLean was the best and most efficient Postmaster General in the nation's history.¹⁴

13. Kahn, *supra* note 4, at 59.

14. 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1798-1798: THEIR LIVES AND MAJOR OPINIONS 538 (Leon Friedman & Fred L. Israel eds., 1980).

In the period leading up to the 1828 election, Adams considered McLean guilty of “deep and treacherous duplicity,” because he believed the Postmaster General was using “the extensive patronage” of his office to “undermine” Adams’s reelection bid.¹⁵ Adams privately complained about McLean’s “political treachery,” but admitted that McLean “play[ed] his game with so much cunning and duplicity that [he could] fix upon no positive act that would justify the removal of him.”¹⁶ That Adams felt he needed evidence of this “treachery” to remove a cabinet member again speaks to the political naiveté of the sixth President. It is hard to imagine that any other President would *not* remove a cabinet member who the President thought was disloyal.

Whether McLean actively undermined Adams is unclear. Historian Thomas Carney recently asserted that these accusations against McLean were “unfounded charges.”¹⁷ In defending McLean, Carney notes that as Postmaster General, McLean “refused to appoint or remove individuals for purely political reasons,” and he similarly “awarded contracts strictly for the purpose of bettering the operations of the post office, disregarding the fact that the contract was going to a political enemy of the administration.”¹⁸ Such nonpartisan behavior would of course be an admirable trait in a modern Postmaster General, but in the early nineteenth century, the Post Office was the most important source of political patronage in the federal government.¹⁹ Postmasters General were expected to use that patronage for the benefit of the President who had appointed them. In retrospect, McLean’s “neutrality” may have been more self-serving than altruistic. He hoped to use the Post Office, with its thousands of local postmasters, as a base for his own 1832 presidential campaign. McLean believed that if he kept all postmasters in their positions in 1828, without regard to their political support for Adams or Jackson, they would be loyal to him four years later. Not surprisingly, Adams viewed McLean’s neutrality in the election of 1828 as disloyalty while Jackson correctly understood that McLean’s neutrality was a great boon to his campaign.

Although he was leading a new political coalition that would soon become the Democratic Party, Jackson asked McLean to continue

15. Diary Entry of John Quincy Adams (June 3, 1828), 8 MEMOIRS OF JOHN QUINCY ADAMS 23, 25 (Charles Francis Adams ed., 1876) [hereinafter ADAMS, MEMOIRS].

16. Diary Entry of John Quincy Adams (July 7, 1828), 8 ADAMS, MEMOIRS, *supra* note 15, at 51, 51.

17. Thomas Carney, *The Political Judge: Justice John McLean’s Pursuit of the Presidency*, 111 OHIO HIST. 122, 125 (2002).

18. *Id.* at 126.

19. WEISENBURGER, *supra* note 1, at 46.

to serve in his cabinet as Postmaster General because McLean was the most competent Postmaster General who had ever held the office. Thus, Jackson was prepared to keep McLean in his cabinet even as he dismissed almost every other person who had served under Adams. Jackson probably also wanted to keep McLean as Postmaster General because McLean had national popularity, and, by not using the powerful patronage of his many thousands of employees to help reelect Adams, McLean had been helpful to Jackson's election. However, while keeping McLean in his office, Jackson still expected that as *his* Postmaster General, McLean would replace the thousands of local postmasters appointed under Monroe and Adams with Jackson men. McLean was reluctant to do this for precisely the same reasons that kept him from using the Post Office to help Adams get reelected: his success as Postmaster General required that he keep all honest and competent local postmasters in office regardless of their political preferences. This approach also dovetailed with his own presidential ambitions because the local postmasters formed a loyal base of supporters for his 1832 presidential campaign.

McLean was willing and perhaps even eager to stay on in Jackson's administration, but he was unalterably opposed to removing his own people from the Post Office. Faced with this dilemma, McLean adroitly convinced Jackson to nominate him for the open seat on the Supreme Court, which the President did just days after taking office. For a few days, McLean actually may have been both Postmaster General and a confirmed member of the U.S. Supreme Court.

Once on the Court, McLean had relatively little impact on constitutional jurisprudence. He first served under John Marshall, and like all other Justices on the Marshall Court (except Joseph Story and William Johnson), McLean labored in the shadow of the Chief Justice. Marshall's death in 1835 could have led to McLean's flourishing, but it did not. Chief Justice Taney, while not as dominating as Marshall, nevertheless tightly controlled the Court and limited the opportunities of most of his Associate Justices.

Politics also affected McLean's Court career in two ways. First, McLean was clearly a political outsider on the Taney Court. Although he was appointed by Jackson, McLean was not actually a Jacksonian Democrat. In fact, it is hard to figure out what he was. At various times in his career, he was considered a National Republican, a Jacksonian Democrat, an Anti-Mason, a Free Democrat, a Whig, a Free Soiler, a Know-Nothing, a North American, and a Republican before finally seeking the presidential nomination of the Constitutional Union Party in 1860. McLean was also a Northerner who hated slavery on a Court dominated by proslavery Southerners

and a string of northern doughfaces—northern men with southern principles—who almost always voted to support slavery.²⁰ McLean was hardly a rabid abolitionist, but on the antebellum Court, he stood out for his relatively strong commitment to freedom and his hostility to slavery.

Second, in addition to his ambivalent political ideology on the Jacksonian Court, McLean was also clearly interested in higher office. His “passion for the presidency . . . burned almost as long and torridly” as Daniel Webster’s.²¹ As John Quincy Adams noted in his diary, Justice McLean “thinks of nothing but the Presidency by day and dreams of nothing else by night.”²² McLean’s quadrennial quest for the White House surely affected his position on the Court. When Chief Justice Taney handed out assignments for majority opinions, he must have understood that allowing McLean to write an important opinion would only heighten McLean’s political profile. Since McLean and Taney were not political allies, the Chief Justice had little reason to support McLean’s aspirations.

McLean’s pursuit of the presidency began fewer than two years after he joined the Court. In 1830, the Anti-Masonic Party emerged because of a growing fear that Masons were a threat to the nation. The party was a strange coalition built mostly around hatred of Andrew Jackson (who was a Mason). Among its members were many men who eventually would become significant political leaders, including William H. Seward, Thaddeus Stevens, William Sprague, and Thurlow Weed. Almost immediately the Anti-Masons began to woo McLean, who initially indicated that he would accept their nomination for President. On September 26, 1831, the Anti-Masonic Party held the first national political convention in American history. In the months leading up to the convention, McLean was the leading candidate for the nomination,²³ but in early September he suddenly removed his name from consideration.²⁴ This left the Anti-Masonic Convention in disarray. McLean, who clearly had his eye on the White House, knew he could never get there through an obscure third party.

20. Justice Benjamin R. Curtis (1851–57) was the only other Northerner who was even moderately antislavery appointed after McLean. Smith Thompson (1823–43) and Joseph Story (1812–45) were the only other northern Justices who were even moderately antislavery who served with McLean. The term “doughface” implied their faces were made of bread dough and Southerners could shape them any way they wished.

21. MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY* 261 (1999).

22. Diary Entry of John Quincy Adams (Mar. 14, 1833), 8 ADAMS, *MEMOIRS*, *supra* note 15, at 537, 537 (quoting former Speaker of the House of Representatives John W. Taylor).

23. Diary Entry of John Quincy Adams (Sept. 14, 1831), 8 ADAMS, *MEMOIRS*, *supra* note 15, at 412, 412; WEISENBURGER, *supra* note 1, at 78–79.

24. WEISENBURGER, *supra* note 1, at 78–79.

Four years later McLean actively sought the nomination of the Whig Party, and as early as 1835, the Whig Party in Ohio officially endorsed his candidacy. However, McLean proved unacceptable to a majority of Whigs, who incorrectly believed he was a closet Jacksonian. Others mistrusted him because he appeared to have no real political principles at all.²⁵ In the end, the Whigs nominated no one that year and instead ran four regional candidates in hopes that, with so many candidates, the election would go to the House of Representatives, where one of the Whigs could emerge victorious, as had happened in 1824 when Adams became President. This strategy failed miserably; Martin Van Buren carried fifteen states and 170 electoral votes, and the four regional candidates cumulatively carried only eleven states and 124 electoral votes.

In 1840, McLean stood on the sidelines as the popular war hero, William Henry Harrison, who was also from Ohio, won the Whig nomination and the presidential election. Harrison died in office only a month after his inauguration and was succeeded by John Tyler, a former Democrat who alienated almost every member of the Whig Party. Tyler offered McLean a cabinet position as Secretary of War, but McLean decided not to leave the bench.²⁶ He understood that being a one-term cabinet member in the administration of an unpopular chief executive, the nation's first unelected President—"His Accidentcy" as John Quincy Adams acerbically called Tyler—would not help him get the presidential nomination, which was all he really wanted.²⁷ So McLean remained on the bench, waiting for the election of 1844, which offered him another shot at the White House.

By 1844, McLean had long shed his taint of Jacksonianism and was acceptable to mainstream northern Whigs. However, Southern Whigs now distrusted him for his position on slavery.²⁸ Given his recent dissent in *Prigg v. Pennsylvania*,²⁹ this was totally sensible. His name was put forward as a vice presidential candidate, but he

25. HOLT, *supra* note 21, at 19; *see also* Kahn, *supra* note 4, at 70 (finding that McLean "wanted to serve the nation and the new administration on his own terms").

26. WEISENBURGER, *supra* note 1, at 102.

27. Robert Cover argues that by this time McLean was committed to the bench, and to his relationship with other Justices, especially Story, and that he would only leave the bench "with the support of men like Story" for the presidency and not a lesser position. ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 245 (1975). Others argue that he had little interest in the bench or his colleagues, but was only motivated by higher office. WEISENBURGER, *supra* note 1, at 101-02.

28. HOLT, *supra* note 21, at 189.

29. 41 U.S. (16 Pet.) 539, 658-73 (1842). For a discussion of *Prigg*, *see infra* text accompanying notes 97-99.

withdrew himself from consideration. The Whig ticket of Clay and Frelinghuysen lost in a close election.³⁰

In 1846, Justice McLean actively began to seek the Whig nomination for the 1848 election. He wrote letters, dined with important politicians, and had his supporters reach out to Whigs across the nation. He tried to sell himself as the last remnant of the founding era—a veteran of James Monroe's Administration who could rise above party politics and partisanship. By March 1846 he seemed like the candidate to beat. But the Mexican War changed all of this, and General Zachary Taylor's victory at Buena Vista in February 1847 made Taylor the most logical Whig candidate. McLean's presidential bid also was hampered by his position on the Court, which made it impossible for him to actively campaign, give speeches, or take positions publicly on a number of issues. At the Whig Convention, which met from June 7 to June 9, McLean's name was put forward, but he received only two votes on the first ballot and none after that.³¹

Having lost the Whig nomination, McLean still had a shot at running for President as the candidate of the newly created Free Soil Party. The Free Soilers emphatically opposed the spread of slavery into the territories recently acquired from Mexico, but they were not abolitionists and avoided an extreme antislavery position that would have alienated most northern voters.

McLean's connection to the free soil movement predated the formal creation of the party by that name in 1848. In October 1847, before the Free Soil Party was created, Charles Sumner of Massachusetts asked Salmon P. Chase of Ohio "how much Anti-Slavery there is in Judge McLean."³² Sumner, a dedicated foe of slavery, declared, "I have strong personal predilections in his favor. I honor his character."³³ At the time Sumner was considering McLean as a candidate for the Liberty Party, but within a few months, Sumner's interest in that party was eclipsed by the formation of the Free Soil Party.

Chase's response to Sumner was complicated. In the 1840s, Chase, who lived in Cincinnati, emerged as the preeminent

30. The uncommon name of the vice presidential candidate led to one of the great rhyming slogans of American politics: "Hurray Hurray, the Country's Risin'; Vote for Clay and Frelinghuysen."

31. 2 JAMES T. HAVEL, *U.S. PRESIDENTIAL CANDIDATES AND THE ELECTIONS: BIOGRAPHICAL AND HISTORICAL GUIDE* 24 (1996).

32. Letter from Charles Sumner to Salmon P. Chase (Oct. 1, 1847), in Beverley Wilson Palmer, *From Small Minority to Great Cause: Letters of Charles Sumner to Salmon P. Chase*, 93 OHIO HIST. 164, 169 (1998).

33. *Id.*

antislavery lawyer in the nation, earning him the nickname “the Attorney General for Fugitive Slaves.” He often appeared before McLean when the Justice was riding circuit, and he often lost in slavery-related cases. In 1843, McLean ruled against him in *Jones v. Van Zandt*.³⁴ Consistent with his understanding of the Constitution and his obligations as a Justice, McLean upheld the Fugitive Slave Act of 1793³⁵ on circuit in the case, as he would in other fugitive slave cases.³⁶ In 1847, McLean voted with the majority to uphold *Jones v. Van Zandt* in the Supreme Court.³⁷ This was Chase’s first Supreme Court case, and although he did not actually go to Washington to argue it, he did produce an impressive printed brief of more than one hundred pages that he sent to scores of lawyers and antislavery activists around the nation.³⁸ Chase surely had reason to doubt McLean’s commitment to antislavery.

On the other hand, McLean also had dissented forcefully from Justice Joseph Story’s overwhelmingly proslavery majority opinion in *Prigg v. Pennsylvania*,³⁹ and he had vigorously defended the rights of northern states to prevent the introduction of slaves by Southerners sojourning in the Free States in *Groves v. Slaughter*.⁴⁰ McLean’s opinions in both cases stood in marked contrast to the proslavery jurisprudence of most members of the Court. In *Prigg*, McLean countered the proslavery opinion of Joseph Story, the Justice from Massachusetts who most Americans thought was antislavery.⁴¹ McLean may not have been as strong an opponent of slavery as Chase

34. *Jones v. Van Zandt*, 13 F. Cas. 1040, 1046 (C.C.D. Ohio 1843) (No. 7501); *Jones v. Van Zandt*, 13 F. Cas. 1047, 1054 (C.C.D. Ohio 1843) (No. 7502) [hereinafter *Van Zandt II*].

35. Fugitive Slave Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

36. *Van Zandt*, 13 F. Cas. at 1044; *Van Zandt II*, 13 F. Cas. at 1052; see also *Driskell v. Parish*, 7 F. Cas. 1095, 1096 (C.C.D. Ohio 1849) (No. 4088) (upholding the Fugitive Slave Act by implication); *Driskell v. Parish*, 7 F. Cas. 1093, 1095 (C.C.D. Ohio 1847) (No. 4087) (same); *Driskell v. Parish*, 7 F. Cas. 1100, 1100–01 (C.C.D. Ohio 1845) (No. 4089) (same); *Greathouse v. Dunlap*, 10 F. Cas. 1062, 1063 (3 McLean 303) (C.C.D. Ohio 1843) (No. 5742) (same).

37. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 232 (1847).

38. SALMON P. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE. AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VAN ZANDT (1847). For a discussion of Chase’s printed brief, see PAUL FINKELMAN, SLAVERY IN THE COURTROOM 70–75 (1985) [hereinafter FINKELMAN, SLAVERY IN THE COURTROOM].

39. 41 U.S. (16 Pet.) 539, 658–74 (1842).

40. *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 464–469 (1841); see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 268 (1981) [hereinafter FINKELMAN, AN IMPERFECT UNION] (“His purpose was to protect the right of Ohio and the rest of the North to exclude slaves and slavery.”).

41. Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247 [hereinafter Finkelman, *Story Telling*].

wished, but he was clearly the only opponent of slavery on the high Court.

Chase's personal relationship with McLean further complicated his response to Sumner. Despite the *Van Zandt* case, Chase had long admired McLean. By 1847, after marrying a niece of McLean's wife, Chase was also one of McLean's relatives.⁴² Surely, for both political and personal reasons, Chase wanted his kinsman and fellow Ohioan to reach the White House. Furthermore, by early winter in 1848, the major slavery-related issue for Chase and Sumner was not fugitive slaves but the spread of slavery into the territories. Sumner believed that "[i]f Judge McLean could be induced to take any practical ground against the extension of Slavery, he would be a popular candidate," and that McLean running for President with John Hale of New Hampshire would be a "strong ticket."⁴³ Chase, who would later become Chief Justice under Lincoln, agreed. He wanted McLean to be the Free Soil Party's presidential candidate because the Justice was "the most reliable man, on the slavery question, now prominent in either party."⁴⁴ He reminded Sumner that McLean had not only endorsed the principles of the Wilmot Proviso, but had gone on to assert that "neither" a resolution like the Proviso "nor legislation is needed to establish the principle" that slavery could not exist in the federal territories because such a ban on slavery was "in the Constitution."⁴⁵ Chase agreed that McLean did "not fully agree with those who are generally known as antislavery men," but that "on the question of extension of slavery he is with us, not only on the question of its impolicy and its criminality, but also because he believed such extension would be a clear infraction of the Constitution."⁴⁶ Chase supported McLean for the Free Soil nomination, despite his "great error" in *Jones v. Van Zandt*.⁴⁷ Thus, Chase urged Sumner to inform

42. Chase had recently remarried for the third time, and his new wife was the niece of McLean's second wife. COVER, *supra* note 27, at 246.

43. Letter from Charles Sumner to Salmon P. Chase (Feb. 7, 1848), in 1 THE SELECTED LETTERS OF CHARLES SUMNER 206, 206 (Beverly Wilson Palmer ed., 1990).

44. Letter from Salmon P. Chase to Charles Sumner (Feb. 19, 1848), in *Diary and Correspondence of Salmon P. Chase*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902, at 131 (1903) [hereinafter ANNUAL REPORT]; see also FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 58 (1987) (indicating that Chase hoped McLean would receive the Free Soil Party nomination).

45. Letter from Salmon P. Chase to Charles Sumner (Feb. 19, 1848), in 2 ANNUAL REPORT, *supra* note 44, at 130. Proposed by Congressman David Wilmot of Pennsylvania, the Proviso would have prohibited slavery in any territory acquired from Mexico during the Mexican War. The Proviso passed the House but was defeated in the Senate.

46. *Id.* at 131.

47. *Id.*

people in New England that McLean could be trusted on the central issue of the election: the spread of slavery into the territories. Chase later wrote that he had spoken with McLean and that he was “emphatically right on the Free Territory Question, nearer right than any so prominent man of the old parties I know, on many others; and right on principle and not from impulses.”⁴⁸

The Free Soilers met in Buffalo, New York, on August 9 and 10, and although McLean might have had a shot at a place on the ticket, after having openly sought the Whig nomination, he refused to allow his name to be put forward at the convention of another party.⁴⁹ Furthermore, once again McLean seems to have had an aversion to third parties, as he had when he rejected the overtures of the Anti-Masonic Party in 1832. A lifetime seat on the Supreme Court—the ultimate political sinecure in the United States—surely was better than a quixotic run for the White House on a third-party ticket that was bound to lose. McLean’s instincts were correct: the Whigs won the presidential election in 1848.

In Ohio the political divisions were extraordinarily close. Neither the Democrats nor the Whigs had a majority in the legislature, and a handful of Free Soilers held the balance of power. The Whigs could have controlled the Ohio legislature if they had made an alliance with the Free Soilers. This would have led to the election of an antislavery Whig to the U.S. Senate. But, in the end the Whigs could not come to an agreement with the Free Soilers. Had McLean become a Free Soiler in 1848, the Free Soilers in the Ohio legislature might have struck a deal with the Whigs that would have sent McLean to the U.S. Senate.⁵⁰ Instead, the Free Soilers attempted to persuade the Whigs in the legislature to send Congressman Joshua Giddings to the Senate. Giddings had been a Whig before joining the Free Soil Party, but the Whigs in the legislature refused to support him for the Senate. Even without joining the Free Soil Party, McLean’s supporters still hoped the state legislature might resolve the impasse by settling on McLean as a senator who could appeal to Whigs, Democrats, and Free Soilers. But the Byzantine politics of the Ohio legislature made that impossible. In the end, the Ohio legislature chose McLean’s long-time supporter and kinsman, Salmon P. Chase,

48. Letter from Salmon P. Chase to Charles Sumner (Mar. 25, 1848), in 2 ANNUAL REPORT, *supra* note 44, at 132.

49. BLUE, *supra* note 44, at 64–65.

50. At the time, before the adoption of the Seventeenth Amendment, the state legislatures elected U.S. Senators.

as the senator from Ohio, while McLean remained on the bench as the Justice from Ohio.⁵¹

McLean almost avoided the election of 1852 altogether. He was no longer seeking the Whig nomination, and the Free Soil Party, whose nomination he might have received in 1848, was now all but defunct. The remaining active antislavery politicians met in Pittsburgh on August 11, 1852, to nominate candidates for the Free Soil Democratic Party. This party included former Democrats who could no longer stomach the proslavery positions of the official Democratic Party, antislavery Whigs who had left the party, and Free Soilers. Their potential candidates for President included successful officeholders like Senators Salmon P. Chase and John Hale and radical antislavery activists like Gerrit Smith of New York. McLean, at age sixty-seven, was now willing to consider a third-party candidacy. Most likely, he understood that at his age he had to run soon or he would never realize his dream of becoming President. Thus, in 1852, he allowed his name to be put forward to the Free Soil Democratic Party. His was one of the seven names offered at the convention, but McLean won few votes, and the convention chose John P. Hale. In the general election, Hale polled slightly more than 150,000 votes out of the more than three million cast.⁵²

By 1856 the Whig Party was an artifact of history. Most Whigs had joined the new Republican Party, but a few did not. Former President Millard Fillmore, for instance, ran as the candidate of the anti-Catholic, anti-immigrant American Party, which was commonly called the Know-Nothing Party. McLean, at age seventy-one, seemed desperate to get a nomination, so he tentatively offered himself to the Know-Nothings and received eleven votes at that party's convention in February 1856. Denied the chance to run as a Know-Nothing, McLean then made himself available to the North American Party, which had split off from the American (Know-Nothing) Party. But the North Americans nominated Nathaniel Banks of Massachusetts, who eventually withdrew from the campaign to support the Republican candidate.

At this time in history, party membership was fluid and affiliations changed quickly. McLean was unalterably hostile to the Democratic Party, which had become a proslavery bastion, and he seemed to be willing to run as the presidential candidate of any party that opposed the Democrats. After failing to be nominated by either of the nativist parties, McLean became an active candidate at the

51. BLUE, *supra* note 44, at 61–73; HOLT, *supra* note 21, at 400.

52. 2 HAVEL, *supra* note 31, at 26–27.

Republican Convention, which ran from June 17 to June 19. At age seventy-one, he was the senior statesman of the new party and an attractive candidate who could appeal to Know-Nothings, former Whigs, Westerners (today's "Midwest" was then the West), and moderate opponents of slavery. He came from Ohio, a very large state, and was popular in Pennsylvania, New Jersey, and Illinois—three conservative states that the party needed to win the election. Unlike his leading opponent for the nomination, John C. Frémont, McLean was an experienced politician who had been in Washington for three decades.⁵³ Despite his strengths, McLean lacked the charisma, fame, and charm of Frémont, the heroic western explorer and soldier. On an informal first ballot, McLean finished with 196 votes, second to Frémont's 359 votes.⁵⁴ After a formal vote, Frémont gained the nomination by acclamation.⁵⁵

The 1856 Republican Convention was the closest McLean ever came to winning a presidential nomination. But in 1860, at age seventy-five, he made one more run. With the party system and the nation collapsing, a motley collection of former Whigs, Know-Nothings, and moderate Democrats organized the Constitutional Union Party.⁵⁶ The new party met in Baltimore on May 9 and 10, and on the first ballot, McLean finished sixth among ten candidates, with nineteen votes. On the second ballot, the party nominated John Bell, a former senator from Tennessee. Not quite finished as a presidential candidate, Justice McLean's name was put forward at the Republican Convention in Chicago a week later. On the first ballot, McLean ran seventh among thirteen candidates with twelve votes. On the third ballot, Lincoln won the nomination, but McLean was one of seven candidates still in contention, running fifth with a few convention votes.⁵⁷

53. WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856*, at 311-17 (1987); 2 HAVEL, *supra* note 31, at 28-30.

54. Carney, *supra* note 17, at 140-44, argues that McLean's supporter Rufus P. Spalding precipitously withdrew McLean's name as a candidate and thus destroyed his chance of winning the nomination. Carney argues that Spalding was in fact secretly supporting Frémont. *Id.* Despite the evidence Carney marshals that Spalding undermined McLean, the best evidence remains that McLean could not have won the nomination over the more charismatic Frémont. For a contrary view, see GIENAPP, *supra* note 53, 338-41.

55. 2 HAVEL, *supra* note 31, at 30. Abraham Lincoln was one of the candidates for the vice presidential nomination.

56. As if to underscore the utter confusion of party politics at this time, the Constitutional Union Party officially called itself the American Party, the same official name the Know-Nothings used in 1856.

57. 2 HAVEL, *supra* note 31, at 31-33.

Within less than a year of the Republican Convention, McLean would be dead. He had been on the Court for thirty-two years, and for almost all of that time, he had been campaigning for President or Vice President. He had been considered a viable candidate by at least eight different parties, and at least three times his name had been put forward at more than one political convention in the same year. This is a record of sorts that has been unmatched by any political figure in the history of the nation. What makes this record even more remarkable is that throughout this period McLean was a Justice on the U.S. Supreme Court.

II. A CAREER ON THE COURT: COMMERCE AND THE ECONOMY

While seemingly always running for President, McLean was also sitting on the bench, deciding cases. As a Justice, he was almost always in the shadow of other more prominent jurists—especially Marshall, Story, and Taney. Even his most important opinion, his dissent in *Dred Scott v. Sandford*, was overshadowed by the unexpectedly strong dissent of the conservative Whig, Benjamin Robbins Curtis.⁵⁸ McLean's career on the Court was also affected by his odd political relationship with Chief Justices Marshall and Taney. When he joined the Court, McLean's political views and positions were between those of a National Republican in the tradition of James Monroe and those of a moderate Jacksonian Democrat. At the same time, his flirtation in 1831-32 with the Anti-Masonic Party, which was virulently anti-Jacksonian, must have made him something of an anathema to men like Taney who were close to Jackson and revered the President.

On the bench, McLean was more inclined to support states' rights than Marshall; he dissented in *Craig v. Missouri*, the case in which Chief Justice Marshall held that the Constitution barred the states from issuing certificates and promissory notes that could circulate like money.⁵⁹ McLean was in the minority in that case, but in *Briscoe v. Bank of Kentucky*, he wrote the majority opinion that effectively reversed *Craig*.⁶⁰ This was probably his most important majority opinion, and it might have redeemed him in the eyes of Jacksonians like Taney who agreed with the opinion. McLean was not, however, totally supportive of states' rights, and he concurred with Marshall's majority opinion in *Worcester v. Georgia*, agreeing that

58. 60 U.S. (19 How.) 393, 564-94 (1857) (Curtis, J., dissenting).

59. 29 U.S. (4 Pet.) 410, 411 (1830).

60. 36 U.S. (11 Pet.) 257, 323-24, 327 (1837).

Georgia had no jurisdiction over the Cherokee Nation.⁶¹ Given President Jackson's aggressive stance against Indian rights,⁶² McLean's vote in *Worcester* must have thoroughly annoyed the man who put him on the Court.

In 1836, the center chair on the Court was vacant; Marshall had died and no one had been appointed to replace him. For this brief moment, McLean was able to take a leadership role on the Court. In his majority opinion in *Mayor of New Orleans v. United States*, McLean took a moderate states' rights position, upholding the notion that, once a territory becomes a state, it has sovereign control over all its land unless the national government specifically retains claims to that land.⁶³ Although it is seldom read and barely remembered, *Mayor of New Orleans* was a significant opinion settling an important issue for western states like Louisiana and McLean's home state of Ohio. The opinion fell to McLean, the only Westerner on the Court.

If McLean was not entirely in agreement with Marshall, he soon discovered he also was not particularly close to Marshall's successor, Chief Justice Taney. His first important opinion under Taney, in *Briscoe v. Bank of Kentucky*, dovetailed with Jacksonian ideology, as the Court allowed Kentucky to charter a bank that could issue its own currency.⁶⁴ Here Taney and McLean led a 6-1 majority with only Story dissenting. But later in the term, in *Charles River Bridge v. Warren Bridge*, McLean joined Story in arguing that the charter of the Charles River Bridge Company gave it an implied monopoly. Taney's majority opinion rejected the claim that the company charter protected it from the competition of the newly constructed Warren Bridge.⁶⁵ McLean's position in this case indicates he clearly was not an orthodox Jacksonian on economic issues.

McLean also joined the majority (but did not write the opinion) in voting against Jacksonian interests in *Kendall v. United States ex rel. Stokes*.⁶⁶ Although the case was decided after Jackson left office, the Court rejected claims of executive privilege by Jackson's former Postmaster General, Amos Kendall, who argued that he could not be compelled by a writ of mandamus to take certain actions. Kendall had refused to spend funds specifically appropriated by Congress to pay

61. 31 U.S. (6 Pet.) 515, 561 (1832).

62. See generally ROBERT REMINI, ANDREW JACKSON AND HIS INDIAN WARS 277-81 (2001) (discussing President Jackson's legacy and his belief that the nation's well-being required removal of the Native American tribes).

63. 35 U.S. (10 Pet.) 662, 736-37 (1836).

64. 36 U.S. at 349.

65. 36 U.S. (11 Pet.) 420, 583 (1837).

66. 37 U.S. (12 Pet.) 524, 608 (1838).

money owed to Stokes. Taney and two other Jacksonians dissented. *Kendell* might be seen as a precursor to the failed attempts of later Presidents to sequester appropriated funds rather than spend them.⁶⁷ The decision was Whiggish in its deference to the legislature and its opposition to executive power. The case had a taint of scandal stemming from the Jackson Administration, and the majority opinion was clearly a rebuke of the former President, his successor Martin Van Buren, and the Democratic Party.

McLean's lone dissent in *Bronson v. Kinzie*⁶⁸ can also be seen as a precursor to modern constitutional law. The case involved a contract for the purchase of land in Chicago and fallout from the two economic crises of the period, the Panic of 1837 and the longer depression that ran from 1839-43. While historians are not fully in agreement about the causes of these two economic downturns, all agree that they either were caused or exacerbated by the banking and currency policies of Andrew Jackson and his close advisor and short-term Secretary of the Treasury, Roger B. Taney.⁶⁹ Bronson sold various lots in Chicago to Kinzie and then sought to foreclose on the mortgages when Kinzie, in the wake of the Panic, could not make his payments. An Illinois law passed in the wake of the panics gave land purchasers a year to redeem land lost to foreclosures and prohibited foreclosure sales unless the land sold for at least two-thirds of its appraised value. On circuit, McLean upheld this law, but in a 5-1 decision, the Court reversed McLean and held that the Illinois law violated the Contracts Clause of the Constitution. The Democratic majority led by Taney reflected the Jacksonian opposition to bankruptcy laws. Jackson's economic and banking policies that had been implemented by Taney when he was Secretary of Treasury were in part responsible for the Panic and the *Kinzie* case.⁷⁰ As Chief Justice, Taney struck down laws meant to counteract the harms caused by the policies he had helped develop and implement while serving in Jackson's cabinet. McLean, in a prescient dissent, argued that the Illinois law did not abrogate the contract but only modified

67. See *Train v. City of New York*, 420 U.S. 35, 48 (1975) (finding executive did not have authority to allocate less funds to the states than were allocated by Congress); *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 137-38 (1975) (same).

68. 42 U.S. (1 How.) 311, 322 (1843).

69. See Jenny B. Wahl, *He Broke the Bank, but Did Andrew Jackson also Father the Fed?*, in *CONGRESS AND THE EMERGENCE OF SECTIONALISM: FROM THE MISSOURI COMPROMISE TO THE AGE OF JACKSON 188, 188-220* (Paul Finkelman & Donald R. Kennon eds., 2008) (discussing Andrew Jackson's destruction of the Second Bank of the United States and how that decision affected both the Panic of 1837 and Crisis of 1839).

70. *Id.*

the method of collecting on it. McLean's position reflected Whig economic ideology, which favored bankruptcy laws and government intervention to help mitigate economic downturns. Nearly a century later, in *Home Building & Loan Assn. v. Blaisdell*,⁷¹ the Court effectively adopted McLean's position.

While on the bench, McLean became increasingly nationalistic, reflecting his growing Whig proclivities. He wrote the majority opinion in *Rhode Island v. Massachusetts*,⁷² settling a boundary dispute between those two states. The entire Court agreed that the established boundary should not be changed. But unlike McLean, Chief Justice Taney argued the Court never should have taken jurisdiction over the case in the first place. Similarly, in *Planters' Bank of Mississippi v. Sharp*, McLean wrote a separate concurrence to the majority opinion striking down an 1840 Mississippi law that banned banks from selling notes to other banks. McLean's separate opinion stressed that the Planters' Bank charter of 1830 specifically gave the bank this right, and thus the state law could not take this right away without violating the Contracts Clause of the Constitution.⁷³ This position was similar to McLean's dissent in *Charles River Bridge* because it supported vested charter rights under the Contracts Clause.⁷⁴ Taney and Justice Peter V. Daniel dissented in *Planters' Bank* on classic states' rights grounds.⁷⁵

In Commerce Clause cases, McLean also departed from Taney, who increasingly chipped away at national power. In the *Passenger Cases*, McLean wrote the lead opinion because he was the senior Justice in a 5-4 majority.⁷⁶ The opinion struck down as a violation of the Commerce Clause state laws in New York and Massachusetts that taxed immigrants.⁷⁷ The states' rights Jacksonians—Taney, Daniel, Samuel Nelson, and Levi Woodbury—dissented.⁷⁸ The moderate Jacksonian nationalists—James Wayne, Robert Grier, and John

71. 290 U.S. 398, 445 (1934) (holding that a provision of the Minnesota Mortgage Moratorium Law, which temporarily extended the allotted time for redeeming real property from foreclosure and sale under existing mortgages, "was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society").

72. 45 U.S. (4 How.) 591, 628 (1846).

73. 47 U.S. (6 How.) 301, 344 (1848).

74. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 583 (1837).

75. 47 U.S. at 334.

76. 48 U.S. (7 How.) 283, 392 (1849).

77. *Id.* at 408-09.

78. *Id.* at 464, 494, 518.

Catron—joined McLean.⁷⁹ McLean's position modified the Court's expansive notion of state police powers articulated in *Mayor of New York v. Miln*, a case in which a much younger McLean had endorsed the notion of state police powers that allowed for the regulation of international commerce at the local level.⁸⁰ There, the Court had upheld a New York law requiring ship captains to provide New York City officials with information on immigrants who were brought into the city. *The Passenger Cases* involved an actual tax, rather than a mere reporting system as in *Mayor of New York v. Miln*, which is probably why moderate Jacksonians like Wayne, Catron, and Grier joined McLean in striking down the laws.

A few years later, McLean dissented in *Cooley v. Board of Port Wardens of Philadelphia*,⁸¹ a case in which the Jacksonian states' rights majority further expanded local commerce power at the expense of national power. The law at issue required ships entering Philadelphia's port to hire local pilots. A majority of the Justices saw this as a local regulation consistent with the police powers of the states.⁸² McLean saw it as an attempt to usurp congressional commerce power and, in effect, provide a monopoly for local pilots.⁸³

Finally, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, McLean spoke for a 7-2 majority, with Taney and Daniel dissenting, in an opinion that held that Virginia did not have the power to authorize the construction of a bridge across the Ohio River if the bridge

79. *Id.* at 410–11. The oddest vote in this case was Justice John McKinley's. He was a states' rights, proslavery Alabamian of little distinction, who logically would have been expected to support the right of states to tax immigrants, as did Daniel and Taney. Like Daniel and Taney, McKinley believed the southern states had a concurrent right to exclude free blacks. He further believed that McLean's position would threaten the rights of the southern states to "repulse" or "tax the nuisance" of free blacks from "Jamaica, Hayti, or Africa." *Id.* at 508. McKinley, however, concluded that the "migration and importation" clause of Article I, Section 9, of the Constitution precluded the states from taxing migrants after 1808. *Id.* at 453–55. McKinley argued that the states could not prohibit migrants and immigrants, but that only Congress could. *Id.* His agenda may have been based on his hostility to northern laws emancipating slaves brought into the free states by visiting slaveowners. At the time, the right of transit with slaves was emerging as a far more important issue to the South than the right to exclude free blacks, which the southern states had successfully been doing for nearly three decades. See generally FINKELMAN, AN IMPERFECT UNION, *supra* note 41, at 19 (1981) (discussing late antebellum legal jurisprudence and analyzing how legal institutions, including the Supreme Court, attempted to cope with the legal and ethical conundrums posed by the existence of a Union that included both free and slave states).

80. 36 U.S. (11 Pet.) 102, 143 (1837) (upholding a New York statute requiring all vessels to file a passenger report upon entering to the port of New York as a rightful exercise of New York's state police powers).

81. 53 U.S. (12 How.) 299, 321 (1852).

82. *Id.* at 313–14.

83. *Id.* at 324.

interfered with interstate traffic on the river—as the bridge at issue did.⁸⁴ Virginia had chartered the Wheeling and Belmont Bridge Company to build a railroad bridge across the Ohio River.⁸⁵ The bridge was so low, however, that it interfered with steamships on the river, forcing them to remove their smoke stacks to navigate under the bridge.⁸⁶ Speaking for the Court, McLean held that this violated the power of Congress to regulate interstate commerce.⁸⁷ Taney and Daniel, reflecting a narrow states' rights vision of the Constitution, argued that the Court had no jurisdiction in the case.⁸⁸

In general, McLean emerged as a moderate nationalist on commercial issues, and he kept alive the tradition of Marshall and Story that Congress and the Constitution were superior to the states. In this context, he often resisted the states' rights, anti-nationalist thrust of some of Taney's jurisprudence. Similarly, like Story and Marshall, McLean was more likely to support vested economic interests, which was almost always a minority position on the Taney Court. Beyond this context, however, his disagreements with Taney and the majority of the Court were often minor, and in the majority of cases, McLean voted with Taney and the other Jacksonians in commercial and economic issues. For example, McLean joined the majority in *Propeller Genesee Chief v. Fitzhugh*,⁸⁹ which expanded federal admiralty jurisdiction. Similarly, in the first Wheeling Bridge case,⁹⁰ McLean joined an eight-man majority, with only the extreme states' rights Justice, Daniel, dissenting. As noted above, McLean wrote the majority opinion in the second Wheeling Bridge case⁹¹ and was joined by five other Jacksonians, but not the two most extreme states' rights Jacksonians, Chief Justice Taney and Associate Justice Peter V. Daniel. McLean wrote a separate concurring opinion in *West River Bridge Co. v. Dix*⁹² upholding the right of Vermont to take a bridge by eminent domain. McLean agreed with the Court that this was a constitutionally permissible taking and not a violation of the

84. 54 U.S. (13 How.) 518, 557 (1852). See generally ELIZABETH BRAND MONROE, *THE WHEELING BRIDGE CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND TECHNOLOGY* xvi (1992) (discussing *Pennsylvania v. Wheeling & Belmont Bridge Co.* and theorizing that “[t]he resolution of the conflict inherent in government support of both land and water transportation sheds new light on the role played by law in the evolution of transportation technology”).

85. *Wheeling & Belmont Bridge Co.*, 54 U.S. at 530.

86. *Id.* at 534–35.

87. *Id.* at 566.

88. *Id.* at 580 (Taney, J., dissenting); *id.* at 594 (Daniel, J., dissenting).

89. 53 (12 How.) U.S. 443 (1852).

90. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647 (1850).

91. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).

92. 47 U.S. (6 How.) 507 (1848).

Contracts Clause, as had been the case in *Dartmouth College v. Woodward*.⁹³ Similarly, in an important tax case, *Dobbins v. Commissioners of Erie County*,⁹⁴ the Court unanimously ruled that federal officials were immune from state taxation. This decision reaffirmed Marshall's holding in *McCulloch v. Maryland*.⁹⁵ These and other cases illustrate that while McLean was closer to Marshall, Story, and federalist jurisprudence, he was only sometimes an outlier on the Taney Court on issues of economics and commerce.

On slavery and race, however, McLean carved out a jurisprudence that was markedly different from almost all the other members of the Court.

III. MCLEAN AND SLAVERY: A LONE ANTISLAVERY VOICE IN A SEA OF PROSLAVERY JURISTS

For most of his time on the bench, McLean was a Northerner on a Court dominated by Southerners. Moreover, with a few exceptions, most of the Northerners on the Court were classic doughfaces—including Henry Baldwin, Samuel Nelson, Robert Grier, Levi Woodbury, and Nathan Clifford—who almost always voted with their southern colleagues on cases involving slavery.⁹⁶ Even Joseph Story, who privately disliked slavery, sometimes supported the institution more than was necessary for deciding the immediate legal issues before him. Story's majority opinion in *Prigg v. Pennsylvania*⁹⁷ was the second most proslavery opinion in the Court's history,⁹⁸ surpassed only by Taney's opinion in *Dred Scott*. Story's famed opinion in *The Amistad*⁹⁹ reached an antislavery result (the Africans on that ship were declared free), but the logic of the opinion was hardly antislavery. Overwhelming evidence presented in the lower court showed that the alleged slaves on the ship were African-born and had been imported to Cuba illegally. Thus, Story upheld the lower court's conclusion that the Africans on the ship had to be freed because they were not legally slaves. Story indicated in his opinion, however, that he would have been fully prepared to return the Africans to Cuba *if*

93. 17 U.S. (4 Wheat.) 518 (1819).

94. 41 U.S. (16 Pet.) 435 (1842).

95. 17 U.S. (4 Wheat.) 316 (1819).

96. See *supra* note 20.

97. 41 U.S. (16 Pet.) 539, 608 (1842).

98. Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605 (1993) [hereinafter Finkelman, *Sorting Out Prigg v. Pennsylvania*]; Finkelman, *Story Telling*, *supra* note 41, at 252–56.

99. *The Amistad*, 40 U.S. (15 Pet.) 518, 587 (1841).

they had legally been slaves in Cuba. Indeed, buried in that opinion was the holding that the Cuban-born slave who served as the cabin boy on *The Amistad* was in fact to be returned to his master.

On the Court, McLean stood out for his opposition to slavery. Senator Thomas Hart Benton of Missouri said that McLean was “abolitionist enough for any body outside of a mad house—& his wife is abolitionist enough for all those who ought to be in one.”¹⁰⁰ This was surely an exaggeration, at least about McLean.¹⁰¹ He enforced the Fugitive Slave Acts of 1793¹⁰² and 1850¹⁰³ as a Circuit Justice and on the Supreme Court in such cases as *Jones v. Van Zandt*,¹⁰⁴ *Norris v. Newton*,¹⁰⁵ and *Ableman v. Booth*.¹⁰⁶ He understood that the Constitution contained compromises over slavery, at least with regard to fugitive slaves, and that the courts were obligated to enforce the Fugitive Slave Clause and the laws passed to enforce it.

McLean faced slavery in two contexts: as a Circuit Justice hearing cases in Ohio, Indiana, Illinois, and Michigan, and as a Supreme Court Justice, reviewing cases on appeal. Because his circuit included the lower Midwest, he heard more fugitive slave cases than any other Justice. This forced him to make a critical distinction between his roles. As a Circuit Justice he was able to develop the law in cases of first impression, but when the Supreme Court had already ruled on an issue, he was obligated, as a conscientious jurist, to follow the high court. Thus, he applied precedents and interpretations even if he disagreed with them. On the Supreme Court, however, he was more of a policymaker and was thus free to interpret the Constitution and the federal laws according to his own conscience and judicial theory. The result was an apparent contradiction—but only an apparent contradiction—between the Circuit Justice who upheld the compromises over slavery and the Supreme Court Justice who used all

100. GIENAPP, *supra* note 53, at 314 (1987) (quoting Thomas Hart Benton).

101. His second wife, Sarah Ludlow Garrard, was the daughter of one of the Lane rebels and was very much a committed abolitionist. The Lane rebels were a group of young men who left Lane seminary to “evangelize” for antislavery. ROBERT H. ABZUG, *PASSIONATE LIBERATOR: THEODORE DWIGHT WELD AND THE DILEMMA OF REFORM 74–122* (1980); GILBERT HOBBS BARNES, *THE ANTISLAVERY IMPULSE 1830–1844*, at 74–78 (1933).

102. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

103. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

104. 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7501), *aff'd*, 46 U.S. (5 How.) 215 (1847).

105. 18 F. Cas. 322 (C.C.D. Ind. 1850) (No. 10,307). For a more in-depth discussion of this case, see Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of “Justice Delayed,”* 78 IOWA L. REV. 89, 89 (1992) [hereinafter Finkelman, *Fugitive Slaves*]. He also upheld the 1793 law in *Greathouse v. Dunlap*, 10 F. Cas. 1062 (C.C.D. Ohio 1843) (No. 5742), and *Driskell v. Parish*, 7 F. Cas. 1100 (C.C.D. Ohio 1845) (No. 4089).

106. 62 U.S. (21 How.) 506 (1859).

the tools available to him to challenge slavery. Yet, even on the Supreme Court, McLean recognized that the Constitution had made some compromises over slavery and that he was obligated to implement them. The end result was that McLean clearly was not “abolitionist enough”¹⁰⁷ for true abolitionists, but he was emphatically the most antislavery member of the antebellum Court.

McLean’s personal views on slavery were probably very much like those of Lincoln, who claimed he was “naturally antislavery” and could “not remember when” he “did not so think, and feel.”¹⁰⁸ McLean doubtless would have agreed with Lincoln’s declaration that “[i]f slavery is not wrong, nothing is wrong.”¹⁰⁹ In the first opinion he ever wrote on slavery, at the age of thirty-two, McLean asserted that “SLAVERY, except for the punishment of crimes, is an infringement upon the sacred rights of man: Rights, which are derived from his Creator, and which are inalienable.”¹¹⁰ McLean never wavered from this position, which he had articulated while on the Ohio Supreme Court. But, like Lincoln, McLean was constrained by fidelity to a Constitution that protected slavery in significant ways.¹¹¹ Throughout his judicial career, McLean struggled harder than any other federal judge to work around these constraints.

A. Slavery and the Northwest Ordinance on the Ohio Supreme Court

McLean’s first encounter with slavery came in *Ohio v. Carneal*,¹¹² a habeas corpus action that arose while he was on the Ohio Supreme Court. McLean articulated his opposition to slavery, but he also acknowledged:

From the nature of our federal compact, and the laws of our national legislature, this Court are [sic] bound to respect as property, to a certain extent, that which is made property by the laws of a sister state, however repugnant, in our conception, to justice, and contrary to the policy of our own laws.¹¹³

Thus, he noted that Ohio was obligated to return fugitive slaves to their masters, but, taking a position he would maintain on the U.S.

107. GIENAPP, *supra* note 53, at 314.

108. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 281, 281 (Roy P. Basler ed., 1953).

109. *Id.*

110. *Ohio v. Carneal*, in OHIO UNREPORTED JUDICIAL DECISIONS, PRIOR TO 1823, at 133, 135 (Ervin H. Pollack ed., 1952).

111. For a discussion of the proslavery aspects of the Constitution, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–10 (2d ed. 2001).

112. *Ohio v. Carneal*, *supra* note 110.

113. *Id.* at 135.

Supreme Court, he also asserted that “[t]he right of a citizen of Kentucky to the possession and service of his slave, when presented for judicial investigation, must be tested, like every other right, by the laws governing the case.”¹¹⁴ In other words, McLean insisted that claims to slaves, including fugitive slaves, required due process and evidence. The right of the master had to be proven before the freedom of a black man would be lost.

After setting out these general principles in *Carneal*, McLean turned to the issue at hand, which involved a black man named Richard Lunsford who was claimed as a slave by Thomas D. Carneal, a resident of Cincinnati. Carneal’s father had lived and died in Kentucky, and at his death all of the senior Carneal’s property passed to his wife. The defendant Thomas D. Carneal, as the administrator of his father’s estate, claimed Lunsford. After a careful examination of the complicated facts of the case, McLean concluded that Carneal did not have good title to Lunsford under Kentucky law, and thus he could not hold Lunsford against his will. Lunsford was set free.

McLean followed this technical analysis with a long discussion of slavery in Ohio. He asserted that “according to the immutable principles of natural justice” every slave was “entitled to his freedom” and “that which had its origin in usurpation and fraud, can never be sanctified into a right.”¹¹⁵ As a state judge, McLean had “sworn to support the Constitution of the United States” and was prepared to do so, but he would not go beyond what was required.¹¹⁶ McLean was uncertain whether masters had a right of transit through the states with their slaves in tow or whether “every slave who sets his foot within the state [of Ohio] with his master’s consent” was free.¹¹⁷ But he was certain that “if a man remove into this state with the intention of becoming a resident, and bring with him his slaves, one day, or one hour,” such actions would be “sufficient to manumit them.”¹¹⁸ This had been the case with Lunsford, marking yet another reason that he was free. Even if Carneal had good title to Lunsford under Kentucky law, he had lost ownership of him by bringing him into Ohio because “[n]o citizen ought to introduce, either directly or indirectly, that which the [Ohio] constitution expressly prohibits.”¹¹⁹

114. *Id.*

115. *Id.* at 139.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 141.

McLean's position was clear: if a citizen of Ohio owned a slave in Kentucky, he could not legally bring that slave into Ohio. Nor could a visitor bring a slave into the state and use the slave's services: "[W]herever the master seeks a profit, by the labor of this slave in this state, he forfeits all right to the possession and services of such slave."¹²⁰ Slavery, in McLean's view, violated all natural law as well as the Ohio Constitution and could only be protected in Ohio to the extent the federal Constitution required such protection.

The issues raised in *Carneal* would reemerge when McLean went to the U.S. Supreme Court and faced two interrelated issues: the status of fugitive slaves and the status of slaves in free territories. These issues led to his two most important opinions—his powerful dissents in *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*.

B. Fugitive Slaves and their Abolitionist Allies

Prigg v. Pennsylvania, decided in 1842, was jurisprudentially the most important slavery-related case until *Dred Scott* in 1857.¹²¹ *Prigg* was the first case that the Court heard under the Fugitive Slave Clause of the Constitution and the Fugitive Slave Act of 1793.¹²² With an enormously complex analysis of the Fugitive Slave Clause,¹²³ Justice Story upheld the 1793 law, struck down Pennsylvania's 1826 Personal Liberty Law, and by extension struck down all other state personal liberty laws.¹²⁴ These laws were designed to protect free blacks from kidnappings, in part by providing due process protections to alleged fugitive slaves. Most importantly, Story nationalized the law of slavery, giving masters a common law right to seize fugitive slaves without any judicial superintendence if they could accomplish the seizure without a "breach of the peace or any illegal violence."¹²⁵ Story also held that while state officials ought to enforce the federal Fugitive Slave Act, Congress could not obligate them to do so because Congress did not pay their salaries.

Seven of the eight Justices then sitting on the Court agreed with the outcome of *Prigg* and with most of Story's opinion and

120. *Id.* at 141–42.

121. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), and *The Amistad*, 40 U.S. (15 Pet.) 518 (1841), were probably more famous when they were decided but were less significant as legal precedents.

122. Act of Feb. 12, 1793, ch. VII, 1 Stat. 302 ("An Act respecting fugitives from justice, and persons escaping from the service of their masters.").

123. See generally Finkelman, *Story Telling*, *supra* note 41, at 247–94.

124. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625–26 (1842).

125. *Id.* at 613.

analysis, although Chief Justice Taney and Justice Peter V. Daniel strenuously objected to Story's conclusion that the federal government could not obligate state jurists to enforce the law.¹²⁶ All of the majority Justices agreed with Story that under the Constitution,

the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace or any illegal violence. In this sense, and to this extent this clause of the constitution may properly be said to execute itself; and to require no aid from legislation, state or national.¹²⁷

McLean stood alone, dissenting from the majority opinion that overturned Prigg's conviction for kidnapping and concluded that state personal liberty laws were unconstitutional.¹²⁸ He was particularly unhappy with Story's assertion that the Constitution provided for a right of self-help for slaveowners trying to recover fugitive slaves. In his dissent, Justice McLean pointed out the logical problems of limiting Story's right of self help to instances in which there was no breach of the peace:

But it is said, the master may seize his slave wherever he finds him, if by doing so, he does not violate the public peace; that the relation of master and slave is not affected by the laws of the state, to which the slave may have fled, and where he is found. If the master has a right to seize and remove the slave, without claim, he can commit no breach of the peace, by using all the force necessary to accomplish his object.¹²⁹

Surely if a master had a right to a slave without a judicial hearing, as Story claimed, then the amount of violence or force used to exercise this right should not matter, and this rationale, McLean knew, meant that the majority opinion would bring the law of slavery into the North.

The facts of *Prigg*, which Story mostly ignored and on which only McLean focused, illustrate the problem of the case and the importance of McLean's dissent. In 1837, Edward Prigg and three other men traveled to Pennsylvania, where they seized Margaret Morgan, her husband, and their children as fugitive slaves and brought them before local Justice of the Peace Thomas Henderson to obtain a certificate of removal, as required by the Pennsylvania Personal Liberty Law of 1826. Morgan's parents had been emancipated informally sometime around the War of 1812 by their

126. At first glance the position taken by Taney and Daniel—that Congress can force state officials to enforce the federal law—seems counterintuitive to their strong support for states' rights. However, Taney consistently supported a proslavery nationalism and was willing to expand federal power to protect slavery.

127. *Prigg*, 41 U.S. at 613.

128. *Id.* at 660–61 (McLean, J., dissenting).

129. *Id.* at 668.

owner, John Ashmore. Morgan grew up thinking she was free and had always lived as a free woman in Maryland. Indeed, in 1830, the U.S. Census for Harford County, Maryland, (taken by the county sheriff) listed her as a free woman of color along with her husband, who was born free in Pennsylvania.¹³⁰ In 1832, the Morgans moved to Pennsylvania, and no one in Maryland made any attempt to prevent them from doing so.

In 1837, Ashmore's widow sent her son-in-law and three neighbors, including Edward Prigg, to retrieve Margaret and her children. At least one and maybe more of Margaret's children also had been born Pennsylvania. Given these facts, Justice of the Peace Henderson concluded that Margaret might actually be free and that her husband and her Pennsylvania-born children were clearly free. Thus, he refused to authorize the removal of Margaret and her family. At this point, Prigg and his cohorts seized Margaret and her children (but not her Pennsylvania-born husband) in violation of the Pennsylvania Personal Liberty Law, which regulated the return of fugitive slaves. They took Margaret and her children to Maryland where Mrs. Ashmore soon sold them "to a negro trader . . . for shipment to the South."¹³¹ Prigg subsequently was convicted of kidnapping under Pennsylvania's Personal Liberty Law, and the Pennsylvania Supreme Court upheld the conviction. Prigg then appealed to the U.S. Supreme Court, which overturned his conviction. Story held that the Fugitive Slave Act of 1793 was constitutional and that the federal government had exclusive jurisdiction over the issue.¹³² Thus, the states could implement only the federal law and could not pass any supplementary laws. That this jurisprudence would lead to the kidnapping of Margaret Morgan's free-born children—or even Morgan herself—was of little concern to Justice Story or a majority of the Court. For McLean, however, the effect of the holding on Morgan and her family was a significant issue.

McLean dissented from the outcome of the case and from most of Story's analysis. McLean agreed with Story that the federal government had exclusive power to regulate the return of fugitive slaves.¹³³ But McLean's support for congressional exclusivity was based on his desire to create some measure of protection and due

130. Finkelman, *Story Telling*, *supra* note 41, at 275 (citing U.S. Census, 1830, Manuscript Census for Harford County, Maryland 394).

131. THOMAS C. HAMBLY, ARGUMENT OF MR. HAMBLY, OF YORK, (PA.) IN THE CASE OF EDWARD PRIGG 9 (1842), reprinted in 1 FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE 129 (Paul Finkelman ed., 1988).

132. *Prigg*, 41 U.S. at 617–18.

133. *Id.* at 665 (McLean, J., dissenting).

process for free blacks. McLean explained that, under the Fugitive Slave Act,

[t]he fugitive is presumed to be at large, for the claimant is authorized to seize him. After seizure, he is in custody And the claimant is required to take him before a judicial officer of the state; and it is before such officer his claim is to be made.¹³⁴

But this nationalist position led McLean to emphatically reject Story's notion of self-help. He argued against this right as a matter of constitutional interpretation and legal theory: "Congress have [sic] legislated on the constitutional power, and have [sic] directed the mode in which it shall be executed. The act, it is admitted, covers the whole ground; and that it is constitutional, there seems to be no reason to doubt."¹³⁵ If this were so, could "the provisions of the act be disregarded, and an assumed power set up under the constitution?"¹³⁶ McLean thought such a concept was "wholly inadmissible by any known rule of construction."¹³⁷

As a matter of legal theory, McLean clearly had the better argument. If Congress had exclusive power to enforce the Fugitive Slave Clause of the Constitution, and if the 1793 law was constitutional, then there could be no separate right under the Constitution by which the claimant could act on his own, in disregard of the law. Thus, McLean was the only member of the Court willing to support the Fugitive Slave Act fully and demand that it be applied to all fugitive slave cases. In other words, McLean wanted full judicial superintendence of all fugitive slave returns.

Unlike Story and the rest of the Court, McLean did not think that exclusive federal jurisdiction over fugitive slave rendition precluded state legislation designed to protect the liberty of free blacks. He agreed that the states could not pass laws to obstruct the federal Fugitive Slave Act,¹³⁸ but he emphatically rejected Story's position that allowed a master to "seize and remove" a fugitive "by force," taking him "out of the state in which he may be found, in defiance of its laws . . . which regulate the police of the state, maintain the peace of its citizens, and preserve its territory and jurisdiction from acts of violence."¹³⁹ Indeed, McLean argued that this aspect of

134. *Id.* at 667.

135. *Id.* at 669.

136. *Id.*

137. *Id.*

138. *Id.* at 666 ("[L]aws which are in conflict with the constitution, or the act of 1793 . . . are void.").

139. *Id.*

Story's opinion was an invitation for lawlessness in violation of both state laws and the demands of the Fugitive Slave Act of 1793.

Thus, McLean argued for upholding state personal liberty laws in order to protect both northern and southern institutions. He noted that in the slave states, "every coloured person is presumed to be a slave; and on the same principle, in a non-slave-holding state, every person is presumed to be free, without regard to colour."¹⁴⁰ McLean believed that the free states could protect their free black citizens and "prohibit, as Pennsylvania has done, . . . the forcible removal of a coloured person out of the state."¹⁴¹ McLean argued that these personal liberty laws did not conflict with the Fugitive Slave Act because the Act only authorized "a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it," while the Pennsylvania law only "punishe[d] a forcible removal of a coloured person out of the state."¹⁴² Thus, the personal liberty laws, if enforced properly, would only interfere with the illegal removal of free people—such as Morgan's Pennsylvania-born children—and would not prevent the return to bondage of an actual fugitive slave. McLean argued that every state had an "inherent and sovereign power . . . to protect its jurisdiction and the peace of its citizens, in any and every mode which its discretion shall dictate."¹⁴³

McLean happily accepted Story's nationalist vision that the federal government had exclusive power over the return of *fugitive slaves*, but at the same time, he argued that the northern states could protect their free blacks from being kidnapped and could guarantee a fair procedure for anyone seized as a fugitive slave. Meanwhile, he was willing to concede that the South could treat all blacks as it wished and could presume that all blacks in its jurisdiction were slaves.

Justice Story refused to require state officials to enforce the Fugitive Slave Act of 1793. In the first use of what today is called the concept of unfunded mandates, Justice Story said that state officials could not be required to enforce the Fugitive Slave Act because the federal government did not pay their salaries. McLean, however, would have required state officials to enforce the Act, asserting that "where the constitution imposes a positive duty on a state or its officers to surrender fugitives, congress may prescribe the mode of

140. *Id.* at 669.

141. *Id.*

142. *Id.*

143. *Id.* at 673.

proof, and the duty of the State officers.”¹⁴⁴ He believed that the issue of fugitives from both justice and labor was significant enough to warrant an exception to the general rule that “Congress can no more regulate the jurisdiction of the state tribunals, than a state can define the judicial power of the Union.”¹⁴⁵ The first two sections of the Act of 1793 had dealt with fugitives from justice, and in that portion of the law Congress had imposed obligations on state governors that never had been challenged. McLean believed that Congress could, “on the same principle, require appropriate duties in regard to the surrender of fugitives from labour, by other state officers.”¹⁴⁶ This was a compromise McLean was willing to accept: the states would conscientiously enforce the federal law and return actual fugitive slaves, but at the same time, the northern states could protect free blacks from being kidnapped and also give alleged fugitives a chance to prove their free status in the state where they were seized—close to the witnesses who could testify on their behalf.

Over the next two decades, the issue of fugitive slaves would be central to the growing sectional tensions over slavery. After *Prigg*, most northern states withdrew any support for the return of fugitive slaves,¹⁴⁷ leading to the passage of the Fugitive Slave Act of 1850, which only exacerbated sectional tensions. McLean offered a different approach, one that would have recognized the interest that free states had in protecting their populace from kidnapping, while at the same time recognizing that Southerners had a constitutional right to recover fugitive slaves.¹⁴⁸ It is not clear that McLean’s compromise would have worked. Cases like Margaret Morgan’s show just how slippery the definitions were. Morgan claimed she was free because she had never been treated as a slave while Maryland asserted that as the daughter of a slave she was still a slave because neither she nor her parents had ever been formally emancipated. Pennsylvania claimed that Morgan’s children born in that state were free because no slave could be born in the state, while Maryland claimed that if Morgan was a fugitive slave living in Pennsylvania, her status and that of her children was governed by Maryland law. Given the competing interests of the free states and the slaves states, state laws

144. *Id.* at 666.

145. *Id.* at 664.

146. *Id.* at 665.

147. Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Antislavery Use of a Proslavery Decision*, 25 CIV. WAR HIST. 5, 35 (1979).

148. See *Prigg*, 41 U.S. at 670–71 (McLean, J., dissenting) (arguing that a statute designed to “prohibit[] the forcible abduction of persons of color” does not conflict with the Constitution, but that “the master [is] entitled to his property”).

like Pennsylvania's would have been a thorn in the side of claimants. Also, there was no guarantee that state officials would have cooperated with the enforcement of the federal law.¹⁴⁹ Even McLean conceded that his solution might not have been effective:

This power may be resisted by a state, and there is no means of coercing it. In this view, the power may be considered an important one. So the supreme court of a State may refuse to certify its record on a writ of error to the supreme court of the Union, under the 25th section of the judiciary act. But resistance to a constitutional authority by any of the State functionaries, should not be anticipated; and if made, the federal government may rely upon its own agency in giving effect to the laws.¹⁵⁰

However imperfect, McLean's was perhaps a more viable solution to the constitutional compromise than Story's solution because it would have created a reciprocal understanding that would have benefited both sides. Story's opinion, which gave the North no opportunity to protect its free blacks and thus forced the North to refuse to cooperate with the return of fugitives, surely was not the answer. "McLean offered a solution to the problem that, however cumbersome, might have reduced tensions over the growing problem of fugitive slaves. McLean, however, was a lone dissenter on an increasingly proslavery Court."¹⁵¹

Following *Prigg*, McLean consistently upheld the right of masters to recover fugitive slaves when the blacks in question were actually fugitives. In *Jones v. Van Zandt*¹⁵² and *Norris v. Newton* (popularly known as the *South Bend Fugitive Slave Case*),¹⁵³ McLean presided over trials in which abolitionists were saddled with huge financial losses for helping slaves escape from their masters. McLean may have had some sympathy for these abolitionists, but he could not countenance law breaking.¹⁵⁴

In *Van Zandt*, McLean surely must have felt some anguish at seeing a relatively poor farmer bankrupted.¹⁵⁵ Van Zandt had offered a

149. *See id.* at 673 ("It appears, in the case under consideration, that the state magistrate before whom the fugitive was brought refused to act.").

150. *Id.* at 666.

151. Finkelman, *Sorting Out Prigg v. Pennsylvania*, *supra* note 98, at 650.

152. 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7501), *aff'd*, 46 U.S. (5 How.) 215 (1847).

153. 18 F. Cas. 322 (C.C.D. Ind. 1850) (No. 10,307). For an in-depth discussion of this case see Finkelman, *Fugitive Slaves*, *supra* note 105, at 93–195.

154. *See Van Zandt*, 13 F. Cas. at 1045–46 (stating that much had been made in argument about "the laws of nature, of conscience, and of the rights of conscience," but that, when the laws indicated to the contrary "[w]e are bound to sustain them").

155. *See id.* at 1046 (noting that the verdict entered against Van Zandt was twelve hundred dollars); *see also* SAMUEL P. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES V. JOHN VANZANDT 6 (1847) ("The defendant John Van Zandt, is an old man, of limited education and slender means . . .").

ride to a group of blacks walking along a road outside of Cincinnati.¹⁵⁶ Slave catchers later overtook Van Zandt's wagon and captured all but one of the fugitives.¹⁵⁷ Jones successfully sued Van Zandt for the value of the missing slave plus the cost of recovering the others.¹⁵⁸ McLean might have used the facts of the case to support Van Zandt on the ground that he had no notice that the blacks he took on as passengers were actually fugitives, but McLean probably believed that Van Zandt, a known abolitionist,¹⁵⁹ was not innocent. Indeed, he almost certainly knew what he was doing and very well may have been driving his wagon on that road at that time because it was a prearranged pick up spot for these fugitives.¹⁶⁰

The situation in *Newton* probably engendered less sympathy. The case began when a mob had surrounded Norris and forcibly took his slaves to South Bend, Indiana, where a local judge set them free.¹⁶¹ The leaders of the mob included the local sheriff, the leading stockholders of the Indiana State Bank, and other important citizens of the community.¹⁶² While he may have approved of their hostility to bondage, McLean could not condone such lawless behavior.

Cases like *Van Zandt* and *Norris v. Newton* only involved money, and that may have made them easier for McLean to decide than other cases. Occasionally, as in *Miller v. McQuerry*,¹⁶³ McLean actually had to remand a fugitive slave to an owner. As Robert Cover demonstrated, McLean was deeply torn by those decisions because he was personally more opposed to slavery than any other Supreme Court Justice, and probably more than any other federal judge.¹⁶⁴

In *McQuerry*, McLean offered a summary of the evidence that left no doubt that under Kentucky law, Miller owned McQuerry:

From the facts proved, there can be no doubt that the fugitive, under the laws of Kentucky, is the slave of the claimant, and that he absconded from his service a little more than four years ago. The testimony is clear on this point. No attempt has been

156. *Van Zandt*, 13 F. Cas. at 1040.

157. *Id.*

158. *Id.* at 1045.

159. See ALBERT B. HART, *SLAVERY AND ABOLITION, 1831-1841*, at 281-82 (1936) (describing Van Zandt as "an abolitionist, and official of the Underground Railroad").

160. See ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868*, at 166 (2006) (asserting that Van Zandt's farm was a known stop on the Underground Railroad).

161. 18 F. Cas. 322, 322-24 (C.C.D. Ind. 1850) (No. 10,307).

162. See Finkelman, *Fugitive Slaves*, *supra* note 105, 99-116 (describing the members of the mob and later suits lodged against several of them).

163. 17 F. Cas. 335, 341 (C.C.D. Ohio 1853) (No. 9583) ("[U]nder the law, I am bound to remand him to the custody of his master.").

164. COVER, *supra* note 27, at 243-49.

made to controvert the facts, or to impeach the credibility of the witnesses. Of the many cases my judicial duties have required me to examine, where damages were claimed for aiding the escape of fugitives from labor, no case has been proved with more distinctness and fullness than this one. No one capable of comprehending evidence can doubt, that the fugitive lived with the claimant, as his slave, for many years, and that he left that service, without the leave of his master, several years ago.¹⁶⁵

After rejecting arguments by McQueryry's lawyers that the Fugitive Slave Act of 1793 was unconstitutional,¹⁶⁶ McLean declared, "I am bound to remand him to the custody of his master, with authority to take him to the state of Kentucky, the place from whence he fled."¹⁶⁷

This was not simple formalism. McLean heard *McQueryry* while riding circuit and had always believed that, as a trial judge, he was not in a position to make policy. As early as his opinion in *Carneal*, McLean had asserted that "[j]udicial functions can but seldom be exercised in a discussion of policy: this is the peculiar province of the legislator. . . . The course of the judge is marked by law; and the construction of which he may only exercise a legal discretion."¹⁶⁸ However much it must have pained him to return McQueryry to his master, McLean had no other options as long as he remained on the bench. As a judge, he had an obligation to obey the laws of the land and enforce the Constitution.

On the Supreme Court, McLean continued to uphold the Fugitive Slave Acts of 1793 and 1850 in *Jones v. Van Zandt*,¹⁶⁹ discussed above, and *Ableman v. Booth*,¹⁷⁰ although he did not write opinions in these cases. McLean never doubted that the Constitution required the return of fugitive slaves, and in this sense he agreed with the proslavery majority on the Court.¹⁷¹ But, unlike his proslavery brethren, McLean also believed that the free states had a right to ban slavery, that the free states had a right to protect free blacks from being kidnapped, and that the Fugitive Slave Clause had to be applied narrowly and carefully to balance slavery and freedom.¹⁷² Finally, he

165. 17 F. Cas. at 336.

166. *Id.* at 337–40.

167. *Id.* at 341.

168. *Ohio v. Carneal*, *supra* note 110, at 136.

169. 46 U.S. (5 How.) 215, 229 (1847), *aff'g* 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7501) (reaffirming the constitutionality of the Fugitive Slave Act of 1793).

170. 62 U.S. (21 How.) 506 (1858).

171. *See, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 667 (McLean, J., dissenting) ("Both the constitution and the act of 1793, require the fugitive from labor to be delivered up, on claim being made [to the person] to whom service is due.").

172. *Compare id.* at 669–71 (McLean, J., dissenting) (finding within the sovereignty of free states the right to ban slavery and prevent parties from capturing free black citizens by instituting a presumption that they were free rather than fugitive), *with id.* at 637–38 (Baldwin,

emphatically believed that Congress had the power to ban slavery in the territories.¹⁷³ These views led McLean to support freedom where he could, both on circuit and on the Supreme Court.

C. *The Jurisprudence of Free Soil*

In *Carneal*, McLean had asserted emphatically the right of Ohio to free a slave who was not a fugitive slave.¹⁷⁴ While on the Supreme Court, McLean reiterated the views set out in *Carneal* in a number of cases. His first opportunity came while riding circuit in *Spooner v. McConnell*.¹⁷⁵ Here, McLean affirmed his view that Ohio was forever to be free from slavery. *Spooner* had nothing to do with slavery, but McLean used the case to assert that the Northwest Ordinance prohibited Ohio from allowing slavery “without the consent of the original states.”¹⁷⁶ This was a particularly strong position because McLean argued that even if the people of Ohio wanted to introduce slavery in the state, they could not do so. In McLean’s view, Ohio did not have complete power over its own destiny because it could not abrogate the provisions of the Northwest Ordinance. But McLean happily exploited this argument to protect Ohio from slavery forever:

The institution of slavery existed in many of the original states, at the period of the adoption of the ordinance of ‘87; and, in several of them, it continues to exist. Yet, the ordinance expressly inhibits the introduction of slavery in any of the states to be formed within the territory; and these states have made this provision of the ordinance, a part of their constitution. In this case then, it is clear, that some of the original states possess rights, and exercise a species of jurisdiction, which is prohibited to Ohio, and other states.¹⁷⁷

McLean further developed his ideas about free soil in his first important Supreme Court opinion involving slavery—his dissent in

J., concurring) (contending that authority to legislate on slave issues rested “exclusively in congress”).

173. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 540–47 (1857) (McLean, J., dissenting) (dissenting vehemently from the Court’s judgment that Congress had no authority to ban slavery in the territories).

174. *Ohio v. Carneal*, *supra* note 110, at 140 (“If a citizen of another state employ his slaves to labor in this state for his benefit, by such an act, he forfeits the right of property in his slaves.”).

175. 22 F. Cas. 939 (C.C.D. Ohio 1838) (No. 13,245).

176. *Id.* at 943.

177. *Id.* at 951. Ironically, one plaintiff in this case, Lysander Spooner, became one of the most radical abolitionists of the antebellum period. See, e.g., Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 9 (2006) (describing Spooner as among the preeminent radical abolitionists of his day). Even though he lost this case, which involved land he owned in Ohio, Spooner was probably happy to have helped prevent slavery from ever spreading into the Old Northwest.

Groves v. Slaughter,¹⁷⁸ a virtually forgotten case involving a commercial transaction. In 1836, Moses Groves, a Mississippi planter, purchased a large number of slaves from Robert Slaughter of Louisiana. Groves gave Slaughter a \$7,000 promissory note for these slaves but then refused to honor the note, claiming the sale was void under the Mississippi Constitution, which prohibited the importation of slaves “as merchandize, or for sale.”¹⁷⁹ The provision was not an attempt to limit slavery in Mississippi; rather, it was designed to prevent an outflow of capital from Mississippi to other states.¹⁸⁰ Migrants to the state were free to bring slaves with them, and by implication residents could travel to other states to purchase slaves and bring them back to Mississippi.¹⁸¹ But under the constitutional provision, traders like Slaughter could not bring unsold slaves into the state as merchandise or ship slaves into the state to purchasers like Groves.¹⁸² Significantly, Groves did not offer to return the slaves.¹⁸³ Slaughter successfully sued Groves in Louisiana federal court, and Groves, who was represented by Robert Walker, one of Mississippi’s U.S. senators, appealed to the Supreme Court.¹⁸⁴ Slaughter retained the services of Henry Clay and Daniel Webster.¹⁸⁵ Beyond the interests of the immediate parties, more than \$3 million was at stake because of the numerous slaves sold to planters in Mississippi.¹⁸⁶

In a straightforward opinion, Justice Smith Thompson ruled that the Mississippi constitutional provision was not in force until 1837 when Mississippi passed enabling legislation.¹⁸⁷ The 1836 contract for the sale of slaves was therefore valid, and Groves was obligated to pay Slaughter.¹⁸⁸ In reaching this conclusion, Thompson avoided the central constitutional question: did Mississippi’s ban on slaves as merchandise violate the Commerce Clause of the U.S. Constitution?¹⁸⁹

Although Thompson avoided the issue, McLean did not. Expressing his growing commercial nationalism, McLean endorsed the

178. 40 U.S. (15 Pet.) 449 (1841).

179. *Id.* at 451.

180. *See id.* at 463 (stating that the provision was directed at “transient merchants”).

181. *Id.* at 500.

182. *Id.* at 501.

183. *Id.* at 452.

184. *Id.* at 450–52.

185. *Id.*

186. *Id.* at 476.

187. *Id.* at 502–03.

188. *Id.* at 503.

189. *Id.*

idea that Congress could regulate all interstate commerce, noting that the “necessity of a uniform commercial regulation, more than any other consideration, led to the adoption of the federal constitution.”¹⁹⁰ Having taken this strong position, however, McLean asserted that slaves were not “merchandize” under the Commerce Clause, but “persons,” and therefore the states were free to prohibit the introduction of slaves into their domains.¹⁹¹ McLean asserted that Ohio could not ban the importation “of the cotton of the south, or the manufactured articles of the north,”¹⁹² but he defended the right of his home state to ban slaves: “The power over slavery belongs to the states respectively. It is local in its character, and in its effects; and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it.”¹⁹³ Here McLean’s antislavery stance dovetailed with proslavery arguments that the national government could not touch slavery in the states where it existed. But this dovetailing was mere coincidence because McLean took this position to protect the North’s right to exclude slaves. He asserted that “[e]ach state has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population.”¹⁹⁴ In one of the strongest condemnations of slavery articulated by an antebellum Supreme Court Justice, McLean concluded:

The right to exercise this power, by a state, is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil, rests upon the law of self-preservation; a law vital to every community, and especially to a sovereign state.¹⁹⁵

Slavery was an “evil,” and McLean insisted that his state could choose to have nothing to do with it.¹⁹⁶ Implicit in McLean’s arguments, however, was the notion that Congress might have the power to regulate, or even ban, the interstate slave trade.

A year after *Groves*, McLean wrote his important dissent in *Prigg*. He continued to uphold the Fugitive Slave Act,¹⁹⁷ as he said he must do in his *Prigg* opinion,¹⁹⁸ but he also continued to try to protect

190. *Id.* at 504 (McLean, J., dissenting).

191. *Id.* at 506–07.

192. *Id.* at 507.

193. *Id.* at 508.

194. *Id.*

195. *Id.*

196. *Id.*

197. *E.g.*, *Jones v. Van Zandt*, 13 F. Cas. 1040, 1045–46 (C.C.D. Ohio 1843) (No. 7501).

198. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 669 (McLean, J., dissenting) (“The act, it is admitted . . . is constitutional, there seems no reason to doubt.”).

the concept of freedom in the North. The tension between free soil and the Fugitive Slave Clause of the Constitution intersected in 1845 in *Vaughn v. Williams*.¹⁹⁹ In that case McLean, riding circuit, found for Williams, an abolitionist who had helped some fugitive slaves escape.²⁰⁰ At first glance, the facts of the case seemed clear and unfavorable to Williams. Vaughn's three slaves had escaped to Indiana.²⁰¹ He found them, but was soon surrounded by white friends of the fugitives, who were led by Williams.²⁰² The slaves escaped, and Vaughn sued Williams for the value of the slaves.²⁰³ Although he never liked enforcing civil judgments against abolitionists like Williams, McLean usually charged juries to find in favor of the slaveowner because the Constitution and the Fugitive Slave Acts protected the owner's right to recover his slaves.²⁰⁴ But this case included another set of facts.

Williams proved that, before Vaughn had purchased these slaves, they had been owned by a Kentuckian named Tipton.²⁰⁵ In 1835, Tipton took the slaves to Illinois, a free state, where he kept them for about six months.²⁰⁶ Tipton then took the slaves to Missouri and sold them.²⁰⁷ Tipton returned to Illinois where he lived for at least two years and voted as an Illinois resident.²⁰⁸ This evidence was enough for McLean to declare that the three blacks had become free because they had lived in Illinois.²⁰⁹ Had Tipton merely been passing through Illinois, the slaves might not have gained their freedom. But he had lived there with his slaves for six months and had clearly become a resident of the state.²¹⁰ This was enough to free the slaves,²¹¹

199. 28 F. Cas. 1115 (C.C.D. Ind. 1845) (No. 16,903).

200. *Id.* at 1118.

201. *Id.* at 1116–17.

202. *Id.* at 1117.

203. *Id.*

204. *See, e.g.,* *Norris v. Newton*, 18 F. Cas. 322, 326–27 (C.C.D. Ind. 1850) (No. 10,307) (stating in the jury charge that the defendant “cannot claim a right to do that which the law forbids”); *Ray v. Donnell*, 20 F. Cas. 325, 329 (C.C.D. Ind. 1849) (No. 11,590) (“We must stand firmly by the principles of the constitution, and maintain the rights secured by it . . . free from all influences which do not arise from the facts and law of the case.”); *Giltner v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848) (No. 5433) (“The defendants’ counsel . . . have discussed the abstract principle of slavery. It is not the province of this court, or of this jury, to deal with abstractions of any kind.”); *Jones v. Van Zandt*, 13 F. Cas. 1040, 1046 (C.C.D. Ohio 1843) (No. 7501) (“It is your duty to follow the law . . .”).

205. *Vaughn*, 28 F. Cas. at 1116.

206. *Id.*

207. *Id.* at 1116–17.

208. *Id.* at 1117.

209. *Id.* at 1118.

210. *Id.*

which meant that Vaughn had no property interest in them and could not claim them under the Fugitive Slave Act.²¹² Nor could he sue Williams for rescuing them from what was, in fact, his unlawful custody.²¹³

In *Strader v. Graham*, McLean continued to develop a jurisprudence of freedom for the North, in contrast to the Court's jurisprudence of slavery. McLean was especially intent on protecting the right of Ohio and the states carved out of the old Northwest to remain untainted by slavery, except where absolutely required to by the Constitution.²¹⁴ Like *Groves v. Slaughter*, *Strader* did not directly involve any slaves or abolitionists.²¹⁵ Graham was the owner of three slaves who had boarded Strader's steamboat, escaped to Ohio, and then moved to Canada.²¹⁶ Graham successfully sued Strader for the value of the slaves under a Kentucky law that made steamboat owners liable for the loss of slaves who escaped on their ships.²¹⁷ Strader appealed to the U.S. Supreme Court on the ground that the slaves actually had become free because Graham previously had given them permission to go to Indiana and Ohio, where they performed as musicians.²¹⁸ Under McLean's decision in *Vaughn v. Williams*, these slaves would have had a strong claim to freedom if they had been captured while running to Canada. Had their status come before McLean while on circuit, he might very well have ruled that allowing the slaves to earn money in Indiana was de facto emancipation.

But, in *Strader* the status of the slaves was not before the Supreme Court.²¹⁹ Strader argued that, under the Northwest Ordinance, the slaves had become free and Kentucky was bound to follow that Ordinance because it was a federal law.²²⁰ Speaking for a unanimous Court, however, Chief Justice Taney held that whether Graham's slaves were free could only be determined by Kentucky law because that was where the case originated. Taney declared:

Every State has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of

211. *Id.*

212. *See id.* ("As the claim to the services of these persons is not sustained, if you believe the evidence . . . you will find for the defendant.").

213. FINKELMAN, AN IMPERFECT UNION, *supra* note 41, at 248-51.

214. 51 U.S. (10 How.) 82, 97 (1850) (McLean, J., concurring).

215. *Id.* at 92-93.

216. *Id.*

217. *Id.* at 93-94.

218. *Id.*

219. *Id.*

220. *Id.* at 94.

the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The [Kentucky] Court of Appeals have determined, that by the laws of the State they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.²²¹

Taney rejected on two grounds Strader's claim that the slavery provision of the Northwest Ordinance had freed these slaves. First, Taney argued that the Ordinance could have no effect beyond its own jurisdiction, and the Ordinance "certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them."²²² Thus, the Ordinance, in Taney's mind, was like a state law rather than a national law and could not have any legal effect south of the Ohio River. Taney asserted that the Ordinance "could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State, nor give this court jurisdiction upon the subject."²²³ Moreover, in his second point, Taney determined that the Northwest Ordinance was no longer in force anyway, and thus it was not binding on the nation or any of the states.²²⁴

McLean agreed that the court lacked jurisdiction in *Strader* and that the outcome was therefore correct.²²⁵ He presumably agreed with Taney that the states generally had the power to determine the status of people within their jurisdiction because this conclusion dovetailed with his opinion in *Vaughn v. Williams*. As if to reiterate this point, McLean reminded his brethren that slavery was banned under the Ohio Constitution, and "all questions of freedom must arise under the constitution, and not under the Ordinance."²²⁶ However, at the same time, he chided Taney for his comments on the status of the Ordinance, noting that since Kentucky was not bound to follow the Ohio Constitution, and the Court therefore had no jurisdiction in the case, "any thing that is said in the opinion of the court, in relation to

221. *Id.* at 93–94 (emphasis omitted).

222. *Id.* at 94.

223. *Id.*

224. *Id.*

225. *Id.* at 97 (McLean, J., concurring).

226. *Id.*

the Ordinance, beyond this, is not in the case, and is, consequently, extrajudicial."²²⁷

Under *Strader*, the northern states presumably could liberate any slave within their jurisdiction *except* a fugitive slave, and the slave states could determine that any black person, even a citizen of a free state, could be held as a slave. Such a tradeoff made sense to McLean because he doubtless assumed that few free blacks would actually go into the South and that most southern states would not take the extreme position of enslaving free people.²²⁸ At the same time, *Strader* allowed McLean to reiterate that his state was a free state and that the Constitution of Ohio would protect the liberty of all people within its jurisdiction.²²⁹

D. Dred Scott: McLean's Forgotten Dissent

Six years after *Strader*, the Supreme Court decided its most important slavery-related case and arguably its most important case since *McCulloch v. Maryland*.²³⁰ The literature on *Dred Scott v. Sandford*²³¹ is voluminous, and the case has been analyzed and reanalyzed for a century and a half.²³²

227. *Id.* McLean would of course make similar arguments in *Dred Scott*, noting that once Taney found he lacked jurisdiction in that case, he could not then pass judgment on the validity of the Missouri Compromise. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 589 (1857) (Curtis, J., dissenting). Justice McLean made a similar point in his dissent. Numerous Republican leaders, especially Abraham Lincoln, would make the same comments about Taney's opinion in *Dred Scott*. *E.g.*, Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 60 & n.95 (1993).

228. Since the 1820s South Carolina had laws in place allowing for the enslavement of free blacks who moved there. Paul Finkelman, *States' Rights North and South in Antebellum America*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125, 130–32 (Kermit Hall & James W. Ely, Jr., eds., 1989). On the eve of the Civil War, Arkansas would pass a law requiring free blacks to leave the state or be enslaved. An Act to Remove the Free Negroes Mulattoes from this State, Act of Feb. 12, 1859, No. 151, 1859 Ark. Acts 175–78.

229. *Strader*, 51 U.S. (10 How.) at 97 (McLean, J., concurring).

230. 17 U.S. (4 Wheat.) 316 (1819).

231. 60 U.S. (19 How.) 393 (1857).

232. Most importantly, see AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857 (2006); THE DRED SCOTT CASE: HISTORICAL AND CURRENT PERSPECTIVES ON RACE AND LAW (David Konig et al. eds., forthcoming 2010); WALTER EHRLICH, THEY HAVE NO RIGHTS (1979); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (1997); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3 (2007) [hereinafter Finkelman, *The Court's Most Dreadful Case*]; Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant*, 12 LEWIS & CLARK L. REV. 1219 (2008).

The general outline of the case is well known. Scott was born a slave in Virginia, taken to Missouri when he was between twenty-five and thirty, and sold to Dr. John Emerson, a U.S. Army surgeon.²³³ Emerson took Scott to Fort Armstrong in Illinois and then to Fort Snelling in what was then the Wisconsin Territory (and is today Minnesota).²³⁴ Illinois was a free jurisdiction under the Northwest Ordinance and the Illinois Constitution of 1819.²³⁵ Both the Missouri Compromise of 1820²³⁶ and the Wisconsin Enabling Act²³⁷ prohibited slavery in the Wisconsin Territory. While at Fort Snelling, Scott married another slave, Harriet Robinson, and eventually they had two children.²³⁸ After his master died, Scott tried to buy his freedom, but Emerson's widow, Irene Sanford Emerson, refused to allow him to do this.²³⁹ Scott then sued for his freedom, arguing that he had become free through his residence in two free jurisdictions.²⁴⁰ Since 1824,²⁴¹ the Missouri courts had held that slaves who were taken to free jurisdictions and held there for a long time, or allowed to work there even for a short time, were free.²⁴² This was precisely the issue that McLean had addressed in *Vaughn v. Williams*.²⁴³ Following a long line of Missouri precedents, a St. Louis jury declared Scott free in 1850.²⁴⁴ However, in 1852, the Missouri Supreme Court reversed this result, explicitly declaring that it would no longer follow the old precedents.²⁴⁵ Such a result was perfectly legitimate under *Strader v. Graham* because, as the Court had held there, each state was free to

233. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 13–14.

234. *Id.*

235. *Id.* at 14–15.

236. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548 (Missouri Enabling Act), *invalidated* by *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

237. Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 10, 16 (establishing the territorial government of Wisconsin). This law went into effect on July 23, 1836. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 15 n.6.

238. *Dred Scott*, 60 U.S. at 530 (McLean, J., dissenting).

239. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 19–20.

240. *Id.* at 13–14.

241. *Winy v. Whitesides*, 1 Mo. 472 (1824).

242. *Id.* For a full history of this case see FINKELMAN, AN IMPERFECT UNION, *supra* note 41, at 217–28 (describing *Winy* and its progeny in the Missouri courts and their effect on *Dred Scott*).

243. See *supra* notes 199–213 and accompanying text.

244. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 22–23.

245. *Scott v. Emerson*, 15 Mo. 576, 577–81 (1852), *aff'd in part, reversed in part sub nom. Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (rejecting a long line of precedent to find that Scott had returned to a condition of slavery after returning to the state, even if entry into free states had made him free there).

decide the status of all the blacks within its jurisdiction.²⁴⁶ At this point, the case should have been over.

However, an odd twist of fate gave Dred Scott a new chance for freedom. By 1852, Mrs. Emerson had moved to Massachusetts and married Dr. Calvin Chaffee, who was distinctly antislavery.²⁴⁷ Chaffee would later become a Republican congressman who would denounce slavery in the House of Representatives.²⁴⁸ As the wife of an antislavery Massachusetts physician, Irene Sanford Emerson Chaffee transferred ownership of Dred Scott to her brother, John F. A. Sanford, a New York businessman with professional and personal ties to St. Louis.²⁴⁹ As long as Sanford kept Scott in Missouri, he could continue to own him, even though he was legally a citizen of New York.²⁵⁰ Scott's newest lawyer, Roswell Field, a native of Vermont, took advantage of these new circumstances to sue Sanford for false imprisonment and assault and battery under federal diversity jurisdiction.²⁵¹ Sanford responded with a plea in abatement, arguing that Scott never could sue in diversity because he was black and no black person ever could be a citizen of Missouri.²⁵² Sanford also argued that Scott was his slave, and thus, he was legally entitled to confine him or chastise him.²⁵³ Scott replied that he had become free by living in Illinois and the Wisconsin Territory, and if he were free and living in Missouri, he must be a citizen for purposes of diversity jurisdiction.²⁵⁴

U.S. District Judge Robert Wells ultimately ruled that Scott could sue in diversity because if he were free, then he should be able to sue in federal court.²⁵⁵ But, after hearing the case, Wells ruled on the merits that Scott was still a slave because the federal courts were obligated to follow the common law of the state where the case was filed.²⁵⁶ Scott then appealed to the U.S. Supreme Court. Because he

246. *Strader v. Graham*, 51 U.S. (10 How.) 82, 93–94 (1850).

247. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 23–24.

248. *Id.* at 23–24, 38.

249. *Id.* at 23–24. John Sanford spelled his name with only one “d.” However, the clerk of the Supreme Court added a “d” to his name, and thus the case is forever known and cited as *Dred Scott v. Sandford*.

250. *Id.*

251. *Id.* at 24–25. See generally KENNETH C. KAUFMAN, *DRED SCOTT'S ADVOCATE: A BIOGRAPHY OF ROSWELL M. FIELD* (1996).

252. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 25–26.

253. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 471 (1857) (Daniel, J., concurring).

254. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 13, 25–26.

255. *Id.* at 26.

256. *Id.* at 27.

won the case, Sanford did not appeal the judge's adverse ruling on his plea in abatement.²⁵⁷

The case was first argued in the December 1855 Term, but in the spring of 1856, the Court declined to decide the case and instead held it over until the following Term.²⁵⁸ The Court heard arguments in December 1856, which was *after* the presidential election of 1856.²⁵⁹ The Court then announced its decision two days after President Buchanan was inaugurated.²⁶⁰ In a 7-2 decision, the Court upheld Judge Wells's ruling.²⁶¹ The outcome of the case, however, is not what made it famous. The Court might easily have affirmed the lower court under *Strader v. Graham*. Or the Court might have declared that it lacked jurisdiction on the ground that free blacks were not citizens of Missouri, and thus Scott, even if free, had no standing to sue in federal court.

Instead, in a sweeping and shocking decision, Chief Justice Taney held that: (1) blacks never could be citizens of the United States, even if they were full citizens in the states in which they lived, and thus could never sue in diversity;²⁶² (2) Congress could not pass laws to regulate the territories;²⁶³ and (3) the ban on slavery in the Missouri Compromise was unconstitutional because slaveowners had a constitutional right to take their property into any federal territory, and thus any law emancipating slaves within the jurisdiction of Congress would constitute a taking of private property without due process of law.²⁶⁴

Justices McLean and Benjamin Robbins Curtis dissented with detailed responses to Taney's opinion. The Curtis dissent was reprinted and distributed throughout the North during the election campaigns from 1857 until the presidential election of 1860.²⁶⁵ Curtis was not known to be antislavery; indeed, he was considered to be a proslavery doughface.²⁶⁶ His political ties were to the conservative Boston merchants, known as "Cotton Whigs," who were deeply

257. *Dred Scott*, 60 U.S. at 530–31 (McLean, J., dissenting).

258. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 28–29.

259. *Id.* at 28.

260. *Id.* at 46.

261. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 *HAMLIN L. REV.* 1, 6–7 (1996).

262. *Dred Scott*, 60 U.S. at 422–23.

263. *Id.* at 449–52.

264. *Id.* at 452–54.

265. *E.g.*, Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 45 (describing newspaperman and Republican Horace Greeley's reprinting of the Curtis dissent in pamphlet form to stoke antislavery political spirit).

266. *Id.* at 30–31 (referring to Curtis as "not even moderately antislavery").

interested in a steady source of cotton for their factories and utterly unconcerned about the nature of the labor that produced the cotton.²⁶⁷ Thus, Curtis's vigorous assault on Taney's opinion was a welcome surprise to Republicans and other opponents of slavery. Curtis's seventy page dissent overshadowed McLean's shorter opinion.

McLean, however, made a number of points that Curtis did not. Relying on his nearly thirty years on the bench—he was by this time the most senior Justice on the Court²⁶⁸—McLean noted that no one had appealed the plea in abatement, and thus it was “rather a sharp practice, and one which seldom, if ever, occurs” for the court to raise the jurisdictional issue on its own.²⁶⁹ This was especially so since “[n]o case was cited in the argument as authority, and not a single case precisely in [sic] point is recollected in our reports,” and “[t]he pleadings do not show a want of jurisdiction.”²⁷⁰ McLean also argued that even if the jurisdictional issue were before the Court, the outcome was not correct. He noted that citizenship for purposes of diversity jurisdiction had never been tied to voting—after all, women could sue in federal court, as could “any individual who ha[d] a permanent domicil [sic] in the State under whose laws his rights [were] protected, and to which he owe[d] allegiance.”²⁷¹ Surely Scott owed allegiance to Missouri, and if free, he was enough of a citizen in McLean's mind to sue in federal court.²⁷²

McLean also directly confronted the deeply racist elements of Taney's opinion. Taney had gone to great lengths to show that blacks were not acceptable as citizens at the time of the nation's founding.²⁷³ But, McLean responded that “the argument . . . that a colored citizen would not be an agreeable member of society” was “more a matter of taste than of law.”²⁷⁴ He noted that blacks had different rights in different states—for example, they could vote in some states and not

267. *Id.* (describing Curtis as a Cotton Whig); Edward M. Maltz, *The Last Angry Man: Benjamin Robbins Curtis & the Dred Scott Case*, 82 CHI.-KENT L. REV. 265, 265–269 (2007) (relating Curtis's personal and political history of “dispassionate” views on issues of slavery and identification as a Cotton Whig).

268. *E.g.*, G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth Century*, 154 U. PA. L. REV. 1463, 1476 (2006).

269. *Dred Scott*, 60 U.S. at 530–31 (McLean, J., dissenting).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 407–418 (outlining a lengthy historical survey of laws at the time of the founding as evidence of the “inferior and subject condition of that race” and, by implication, their lack of citizenship).

274. *Id.* at 533 (McLean, J., dissenting).

in others.²⁷⁵ In Ohio, they could not vote, but they had many other rights and could even hold office.²⁷⁶ McLean also noted the hypocrisy of using race as a proxy for citizenship:

On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.²⁷⁷

Citing numerous cases and various historical examples, McLean asserted that Congress had the power to pass laws for the territories.²⁷⁸ He noted that while the Constitutional Convention was in session, the Congress under the Articles of Confederation passed the Northwest Ordinance.²⁷⁹ Thus, the Founders knew perfectly well that Congress had passed laws for the territories and had specifically banned slavery in them. "The members of the Convention must therefore have been well acquainted with the provisions of the Ordinance."²⁸⁰ McLean asked, "Can any one suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country, in the organization of temporary Governments for the vast territory northwest of the river Ohio?"²⁸¹ Clearly the Framers intended to give Congress the power to regulate the territories, pass laws for the territories, and even ban slavery from the territories.²⁸² To conclude otherwise, as Taney did, was to ignore not only the history of the founding but also the intelligence of the Founders. Implicitly attacking Taney for betraying the Founders, McLean declared, "I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution . . ." ²⁸³

If Congress had the power to regulate the territories as McLean argued, then the Missouri Compromise was valid and Scott was free.²⁸⁴ McLean also argued that Missouri had an obligation to

275. *Id.*

276. Paul Finkelman, *Race, Slavery, and the Law in Antebellum Ohio*, in 2 *THE HISTORY OF OHIO LAW* 748 (Michael Les Benedict & John F. Winkler eds., 2004); Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 *CASE W. RES. L. REV.* 373 (2004).

277. *Dred Scott*, 60 U.S. at 533 (McLean, J., dissenting).

278. *Id.* at 538–47.

279. *Id.* at 539.

280. *Id.* at 539–40.

281. *Id.* at 540.

282. *See id.* at 540–47 ("If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion.").

283. *Id.* at 537.

284. *Id.* at 554–55.

uphold that freedom.²⁸⁵ McLean pointed out that juries in his circuit regularly punished those who interfered with the return of fugitive slaves. Indeed, he declared, "I have never found a jury in the four States which constitute my circuit, which have not sustained" the Fugitive Slave Act "where the evidence required them to sustain it."²⁸⁶ The juries in his circuit had acted this way "to vindicate the sovereign rights of the Southern States, and protect the legal interests of our brethren of the South."²⁸⁷ Missouri thus was obligated to respect the law of Illinois, which made Dred Scott free.²⁸⁸ Otherwise, there could be no comity within the Union.

McLean's opinion was a powerful statement of northern rights. He implicitly accused Missouri and, by extension Chief Justice Taney, of undermining harmony within the Union. While Southerners might rail against the North for failing to support the fugitive slave laws, McLean showed that, in fact, the North did support those laws. McLean's antislavery relative Salmon P. Chase had castigated the Justice for his opinion in *Jones v. Van Zandt*,²⁸⁹ but now McLean's fidelity to law favored freedom. If McLean and the juries in Ohio were willing to support the interests of the South, then Missouri, Chief Justice Taney, and the other Southerners on the Court should be willing to support the northern state laws that would make Scott a free man. Of course, the five Southerners on the Court, along with their doughface allies Robert Grier and Samuel Nelson, ignored McLean.

IV. CONCLUSION

Most Northerners also ignored McLean's *Dred Scott* opinion. In part, they were no doubt enamored with the surprisingly powerful antislavery opinion from Curtis. However, politics also may have been a factor. *Dred Scott* was decided four months after the 1856 presidential election, in which McLean had been a very serious candidate for the Republican nomination.²⁹⁰ Had *Dred Scott* been

285. See *id.* at 557–62 (contending that such a rule of law was necessary to maintain comity between the states).

286. *Id.* at 558.

287. *Id.* at 559.

288. *Id.*

289. See COVER, *supra* note 27, at 247 (quoting Chase as stating he believed that McLean, in rendering the *Van Zandt* decision, "fell into great error"); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 500 (2004) (quoting Chase that if McLean's *Van Zandt* opinion stood, the "Declaration of Independence [is] a fable").

290. Finkelman, *The Court's Most Dreadful Case*, *supra* note 232, at 30 n.98.

decided in the spring of 1856, McLean's dissent might have thrust him into the Republican nomination and perhaps even the White House. While not as charismatic as Frémont, he might have carried some of the conservative northern states as a symbol of gravitas and as a throwback to the golden age of Monroe and Adams.

By the spring of 1857, Republicans were looking at the next election. The party had done well in 1856 with a famous candidate with little political experience and thought it might win with someone like Seward or Chase at the head of the ticket in 1860. Puffing McLean's *Dred Scott* opinion would have helped no one else in the party. Thus, party leaders—like Seward; Chase; and the rising newcomer, Lincoln—generally ignored McLean's solid and powerful response to Taney's majority opinion. So too did Horace Greeley, who, between 1857 and 1860, published three pamphlet editions of the Taney and Curtis opinions to help boost the Republicans²⁹¹ but never gave the public easy access to McLean's opinion.

Thus, even in the wake of his most important dissent, McLean was underappreciated. In the end, his political ambitions were not fulfilled, but his lifelong flirtation with the presidency undermined his reputation and influence as a jurist.²⁹² In 1861, on the eve the Civil War, he died, no longer relevant as a political figure and no longer able to mount a significant challenge to the proslavery, anti-national jurisprudence of Chief Justice Taney. The best his eulogizer could say was that McLean was taken away "to prepare us for the evil" that was coming.²⁹³ He was a "great Statesman and Judge,"²⁹⁴ but in the end, he was not much appreciated.

He deserves better. His lifelong battle against the nationalization of slavery by the Court was often futile, but he remained a voice for freedom, however lonely, on a Court dominated by judges who never knew the meaning of their own title—Justice—when it came to slavery and race. To his great credit, McLean knew the meaning of this term and tried, within the limits of his office and the Constitution, to implement justice for all Americans, even those who might be called slaves in some states. For that, he should be better appreciated.

291. FINKELMAN, *SLAVERY IN THE COURTROOM*, *supra* note 38, at 50.

292. See Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790–1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 639 (1962) (discussing the negative reactions even of supporters to McLean's extrajudicial statements during his "perennial" political candidacy).

293. SPRAGUE, *supra* note 3, at 33.

294. *Id.* at 29.
