Introduction

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The world needs historians. Historians challenge us to remember, and in doing so ensure that we never forget. Historians unearth previously unknown sources that allow them to create new historical knowledge, thus disproving the idea that there is nothing new or exciting about the past. Perhaps most important, historians continuously reframe and rethink what we already know, updating our historical frameworks and categories by employing new methods and approaches to their study of the past. In other words, the discipline of history is just as active and alive as any other academic field of study. Although we often think of scientists as the ones who "push back the frontiers of knowledge," historians continue to do so as well.

For two reasons, I have been thinking a lot about the work of historians lately and about why we need them more than ever. First, at a time when seemingly everyone is creating digital content by tweeting, blogging, or posting on social media platforms, it is easy for narratives to be asserted, repeated, and then reinforced, without the hard work of investigating, fact-checking, or editing. Historians do the hard work. They have long prided themselves on their plodding, methodical labor, often in the archives with materials that have not made it onto the internet. They take their work seriously, as they want to document the evidence for every claim they make. We need meticulous scholars who deploy this slow but steady scholarly approach. Second, we live in a time when some want to restrict the academic freedom of historians by limiting either the subjects they cover or the ways they teach or approach those topics. As a society, there is nothing to be gained from restricting how we investigate or interpret our past. The first duty of any historian is to be factual, and sometimes what we find in the archives—what we learn from the primary sources—is neither pleasant nor positive.

This issue of the *Journal* proves that we need historians. A few years ago, the *Washington Post* ran a story about slavery's hold on American institutions during the pre-Civil War era. It was a sweeping investigation that correctly identified slavery as a pervasive system in the early decades of the republic. Among those identified in the article as a slaveholder was Justice John McLean of Ohio, perhaps best known for his dissent in the infamous case of *Dred Scott v. Sandford* (1857). Although the *Post* later corrected its initial claim that McLean had owned

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enslaved people in 1820, historians Paul Finkelman and Candace Gray Jackson offer here a comprehensive examination of the evidence regarding McLean's relationship to slavery. Their thoughtful analysis, which includes a review of census records, demonstrates that McLean positioned himself clearly on the side of Black freedom throughout his career. Finkelman is the Robert F. Boden Visiting Professor of Law at Marquette University Law School, and Gray is a Ph.D. candidate in the African American History program at Morgan State University.

Unlike McLean, in the past few decades John Marshall Harlan I has garnered a great deal of attention. A handful of biographies have almost uniformly portrayed him as the "great dissenter" of the late-nineteenth and early-twentieth century Supreme Court. His decisions in the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), in particular, have earned the Kentuckian that reputation. But as Daniel Elliott argues, adding another racial justice case to the mix—*United States v. Shipp* (1909)—shows a different side of Harlan. By examining the Justice's role in this case involving the lynching of a Black Tennessean, according to Elliott, the "great dissenter" might also be understood as a consensus builder. Elliott, a former undergraduate student of mine at Rhodes College, is a J.D. and M.A. in Legal History Graduate of the University of Virginia School of Law.

Dartmouth College v. Woodward (1819) is an iconic Supreme Court case, one that has long appeared in law school casebooks and in the constitutional history canon. Yet, even such a well-known decision, as Thomas H. Cox and Gregory R. Witkowski show, can be re-framed and re-interpreted by thoughtful scholars. While most have viewed the famous Contract Clause case as a "classically liberal" decision—part of the Court's protection of the rights of property—Cox and Witkowski focus on the importance of the decision for charitable and non-profit organizations. Cox is Associate Professor of History at Sam Houston State, while Witkowski is Senior Lecturer, Nonprofit Management Programs, at Columbia University.

Schneiderman v. United States (1943), in contrast to *Dartmouth College*, would probably not make it onto a list of great constitutional cases. Yet, Cliff Sloan invites us to pay attention to this case involving the U.S. government's attempt to strip a Soviet-born U.S. citizen of his citizenship. Argued in the middle of World War II, the case attracted a great deal of fanfare at the time, in part because Wendell Willkie, the defeated Republican presidential candidate in 1940, argued on behalf of William Schneiderman, a Communist Party member. And the case dealt with a weighty matter—that of stripping one of one's citizenship. Sloan is a professor from practice at Georgetown University Law Center and the author of *The Court at War: FDR, His Justices, and the World They Made* (Public Affairs, 2023).

The noted historian E.H. Carr once defined history as an "unending dialogue between the present and the past." We need historians in every generation, and we need historical journals like this one—a venue for publication that allows scholars to unearth previously unknown sources, create new knowledge, and re-frame and re-think existing ideas about the past. Thanks for reading.

Justice John McLean: Politician, Anti-Slavery Jurist, Emancipator of Slaves, and . . . Slaveowner?

Paul Finkelman and Candace Jackson Gray

In 2022, the *Washington Post* published a breathtaking article on members of Congress who owned slaves. The *Post* found that "More than 1,800 congressmen once enslaved Black people," and the *Post* proclaimed "This is who they were, and how they shaped the nation."[1] The *Post* article should hardly have surprised anyone, although the details are certainly useful. Slavery was legal in all thirteen rebelling colonies when the Continental Congress declared independence in 1776. At the time slaveowners constituted virtually all of the delegates from the six newly independent southern states (Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia), where slavery would continue until after the Civil War began and where state laws required segregation until *Brown v. Board of Education* (1954) and passage of the Civil Rights Act of 1964. By 1860 there would be fifteen slave states, as well as several territories where slavery was legal.[2]

Similarly, no one should be surprised that almost all southern members of Congress owned slaves. Some like David ("Davy") Crockett, Sam Houston, and Andrew Johnson owned only a few slaves. Many other members of Congress owned large numbers—or huge numbers—of enslaved men, women, and children, including James Madison, James Monroe, Charles Pinckney, Charles Carroll of Carrollton, Daniel Carroll, Henry "Light Horse Harry" Lee, John Marshall, Gabriel Duvall, Andrew Jackson, Henry Clay, John C. Calhoun, Howell Cobb, Judah P. Benjamin, Alexander Stephens, and Jefferson Davis. The southern slaveowners in Congress included many who went on to become presidents, vice presidents, cabinet officers, supreme court justices, or in the case

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of the last four named, leaders of the Confederate government.

Representatives and senators from the Northern states also owned slaves either before or while they served in the national legislature. Among them were William Samuel Johnson of Connecticut (a signer of the Constitution), Aaron Burr (a future vice president), De Witt Clinton, and Martin Van Buren (a future president) of New York; New Jersey members Abraham Clark (a signer of the Declaration of Independence), Jonathan Dayton (a signer of the Constitution), and William Paterson (a signer of the Constitution and a future Supreme Court justice); Pennsylvania's Robert Morris and George Clymer (both signers of the Constitution), and William Henry Harrison (a future president), who was a senator from Ohio.

Curiously, the *Washington Post*'s massive "exposé" of slave-owning members of Congress ignored the Continental Congress and the Congress under the Articles of Confederation, which would have added many southern members of Congress with large numbers of slaves, including Thomas Jefferson, Patrick Henry, John Rutledge, Arthur Middleton, and Thomas Lynch, Jr., and northerners who owned a few slaves before or during the Revolution, including Benjamin Franklin and John Hancock. Four future Supreme Court justices who served in Congress under the Articles of Confederation owned slaves: John Jay, James Wilson, John Rutledge, and Thomas Johnson. Because the purpose of the *Post* article was to teach America how deeply embedded slavery is in our culture, it is unfortunate that the *Post* reporters were unaware of the existence of the Congress from 1774 to 1788.[3]

The *Washington Post*'s Portrayal of John McLean

Slavery was also legal in all the northern colonies in 1774, when the first Continental Congress met, and in all the new states after the Americans declared independence in 1776. Many northern delegates to early Congresses, as well as after the adoption of the Constitution, were slaveowners, especially from New York, Pennsylvania, and New Jersey. At the time almost all elite families outside of New England (and some there as well) owned slaves, as did many urban business owners. Slave labor dominated the landscape of southern agriculture, but slaves also worked on farms in parts of New York, New Jersey, and Pennsylvania. After Independence, the northern states quickly, or gradually, ended slavery,[4] but many future members of Congress from the North owned slaves before the Revolution or in the Early National period. Others owned slaves during the territorial period or in the South, before migrating north. In the slave states, which grew to fifteen by 1860, non-slaveowners in the House or Senate were rare. Many southerners elected to Congress after the Civil War had owned slaves before 1865.

The same was true for Supreme Court justices and presidents. Except for a few years in the late 1820s and early 1830s, the Supreme Court had a slaveholding majority until the Civil War began. After 1861 some former slaveowners served on the Court, including Samuel F. Miller, Lincoln's first appointment, who owned slaves in Kentucky before moving to Iowa,[5] and Lucius Quintus Cincinnatus Lamar. Justices David Davis, Howell Jackson, and Edward Douglas White grew up in slaveholding families, but it is not clear if they inherited or owned slaves before the Civil War. Justice John Marshall Harlan, the Court's most vigorous supporter of Black liberty and civil rights in the late nineteenth and early twentieth century, owned slaves in his native Kentucky before the Civil War.

The same is true for the presidency. Of the first eighteen presidents, *only* John Adams, John Quincy Adams, Millard Fillmore, Franklin Pierce, and Abraham Lincoln did *not* own slaves or come from slave-owning families. Ulysses S. Grant always hated slavery,

supported enlisting Black soldiers during the Civil War, and led the United States Army from 1864 to 1865, as it destroyed slavery during the Civil War. But, when he left the Army in the 1850s, his slave-owning father-in-law, who lived in Missouri, gave Grant a slave named William Jones, so he could better establish himself in civilian life. When the future anti-slavery general and president moved from Missouri to Illinois he brought Jones with him, manumitting him there. Grant was virtually impoverished at the time and could easily have sold Jones for a handsome sum in Missouri. Grant's brief time as a slaveowner illustrates the ubiquitous nature of the institution and the way in which slavery infiltrated the lives of many Americans, even if they despised the institution.

One startling claim by the *Post* involved Supreme Court Justice John McLean, the most anti-slavery member of the Court from his appointment in 1829 until his death in 1861. In its online version of the piece, the *Post* has a portrait of Justice McLean with the caption: "John McLean, an Ohio congressman and, later, a Supreme Court justice, dissented in the notorious 1857 *Dred Scott* decision, in which the high court ruled that Black Americans were not citizens under the Constitution. McLean was once an enslaver."[6]

The *Post* almost gleefully explained:

> History remembers Rep. John McLean, an Ohio congressman and then a longtime Supreme Court justice, as one of two jurists who dissented in the notorious 1857 Dred Scott decision, in which the Supreme Court ruled that Black Americans were not citizens under the Constitution. Yet McLean was also one of the rare residents of free state Ohio who was recorded as a slaveowner in the 1820 Census, when he was serving on the state's Supreme Court.[7]

The only problem with this statement is that it is simply not true. McLean *did not* own a slave in 1820 and the U.S. Census for that year does not show he did. On the contrary, the census reported that there were *no* slaves anywhere in Ohio in 1820.[8] Moreover, the form used to collect data in Warren County, Ohio, where McLean lived, did not even provide a category for enumerating "slaves," because slavery was illegal in the state and there were *no* slaves in the state. The census enumerator in Warren Country did not use a pre-printed form, but rather a handwritten form which did provide a category for "free Colored persons" living in the county. The manuscript census form for John McLean's household indicates there was a male agricultural worker on his farm, who was *not* listed as a "free Colored person," much less as a "slave."[9]

The *Post* has since removed McLean's name and picture from its website and added—at the very end of the online story—a fourteen-line correction, in small typeface, noting errors that were on its website for two years. Towards the end of the correction, the *Post* noted that the original "article also incorrectly said that Rep. John McLean (Ohio) was a slaveholder in 1820 based on digitized census records. McLean was not a slaveholder in 1820."[10] As we have noted, this error was not actually based on "digitized census records," but on the *Post*'s failure to properly read and understand the census records. The *Post*'s correction is useful, but it is unlikely that many people will return to the *Post*'s current online version of its original story to discover the correction. We hope our article will alert people interested in U.S. history, as well as professional scholars, to the complexity of slavery during Justice McLean's lifetime.

The original erroneous claim in the *Washington Post* story (along with the failure to include data from the pre-Constitution congresses) illustrates that problems can occur when talented reporters, skilled in modern investigations, attempt to write history

without collaborating with trained historians who understand the context of historical facts of the time period and who are skilled at using historical records. While we think all scholars will appreciate the great deal of data in the *Post* investigation, it could have been better.

Despite the *Post*'s completely inaccurate original story about McLean and the 1820 Census, the issue of John McLean's relationship to slavery is worth exploring. This article shows how deeply slavery was woven into the fabric of American culture and the American economy and the complexity of understanding the interactions with slavery of northerners who temporarily resided in the slave South. Anyone who ventured south of the Ohio River, south of Pennsylvania, or into Missouri, Arkansas, Louisiana, Texas, and the Indian Territory (that later became Oklahoma) was forced to interact with slavery.[11] This included the nation's capital, where slavery was completely legal and prospered, and where McLean lived in the 1820s and later went annually for sessions of the Supreme Court.

McLean was deeply opposed to slavery. In 1817, while on the Ohio Supreme Court, he emphatically declared that no one could be held as a slave under Ohio law.[12] Thus, it is utterly improbable he would have owned a slave in a state where he himself had declared such ownership was illegal and would then have brazenly reported such illegal ownership to a census taker.

John McLean was born in New Jersey in 1785. In 1797, when McLean was twelve, the family settled in what is today Warren County, Ohio. He served the federal government in numerous capacities before becoming a Supreme Court justice. McLean was a member of the House of Representatives (1813–1816), Commissioner of the General Land Office (1822–1823), and U.S. Postmaster General (1823–1829).

McLean, Early Ohio, and Slavery

McLean was born in New Jersey in 1785. His father Fergus, a Scotch-Irish Presbyterian, immigrated to the New Jersey colony on the eve of the American Revolution, served in the War, and shortly after John's birth migrated west with his family, living in Virginia and Kentucky before moving to the Northwest Territory. In 1797, when the future justice was twelve, the family finally settled in what is today Warren County, Ohio where young McLean had his first formal education. The McLeans were modest farmers, starting a new life on the frontier territory of the new nation.[13]

Slavery was legal in New Jersey when John was born there,[14] and in Virginia and Kentucky, where the family lived on its slow migration west. Had Fergus McLean wanted to own slaves, he had a series of opportunities to do so. But, instead, he moved to the Northwest Territory, where slavery was illegal. In that sense, Fergus McLean was much like Thomas Lincoln, the president's father, who left slaveholding Kentucky for the Indiana Territory, where slavery was also prohibited.

The Northwest Ordinance of 1787 prohibited slavery in what became Ohio. Article VI

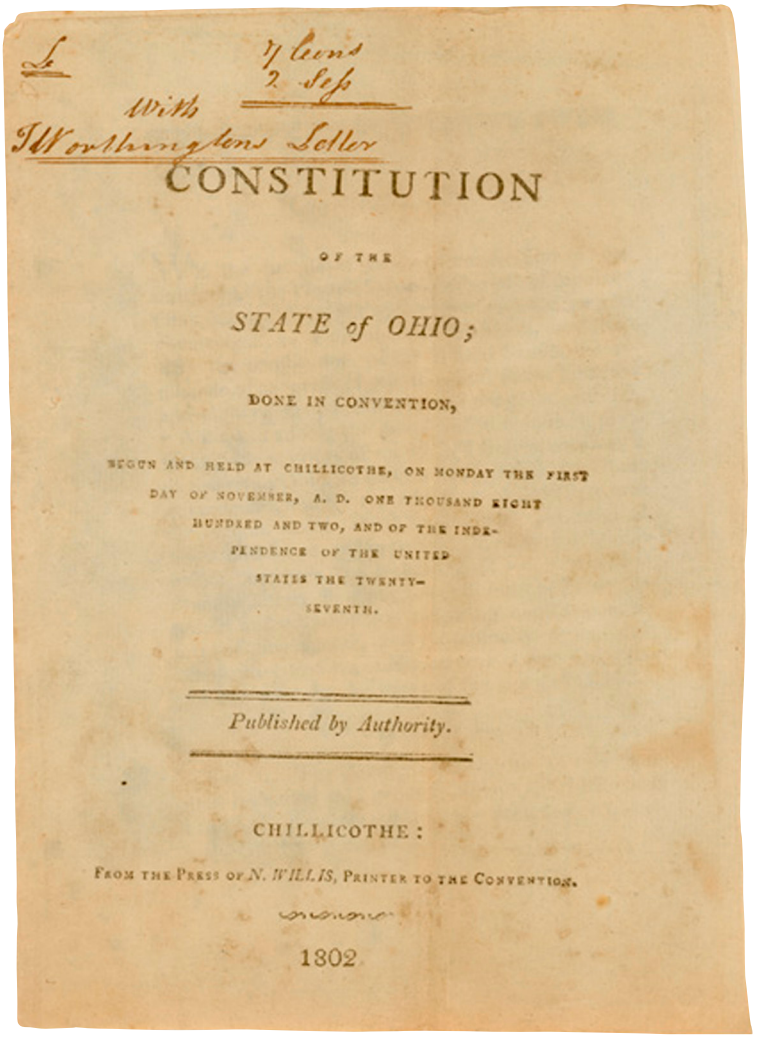
of the Ordinance famously declared: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."[15] The Ordinance also allowed for the recapture of fugitive slaves escaping into the Territory. The Ordinance was not particularly effective at ending slavery where it already existed, in the southern part of what would become the states of Indiana and Illinois. Some people were held in slavery in those states into the 1830s and 1840s.[16] But, the Ordinance was certainly useful in stopping slavery from taking root in Ohio. In 1803, Ohio became the seventeenth state and the first to enter the Union with no slaves living there and no history of slavery before statehood.[17] The state's first constitution was crystal clear on the subject of slavery:

> There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretense of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on a condition of a bona fide consideration, received or to be received, for their service, except as before excepted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the State, or if made in the State, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.[18]

The language on "indentures" was designed to prevent slaveowners from evading the ban on slavery by having slaves agree to indentures in a slave state, and then bringing them to Ohio, where they would be held in involuntary servitude for long periods of time. Such indentures would have been legally problematic, because under the laws of every slave state, slaves could not be a party to a contract or any other legal agreement, and thus they could not agree to an indenture. If the owner manumitted the slave first, then the former slave could have agreed to the indenture, but it might also have been unenforceable, because there would have been no bona fide consideration for the free person (former slave) agreeing to work for no pay for many years. However, the Ohio framers left nothing to chance, prohibiting indentures for more than a year. The one-year agreement could have been defended on the grounds that taking a slave (or someone who was now a former slave) to a state where slavery was illegal gave the former slave greater protection from kidnapping or re-enslavement. Indeed, it might even encourage some owners to bring their slaves to Ohio, where they would become free people.

Illustrating Ohio's ironclad commitment to creating a free state, the constitution also declared: "But no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this State."[19] In theory this clause might have been undone by a new constitution or a constitutional amendment to remove the clause, and then a second constitutional amendment to allow slavery. But such a cumbersome process was never attempted and would have been difficult to achieve.

At statehood in 1803, Ohio emphatically rejected slavery. Its population reflected this opposition, as there were no slaves in the state. In 1807, the Ohio Supreme Court used the constitution's prohibition on slavery to explain why it was essential for the state supreme court to have the power to strike down an act of the state legislature if it violated the


L
7 Cents
2 Sep
With
Worthingtons Letter
CONSTITUTION
OF THE
STATE of OHIO;
DONE IN CONVENTION,
BEGUN AND HELD AT CHILLICOTHE, ON MONDAY THE FIRST DAY OF NOVEMBER, A. D. ONE THOUSAND EIGHT HUNDRED AND TWO, AND OF THE INDEPENDENCE OF THE UNITED STATES THE TWENTY-SEVENTH.
Published by Authority.
CHILLICOTHE:
FROM THE PRESS OF N. WILLIS, PRINTER TO THE CONVENTION.
1802

After its adoption on November 29, 1802, the Ohio constitution was sent to Congress. The territory was granted statehood, and on March 1, 1803, Ohio became the seventeenth state. It was the first to enter the Union with no slaves living there and no history of slavery before statehood.

state constitution. The Court listed examples of how the state constitution prohibited certain acts which were a "whole train of evils against which our constitution meant to provide." Such potential evils included denial of a jury trial or creating a religious test for office holding. Slavery was the Court's very first example of "the necessity of guarding the constitution with the most scrupulous vigilance" to prevent constitutionally impermissible "evils." The Court noted that, by an act of the legislature, "slavery may be introduced"[20] into the state. However, the Court asserted, "If an attempt by law, should be made to introduce slavery . . . courts have not only the power, but it is their indispensable duty, on application according to the due and ordinary course of law, to cause 'right and justice to be administered without denial or delay'" by striking down the law.[21] While Ohio was not particularly welcoming to free Blacks,[22] the free Black population of the new state grew steadily, from 198 in 1800 to 1,899 in 1810, to 4,723 in 1820.

The census found no slaves in Ohio in any of those years.[23]

In 1804, a year after Ohio statehood, the nineteen-year-old McLean moved to Cincinnati, as an apprentice to the Clerk of Hamilton County. At this time, he also began to read law under Arthur St. Clair, Jr., whose father had been the governor of Northwest Territory from 1787 to 1802. In 1807, at age twenty-two, McLean was admitted to the Ohio bar. That year he married Rebecca Edwards, the daughter of a physician in Newport, Kentucky. There is no evidence that at the time her father, Dr. Uriah Edwards, owned any slaves,[24] even though it was common for urban professionals in the South to own slaves for household domestic labor. Rebecca and John were married by an Episcopal clergyman, who had once taught McLean in an Ohio school but had since moved to Kentucky. In 1811, McLean became a Methodist, converted by the evangelist John Collins, and would remain an active member of the church for the rest of his life. He later wrote a glowing biography of Collins.[25]

At the time most northern Methodists (and some in the South) were anti-slavery. In 1819, for example, Roger B. Taney successfully defended Rev. Jacob Gruber, a Methodist minister from Pennsylvania, who was prosecuted in Maryland for denouncing slavery in a sermon at a revival meeting. Taney argued that anyone who came to a Methodist revival, including slaveowners who brought slaves with them, could not have been surprised that Gruber denounced slavery. Taney told the Maryland jurors, "it is well known, that the gradual and peaceable abolition of slavery in these states, is one of the objects, which the Methodist society have steadily in view. No slaveholder is allowed to be a minister of the church. Their preachers are accustomed, in their sermons, to speak of the injustice and oppressions of slavery."[26] In 1844, the Methodists would be the first national church to divide over slavery. McLean's lifelong commitment to this faith, which began when he was just twenty-six, illuminates his early opposition to human bondage.

As a new lawyer McLean knew that no one could keep a slave in Ohio, and even if he had been inclined to own a slave—for which there is not a shred of evidence—he could not have bought one in Ohio or owned one there. It would have been possible to buy a slave in nearby Kentucky, but the young attorney undoubtedly knew that slaves brought into Ohio could immediately claim freedom under the state constitution. Owning a slave would also have undermined McLean's legal career and his political ambitions. In 1811 he obtained a patronage job as an examiner in the federal land office in Cincinnati. The next year he won a seat in Congress, representing four counties that included Cincinnati. He remained in that office until May 1816 when he went to the Ohio Supreme Court.[27] Owning a slave in Ohio at this time—or any time in the rest of McLean's life—would have been political suicide.

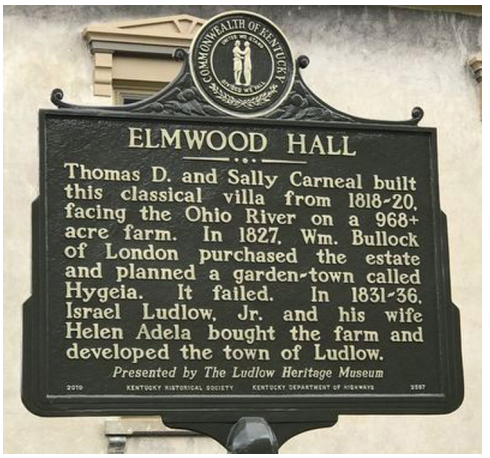
At this time the Congress usually only met from December to March or April. For example, in November 1814 McLean won a second term to serve in the Fourteenth Congress. While this Congress lasted from March 4, 1815 to March 4, 1817, it did not actually meet until December 1, 1815—thirteen months after the election.[28] By the time the session ended, on April 30, 1816, McLean had resigned to take a seat on the Ohio Supreme Court. Like most members of Congress in this period, McLean rented space in a boarding house during these relatively short Congressional sessions. He could neither afford to buy a house in Washington, nor did he need one. It is likely the boarding houses where he lived used slave labor, although some may have hired free Blacks as well. By mid-century there would be boarding houses that only used free labor to accommodate the demands of anti-slavery members of Congress.[29]

Before 1820 there were no active opponents of slavery in Congress, so even members

of Congress who hated slavery were likely to encounter the system of human bondage when they rented rooms and took their meals. This surely would have been McLean's fate. Living in a slave jurisdiction—which the national capital was—members of Congress had to accept other people's slaves as part of their lives, no matter how wrong they thought the institution was. Even so, there was a big difference between living in a boarding house or eating in a restaurant where slaves labored and actually owning slaves.

In 1816, the thirty-one-year-old McLean left Congress for the Ohio Supreme Court. In 1817, he wrote a strongly anti-slavery opinion in *Ohio v. Carneal*. In this case McLean emphatically denied the right of any resident of Ohio to own a slave in the state.[30] *Carneal* was a *habeas corpus* action on behalf of a Black man, Richard Lunsford, against Thomas D. Carneal, a resident of Cincinnati. Carneal's father had lived in Kentucky, where Lunsford was his slave. When his father died, Thomas became the administrator of the estate, and in that capacity, he brought Lunsford to Cincinnati. McLean's opinion suggests Carneal no longer had good title to Lunsford under Kentucky law, and that he may have been owned by someone else. This did not matter because Carneal had legal custody of Lunsford when he brought him to Cincinnati to work, and McLean ruled that this made Lunsford free. There was also evidence that at least two previous owners of Lunsford had brought him to Ohio. The legal issue was not who owned Lunsford, rather it was if he became free when whomever held him as a slave took him to Ohio.[31]

In a long opinion McLean asserted "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."[32] When McLean wrote this opinion there was no strong abolitionist movement in the United States. It would be a decade-and-a-half before William Lloyd Garrison began to publish *The Liberator* and organize the American Anti-Slavery Society. It would be almost three decades before Frederick Douglass published his profoundly important autobiography, providing an eloquent first-person account of the brutality and inhumanity of slavery.[33] But, as an early opponent of slavery, McLean did not need a Garrison or a Douglass to teach him that slavery violated natural justice and was based on "usurpation and fraud."[34]



In 1817, while a judge on the Ohio Supreme Court, McLean wrote a strongly anti-slavery opinion in *Ohio v. Carneal*, denying the right of any resident of Ohio to own a slave in the state. A year later, Thomas D. Carneal, a resident of Cincinnati and the named party in the case, built a classical villa on a large area of farmland facing the Ohio River in Ludlow.

As a state judge, McLean had "sworn to support the Constitution of the United States," and was prepared to do so, regarding fugitive slaves. Had Lunsford escaped from Kentucky into Ohio, McLean would probably have upheld a claim for him as a fugitive slave. However, McLean would not go beyond what the Constitution required. McLean was uncertain if slave owners had a right of temporary transit through the state with their slaves in tow or whether "every slave who sets his foot within the state [of Ohio] with his master's consent" was

immediately free. But these questions were not before him, because Carneal was not a southern slaveowner in transit. He lived in Ohio. McLean had no doubt 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." Thus, the moment Carneal brought Lunsford to Ohio, Lunsford became free, because "[n]o citizen ought to introduce, either directly or indirectly, that which the [Ohio] constitution expressly prohibits."[35]

McLean was clear: residents of Ohio or non-residents who were doing business in the state could not own slaves in that state, and if they brought slaves into the state, the slaves were immediately free. "[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." Slavery, in McLean's view, violated natural law as well as the Ohio Constitution and could only exist in Ohio to the extent the federal Constitution protected it.[36]

In the light of McLean's 1817 opinion in *Carneal* and the 1820 Census, which recorded *no* slaves in Ohio, it is hard to imagine why the *Washington Post*, or anyone else, would think McLean, while living in Ohio in 1820, was a slaveowner.

McLean as Postmaster General

In September 1822, McLean resigned from the Ohio Supreme Court and moved to Washington, D.C., to accept a presidential appointment as the Commissioner of the General Land Office. This prized federal position tripled his salary, to $3,000 a year. Never wealthy, and a public servant for almost his entire adult life, McLean happily accepted this job. He was in this office for less than a year when, in June 1823, President James Monroe chose him as postmaster general. He served for the rest of Monroe's administration, the entire term of John Quincy Adams, and the very beginning of the administration of Andrew Jackson, before Jackson placed him on the Supreme Court in March 1829. He is the only postmaster general to have served in three successive presidential administrations. McLean was certainly the most competent and successful postmaster general since the Revolution. He rooted out significant incompetence and sometimes corruption in the postal system. During his tenure Congress increased the salary of the postmaster general and provided funds for new post office infrastructure. John Quincy Adams, who was furious at McLean for not using the Post Office as a patronage system to help him win reelection, nevertheless believed McLean was "the most efficient officer" that had ever held the position. Modern scholars concur in this assessment.[37]

For nearly seven years, as Commissioner of the General Land Office and postmaster general, McLean lived mostly in Washington, while maintaining his permanent residence in Ohio. In the nation's capital he lived with his family in a rented house in what is today Georgetown but at the time was a separate village called Georgetown Heights, and later in what today is downtown Washington. There are no existing records of the exact location of his first rented house, although he was apparently a neighbor of his friend John C. Calhoun, who was secretary of war under President Monroe and vice president under both Adams and Jackson. Calhoun brought slaves with him to run his household in Georgetown Heights, in what today is Dumbarton Oaks.[38]

What did the non-slaveholding McLean do for household help? In an age without indoor plumbing, refrigeration, electricity, or running water, it was impossible to run a middle-class household, much less that of a major national officeholder, without domestic servants. At the time it was common for landlords to rent large houses to political

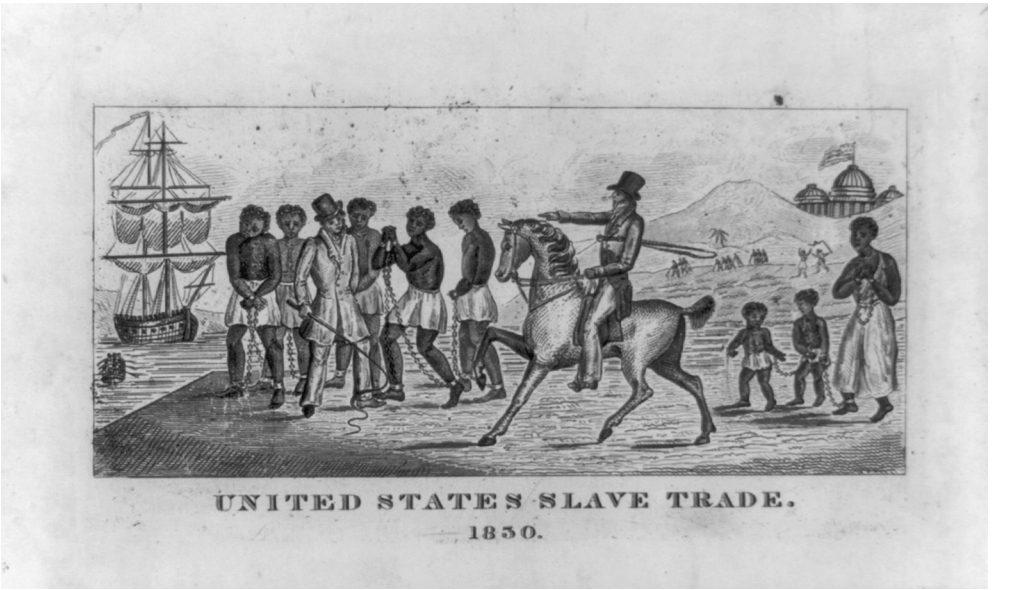
officials and provide a staff of servants, who were often slaves owned by the landlord. It appears McLean rented a house that came with servants, probably slaves. He did not own them. They were just included in the rental agreement for the house. He may have also employed some slaves who hired their own time. McLean most likely learned from them about the horrors of slavery, their fear of being sold, their desire for freedom, and the total uncertainty and insecurity of their lives. While McLean was clearly a strong opponent of human bondage *before* moving to Washington, living in this slave city surely reaffirmed his personal understanding that slavery was an obscenity. It is also possible that McLean hired some free Blacks to work for him. In 1820 Washington had about 4,500 slaves and 2,800 free Blacks. By 1830, the city's 9,100 Blacks were almost evenly divided between free people and those held as slaves.

In March 1829, President Andrew Jackson put McLean on the Supreme Court. In this period the Court met for a single term, usually from December until March. When the term ended, the justices usually returned to their home states. From the time McLean went on the Court, in 1829, until he died in 1861, his permanent residence was in Ohio, first in rural Warren County and later in Cincinnati. In Ohio it would have been legally, politically, and socially impossible to have a slave, just as it had been since statehood in 1803.

The Anti-Slavery Justice

After his confirmation in March 1829, Justice McLean emerged as the most articulate and consistent opponent of slavery on the Supreme Court.[39] In *Menard v. Aspasia*,[40] McLean wrote a powerful opinion denouncing slavery and upholding the anti-slavery Article of the Northwest Ordinance which he noted was "the express provision of the ordinance, in favour of liberty." This was the first time in the Court's history that the justices upheld the right of Blacks to freedom based on the Northwest Ordinance.[41] In his opinion McLean wrote a detailed history of the Revolution, the early national period, and the importance of Article VI of the Ordinance, ending slavery in the Northwest. Significantly, before McLean went on the Court, Chief Justice John Marshall refused to even consider a freedom claim under the Northwest Ordinance, asserting that the Court had no jurisdiction over a freedom suit under this federal law.[42]

In 1844 McLean wrote an opinion upholding the freedom of Moses Bell. James Rhodes claimed Bell as a slave, but a District of Columbia trial court ruled that Bell was free because Rhodes had illegally imported him into the District. The case was based on various Virginia and Maryland statutes that governed the national capital. At the time the District of Columbia consisted of two counties, Washington County, which had been part of Maryland, and Alexandria County, which had been part of Virginia. The District contained Washington City (as the national capital was called at the time), the small towns of Georgetown and Alexandria, and a great deal of farmland.[43] The two counties had different laws. Many local rules in Washington County—including those regulating slavery—were based on Maryland law. Similarly, the local rules on slavery in Alexandria County were based on Virginia law. Both states prohibited importing new slaves, except when people moved into the state bringing their slaves with them or inherited slaves from elsewhere. Put simply, a person living in Washington City could buy a slave in Georgetown or from a farmer in Washington County, but not from Alexandria or a farm on the other side of the Potomac. Similarly, a person living in Alexandria could bring a slave into the town from a nearby farm, but not from Georgetown or Washington City.



This abolitionist print depicts the U.S. slave trade in 1830. Overlooking the main scene is the U.S. Capitol building. Slavery was legal in the District of Columbia until April 1862 (one year after Justice McLean's death); it was abolished when President Lincoln signed the D.C. Emancipation Act into law.

No residents of Washington could bring a slave into the district from anywhere else, except as an inheritance.

Rhodes had imported Bell into Washington County, and that led to his liberty. McLean clearly and efficiently analyzed the statutes, and not only upheld Bell's freedom, but ordered Rhodes to pay the "costs" of the litigation. There is nothing profound about this case, nor was it radically "anti-slavery," since McLean accurately enforced the statutes of the slave states of Virginia and Maryland as they applied to the District of Columbia, and affirmed the jury verdict of the twelve White men, some of whom were probably slaveowners, who found in favor of Bell.[44] However, it is worth noting that in several nearly identical cases involving these laws, Chief Justice John Marshall had *always* found ways to keep slaves in bondage by not rigorously or accurately applying the laws. In one case Marshall conceded the law at issue was "certainly ambiguous, and the one construction or the other may be admitted, without great violence to the words which are employed." Marshall then proceeded to support the slaveowner's property claim rather than the Black man's claim to his own liberty.[45] Significantly, McLean followed the law strictly, and vigorously supported liberty, just as he had in *Menard v. Aspasia*.[46]

McLean also supported the right of the North to ban slavery and protect the liberty of free Blacks. McLean first set this out in a concurring opinion in *Groves v. Slaughter*, which involved a suit for the value of slaves taken from Louisiana and sold in Mississippi, despite a clause of the Mississippi constitution providing "The introduction of slaves into this state, as merchandise, or for sale, shall be prohibited, from and after the first day of May, eighteen hundred and thirty-three." The Court ruled the seller (Slaughter) was entitled to money owed to him because the clause in Mississippi's constitution was not self-executing and required legislation to go into effect. In his opinion for the Court, Justice Smith Thompson declined to consider

whether a ban on the importation of slaves as merchandise violated the Commerce Clause of the Constitution, because "such inquiry is not properly in this case."[47]

McLean concurred in this result, affirming the legality of the sale of the slaves in Mississippi, because the Mississippi state constitutional clause on selling slaves into the states could not go into effect without implementing legislation. Thus, Mississippi had not actually banned the sale of slaves brought in from other states. However, he emphatically argued Mississippi could constitutionally ban the importation of slaves as merchandise if it chose to do so. His mission was not to protect the rights of slave traders or purchasers in the South, but to protect the right of the northern states to ban *all* slaves from their states, as Ohio had done. In his concurrence McLean argued that considering slaves as objects of commerce did not prevent the free states from banning slaves altogether, and this would not violate the Commerce Clause or any other aspect of the Constitution. He denied the "dormant" powers of Congress could be invoked to prevent northern states from prohibiting commerce in slaves.[48] He argued Congress could regulate international commerce in slaves, but it lacked the power to prevent the northern states from banning the importation of slaves as articles of commerce. He insisted that "a state may admit or prohibit slaves at its discretion."[49] Anticipating what would later be a mainstay of the Republican Party's critique of slavery in the 1850s—that slavery was local, and freedom was national[50]—McLean asserted, "if slaves are considered in some of the states as merchandise . . . [t]he character of property is given them by the local law."[51]

McLean then explained the anti-slavery provisions of his own state's constitution: "The constitution of Ohio declares that there shall be neither slavery nor involuntary servitude in the state except for the punishment of crimes." He argued:

> It goes much further than the constitution of Mississippi. That prohibits only the introduction of slaves into the state by the citizens of other states, as merchandise; but the constitution of Ohio not only does this, but it declares that slavery shall not exist in the state. Does not the greater power include the lesser. If Ohio may prohibit the introduction of slaves into it altogether, may not the state of Mississippi regulate their admission?[52]

He reaffirmed his own decision in *Ohio v. Carneal*, that Ohio could prohibit anyone from slave ownership in the state: "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." Thus, "[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." While not adopting the "higher law" arguments of abolitionists, McLean borrowed their language: "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."[53]

A year later McLean wrote the only dissent in *Prigg v. Pennsylvania*,[54] in which the Court struck down northern personal liberty laws designed to protect free Blacks from being illegally seized as fugitive slaves and taken South. The case involved Edward Prigg, who was convicted of kidnapping Margaret Morgan and her children (at least one of whom was born in Pennsylvania and was thus clearly a free person) and taking

them to Maryland. Morgan's parents had been enslaved in Maryland but were privately set free by their owner. Morgan had been born in Maryland and was never claimed as a slave by anyone while she lived there. The 1830 Census (which was conducted by the county sheriff) recorded her as a free Black person living in Harford County, Maryland. In 1832 she and her Pennsylvania-born husband moved to his hometown of York. Five years later, Prigg and three other Maryland men seized Margaret and her entire family (including her husband) and brought them before a Pennsylvania judge to obtain a certificate to remove them as fugitive slaves. The judge refused to issue the certificate because there was strong evidence the entire family was free. At this point Prigg and his cohorts kidnapped Morgan and her children—but not her Pennsylvania-born husband—and took them to Maryland, where they were soon sold to slave traders.[55] After two years of negotiations the governor of Maryland allowed Prigg to be extradited to Pennsylvania, where he was convicted of kidnapping. Prigg appealed this conviction to the Supreme Court of the United States.

Speaking for an 8–1 majority, Justice Joseph Story wrote an overwhelmingly proslavery decision while ignoring the evidence that Morgan was probably free under Maryland and Pennsylvania law, and certainly her Pennsylvania-born child or children were free at birth. He struck down all northern state laws designed to provide due process for alleged fugitive slaves and upheld the constitutionality of the Fugitive Slave Law of 1793, despite its blatant lack of due process for alleged fugitives. He further declared that the Fugitive Slave Clause of the Constitution empowered slave catchers to seize suspected fugitive slaves without any judicial hearing, even the one required by the 1793 law. He asserted that the Constitution gave slaveowners a common law right of "self-help" to seize any suspected fugitive slaves wherever they found them and remove them from the state without any judicial process, when this could be accomplished without a breach of the peace.[56] This was the most proslavery decision by the Court until *Dred Scott v. Sandford* (1857).[57]

As he would in *Dred Scott*, a decade and a half later, McLean vigorously dissented from the proslavery Opinion of the Court in *Prigg*, in part because it set the stage for kidnapping free Blacks whom slave catchers "believed" were fugitives. McLean asserted a judicial enforcement of the Fugitive Slave Clause was essential to constitutional stability and due process of law. He argued the states had "concurrent" power to enforce the Clause, noting that the Clause specifically mentioned the importance of the states in the process of returning fugitive slaves. While agreeing the free states had an obligation to enforce the federal law and the constitutional clause, he argued the states retained the power to enforce their own police regulations to protect people within their jurisdiction and to enforce their own criminal laws. He conceded a slaveowner could recover a fugitive slave, but at the same time the state was obligated to protect an alleged fugitive "against all the world except the claim of the master. Should any one commit lawless violence on the slave, the offender may unquestionably be punished." Furthermore, McLean asserted that a fugitive slave who committed a crime in a free state could "unquestionably be punished" under state law "in disregard of the claim of the master." McLean reminded his brethren and the nation that:

> In a state where slavery is allowed, every coloured person is presumed to be a slave; and on the same principle, in a nonslaveholding state, every person is presumed to be free without regard to colour. On this principle, the states, both slaveholding and non-slaveholding, legislate.

> The latter may prohibit, as Pennsylvania has done under a certain penalty, the forcible removal of a coloured person out of the state.[58]

Obviously removing Blacks without judicial superintendence could lead to seizures based on mistaken identity or intentional kidnapping.

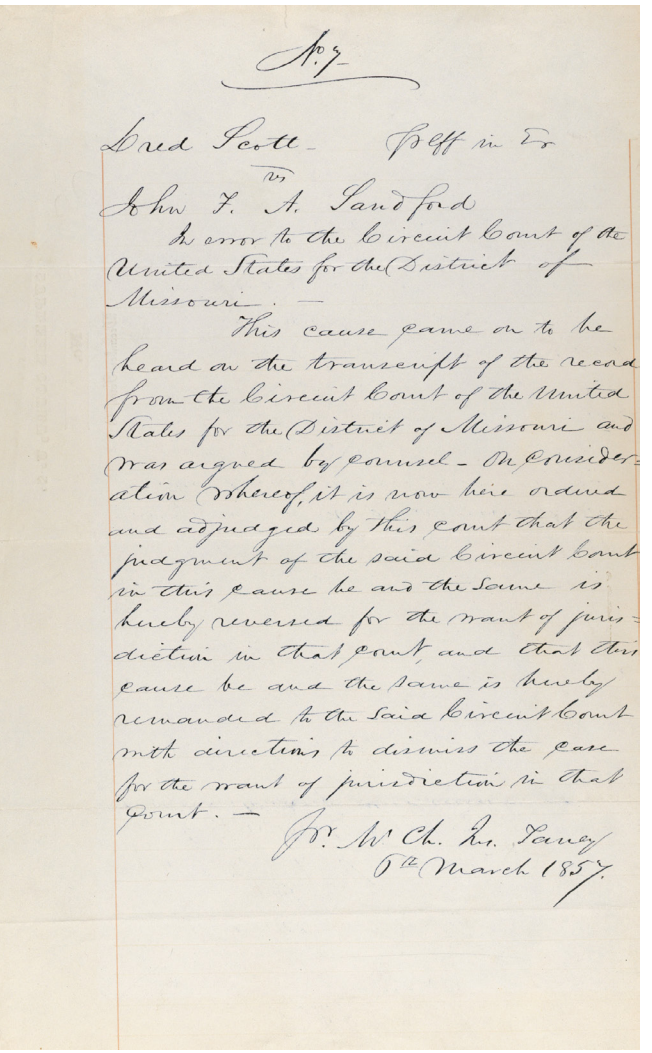
McLean's opinion did not deny the right of owners to recover fugitive slaves. He simply insisted it be done according to the rule of law, protecting the rights of the free states and the rights of free Blacks living in those states. His dissent fell on the deaf ears of justices who had no sympathy for the rights of free Blacks and were obsessed with placating proslavery southern leaders. In addition, Story saw *Prigg* as a vehicle for strengthening federal power and supporting his jurisprudential project of creating a federal common law.[59]

McLean's fears in *Prigg* are illustrated by *Vaughn v. Williams*, a case he heard three years later while riding circuit. Vaughn, a Missouri slaveowner, sued Williams for helping three fugitive slaves he claimed escape from his custody, after he seized them by force in Indiana. Vaughn was attempting to exercise his right of "self-help," as set in *Prigg*, but could not do so because of interference from local whites, including Williams. Vaughn agreed to bring the case of the alleged fugitives before a local judge. However, by the time Vaughn and the alleged fugitives were close to a nearby town, about 150 people had gathered, and at the encouragement of Williams, the man driving the wagon with the Blacks rode off and Vaughn was unable to get through the crowd to catch them or ever find them again.[60]

This should have been a simple case under the Fugitive Slave Law of 1793, which allowed Vaughn to recover damages. Indeed, just two years before, McLean ruled in favor of a slaveowner from Kentucky who had sued the abolitionist John Van Zandt for helping his slaves escape in southern Ohio, and successfully interfering in the capture of one of them.[61] McLean, although a strong opponent of slavery—indeed the only strong opponent on the Court during most of his thirty-two years as a justice—also recognized that the Constitution supported the right of an owner to recover a fugitive slave and that as a jurist he was obligated to enforce the 1793 law, and later the 1850 law.

However, in *Vaughn* v. *Williams* McLean was able to avoid supporting slavery. The evidence in this case proved that before Vaughn had purchased these slaves, their previous owner, a man named Tipton, had taken them to Illinois in October 1835 and kept them there until April 1836. Tipton then brought them back to Missouri and sold them. After the sale Tipton returned to Illinois where he continued to live, own land, and vote. On the basis of this evidence, McLean concluded the three Blacks became free because Tipton brought them to Illinois when he became a resident and kept them as slaves there, in violation of Illinois law and the Illinois Constitution. McLean determined they were actually free people whom Tipton had illegally forced to go back to Missouri, where he fraudulently sold them as slaves to Vaughn. Thus, McLean ruled they were never fugitive slaves, and Williams had a legal right to help them recover their liberty. It took the jury only a few minutes to decide in favor of Williams.

The *Van Zandt* and *Vaughn* cases illustrate McLean's willingness to enforce the Fugitive Slave Law of 1793, when the facts of the case demanded it, and to protect the right of the free states in his circuit to prohibit slavery. Indeed, McLean asserted Tipton had "forcibly abducted" the three Blacks when he took them to Missouri.[62] This outcome contrasts with the behavior of U.S. District Judge John K. Kane, in Philadelphia, who upheld the prosecution of the abolitionist Passmore Williamson for rescuing Jane Johnson and her two sons, when their owner


No. 7

Dred Scott — Plff in Er

vs

John F. A. Sandford

In error to the Circuit Court of the United States for the District of Missouri. —

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri and was argued by counsel — On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be and the same is hereby reversed for the want of jurisdiction in that court, and that this cause be and the same is hereby remanded to the said Circuit Court with directions to dismiss the case for the want of jurisdiction in that court. —

Js. M'Ch. Lr. Taney

6th March 1857.

Justice McLean dissented in the nefarious 1857 *Dred Scott* decision, in which the high court ruled that Black Americans were not citizens under the Constitution. In his dissent, McLean famously argued for enforcing laws to protect the liberty of slaves brought into free states and free territories.

voluntarily brought them into Pennsylvania as slaves. Kane simply refused to recognize that under Pennsylvania law, just like in Ohio, Illinois, and Indiana, any slave brought into the state immediately became free.[63] Kane also refused to acknowledge that the Fugitive Slave Clause of the U.S. Constitution and the Fugitive Slave Law of 1850 did not apply to a slave whom an owner brought into a free state. The clause and law only applied to slaves "escaping into another" state.[64]

In his dissent in *Dred Scott*, McLean famously argued for enforcing laws to protect the liberty of slaves brought into free states and free territories.[65] As he had in other cases, McLean provided a strong argument for the power of Congress to ban slavery in the territories in the Old Northwest and the territories north and west of Missouri. Thus, his private views dovetailed with Congress's power to prevent the spread of slavery into the territories.[66] The unexpected dissent of Justice

Benjamin Robbins Curtis gained far more attention than McLean's dissent because Curtis was a conservative "cotton Whig," who was generally sympathetic to slavery. McLean's dissent was deeply rooted in political and constitutional history, the precedents of the Missouri supreme court, and the traditional power of Congress to ban slavery in federal territories, as it had done in the Northwest Ordinance and the Missouri Compromise. It deserves far more attention than most scholars have given it.

McLean's jurisprudence on the Ohio Supreme Court, as a Circuit Justice, and on the United States Supreme Court shows him to be strongly anti-slavery and deeply committed to Black freedom. However, he also upheld the rights of slaveowners in fugitive slave cases and upheld judgments (both civil and criminal) against abolitionists who harbored fugitives or, in the case of Sherman Booth, rescued them from the custody of federal marshals.[67] McLean enforced the fugitive slave laws of 1793 and 1850 because he was both committed to the rule of law and had taken an oath to support the Constitution.

McLean, Political Ambitions, Abolitionist Accusations, and a Black Servant Named Lucinda

While sitting on the Court, McLean was always politically active, and almost every four years he sought a presidential or vice-presidential nomination. Historian Michael Holt correctly observed that McLean's "passion for the presidency . . . burned almost as long and torridly" as that of Daniel Webster. John Quincy Adams, who knew McLean well, thought McLean "thinks of nothing but the Presidency by day and dreams of nothing else by night." McLean was considered for the Free Soil Party nomination in 1848, with strong support from the leading political abolitionists Charles Sumner and Salmon P. Chase (who was married to the niece of McLean's wife), but McLean declined to run on a third party. By 1852, he had reconsidered his opposition to a third-party campaign, and sought the nomination of the Free Democratic Party, which was a short-lived anti-slavery party. On the first ballot at the 1856 Republican convention, he had 196 votes and finished second to John C. Frémont, who won the nomination. He would get twelve votes in the 1860 Republican convention.[68]

As a firm advocate of the rule of law and fidelity to the Constitution, McLean was never a radical abolitionist, but rather an opponent of slavery who worked within the existing political system and the constitutional structure. He aggressively sought to protect the freedom of Blacks who had a legitimate claim to that status under state or federal law, opposed the spread of slavery in the West, vigorously supported the right of the free states to exclude all slavery, and sought to protect free Blacks from kidnapping. However, he fully understood that the Constitution protected slavery where it existed and allowed slaveowners to recover slaves who escaped to free states. Firmly committed to the rule of law and the Constitution, he supported the right of slaveowners to recover fugitive slaves, once they had proved their ownership.

In many ways he was very much in same political orbit as Abraham Lincoln, who promised in his first inaugural address to enforce the Constitution and reminded the nation that he had no power or intention to interfere with slavery where it existed. Quoting from one of his earlier speeches, he reminded the nation, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." He further noted:

> Those who nominated and elected me did so with full knowledge that

> I had made this, and many similar declarations, and had never recanted them. And more than this, they placed in the platform, for my acceptance, and as a law to themselves, and to me, the clear and emphatic resolution which I now read: 'Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes.'[69]

Lincoln had "no purpose" or "inclination" to interfere with slavery where it existed because he knew the Constitution did not allow him to do so.[70]

Strong abolitionists, especially those aligned with William Lloyd Garrison, despised people like Lincoln and McLean because they accepted the existing constitutional structure, even as they attacked slavery within it. Garrison and his followers refused to vote, refused to participate in electoral politics, and insisted the Constitution was a proslavery compact, "A covenant with Death, and an agreement in Hell." Their solution to slavery was secession of the free states, under the slogan "No Union with Slaveholders." Anti-slavery politicians and jurists, like McLean, Chase, Sumner, and Lincoln rejected such a radical approach to the problem of American slavery.[71] Thus, when Lincoln ran for president, Wendell Phillips, a Harvard-trained lawyer and the most articulate and acerbic Garrisonian, referred to him as "the slave hound of Illinois," because in his only term in Congress Lincoln proposed a gradual abolition law for Washington, D.C. that included a provision for the return of fugitive slaves. Rather than praise Lincoln for proposing an end to slavery in the national capital, Phillips attacked him for his fidelity to the Constitution, which contained the Fugitive Slave Clause.[72]

Four years before Lincoln ran for President, Justice McLean received similar treatment from the *Anti-Slavery Bugle*, a radical Garrisonian paper published in Salem, Ohio, with the Garrisonian slogan "No Union with Slaveholders" emblazoned on its front page.[73] In early 1856, McLean was Ohio's "favorite son" in the new Republican Party, the nation's most important and ultimately successful anti-slavery party, which campaigned under the slogan, "Free Soil, Free Labor, Free Speech, Free Men." The *Bugle* despised the Republicans because they were not radical enough on slavery, and denounced McLean, accusing him of holding a slave in Ohio which the paper said was consistent with "his zeal for the supremacy of the slaveholders, over Ohio, as exhibited in the Rosetta case and on various other occasions."[74] While the Court's most anti-slavery member, McLean's fidelity to the Constitution and his willingness to uphold the fugitive slave laws made him an anathema to uncompromising Ohio Garrisonians. Although Garrisonians refused to vote or run for office, they were quick to denounce politicians who were not sufficiently anti-slavery. As a local leader, McLean was an easy target for the *Bugle*.[75]

The *Bugle* followed this attack on McLean with a letter from Dr. Abraham Brooke, accusing McLean of being a brutal slaveowner, in flagrant violation of Ohio law.[76] Brooke, a Quaker (although he had been "disowned" by fellow Quakers in the 1840s), was a physician, radical reformer, "free thinker," and one of the leading Garrisonian abolitionists in Ohio. A sympathetic historian described him as a "shadowy figure."[77] In 1836, while

living in Stark County, in northern Ohio, just south of Akron, he helped organize a branch of Garrison's American Anti-Slavery Society. A year later he moved to Oakland, Ohio, in Clinton County, which is about fifty miles from Cincinnati and about twenty-five miles northwest of Warren County, where McLean lived. In 1839 he organized the Chester Township Anti-Slavery Society in Clinton County, which was also a branch of Garrison's American Anti-Slavery Society. That year he also organized the Society for Universal Inquiry and Reform. In 1841 he was sentenced to five days in jail for "riot" after rescuing slaves brought into Ohio by Virginians moving west. Two days later, he and the other defendants were released when the Ohio Supreme Court, in part relying on McLean's opinion in *Carneal*, overturned their convictions.[78] The Ohio court determined that the slaves Brooke helped rescue had in fact become free the moment their owner brought them to Ohio, and thus Brooke had a legal right to help them escape from the custody of the Virginians who were illegally holding them in bondage. This 1841 arrest established Brooke's credentials as an abolitionist "martyr," although his martyrdom was short and not very painful. In 1842–43, he was sympathetic to the Liberty Party, which most Garrisonians were not, but by 1844 he was a "notorious eccentric because of his attempts at complete nonresistance." He became a strict vegetarian, refused to cut his hair or beard, use money, or send letters through the post office because it would taint him by using a government institution. He later moved away from some of these radical positions. By 1850 he was also a spiritualist. In 1853 he moved to Marlborough, in northern Ohio, about twenty miles from Salem, where the *Bugle* was published. He continued to publish articles and letters in the *Bugle* and other anti-slavery newspapers.[79]

In his letter to the *Bugle*, Brooke asserted that in 1838 McLean had purchased a young slave girl named Lucinda in Kentucky and forcibly kept her at his home in Warren County where she was "held and used as a chattel personal, and subjected to the beatings and privations, incident to the condition of a slave." He further asserted that when McLean thought Lucinda might run away, he kept her locked up in an attic and was preparing to have her taken back to Kentucky, where she would be sold. He concluded: "These facts prove him to have no conscience which forbids the crimes of slave buying and slave owning, even where practised [sic] contrary to what he would call law and help to illustrate the reason why his judicial decisions are always inimical to liberty."[80]

Given his activism, his work on the underground railroad, and the fact that he briefly spent time in jail for helping alleged fugitive slaves, Brooke and the editors of the *Bugle* doubtless considered McLean to be "the enemy" because he had upheld the Fugitive Slave Laws of 1793 and 1850 while riding circuit and on the Supreme Court. Committed to his cause, Brooke exaggerated, told half-truths (although he may have sincerely believed them), never seriously investigated his claims, and asserted "facts" which were both false and utterly implausible. His assertion that McLean's "decisions are always inimical to liberty" was categorically untrue, given his many pro-freedom opinions in such cases as *Carneal*, *Rhodes v. Bell*, *Groves v. Slaughter*, *Prigg v. Pennsylvania*, and *Vaughn v. Williams*. Indeed, Brooke himself had benefitted from the precedent set in *Carneal*. But for Brooke his "cause" seemed far more important than accuracy or truth. Indeed, in his own way, Brooke was an early proponent of "alternative facts."

Both Brooke and the editors of the *Bugle* denounced McLean for events that were almost twenty years old, with no actual witnesses, hearsay evidence, and assertations of vague facts. The *Bugle's* attack on McLean and Dr. Brooke's letter seemed to be motivated

more by McLean's jurisprudence in fugitive slave cases, than the actual facts of Lucinda's life. The reference to Rosetta's case underscores this. McLean's constitutional fidelity was unforgivable for these abolitionists, who believed the Constitution was a "covenant with death" and argued for "no union with slaveholders." That McLean was more anti-slavery than anyone else on the Court—and had written important opinions denouncing slavery and protecting freedom in Ohio—was irrelevant to Brooke and the *Bugle*.

In addition to asserting that McLean kept Lucinda hidden in an attic and was planning to return her to slavery in Kentucky, Brooke said that in 1838 she fled from McLean's house "and made her escape to a friend some fifty or sixty miles distant from Cincinnati." Brooke did not explain how she knew "this friend" or where this friend lived. Brooke claimed that after "escaping" from McLean she went to Springborough[81] which had a strong Quaker community. But Brooke did not seem to realize that Springborough was in Clear Creek Township in Warren County, which was the same township where McLean lived. Springborough was about five miles from McLean's farm in Ridgeville, Clear Creek Township. This would been about a one hour-and-a-half walk for Lucinda along the Ridgeville to Springborough Pike that connected the two places. Clearly, she was not "escaping" from McLean if she remained that close to him. Brooke asserted Lucinda was later taken to Clinton County on "the underground train." In his letter Brooke claimed (incorrectly) that she was still living there in 1856.[82]

Brooke's convoluted narrative implies McLean held Lucinda in captivity in Cincinnati, and that on her own she travelled some fifty or sixty miles away to reach her unnamed friend in Springborough. When Brooke wrote the letter McLean was living in Cincinnati, but Brooke apparently thought McLean was living there in 1838, when Brooke also believed Lucinda came to work for him. But in the 1830s and early 1840s McLean was still living in Warren County. Brooke's letter, which was based on things he had "heard," rather than personal knowledge, demonstrated he actually knew very little about where McLean had lived or when Lucinda actually came to work in his house, close to twenty years earlier. What we do know, from the census, is that by 1850 Lucinda was married and living near Jasper, in nearby Fayette County, Ohio, about fifty miles from where McLean had lived in the late 1830s. At the time Brooke wrote this polemic he was living more than 200 miles away in Stark County.

Two weeks after Brooke's letter appeared, the *Bugle* published a strong rebuttal from Aaron Harlan, a lawyer who grew up in Warren County, where McLean was his neighbor in the late 1830s when Lucinda worked in his house. By 1856, Harlan represented Greene County in the U.S. Congress. His district, near Warren County, was intensely anti-slavery. Harlan was also a Trustee of Antioch College, which had admitted Blacks and women on the same basis as White men when it began in 1850. It was a hotbed of anti-slavery activism. No one, not even the Garrisonians who published the *Bugle*, could argue that Harlan was "soft" on slavery.

Under the title "Judge M'Lean and Slavery," Harlan told a very different story, based on his personal knowledge of the events in 1836–38, when he was McLean's neighbor.[83] Harlan's letter contrasted with Brooke, who clearly had never met McLean. Harlan demonstrated that Lucinda first came to the McLean family in 1836, not 1838 as Brooke implied. The existing documentation from these transactions confirms that date.[84] At this time Brooke was still living in Stark County, more than 200 miles from Warren County, and could not have had any first-hand knowledge of how Lucinda came to McLean's house. While Lucinda was living with the McLean family, Brooke relocated to Clinton

County, and a year later (1838) resumed his anti-slavery activities. We cannot know if he ever went to Warren County in this period. His letter implies he believed McLean was living in Cincinnati when Lucinda came to live with him. McLean actually moved to Cincinnati after his wife Rebecca died in December 1841, which was well after Lucinda had left the McLean family. Furthermore, when Lucinda left the McLean family, she initially remained close by, in Clear Creek Township, before eventually settling further away in Jasper.

Harlan wrote that in 1836 McLean's wife, Rebecca, was ill and needed a servant to help take care of her. Someone recommended McLean try to hire a teenage girl, Lucinda, who was then a slave in Covington, Kentucky. Rebecca was from Covington, and it is entirely possible (although there are no extant records on this point) that Rebecca's family knew Lucinda's owner, Mr. A. Stevens, described as an "Old Gentleman." Covington was a small town with only about one hundred slaves living there, so it is plausible the connection between the McLeans and Stevens was not random. McLean agreed to pay Stevens $200 if he would bring her to Ohio so that she could work for McLean for three or four years. The $200 was based on the "highest wages for female labor" at the time. While McLean was technically "hiring" Lucinda from her Kentucky slaveowner, the Justice made it clear that Stevens would "make her free by taking to her to Ohio." McLean was emphatic that as soon as Stevens brought Lucinda to Ohio, she would no longer be a slave, and after she stopped working for McLean, she would be free to go wherever she wished.[85] This of course was consistent with McLean's own decision in the *Carneal* case, some forty years earlier. The transaction was completely transparent, and McLean made sure Stevens understood "he could have no claim on the girl as she would be emancipated by being taken to Ohio." When Lucinda arrived in Ohio, she would be immediately free, and could never again be returned to Kentucky as a slave.[86]

Stevens agreed to this bargain, and brought Lucinda to Ohio, where she was immediately free. According to Harlan, the teenager Lucinda also agreed to come work as caretaker for Rebecca McLean.

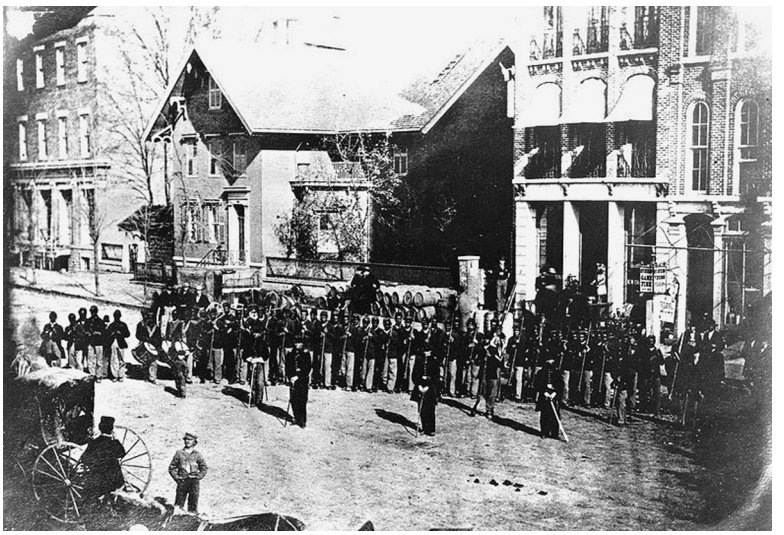
Lucinda's consent was obviously problematic. As a slave in Kentucky, she had virtually no control over her own life. As a teenager she was not necessarily mature enough, or informed enough, to be able to make a good decision, assuming she was in a position not to consent to the arrangement. On the other hand, living across the river from a free state, she doubtless realized this was a huge opportunity to gain her freedom and not have to worry about being sold to the deep South. Furthermore, Lucinda likely understood once Stevens brought her to Ohio, she was no longer a slave and not obligated to work for McLean.

It is not clear how much McLean was directly involved in these negotiations. Given his status as a Supreme Court Justice, it seems unlikely he personally travelled to Kentucky, especially because he was not living in Cincinnati; at the time there were no railroad connections between Cincinnati and Warren County, and such a trip would have taken a few days or more.[87] The negotiations seem to have been handled by John Reeves, who was the business partner of McLean's younger brother, William, who began the first of three terms in Congress shortly before John became postmaster general. By this time William was in Cincinnati, practicing law and involved in a mercantile business with Reeves. In mid-August 1836, Reeves informed McLean that Stevens was delayed in bringing Lucinda to Cincinnati to receive his payment.[88] Reeves reiterated to Stevens that when he brought Lucinda into Ohio, she would be immediately free. Everyone involved in this transaction understood this.

According to Harlan, Lucinda was brought to Cincinnati and taken to work for McLean at his home in Warren County. This was not an "indenture" or an "apprenticeship," but an agreement that McLean would provide for her for three or four years, at which point she would be an adult and could go off on her own. What happened next is unclear. Harlan says the relationship did not work out, Rebecca McLean expressed distrust of Lucinda, and soon after that Lucinda left. As Harlan noted, "Taking her back to Kentucky never entered into the mind of Judge M'Lean. He had given to her freedom, and it was optional with the girl whether she would remain in his family or not."[89]

The correspondence with Reeves clearly shows that McLean never "owned" Lucinda in Kentucky, much less in Ohio, even though the contemporary letter of Reeves and the letter from Harlan almost twenty years after used the word "purchased" to describe the transaction. Neither McLean nor his agent Reeves went to Kentucky to purchase Lucinda from Stevens. Rather, Stevens brought Lucinda to Ohio, knowing the moment she set foot in Ohio with the consent of her owner (Stevens) she was free. The "purchase" was actually for Lucinda's freedom, for which McLean's agent gave Stevens $200. McLean never claimed to own Lucinda as a slave and reminded Stevens that once she stopped working for him, she would not be returned to Kentucky. As a matter of technical law, McLean did not "buy" her in Ohio because it was illegal to buy a slave in Ohio and once she entered Ohio, she was in fact a free person and not a slave.[90] These technical legal issues may not have meant anything to Brooke or the *Bugle*'s editors, but they doubtless meant a great deal to McLean, who never intended to become a slaveowner, and to Lucinda, who became a free person when she went to work for McLean. Rather than buying a slave, he facilitated a teenage girl's move to Ohio to gain her freedom and then to be protected, housed, fed, and clothed until she was legally an adult and able to live on her own as a free person.

Clearly, McLean believed Lucinda would work in his house for about four years. McLean



A Black servant named Lucinda first came to work for the McLean family in 1836. By 1850 Lucinda was married to a Randolph Upthegrove. In 1863, their son Charles was serving in the 127th Ohio Infantry Regiment, later renamed the Fifth United States Colored Infantry Regiment (5th USCT). This photo shows a portion of the regiment in Delaware, Ohio, probably in 1863.

doubtless assumed that as a fourteen- or fifteen-year-old, she would function as apprentices did at this time and eventually leave the McLean family to live on her own, as a free person. Had it worked out, Lucinda would have left the McLean family as a free woman with the recommendation and patronage of a Supreme Court Justice and probably some money to start her new life.

But, according to Harlan, it did not work out. After a short while Mrs. McLean felt Lucinda was "ill-natured and worthless," and actually feared her. We cannot confirm Lucinda's behavior or her reason for leaving McLean's employment. McLean made no attempt to stop her and "Taking her back to Kentucky never entered into the mind of Judge M'Lean."[91] Whatever happened in the McLean house, the move to Ohio gave Lucinda her freedom. By 1850 Lucinda was married to a Randolph Upthegrove, the son of a former slave.[92] Upthegrove's father had been born in South Carolina and was freed in Ohio by his owner, who was also his father. The Upthegroves were living near Jasper, in Fayette County, one county away from where McLean had lived. Lucinda shows up in the U.S. census in that year and in 1860. In 1863, her oldest son Charles was serving in the 127th Ohio Infantry Regiment, which was later renamed the Fifth United States Colored Infantry Regiment (5th USCT). He saw action in Virginia and North Carolina.

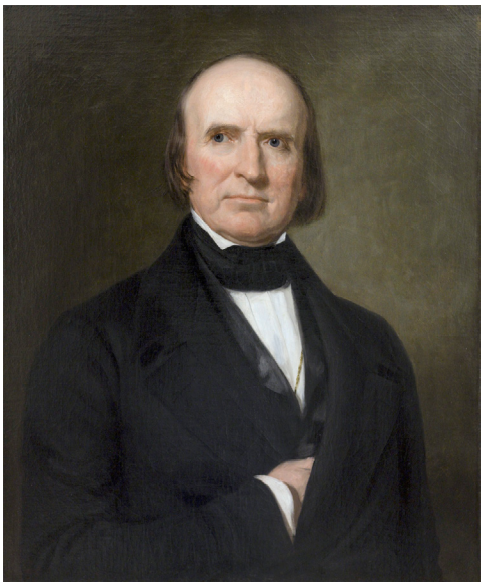
After Lucinda left, Rebecca McLean relocated to Louisville, Kentucky, moving in with the family of her daughter-in-law, Mildred Taylor McLean. Mildred was the daughter of Hancock Strother Taylor, who owned a small plantation near Louisville. Hancock's brother was the future president, General Zachary Taylor. In January 1840, Rebecca wrote her husband from Louisville about her situation there, including that she believed the Taylors had found a "woman" (who was probably a slave) who could take care of her. Rebecca noted she was going to buy this woman new clothes "to keep her from suffering." Rebecca remained in Louisville until her death in December 1841. She was buried in Louisville but later reinterred with John in Cincinnati after his death in 1861.[93]

McLean in Washington: Slaveowner, Emancipator, or Both?

In defending McLean against Dr. Brooke's "slanderous charge," as he called it, Rep. Harlan noted when McLean lived in Washington, D.C. in the 1820s he "paid for the emancipation of slaves" and when "he returned from Washington City to Ohio he brought with him a colored man[,] his wife[,] and four or five children, all of whom he had bought from slavery and emancipated, and furnished them in Cincinnati with furniture." He also noted that while in Washington he emancipated another slave who was a "Dining-Room Servant," who "he might have sold for ten to fifteen hundred dollars."[94]

Harlan's defense of McLean—that he was an emancipator rather than a slaveholder—did not impress the *Bugle*'s editors, who once again responded by castigating him for his decisions upholding the fugitive slave laws—while, not surprisingly, ignoring his opinions upholding Black freedom and his other anti-slavery decisions. For Garrisonians there was no middle ground. The paper also pointed out that McLean had indeed owned slaves in Washington, sarcastically noting emancipating his "valuable Dining-room Servant" was "an unusual exhibition of virtue after he had incurred the guilt and perpetrated the meanness of enslaving him. It seems he has been a slaveholder." The paper concluded: "He *is a Slaveholder* so acknowledged by his friend while he lived in Washington City." Endorsing Brooke's exaggerations and his incorrect facts, the *Bugle* asserted "his whole judicial life proves him practically one of the most cool and cruel enemies of the slave."[95]

This editorial is problematic. Even if all the facts in Brooke's letter and Harlan's letter were true, McLean was not a slaveholder in



This mid-nineteenth century portrait of McLean, painted during his time as a justice on the Supreme Court, is attributed to G.P.A. Healy. A prolific and much sought-after artist, Healy painted portraits of prominent Washingtonians.

1856, and thus the use of the present tense "He *is a Slaveholder*" was either intentionally misleading or intentionally dishonest. But, from the Garrisonian point of view, it was a good way to undermine McLean's hopes for the Republican nomination.

On another level, of course, despite the exaggeration, in 1824 McLean owned two slaves in Washington. Whether he was an enslaver, or an emancipator, is, however, complicated. The Garrisonians were not troubled with such complications because in their view *no one*, under any circumstances, should ever participate in the slave system. Thus, they objected to anyone ever buying a slave, even if it was for the purpose of freeing that slave. Such an approach was ideologically "pure," but also simplistic. Given the arc of McLean's relationship to slavery and enslaved people, McLean clearly was not buying *people* to hold them in slavery, rather he purchased the *freedom* of people already held in slavery.

The most notorious example of this Garrisonian view concerns the manumission of Frederick Douglass. The publication of his autobiography, *Narrative of the Life of Frederick Douglass: An American Slave*,[96] made Douglass the most famous fugitive slave in America. Thus, in August 1845 he sailed to England because it was no longer safe for him to remain in Massachusetts. He remained there for about a year-and-a-half, returning in early 1847. He was able to return to the United States only because two wealthy English abolitionists, Ellen Richardson and her sister-in-law, Anna Richardson, raised 150 pounds sterling (about $750 in 1847 and about $18,500 in 2023) to purchase Douglass's freedom.[97] Douglass's benefactors sent the money to an attorney in the U.S. who arranged to purchase Douglass's legal manumission. In his third autobiography, written after the Civil War had destroyed slavery, Douglass explained that after this "ransom," as he called it, was paid to his owner,[98] the two women placed "the papers of my manumission into my hands." Douglass later explained the constitutional significance of this event: "To this commercial transaction, to this blood-money, I owe my immunity from the operation of the fugitive slave law of 1793, and also from that of 1850."[99]

Garrisonians objected to Douglass allowing himself to be purchased. For them, sending money to a slaveowner was supporting slavery, just as voting under the Constitution supported slavery. The Garrisonians sought moral purity; Douglass sought liberty and the freedom to speak openly against slavery. He saw nothing wrong with permanently securing his freedom and never having to worry about being seized as a fugitive slave. While a famous fugitive slave, Douglass risked capture. His fame made him more vulnerable than most fugitives. But, once he was legally free, his fame protected him from kidnapping or mistaken identity. Douglass argued that if he had been a "private person," there would have been no reason to purchase his freedom because he "could have lived elsewhere, or perhaps might have been

unobserved even here [in the United States], but I had become somewhat notorious, and I was therefore much exposed to arrest and capture."[100] Douglass argued that being ransomed from slavery was not a violation of abolitionist principles, rather he compared "the exchange to 'money extorted from a robber' or a 'ransom' rather than an affirmation of any man's right of ownership of another."[101]

In his response to Dr. Brooke, Rep. Harlan wrote "If Mr. A. Brooke who has busied himself in this matter will find any six persons in his county who have paid as much money as Judge M'Lean has paid for the emancipation of slaves the evidence ought to be published." He then noted, as we have above, that when McLean returned from living in Washington "he brought with him a colored man his wife" and their children, and that he had purchased the freedom of another slave who was a "Dining-Room Servant."[102]

As we noted above, the *Bugle* used this information not to praise McLean for helping Lucinda, a family of six or seven slaves to gain their freedom in Ohio, and a single man to become free, but to "prove" that McLean owned slaves, and to castigate him for doing so. For Garrisonians, purchasing slaves to free them strengthened the system of slavery, reaffirmed the legality of owning human beings, and enriched southern whites. "No Union with Slaveholders"—the Garrisonian slogan—also implied no commerce with them and no economic or legal recognition of the right to own human beings.

McLean was clearly not a Garrisonian. There were slaves in the house he rented in Washington, and he arranged for some of them to be free. He may have technically owned a few of these slaves, in preparation for manumitting them. Or, he may have given money to their owners and had the owners free them, as he did with Lucinda. In either scenario, the bottom line was the same: slaves who worked in McLean's household became free people.

Richard

In September 1822, McLean became the Commissioner of the General Land Office and moved to Washington, which would be his full-time residence until the spring of 1829. He sojourned to Washington when Congress was in session from 1813 to 1816, living in boarding houses like most other Congressmen. With a full-time job in the nation's capital, he rented a house, first in Georgetown and later in Washington City. As we noted above, as a high-ranking public official, with a good salary, he would have had household servants. At least initially they were probably slaves, provided by the landlords from whom he rented. He almost certainly did not plan to buy slaves for several reasons. As we have seen, he opposed slavery and emphatically declared this while on the Ohio Supreme Court. He did not come from a slaveholding culture, which was alien to him. Slaves were also enormously expensive, and McLean was hardly wealthy. As a presidential appointee he knew his federal positions were transitory. With Monroe's second term almost half over, there was no reason for him to assume he would remain in Washington for very long. Thus, it would have been economically foolish to buy slaves.

In 1823, after his appointment as Postmaster General, McLean rented a slave named Richard for $8.00 a month from Washington Bowie, a major figure in the Maryland/D.C. community. Richard may have been in the house in Georgetown that McLean rented from Bowie, who died in 1826. Richard continued to work in the McLean household until 1828, when William S. Nicholls, who now owned Richard, contacted McLean about unpaid rent for Richard that had accrued since Bowie's death.

McLean and Nicholls corresponded about how much back rent was due, with McLean pointing out he had paid for Richard's clothing (which should have been Bowie's cost) and given him some cash as spending money.

For nearly seven years, as Commissioner of the General Land Office and postmaster general, McLean lived mostly in Washington, while maintaining his permanent residence in Ohio. In the nation's capital he lived with his family in a rented house in what is today Georgetown. This map shows the layout of Georgetown in 1830.

To settle the business, Nicholls proposed that McLean buy Richard. McLean made it clear he did not want to own a slave, and certainly could not take one back to Ohio. With less than a year to go in the Adams administration, McLean and his family were expecting to move back to Ohio. In July 1828, McLean paid Nicholas $400, on condition that Nichols manumit Richard. There is no bill of sale for Richard, and it does not appear McLean purchased him as a slave, but rather that he gave Nicholls money to free him. Richard, who was apparently the "dining room" servant Harlan referred to in his letter to the *Bugle*, probably remained in Washington as a free man, although he might have moved to Ohio with McLean.[103]

Despite Harlan's assertion that McLean "owned" a valuable servant, it does not appear McLean ever bought Richard or legally owned him as a slave. We know he rented Richard's services from Bowie and later paid Nicholls past due rent in return for Nicholls manumitting Richard. To that extent McLean, like almost every other government official in Washington in the 1820s, participated in the system of slavery. Unlike other officials, McLean used his personal funds to help slaves who worked for him gain their freedom.

The Hawkins Family

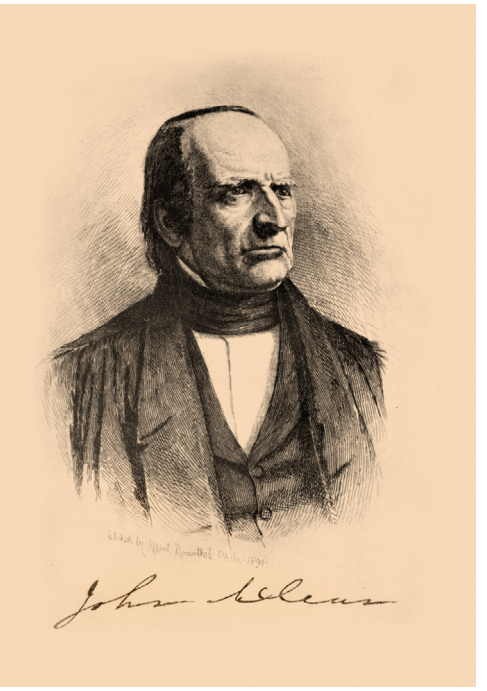
Starting in the 1820s, McLean helped a Black couple, Thomas and Jane Hawkins,

and their children, become free and move to Ohio. There are two existing documents and three census records about these events.

The documentary evidence begins with an 1824 bill of sale to McLean from Benjamin B. Beall, who was the trustee for his relative R. B. Beall. Benjamin Beall sold Jane Hawkins, a twenty-three-year-old slave woman and her eighteen-month-old child, to McLean for $200.[104] The price for these two slaves was low, perhaps because Beall knew McLean planned to manumit them. It is also possible Beall thought Jane might run away with her child because she feared being sold south, and decided a quick sale, even below market price, was the wisest move. But the $200 was a significant outlay of cash for McLean, which represented about seven per cent of his annual salary.

There is no other contemporary documentation for this transaction, and if the *Washington Post* reporters discovered this evidence, they would have been technically correct in saying the former Congressman bought a slave about a decade after he left Congress, while he was living full time in Washington City as the Postmaster General. At first glance, the purchase makes no sense. McLean could have hired a slave (or a free Black) to work in his house for much less money at this time. He had a prestigious position as Postmaster General in the Monroe administration, but Monroe would step down from the presidency on March 4, 1825, and there was no reason for McLean to expect he would be in the next administration. Thus, in a little more than a year, McLean assumed he would be returning to Ohio to resume his law practice, or perhaps regain his seat on the Ohio Supreme Court. He was a truly unlikely purchaser of slaves, given his own strong opposition to slavery, suggested by his devout faith as a Methodist and his decision in the *Carneal* case. But, as other evidence demonstrates, McLean was not buying Jane and her child as an investment or to keep them as slaves. He was buying them to manumit them, and probably to prevent them from being sold to slave traders, which would likely otherwise have been their fate if Benjamin Beall, as the trustee for the dying or already deceased R.B. Beall, had to sell off assets to pay creditors or distribute inheritances.

A letter sent to McLean nearly three decades later helps makes sense of this, as do subsequent census records in Ohio. In August 1851 McLean received a long letter from Thomas Hawkins, informing him that his wife Jane had recently died, and he (Thomas) had suffered from the same fever that killed her. Hawkins said he had "become old & much broken down" and was devastated by the death of Jane, which was "irreparable." He felt "lost" and did "not know where to go." He was also destitute and asked for "some pecuniary assistance at this time



This etching of a bust-length vignetted portrait of Justice McLean was commissioned for Hampton L. Carson's *The Supreme Court of the United States: Its History and Centennial*, published by John Y. Huber Company of Philadelphia in 1891.

of my want." He apologized for turning to McLean and said he "would be the last one to trouble you if I were not in want." Hawkins said he had dictated the letter to "a good friend," who then wrote it for him. The letter was in fact written in a clear, seemingly professional, hand. In the letter he affectionately called McLean "my old Master."[105]

Census records show that in 1840 Thomas and Jane Hawkins lived in Middletown, Ohio, with their five children, including two who were the right age to have been infants in 1824. In 1850, the Hawkins family was also in Middletown, and in 1860 Thomas Hawkins was still there.[106]

This evidence dovetails with the claims in the Harlan letter that "When Judge M'Lean returned from Washington City to Ohio he brought with him a colored man and his wife and four or five children, all of whom he had bought from slavery and emancipated, and furnished them in Cincinnati with furniture &c. for housekeeping."[107] We do not know exactly when McLean moved the Hawkins family to Cincinnati or when they relocated to Middletown. But we do know in 1840 (and thereafter) they were living in Middletown, which was about thirteen miles from McLean's home in Clear Creek in Warren County. McLean helped the whole family in Washington and moved them all to Ohio where they were free. He also set them up near him, probably to make sure they were able to succeed in their new status as free people in the free state of Ohio, And so they did, at least until disease killed Jane and devastated Thomas.

Conclusion

Did McLean own some slaves in his lifetime, well after he was no longer in Congress? In 1824, he clearly purchased Jane Hawkins and one of her children, and within six years she was living in Ohio with her husband and all her children as free persons. We do not know if McLean bought Richard, although the evidence strongly suggests this did not happen. Rather, it seems that McLean paid money to Richard's owner, who then manumitted him. But whatever the details might be, the outcome was the same: Richard became free in Washington after McLean spent money to make that happen. The evidence shows that McLean clearly did not buy Lucinda, but rather paid her owner to bring her to Ohio, where she became free once she crossed the Ohio River and landed in the Buckeye state.

It is not clear if McLean actually owned Thomas Hawkins, or if he was a free Black who worked at McLean's rental houses in Georgetown and then Washington City. Hawkins calls him "My old Master," but that language, in this time period, would have been appropriate if Hawkins was a free Black servant or a slave.

We also do not know when Jane Hawkins and her child (or children) became free. McLean appears to have purchased her in January 1824. He might have freed her then. But he may have not wanted to bother with the complexities of manumitting her in Washington, D.C., because he expected to take her to Ohio, where she would immediately free, at the end of the Monroe administration in March 1825. What we know is that McLean brought the entire Hawkins family to Ohio in 1829, where they instantly became legally free people. The *Bugle* accused him of buying slaves to exploit them, and certainly Jane, Thomas, and Richard worked in his home in Washington. However, the claim of exploitation is problematic. In 1824 it seems likely Thomas Hawkins was working for McLean either as a free Black or a rented slave. As in many slave couples, Hawkins (if a slave) was likely owned by one person, and his wife[108] Jane (and under the law of slavery her children) was owned by someone else, the Beall family. She was sold by the "Trustee" for R.B. Beall, implying R.B. was dead (or

dying) and the family wanted to dispose of his slaves to pass on cash as inheritances. If so, then there was some urgency to buy Jane, so that she would not be sold away from her husband to settle R.B. Beall's estate. In addition, in January 1824 McLean assumed he was going to be leaving Washington at the end of Monroe's term, in early March 1825. Thus, it made sense to buy Jane and her child at a good price, keep the Hawkins family together, and take them all to Ohio and freedom. But McLean's move back to Ohio was delayed by more than four years.

McLean ended up in the Adams administration for the next four years, and then briefly in the Jackson administration. Jackson put him on the Court in March 1829, but McLean did not actually take his seat until 1830. He moved back to Ohio in the spring of 1829, with the Hawkins family, who were now free. Thus, he may have found himself in the odd (and perhaps uncomfortable) position of owning slaves for more than five years, when he had expected to make them free persons much sooner.

A quarter of a century after these events, Dr. Brooke and the *Bugle* condemned McLean for his successful efforts at freeing Richard, the Hawkins family, and Lucinda. This was consistent with Garrisonian abolitionists who persistently (although not always consistently[109]) argued that no one should pay "ransom" to slave owners to free people from bondage. The most famous example of this, as we noted, were the attacks from Garrisonians leveled at Frederick Douglass when he was able to return to the United States as a free man, after nearly two years in Britain, because two British opponents of slavery had sent 150 pounds sterling to a lawyer who paid Douglass's owner for manumitting him.

Some Garrisonians condemned these transactions because they supported slavery and confirmed that treating people as property was legitimate. Douglass defended his right to be free arguing "this commercial transaction . . . this blood-money" gave him "immunity from the operation of the fugitive slave law of 1793, and also from that of 1850."[110] Douglass argued that paying "ransom" was not "an affirmation of any man's right of ownership of another."[111]

Douglass, the most important Black abolitionist in the nation, was fair game for the Garrisonians for accepting freedom when his friends ransomed him from slavery. Not surprisingly, Justice McLean, who was antislavery, although not an abolitionist, was fair game for the vitriol of Brooke and the *Bugle*. We can only imagine how the Hawkins family, Richard, or the married Lucinda and her family might have responded to these attacks on the benefactor who spent his own money to free them from bondage.

In the end, McLean's relationship with slavery underscores how the Constitution's support for slavery and slavery's stranglehold on American politics from 1787 to 1861 undermined liberty and justice in the American nation and created difficult, sometimes insurmountable, dilemmas for jurists and politicians who detested human bondage. Slaveowners on the Supreme Court, in the federal courts, in Congress, and in the White House, on the other hand, were not much troubled by these issues.

One can condemn McLean for holding Jane Hawkins and her child in slavery for a few years, before manumitting her and her family in a free state. Or we can praise him for using his limited funds to buy freedom for the Hawkins family and some other slaves. Similarly, one can attack him for enforcing the Fugitive Slave Clause of the Constitution, which he swore to uphold. Or we can praise him for using every opportunity to free slaves in Ohio and elsewhere, and being the only Supreme Court justice to consistently stand up to the aggressively proslavery jurisprudence of Marshall, Story, Taney, and almost all the rest of his brethren, in cases involving slavery and Black liberty.[112] His decisions or

votes upholding the fugitive slave laws in the *Van Zandt* case and *Ableman v. Booth* may seem deplorable today. On the other hand, his full-throated and lonely opposition to slavery and his support of Black rights in *Prigg v. Pennsylvania* and *Dred Scott* make him a rare icon of liberty on a Supreme Court that was almost always dedicated to the proposition that all men were *not* created equal, and Blacks were never entitled to "life, liberty, and the pursuit of happiness."[113]

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ENDNOTES

[1] "Who Were the Congressional Enslavers?" *Washington Post*, February 11, 2022, available at: https://www.washingtonpost.com/history/interactive/2022/congress-slaveowners-names-list/ (last accessed May 6, 2024).

[2] The new states were Kentucky (1792), Tennessee (1796), Louisiana (1812), Mississippi (1817), Alabama (1819), Missouri (1821), Arkansas (1836), Florida (1845), and Texas (1845); slavery was also legal and some people were held as slaves in the Indian Territory (modern day Oklahoma), New Mexico Territory (which included Arizona), Utah Territory (which included Nevada, and parts of Colorado and Wyoming), and the Kansas Territory (which included part of Colorado).

[3] Adding the delegates to the Constitutional Convention would also have enlarged the list, with some major slaveowners like Charles Cotesworth Pinckney, Edmund Randolph, and George Mason, and minor slaveowners like James McHenry, James Wilson, and John Dickinson, who had freed all of his slaves before the Constitutional Convention.

[4] Massachusetts, New Hampshire, and Vermont (the fourteenth state) ended slavery in their Revolutionary-era constitutions, while Pennsylvania (1780), Rhode Island (1784), Connecticut (1784), New York (1799), and New Jersey (1804) passed gradual emancipation acts, under which no new slaves could be imported into the state, all children of slaves would be born free, and those people held as slaves would remain in servitude until they died, unless voluntarily freed by their owners. In 1827, New York emancipated all slaves still in the state, and in 1847 New Jersey changed the status of all remaining slaves to indentured servants. The best study of this process is Arthur Zilversmit, **The First Emancipation: The Abolition of Slavery in the North** (1967). All the northern states entering the Union after the Constitution was ratified—starting with Vermont in 1791 and Ohio in 1803—banned slavery, but it continued to exist in Indiana and Illinois after statehood.

[5] Michael Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era** (2003).

[6] "Who Were the Congressional Enslavers?"

[7] "Who Were the Congressional Enslavers?"

[8] Campbell Gibson and Kay Jung, **Historical Census Statistics on Population Totals by Race, 1790 to 1990 and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States. U.S. Census Bureau, Population Division, Working Paper No. 56, Table 50, Ohio** (2002).

[9] "United States Census, 1820," database with images, FamilySearch. (https://familysearch.org/ark:/61903/3:1:33S7-9YBC-4VC?cc=1803955&wc=3L7F-VKD%3A1586985003%2C1586986102%2C1586985011 : 14 July 2015), Ohio > Warren > Deerfield > image 11 of 12; citing NARA microfilm publication M33 (Washington D.C.: National Archives and Records Administration, n.d.).

[10] "Who Were the Congressional Enslavers?"

[11] In the 1850s there were also some slaves and laws supporting slavery, in the Kansas, New Mexico, and Utah territories.

[12] *Ohio v. Carneal* (Ohio Supreme Court, 1817), in Ervin H. Pollack, ed., **Ohio Unreported Judicial Decisions, Prior to 1823** (1952), 133.

[13] Francis P. Weisenburger, **Life of John McLean: A Politician on the United States Supreme Court** (1937), 1–5.

[14] In 1804, New Jersey passed a gradual emancipation law, providing for the freedom of the children of any slaves born in the state after the act was passed. People already held as slaves in the state remained in bondage. Zilversmit, **The First Emancipation,** 184–200, 215–22.

[15] Northwest Ordinance, 1787, Art. VI. For a history of the drafting and adoption of that clause see Paul Finkelman, **Slavery and the Founders: Race and Liberty in the Age of Jefferson, 3rd ed.** (2014), 46–73.

[16] On the lingering of slavery in those places, see Finkelman, **Slavery and the Founders,** 74–101.

[17] Slavery existed in all the first thirteen states when independence was declared, as well as in what became the next three states: Vermont, Kentucky, and Tennessee.

[18] Ohio Constitution, 1803, Art. VIII, Sec. 2.

[19] Ohio Constitution, 1803, Art. VII, Sec. 5.

[20] *Rutherford v. M'Faddon* (Ohio Supreme Court, 1807), in Pollack, **Ohio Unreported Judicial Decisions**, 71, at 76–77.

[21] *Rutherford v. M'Faddon*, 86.

[22] Paul Finkelman, "The Strange Career of Race Discrimination in Antebellum Ohio," *Case Western Reserve University Law Review* 55 (2004), 373.

[23] In 1830, the census recorded six slaves in the state and in 1840 the census recorded three, but it seems likely that these were transcription errors by census takers. By 1840 there were more than 17,000 free Blacks in the state, giving Ohio the third largest free Black population in the North.

[24] Fourth Census of the United States, 1820; Census Place: Covington, Campbell, Kentucky; Page: 20; NARA Roll: M33_20; Image: 30. By 1830 he had moved to Louisiana, and owned five slaves that year, which was just before he died.

[25] John McLean, **A Sketch of The Life of Rev. John Collins, Late of The Ohio Conference** (Cincinnati: Swormstedt and Power, 1849). For McLean's early career see Thomas E. Carney, "The Political Judge: Justice John McLean's Pursuit of the Presidency," *Ohio History* 111 (2002), 121–2.

[26] David Martin, **The Trial of the Rev. Jacob Gruber, Minister in the Methodist Episcopal Church, at the March Term, 1819, in the Frederick County Court, for a Misdemeanor** (Fredericktown, MD: David Martin, 1819), 36. See also, Paul Finkelman, **Slavery in the Courtroom** (1985), 158–61.

[27] Weisenburger, **Life of John McLean**, 18.

[28] McLean's first term in Congress, the Thirteenth Congress, was unusual for having three sessions that totaled about twelve months, between May 24, 1813 and March 3, 1815. These long sessions, and the extra session, were a result of the ongoing War of 1812.

[29] Rachel A. Shelden, "Messmates' Union: Friendship, Politics, and Living Arrangements in the Capital City, 1845–1861," *Journal of the Civil War Era* 1 (December 2011), 453–8; Corey Brooks, "Stoking the 'Abolition Fire in the Capitol': Liberty Party Lobbying and Anti-slavery in Congress," *Journal of the Early Republic* 33 (Fall 2013), 523–47.

[30] *Ohio v. Carneal*, 133. McLean understood that a citizen of Ohio could own slaves in Kentucky, Virginia, or some other slave state, or that a southerner could recover a fugitive slave in Ohio under Art. IV, Sec. 2, Cl. 3 of the U.S. Constitution.

[31] In his opinion McLean concluded that Carneal had no legal claim to Lunsford, even under Kentucky law, but this technical conclusion was irrelevant to the broader holding that slaves became free when their owners voluntarily brought them into Ohio.

[32] *Carneal*, 138–9, 141.

[33] Frederick Douglass, **Narrative of the Life of Frederick Douglass, An American Slave** (Boston: The Anti-Slavery Office, 1845).

[34] *Carneal*, 138–9, 141.

[35] *Carneal*, 138–9, 141.

[36] *Carneal*, 142.

[37] Adams quoted in Weisenburger, **Life of John McLean**, 47, 48. Richard John, **Spreading the News: The American Postal System from Franklin to Morse** (1995).

[38] Weisenburger, **Life of John McLean**, 32–4, 48–9. Whitehill Walter Muir, **Dumbarton Oaks: The History of a Georgetown House and Garden 1800–1966** (1967), 38–47.

[39] The only other justice openly hostile to slavery at this time was Smith Thompson of New York. Joseph Story had once been a vigorous opponent of slavery. But by the mid-1820s he had ceased to articulate any anti-slavery views, perhaps because Chief Justice John Marshall had gone out of his way to reject his view that the African slave trade violated natural law in the *Antelope* case. Paul Finkelman, **Supreme Injustice: Slavery in the Nation's Highest Court** (2018), 129.

[40] *Menard v. Aspasi*a, 30 U.S. (5 Pet) 505, 515 (1831).

[41] Finkelman, **Supreme Injustice**, 72–3.

[42] *LaGrange, alias Isidore, A Man of Color v. Chouteau*, 31 U.S. (4 Pet.) 20, at 22-23 (1830). Finkelman, **Supreme Injustice**, 69–72, provides a full discussion of this case.

[43] District of Columbia Map of 1835 in Thomas Gamaliel Bradford, **District of Columbia** [Boston: T.G. Bradford, 1835] Map. https://www.loc.gov/item/88694084/ .

[44] *Rhodes v. Bell,* 43 U.S. (2 How.) 397 (1844).

[45] *Scott v. Negro Ben*, 10 U.S. (6 Cr.) 3, at 6 (1810). For a full discussion of these cases, see Finkelman, **Supreme Injustice**, 56–75.

[46] *Menard v. Aspasi*a, 30 U.S. (5 Pet) 505, 515 (1831).

[47] *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, at 497 and 503; Mississippi Constitution, 1841, Art. VII, Slaves, Sec. 2.

[48] 40 U.S. at 505.

[49] 40 U.S. at 506.

[50] On this argument see James Oakes, **Freedom National: The Destruction of Slavery in the United States, 1861–1865** (2012), and James Oakes, **The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution** (2021).

[51] 40 U.S. at 507.

[52] 40 U.S. at 507.

[53] 40 U.S. at 508.

[54] *Prigg v. Pennsylvania,* 41 U.S. (16 Pet.) 539 (1842).

[55] Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story's Judicial Nationalism," *Supreme Court Review* (1994), 247.

[56] See Finkelman, "Story Telling on the Supreme Court"; Paul Finkelman, "*Prigg v. Pennsylvania*: Understanding Justice Story's Pro-Slavery Nationalism," *Journal of Supreme Court History* 2 (1997), 51; Finkelman, **Supreme Injustice**, 140–71. On the Personal Liberty Laws, see Thomas D. Morris, **Free Men All: The Personal Liberty Laws of the North, 1780–1861** (1974).

[57] 60 U.S. (19 How.) 393 (1857).

[58] Prigg, 41 U.S. (16 Pet.) at 668–69 (McLean, J., dissenting).

[59] Finkelman, "Story Telling on the Supreme Court," and Finkelman, "*Prigg v. Pennsylvania*."

[60] *Vaughn v. Williams*, 28 F. Cas. 1115 (1845). For a more detailed discussion of this case, see Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (1981), 243–51.

[61] *Jones v. Van Zandt*, 13 F. Cas. 1047 (1843).

[62] 28 F. Cas. 1115.

[63] *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 682 (1855). For a full discussion of this case see Paul Finkelman, **Slavery in the Courtroom (**1985) 39–43; Finkelman, **Imperfect Union**, 141–43, 255–61; and [Pennsylvania Anti-Slavery Society], **Narrative of the Facts in the Case of Passmore Williamson** (Philadelphia: Merrihew & Thompson, 1855).

[64] U.S. Constitution, Art. IV, Sec. 2, Cl. 3.

[65] 60 U.S. (19 How.) 393 (1857). McLean discusses these issues at great length from pages 550 to 564 of his dissenting opinion, arguing that Scott's status as a free person was created by the law of Illinois when he lived there from December 1833 to May 1836, and "that when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom." 60 U.S. at 551 (McLean, J., dissenting). He rejected the claims of Taney and others in the majority that the case turned on Missouri law. "This is said by my brethren to be a Missouri question; but there is nothing which gives it this character, except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by Supreme Court of that State. It involves a right claimed under an act of Congress and the Constitution of Illinois." 60 U.S. at 555 (McLean, J., dissenting). For a discussion of Scott's residence in Illinois and a convenient edited version of McLean's thirty-five-page dissent, see Paul Finkelman, **Dred Scott v. Sandford: A Brief History with Documents**, 2nd ed. (2017) 12–13, 98–106.

[66] John McLean, "Has Congress the Power to Institute Slavery," *National Intelligencer*, May 16, 1856.

[67] *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859). See also H. Robert Baker, **The Rescue of Joshua Glover: A Fugitive Slave, The Constitution, and the Coming of the Civil War** (2006).

[68] Michael F. Holt, **The Rise and Fall of the American Whig Party** (1999), 261; Charles Francis Adams, ed., **The Memoirs of John Quincy Adams** (1876), 8: 537. On his overall political activism on the Court, see Paul Finkelman, "John McLean: Moderate Abolitionist and Supreme Court Politician," *Vanderbilt Law Review* 62 (2009), 519, 529–33.

[69] Abraham Lincoln, "First Inaugural Address—Final Text," in Roy P. Basler, ed., **The Collected Works of Abraham Lincoln** (1953), 4:262–63.

[70] Paul Finkelman, "Lincoln, Emancipation and the Limits of Constitutional Change*," Supreme Court Review* (2008), 349–87.

[71] At one level the Garrisonians were correct. Ending slavery was not possible under the Constitution, since an amendment to end slavery would have required the support of three-quarters of the states. This was impossible, because on the eve of the Civil War there were fifteen slave states in a thirty-three-state union. To this day, in 2024, those fifteen states could block an amendment ending slavery. Indeed, slavery ended only when the union with slaveholders collapsed, not because of Northern secession but because of Southern secession. For a discussion of this, see Paul Finkelman, "The Founders and Slavery: Little Ventured, Little Gained," *Yale Journal of Law and the Humanities* 13 (2001), 413–449, and Paul Finkelman, **Slavery and the Founders**, 3–45.

[72] Paul Finkelman, "Civil Liberties and the Civil War: The Great Emancipator as Civil Libertarian," *Michigan Law Review* 91 (1993), 1353; Irving H. Bartlett, "Wendell Phillips and the Eloquence of Abuse," *American Quarterly* 11 (1959), 509, 518.

[73] The *Bugle* was the most important Garrisonian paper in the west, published from 1845 to 1861, first in New Lisbon Ohio, and later in Salem Ohio. For a good description of the paper see "*Anti-Slavery Bugle (New-Lisbon, Ohio) 1845–1861*," https://www.loc.gov/item/sn83035487/ This link shows an issue of the paper with the Garrisonian slogan "No Union with Slaveholders" on the first page.

[74] "Judge M'Lean and Slaveholding in Ohio," *Anti-Slavery Bugle*, April 12, 1856, 3. The Rosetta Case involved a young slave girl, Rosetta Armstead, owned by Rev. Henry Dennison, an Episcopal priest in Kentucky. (All contemporary records of the case and almost all histories of the case refer to her only by her first name, Rosetta.) Rev. Dennison, who was the son-in-law of former President John Tyler, asked a friend (a Dr. Miller) to bring Rosetta to his relatives in Virginia. When Miller brought Rosetta into Ohio, on his way to Virginia, a state court declared her free, in part applying McLean's opinion in *Carneal*. Rev. Dennison then went to Cincinnati where he asked U.S. Commissioner John L. Pendry to intervene under the Fugitive Slave Act of 1850. With a warrant from Pendry, U.S. Marshal Hiram H. Robinson brought Rosetta before the Commissioner. Ohio officials then arrested Marshal Robinson for contempt, because the state courts had declared Rosetta to be free under state law. R.J.M. Blackett, **The Captive's Question for Freedom: Fugitive Slaves, the 1850 Fugitive Slaw Law, and the Politics of Slavery** (2018), 246–8. In *Ex parte Robinson*, 20 F. Cas. 965 (1856), Justice McLean ordered the release of Marshal Robinson on the grounds that state officials had no legal authority to arrest federal officers acting under federal law. He based this on "An Act further to provide of the collection of duties on imports," act of March 2, 1833, 4 Stat. 632, 634, Sec. 7. Known as the "Force Bill," Congress had passed this law in response to South Carolina's formal nullification of the federal tariff of 1832 during the Nullification Crisis. The *Bugle* was furious at McLean for this decision, which upheld federal law and federal power. The *Bugle* believed McLean was proslavery because he enforced the Force Bill, as it was intended to be used. The *Bugle* was, not surprisingly, uninterested in the purpose of the Force Bill or that it had been adopted in response to the actions of the most pro-slavery state in the nation. When Rosetta finally appeared before Commissioner Pendry, he declared her free, since she had not in fact "escaped" into Ohio and thus she became free when her owner's agent brought her into the state. Levi Coffin, **Reminiscences** (Cincinnati: Western Tract Society, 1876), 554–7; "The Rosetta Armstead Case: A Fight for Freedom," https://ohiomemory.ohiohistory.org/archives/2628. Ironically, precedents like McLean's decision in this case would help protect federal officials supporting former slaves in the South after the Civil War. The *Bugle*'s attack on McLean for his decision that Robinson was not subject to arrest by state officials simply illustrated that the paper's ideological goals were far more important than a significant analysis of complicated legal matters, or that McLean's decision was not directly about slavery, but rather about federalism. That the *Bugle* did not mention that Rosetta remained free underscores this point. See also the attack on McLean in the *Anti-Slavery Bugle,* April 26, 1856.

[75] Illustrative of the politics of the era, southern politicians denounced McLean for his opposition to slavery. Senator Henry S. Foote of Mississippi, an unabashed defender of slavery, argued he was "unfit" to adjudicate cases involving slavery because of his public opposition to the institution. *National Intelligencer*, January 18, 1849, quoted in Carney, "The Political Judge," 133.

[76] Letter of A[braham] Brooke to the *Antislavery Bugle*, April 8, 1856, in "Judge M'Lean and Slaveholding in Ohio," *Anti-Slavery Bugle*, April 12, 1856, 3.

[77] Thomas D. Hamm, **God's Government Begun: The Society for Universal Inquiry and Reform, 1842–46** (1995), 40, 197.

[78] Hamm, **God's Government**, 40, 42, 43, 46.

[79] Hamm, **God's Government**, 49, 62, 218; Thomas D. Hamm, "Brooke, Abraham (1806-08 March 1867)," **American National Biography** (1999) https://doi.org/10.1093/anb/9780198606697.article.0802294

[80] Brooke to the *Bugle*, April 8, 1856. Lucinda's age is uncertain, but the 1850 census says she was twenty-seven at the time. This means that in 1836 or 1837 when she came to Ohio (she left McLean's family in 1838) she would have been about thirteen or fourteen, but the other evidence suggests she was older, and that the 1850 census believed she was younger than she actually was.

[81] In the 1890s the town officially changed its name to Springboro.

[82] Brooke to the *Bugle*, April 8, 1856.

[83] A[aron] Harlan, "To the Editors of the Anti-Slavery Bugle," April 17, 1856, in "Judge M'Lean and Slavery," 2. [hereinafter Harlan letter.]

[84] John Reeves to Hon. John McLean, August 16, 1836, https://auction.universityarchives.com/auction-lot/supreme-court-justice-john-mclean-purchases-a-sla_4B5438E90C [Hereinafter Reeves letter].

[85] Harlan letter. We have been unable to find any record of "A. Stevens" to learn more about him. We assume that as an "Old Gentleman" Stevens concluded that $200 was financially beneficial to him, and perhaps relieved him of having to "sell" Lucinda or having his heirs sell her.

[86] Harlan letter; John Reeves letter.

[87] The first rail line to Cincinnati opened in 1841. Josiah Morrow, **History of Warren County. Chapter VI. General Progress** (Chicago: W. H. Beers Co, 1882; reprint, Mt. Vernon, IN: Windmill Publications, 1992), https://sites.rootsweb.com/~ohwarren/Beers/III/0289railway.htm#:~:text=The%20first%20railroad%20in%20the,the%20two%20great%20State%20canals (last accessed January 28, 2024).

[88] Reeves letter.

[89] Harlan letter.

[90] Plausibly, McLean's agent (Reeves) could have taken custody of Lucinda from Stevens and refused to pay him, on the grounds that Stevens had nothing to sell McLean because Lucinda became free the moment she entered Ohio. But McLean, who appears to have been honorable in his business dealings, doubtless believed he had agreed to pay Stevens for transporting Lucinda to Cincinnati, not to *buy* her there.

[91] Harlan letter.

[92] His name is also spelled Updegrove.

[93] Rebecca McLean to My dear Husband [John McLean], Jany. 5 1840. Letter is in private hands. "Rebecca *Edwards* McLean," Find a Grave, https://www.findagrave.com/memorial/24212821/rebecca-mclean (last accessed January 28, 2024).

[94] Harlan letter.

[95] "Justice to Judge M'Lean," *Anti-Slavery Bugle,* April 26, 1856, 2.

[96] Douglass, **Narrative of the Life of Frederick Douglass**. For a more detailed account of how Douglass became free, see Paul Finkelman, "Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican," *Missouri Law Review* 81 (2016), 45–7.

[97] Frederick Douglass, **The Life and Times of Frederick Douglass** (De Wolfe & Fiske Co., rev. ed. 1892), 314–5.

[98] The transaction was enormously complicated. Douglass, **Life and Times**, 314–5. Thomas Auld, who had owned Douglass, sold him to Hugh Auld, who in turn manumitted him in return for the 150 pounds sterling.

[99] Douglass, **Life and Times**, 314–5.

[100] Douglass, **Life and Times**, 314–5.

[101] Robin L. Condon and Peter P. Hinks, "Introduction to Volume Three," *in* John R. McKivigan, ed., **The Frederick Douglass Papers: Series Two** (2012), 3: xvi.

[102] Harlan letter.

[103] https://historical.ha.com/itm/miscellaneous/documents-and-letters-concerning-the-purchase-of-a-slave-by-john-mclean-future-associate-justice-of-the-supreme-court/a/6207-47186.s [last visited January 29, 2024]

[104] Deed of Sale from Benj. B. Beall to John McLean Esq., January 14, 1824. Heritage Auctions, https://historical.ha.com/itm/miscellaneous/documents-and-letters-concerning-the-purchase-of-a-slave-by-john-mclean-future-associate-justice-of-the-supreme-court/a/6207-47186.s [last visited January 29, 2024]

[105] Thomas Hawkins to My old Master, Middletown, Butler County, August 23, 1851. Heritage Auctions, HA.com.

[106] The 1840 census shows that in the Hawkins household there are two males under 10; one male age 10–24; one male age 36–55; one female under 10; one female 10–24; one female 36–55. The male and female aged 36–55 would have been Thomas and Jane Hawkins. Either the male or female, age 10–24, could have been the child mentioned in the bill of sale in 1824. "United States Census, 1840," database with images, *FamilySearch* (https://www.familysearch.org/ark:/61903/1:1:XHRX-PFD : Thu Jul 20 19:31:10 UTC 2023), Entry for Thomas Hawkins, 1840; "United States Census, 1850," database with images, *FamilySearch* (https://www.familysearch.org/ark:/61903/1:1:MX3J-F7V : Fri Sep 15 21:51:53 UTC 2023), Entry for Thomas Hawkins and Mary Jane Hawkins, 1850, with a child Henry who is 10.

[107] Harlan letter.

[108] It is of course important to remember that under the law of *all* slave jurisdictions in the United States, no slaves could legally be married.

[109] After the fugitive slave Anthony Burns was sent back to Virginia, some abolitionists in Boston (including some Garrisonians) successfully raised funds to buy him and bring him to Boston where he spent the rest of his life as a free man. Paul Finkelman, "Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys," *Cardozo Law Review* 17 (1996), 1793–1858.

[110] Frederick Douglass, **Life and Times**, 315.

[111] Condon and Hinks, "Introduction to Volume Three," xvi.

[112] Finkelman, **Supreme Injustice.**

[113] Declaration of Independence, preamble (1776).

Heart of *Dartmouth*: Charity, Corporations, and the Supreme Court

Thomas H. Cox and Gregory R. Witkowski

In late March 1819, Daniel Webster dashed off a quick letter to his colleague Joseph Hopkinson. Seven weeks earlier, both attorneys had argued *Dartmouth College v. Woodward* before the Supreme Court.[1] Representing Webster's alma mater, the pair had argued that Dartmouth College's 1769 royal charter was a private contract, which prevented the New Hampshire state legislature from converting it into a public university. The justices had now issued a favorable ruling. The *Dartmouth College* decision created a firm precedent that put the authority of the federal government behind the right of all charitable or profit-seeking corporations to govern their affairs free from legislative oversight. Sensing the case's historical significance, Webster urged his colleague to write a pamphlet commemorating the outcome of the case. "Our College cause will be known to our children's children," quipped Webster. "Let us take care that the rogues shall not be ashamed of their grandfathers."[2] Although Webster likely spoke in jest, his words proved prophetic. Over the next two centuries, law professors would depict *Dartmouth College* as a pivotal Contract Clause case in which Chief Justice John Marshall and Justice Joseph Story asserted "that once a right had become 'vested' by either private bargaining or an arrangement with the state, the state could not take the right away or alter its fundamental character."[3]

However accurate this assessment of the decision might be, it is a "classically liberal" interpretation that overlooks an essential element of the *Dartmouth College* case. It does not fully account for the way that the Marshall Court used the decision as a precedent for cases involving charities and eleemosynary corporations—what we might today call nonprofit organizations. Between them, Marshall (who wrote the Court's opinion) and Story (who penned an influential concurrence) created a system in which state legislatures could incorporate charters with

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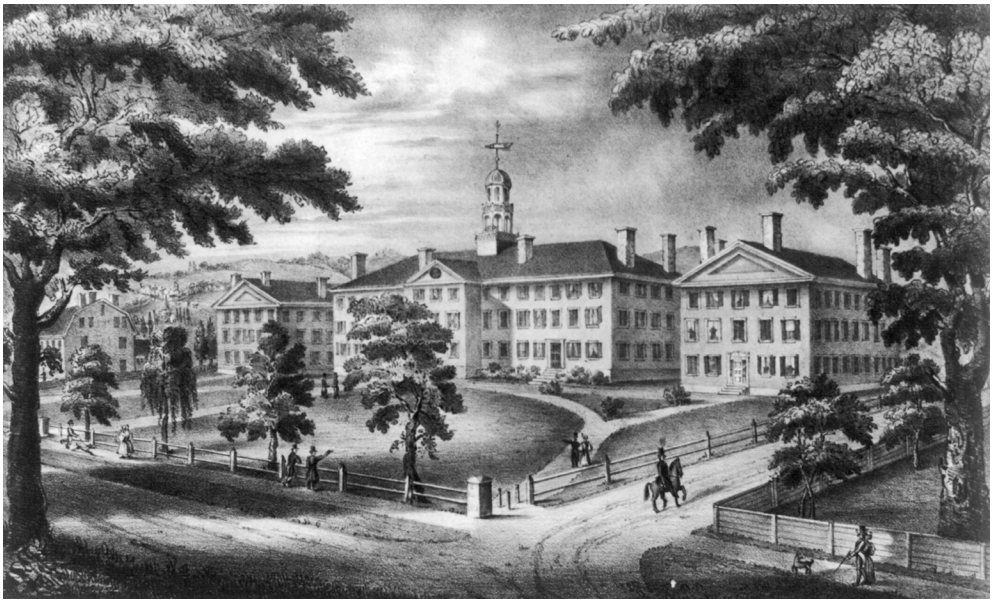
"reservation clauses" and leave the federal judiciary to manage the far fewer but more sensational disputes involving charities on a case-by-case basis. *Dartmouth College* became an important precedent regarding charitable organizations, a precedent that the Court developed in a number of later cases. As we explain in the pages that follow, legal historians should pay greater attention to this important part of the jurisprudential legacy of *Dartmouth College* and what it says—even today—about the legal role that nonprofit and charitable organizations play in American society.

The Origins of *Dartmouth College*

To better understand the complexity of the *Dartmouth College* decision, it helps to reexamine the historical circumstances under which the case arose. The origins of *Dartmouth College v. Woodward* lie in the Enlightenment and First Great Awakening, which swept the British North American colonies in the 1730s and 1740s. As both rationalism and "rational religion" became popular throughout the British Empire, colonists along the Atlantic seaboard created institutions—libraries, colleges, hospitals, and charitable foundations—to better society around them. In 1766, Congregationalist Minister Eleazar Wheelock, a Connecticut-born Yale graduate, sent a Mohegan, Samson Occom, to Great Britain to solicit funds to create a missionary school. Occom courted William Legge, the Second Earl of Dartmouth, about the project. After securing more than £11,000 in startup funds, Wheelock appealed to John Wentworth, the royal Governor of New Hampshire, for a school charter, and local landowners for donations to establish the school. In 1769, acting in the name of King George III, Wentworth issued a charter creating a college named Dartmouth (after Lord Legge's family estate), which would provide "for the education and instruction of Youth



In 1769, John Wentworth, the royal Governor of New Hampshire, issued a charter for Dartmouth College, to be established in the town of Hanover. It would provide "for the education and instruction of Youth of the Indian Tribes in this Land, and also of English Youth and any others."

of the Indian Tribes in this Land, and also of English Youth and any others."[4]

As the founding father of Dartmouth, Wheelock could remain college president for life and name his successor. A board of trustees, dominated by wealthy donors, helped govern the institution. Despite these initial successes, Reverend Wheelock passed away a decade after establishing his college. However, his son, Jonathan, served as president for thirty-eight years. The younger Wheelock and his board of trustees successfully guided Dartmouth through enrollment, funding, and religious controversies.[5]

Yet by the early 1800s, Jeffersonian-style republicanism had become popular across the young United States. Taking the third President's mantra that the "earth belongs to the living," New Hampshire Governor William Plumer, aided by a Republican-dominated state legislature, spearheaded an 1816 law that revised Dartmouth's 1769 charter. Changing the college's name to "Dartmouth University," the measure allowed Plumer to appoint both new trustees and a new board of overseers to run the institution. When Wheelock and the original board refused to leave office, Dartmouth suffered through an eight-month period in which two groups of trustees attempted to govern the college while thwarting one another. When President James Monroe visited the Granite State in 1817, he received honorary degrees from both Dartmouth College and Dartmouth University.[6]

Enter Daniel Webster

Tired of the impasse, the original trustees sued William H. Woodward—whom Plumer had appointed Dartmouth University's secretary-treasurer—in the New Hampshire Court of Common Pleas in February 1817. The elderly board members demanded that Woodward return the school's charter, seal, and records and pay $50,000 in damages to cover court costs. As Woodward served on the Court of Common Pleas, his colleagues quickly forwarded the case to the New Hampshire Supreme Court.[7] Wheelock and his allies pulled off a coup when they convinced attorney Daniel Webster to represent the cause in court. One of the greatest orators in American history, Webster also held a Dartmouth diploma. In early 1817, he argued before the New Hampshire Supreme Court justices, contending that Dartmouth's 1769 charter constituted a vested right that neither the Governor nor state legislature could alter.

Furthermore, Webster argued, under the terms of New Hampshire's 1776 state constitution, only courts, not legislatures, could deprive citizens of property. For good measure, he insisted that Dartmouth's charter represented a private contract between New Hampshire's colonial government and Dartmouth's Board of Trustees. As such, it could not be changed without the consent of both parties. The state supreme court sided with Governor Plumer and the New Hampshire legislature and ruled that Dartmouth College effectively served as a public institution. Under

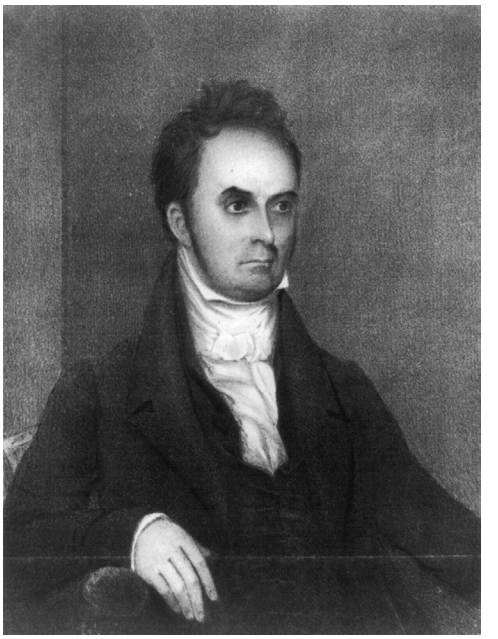
Born in 1759, William Plumer served the state of New Hampshire in numerous political capacities—as a member of the House of Representatives, a U.S. Senator, and as Governor twice (1812–1813, 1816–1819).

such circumstances, "A gift to a corporation created for public purposes is, a gift to the public," and Dartmouth's trustees were, in effect, public servants. New Hampshire could thus change the College's 1769 charter as needed.[8]

Anticipating the decisions of the New Hampshire Court of Common Pleas and the New Hampshire Supreme Court, Webster quickly appealed the case to his preferred forum, the Supreme Court of the United States. In March 1818, Webster repeated his arguments in favor of Dartmouth College before that tribunal, then consisting of seven justices: Chief Justice Marshall and Associate Justices Bushrod Washington, William Johnson, Thomas Todd, H. Brockholst Livingston, Gabriel Duvall, and Story. Webster insisted that Dartmouth's 1769 charter had created a private or "eleemosynary" charity. Governor Plumer and his followers in the state legislature, it therefore followed, had deprived both Dartmouth's Board of Trustees of their vested rights to govern the institution and the faculty's rights to their livelihoods.[9]

Having laid the groundwork for his case, Webster argued that the New Hampshire legislature had arbitrarily changed Dartmouth's charter and, therefore, violated the U.S. Constitution's Contract Clause. Describing Dartmouth as a beacon of rationalism and science amid a dark wilderness, Webster emotionally concluded:

> 'Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But, if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science which, for more than a century, have thrown their radiance over our land! It is, sir, as I have said, a small college. And yet there are those who love it…'[10]



In 1819, Daniel Webster (future member of Congress and Secretary of State) successfully argued *Dartmouth College v. Woodward*. In a pamphlet commemorating the outcome of the case, he wrote: "Our College cause will be known to our children's children."

As Yale professor Chauncey Goodrich would hazily remember thirty-six years later, Webster's summation proved so powerful that it reduced Chief Justice John Marshall, his colleagues, and audience members to tears.[11]

Waiting to Decide

After that first argument, Marshall made the unusual announcement that the typically unified high court could not reach a consensus for a decision and would thus defer judgment until the Court's next Term in 1819. Marshall had good reason to postpone the *Dartmouth College* case. President John Adams appointed the former Continental Army officer, Virginia Congressman, and Secretary of State to be chief justice of the Court in 1801 following the Federalist Party's defeat in the turbulent elections of 1800. As the highest-ranking Federalist left in national office, Marshall worked slowly and deliberately

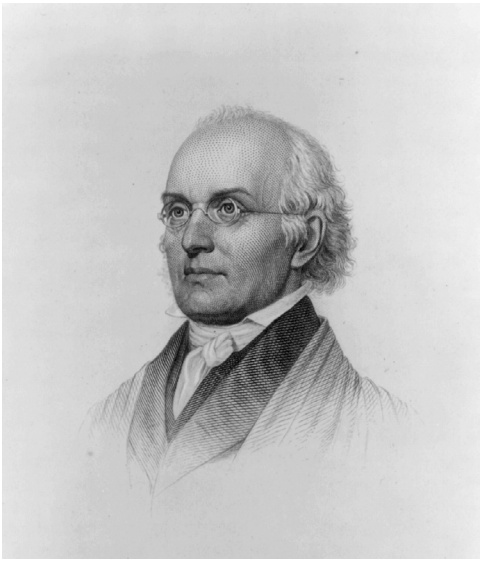
to hand down popular decisions that would enhance commerce, nationalism, and public faith in the federal judiciary, the last branch of government that would remain under Federalist control for the near future.[12]

Indeed, by 1819, the Marshall Court had already handed down two controversial decisions involving contract and corporate rights. *Fletcher v. Peck* (1810) involved the sale of western lands in Georgia.[13] At the end of the American Revolution, Georgia claimed a large western territory called the "Yazoo lands." In 1795, the Georgia legislature sold 35,000 acres of Yazoo land at fire-sale prices to American and European speculators. These real estate brokers, in turn, sold marked-up plots to settlers. When the Georgia public learned of the scandal, they elected a new legislature that repealed the land sales. According to public legend, the representatives used a magnifying glass to cause "fire from heaven" to incinerate the Yazoo Act "as if by the burning rays of the lidless eye of Justice."[14] However, by this time, innocent buyers of Yazoo land, several in New England, sued in federal court to protect their investments. In a 5–1 decision, Marshall acknowledged that "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded."[15] As such, the Georgia legislature's 1795 repeal of the initial Yazoo land sales violated the Contract Clause of the U.S. Constitution.

The controversy, of course, came in the fact that by arguing that contracts, even fraudulent contracts, flowed from the natural rights of the contracting parties, Marshall raised the issue of whether all contracts could be considered immune from legislative control. Not to mention the fact that upholding the rights of New England real estate agents over the authority of the Georgia legislature proved deeply unpopular throughout the South.[16]

The other Marshall Court decision that generated controversy was *Terrett v. Taylor* (1815).[17] It dealt with the thorny issues of freedom of religion, the incorporation of charities, and contract rights. During the colonial period, wealthy Virginia planters and the colonial government donated land to Great Britain's Anglican Church. Profits earned from "glebe lands" went to support local clergy. In January 1786, the Virginia legislature passed Thomas Jefferson's Statute of Religious Freedom, which called for a separation of church and state in the Old Dominion. When Vestrymen from the Episcopal Church of Alexandria attempted to sell the land, Virginia authorities passed two laws in 1798 and 1801, repealing their previous land donations and insisting that the state sell the land in question with the proceeds going to help poor Virginians.[18]

Following lengthy appeals, the matter came to the Supreme Court. After deliberation, Justice Story set about writing the Court's opinion for the five-justice majority. A Puritan descendant and devout Unitarian, Story voted Republican and excelled in admiralty law. Appointed to the high court by President Jefferson, Story soon fell under the sway of Marshall's infectious nationalism. Realizing that the case involved politically volatile issues such as freedom of religion and corporate rights, Story took pains to point out that the Marshall Court's decision was grounded in "the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and the decisions of most respectable judicial tribunals."[19] Although admitting that Virginia currently maintained a strict separation of church and state, Story argued that the state could still incorporate different denominations. As representatives of a charitable institution,



Together with Chief Justice Marshall's majority opinion in *Dartmouth College*, Justice Joseph Story's concurrence in the case is part of the legacy of this seminal Contract Clause decision.

Virginia's Anglican officials could buy or sell church property as they saw fit. Story recognized that corporations created for the public good maintained independence from public governance.

Furthermore, just as *Dartmouth College* wound its way through the federal courts, another controversy over inheritance rights and the incorporation of charities loomed on the horizon. *Trustees of Philadelphia Baptist Association v. Hart's Executors* (1819) involved the will of Silas Hart, a wealthy planter who left his fortune to the Baptist Association, a group of leading Baptists who met annually in Philadelphia.[20] Hart wished for his wealth to create "a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry, always giving a preference to the descendants of my father's family."[21] In 1797, the Pennsylvania legislature incorporated the Baptist Association, which subsequently tried to secure Hart's estate over the protests of his family. The resulting lawsuit would be decided by the Court on the same day that it announced the decision in *Dartmouth College*. Wary of the controversy that these three decisions had generated, Marshall postponed the decision in *Dartmouth College* for a year. He shrewdly used the time to quietly work on his fellow justices, seeking to create as much consensus as possible.[22]

Unlike later chief justices, Marshall insisted that the justices live together in the same Washington D.C. boarding house whenever possible. As Justice Washington would later relate to former President Jefferson, when he joined the high court:

> I heard nothing but lectures on the indecency of judges cutting at each other, & the loss of reputation which the Virginia appellate court had sustained by pursuing such a course etc. At length I found I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all.

Such a topic would certainly prey on Justice Johnson's mind as the Supreme Court heard the *Dartmouth College* case.[23]

The Court Decides

These collegiality tactics soon bore fruit. In February 1819, the chief justice handed down a 5–1 decision upholding Dartmouth's 1769 charter. Just as Webster had used rhetorical flourishes to invoke strong emotions in his summation, Marshall grounded his sweeping decision in nationalism and "logic" rather than precedent. Although maintaining that state legislatures held a responsibility to regulate corporations, state and federal courts were necessary to protect the property rights and contracts of ordinary Americans. In lines made famous by future generations of legislators and jurists, Marshall maintained that

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.[24]

Following the American Revolution, the fledgling New Hampshire state government had assumed all previous contracts made in the name of the British monarchy and colonial legislature. Therefore, Marshall concluded,

> The opinion of the Court, after mature deliberation, is that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this Court.[25]

Whereas Marshall's decision invoked English common law to uphold corporate rights, Story and Washington handed down more specific concurring opinions that invoked precedents and provided specific guidelines for creating future corporate contracts. Story likewise insisted that "if the [New Hampshire] legislature mean to claim such an authority [to alter corporate contracts], it must be reserved in the grant."[26] Dartmouth could therefore keep its charter, while reform-minded state legislatures could regulate private corporations if they reserved that right for themselves. Although state legislatures rarely incorporated organizations that they maintained true governance over, they maintained both that right as well as the ability to regulate all corporations.

The opinions written by Marshall and Story dealt with big questions of federalism and corporate rights. By contrast, Washington's concurrence sought to create a practical framework under which state legislatures could take the lead in creating and regulating such corporations. Seeking to distinguish between civil and eleemosynary corporations, Washington reasoned that as state legislatures create or recognize public corporations to promote the public good, they can likewise regulate such organizations as needed. Yet when public officials worked with private groups to create private charities, they essentially "entrusted franchise or incorporeal hereditament founded upon private property, devoted by its patron to a private charity, of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his appointment according to such laws and regulations as he or the persons so selected may ordain."[27]

Although he sided with the Court's majority, Washington's concurring opinion represented a rare break from the usual unanimity of the Marshall Court. However, when combining Washington's opinion with Justice Gabriel Duvall's lone dissent (without an opinion), we can glean additional insight into Washington's thinking on the *Dartmouth College* case. As the Supreme Court's unofficial clerk, Washington rightly feared that the *Dartmouth College* precedent would flood the courts with endless corporate cases. As a former chief justice of the Maryland General Court, Duvall could undoubtedly relate to Johnson's concerns about overloading the Supreme Court's docket. As such, Duvall may have issued his silent dissent out of sympathy for Johnson. Or Johnson and Duvall may have privately agreed that one would write a concurring, if critical, opinion while the other would issue a dissenting vote without comment. Such a strategy would subtly remind Marshall of his brethren's displeasure at the *Dartmouth College* decision while not directly violating the chief justice's informal rule of issuing unanimous or near-unanimous decisions to enhance the Court's reputation. The same day that the Court handed down its

Dartmouth College decision it also decided in the *Hart's Executors* case that as the Philadelphia Baptist Association had not been incorporated at the time of Silas Hart's death, it could not claim his fortune.[28]

Upon receiving news of the *Dartmouth College* and *Hart's Executors* decisions, many Americans, particularly business and philanthropic interests, responded favorably to the outcome of both cases. On one level, the Marshall Court had pulled off a tremendous constitutional victory. Drawing on little in the way of precedent, it had upheld the property rights of private charities, held out for Jeffersonian officials at the state level a means to regulate future public and private corporations, and provided guidelines for such regulation. However, there was controversy on the horizon. This is because the sheer expansion of for-profit corporations and philanthropic organizations in the early 1800s would soon test the limits of *Dartmouth College*.

Reevaluating *Dartmouth College*

In the two centuries since the *Dartmouth College* decision, historians have produced a small library of books and articles on the "College cause." From 1819 to the mid-twentieth century, most works stressed the importance of the case for an industrializing, modern nation. For instance, Albert J. Beveridge, a senator turned judicial biographer, asserted in his *Life of John Marshall* (1919) that "[i]t is undeniable and undenied that America could not have been developed so rapidly and solidly without the power which the law as announced by Marshall gave to industrial organization."[29] And, indeed, as late as the 1970s, most scholars clung to a classically liberal interpretation of the decision. For instance, in *Private Interest and Public Gain*, Francis Stites maintained that the Marshall Court was primarily concerned about vested rights, specifically whether the trustees of Dartmouth College had a right not only to the physical grounds of the university but also to hire or fire faculty, set curricula, and promote education throughout New Hampshire without interference.[30] Even critical legal historians deemphasized the importance of *Dartmouth College*. As Morton Horwitz asserted, "the conception of the corporation as a public body had been on the decline for almost a generation [before the decision], although the implications of this trend were only beginning to be explored."[31]

In recent years, legal scholars have devoted new scholarly attention to *Dartmouth College*. For example, Mark G. McGarvie argues that, "by demanding formal legal structures for religious and philanthropic organizations," the decision

> encouraged American culture to move from the colonial model—in which community involvement in everything from barn raisings and quilting bees to the public militia, church, and school reflected informal personal relationships—toward a modern society premised on contract and formal institutional structures.[32]

Likewise, Adam Winkler points out that far from representing a triumph for conservative corporate interests, *Dartmouth College* "resonated with the claims colonists made about the limits on parliamentary power during the debates over independence."[33] By therefore depicting the Marshall Court justices as products of a revolutionary upheaval attempting to preserve the more useful parts of colonial legal precedents while adapting revolutionary principles to accommodate America's booming commercial economy, scholars like McGarvie and Winkler refocus scholarly attention on the origins of *Dartmouth College* and the worldviews and motives of the justices who handed down the seminal decision.

Yet, even these more recent scholarly works leave room for a fresh interpretation

of the decision. Borrowing from William Novak's *The People's Welfare* (1996), we believe that as a High Federalist and product of Virginia's paternalistic legal system, Marshall primarily sought in *Dartmouth College* to use common law principles rather than legal precedents to uphold the rights of a small, liberal arts college that mainly served upper-class students destined to take their place in New Hampshire high society.[34] Drawing from R. Kent Newmyer's *Joseph Story: Statesman of the Old Republic* and Elizabeth Brand Monroe's "The Influence of the Dartmouth College Case," we contend that Story, the most business-oriented member of the Court (his Jeffersonian political affiliation notwithstanding), pushed hard to use *Dartmouth College* as a broad decision to promote laissez-faire capitalism and American nationalism.[35]

Story sought to appease state interests by arguing that state legislatures could preserve for themselves the right to regulate companies in the future by providing "reservation clauses" in their charters. Such a system would allow ordinary Americans to create for-profit companies while leaving the federal judiciary to oversee controversial cases involving leading private firms and the funding of colleges, charities, and other eleemosynary institutions.[36]

An Important Precedent for Charities and Non-Profits

Following their expansive ruling in *Dartmouth College*, the Marshall Court justices would use the decision for the next seventeen years to defend not only businesses and banks, but also charities and other philanthropic organizations. For instance, beginning in the 1830s and 1840s, Jacksonian legislators and attorneys began to interpret wills as similar to private contracts in which the intent of the testator trumped familial or social considerations.[37] In this way, *Dartmouth College* became a precedent essential for charitable organizations not only because it recognized their independence but also because many benefited from bequests. These last testimonies that gave funds to philanthropic organizations challenged English common law traditions but indicated that these, too, were contracts of sorts between the deceased and the institution.

Society for the Propagation of Gospel v. New Haven (1823) represented one of the earliest cases involving a charitable organization to address the issues raised in *Dartmouth College*.[38] On the surface, the affair resembled *Hart's Executors*. Throughout the 1700s, the Anglican Church spread throughout the British North American colonies. Believing that religion and local government had mutual interests in promoting social stability and wishing to respect the official state religion of the British Empire, many colonial legislatures supported the church with funds and property donations. In 1761, the Vermont legislature set aside public lands for the Anglican Church's Propagation of the Gospel Society. Following the American Revolution, the Vermont legislature passed a law that attempted to reclaim and sell such property, and the matter was appealed to the Supreme Court of the United States. Perhaps sensing an opportunity to expand on his concurring opinion in *Dartmouth College* and once again warn his brethren about the dangers of too much paperwork, Washington handed down the Court's unanimous opinion. He explained that the Vermont law was particularly troublesome because "the effect . . . is not merely to deprive the corporation of its legal control over the charity" but to "destroy the trusts altogether by transferring the property to other persons and for other uses than those to which they were originally destined by the grant made to the society." Under the 1783 Paris Peace Treaty terms, the federal and state

governments had to honor legal agreements between colonial governments and private religious organizations.[39]

Seven years later, the Marshall Court dealt with similar issues in *Inglis v. Trustees of Sailor's Snug Harbor* (1830).[40] One of the most convoluted cases in Supreme Court history, the case revolved around an inheritance dispute over the estate of Richard Randall, a wealthy New Yorker with significant landholdings around Greenwich Village. At stake was whether John Inglis, a cousin of Randall, could inherit his cousin's estate. Inglis, an Anglican Bishop in Nova Scotia, sought to recover a fortune made by Randall's father, Thomas, a privateer who had prayed on British shipping during the American Revolution. Yet, unlike Dartmouth's Board of Trustees, Richard Randall spared no expense in protecting his philanthropic endeavors. In 1801, he hired none other than former Treasury Secretary Alexander Hamilton to write a will that donated his fortune to create an asylum and rest home for elderly sailors to be called the Sailors Snug Harbor. Hamilton set up the will so that Randall's fortune would be held in a charitable trust which "shall forever hereafter be used and applied for supporting the asylum, or marine hospital." Randall's will also decreed that his asylum "hereby directed and created should be perpetual" and that its board of directors and their successors would "forever continue and be the governors thereof and have the superintendence of the same."[41]

John Inglis' claim to Randall's fortune was thin but well-pressed in state and federal court. Inglis had been born in New York in 1777 following the outbreak of the American Revolution. He was, therefore, in theory, a U.S. citizen capable of claiming the inheritance of another American. Yet following the British evacuation of New York at the end of the Revolutionary War, John Inglis and his father, Charles Inglis, fled to Canada. In a 4–2 decision, Justice Smith Thompson (himself a New York native) upheld Randall's will. Thompson maintained that in 1783, Charles Inglis had proven his loyalty to the Crown by leaving New York City as British troops evacuated the area. As Inglis had decided as a parent to take his five-year-old son Jonathan with him, his decision to maintain his status as a British subject also applied to his offspring. The hapless Inglis could, therefore, not claim Russell's estate under New York law.[42]

The judicial consensus established by the *Inglis* case lasted for the remainder of John Marshall's career. Following his death in 1835, President Andrew Jackson nominated Treasury Secretary Roger Brooke Taney as chief justice. As a loyal Jacksonian, Taney sought to direct the Supreme Court away from the Marshall Court's nationalist leanings. Although a firm believer in *stare decisis*, Taney nevertheless wanted the federal judiciary to rein in federal power, particularly regarding the regulation of private corporations and charities, to allow state tribunals more leeway to manage local affairs.[43] The case of *Vidal v. Girard's Executors* (1844) would afford Taney and his colleagues such an opportunity.[44]

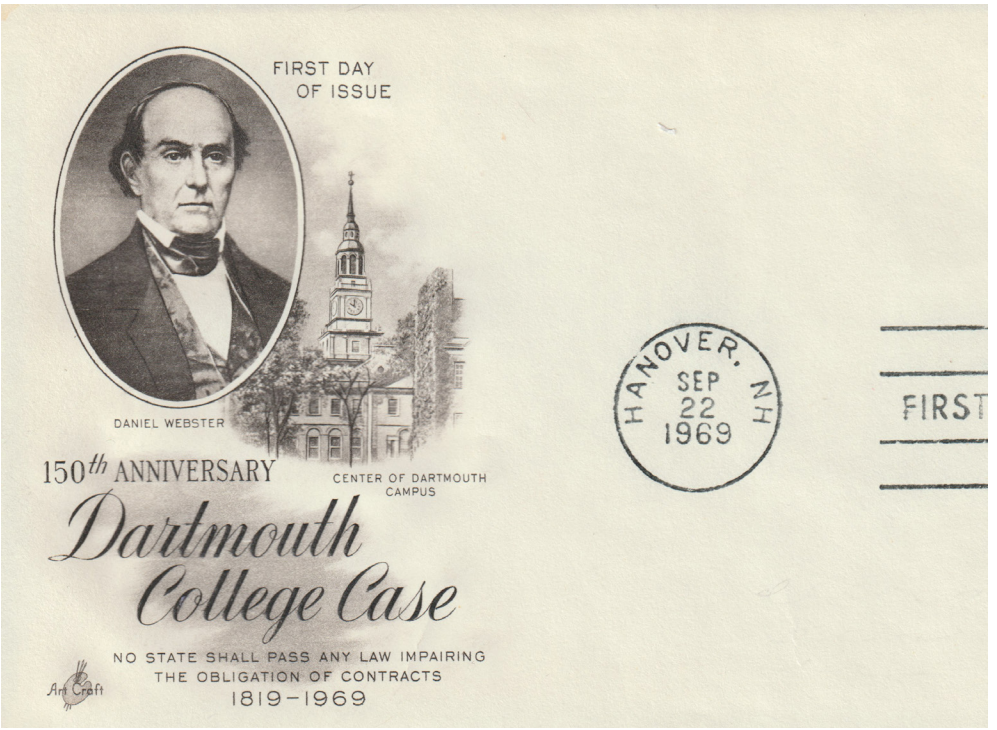
Much like the *Inglis* case, the *Vidal* controversy centered on the disposition of the estate of a wealthy New Yorker. A French native, Stephen Girard, migrated to Philadelphia in 1776 as a blockade runner, bringing supplies to American patriots in return for hefty profits. Following the war, Girard would repeat this business formula, shipping much-needed goods to Latin American revolutionaries in support of their bids for independence from Spanish domination. He then plowed profits gleaned from these enterprises into yet another fortune by selling opium in China. During the War of 1812, Girard helped keep the American war effort alive through a massive loan of $8 million to

the federal government, created his private bank, and spearheaded efforts to develop the Second Bank of the United States. At the time of his death in 1820, Girard could boast that with a fortune estimated at $1,800,000, he was the richest man in America.[45]

In his will, Girard left an unprecedented $400,000 to charitable institutions. His will also called for the creation of a charitable trust to establish a school in Philadelphia for orphans. An atheist, Girard sought to avoid sectarianism by forbidding clergy from teaching at his school. Daniel Webster, who served as legal counsel for Girard's family, contested the will. He argued that Girard's will violated Pennsylvania's common law traditions, which recognized Christianity as an established religion.[46]

The controversy surrounding Girard's fortune, plus Daniel Webster's involvement in the case, created quite a headache for the Supreme Court. Story was already fully invested in the matter. As the court member who had pushed hardest for a broad decision in *Dartmouth College,* Story doubtless wanted to uphold his 1819 decision, fend off criticism from colleagues like Washington, and retain for the Supreme Court the exclusive right to manage high profile philanthropy cases. As a devout Unitarian concerned with the ongoing battles between Protestants and Catholics over which Bibles should be used in public schools, Story may have furthermore wanted to ensure that students at leading American schools retain at least some form of religious guidance.[47]

Not surprisingly, Story authored the high court's unanimous opinion in *Vidal*. He began by acknowledging that Pennsylvania's Constitution guaranteed religious freedom and protected Girard's will. However, Story then speculated that had Girard created a



The *Dartmouth College* decision is considered a vital part of New Hampshire history. In 1969, the 150th anniversary of the decision was celebrated in numerous ways, including the release of this First Day Cover.

school that taught "Judaism, or Deism, or any other form of infidelity," the Court might have ruled differently.[48] Yet Pennsylvania remained an overwhelmingly Christian society. Story reasoned that Girard's demand to exclude ministers did not mean he wanted students to refrain from religious instruction. The school's board of trustees could certainly hire teachers known not only for academic skills but also for piety and virtue. Having by now proved his point about overburdening the court with extra work, Justice Washington concurred with his brethren but did not write a concurring opinion.

Story and Washington both clearly saw the painful irony of using *Dartmouth College*, a case in which a small, private religious school had fended off state legislative control, to justify the use of Stephen Girard's estate funds to support the hiring of clergy in clear violation of Girard's final wishes. Both cases involved the use of a wealthy donor's gift for an educational institution. Yet, whereas in *Dartmouth College,* the high court limited the powers of the state, in *Vidal* Chief Justice Taney and his colleagues limited donor intent. Although Washington saw no need to rebuke his colleague and friend, Michael McConnell would later accuse Story of promoting "Protestantism in disguise."[49] The implications of *Dartmouth College* would take the remainder of the nineteenth century to become settled.

A Better Understanding of the *Dartmouth College* Legacy

By the end of the Taney Court era, *Dartmouth College v. Woodward* no longer constituted a controversial decision. Instead, it was considered a landmark Supreme Court precedent that had stood the test of time for over four decades. What had started as a decision to uphold the rights of a small, private college in New England had become a decision used to enforce the rights of churches, charitable organizations, and even the contested will of the wealthiest merchant in the United States. It is noteworthy that a decision that would have such an influence on corporate rights developed out of defending the interests of charitable institutions, including both their independence from oversight and the protection of the donor's intent with a gift bequest. The historiography has tended to define the legacy of the case in terms of for-profit corporations. At the same time, nonprofit scholars have often focused on the importance of the case for charitable organizations. However, as this article has suggested, *Dartmouth College* is better understood as a critical precedent for a number of rulings on *charitable* organizations. More contemporary rulings in the late twentieth and early twentieth first centuries justifying corporate independence without reference to *Dartmouth College* make it likely that the case will continue to impact charitable causes more than corporate ones moving forward.

ENDNOTES

[1] 17 U.S. (4 Wheat.) 518 (1819).

[2] Daniel Webster to Joseph Hopkinson, March 22, 1819, in Daniel Webster and Edward Everett, eds., **The Writings and Speeches of Daniel Webster: Writings and Speeches Hitherto Collected**, vol. 16 (1903), 47.

[3] Herbert Hovenkamp, **Enterprise and American Law**, 1836–1937 (1991), 17.

[4] Colin G. Calloway, **The Indian History of an American Institution: Native Americans and Dartmouth** (2010), 1–18.

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[6] Elizabeth Brand Monroe, "The Influence of the *Dartmouth College* Case on the American Law of Educational Charities," *Journal of Supreme Court History* 32:1 (March 2007), 1–21.

[7] Francis N. Stites, **Private Interest and Public Gain: The Dartmouth College Case, 1819** (1972), 41–2.

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[9] 17 U.S. at 573.

[10] George Ticknor Curtis, **Life of Daniel Webster: Vol. I** (1870), 170.

[11] Curtis, **Life of Daniel Webster**, 171.

[12] The leading works on John Marshall and his jurisprudence include Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997); Joel Richard Paul, **Without Precedent: Chief Justice John Marshall and His Times** (2018); David Scott Robarge, **A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court** (2000); Jean Edward Smith, **John Marshall: Definer of a Nation** (1996); and Harlow Giles Unger, **John Marshall: The Chief Justice Who Saved the Nation** (2014).

[13] 10 U.S. (6 Cranch) 87 (1810).

[14] Charles F. Hobson, **The Yazoo Land Sale: The Case of *Fletcher v. Peck*** (2016), 53.

[15] 10 U.S. at 133.

[16] C. Peter Magrath, **Yazoo: Law and Politics in the New Republic: The Case of *Fletcher v. Peck*** (1966), 110.

[17] 13 U.S. (9 Cranch) 43 (1815).

[18] Michael W. McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic," *Tulsa Law Review* 37:1 (2000–2001), 7–43.

[19] 13 U.S. at 52.

[20] 17 U.S. (4 Wheat.) 1 (1819).

[21] 17 U.S. at 2.

[22] For John Marshall's judicial style and relationship with his fellow justices see Smith, **Definer of a Nation**, 473–4.

[23] Letter from William Johnson to Thomas Jefferson, December 10, 1822, cited in G. Edward White, **The Marshall Court and Cultural Change, 1815–1835** (1991), 189.

[24] 17 U.S. at 636.

[25] 17 U.S. at 650.

[26] 17 U.S. at 712 (Story, J. concurring).

[27] 17 U.S. at 662 (Washington, J., concurring).

[28] 17 U.S. at 27.

[29] Albert J. Beveridge, **The Life of John Marshall, Volume 4: The Building of the Nation, 1815–1835** (1916), 167.

[30] Stites, **Private Interest and Public Gain**, 110–13.

[31] Morton J. Horwitz, **The Transformation of American Law, 1780–1860** (1977), 11–12.

[32] Mark G. McGarvie, "The Dartmouth College Case and the Legal Design of Civil Society," in **Charity, Philanthropy, and Civility in American History**, Lawrence Friedman and Mark G. McGarvie, eds. (2004), 105.

[33] Adam Winkler, **We the Corporations: How American Businesses Won their Civil Rights** (2018), 72–4.

[34] William Novak, **The People's Welfare: Law and Regulation in Nineteenth Century America** (1996), 107.

[35] R. Kent Newmyer, **Supreme Court Justice Joseph Story: Statesman of the Old Republic** (1985); Monroe, "The Influence of the *Dartmouth College* Case."

[36] Gerald N. Magliocca, **Washington's Heir: The Life of Bushrod Washington** (2022), 109–110.

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[38] 21 U.S. (8 Wheat.) 464 (1823).

[39] 21 U.S. at 485.

[40] 28 U.S. (3 Pet.) 99 (1830).

[41] 28 U.S. at 105.

[42] Matthew Ing, "Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause," *Akron Law Review* 45:3 (June 2012), 719–59.

[43] Bernard C. Steiner, **Roger B. Taney: Chief Justice of the United States Supreme Court** (1922), 187–231.

[44] 43 U.S. (2 How.) 127 (1844).

[45] James McBride, "A Tale of Capital, Philanthropy, and the Supreme Court," *Differences: A Journal of Feminist Cultural Studies* 18:3 (Fall 2007), 7–42.

[46] Jay Alan Sekulow and Jeremy Tedesco, "The Story Behind *Vidal v. Girard's Executors*: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty," *Pepperdine Law Review* 32:3 (2005), 605–45.

[47] Sekulow and Tedesco, "The Story Behind *Vidal v. Girard's Executors*."

[48] Newmyer, **Supreme Court Justice Joseph Story**, 129–31.

[49] Michael W. McConnell, "Educational Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling," in **Moral and Political Education: NOMOS XLIII**, edited by Stephen Macedo and Yael Tamir (2001), 108.

The Great Dissenter No More: Justice Harlan, the Fourteenth Amendment, and *United States v. Shipp*

J. Daniel Elliott

It's a story very familiar to students of Supreme Court history. The Reconstruction Amendments fundamentally reshaped the constitutional landscape of the country. The Thirteenth Amendment barred slavery, the Fourteenth altered the relationship between the federal government and the states, and the Fifteenth guaranteed voting rights regardless of race. These presented the Court with opportunities to make radical alterations to the federal system and meaningful changes to the nature of race relations under the law throughout the country. Yet the reality of what followed the adoption of these Amendments was no shining moment in race relations or in the powers of the federal government to protect newly freed Black Americans. Despite the opportunity for vigorous federal enforcement of equal protection under the law and due process protections, the Court left little opportunity for any federal involvement in such matters. Through a series of post-Reconstruction decisions, the Court effectively gutted the Thirteenth and Fourteenth Amendments, taking important constitutional options away from the millions of Black Americans waiting for federal involvement to protect their rights.[1] This period of the Court's history, sometimes called judicial Reconstruction,[2] was among the worst periods of the Court for civil rights advocates and petitioners.

Equally familiar is the chapter of this story which tells us that in three pivotal cases—*The Civil Rights Cases*,[3] *Plessy v. Ferguson*,[4] and *Hodges v. United States*[5]—one justice refused to sign onto the Court's decisions. Instead, so the familiar story goes, Justice John Marshall Harlan authored stinging dissents, for which history has awarded him the name "The Great Dissenter."[6] With a reputation for a fierce belief that the Constitution's

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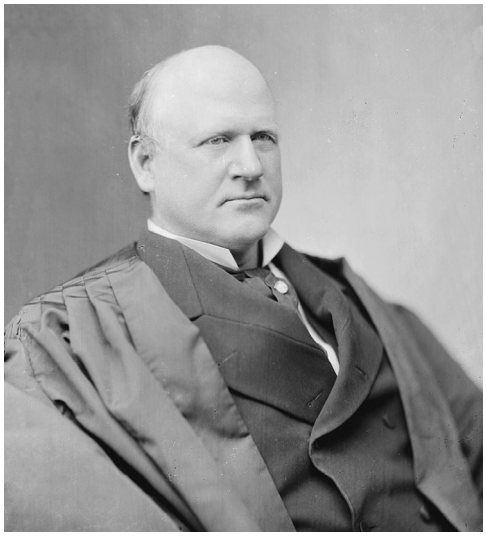
newest post-war Amendments empowered the federal government to step in between the states and their new Black citizens,[7] Justice Harlan's dissents in each of these cases advocates for vigorous federal protection of Blacks, protection that the Court itself declined to grant. Justice Harlan's career, marked by dissents that read like shouting into a canyon, left many historians and observers bemoaning the reality that his position on the Fourteenth Amendment was not persuasive to his fellow justices.

Yet, this story, by virtue of its focus on the instances when Harlan was *not* able to rally the Court in support of his position, is incomplete. *United States v. Shipp*[8] does not fit this fiery-dissent-in-order-to-protect-Black-citizens'-constitutional-rights narrative, but this does not make it any less important, quite the contrary.[9] In *Shipp*, Harlan took a quieter, more measured approach, one more focused on consensus and agreement than bombastic rhetoric and fervent dissent. Justice Harlan successfully set aside his Great Dissenter posture in favor of a new role: coalition-building around significant acts of federal power to protect Black civil rights.[10] This was a seminal moment in U.S. constitutional history, and it asks us to rethink the conventional "dissenter" label attached to Justice Harlan. After examining his role in the *Shipp* case, maybe a better appellation is Harlan the Great Coalition-Builder.

Justice Harlan, Great Dissenter

Born to a slave-holding family in Kentucky in 1833, John Marshall Harlan began his career as a lawyer and political figure in the immediate pre-war period in what would be a border state between the Union and Confederacy.[11] Although he came from enslaving roots in an area which would have readily accepted his support of the Confederacy had he chosen to provide it, Harlan instead opted to fight for and advocate on behalf of the Union effort for the duration of the Civil War. In many ways, the war caught him between his family heritage of slavery and a belief that a united nation must survive over one divided by slavery and secession.[12]

The duality of Harlan's personal and political beliefs on slavery pervades all corners of his life and career. Throughout the 1850s, Harlan offered criticism of both abolitionists and pro-slavery voices around the nation.[13] Despite living in and finding significant political influence from a Southern state, he ardently opposed secession before resolving to recruit and lead a Union Army infantry unit out of his home state of Kentucky.[14] During the war, he opposed President Lincoln's Emancipation Proclamation, yet did not change his support for the Union or his personal involvement in the war effort.[15] And as attorney general for the state of Kentucky, he opposed ratification of the Thirteenth Amendment, describing it as a "direct interference, by a portion of the states, with the local concerns of other states."[16] Yet during his tenure on the Court, he fought bitterly with his fellow justices, insisting that



Born in Kentucky in 1833, John Marshall Harlan served as attorney general of that state from 1863 through 1867. President Rutherford B. Hayes appointed him to the Supreme Court in 1877. He served as an associate justice until his death in October 1911.

the Amendment expanded beyond the mere legal prohibition of slavery and empowered Congress to prevent the badges and incidents of slavery from continuing to mark formerly enslaved peoples.[17]

When Harlan reached the Court in December of 1877, his views on the impact of slavery on American society after the Civil War and on the role of the Reconstruction Amendments in altering the nation's federal system solidified and cemented his opposition to the predominant jurisprudential approach of the Waite Court.[18] From 1874 to 1888, that Court carried a reputation for apathy regarding the civil rights issues plaguing Black Americans after the war, and for sharply curtailing federal efforts to enforce the Reconstruction Amendments "by appropriate legislation." It was this period of the Court which saw Harlan's first dissents, notably in *The Civil Rights Cases*. Yet what may be less familiar is the Court's understanding of how the Fourteenth Amendment interacted with criminal law more generally in this period.

The Fourteenth Amendment and the Criminal Law

On its face, the Fourteenth Amendment's interactions with criminal law seem to flow most obviously from Section 1's Due Process Clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." This mirrors the Fifth Amendment's Due Process Clause, with one notable distinction: the Fourteenth Amendment specifically targets state powers and actions, which the Fifth Amendment does not. The Fourteenth Amendment's Due Process Clause is the basis for much of the federal Constitution's relationship between criminal law and the several states.

But what is today a given was, for many decades following the ratification of the Fourteenth Amendment, an unrealistic option. The Court made as much clear in 1833, when in *Barron v. Baltimore* it held the Bill of Rights inapplicable to the states.[19] Even after the ratification of the Fourteenth Amendment the Court reaffirmed the central holding of *Barron* in *United States v. Cruikshank* (1876).[20] In short, even the direct admonition that no state shall deprive persons of life, liberty, or property except by due process of law did not clearly establish the Bill of Rights as the kind of process due to criminal defendants in state court.

Over time, the Court has reversed course. Instead of concluding that *Barron* and *Cruikshank* were wrongly decided, the Court created the doctrine of "selective incorporation," deciding that some rights crystalized in the Bill of Rights might be applicable against the states under the Fourteenth Amendment, while others might not. The underpinnings of this doctrine emerged, over Justice Harlan's dissent, in *Twining v. New Jersey* in 1908.[21] There, the Court considered whether the Fifth Amendment's protection against self-incrimination applied against the states. Writing for the Court, Justice William H. Moody articulated the groundwork for selective incorporation:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[22]

Thus, while possible that a right from the first eight Amendments might be protected against the states via the Fourteenth Amendment's Due Process Clause, the right against self-incrimination was not one of those ready for incorporation just yet. It would not be

applied against the states until *Malloy v. Hogan* (1964).[23]

Dissenting in *Twining*, Harlan objected to the failure to incorporate the Bill of Rights outright. In his view, the Fourteenth Amendment necessarily protected against self-incrimination, as it would necessarily protect against other violations of the Bill of Rights. This was part of the "'birthright'" of all Americans.[24]

This was not the first time that Harlan had expressed a belief in total incorporation of the Bill of Rights via the Fourteenth Amendment. He had previously done so—again in dissent—in *Hurtado v. California* (1884).[25] There, the Court held that the Fifth Amendment's guarantee of a grand jury indictment did not extend to the states, eviscerating a claim of due process violations for a state defendant. As he would do in *Twining*, Justice Harlan dissented, turning to history to show the role the formal indictment guaranteed by the Fifth Amendment played in "due process," insisting the Fourteenth Amendment necessarily meant the states had to play by the same rules as the federal criminal system.[26] Had it been adopted by his colleagues, Harlan's approach in *Twining* and *Hurtado* would have advanced the relationship of the Fourteenth Amendment and criminal law by a half-century or more.

Race, the Court, and Justice Harlan

Justice Harlan's time on the Supreme Court coincided with a "nadir" in post-war race relations, which infected the country's social outlook on race as well as the Court's legal posture toward it. Historian Rayford Logan used the term "nadir"—in this context—in his 1954 book *The Negro in American Life and Thought: The Nadir, 1877–1901*. The book's title makes a claim as to when the nadir truly came: from the end of Reconstruction to just after the turn of the twentieth century. Other historians have argued for later end dates, inclusive of the re-emergence of the Ku Klux Klan to a strength of four million in 1924[27] or of the first "Great Migration" of Black Americans out of the South, when some 1.6 million relocated to the North and Midwest by 1930.[28] By these accounts, the "nadir" encompasses all of Justice Harlan's time on the bench, and with good reason. The Court on which Harlan sat found so few cases in favor of a Black petitioner that one would not be wrong to be skeptical of the Court's commitment to the Reconstruction Amendments.

One such rare exception, where the Court did apply a Reconstruction Amendment to the benefit of a Black petitioner, was the case of *Neal v. Delaware* (1880).[29] The state constitution of Delaware limited the pool of potential grand and trial jurors to only those able to vote. Through a majority opinion by Justice Harlan, the Court held that the Fifteenth Amendment meant that the pool of eligible jurors in Delaware had to include Blacks. This had the effect of compelling new trials for the Black defendant who had petitioned the Court to recognize the right of Black citizens to serve on juries. The holding of *Neal*, however, did not extend to forbidding the exclusion of Black citizens on the basis of their race from jury service *in toto*. Instead, the case merely decided that, where a state aligned jury service with voter eligibility, it must embrace Black jurors.

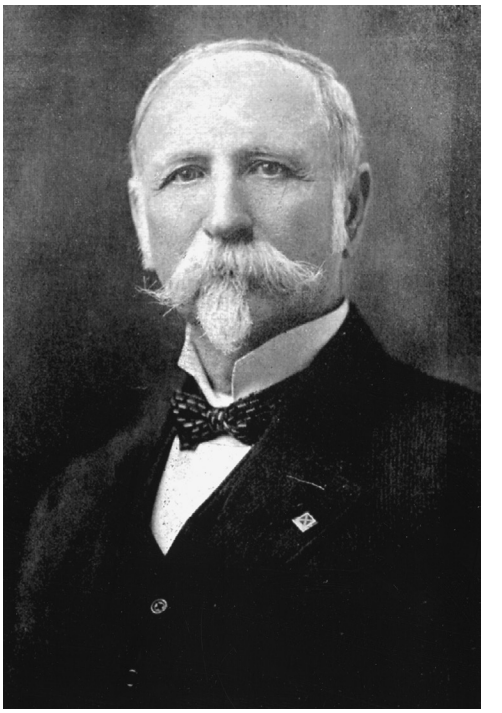
Shipp: Justice Denied

We now turn to the story of *United States v. Shipp* and consider the important role it plays in the jurisprudential legacy of Justice Harlan.[30] Though the story does not begin with Harlan, in order to illustrate the way in which his actions in the case differed from his prior work, it is important to give the events underlying *Shipp* far more historical attention than they have thus far been afforded. What follows is reconstructed from the trial

records of *Tennessee v. Ed Johnson*, the *habeas* proceeding of *Ed Johnson v. Tennessee*, and the Supreme Court records for *United States v. Shipp*. These records offer vast and fascinating insights into the case, and provide us with a full transcript of the testimony taken on behalf of the Supreme Court by its appointed Commissioner in Chattanooga. To underscore Justice Harlan's role, the story focuses on three main phases: the initial trial, Johnson's appeals, and the reaction in Chattanooga to the Supreme Court's stay of Johnson's execution.

The story of *United States v. Shipp* begins in Chattanooga, Tennessee, with the alleged rape of Nevada Taylor, a young white woman. Joseph F. Shipp, former Captain in the Confederate Army and then-current elected Sheriff of the county which includes Chattanooga, saw the rise of crime in the city as coming to a head with this attack.[31] The largely white population of the city was quick to blame the Black community for any crime, especially one as heinous as rape. With headlines like "Desperadoes Run Rampant in Chattanooga; Negro Thus Reach Climax of Boldness"[32] describing the environment in the months before the January 1906 attack, and with one of the two city newspapers announcing the morning after the attack, "Brutal Crime of Negro Fiend: Details Shock the City,"[33] the racial animus of the white city against its Black community was clear. As it related to this particular attack, however, there was only one problem: the victim did not identify her attacker as Black before Sheriff Shipp suggested it.[34] Indeed, by her own admission the victim could not identify her attacker, who came behind her in a graveyard; the victim never claimed to have seen her attacker.[35]

With his reelection campaign faltering in part because of the crime wave, Sheriff Shipp grew desperate for a conviction in the alleged rape case.[36] So when a tip came in, implicating Ed Johnson, a young Black man,



As Sheriff of Hamilton County, Tennessee, Joseph F. Shipp, a former Captain in the Confederate Army, played a major role in enabling a mob to lynch Ed Johnson for a crime he did not commit. The Supreme Court found Shipp guilty of contempt of court in 1909.

the Sheriff readily took steps towards arresting and securing the conviction of Johnson. The city was clamoring for a swift resolution; it was not inclined to tolerate a slow-moving judicial process. The *Chattanooga News* declared that "[t]he fiendish and unspeakable crime committed . . . by a Negro brute . . . is the sample of the crimes which heat southern blood to the boiling point and prompt law abiding men to take the law into their own hands and mete out swift and horrible punishment."[37] Whether Shipp could keep his defendant alive long enough to see trial was a genuinely open question in a white community filled with fear that was stoked into a frenzy by the newspapers. Within hours of getting his tip, and just days after the alleged attack, Shipp took Johnson into custody and spirited him away to Knoxville by

train in an effort to prevent those same "law abiding men" from taking the law "into their own hands."[38] When a mob formed that same evening to seize and hang Johnson through the exact kind of vigilante justice the *Chattanooga News* had predicted (or perhaps, called for), but failed to meet its objective, it grew displeased with Shipp. Facing electoral defeat, Shipp wouldn't make the same mistake again.[39]

The furious Chattanooga mob did not have to wait long to see if the courts would deliver unto Johnson the execution it fervently sought. Johnson's capital trial began less than two weeks after his arrest, with court-appointed counsel who had never tried a criminal case (let alone a capital case) and a community of spectators waiting for the hammer to fall.[40] By modern standards, the trial was a spectacle of constitutional errors: no one from the Black community was drawn into the pool of prospective jurors, an almost certainly intentional move on the part of Judge Samuel McReynolds;[41] members of the public who sought to support Johnson at trial were excluded from the gallery;[42] and in an unusual scene on the third day of trial during the state's rebuttal evidence, a juror himself asked (and was permitted) to examine the alleged victim about the certainty of her identification.[43] When, through tears, she admitted she could not be sure, but that she believed Johnson to be her attacker, another juror leapt to his feet, pointed at Johnson, and screamed in court: "If I could get at him, I'd tear his heart out right now."[44] That juror, along with the two who physically restrained him from attacking Johnson in the courtroom, remained active members of the jury panel and contributed their votes to Johnson's conviction.

Trial concluded shortly thereafter with the final rebuttal from the District Attorney, Matt Whittaker: "Send that black brute to the gallows."[45] That is, of course, precisely what the jury did. Conviction came after brief deliberations on the evening of the third day of trial and even more brief deliberations before the announcement of the verdict the following morning.[46] In thanking the jury for their service, McReynolds unintentionally highlighted one of the most unthinkable aspects of the sham trial: "It is now seventeen days since the crime for which Johnson was today convicted was committed."[47] In just seventeen days, the entire adversarial trial process of which the Sixth Amendment speaks churned over and produced a death sentence for a man with nine separate and exonerating alibi witnesses, all of whom testified on his behalf.[48]

Shipp: An Appeal, and the Supreme Court's Intervention

But there was a ray of legal hope for Johnson. His legal team had found an ally in Noah Parden, a prominent Black attorney in Chattanooga with experience in criminal defense work at all levels, including appeals throughout the state courts.[49] With Parden taking over from the trial-weary appointed counsel, Johnson's defense now turned to aggressive appellate practice, seeking to right the multitude of perceived errors which, to Parden then and to courts today, amounted to a deprivation of the right to a fair trial. Those appeals began almost immediately, first with a motion for a new trial before Judge McReynolds. Rejecting the claim that Johnson's trial had been anything less than fair, Judge McReynolds did not hold back. "The court has never witnessed a trial that was conducted more fairly . . . What can two Negro lawyers do that the defendant's previous three attorneys were unable to achieve?" He asked rhetorically: "Do you think a Negro lawyer could possibly be smarter or know the law better than a white lawyer?"[50]

Unsurprisingly, in light of his response to the idea that Johnson's trial was constitutionally deficient, McReynolds denied a motion

for a new trial. Johnson's appellate team then turned to the Tennessee Supreme Court, in Nashville, seeking an emergency stay of execution and a chance to argue the case for Johnson's release or retrial.[51] Parden argued that the conviction could not be sustained against the weight of the evidence presented at trial, that the denial of motions for a new venue and an out-of-town jury constituted reversible error given the tense and bloodthirsty atmosphere amongst the white population of Chattanooga, and that the outburst of the juror described above denied Johnson a fair trial by an impartial jury.[52] Less than two weeks later, the Tennessee Supreme Court unanimously responded, dismissing the case on both technical and meritorious grounds and paving the way for Johnson's prompt and public execution.[53]

Yet Parden was not through with the fight to spare Johnson's life. Instead, four days later Parden filed a petition for a writ of habeas corpus in the United States District Court in Knoxville (whose geographic jurisdiction covered Chattanooga), a last-ditch effort to save Johnson from the gallows.[54] In his petition, Parden alleged that Johnson's trial contained so many errors of fundamental and constitutional fairness as to make his detention and pending death sentence illegal and unconstitutional.[55] Filed pursuant to the Habeas Corpus Act of 1867,[56] Parden's petition has been regarded by one commentator as "nothing more than a tactic to delay punishment"[57] given how rarely such petitions yielded any positive results for the defendants whose counsel sought them.

To provide the District Court with the time needed to conduct the review of Johnson's case and the present petition, Judge Charles Clark issued a show-cause order to Sheriff Shipp, preventing Johnson's execution and placing Johnson under the care of the federal marshals until such time as the petition could be disposed of.[58] Three days later, the federal court convened a hearing on the petition, where both Parden and Johnson's team and Shipp and the state's counsel offered testimony and evidence surrounding the trial procedures and practices. At the conclusion of the hearing, which lasted into the night and early morning hours of the next day, Clark could neither provide Parden the relief he sought for Johnson nor Shipp the permission to proceed with Johnson's execution.[59] Clark's verbal order from the bench rejected the claims of systematic exclusion of Black citizens from the jury pool for a lack of evidence, and while he believed that Johnson's trial may very well have been unfair, Clark was unable to overturn the state court's judgment on federal constitutional grounds.[60] The Sixth Amendment to the Constitution only guaranteed the right to a fair trial to *federal* defendants.[61]

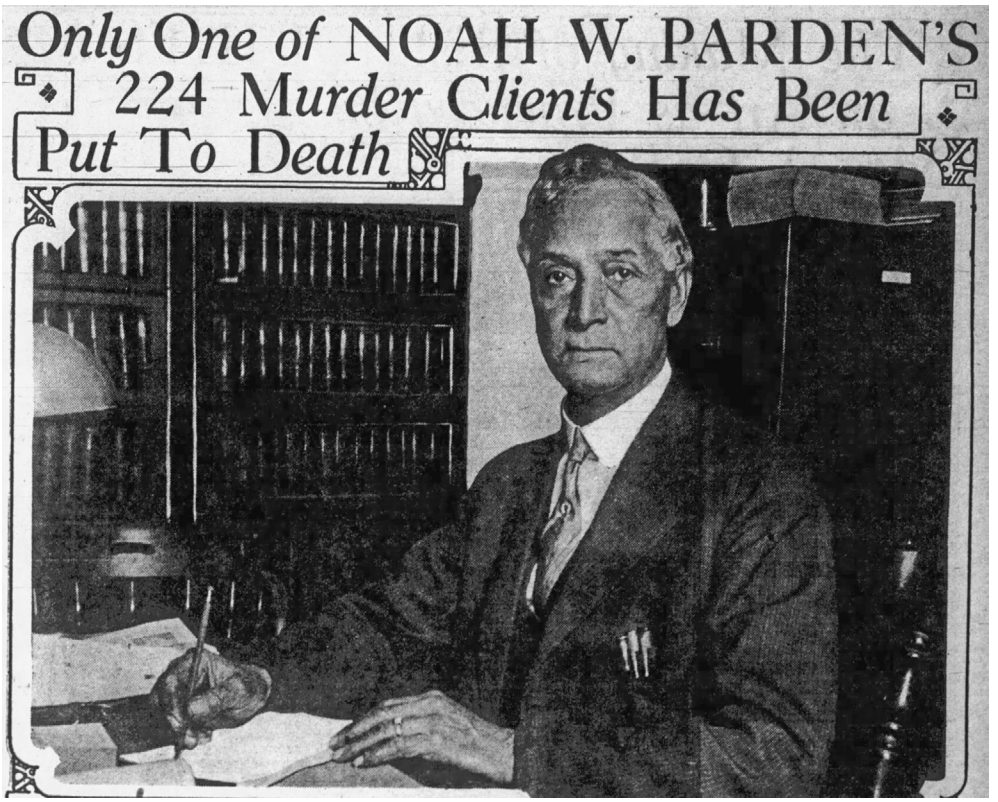
The last point bears emphasis. At the time of Johnson's trial, the Sixth Amendment's guarantee of a right to a fair trial only protected *federal* defendants in *federal* court, and Johnson was neither. Even though the language of the Fourteenth Amendment seemed to guarantee that no state could deprive someone of their life "without due process of law," what process was due remained an open question. Not until *Duncan v. Louisiana* (1968) did the Supreme Court hold that the guarantee of a fair trial extended to state proceedings.[62] Johnson, in filing his habeas petition, essentially asked the District Court to incorporate that guarantee some sixty-two years before the Supreme Court did so. On the law as it stood, Johnson's appeal had to fail. But this does not mean that Judge Clark's order was a victory for Shipp. Clark also ordered that the execution of Johnson be delayed an additional ten days (later reduced to seven) to allow Johnson and his legal team to appeal the denial of the writ of *habeas corpus* to the Supreme Court of the United States.

With the invitation of the federal judge to appeal his order upwards, and with the stay

of execution keeping Johnson alive past the next week, Parden got to work preparing his appeal. Despite the fact that neither Parden nor his law partner had ever practiced before the Supreme Court,[63] the pair were determined.[64] With the assistance of another Black attorney, one who had been co-counsel on a case before the Supreme Court and could help Parden cross the procedural hurdles that his representation of Johnson posed, the last effort to save Johnson began.[65]

With his preparations in place, the petition for a writ of certiorari and emergency motion for a stay of execution drafted and finalized, Parden took the train from Chattanooga to Washington. He entered the Supreme Court on March 17, 1906, for the most important presentation of his career.[66] Once inside the courthouse, Parden came face to face with the circuit justice for the Sixth Circuit of the United States, which included Tennessee and Chattanooga. Associate Justice John Marshall Harlan, sat intently, questioning Parden on points of law and the trial record and betraying no emotion one way or the other.[67]

Parden reminded the Court of the urgency of the case: Johnson would hang in three days without the Supreme Court's interference.[68] However, as the justices well knew, they had never ruled that the Sixth Amendment applied to the states. In *Hurtado*, Harlan had failed to convince his colleagues otherwise. Would *Shipp* be any different?



Noah W. Parden, a prominent Black attorney in Chattanooga with experience in criminal defense work at all levels, successfully sought a stay of execution from the Supreme Court for his client Ed Johnson. The next day, a mob defied the justices and lynched Johnson. As this newspaper clipping indicates, this was a rare occasion when Parden was unable to save the life of one of his capital clients.

Shipp: A Justice Inspired

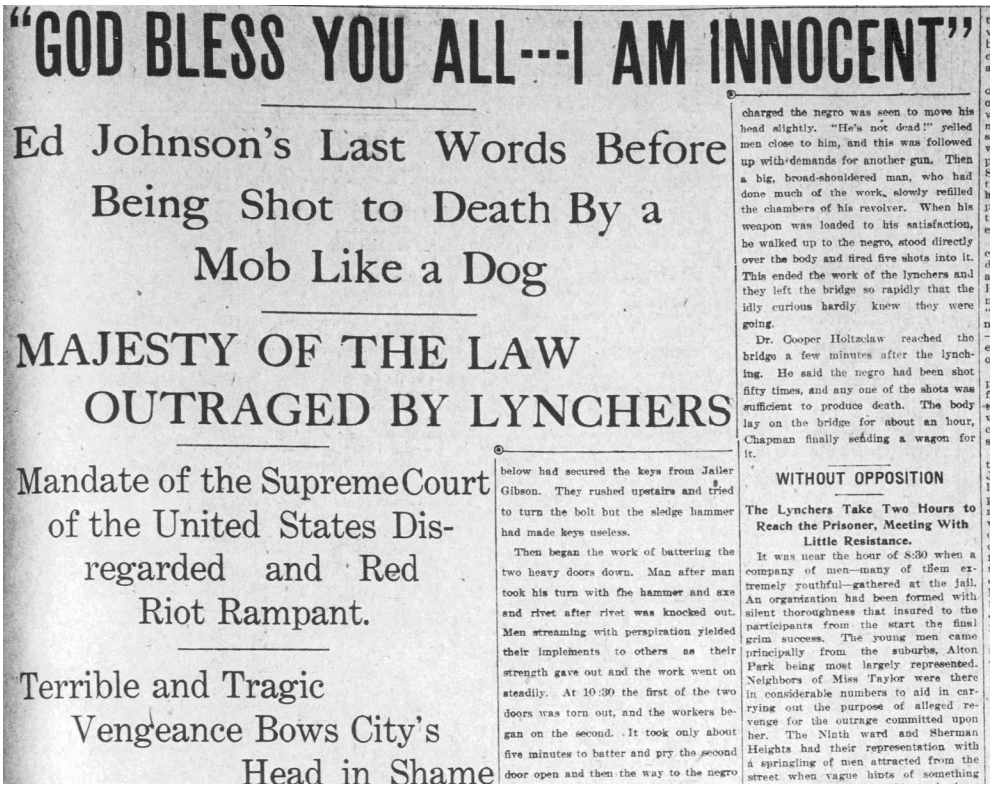
Something about Johnson's case inspired a change in tactic. With a draft order staying Johnson's execution in hand, Justice Harlan proceeded to Chief Justice Melville Fuller's home in D.C., where a majority of the Court's members had gathered at Harlan's request.[69] Harlan argued to his colleagues that Johnson had suffered an unfair trial; he pleaded with them to issue the stay and take the case.[70] Over what has been reported to be an hour-long discussion, Harlan succeeded where before he had failed. In addition to creating the consensus required to issue the stay, he mustered a unanimous coalition to spare Johnson that week and hear the case in full in the coming the months.[71] The Court's March 18, 1906 Administrative Order read as follows: "All further proceedings [against Johnson] be stayed and the custody of the accused retained pending an appeal in Washington."[72]

When word reached Chattanooga, the white community's response to the interjection of the Supreme Court in what they viewed as local business was immediate and predictably angry. The local paper declared, "All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty and that he ought to suffer the penalty of the law as speedily as possible . . . Such delays are largely responsible for mob violence all over the country."[73] As early as noon in the downtown parts of the city, conversation about a mob forming to lynch Johnson began to spread.[74]

This time, however, Sheriff Shipp did something unusual. Despite the credible rumors of impending vigilante violence against Johnson, he dismissed all but one deputy from their posts at the jailhouse for that evening.[75] Indeed, the only deputy he left at the courthouse was the night watchman, a seventy-three-year-old man called Deputy Gibson.[76] When that lynch mob did form and did enter the jail to seize and murder Johnson, only Gibson stood in their way. By his own admission during the collection of evidence against the *Shipp* defendants, Deputy Gibson had a duty to protect Johnson and was capable to do so, armed with a pistol and an able body. Instead of intervening, though, he largely stood by and watched, without using or threatening violence against the jailhouse invaders, as a multiple-hour attack on the building slowly but surely brought the mob through the iron gates separating the courthouse proper from the inmates. The only "inmates" in sight on the entire floor were Johnson and a white woman.[77] All other prisoners in Shipp's care had been moved into the courthouse basement for the night, safe from the mob that Shipp knew was coming.[78] When the mob finally broke through the gate, the task of identifying and capturing their victim was simple. Indeed, the hardest part about the operation was tearing through the wrought iron hinges of the gate: despite Gibson offering the invaders a key after a few moments of their assault on the gate, they had already irreversibly damaged the keyhole.[79]

During the assault, Shipp was largely unaccounted for. That is, until he appeared at the jailhouse to speak to the mob. Calmly asking the mob not to damage the courthouse property and weakly suggesting that they disband, Shipp's true intentions were hardly hidden from the crowd. Shipp neither raised his voice nor brandished his weapon in an attempt to break up the mob, facts which the Court eventually heard through the testimony of Deputy Gibson. Instead, when the mob suggested that Shipp wait in the bathroom with Gibson, he politely complied.[80]

The mob took Johnson, placed a rope around his neck, and led him through the city streets to the Walnut Street Bridge, which still stands in Chattanooga. Once at the midway point of the bridge, the mob hoisted Johnson up to complete their act. Onlookers in the mob captured Johnson's now-famous last words: "God bless you all. I am a [*sic*]



"GOD BLESS YOU ALL---I AM INNOCENT"

Ed Johnson's Last Words Before Being Shot to Death By a Mob Like a Dog

MAJESTY OF THE LAW OUTRAGED BY LYNCHERS

Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant.

Terrible and Tragic Vengeance Bows City's Head in Shame

below had secured the keys from Jailer Gibson. They rushed upstairs and tried to turn the bolt but the sledge hammer had made keys useless.

Then began the work of battering the two heavy doors down. Man after man took his turn with the hammer and axe and rivet after rivet was knocked out. Men streaming with perspiration yielded their implements to others as their strength gave out and the work went on steadily. At 10:30 the first of the two doors was torn out, and the workers began on the second. It took only about five minutes to batter and pry the second door open and then the way to the negro

charged the negro was seen to move his head slightly. "He's not dead!" yelled men close to him, and this was followed up with demands for another gun. Then a big, broad-shouldered man, who had done much of the work, slowly refilled the chambers of his revolver. When his weapon was loaded to his satisfaction, he walked up to the negro, stood directly over the body and fired five shots into it. This ended the work of the lynchers and they left the bridge so rapidly that the idly curious hardly knew they were going.

Dr. Cooper Holtzclaw reached the bridge a few minutes after the lynching. He said the negro had been shot fifty times, and any one of the shots was sufficient to produce death. The body lay on the bridge for about an hour, Chapman finally sending a wagon for it.

WITHOUT OPPOSITION

The Lynchers Take Two Hours to Reach the Prisoner, Meeting With Little Resistance.

It was near the hour of 8:30 when a company of men—many of them extremely youthful—gathered at the jail. An organization had been formed with silent thoroughness that insured to the participants from the start the final grim success. The young men came principally from the suburbs, Alton Park being most largely represented. Neighbors of Miss Taylor were there in considerable numbers to aid in carrying out the purpose of alleged revenge for the outrage committed upon her. The Ninth ward and Sherman Heights had their representation with a springling of men attracted from the street when vague hints of something

On March 19, 1906, in defiance of the Supreme Court's stay of execution, a mob lynched Ed Johnson on Chattanooga's Walnut Street Bridge. Onlookers captured Johnson's now-famous last words: "God bless you all. I am a [*sic*] innocent man." A note attached to the body read: "To Chief Harlan [*sic*]. Here is your Negro. Thanks for your kind consideration of him. You can find him at the morgue."

innocent man."[81] The crowd opened fire on Johnson's dangling body until it fell to the bridge below, where someone took it upon themselves, as a representative of the "Committee" (ostensibly the lynch mob which had just murdered Johnson), to express their views: "To Chief Harlan [*sic*]. Here is your Negro. Thanks for your kind consideration of him. You can find him at the morgue."[82]

The Trial of Joseph Shipp and the Emergence of a Great Coalition Builder

The public reaction to Johnson's lynching was swift and mixed. Chattanooga's two largest newspapers took opposite positions on the matter. The *Chattanooga Times* proclaimed that, "[i]n the presence of the mob spirit rampant in the land, we have nothing to expect but anarchy and ruin."[83] The *Chattanooga News*, however, had only Johnson, his counsel, and the Supreme Court itself to blame for the lynching, which "is a direct result of the ill-advised effort to save the Negro from the just penalty of the laws of Tennessee . . ." Continued the paper: "There is no community south or north which will submit to delay in punishment for this particular crime. The Supreme Court of the United States ought in its wisdom to take cognizance of this fact."[84] Even Tennessee's Governor, James Cox, had a position on the lynching. In an interview with the *Nashville Banner*, he too blamed the Court: "No lynching would

have occurred had the case not been taken from the Tennessee courts into the federal courts."[85]

The justices, upon reading the news of Johnson's lynching and receiving word of the note from the "Committee" that was pinned to Johnson's corpse, were stunned. As the *New York Times* reported:

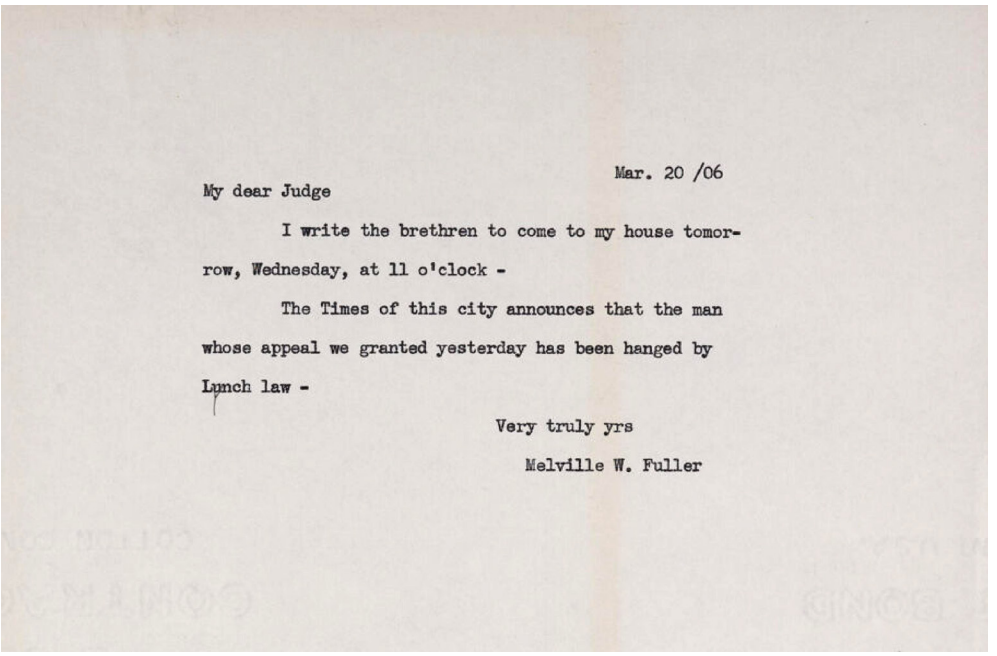
> The event has shocked the members of the Court beyond anything that has ever happened in their experience on the bench … No justice can say what will be done. All, however, agree in saying that the sanctity of the Supreme Court shall be upheld if the power resides in the Court and the government to accomplish such a vindication of the majesty of the law.[86]

Justice Harlan, speaking to the *Washington Post*, further expounded on his view of the indignity done upon the Court: ". . . the mandate of the Supreme Court has for the first time in the history of the country been openly defied by a community." Even President Theodore Roosevelt weighed in, describing the lynching as "contemptuous of the court" and "an affront to the highest tribunal in the land that cannot go without proper action being taken."[87]

That "proper action" came swiftly. The Attorney General, William Moody, quickly sent a letter to James R. Penland, the United States Attorney in Knoxville, authorizing a federal investigation into the lynching.[88] The Department of Justice began exploring the possible indictment and trial of Shipp, his deputies, and other members of the mob under the same Enforcement Act which had been restricted by the Supreme Court in *Cruikshank*.[89] By the end of the spring the largest point of disagreement amongst the leadership of the Department of Justice, and those detailed to this particular investigation, was whether to call up a special grand jury in Knoxville to indict the case during Shipp's re-election campaign or to wait until the next regular grand jury sat in October.[90] While the Department of Justice officials in Knoxville discussed those options, Moody attended a private meeting with Chief Justice Melville W. Fuller and Justice Harlan. The men needed to figure out the federal government's best path going forward. All agreed that Moody should bypass the federal grand jury and file an information and complaint alleging contempt of the Supreme Court, who for the first time ever would sit as trial court in a criminal matter.[91]

The complaint against Shipp and his co-defendants came on May 28, 1906. In it the Department of Justice alleged a conspiracy between Shipp, his deputies, and members of the mob, to violate Johnson's civil rights and to directly ignore an order from the Supreme Court not to execute Johnson's pending appeal.[92] The recitation of facts painted a damning picture of the scene in Chattanooga that March day when Johnson's lynch mob found their target.[93] The Supreme Court accepted the information and complaint, issuing show-cause orders to the twenty-seven named defendants, demanding that they answer for their alleged contempt and show why the Court ought not to sanction them accordingly.[94] Harlan's meeting with the chief justice,[95] Department of Justice officials,[96] and fellow justices in various informal settings,[97] had successfully convinced the Court to proceed with a never-before-seen legal maneuver.

However, the Court faced a problem—immediate legal challenges from the defendants that suggested the Court had no jurisdiction to hear this contempt complaint since the Court had no jurisdiction to hear Johnson's *habeas* petition in the first place. The argument proceeded by rejecting Johnson's underlying premise that his conviction was unlawful. To the defendants, since the trial court administered a fair trial for



Mar. 20 /06

My dear Judge

I write the brethren to come to my house tomorrow, Wednesday, at 11 o'clock -

The Times of this city announces that the man whose appeal we granted yesterday has been hanged by Lynch law -

Very truly yrs

Melville W. Fuller

On March 20, 1906, the day after the lynching of Ed Johnson, and the brazen defiance of the Court's order, Chief Justice Melville W. Fuller wrote his colleagues, asking them to gather at his house on F street the next day to discuss the matter.

Johnson and the jury duly convicted him, Johnson had no legal right to petition for *habeas corpus* relief; absent that right, the federal courts had no business interfering in the rights of the state courts to try and execute defendants.[98] And if the federal courts lacked jurisdiction over Johnson's habeas petition, then any defiance of an order of the Supreme Court, in such a proceeding, was also outside the jurisdiction of the Court to punish.[99] After two days of argument, the Court unanimously rejected the defendants' contention that it lacked jurisdiction to hold Shipp and his co-defendants responsible for their conspiracy to murder Johnson and violate the Court's order.[100] While recognizing that "orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt,"[101] the Court then reminded the defendants what dealing with the Supreme Court, the highest judicial body in the nation, meant: "[T]his court, and this court alone, could decide [if the federal court's lack of jurisdiction] was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it."[102] By taking the question of jurisdiction, and Johnson's life, into their own hands back in March, the defendants had robbed the Court of the chance to definitively say whether it had jurisdiction over the *habeas* petition and appeal. For that, the defendants had to answer.

Having disposed of the preliminary hurdle to the Court's contempt proceeding, the parties then turned to matters of practicality: how would the Court hear evidence, and where?[103] Would the defendants have a chance to make closing arguments to the Court, and if so, how?[104] These matters had never before been worked out, as never before had the Court heard a criminal trial in the first instance. Yet through trial and error, the Court and parties eventually worked out

an arrangement. The Court would appoint as Commissioner its deputy Clerk, James D. Maher, who would travel to Chattanooga and take evidence like a trial court.[105] After that, the parties would travel back to Washington to argue their view of the evidence to the Court. The justices would then rule on the complaint as to each defendant.

Throughout much of 1907, Commissioner Maher sat in Chattanooga hearing testimony, the record of which is preserved in the National Archives Supreme Court collection. The twenty volumes, taking up more than 2,200 typewritten pages (of which more than 1,200 were selected for publication by the Commissioner in his final report to the Court),[106] include the testimony of dozens of witnesses, focusing on the role Shipp played in the conspiracy to lynch Johnson, and implicating five others to the satisfaction of the Court.[107] Several of the original twenty-seven defendants had their charges dropped by the Department of Justice after the testimony concluded, as the evidence placing them in the mob proved shakier than excepted.[108] And of the nine defendants whose charges remained after the government's motion to dismiss, the Court itself only voted to convict six, acquitting the others in a 5–3 decision convicting Shipp and others.[109]

Harlan's Last Word on State Action

This time, Harlan was somewhat less successful in uniting the entire Court behind his opinion. Shipp and his co-defendants' convictions rested on a narrow majority. William Moody was now on the Court and recused himself, and three justices dissented.[110] But the work Chief Justice Fuller and Justice Harlan did behind the scenes turned out to be enough.[111] A majority of the Court held that the evidence which the Department of Justice presented to the Commissioner in Chattanooga proved that a conspiracy existed between state officials and private citizens to murder Johnson and deprive him of his chance at an appeal to the Supreme Court.[112]

The result of the Court's opinion in *Shipp*, whereby three state officials and three private citizens were each convicted of the contempt, constitutes the only time in this era of Supreme Court history where private citizens received Court-authorized punishment for depriving a Black citizen of his civil rights. This was only made possible by skirting what Harlan saw as the overly restrictive readings of the Fourteenth Amendment. Only by employing the previously-unheard-of approach of Supreme Court contempt proceedings could Harlan vindicate Johnson's legal right to appeal.

But why has this episode from the Supreme Court—and Justice Harlan's—history largely fallen into obscurity? Perhaps the answer is as simple as the fact that Harlan did not author any of the opinions in *Shipp*. It was Justice Holmes who spoke for the unanimous Court to authorize the trial at its inception,[113] and it was Chief Justice Fuller who wrote the divided opinion of conviction.[114] The justices' motivation for coalescing around the contempt strategy remains unclear. It may well have been a strategic move to avoid implicating personal emotions in the Court's opinion, since the "Committee" who lynched Johnson had called out Justice Harlan by name in its note on Johnson's body. We know that perceptions of bias did occupy at least some of the Court's concern. Holmes emphasized as much in his *Shipp* opinion. As he put it when addressing the contempt issue, "The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."[115] It strains credulity to think that the justices who decided *Shipp* had no personal interest in the matter or that there was "nothing" in the case

that affected the judges in their own persons. But the Court's choice of emphasis suggests that Harlan's approach had succeeded.

In this way, then, Justice Harlan's final words on the state action doctrine are not really his own. Instead, they are the collected beliefs of the justices who joined the majorities throughout the *Shipp* case, undoubtedly aided in their decision-making by Harlan's fervent belief that Johnson had been denied justice in the state courts and that the open hostility of the mob towards the Supreme Court deserved penalty. Harlan had stepped into a new role, that of Great Coalition-Builder.

The *Shipp* Epilogue

Following the conviction of Shipp and his five fellow co-defendants, the Court only once again entertained the *Shipp* case: hearing arguments and issuing a brief per curiam opinion on sentences.[116] Shipp, one heavily-involved deputy, and the citizen leader of the lynch mob each received a ninety-day sentence at the federal prison in Washington, D.C.[117] The remaining three defendants, including two citizens and Deputy Gibson, the elderly night jailer who failed to intervene in the attack on the jailhouse, received sixty-day sentences.[118] These sentences, however, were not the product of easy or clear instruction from a written statute. Instead, they came about through no small debate among the justices. Holmes, for example, considered that the severity of conduct, the "grave offense" of Shipp and his co-conspirators, warranted a sentence of one year's imprisonment.[119]

When Shipp left the D.C. prison after close to seventy-five days, having received credit for his good behavior in jail,[120] he boarded a train back to Chattanooga as a private citizen once more. He had lost his bid for another re-election in 1908, amidst the Supreme Court's trial.[121] Yet he was no ordinary citizen to the members of the white community in Chattanooga. When he stepped off the train in his hometown, a crowd of 10,000 onlookers broke out into song: "Dixie" and "Home, Sweet Home" filled the platform as the community offered its hero's welcome to the former Sheriff.[122] The Sheriff spent the rest of his days strolling town in his Confederate uniform, teaching the Lost Cause mythology to anyone who would listen until his death in 1925.[123]

In the year after the Court's action against Shipp, the annual number of lynchings in the United States fell from ninety-seven to eighty-two.[124] That declining trend continued over the next decade, while the number of attempted lynchings stopped by law enforcement significantly rose after Shipp's conviction.[125] Though it is impossible to say that this change in the nation's experiences with lynching was driven by Shipp's trial and punishment, the changes in lynching behavior and police involvement to prevent lynchings cannot be overlooked as one possible outcome of *Shipp*.

Justice Harlan remained on the Court until his death in October of 1911, about eighteen months after Sheriff Shipp left the D.C. prison. Though Harlan planned to serve until the age of ninety-five, he made it only to seventy-eight, just shy of thirty-four years of service. The justice had precious few opportunities to exercise his dissenting pen after *Shipp*, and none involved Fourteenth Amendment civil rights for Black Americans. The *Shipp* proceedings were Harlan's last chance to bring the Court along with him into a more active role in protecting the rights of Black Americans. While a successful episode in Harlan's mission to support federal court action against those who sought to violate the civil rights of Black Americans, the historical singularity of *Shipp* derives from the fact that the Court never again held anyone in criminal contempt, let alone for such contempt as followed from preventing Black Americans from exercising their right to appeal.


U. S. SUPREME COURT COULDN'T STOP A LYNCHING

Door Where Lynchers Entered Chattanooga Jail.

Ed Johnson Who Was Lynched.

the jail office. Then a few more came in, and after awhile there were about 75. About one-third of them were actively engaged in what followed.

While some of them argued with Gibson, two heavy doors were laboriously battered down. Just two and one-half hours were consumed at the jail by the mob, and in the course of that time Sheriff Shipp was summoned to the jail by telephone. He endeavored to argue with the mob but was locked up in a bath room.

After securing him the mob dragged the negro through the street, vetoing the suggestion of several men "to kill him now."

On the bridge, all demands for a confession were met with the words from Johnson, "I'm ready to die, but I never done it." He was promptly hoisted off his feet by a rope round

Although the Supreme Court could not prevent Ed Johnson's lynching, in 2001 the criminal court in Hamilton County, Tennessee, expunged Johnson's conviction for the rape of Nevada Taylor, "restoring [him] to the presumption of innocence that he enjoyed before his conviction."

A Story That Needs to Be Told

In the century since Justice Harlan's passing, scholarly analysis of his career and his judicial philosophy has centered, rightly or wrongly, on his dissents. Harlan was arguably the greatest dissenter in Supreme Court history, and certainly among the earliest to develop a voice for fairness and racial equality through the medium of the minority opinion. Yet he was more than that. Through the lens of *United States v. Shipp*, a different kind of Justice Harlan comes into view, one willing to work behind the scenes without the fiery rhetoric that defined his dissents. By channeling the Court's inherent rage at the open defiance of its own orders into an ingenious, expansive, and singular use of federal power against individuals, both state actors and private citizens, whose activity irreversibly harmed the civil rights of a Black American, Justice Harlan ended his career in the jurisprudence of race relations with a victory, not a defeat.[126]

Through *Shipp*, the record of Justice Harlan's career takes on new light. As the Great Coalition-Builder, Harlan took his deeply rooted belief in the legal equality of all Americans, regardless of race, from the backburner to the front page. Harlan eked out a victory he had previously never achieved.

In 2001, the criminal court in Hamilton County expunged Ed Johnson's conviction for the rape of Nevada Taylor, "restoring [him] to the presumption of innocence that he enjoyed before his conviction."[127] The Ed Johnson Project, a collection of activists and community members in Chattanooga, campaigned during the 2010s to raise awareness

of Johnson's lynching, culminating in a memorial beside the Walnut Street Bridge where Johnson died. That memorial, dedicated in September of 2021, seeks to teach the public about Johnson's life and tragic death, drawing a formal apology from the City of Chattanooga to Johnson, during the dedication ceremony, for the "miscarriage of justice" that Johnson suffered more than a century ago.[128]

ENDNOTES

Author Note: I thank Charles Barzun and Ted White for their mentorship, countless more professors at the University of Virginia for their comments, reactions, and ideas, Douglas Linder at UMKC School of Law, Sean Gray, Sadie Goering, Jack Jiranek, and Harrison Gordon at UVA Law, Helen Knowles-Gardner of the *Journal of Supreme Court History*, two anonymous reviewers for their helpful feedback on earlier drafts, the National Archives in College Park, MD, the Library of Congress, and the University of Virginia library system for their assistance in conducting research, and Paige Elliott and Shaelynn Martin for outstanding assistance in performing field research. I give special thanks to Shaelynn for her unwavering support of me throughout my academic career and the life of this piece.

[1] See, generally, *United States v. Cruikshank*, 92 U.S. 542 (1876); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896); and *Hodges v. United States*, 203 U.S. 1 (1906), among others.

[2] See Pamela Brandwein, **Rethinking the Judicial Settlement of Reconstruction** (2011).

[3] 109 U.S. at 3.

[4] 163 U.S. at 537.

[5] 203 U.S. at 1.

[6] See, e.g., Peter S. Canellos, **The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero** (2021); Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (1992), 164; Linda Przybyszewski, **The Republic According to John Marshall Harlan** (1999), 8.

[7] Canellos, **The Great Dissenter**, 1–4.

[8] Throughout, I use the singular "case" to describe the events of *United States v. Shipp*. In reality, the events of *Shipp* produced three separate opinions throughout the period of 1906 to 1910, each with its own unique case number and citation. *Shipp* I, 203 U.S. 563 (1906) (detailing the complaint against Shipp and his codefendants and offering the Court's answer to the jurisdictional questions posed in having a criminal trial in the Supreme Court); *Shipp* II, 214 U.S. 386 (1909) (the divided Court opinion finding Shipp and five codefendants guilty of contempt of the Supreme Court); and *Shipp* III, 215 U.S. 580 (1909) (a brief order sentencing the six convicted defendants).

[9] Indeed, scholars tend not to discuss *Shipp* at all. While Mark Curriden and Leroy Phillips offer a popular narrative of the case and Canellos devotes fourteen pages of his 400+ page text on Justice Harlan to the case, the only other considerations of the case come in law review article footnotes on the nature of contempt. See Mark Curriden and Leroy Phillips, **Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism** (1999); Canellos, **The Great Dissenter**, 411–24. Even the Oliver Wendell Holmes Devise, an authoritative history of the Supreme Court, makes only two passing references in footnotes to *Shipp* in the volume devoted to the relevant period. See Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (2006).

[10] Canellos, **The Great Dissenter**, 411–24.

[11] Przybyszewski, **The Republic According to John Marshall Harlan**, 14; Steve Luxenberg, **Separate: The Story of *Plessy v. Ferguson*, and America's Journey from Slavery to Segregation** (2019), 38–9, 44, 108.

[12] Luxenberg, **Separate**, 122–4.

[13] Luxenberg, **Separate**, 38–9, 44.

[14] Luxenberg, **Separate**, 122–4.

[15] Luxenberg, **Separate**, 194–6.

[16] Luxenberg, **Separate**, 202 (internal citation omitted); see also 109 U.S. at 35 (Harlan, J., dissenting).

[17] Luxenberg, **Separate**, 202.

[18] Przybyszewski, **The Republic According to John Marshall Harlan**, 14, 74.

[19] 32 U.S. 243 (1833).

[20] 92 U.S. at 542.

[21] 211 U.S. 78 (1908).

[22] 211 U.S. at 99.

[23] 378 U.S. 1 (1964).

[24] 211 U.S. at 119 (Harlan, J., dissenting).

[25] 110 U.S. 516 (1884).

[26] 110 U.S. at 547–8 (Harlan, J., dissenting).

[27] Richard N. Current et al., **American History: A Survey**, 7th ed. (1987), 693.

[28] Lakisha Odlum, "The Great Migration," Digital Public Library of America, (last accessed January 24, 2024).

[29] 103 U.S. 370 (1880).

[30] This section offers a brief introduction to the events which brough Sheriff Joseph F. Shipp into the Supreme Court as a criminal defendant making an initial appearance. The full narrative of the case, including Ed Johnson's constitutionally deficient trial in Chattanooga, the tales of his appeals through all levels of state and federal courts, his horrifying lynching and the public response to the Court's execution stay in the city, and Shipp's role

in all of these steps, are more fully explored in Curriden and Phillips, **Contempt of Court**. Although a shortcoming of this book is its lack of footnotes/endnotes, I encourage readers to explore the story of *Shipp* through Curriden and Phillips, as I try here to offer only the most essential facts needed to establish Justice Harlan's interest and role in the case through the trial records available today.

[31] Curriden and Phillips, **Contempt of Court**, 28.

[32] *The Chattanooga Times*, December 26, 1905.

[33] *The Chattanooga News*, January 24, 1906.

[34] Sworn testimony of Nevada Taylor, *Tennessee v. Ed Johnson*, February 6, 1906 (hereafter Taylor testimony); Sworn testimony of Sheriff Joseph F. Shipp, *Tennessee v. Ed Johnson*, February 6, 1906.

[35] Taylor testimony.

[36] Curriden and Phillips, **Contempt of Court**, 35–7.

[37] *The Chattanooga News*, January 24, 1906.

[38] *The Chattanooga News*, January 24, 1906; Curriden and Phillips, **Contempt of Court**, 48–50.

[39] Curriden and Phillips, **Contempt of Court**, 48–50.

[40] Sworn testimony of Robert Cameron, *Ed Johnson v. Tennessee*, Habeas Petition Hearing, March 10, 1906. Cameron was one of the three appointed trial counsel for Johnson.

[41] Curriden and Phillips, **Contempt of Court**, 230 (the *Chattanooga News* editor J.G. Rice "unashamedly contradicted Judge McReynolds and Sheriff Shipp in regard to the allegation that black people were intentionally kept off juries. 'The allegation is a fact. The South long ago decided this to be a white man's government. . . .'"). Judge McReynolds would go on to represent Tennessee in the House of Representatives. "McReynolds, Samuel Davis," Biographical Directory of the United States Congress, https://bioguide.congress.gov/search/bio/M000598 (last accessed March 8, 2024).

[42] Curriden and Phillips, **Contempt of Court**, 99.

[43] Curriden and Phillips, **Contempt of Court**, 108–9; Taylor testimony.

[44] Taylor testimony.

[45] Closing argument of Matt Whittaker, *Tennessee v. Ed Johnson*, February 8, 1906.

[46] Curriden and Phillips, **Contempt of Court**, 118–20.

[47] Judge Sam McReynolds, Reading of the Verdict, *Tennessee v. Ed Johnson*, February 9, 1906.

[48] Trial transcript, *Tennessee v. Ed Johnson*, February 6–7, 1906; Curriden and Phillips, **Contempt of Court**, 95–105.

[49] Curriden and Phillips, **Contempt of Court**, 6–8, 131-5.

[50] Judge Sam McReynolds, Hearing on the Motion for a New Trial, *Tennessee v. Ed Johnson*, February 13, 1906. The "two Negro lawyers" to which Judge McReynolds refers are Parden and his law partner Style Hutchins.

[51] Curriden and Phillips, **Contempt of Court**, 145.

[52] Noah Parden, Motion for Writ of Error, *Tennessee v. Ed Johnson*, February 20, 1906.

[53] Order Denying Motion for Writ of Error, *Tennessee v. Ed Johnson*, March 3, 1906.

[54] Noah Parden, Petition for Writ of Habeas Corpus, *Ed Johnson v. Tennessee*, March 7, 1906.

[55] Petition for Writ of Habeas Corpus.

[56] Habeas Corpus Act of 1867, 14 Stat. 385, Pub. L. 39–28.

[57] Curriden and Phillips, **Contempt of Court**, 151.

[58] Show Cause Order.

[59] Curriden and Phillips, **Contempt of Court**, 167.

[60] Verbal Order Denying Petition for Writ of Habeas Corpus, *Ed Johnson v. Tennessee*, March 8, 1906.

[61] Verbal Order Denying Petition for Writ of Habeas Corpus.

[62] 391 U.S. 145 (1968).

[63] Indeed, exceedingly few Black attorneys ever had; when Parden spoke to Justice Harlan seeking a stay of execution and writ of certiorari to have Johnson's appeal heard before that High Court, he was the first Black attorney to ever appear before a justice in that procedural posture. *See* Curriden and Phillips, **Contempt of Court**, 11–12.

[64] Curriden and Phillips, **Contempt of Court**, 11–12, 173.

[65] Curriden and Phillips, **Contempt of Court**, 174.

[66] Curriden and Phillips, **Contempt of Court**, 1.

[67] Curriden and Phillips, **Contempt of Court**, 9–16.

[68] Curriden and Phillips, **Contempt of Court**, 16.

[69] Curriden and Phillips, **Contempt of Court**, 193–5. Curriden reports on the nature of this meeting using memos and notes from the justices involved to provide the bones for the narrative which Curriden recounts.

[70] Curriden and Phillips, **Contempt of Court**, 193–5.

[71] Curriden and Phillips, **Contempt of Court**, 193–5.

[72] James H. McKenney (Clerk of the Supreme Court), Administrative Order Staying Execution, *Ed Johnson v. Tennessee*, March 18, 1906.

[73] *The Chattanooga News*, March 18, 1906.

[74] Sworn Testimony of George Brown, *United States v. Shipp, et al.*, June 20, 1907.

[75] Complaint, *United States v. Shipp, et al.*, May 28, 1906.

[76] Complaint.

[77] Sworn Testimony of Jeremiah Gibson, *United States v. Shipp, et al.*, June 26–27, 1907 (hereafter Gibson testimony).

[78] Gibson testimony; Complaint.

[79] Gibson testimony.

[80] Gibson testimony.

[81] Curriden and Phillips, **Contempt of Court**, 213.

[82] "Saucy Note for Justice Harlan," *Knoxville Sentinel*, March 26, 1906; "Negro Lynched by Chattanooga Mob," *Birmingham News*, March 20, 1906.

[83] *Chattanooga Times*, March 20, 1906.
[84] *Chattanooga News*, March 20, 1906.
[85] *Nashville Banner*, March 1906.
[86] *New York Times*, March 21, 1906.
[87] *Washington Post*, March 23, 1906.
[88] Letter from Attorney General William Moody to United States Attorney James R. Penland, March 31, 1906, Record Group 60: General Records of the Department of Justice, Straight Numerical Files, 1904–1974, Boxes 271–272, National Archives, College Park, MD; https://catalog.archives.gov/id/583895 (hereafter DOJ-Archives).
[89] 92 U.S. at 542.
[90] Letter from Penland to Moody, May 1, 1906; Memorandum from M. D. Purdy to William Moody, April 30, 1906, both in DOJ-Archives.
[91] Curriden and Phillips, **Contempt of Court**, 252.
[92] Complaint, *United States v. Shipp, et al.*, May 28, 1906.
[93] Report of E. P. McAdams and Henry G. Dickey to William Moody, April 20, 1906, DOJ-Archives. During this period, the Federal Bureau of Investigation had yet to be formed and given the relative brevity of the federal criminal code at the time, the Department of Justice had few dedicated investigators in their employment. Additionally, the Secret Service remained still in the control of the Department of Treasury, acting as counterfeit currency investigators instead of Presidential bodyguards. McAdams and Dickey were loaned to the Department of Justice to conduct this investigation.
[94] Show Cause Order, *United States v. Shipp, et al.*, May 28, 1906.
[95] Letter from Chief Justice Melville Fuller to Justice Oliver Wendell Holmes Jr., March 20, 1906, (copy of a letter sent to all justices setting a meeting at Fuller's house the day after the lynching). Mark DeWolfe Howe research materials relating to life of Oliver Wendell Holmes, Jr., 1858–1968. General Correspondence, General, Group II: Box 14, Folder 41, Fuller, Melville Weston, correspondent, March 20, 1906–May 23, 1910, Harvard Law School Library (hereafter MDWH-HLS). Available at https://nrs.lib.harvard.edu/urn-3:hls.libr:8351836.
[96] "To Arrest Lynchers," *Washington Post*, March 22, 1906.
[97] Canellos, **The Great Dissenter**, 421–4.
[98] Motion to Set Down for Hearing on Preliminary Questions of Law, Without Prejudice, etc., *United States v. Shipp, et al.*, November 12, 1906.; Brief of J. F. Shipp, Sheriff, and his Deputies, on Preliminary Questions, *United States v. Shipp, et al.*, December 3, 1906 (hereafter Defendant Brief).
[99] Defendant Brief.
[100] Defendant Brief.
[101] Defendant Brief.
[102] Defendant Brief.
[103] Motion for the Summoning of Witnesses and to Take Testimony Herein, *United States v. Shipp, et al.*, January 14, 1907.
[104] Motion that Reports of Commissioner be Filed, *United States v. Shipp, et al.*, October 14, 1907.
[105] Order Appointing James D. Maher as Commissioner, *United States v. Shipp, et al.*, February 4, 1907.
[106] Final Report of Commissioner James D. Maher, *United States v. Shipp, et al*, October 14, 1907.
[107] 214 U.S. at 386.
[108] Motion of the Attorney General to Dismiss as to Certain Defendants, *United States v. Shipp, et al.*, October 13, 1908.
[109] 214 U.S. at 425. By the time the Court heard *Shipp* I, II, and III, former Attorney General Moody had been promoted to Justice Moody. He sat out of consideration of any of the *Shipp* matters, given his role in bringing the contempt scheme to the Court in the first place.
[110] 214 U.S. at 425.
[111] Justice Harlan kept virtually no record of the *Shipp* case among his papers, which are available at the Library of Congress. Chief Justice Fuller's papers, also at Library of Congress, are also scant of detail relating to *Shipp*. Justice Holmes, however, did retain some notes and letters between the justices on the matter, which corroborate contemporaneous news accounts of the justices' informal, in-house meetings to strategize about the case. See Fuller to Holmes, March 20, 1906; "To Arrest Lynchers." Justice Harlan's role in pushing the case towards its ultimate destination is one which Justice Thurgood Marshall recognized in an interview with Curriden, summarized and quoted in the preface to Curriden and Phillips, **Contempt of Court**, xvii.
[112] 214 U.S. at 425.
[113] 203 U.S. at 563.
[114] 214 U.S. at 386.
[115] 203 U.S. at 574.
[116] 215 U.S. at 580.
[117] 215 U.S. at 581–582.
[118] 215 U.S. at 581–582.
[119] See Letter from Holmes to Fuller, May 13, 1909, General Correspondence, General, Group II: Box 14, Folder 43, plus several undated typescripts of OWH to Fuller, May 21, 1907–May 25, 1910, MDWH-HLS. Available at https://nrs.lib.harvard.edu/urn-3:hls.libr:8351838?n=15.
[120] Curriden and Phillips, **Contempt of Court**, 338.
[121] Curriden and Phillips, **Contempt of Court**, 318.
[122] Curriden and Phillips, **Contempt of Court**, 338.
[123] Curriden and Phillips, **Contempt of Court**, 339.
[124] Curriden and Phillips, **Contempt of Court**, 339.

[125] Curriden and Phillips, **Contempt of Court**, 339; Canellos, **The Great Dissenter**, 423.

[126] The victory of *Shipp* is one which historian Orville Vernon Burton calls a "first small step towards racial justice." I fully adopt this opinion, even if the *Shipp* opinion is more an aberration in the Court's race relations jurisprudence than a marked shift towards pro-Black rights opinions. See Orville Vernon Burton, **Justice Deferred: Race and the Supreme Court** (2021), 115.

[127] Expungement Order, *Tennessee v. Ed Johnson*, June 12, 2001.

[128] "Chattanooga Dedicates Memorial to Ed Johnson More Than a Century After Mob-Lynching," *WTVC New Channel 9*, September 19, 2021. Available at https://newschannel9.com/news/local/chattanooga-dedicates-memorial-to-ed-johnson-more-than-a-century-after-mob-lynching (last accessed March 1, 2024).

A "Barefoot" Lawyer and the Supreme Court During World War II: *Schneiderman v. United States*

Cliff Sloan

At the height of World War II, the Supreme Court considered *Schneiderman v. United States* (1943), a case in which the United States sought to strip a Soviet-born U.S. citizen of his citizenship.[1] The government maintained that William Schneiderman's membership in the Communist Party established his unsuitability for citizenship at the time of his application.

Fifteen years before the *Schneiderman* argument, the Court held, in *Whitney v. California* (1927), that an individual's engagement with a Communist Party organization supported a criminal conviction under the state's criminal syndicalism statute.[2] *Whitney* included a powerful concurrence by Justice Louis D. Brandeis articulating broad free speech principles that would have a far-reaching impact.[3] The issue now before the Court was whether Schneiderman's Communist Party membership justified revoking his U.S. citizenship.

The *Schneiderman* case attracted intense public interest for at least two reasons. First, by the time it reached the Court, the Soviet Union had become an important U.S. ally fighting the Axis nations of Germany, Italy, and Japan. The government's high-profile denaturalization action against a Soviet-born citizen might have implications for that critical alliance. Second, Schneiderman's Supreme Court lawyer was very well known—a prominent and popular American political leader.

An Anticipated Argument

On November 9, 1942, the Supreme Court's ornate chamber hummed with anticipation about the arguments in the case.

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"The courtroom was full," reported the Associated Press, "and a double line waited hopefully outside."[4] As the session began, a buzz ran through the hushed crowd. A heavyset lawyer in a three-piece suit strode to the lectern to argue for William Schneiderman. The secretary of the California Communist Party, Schneiderman had come to the United States from the Soviet Union at the age of three and had become a naturalized citizen in 1927, when he was twenty-one. The U.S. government now sought to strip his American citizenship because of his Communist Party membership; the asserted ground was that Schneiderman's Communist Party activities proved he had been deceitful when he had stated in his citizenship application that he was committed to the U.S. Constitution.

Schneiderman's lawyer—and the cause of the crowd's excitement—was Wendell Willkie. The Republican presidential candidate against Franklin D. Roosevelt in the 1940 election, Willkie was appearing for the first time before the Supreme Court. As he vigorously argued for the Communist, a reporter noted, the "familiar lock of hair fell over his forehead," as it had when he had barnstormed the country running for president.[5]

At first blush, Schneiderman seemed an odd client for Willkie. The fifty-year-old Willkie was a prominent corporate lawyer who had been a pro-business president of a major utility. Schneiderman, by contrast, was a proud and defiant Communist, scathingly critical of capitalism and captains of industry. But Willkie was an atypical Republican. The Republican Party had turned to him in 1940 as a breath of fresh air after two landslide drubbings by Roosevelt (against incumbent President Herbert Hoover in 1932 and Kansas Governor Alf Landon in 1936). Parting company with his party's isolationists, Willkie had called for strong actions supporting Britain. Despite his career in corporate boardrooms and councils, Willkie projected a down-home, regular-guy, aw-shucks manner, speaking plainly, throwing his jacket aside, waving his hands as his untamable hair cascaded downward. FDR's Interior Secretary, Harold Ickes, mocked the Indiana-born candidate as the "simple, barefoot Wall Street lawyer."[6] Although Willkie lost the 1940 election, he received almost forty-five percent of the popular vote—a better showing than Hoover and Landon, neither of whom had topped forty percent against Roosevelt. (Willkie also won ten states in the electoral college, compared with six for Hoover and two for Landon.)

On November 10, 1942, the day after the first oral argument in *Schneiderman v. United States*, newspapers across the country ran this AP photo of William Schneiderman reading a copy of the Communist Party publication *People's World*.

Willkie's role defending a prominent Communist was not entirely surprising. Alongside his Wall Street roots and Republican candidacy, Willkie had displayed a strong

civil libertarian streak. He had spoken out in favor of First Amendment protections for unpopular speech. In March 1940, he had written a much-discussed *New Republic* article called "Fair Trial," in which he criticized the prosecutions of both an American Nazi and an American Communist.[7]

Willkie Takes the Case

In June 1939, the federal government began a denaturalization proceeding to revoke Schneiderman's citizenship. The government won in the trial court and in the San Francisco–based U.S. Court of Appeals for the Ninth Circuit.[8]

Schneiderman's lawyer was Carol King, a leading civil liberties lawyer at a time when few women were members of the bar. In October 1941, she succeeded in obtaining Supreme Court review of Schneiderman's case. On impulse, she sent Willkie her Supreme Court filing and asked him to become involved on Schneiderman's behalf. He was intrigued, and appalled by the possibility that the government would deprive an American of citizenship based solely on organizational membership and affiliation.

Willkie and Schneiderman met, coincidentally, on December 8, 1941, the day after the Pearl Harbor attack, in Willkie's New York law office on 15 Broad Street, just steps from Wall Street. As Schneiderman later recalled, "A more incongruous meeting would be hard to imagine: A Communist faced with the loss of his citizenship and deportation, and a Wall Street lawyer who only the year before had been the Republican candidate for president." They discussed his case, as well as the shocking attack and the war ahead.[9]

Willkie agreed to represent Schneiderman in the Supreme Court without charge. Operating as lead counsel, he filed the opening brief in January 1942. Willkie worked on the draft extensively, emphasizing that he would not be a mere "shirt front" who let others do the work. King recalled that "the brief had to be completely his, a part of his very being, his own expression of the political injustice he had agreed to combat."[10] In a clear invocation of the global struggle, he argued that stripping Schneiderman of citizenship for membership in an organization would be a "totalitarian" action.[11]

Schneiderman's lawyer Carol King, a leading civil liberties lawyer, asked Willkie to become involved on Schneiderman's behalf before the Supreme Court. When she died in 1952, King was feted by civil liberties groups. The columnist I.F. Stone glowingly described "the unyielding spirit in which she continued to defend radical and alien against an almost overpowering tide of reaction."

The geopolitical situation threatened to upend orderly consideration of the case. American relations with the Soviet Union

had taken a circuitous path. In August 1939, Germany and the Soviet Union signed their nonaggression pact, making Russia an ally of the hated Axis nations. But then, in June 1941, Germany invaded Russia. U.S. support for the Soviet Union became an important issue; one prominent American initiative was the inclusion of the Soviet Union in the Lend-Lease program in November 1941.

When Willkie filed his opening brief in January 1942, the United States was less than two months into the war, and the Soviet Union was a vital and essential ally on the eastern front. Schneiderman's case presented a sensitive dilemma for the Roosevelt Administration. The Justice Department had initiated the denaturalization proceeding and was committed to it; red-baiters in Congress, meanwhile, were always on the prowl for perceived softness toward Communists. But the Soviet Union now was an important wartime partner, and this punitive action against a Soviet-born U.S. citizen, stripping him of his citizenship and deporting him, threatened to be a provocation.

The Stone Court

The membership of the Supreme Court had undergone dramatic confrontation. After Franklin D. Roosevelt's battles with the Supreme Court, culminating in his unsuccessful Court-packing plan and the famous "switch in time that saved nine," a wave of resignations and deaths permitted FDR to reshape the Court entirely. By the summer of 1941, Roosevelt had appointed seven justices (Hugo L. Black, 1937; Stanley F. Reed, 1938; Felix Frankfurter, 1939; William O. Douglas, 1939; Frank Murphy, 1940; James F. Byrnes, 1941; Robert H. Jackson, 1941), and elevated an eighth (Harlan Fiske Stone) to chief justice. It was the greatest impact on the Court of any president since George Washington. And it was not simply the number of justices that FDR appointed. The justices revered the president, and many maintained close relations with him even after joining the Court. Only Justice Owen J. Roberts—the justice who was perceived to be the "switch in time" allowing New Deal programs to be upheld—did not owe his seat to President Roosevelt's appointment.[12]

Under Secretary of State Sumner Welles, a close friend of FDR, advised Chief Justice Stone, through an informal letter by government attorneys, that the United States wanted an indefinite postponement. He asked for the case to be put on hold in light of the war.[13] As the *New York Times* later reported, "It was an open secret that the government wished to have the issue delayed because of possible friction with Russia."[14]

Stone consulted his colleagues. In an April 18 memo, he wrote:

> The Government, for reasons which are obvious, has found it embarrassing to proceed with this case at the present juncture and has secured several postponements, the last one on consent of Mr. Willkie. While I should be glad to have the case postponed by agreement of counsel, my own view is that the Court cannot rightly force its postponement over Mr. Willkie's objections.[15]

The issue generated a contentious discussion in the Court's private Conference on April 22. Stone objected to the foreign policy ground for Welles' suggested indefinite postponement. "I feel embarrassed," he declared, "by that kind of request . . . for nonjudicial consideration. . . . If we yield, we might be criticized as determining policy here as adjunct to diplomatic policy, and we ought not to do that. . . . The only thing that keeps this Court alive and gives it…influence is that we are not influenced by things extrinsic to our job." Three justices—Roberts, Douglas, and Murphy—leaned toward Stone's view. But others disagreed. Black said that the nation

was "in . . . desperate danger," *Schneiderman* was not "a run of the mine case," and the Court should grant the government's request. Reed similarly emphasized that the Court was not "separate and apart from the rest of government" and that the foreign policy concerns should be taken into account. Frankfurter believed that, with regard to this timing issue, the Court could take into account "extra-legal considerations." When a justice mentioned Willkie's view that foreign policy concerns should not enter the case, Frankfurter exploded: "I will take this policy from [the] State Department, not Willkie." Eventually Byrnes, a former senator experienced in steering legislation through congressional logjams, suggested a compromise, which all found satisfactory. The Court would give the government the opportunity to formally express its views favoring postponement on the record, and Willkie could respond.[16]

But the government declined the invitation, not wanting to explain its position publicly and engage with Willkie. The government's machinations nevertheless succeeded in delaying the case and putting it over until the following Supreme Court Term.

When Willkie marched to the podium on November 9, 1942, only seven justices were on the bench. Byrnes was now gone from the Court and ensconced in the White House as FDR's top aide overseeing the domestic economy. His replacement had not been named, much less confirmed. Jackson, meanwhile, had recused himself because the case against Schneiderman had been pending in the lower courts while he was FDR's Attorney General. In contrast, Murphy, who had been FDR's Attorney General when Schneiderman's denaturalization proceeding began, continued to participate—a point that irked Jackson.

Willkie's argument was riveting for those in attendance. He began by pointedly noting that Schneiderman was born "near Stalingrad."[17] At the time, the siege of Stalingrad dominated American headlines. Willkie's reference also was particularly striking because, just six weeks earlier, on September 27, Willkie had met with Stalin in Moscow amid great hoopla and public attention as part of a high-profile worldwide diplomatic mission approved by FDR.[18]

Emphasizing Schneiderman's impeccable record of compliance with all U.S. laws, Willkie said that Schneiderman could not be held responsible, by imputation or association, for every position of other Communist Party members or every tenet of Communist Party philosophy. "Why, you might just as well impute to me beliefs in Ham Fish's statements because we belong to the same political party," he told the justices, who laughed with the audience at his reference to Hamilton Fish, the senior House Republican from New York with whom Willkie vigorously disagreed on many issues, including Fish's strident isolationism before the war. Willkie also dismissed the suggestion that Karl Marx's advocacy of revolution justified punitive action against party member Schneiderman. He quoted statements from Abraham Lincoln, "the founder of my party," and Thomas Jefferson, "the founder of the Democratic Party," on their views that revolution sometimes is necessary to uphold democratic ideals. "Both the Lincoln and Jefferson statements are stronger than that of Marx," he told the Court. Throughout his argument, the Associated Press noted, Willkie "[whacked] the lectern with the flat of his fingers."[19]

Commenting on Schneiderman's testimony that he had not read the acceptance speech of the Communist Party's presidential candidate, Willkie observed, to knowing chuckles from the justices, "I doubt that any presidential candidate's acceptance speeches are ever read." The *Baltimore Sun* reported that the justices "found the session with the Hoosier-New Yorker an enjoyable and interesting experience." Solicitor General Charles Fahy, rising to answer Willkie, quickly shot

At the time of Wendell Willkie's argument in *Schneiderman*, the siege of Stalingrad dominated American headlines. Six weeks earlier, on September 27, Willkie had met with Stalin in Moscow amid great hoopla and public attention as part of a high-profile worldwide diplomatic mission approved by FDR.

back. "Jefferson strove to establish and Lincoln to preserve the form of government that petitioner would destroy. Let us not make a shambles of citizenship." Fahy continued, noting that when Schneiderman applied for and received his naturalization, he did not hold "true faith and adherence" to the principles of the U.S. Constitution, and his allegiance lay "elsewhere."[20]

The Court Tries to Decide

At its Conference on Saturday, November 14, the Court considered the case but could reach no resolution. It took up the case again at its Conference three weeks later. Four justices favored Schneiderman (Black, Reed, Douglas, and Murphy), and three supported the government's citizenship-stripping (Stone, Roberts, and Frankfurter). Some justices were irritated about having to decide the explosive case at all. Roberts, while voting for the government, complained, "It is very unfortunate that law officials have put up this case at this time. But that is for them and not for us."[21]

According to a memo Frankfurter wrote for his files, when his turn came in the justices' Conference, he "spoke rather at length." He reminded his colleagues that he

had wanted to put the case on hold, as the government had requested. "Last spring it seemed very important to me that the case should not be heard because of the posture of things in the world. For myself, I cannot understand why the government did not confess error in this particular case and let it go at that." (Since Frankfurter agreed with the government's legal position, it is curious he thought the government should "confess error"—formally deem its legal position erroneous—although perhaps he meant some other kind of government retreat in the denaturalization proceeding.) "But," he continued, "that is their concern and not ours. The case is now here for adjudication."[22]

With the case now before them for decision, Frankfurter, who was perhaps the justice most involved in foreign affairs and military matters through his ubiquitous network of relationships and protégés, proclaimed that the Court must ignore the geopolitical implications. "This case has nothing to do with the second front or the fifth front or Russia or our relations with Russia or with what will or won't be the possible consequences of deciding one way or another." Invoking his experience as the only naturalized justice, the Vienna-born Frankfurter explained why he supported canceling Schneiderman's citizenship. "None of you has had the experience that I have had with reference to American citizenship. . . . American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution." Frankfurter drew on his experience with the "Schneidermans" he had known, the Communists of his youth:

> I have known the Schneidermans and a good many of them well since my college days, and I have admired, and still do admire, their devotion to their ideals. They are the salt of the earth so far as character and selflessness go. But they are devoted to a wholly different scheme of things from that to which this country, through its Constitution is committed.[23]

Uncomfortable with moving ahead, Douglas suggested putting the case off until a new justice (Byrnes' replacement) was in place and allowing the Court to decide the case with eight justices rather than seven. Murphy agreed. Reed then requested deferring consideration of the case for another week. Stone acquiesced.

The following week, on Saturday, December 12, the justices conferred again. Black now again pushed for delaying the case until the conclusion of the war. "I would hold it for the duration because of the misuse that would be made by our enemies," he argued. Reed joined him, saying, "I would hold the case, if necessary, until after the war because of the risks of the war situation." Douglas renewed his suggestion to have the case reargued when a new justice was in place. When Murphy again agreed with Douglas about deferring until a new justice was confirmed, Stone noted that an eight-justice Court might lead to a four–four tie, leaving the ruling against Schneiderman in place with no Supreme Court opinion—a result that some justices thought would be "just right," a low-key way to resolve the highly charged case.[24]

The Court decided to put the case over for reargument.

Seeking an Eighth Justice

In the fall of 1942, the question of Byrnes's successor on the Court loomed large. "Each time a justice joins the Court," explained Justice John Paul Stevens decades later, "it creates a new dynamic and a different institution—in effect, a new court."[25]

Public speculation focused on Attorney General Francis Biddle or Solicitor General

Fahy to fill the vacancy.[26] Frankfurter, however, saw an opportunity to promote a candidate who would be closely aligned with him on the increasingly fractious Court and who was deeply respected and admired: Judge Learned Hand of the New York–based U.S. Court of Appeals for the Second Circuit.[27] Hand was legendary, perhaps the most esteemed lower court judge in the country. Taft had appointed him to the federal district court, Coolidge to the appellate court. But there was a problem. Hand was seventy years old, and in 1937 FDR had emphasized the age of the justices as his primary Court-packing justification.

Frankfurter was undeterred. He wrote at least three letters to FDR urging Hand's selection and met with the president personally to plead his case. Frankfurter suggested that Roosevelt explain the appointment of the septuagenarian Hand by invoking the extraordinary circumstance of the war. He even sent FDR his draft of a presidential statement announcing the Hand appointment:

> In time of national emergency when each must serve where he can be most useful, it is fitting that in replacing a member of the Court who has been drafted into the war effort, considerations of age and geography—which in normal days might well be controlling—should yield to the paramount considerations of national need. . . . Judge Learned Hand enjoys a place of pre-eminence in our federal judiciary. . . . He will bring to the Court a youthful vigor of mind and a tested understanding of the national needs within the general framework of the Constitution.[28]

Frankfurter simultaneously enlisted allies to barrage the president with pro-Hand messages.

FDR responded cautiously. He determined that he did not want to make the nomination before the 1942 midterm elections—elections that turned out poorly for the Democrats, with Republican gains of forty-seven seats in the House and ten seats in the Senate (still leaving Democrats with comfortable majorities in both chambers). Turnout was exceptionally low—33.6 percent in House elections and only 29.6 percent in Senate races.[29] Democrats tried to spin their disappointing results by saying that several million pro-FDR members of the armed forces were too preoccupied by the war to vote and that millions of other Democrats on the home front were too busy working for a living and supporting the war effort to vote.[30]

After the election, FDR became irritated by Frankfurter's incessant pressure. During a poker game at the home of Treasury Secretary Henry Morgenthau Jr., the president told Douglas, "This time Felix overplayed his hand. Do you know how many people today asked me to name Learned Hand? Twenty, and every one a messenger from Felix Frankfurter. And by golly, I won't do it."[31] FDR advised Frankfurter he could not contradict his previous statements on age. "Sometimes a fellow gets estopped by his own words and his own deeds," the president diplomatically wrote his longtime adviser, "and it is no fun for the fellow himself when that happens."[32]

FDR settled on Judge Wiley Rutledge for Byrnes's seat. Rutledge touched many bases for FDR—geography, youth, judicial experience (a rarity for FDR's Supreme Court appointments), and, not least, a demonstrated pro-Roosevelt record.

FDR loved the fact that Rutledge had spent his professional life west of the Mississippi and had lived in many places. At the time, Douglas was the only justice who had any claim to being from the West, with his Washington State upbringing—and Douglas had spent his professional career in the East. Rutledge had enjoyed a peripatetic academic career at the University of Colorado Law School, Washington University Law

School in St. Louis, and the University of Iowa Law School (where he was dean). He also had been born in Kentucky and raised in Tennessee.[33] When FDR met Rutledge to discuss the Supreme Court nomination, the president gleefully proclaimed, "Wiley, you have geography!"[34]

Rutledge was universally regarded as a kind, good-hearted, amiable person[35]—in Douglas's words, "a quiet, dignified man with the presence of a parish priest."[36] In obvious contrast to Learned Hand, he also was young—only forty-eight.

Rutledge's views were very much in sync with FDR's. During the 1930s, Rutledge had publicly criticized the Supreme Court's invalidation of New Deal legislation. While he was at the University of Iowa Law School, he attracted notice from the president and his circle as one of the few prominent legal voices endorsing FDR's Court-packing plan. Influential editorial writer Irving Brant of the *St. Louis Star-Times* recommended Rutledge to the president and his advisers for the vacancies that went to Frankfurter and Douglas.[37] FDR considered him for both and, in 1939, named Rutledge to the Court of Appeals in Washington, D.C. As a judge, Rutledge strongly supported judicial deference to government programs and regulation.

Rutledge was the lone FDR appointee with previous experience as a federal judge. The only other Supreme Court appointees who had served as judges, Hugo Black and Frank Murphy, had been, respectively, a police court judge and municipal court judge, both for relatively short periods before they launched their political careers—Black as a Senator from Alabama, and Murphy as the Mayor of Detroit and Governor of Michigan. Rutledge also was the only one of FDR's eight associate justice appointees with whom the president had no prior personal relationship, a fact that may have been appealing in light

In January 1943, FDR nominated Wiley Rutledge to fill a vacancy on the Court. This photo, from October 1944, shows the justices as they made their annual call on the president (Rutledge is furthest to the right). Joining them was Solicitor General Charles Fahy, who was also considered for the vacancy (Fahy is furthest to the left). Fahy argued *Schneiderman* for the United States.

of the criticism he had begun to receive for placing allies and cronies on the Court (and continuing to use them for various tasks).

Attorney General Biddle was active in the search for the new justice. Biddle consulted Stone, Black, and Douglas about possible nominees. All were enthusiastic about Rutledge, a consensus Biddle reported to FDR. Stone also privately advised Biddle against another public front-runner, Solicitor General Fahy. According to Biddle's memoir, Stone counseled against selecting Fahy because the Court should not have a second Catholic (in addition to Murphy). In a statement shocking to today's ears (particularly from a chief justice who often was sensitive to claims of religious discrimination in his time on the bench), Stone warned Biddle that, if Fahy were appointed, "the Church might feel it was always regularly entitled to two." Stone emphasized that he hoped for a justice who would "stick"—a justice who would stay on the Court and be devoted to its work.[38]

Roosevelt nominated Rutledge on January 11, 1943. Confirmed by voice vote on February 8, he took his seat on February 15. On his inaugural day at the Court, Rutledge wrote the president a letter of appreciation, telling FDR that he was "very much in [Rutledge's] thoughts" and that Rutledge hoped his service might "help to establish more firmly the democratic institutions which you fight to keep, and to create throughout the world."[39]

Schneiderman Reargument

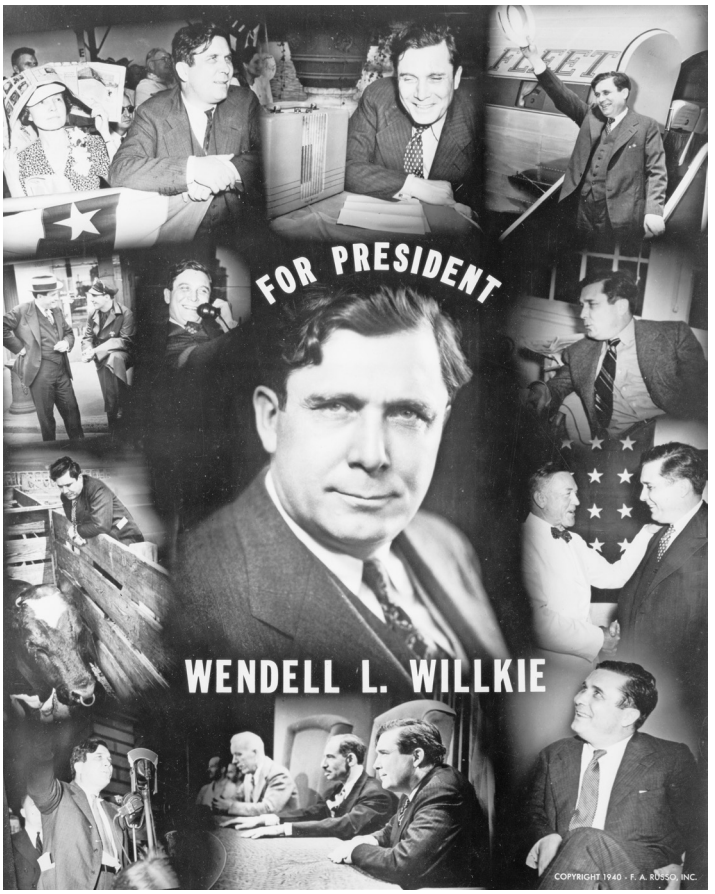
With a new justice in place and Jackson still recused, the Supreme Court held reargument in the *Schneiderman* case on Friday, March 12, 1943. Just weeks previously, the Soviet Union had won the brutal Battle of Stalingrad.

Once again, Willkie put on a show. Gesticulating energetically, he dropped his eyeglasses on the floor in excitement and left it to an associate to pick them up. Willkie emphasized his own experience reading the Communist Manifesto before he turned twenty-one, calling it "one of the great historical documents of all time."[40] At the time, newspapers still ranked Willkie as a top candidate for the Republican presidential nomination in 1944 with Governors Tom Dewey of New York and Harold Stassen of Minnesota, but that did not dim his ardor in the Court on behalf of his client.[41] "Willkie in Fiery Plea—Vehement Argument Presented for Communist Party Man," declared the headline in the *Kansas City Times*.[42]

Once again, Solicitor General Fahy forcefully responded. "This man was a Communist," Fahy declared. "His beliefs were contrary to the principles of the United States Constitution."[43]

Newly ensconced at the end of the bench, Rutledge was active in the argument and appeared skeptical of the government's position. Rutledge emphasized that stripping a person's citizenship was the "most tremendous penalty that could be imposed short of capital punishment." Picking up on Willkie's point, he stressed that, in the Declaration of Independence, Jefferson had advocated the necessity for revolution under certain circumstances.[44]

The case had become a sore point for the justices. When Black elicited a concession from Fahy that Schneiderman had engaged only in "general political talk," Frankfurter asked, "Is it suggested that the Communist Party has no principles?" He sought to frame Communist Party membership as adherence to an anti-American creed rather than membership in a debating society. According to Frankfurter's diary entry, Black turned to him "with blazing eyes and ferocity in his voice" and seethed, "The Hearst press will love that question" (referring to the conservative newspaper chain owned by William Randolph Hearst). Frankfurter shot back, "I don't



As this 1940 presidential campaign poster indicates, Wendell Willkie, who argued William Schneiderman's case at the Court in 1942 and 1943, wore many different professional hats, including as the Republican candidate for president against FDR in 1940. Newspapers still ranked him as a top candidate for the Republican presidential nomination in 1944.

give a damn whether the Hearst press or any other press likes or dislikes any question that seems to me relevant to the argument. I am a judge and not a politician." Black replied, "Of course, you, unlike the rest of us, live in the stratosphere." [45] Frankfurter noted in his diary that Jackson remarked to him later that day, "It is an awful thing at this time of the Court's and country's history, with the very difficult and important questions coming before this Court, to have one man, Black, practically control three others, for I am afraid Rutledge will join the Axis"—their disparaging term, in the midst of the war against Axis powers, for Black and his allies on the Court.[46] Jackson and Frankfurter feared that Rutledge, the new justice, would be with Douglas and Murphy under the sway of what they perceived as Black's influence.

In Conference, Black was emphatic. He no longer wanted to delay a decision. "The doctrine of imputed guilt is offensive to me," he declared in expressing his support for Schneiderman and Willkie—and, although it was unspoken, for a position that would not alienate the Soviet Union.[47] Reed, Douglas, and Murphy agreed with Black that Schneiderman should prevail, as they had previously indicated, and Rutledge now joined them. Stone, Roberts, and Frankfurter, in contrast,

held firm on supporting the US government's stripping of citizenship from Schneiderman and would dissent. As the senior justice in the five–three majority, Black assigned the opinion to Murphy.

Murphy's Opinion

Murphy circulated his draft opinion on May 31. The core of his opinion was that taking away somebody's citizenship required "clear, unequivocal, and convincing" evidence; "rights once conferred should not be lightly revoked." The government's proof, Murphy concluded, fell short of that demanding standard.[48]

Frankfurter's reaction, as recorded in his diary, was scathing. "The *Schneiderman* opinion," he wrote:

> was circulated today after months of incubation. I know not in what incubators, except that it largely reflects cunning and disregard of legal principles to which Hugo Black gave expression from time to time in connection with this case. It is one of those extraordinarily shortsighted opinions which, to accomplish an immediate end, is quite oblivious of its implications for the future.[49]

That same day, Frankfurter wrote Stone about Murphy's opinion. It was "plain as a pikestaff" that "the present war considerations—political considerations—are the driving force behind the result of this case." He thought it clear that, if the case involved a Bundist (a German organization favoring the Nazis) instead of a Communist, Murphy would have come to "the opposite result." Frankfurter also noted in his diary that Roberts, the third dissenter, "was deeply disheartened" by Murphy's draft and believed it "one more of these efforts to bring the Court into disrepute."[50]

Never one to give up on all possible angles, Frankfurter tried various approaches to Murphy. "Thorough and comprehensive as your opinion is," Frankfurter needled his colleague, "you omitted one thing that, on reflection, you might have to add. I think it is only fair to state, in view of your general argument, that Uncle Joe Stalin was at least a spiritual co-author with Jefferson of the Virginia Statute for Religious Freedom."[51] Shortly afterward, Frankfurter tried another clunky attempt at humor. He advised Murphy that the summary at the beginning of the opinion—known as the headnote—should read, "The American Constitution ain't got no principles. The Communist Party don't stand for nuthin'. The Soopreme Court don't mean nuthin'. Nuthin' means nuthin', and this country don't mean to us what Russia means to the Bolshies." Taking the high road and trying to reply in a light vein, Murphy responded that Frankfurter's draft headnote revealed "long and arduous preparation" as well as "commendable English understatement and New England reserve."[52]

In Frankfurter's view, Murphy was uneasy because he knew the law commanded one result while his personal instincts drove him in another direction. He visited Murphy and told him, "I just know you cannot be happy about the result in the Schneiderman situation. I know it cannot really satisfy your conscience." According to Frankfurter, Murphy replied, "I think the Chief has the better of the law in this case but the faith of my whole life is wrapped up in support of Liberty." Frustrated, Frankfurter chided Murphy that the case was being decided on political grounds:

> While it may not be true of us, you know very well, Frank, that it is true of some of the members of the Court that the dominating consideration in this case is thought of Russia and Russia's share in this war. And because of that legal principles are going to be twisted all out of shape. And when we get the case of

> the Bundists next year there will be some fine somersaulting.[53]

Murphy, though troubled, would not move on his bottom line. Frankfurter likely failed to appreciate the entirety of Murphy's perspective. In a letter to his brother around this time, Murphy alluded to their Irish "forbears" who had immigrated to the United States. Murphy would not now force "the trek of exile back to the old world" without "clear and convincing" proof of wrongdoing.[54]

Frankfurter also sought to pry Reed away from the majority. He told Reed that he understood Reed had voted for Schneiderman because the Soviets were in such dire circumstances at the time and "you, in your patriotic way, deemed yourself . . . a sort of liaison officer between hard-pressed Russia and this country." But, Frankfurter noted hopefully, Russian military fortunes had changed (with the victory over the Nazis at Stalingrad), and so Reed now should reverse himself as well, viewing the case as if it involved a Bundist. Reed, too, rejected Frankfurter's entreaties.[55]

Separate *Schneiderman* Opinions

Stone's dissent, written for himself, Roberts, and Frankfurter, highlighted the U.S. alliance with the Soviet Union—and said it was not at issue. "The case obviously has nothing to do with our relations with Russia, where petitioner was born," Stone proclaimed, "or with our past or present views of the Russian political or social system."[56] Murphy quickly added a similar statement at the beginning of his opinion. "We agree with our brethren of the minority," he declared, "that our relations with Russia, as well as our views regarding its government and the merits of Communism, are immaterial to a decision of this case."[57] Stone's dissent also decried the majority's reasoning. The factual findings about Schneiderman's Communist Party activities, he argued, amply demonstrated that he lacked the required "attachment" to the U.S. Constitution at the time of his naturalization in 1927.[58]

Conflicts among the justices continued to emerge, not only between the opposing sides, but also within them. After leaving for a summer in Oregon, Douglas circulated a concurrence for publication—a concurrence that was final and would not be changed—emphasizing that Congress could prohibit membership in the Communist Party as a condition of citizenship but had not done so.[59] Douglas's surprise separate opinion offended Murphy, who had been in discussions with Douglas and believed he could have accommodated Douglas in the majority opinion if Douglas had given him the chance. According to Frankfurter, Murphy was "greatly wounded by the Bill Douglas concurring opinion in the *Schneiderman* case and the circumstances attending it" and was "shocked" by Douglas's "skullduggery." Frankfurter wrote that he and Murphy suspected a political motivation: Douglas wanted his separate concurring opinion to protect his anti-Communist reputation while still allowing Schneiderman to retain his citizenship.[60]

Rutledge also wrote a concurrence, emphasizing the potential impact on millions of naturalized citizens.[61] Unlike Douglas's, Rutledge's concurrence was welcomed by Murphy as friendly and supportive. Only a few months on the Court, Rutledge wrote Murphy about his draft, "This is a magnificent opinion….You will be proud of this opinion all your life."[62]

Jackson explained in the Supreme Court opinion that he had recused himself because he had been attorney general while the case was pending. He noted that the Schneiderman case "was instituted in June of 1939 and tried in December of that year," and that he became attorney general in January 1940—a clear shot at the author of the opinion, Frank Murphy, who was attorney general when the case was "instituted" and "tried" and yet declined to recuse himself.[63]

The *Schneiderman* Ruling

The Court announced *Schneiderman* on Monday, June 21, the last day of the term and an exceptionally hot day in Washington. Many newspapers observed that the geopolitical issues played a central, if unspoken, role in the decision. The *Washington Post* editorialized, "Mr. Dooley's famous dictum that the Supreme Court follows the election returns may be given even wider application. Apparently the Court also follows the course of foreign affairs." The *Philadelphia Record* stated in its own editorial that "it is odd—and amusing—that both the majority and minority decisions hasten to say that the decision has 'nothing to do with our relations with Russia.' We all know, of course, that it has." The *Chicago Tribune* reported that "there was more than a suggestion in the opinions that the majority of the court may have been influenced by reference to our ally, soviet Russia, of which Schneiderman is a native, in giving the Communist a clean bill of health." And the *New York Times* observed that "the Schneiderman case attracted great attention in view of the issues involved and American relations with the Soviet."[64]

Willkie took the opportunity to castigate the Roosevelt Administration, even though he generally had friendly relations with his 1940 electoral opponent and undertook foreign missions in coordination with him. "I have always felt confident as to how the Supreme Court would decide a case involving fundamental American rights," Willkie told reporters. "My bafflement has been as to why the Administration has started and prosecuted a case in which, if they had prevailed, a thoroughly illiberal precedent would have been established."[65]

The standard announced by *Schneiderman*—the need for "clear, unequivocal, and convincing" evidence in denaturalization proceedings—would prove to be durable. And, contrary to Frankfurter's prediction that the Court would rule differently if it considered a case involving a Bundist, the following year the Court rejected the government's attempted denaturalization of a German American Bundist—in a unanimous opinion by Felix Frankfurter.[66]

Forged in the midst of World War II, decided in the cross-currents of our alliance with the Soviet Union, argued by a recent (and possible future) Republican nominee opposing FDR, *Schneiderman v. United States* ensured that the cataclysmic step of stripping somebody of American citizenship required the government to meet a heavy and demanding burden. At a time when darkness shrouded the globe, in the most unlikely of circumstances, *Schneiderman* self-consciously provided, in Murphy's words, a beacon to "the spirit of freedom and tolerance in which our nation was founded" and the "desire to secure the blessings of liberty in the thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native born."[67]

ENDNOTES

Author's note: The author thanks Abby West and Austin Beaudoin, former students at Georgetown University Law Center, for their valuable research assistance.

[1] 320 U.S. 118 (1943).

[2] 274 U.S. 357 (1927), overruled by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[3] 274 U.S. at 372 (Brandeis, J., joined by Holmes, J., concurring).

[4] AP, "Supreme Court Room Crowded as Willkie Defends Communist," *Cincinnati Enquirer*, November 10, 1942.

[5] AP, "Supreme Court Room Crowded."

[6] Turner Catledge, "Ickes Belittles Willkie Address as 'Demagoguery,'" *New York Times*, August 20, 1940.

[7] Wendell L. Willkie, "Fair Trial," *New Republic*, March 18, 1940, 370–2; David Levering Lewis, **The Improbable Wendell Willkie: The Businessman Who Saved the Republican Party and His Country, and Conceived a New World Order** (2018), 272.

[8] *United States v. Schneiderman*, 33 F. Supp. 510 (N.D. Cal. 1940); *United States v. Schneiderman*, 119 F.2d 500 (9th Cir. 1941).

[9] William Schneiderman, **Dissent on Trial: The Story of a Political Life** (1983), 79–83. Days before Willkie and Schneiderman met on December 8, the *New York Times* reported that Willkie would take on the representation. James C. Hagerty, "Willkie to Plead Case for U.S. Red," *New York Times*, November 29, 1941.

[10] Carol King, "The Willkie I Knew," *New Masses*, October 24, 1944, 10.

[11] *Schneiderman v. United States*, Brief for Petitioner, 5, 26.

[12] Cliff Sloan, **The Court at War: FDR, His Justices, and the World They Made** (2023), 15–6. The "switch in time that saved nine" was a popular quip referring to the perception that Justice Owen J. Roberts had changed his votes to allow New Deal programs to be upheld in the midst of FDR's court-packing initiative. Sloan, **The Court at War**, 45–6; John Q. Barrett, "Attribution Time: Cal Tinney's 1937 Quip, 'A Switch in Time'll Save Nine,'" *Oklahoma Law Review* 73 (2021), 229.

[13] Jeffrey F. Liss, "The *Schneiderman* Case: An Inside View of the Roosevelt Court," *Michigan Law Review* 74 (1976), 500, 507; J. Woodford Howard, **Mr. Justice Murphy: A Political Biography** (1968), 310; Sidney Fine, **Frank Murphy: The Washington Years** (1984), 409; John D. Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (1994), 357.

[14] Lewis Wood, "Red's Citizenship Declared Valid by Supreme Court in 5-to-3 Ruling," *New York Times*, June 22, 1943.

[15] Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (1956), 686; Fine, **Frank Murphy**, 409.

[16] Fine, **Frank Murphy**, 409; Liss, "The *Schneiderman* Case," 507.

[17] King, "The Willkie I Knew," 10. Schneiderman later stated that Willkie "was stretching a point." Schneiderman believed he actually had been born "at least a thousand miles or more" from Stalingrad. Schneiderman, **Dissent on Trial**, 96.

[18] "Willkie Is Toasted by Stalin as Guest at Kremlin Dinner," *New York Times*, September 28, 1942; Lewis, **Improbable Wendell Willkie**, 223–65. FDR had given Willkie a private letter to Stalin with instructions that Willkie hand it to Stalin personally—but Willkie forgot to deliver the letter. Lewis, **Improbable Wendell Willkie**, 230, 248.

[19] AP, "Penalizing of Farmer Upheld," *Cincinnati Enquirer*, November 10, 1942.

[20] Dewey L. Fleming, "Willkie Defends Communist's Case," *Baltimore Sun*, November 10, 1942; Frederick R. Barkley, "Communist's Case Argued by Willkie," *New York Times*, Novmber 10, 1942; AP, "Supreme Court Room Crowded as Willkie Defends Communist," *Cincinnati Enquirer*, November 10, 1942; "Willkie, Defending Communist, Says Social Ideas Complicated," *Miami Herald*, November 10, 1942; "California Communist Defended by Willkie," *Los Angeles Times*, November 10, 1942; AP, "Willkie Asks for Citizenship for Communist," *St. Albans Daily Messenger* (St. Albans, VT), November 10, 1942. Fahy later said that the Schneiderman matter was one of the few Supreme Court cases he had discussed with FDR directly and that the president had left him free to pursue the case as he saw fit. Liss, "The Schneiderman Case," 506–7. Schneiderman, in turn, claimed that he learned "many years later of the behind-the-scenes role of President Roosevelt in the prosecution of the case," but he did not explain his statement or provide support for it. Schneiderman, **Dissent on Trial**, 83.

[21] Joseph P. Lash, ed., **From the Diaries of Felix Frankfurter** (1975), 210–7; Fine, **Frank Murphy**, 410–1.

[22] Sloan, **The Court at War**, 131.

[23] Sloan, **The Court at War**, 132. Frankfurter expressed similar views on the importance of patriotic bonds in his opinion upholding a mandatory flag salute, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and in his dissent from the decision overturning that opinion, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

[24] Sloan, **The Court at War**, 132.

[25] John Paul Stevens, **The Making of a Justice: Reflections on My First 94 Years** (2019), 135.

[26] "Roosevelt to Name 8th Court Choice," *Washington Post*, October 4, 1942, 3; "Biddle Is Reported Cool to Court Post," *New York Times*, October 8, 1942, 16.

[27] Brad Snyder, **Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment** (2022), 406–9.

[28] Letter from Frankfurter to FDR (December 3, 1942), in Max Freedman, ed., **Roosevelt and Frankfurter: Their Correspondence, 1928–1945** (1967), 673.

[29] "Party Divisions of the House of Representatives, 1789 to Present," History, Art & Archives, United States House of Representatives, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last accessed February 23, 2024); "Party Division," United States Senate, https://www.senate.gov/history/partydiv.htm (last accessed February 23, 2024).

[30] Robert C. Albright, "Hill Leaders See Mandate for Tighter War Effort," *Washington Post*, November 6, 1942; Henry N. Dorris, "Wallace Blames Light Vote Cast," *New York Times*, November 6, 1942.

[31] William O. Douglas, **Go East, Young Man: The Early Years** (1974), 332 (ellipses omitted). Douglas's

recollection, decades after the poker game, contains at least one obvious error. He refers to the work of Missy LeHand on the Byrnes Supreme Court vacancy (in early 1943), but LeHand had suffered a debilitating stroke in June 1941 and was no longer working in the White House at that time—or working any place—during a prolonged and ultimately unsuccessful convalescence. Grace Tully, who had worked under LeHand, had assumed LeHand's responsibilities as FDR's personal secretary by the time of the Byrnes vacancy. Perhaps Douglas was thinking of Tully rather than LeHand.

[32] Letter from FDR to Frankfurter, December 4, 1942, in Freedman, **Roosevelt and Frankfurter**, 674.

[33] Louis Pollak, "Wiley B. Rutledge," in Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1993** (1993), 411–5.

[34] Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court, 2nd ed.** (1985), 235.

[35] Supreme Court historian Henry J. Abraham noted that Rutledge "genuinely loved people of all walks of life." Abraham, **Justices and Presidents**, 235. Rutledge once wrote to Harvard constitutional law professor Thomas Reed Powell, "I like people, have some sort of way of letting them know it, and in turn, they like me regardless of all the other deficiencies." John M. Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge** (2004), 219.

[36] William O. Douglas, **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (1980), 25.

[37] Ferren, **Salt of the Earth**, 218–9; Snyder, **Democratic Justice**, 303–7, 408.

[38] Francis Biddle, **In Brief Authority** (1962), 192–3.

[39] Ferren, **Salt of the Earth**, 221.

[40] AP, "Willkie Speaks for Communist," *Wilkes-Barre Record* (Wilkes-Barre, PA), March 13, 1943; "Willkie Presses Argument for Red," *New York Times*, March 13, 1943. Decades later, Fahy told an interviewer that "Willkie's performance was far more 'lawyer-like' on reargument and, therefore, far more effective." Liss, "The *Schneiderman* Case," 503 n.18. Willkie biographer David Levering Lewis similarly noted that Willkie's reargument "was said to have been less flamboyant and technically tighter" than his first argument. Lewis, **Improbable Wendell Willkie**, 274.

[41] "Governor Stassen to Discuss Post-war Planning and Fourth Term Talk Tonight," *Tampa Times*, March 13, 1943. For Republican criticism of Willkie's Schneiderman representation, see Ellsworth Barnard, **Wendell Willkie: Fighter for Freedom** (1966), 400–5; and Lewis, **Improbable Wendell Willkie**, 271.

[42] "Willkie in Fiery Plea," *Kansas City Times*, March 13, 1943.

[43] "Willkie in Fiery Plea."

[44] AP, "Willkie Speaks for Communist."

[45] Lash, **Diaries**, 209. The back-and-forth between Black and Frankfurter described by Frankfurter in his diary apparently was whispered and private; no contemporary news account reported the comments.

[46] Lash, **Diaries**, 209.

[47] Fine, **Frank Murphy**, 411.

[48] 320 U.S. at 125 (1943). Murphy invoked Brandeis's free speech concurrence in *Whitney*. See 320 U.S. at 158.

[49] Lash, **Diaries**, 248–9.

[50] Fine, **Frank Murphy**, 415–6.

[51] Fine, **Frank Murphy**, 416.

[52] Lash, **Diaries**, 249, 257–9.

[53] Lash, **Diaries**, 249, 257–9.

[54] Fine, **Frank Murphy**, 417.

[55] Fine, **Frank Murphy**, 417; Liss, "The *Schneiderman* Case," 516.

[56] 320 U.S. at 171–2 (Stone, C.J., dissenting).

[57] 320 U.S. at 119.

[58] 320 U.S. at 183-87 (Stone, C.J., dissenting).

[59] 320 U.S. at 161–5 (Douglas, J., concurring).

[60] Lash, **Diaries**, 257–8; Liss, "The *Schneiderman* Case," 512.

[61] 320 U.S. at 165–70 (Rutledge, J., concurring).

[62] Howard, **Mr. Justice Murphy**, 322.

[63] 320 U.S. at 207. In a pointed note to Murphy, Jackson stated, "As you know, I disqualified myself. The inference from that is this case was my responsibility. That is true to a very limited extent only, as you know." Liss, "The *Schneiderman* Case," 521.

[64] "Beliefs Are Personal," *Washington Post*, June 24, 1943; *Philadelphia Record*, June 23, 1943, cited in Liss, "The *Schneiderman* Case," 508; Arthur Sears Henning, "Court Upholds Naturalization of Communist," *Chicago Tribune*, June 22, 1943; Wood, "Red's Citizenship Declared Valid."

[65] "Willkie Baffled by Motive," *New York Times*, June 22, 1943. Willkie entered the primaries for the Republican nomination for President in 1944 but withdrew in April 1944 after disappointing showings. He died on October 8, 1944, at the age of fifty-two.

[66] *Baumgartner v. United States*, 322 U.S. 665 (1944). When prosecutions of Communists intensified in the late 1940s and 1950s, the federal government frequently targeted William Schneiderman and his ideological allies. Remarkably, Schneiderman was a party (with others) in two additional Supreme Court cases and was on the winning side in both. See *Stack v. Boyle*, 342 U.S. 1 (1951); *Yates v. United States*, 354 U.S. 298 (1957).

[67] 320 U.S. at 120.

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Cover: Daniel Webster arguing the Dartmouth College case before the Supreme Court in 1818. Robert Burns, painter, 1900.

Errata

In Timothy S. Huebner's Introduction in 49.2, the following error needs correction:

Page 104: first column, second line, "Candace Gray Jackson" should be "Candace Jackson Gray"