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## Reassessing Long-Accepted Truths About Justice John McLean: His Secret of Success

Was he a treacherous double-dealer or man of integrity;  
Was he a politician on the court or a statesman;  
Was he father of the 14th Amendment?

PAUL BRICKNER\*

### INFORMAL INTRODUCTION

Assessing the life, work, and reputation of important jurists long after their eras have ended has a number of drawbacks and hurdles. The primary deficiency is an inability to consult with anyone who knew the jurist. The working tools of historians, lawyers, and even collectors can be useful and important, but they are not usually a satisfactory substitute for face-to-face inquiry. Judge Richard A. Posner, with his usual insight and genius, has provided us with a new genre of analysis to apply when evaluating the reputation of a judge or justice.<sup>1</sup> However, his approach is less satisfactory when evaluating the reputation of a jurist from the early-to middle-19th century whose reputation has been molded, in large part, decades ago. For example, if we tabulate the number of times decisions of the jurist in older cases have been cited, the results will be skewed by the high frequency of citations to some of the landmark decisions by the great Chief Justice John Marshall, which Chief Justice Burger referred to as “building block cases.”<sup>2</sup> A decision important in its day might remain important for a generation before it melds with “the growth of the law,” to borrow a phrase from Benjamin Nathan Cardozo when he was Chief Judge of New York.<sup>3</sup> The

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1. *See generally* RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

2. Warren E. Burger, *We the People*, 37 *CASE W. RES. L. REV.* 385, 391 (1987).

3. *See generally* BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (Yale Univ. Press 1924).

numbers might not reflect accurately the influence of those decisions that have become the established law.

On first reading the impressive biography by Professor Francis Phelps Weisenburger one feels that there is little to add to Dr. Weisenburger's extraordinary body of scholarship.<sup>4</sup> However, research and an element of luck proved me wrong. I located a brief memorial piece by McLean on John Marshall, one I had not seen referenced elsewhere.<sup>5</sup> I located a letter by Thomas Jefferson to McLean at Oxford University's Bodleian Library, again, one seemingly not seen referenced.<sup>6</sup> I purchased several letters by McLean, including one—probably a draft of the final page—to a newspaper editor that sought to refute negative aspersions to his character.<sup>7</sup> Autograph collectors had probably preserved this item of ephemera. In addition, the passage of several generations provided new perspectives.

I found, over the years, a number of items not referenced by Dr. Weisenburger that seemed important: A commencement address by McLean intended for delivery at Augusta College, Kentucky;<sup>8</sup> A eulogy by Rev. William B. Sprague, America's first autograph collector who knew McLean for more than thirty years;<sup>9</sup> a speech given by McLean to a mercantile library association in Cincinnati;<sup>10</sup> McLean's brief eulogy for John Marshall, with whom he served for six years;<sup>11</sup> and an editorial about the Postmaster General published by a New York City newspaper in response to the above-noted final page of McLean's letter.<sup>12</sup> The editorial is of exemplary quality, one superior to much of today's editorial writing.

The partial letter was a remarkable find. For the first time we could hear Postmaster General McLean's response to accusations that he had been disloyal to the President and to the administration in which he served by promoting the presidential aspirations of Andrew Jackson. It was as if we

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4. See generally FRANCIS P. WEISENBURGER, *THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT* (1937).

5. See 1 N.C. MCLEAN, *REPORTS OF CASES ARGUED AND DECIDED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SEVENTH CIRCUIT*, Appendix 556-57 (Morgan & Co. 1840).

6. Letter from Thomas Jefferson, Monticello, to John McLean (Dec. 30, 1825) (on file with Jeffersonian, Missouri Historical Society Archives, St. Louis).

7. Letter from John McLean to the Editor of *The Nat'l Advocate* (1828) (on file with author).

8. JOHN M'LEAN, *AN ADDRESS PREPARED AT THE REQUEST OF THE UNION AND JEFFERSON SOCIETIES, OF AUGUSTA COLLEGE 2* (1831) [hereinafter M'LEAN, *AN ADDRESS*].

9. WILLIAM B. SPRAGUE, *A DISCOURSE DELIVERED SUNDAY MORNING, APRIL 7, 1861, IN THE SECOND PRESBYTERIAN CHURCH, ALBANY, IN COMMEMORATION OF THE LATE HON. JOHN MCLEAN, LL.D., ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 22* (Albany, C. Van Benthuyssen 1861).

10. JOHN MCLEAN, *A LECTURE ON GOVERNMENT: DELIVERED BEFORE THE YOUNG MEN'S MERCANTILE LIBRARY ASSOCIATION, OF CINCINNATI, NOVEMBER 22, 1853* (C.F. Bradley & Co. 1854).

11. 1 N.C. MCLEAN, *supra* note 5, at 556-57.

12. Editorial, *Post Master General*, *THE NAT'L ADVOCATE*, May 26, 1828, at 2.

were able to place a microphone to McLean's lips in 1828, play television newscaster and interview him. The letter and editorial are truly remarkable primary sources. The interplay of these various items provides important new insights into McLean's times and career. Add to this mix insight into the intrigue that public service sometimes engenders and something of the intrigue of the election process, and one has a fresh perspective on McLean, the so-called "politician on the Court."<sup>13</sup>

The years allow us now to make significant additions to the McLean story, probably the most important insights into John McLean's life and service since Dr. Weisenburger published his McLean book in 1937.<sup>14</sup> Long-established "truths" about McLean were false and needed to be corrected. His reputation had been tarnished for decades by repetition of diary entries about him by President John Quincy Adams, in whose administration he served as Postmaster General.<sup>15</sup> Adams was wrong. Historians have been wrong to take the Adams quotes and repeat them without question. However, taking the Adams' diary entries at face value is easy to do because of our sixth President's well-earned reputation as a distinguished public servant and a preeminent scholar.<sup>16</sup> Even now, few have served in the White House with the intellectual credentials of John Quincy Adams.

In addition, beyond repeating the acerbic diary entries of Adams, some historians have projected 20th and 21st century political thinking onto an 1828-1829 scenario, and have described the appointment of McLean to the Supreme Court as a political payoff for McLean's alleged disloyalty to Adams and his promotion of the election of Adams' opponent Andrew Jackson in 1828.<sup>17</sup> That accusation can be refuted directly by the Adams diary, which was also the origin of the disloyalty accusation,<sup>18</sup> and by contemporary sources, including the voice of the legendary Justice Joseph Story.<sup>19</sup> Indeed, Charles Francis Adams, editor of his grandfather's dairies, reminded us in his preface to the dairies "of the objections commonly made to publications of this kind, in their relation to opinions or action ascribed to

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13. See WEISENBURGER, *supra* note 4.

14. See generally *id.*

15. 8 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848 51 (Charles Francis Adams ed., 1828).

16. Howard Jones, *John Quincy Adams: Eloquent Advocate, in AMERICA'S LAWYER-PRESIDENTS* 41 (Norman Gross ed., 2009).

17. See, e.g., SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE UNION 406 (1956).

18. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 51.

19. 1 LIFE AND LETTERS OF JOSEPH STORY: ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 564 (William W. Story ed., 1851).

other persons no longer in life to protect their own reputations, or who have left scanty means of rectification behind them.”<sup>20</sup>

John McLean was considered the best Postmaster General in the history of our young nation. The people who whispered to Adams that McLean should be replaced because he supported Adams’ looming presidential election opponent—General Andrew Jackson—no doubt spread the same reports to the media. Those people wanted McLean out of office not because his performance was substandard or deficient, but because they wanted patronage, the spoils of the largest government agency of the day, a department larger than all others combined (including the Army and the Navy).<sup>21</sup> Jackson too wanted the “spoils of victory:” Post Office public contracts and public offices. Jackson removed McLean from the Post Office (by elevating him to the Supreme Court) in order to appoint a more accommodating Postmaster General, one who would clean house and make room for the Jacksonians.<sup>22</sup> Rev. Sprague recollected that McLean had complained to him that the “politicians gave him no rest.”<sup>23</sup> One cannot help wonder whether a letter in the hand of Thomas Jefferson, the sage of Monticello, asking for the establishment of a postal facility at the campus of the University of Virginia was the product of a heartfelt need or simply another request from one of the many politicians who gave McLean “no rest.” From McLean’s perspective, Jefferson most likely can be counted as one of the politicians who “gave him no rest.”

The theory that McLean’s dissent in *Dred Scott v. Sandford*<sup>24</sup> provided the framework or foundation for the 14th Amendment to the United States Constitution is supported by three brief references in the literature.<sup>25</sup> If this theory is true, McLean’s importance as a justice and a historical figure is greatly underestimated. His dissent in *Dred Scott* is by itself enough to lift McLean from the ranks of an average Justice (his present standing), as noted by Professor Joan E. Cashin of Ohio State University.<sup>26</sup> By developing a more complete statement on the 14th Amendment issue and offering it as a starting place for new McLean research, we can grasp hold of a firmer foundation for his important place in constitutional history.

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20. 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at viii.

21. See WEISENBURGER, *supra* note 4, at 45-46.

22. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 703 (1974).

23. SPRAGUE, *supra* note 9, at 22.

24. 60 U.S. 393 (1857).

25. See *id.* at 529 (McLean, J., dissenting).

26. Interview with Dr. Joan E. Cashin, Ph.D., Ohio State University, in Columbus, Ohio (July 29, 2004).

I. THE CHILD IS FATHER OF THE MAN: EARLY LIFE AND EARLY CAREER;  
FUNDAMENTAL PERSONALITY INSIGHTS

John McLean was scheduled to deliver the commencement address at Augusta College in Kentucky but was unexpectedly called away for an “indispensable journey to Washington City . . . .”<sup>27</sup> His intended address, printed for the second time in 1831, speaks in general terms about education, intelligence, and judgment, and of their importance to careers both in public service and in what today we call the private sector.<sup>28</sup> The long address contains several revealing autobiographical elements.<sup>29</sup>

By the time the address was published, McLean had become the twenty-first person seated on the Supreme Court of the United States.<sup>30</sup> At age forty-four, the time of his appointment, McLean had a varied and distinguished career as a farmhand who cleared the land for his family farm and then engaged in the arduous labor of frontier farming; as an apprentice in the office of the Clerk of Courts of Hamilton County, Ohio (1804); as a student of the law who “read law” in the office of Arthur St. Clair, the prominent Cincinnati attorney who was son of Arthur St. Clair, Governor of the Western Territory; as an examiner in the U.S. Land Office in Cincinnati (1811-1812); as a practicing attorney in Lebanon, Ohio (1807-1811); as a founder and publisher of the “Western Star” (1807-1810), a newspaper published to this day in Lebanon, Ohio; as a U.S. Congressman (1813-1816); as a judge on the Supreme Court of Ohio (1816-1822); as Lands Commissioner of the United States (1822-1823); and as Postmaster General of the United States (1823-1829).<sup>31</sup> Of course his Congressional duties often took him to Washington, and his Lands Commissioner and Postmaster General posts required that he be located in Washington.<sup>32</sup> In each of his endeavors, John McLean was held in high regard.<sup>33</sup>

A. *Well Regarded*

John McLean appears to have been well-regarded personally and as a man of achievement in all that he undertook. He was admired as a capable

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27. M’LEAN, AN ADDRESS, *supra* note 8, at 2.

28. *Id.*

29. *See generally* M’LEAN, AN ADDRESS, *supra* note 8.

30. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES OF THE SUPREME COURT OF THE UNITED STATES 104 (1978).

31. JOHN J. PATRICK, RICHARD M. PIOUS & DONALD A. RITCHIE, THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT 406 (2001); WEISENBURGER, *supra* note 4, at 4-5; 6.2 DICTIONARY OF AMERICAN BIOGRAPHY 127-28 (1933).

32. *See* PATRICK, PIOUS & RITCHIE, *supra* note 31, at 406.

33. *See* DICTIONARY OF AMERICAN BIOGRAPHY *supra* note 31, at 127-28.

practicing attorney (1807-1812) for “his industry and scrupulous care.”<sup>34</sup> As a practicing attorney, he represented a judge in impeachment proceedings.<sup>35</sup> Regarding that representation, he and co-counsel were said to have “defended the Judge in a very able manner: especially Mr. Cass and Mr. McLean displayed extraordinary eloquence and ability.”<sup>36</sup> That defense took place in 1812,<sup>37</sup> McLean’s last year as a full-time practicing attorney; he was elected to Congress later that same year.<sup>38</sup> He was reelected two years later.<sup>39</sup> Congressional duties permitted him to practice law only half of each year.<sup>40</sup>

Historian Henry Adams, son of Charles Francis Adams and Abigail Brooks Adams, grandson of President John Quincy Adams and great-grandson of President John Adams,<sup>41</sup> wrote approvingly of John McLean as a Congressman.<sup>42</sup> Adams noted:

The Fourteenth Congress was well disposed to support the attempt [to establish a national bank or issue a national currency]. Under the stress of war the people had selected as their representatives the ablest and most vigorous men of their generation . . . . A swarm of younger men, far above the average, reinforced both sides of the House . . . . John McLean sat again for Ohio.<sup>43</sup>

Henry Adams recognized McLean as one of the “far above average” young Congressmen but made no mention of the harsh comments about McLean that his grandfather, the second President Adams, recorded in his diary during the years that McLean served as Postmaster General in his grandfather’s administration and afterwards, when Justice McLean was himself a possible candidate for President of the United States.<sup>44</sup> Perhaps Henry Adams took heed of the cautionary statement, noted above from the

34. *See id.* at 127.

35. WEISENBURGER, *supra* note 4, at 8.

36. *Id.*

37. *Id.*

38. VERITAS, A SKETCH OF THE LIFE OF JOHN MCLEAN OF OHIO 7 (1846).

39. *Id.* at 10. *See also* WEISENBURGER, *supra* note 4, at 21 (McLean’s service as a Member of Congress led to his appointment by President James Monroe to the Supreme Court, because during his second term he had supported Monroe’s presidential aspirations in a Congressional caucus).

40. *See* PATRICK, PIOUS & RITCHIE, *supra* note 31, at 217 (“Since Congress met for only half the year, it was commonplace for members to continue their other business during the months of adjournment.”).

41. Richard L. Aynes, *John McLean*, in 15 AMERICAN NATIONAL BIOGRAPHY 142 (John A. Garraty & Mark C. Carnes eds., 1999).

42. *See* HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE SECOND ADMINISTRATION OF JAMES MADISON 1813-1817, at 1254-55 (1986).

43. ADAMS, *supra* note 42.

44. *Id.* *See also* 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15.

preface to the John Quincy Adams *Memoirs* by his father Charles Francis Adams.<sup>45</sup> Henry chose not to reference any of the acerbic entries by his grandfather about John McLean.<sup>46</sup>

### B. Postmaster General

President James Monroe appointed John McLean Postmaster General.<sup>47</sup> He was commissioned on June 26, 1823, during a Senate recess, “entered [his] duties July 1, 1823,” was nominated by the President on December 5, 1823, and “confirmed and recommissioned December 9, 1823.”<sup>48</sup> He served until taking his seat on the Supreme Court<sup>49</sup> after being appointed an Associate Justice by President Andrew Jackson in 1829; just days after Jackson took office.<sup>50</sup>

During his tenure, McLean began referring to the Post Office as the Post Office Department, although Congress did not designate it a department until 1872.<sup>51</sup> It was called an “Executive Department” in 1873.<sup>52</sup> Dr. Rich noted that incidental references to the Post Office as a department had appeared earlier than 1825.<sup>53</sup> Indeed, on October 22, 1827, President John Quincy Adams referred in his diary to the improved “condition of the Post Office Department. . . .”<sup>54</sup> The following month, an Adams diary entry relating to his Postmaster General reported: “This officer, who came into that place in 1823, has given great satisfaction in the administration of it.”<sup>55</sup> As early as 1828, McLean issued handsome certificates of appointment to new postmasters.<sup>56</sup> The certificates, many of which were probably framed and hung in post offices throughout the country, prominently displayed the McLean name.<sup>57</sup> President Jackson made the Postmaster General a cabinet position in 1829, reflecting the rapid growth of that office in the two decades following 1810 and the increasing

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45. See 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at viii.

46. See generally HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE FIRST ADMINISTRATION OF JAMES MADISON 1809-1813 (1986); ADAMS, *supra* note 42.

47. WEISENBURGER, *supra* note 4, at 35.

48. WESLEY EVERETT RICH, THE HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829 174 (1924).

49. See RICH, *supra* note 48.

50. Aynes, *supra* note 41, at 142; see VERITAS, *supra* note 38, at 13-14.

51. A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 467 (George Thomas Kurian et al., eds., 1998).

52. RICH, *supra* note 48, at 112.

53. See *id.* at 92, 98.

54. 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 343.

55. *Id.*

56. See RICH, *supra* note 48, at 174.

57. *Id.*



importance of the national Post Office.<sup>58</sup> McLean, however, had already left that position for his seat on the Supreme Court, before the Postmaster General joined the cabinet at President Jackson's invitation.<sup>59</sup>

Francis Weisenburger, McLean's biographer, records that in five years (from 1823 to 1828) under McLean, "the number of post offices had increased from 4,498 to 7,651."<sup>60</sup> He mentions that, "McLean estimated that in the country as a whole 26,956 persons were employed in the postal service in 1828. This was a greater number than in all other branches of the executive department, including the army and navy."<sup>61</sup> McLean, in those days, had the responsibility of presiding over the largest department in the executive branch.<sup>62</sup>

McLean may rank as the nation's finest Postmaster General even to this day for his attention to detail, the quality of his service, and the administrative skills he exercised during a time of rapid national growth and rapid growth of the Post Office.<sup>63</sup> Dr. Wesley E. Rich points out that in forty years, from 1790 to 1829, the number of post offices increased over 10,000%, from 75 to 8,050.<sup>64</sup> He notes that there was no five-year period before 1830 when the rate of increase in the number of post offices fell below 34%.<sup>65</sup> During that same period, the length of the post roads increased over 6,000%, from 1,875 miles to 114,780.<sup>66</sup> In addition, during that same forty years, the estimated number of letters increased about fifty times from 265,545 to 13,659,344.<sup>67</sup> McLean was known "as an able administrator."<sup>68</sup> Indeed, in a memorial piece Chief Justice Roger B. Taney paid tribute to his administrative skills.<sup>69</sup>

A report published in 1826, early in McLean's tenure, reviewed Post Office operations and noted there were 6,000 post offices and 6,000 postmasters who issued 24,000 quarterly reports.<sup>70</sup> There were 1,232 mail

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58. GOVERNMENT AGENCIES: THE GREENWOOD ENCYCLOPEDIA OF AMERICAN INSTITUTIONS 583 (Donald R. Whitnah ed., 1983).

59. McLean was appointed to the Supreme Court of the United States in 1829, and the Post Master General joined the cabinet in 1873. RICH, *supra* note 48, at 174.

60. WEISENBURGER, *supra* note 4, at 45-46.

61. *Id.* at 46.

62. *Id.* at 45-46.

63. BEMIS, *supra* note 17, at 139; *see* RICH, *supra* note 48, at 182-83.

64. RICH, *supra* note 48, at 182-83.

65. *Id.*

66. *Id.* "He had brought the postal service to the highest level of efficiency ever attained . . . ." BEMIS, *supra* note 17, at 139.

67. RICH, *supra* note 48, at 108.

68. Aynes, *supra* note 41, at 142; DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127.

69. "Death of Judge John McLean," 66 U.S. 8 (1861).

70. *The Post Office Department* (from the NATIONAL INTELLIGENCER, Baltimore, Md.), NILE'S WEEKLY REGISTER, June 3, 1826, at 243-44.

routes covering a distance of 95,930 miles.<sup>71</sup> Moreover, the Post Office Department had the responsibility of “investigating recommendations, appointing and commissioning 1,339 postmasters, obtaining their bonds with sureties, and their oaths of office.”<sup>72</sup> The article concluded that the business and labors of the Post Office would “continue to increase . . . from eight to twelve per centum annually.”<sup>73</sup>

Dr. Rich describes Postmaster General McLean as proposing a new plan for internal Post Office operations, “with *characteristic vigor*,” a complimentary description that expresses the enthusiasm that he brought to the job.<sup>74</sup> McLean, in a Congressional caucus, had thrown his support behind Monroe’s road to the Presidency.<sup>75</sup> President James Monroe named McLean Lands Commissioner and then the Postmaster General<sup>76</sup> while President John Quincy Adams, Monroe’s successor in office, retained McLean as Postmaster General.<sup>77</sup>

Some urged President John Quincy Adams to remove McLean from office for disloyalty, alleging he was supporting the quest of “the General” (Andrew Jackson) to win the Presidency by defeating President Adams in the 1828 fall election.<sup>78</sup> Indeed, Adams, in an 1828 entry in his diary, paid McLean a high but backhanded compliment when he wrote:

Colonel Thomas . . . mentioned to me some new indications of the political treachery of the Postmaster-General, McLean. Of this I can no longer entertain a doubt. He has been all along a supple tool of the Vice-President, Calhoun, but plays his game with so much cunning and duplicity that I can fix upon no positive act that would justify the removal of him.<sup>79</sup>

John Quincy Adams meant that McLean was skillful in concealing his disloyalty and “treachery,” but also implicit in his writing is the idea that McLean was performing his duties so well that there was no “positive act,”

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71. *Id.* at 243.

72. *Id.*

73. *Id.* at 244.

74. RICH, *supra* note 48, at 118 (emphasis added).

75. Thomas E. Carney, *The Political Judge: Justice John McLean’s Pursuit of the Presidency*, 111 OHIO HISTORY 121, 122-23 (2002).

76. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127; *Republican Candidates for the Presidency*, HARPER’S WEEKLY, May 12, 1860, at 298.

77. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127.

78. See 6 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 539; 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 51.

79. THE DIARY OF JOHN QUINCY ADAMS, 1794-1846: AMERICAN DIPLOMACY, AND POLITICAL, SOCIAL, AND INTELLECTUAL LIFE, FROM WASHINGTON TO POLK 382-83 (Allan Nevins ed., 1951); 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 51.

either a treacherous act or a job-related failure that the President could point to as a just cause for removal.<sup>80</sup> John Quincy Adams seemed to feel that McLean, although a Presidential appointee, did not serve solely at his pleasure. There had to be an act, omission, or cause to justify removal from office. Much later, when McLean was a possible presidential candidate in 1843, Adams wrote “McLean is but a second edition of John Tyler—vitality Democratic, double-dealing, and hypocritical.”<sup>81</sup>

One of John Quincy Adams’ biographers, Samuel Flagg Bemis, described McLean as “the efficient Postmaster General.”<sup>82</sup> McLean served in Congress during the administration of James Madison,<sup>83</sup> but it was President James Monroe who appointed him first Lands Commissioner and then appointed him Postmaster General.<sup>84</sup> Upon assuming the office of President, John Quincy Adams allowed McLean to remain in what was then a non-cabinet post.<sup>85</sup> The post was important since by law the Postmaster General, not the President, was the appointing authority for postmasters and deputy postmasters in cities and towns throughout the entire nation.<sup>86</sup> President John Quincy Adams spoke highly of McLean’s performance as Postmaster General, even as he expressed concerns about reports of McLean’s disloyalty to the Adams administration in which McLean played an important role.<sup>87</sup>

### C. Presidential Prospect

On March 14, 1833, John W. Taylor told John Quincy Adams that John McLean, then only a relative newcomer to the Supreme Court, “thinks of nothing but the Presidency by day and dreams of nothing else by night.”<sup>88</sup> Professor Thomas E. Carney, Associate Professor at the University of Baltimore, skillfully recounts that Judge Rufus P. Spalding of Cleveland, Ohio, withdrew McLean’s name from consideration during the 1856 Republican nominating convention, even though he had earlier expressed

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80. See 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 51.

81. 11 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 352.

82. BEMIS, *supra* note 17, at 59.

83. McLean served in Congress from 1812 to 1816 when he was elected to the Ohio Supreme Court. Aynes, *supra* note 41, at 142. James Madison was President of the United States from 1809-1817. *Our Presidents: James Madison*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/president/s/jamesmadison> (last visited Oct. 25, 2011).

84. Aynes, *supra* note 41, at 142.

85. *Id.*

86. RICH, *supra* note 48, at 127.

87. *Id.* at 132.

88. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 537.

strong support for the man and McLean was a viable, if not formidable, candidate.<sup>89</sup>

McLean's many admirers were untroubled by the fact that he was seemingly available as a presidential nominee at the same time he was sitting as an Associate Justice of the Supreme Court.<sup>90</sup> McLean's reputation was a strong one. For example, Benjamin Brown French, the Washington diarist and delegate to the Republican Party's 1856 nominating convention in Philadelphia,<sup>91</sup> had high regard for Justice John McLean even before he had met him.<sup>92</sup> On November 20, 1856, he recorded in his diary:

I had no hope of Fremont's election from the day he was nominated. I was for John McLean, and counseled as strongly as I could his nomination, but was overruled by the majority, and now they see the fruits of their *headstrong preference* for Fremont. Had McLean been nominated, he would this day have been President-elect of the United States!<sup>93</sup>

French continued by explaining that John M. Clayton (a U.S. Senator from Delaware), who was a Whig and who had been U.S. Secretary of State, Delaware Secretary of State, and Chief Justice of Delaware,<sup>94</sup> had urged him to use all of his influence to secure McLean's nomination.<sup>95</sup> Clayton too felt that McLean would be elected, while another Republican would not.<sup>96</sup> Indeed, Abraham Lincoln thought McLean would have been a better choice for Illinois Republicans than Fremont.<sup>97</sup>

In his diary entry for February 1, 1857, French indicates that he had never met Judge McLean until spending the evening with him: "I was never introduced to him before, but found him one of the most pleasant & agreeable men I have ever met. Oh if he had only been nominated at Phila. last summer as the Republican candidate for President, but he was not!"<sup>98</sup> Since McLean was over age seventy and had served on the High Court for

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89. Carney, *supra* note 75, at 140.

90. *See id.* at 127.

91. Michael Spangler, *Benjamin Brown French in the Lincoln Period*, THE WHITE HOUSE HISTORICAL ASSOCIATION, 5, 8, 13, 17, available at [http://www.whha.org/whha\\_publications/publications\\_documents/whha\\_whitehousehistory-index.pdf](http://www.whha.org/whha_publications/publications_documents/whha_whitehousehistory-index.pdf) (last visited Nov. 13, 2011).

92. BENJAMIN BROWN FRENCH, WITNESS TO THE YOUNG REPUBLIC: A YANKEE'S JOURNAL, 1828-1870 (Donald B. Cole & John J. McDonough eds., 1989).

93. FRENCH, *supra* note 92, at 72 (emphasis in original).

94. 6 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 179 (1967).

95. FRENCH, *supra* note 92, at 273.

96. *Id.*

97. DAVID HERBERT DONALD, LINCOLN 193 (1995).

98. FRENCH, *supra* note 92, at 276.

more than a quarter of a century,<sup>99</sup> he must have been remarkably charismatic to be so highly regarded as a Presidential candidate.

As a practicing lawyer, Lincoln had observed Justice John McLean on the bench.<sup>100</sup> He thought well enough of him to believe that McLean would be the Republicans' strongest presidential candidate in 1860, "if only he were fifteen, or even ten, years younger."<sup>101</sup>

Shortly before the Republican nominating convention convened in Chicago in 1860,<sup>102</sup> *Harper's Weekly* named McLean, despite his age, as one of eleven prominent candidates for the party's presidential nomination.<sup>103</sup> Sketches of the eleven, based on photographs by Matthew Brady, were portrayed on a two-page spread in the weekly.<sup>104</sup>

#### D. John McLean's Education

McLean earned his many accomplishments with only the limited education available to him on the frontier, as his family moved from New Jersey to Virginia, Kentucky, and Ohio.<sup>105</sup> "During these wanderings young McLean's education suffered. He attended school as opportunity offered and as the pressing needs of the family permitted."<sup>106</sup> In addition, on his own initiative, he sought out instructors and studied the classics for two years beginning at age sixteen.<sup>107</sup> His important public achievements were garnered without a college or law school education and without even a few formal law-related courses that have benefited others, including John Marshall.<sup>108</sup> Instead, he studied or read law in the Cincinnati office of Arthur St. Clair, Jr., a leading member of the Ohio bar and son of the famed Governor of the Western Territory.<sup>109</sup> At the time, that was the common means of entry into the legal profession.

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99. See Aynes, *supra* note 41, at 142 (stating that McLean was born on March 3, 1785 and that he "was appointed an associate justice of the U.S. Supreme Court . . . in 1829.").

100. DONALD, *supra* note 97, at 186.

101. *Id.* at 243.

102. *Republicans Wigwag at Chicago*, HARPER'S WEEKLY, May 12, 1860, at 289.

103. *Prominent Candidates for the Republican Presidential Nomination at Chicago*, HARPER'S WEEKLY, May 12, 1860, at 296-97.

104. *Id.* at 296-97. Along with McLean, the other candidates included Chase, Fremont, Lincoln, and Seward. *Id.*

105. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127-28.

106. *Id.*

107. Aynes, *supra* note 41, at 142.

108. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127-28; *John Marshall*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, [http://bioguide.congress.gov/scripts/bio\\_display.pl?index=M00157](http://bioguide.congress.gov/scripts/bio_display.pl?index=M00157) (last visited Nov. 14, 2011).

109. Aynes, *supra* note 43, at 142. Historian Finkelman incorrectly noted that McLean read law under Arthur St. Clair, famous military leader and Governor of the Western Territory, rather than under his son the Cincinnati lawyer. PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH*

In those days “[t]here was no law school . . . in the West.”<sup>110</sup> When the French writer, political philosopher, and historian Alexis de Tocqueville visited America, he interviewed in Cincinnati two members of the legal profession: the young legal educator and scholar, Timothy Walker, and Justice John McLean.<sup>111</sup> Tocqueville noted, “To be a lawyer . . . one must have spent two years in the study of a lawyer and pass an examination before a committee named by the judges . . . .”<sup>112</sup> This was the means by which John McLean had entered the legal profession.<sup>113</sup> It was the common means of entry into the profession for many years, until law schools became well established.<sup>114</sup>

He sharpened his advocacy skills by joining a debating society in Cincinnati.<sup>115</sup> For a while, as a member of Congress, McLean exchanged academic knowledge and learning with Senator Jeremiah Morrow of Ohio; McLean taught the Senator grammar and the Senator helped McLean with mathematics.<sup>116</sup>

Because he was an avid student and a lifelong learner, he seems to have been sensitive to his lack of a formal higher education. His commencement address for Augusta College noted:

In some of the learned schools, the opinion seems to prevail, that no man can be truly great, who has not passed through the established orders of study, with measured steps and technical exactness. On the other hand, many are found to err, in supposing that a regular and laborious course, is incompatible with genius. No unerring rule can be laid down, by which mind can be accurately measured; or its powers most fully developed.<sup>117</sup>

For a frontiersman, John McLean had acquired a great deal of learning, knowledge, and insight.<sup>118</sup> He had an inquisitive mind that expressed itself

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DOCUMENTS 100 (1997). *See also* 1 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 94, at 94-95 (noting Arthur St. Clair, Jr. was the son of the famed Governor of the Western Territory).

110. GEORGE WILSON PIERSON, *TOCQUEVILLE IN AMERICA* 357 (Johns Hopkins University Press, 1996) (1938).

111. PIERSON, *supra* note 110, at 17-19, 353.

112. *Id.* at 357; *see* WEISENBURGER, *supra* note 4, at 5-6.

113. Burnett Anderson, *John Mclean*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789-1993* 101-02 (Clare Cushman ed., 1993).

114. Hugh C. Macgill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790- 1920*, in *2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789-1920)* 36-38 (Michael Grossberg & Christopher Tomlins eds., 2008); *see* WEISENBURGER, *supra* note 4, at 6.

115. *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 31, at 127-28.

116. WEISENBURGER, *supra* note 4, at 9.

117. M’LEAN, *AN ADDRESS*, *supra* note 8, at 4.

118. *See* Aynes, *supra* note 41, at 142-43.

in wide-ranging reading and learning.<sup>119</sup> Those qualities or characteristics are evident in his prolific correspondence.<sup>120</sup> He was a skilled writer, despite limited formal education.<sup>121</sup>

McLean was proud of the honorary degrees conferred upon him by Harvard and Wesleyan, and described himself in a book he authored on a Methodist minister as “Hon. John M’Lean, LL.D, Judge of the Supreme Court of the United States.”<sup>122</sup>

#### *E. Family background*

John McLean was the son of Sophia Blackford, and her husband, Fergus McLean, an Ulsterman who immigrated to America in 1775 during the Revolution.<sup>123</sup> His father had been a weaver in Ireland, but—in a pattern often repeated by Irish immigrants—turned from weaving to farming when he settled in New Jersey.<sup>124</sup> John, the oldest of five children, was born in that state in 1785.<sup>125</sup> The family moved westward in 1789, first to Morgantown, Virginia (now West Virginia), and then on to two locales in Kentucky before crossing the Ohio River and settling, in 1796, in a wilderness that is now part of Warren County, Ohio.<sup>126</sup> In Ohio, they cleared the forest-covered land and built their own homestead.<sup>127</sup> Young John led the life of a frontiersman.<sup>128</sup> Backbreaking work and arduous physical labor were hallmarks of his upbringing.<sup>129</sup> As a Supreme Court Justice, he had exemplary work habits. Chief Justice Taney noted that, “until the last two years of his life, when his health began to fail, [he] was never absent from his duties here for a single day.”<sup>130</sup>

In the Augusta College commencement address, McLean wrote:

It is believed that few, if any individuals in this country, have highly distinguished themselves as professional men, or as statesmen, who had not to overcome various obstacles in early life. Many might be named as occupying the first rank, who in youth, were thrown upon their own resources for their means of

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119. *See id.*

120. Anderson, *supra* note 113, at 101-05; *see* M’LEAN, AN ADDRESS, *supra* note 8, at 23-27.

121. Anderson, *supra* note 113, at 101-02.

122. JOHN MCLEAN, SKETCH OF REV. PHILIP GATCH (Swormstedt & Poe 1854).

123. WEISENBURGER, *supra* note 4, at 1.

124. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127-28.

125. WEISENBURGER, *supra* note 4, at 2-3.

126. *Id.*

127. *See* DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127-28.

128. *See* WEISENBURGER, *supra* note 4, at 3-4.

129. *See id.* at 3-5.

130. 66 U.S. 8, 12.

subsistence. Under such circumstances, they learned to measure time more accurately, by their expenditures and saw the necessity of improving every moment.<sup>131</sup>

Surely John McLean was speaking of his own experience. He drew a connection between the hard work of his youth and his many achievements and successes as a professional and as a statesman.<sup>132</sup> There was, he could see, great benefit gained in having been born without a silver spoon in his mouth and having to rely on his own resources for subsistence.<sup>133</sup> He continued:

We frequently hear expressions of regret that certain individuals, who have risen to eminence by their own merits, had not received an early classical education. Perhaps this very circumstance may lay at the foundation of their success. It may have led to a determination and effort, to surpass those who enjoyed better opportunities of advancement. This then is the secret of their success; and it is of infinitely more importance to them, and to their country, than could have been the most finished education. They have learned the value of time, and what is still better, they have improved it.<sup>134</sup>

With these words, John McLean tells us of his ambitions and his own explanation for his success. He speaks of the fundamental American view that hard work leads to success in our land of almost-unlimited opportunities. This is the rags-to-riches philosophy, captured a few decades later and afterwards until the turn of the century by Horatio Alger, Jr. (the famed author of novels for boys, including classics such as *Ragged Dick*<sup>135</sup> and *Risen From the Ranks*)<sup>136</sup> and *A Debt of Honor: The Story of Gerald Lane's Success in the West*, a poignant tale based partly on the life and angst of Benjamin Nathan Cardozo, who had been tutored by Alger.<sup>137</sup>

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131. M'LEAN, AN ADDRESS, *supra* note 8, at 23.

132. See Anderson, *supra* note 113, at 101-03.

133. See M'LEAN, AN ADDRESS, *supra* note 8, at 23.

134. *Id.* at 23-24.

135. HORATIO ALGER, JR., RAGGED DICK; OR, STREET LIFE IN NEW YORK WITH THE BOOT BLACKS (Henry T. Coates & Co. 1867).

136. HORATIO ALGER, JR., RISEN FROM THE RANKS; OR, HARRY WALTON'S SUCCESS (Henry T. Coates & Co. 1874).

137. HORATIO ALGER, JR., A DEBT OF HONOR, THE STORY OF GERALD LANE'S SUCCESS IN THE FAR WEST (1900); see also Paul Brickner, *Kaufman's Cardozo: Judicial Biography as Legal History*, 88 GEO. L.J. 1895, 1903-06 (2000) (reviewing ANDREW L. KAUFMAN, *CARDOZO* (1998) (explaining Cardozo was also another individual who exemplified the novels written by Horatio Alger, Jr.)).



Of course, rising from humble beginnings was valued too in Great Britain, despite class distinctions more prevalent in that nation than in America.<sup>138</sup> Lord Campbell, in writing of the legendary British jurist Lord Mansfield, reported that Mansfield told a prospective biographical writer that he would do better writing about Lord Hardwicke than himself, because he (Mansfield) had been born into advantages that Hardwicke had not been afforded.<sup>139</sup> Lord Hardwicke rose to become Chief Justice and Lord Chancellor, although he was of a peasant background.<sup>140</sup> This was a tongue-in-cheek comment. Of course, peasants are unknown in America—one of the reasons that many immigrants chose to leave behind their European countries and mores. McLean enhances Lord Mansfield's point by referencing antiquity's "many encouraging examples."<sup>141</sup> "Even slaves," he notes, "have risen above their shackles, and by reflecting honor on their country, became known to fame."<sup>142</sup> Lord Mansfield's landmark decision and opinion in a major habeas corpus case had a profound impact on the law of slavery and on both McLean's thinking on the subject and his strong opposition to slavery.<sup>143</sup>

Near the conclusion of the commencement address, McLean reminisces:

There is no spot upon the face of this globe, that promises so rich a harvest to genius and enterprise, as this western country. Its advance is more like the effects of magic, than the sober realities of life.

Some forty or fifty years ago, a trace of civilized man, could scarcely be found, in this expansive region. The beautiful shores of the Ohio, and its tributary streams, presented an almost unbroken wilderness. It was home to the savage, and a vast covert, where beasts of prey roamed at pleasure. Now its whole aspect is changed: the wilderness has disappeared, and the solitary places are gladdened, by the hum and bustle of civilization. A bursting, teeming, population, everywhere meets the eye. Cities, towns and villages, have risen into existence; colleges and academies have

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138. 2 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 302 (1849).

139. *Id.*

140. *Id.*

141. McLEAN, *AN ADDRESS*, *supra* note 8, at 25.

142. *Id.*

143. *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

been multiplied; and all the appendages of advanced society, are here seen springing into life.<sup>144</sup>

He writes extremely well for a man with little formal education. His love of learning served him well throughout his public life, including thirty-two years as an Associate Justice of the Supreme Court of the United States.<sup>145</sup> In his years on the High Court, good writing skills were important to the Justices, who had no law clerks to assist in researching and preparing their opinions.<sup>146</sup> During his tenure, McLean authored 245 opinions of the court and 33 dissenting opinions according to one authority,<sup>147</sup> and 160 opinions and 30 dissents according to another.<sup>148</sup>

The Augustana College commencement address reveals a John McLean who was clear-eyed and introspective. He seemed to understand his own strengths and to see strength in what others might perceive as possible weaknesses. This ability to turn a perceived negative into a positive is a mainstay in the art of lawyering. The arduous physical labor required in helping to clear the forest-covered land for his family's Ohio homestead also built character.<sup>149</sup> Eating bear meat on his first visit to his Ohio home was a part of his life's experience as a youngster and his frontier boyhood.<sup>150</sup>

In short, the commencement address reveals a John McLean who was ambitious for professional success and statesmanlike achievements, who placed great value on education, who was concerned about greatness and genius, and who saw youthful obstacles and hurdles as enhancing the determination and effort needed to be successful against those who enjoyed, by chance of birth, privileges, and better opportunities than chance had afforded him.<sup>151</sup> McLean was a competitive and ambitious man, but one who cared deeply about his nation and its entire people.<sup>152</sup> He recognized that even slaves had "risen above their shackles,"<sup>153</sup> though the U.S.

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144. M'LEAN, AN ADDRESS, *supra* note 8, at 26.

145. See Aynes, *supra* note 41, at 142-43.

146. ARTEMUS WARD & DAVID L. WEIDEN, SORCERER'S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 54 (2006).

147. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 143 (1978).

148. Aynes, *supra* note 41, at 143.

149. See WEISENBURGER, *supra* note 4, at 3.

150. See *id.*

151. See generally M'LEAN, AN ADDRESS, *supra* note 8 (John McLean is reflecting on his own personal experience when giving commencement speech at Augusta College).

152. See *id.* at 14-27.

153. *Id.* at 25.

Constitution considered them the equivalent of three-fifths of a white person.<sup>154</sup>

His 1812 and 1814 elections to Congress exposed him to the nation's capital.<sup>155</sup> In time, he seems to have acquired an early case of Potomac fever that caused him to yearn for career opportunities in Washington, despite the fact that the richest "harvest to genius and enterprise" anywhere on the globe could be found right in his own beloved "western country."<sup>156</sup>

#### F. Reputation and Character

With few exceptions, John McLean was held in high personal regard throughout his life. Historian Henry Adams spoke highly of him as a young Congressman, "John McLean sat again for Ohio."<sup>157</sup> He was held in high regard as Postmaster General and may even have been the finest Postmaster General in American history.<sup>158</sup> Certainly, he was considered the better than those who had served before him.<sup>159</sup> Pulitzer Prize-winning historian Samuel Flagg Bemis, in his study of John Quincy Adams, says that "Adams had reappointed [McLean] on the basis of his unexampled merit and qualifications."<sup>160</sup> Bemis also notes that McLean "had brought the postal service to the highest level of efficiency ever attained."<sup>161</sup>

John McLean served as an Associate Justice of the Supreme Court of the United States from 1829 until his death on April 4, 1861.<sup>162</sup> John McLean is remembered best for his dissent in the infamous *Dred Scott* case of 1857, a Supreme Court decision that some say "caused" the Civil War.<sup>163</sup> McLean's opinion was one of only two dissents in the case; Justice Curtis of Massachusetts wrote the other.<sup>164</sup> McLean's opinion, although forceful, is said to be of lesser quality than that of Justice Benjamin R. Curtis, who served from 1851 to 1857.<sup>165</sup> Stanley Kutler, the eminent historian, does

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154. U.S. CONST. art. I, § 2, cl.3, amended by U.S. CONST. amend. XIV.

155. See WEISENBURGER, *supra* note 4, at 9.

156. M'LEAN, AN ADDRESS, *supra* note 8, at 26.

157. ADAMS, *supra* note 42, at 1254-55.

158. See WEISENBURGER, *supra* note 4, at 46-47.

159. See *id.* at 45-47.

160. BEMIS, *supra* note 17, at 139.

161. *Id.*

162. Anderson, *supra* note 113, at 103, 105.

163. *Dred Scott*, 60 U.S. at 529 (McLean, J., dissenting); Anderson, *supra* note 113, at 104; FINKELMAN, *supra* note 109, at 236; Paul Finkelman, *John Mclean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 561-62 (2009).

164. *Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting); Finkelman, *supra* note 163, at 561-62.

165. See Finkelman, *supra* note 163, at 564-65. See Kathleen Shurtleaf, *Benjamin R. Curtis*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993 103, 105 (Clare Cushman ed., 1993).

not even include McLean's dissent in one of his books that included opinions of other Justices.<sup>166</sup>

McLean is ranked "average" in terms of the Justices who have served on the High Court.<sup>167</sup> However, one historian, Professor Joan E. Cashin (a mid-18th-century American history scholar at Ohio State University) has wisely noted that merely dissenting in *Dred Scott* should earn McLean an above-average ranking.<sup>168</sup> Indeed, even the great emancipator Abraham Lincoln, who freed the slaves, agreed with Chief Justice Taney's holding that a Negro could not be a citizen.<sup>169</sup> Chief Justice Rehnquist points out that Justices McLean and Curtis read their dissenting opinions the day after the eighty-year-old Chief Justice Taney had read his.<sup>170</sup> It took the two dissenters five hours to read their opinions.<sup>171</sup> Chief Justice Rehnquist states that, "Taney had a first-rate legal mind, and was a clear, forceful writer."<sup>172</sup> He continues by suggesting that Taney's *Dred Scott* decision, although a "serious mistake, . . . should not be allowed to blot out the very constructive work otherwise done in his career."<sup>173</sup> Rehnquist applauds Taney for common sense and vision, and for being willing, "to find in the United States Constitution the necessary authority for states to solve their own problems" and describes that willingness as "a welcome addition to the nationalist constitutional jurisprudence of the Marshall Court."<sup>174</sup> Nevertheless, Taney's opinion smacks of an unfortunate degree of extreme racism.

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166. STANLEY KUTLER, *THE DRED SCOTT DECISION, LAW OR POLITICS* vii (Houghton Mifflin Company 1967).

167. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 370 (1999); Barbara A. Perry, *Lawyer-Presidents and Their Supreme Court Appointments*, in *AMERICA'S LAWYER PRESIDENTS: FROM THE LAW OFFICE TO OVAL OFFICE* 307 (Norman Gross ed., 2004). President Andrew Jackson appointed Chief Justice Roger B. Taney, who is ranked "great" despite his *Dred Scott* Decision. See ABRAHAM, *supra*, at 167. Of the five associate justices that he appointed, all had previous judicial experience at the state or federal level. See *id.* Yet, Jackson was more concerned that they represented the right circuit and remained loyal to the Democratic Party, though their partisan fealty sometimes wavered on the bench. See *id.* Justice McLean, for example, wrote one of the two dissents in *Dred Scott*, and his rationale for doing so provided the foundations of the Fourteenth Amendment. See *infra* Part II.B. In any case, all scored "average" ratings, except for Barbour, who was tabbed below average. *Id.*

168. Interview with Dr. Joan E. Cashin, *supra* note 26.

169. DONALD, *supra* note 97, at 200 (stating "[a]n initial examination of the opinions [in *Dred Scott* case] failed to give Lincoln much cause for alarm. As he explained later, he 'never . . . complained especially of the *Dred Scott* decision because it held a negro could not be a citizen.'").

170. WILLIAM R. REHNQUIST, *THE SUPREME COURT: REVISED AND UPDATED* 61-62 (William Morrow & Co. 1987) (2002).

171. REHNQUIST, *supra* note 170, at 62.

172. *Id.* at 69.

173. *Id.*

174. *Id.*

Given the prevalence of racial stereotyping and race-driven thinking of the day, including Lincoln's, the two dissenting opinions are indeed strikingly noteworthy, progressive, and forward-looking. In fact, McLean's remarkable dissent in *Dred Scott* provided the rationale for the 14th Amendment, as discussed below.<sup>175</sup>

McLean's rank among the Justices may be underrated.<sup>176</sup> He certainly was regarded well enough to be interviewed by de Tocqueville, the eminent French philosopher and historian.<sup>177</sup> They discussed the place of the American judiciary in government affairs.<sup>178</sup> The judge's reputation caused De Tocqueville to see McLean, a young jurist, as an authority.<sup>179</sup>

Samuel Miller, who joined the Supreme Court in 1862, the year after McLean's death,<sup>180</sup> held McLean in high regard.<sup>181</sup> Miller is ranked among fifteen "near great" Justices.<sup>182</sup> Justice Louis D. Brandeis, ranked among the dozen "great" Justices<sup>183</sup> held Miller in high regard,<sup>184</sup> as did Chief Justice William H. Rehnquist, who ranked Miller and Field "at the very top of the associate justices" of the 19th century.<sup>185</sup> In the 1960s, Justice William O. Douglas recalled that Justice Brandeis (1856-1941)<sup>186</sup> had wondered why so excellent a Justice, Miller, had been forgotten.<sup>187</sup> Stanford history professor Charles Fairman's 1939 biography of Miller properly elevated Miller's stature by making his achievements more visible and therefore more memorable.<sup>188</sup> Fairman explained that Miller valued precedent for its inherent value but also often noted the identity of the source as an important factor:

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175. See *infra* Part II.B.

176. Paul Brickner, *The Passenger Cases (1849): Justice John McLean's "Cherished Policy" As the First of Three Phases of American Immigration Law*, 10 SW. J. L. & TRADE AM. 63, 69 (2003).

177. See PIERSON, *supra* note 110, at 353.

178. See *id.* at 353-56.

179. See *id.*

180. Anderson, *supra* note 113, at 105 (stating that McLean died in 1861); Anderson, *supra* note 115, at 178-79 (noting that Miller was sworn in July 21, 1862).

181. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 63-64 (1939).

182. ABRAHAM, *supra* note 167, at 370.

183. *Id.* at 369.

184. Letter from Louis Brandeis to Robert Netherland Miller (Nov. 3, 1926), in 5 LETTERS OF LOUIS D. BRANDEIS, 1921-1941: ELDER STATESMAN 233 (Melvin I. Urofsky & David W. Levy eds., 1978) ("He is a Kentuckian who rendered most distinguished service as an Associate Justice.").

185. REHNQUIST, *supra* note 170, at 99.

186. Philippa Strum, *John McLean*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993 331, 334-35 (Clare Cushman ed., 1993).

187. William O. Douglas, *Louis Brandeis: Dangerous Because He Was Incorruptible*, N.Y. TIMES, July 5, 1964, at BR3; see Paul Brickner, *Rehnquist, The Supreme Court: How It Was, How It Is*, 26 HARV. J. ON LEGIS. 285, 291 (1989) (reviewing WILLIAM R. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987)).

188. See FAIRMAN, *supra* note 181.

Justice Miller was not long on the Court before certain notable characteristics became apparent. They are to be marked throughout his work. “Authorities” were more or less persuasive according to their inherent reason and the character of their source. Thus he would note that a principle had been stated “by Chancellor Kent, with his usual force and clearness;” by “Judge McLean, . . . with his usual ability . . . .”<sup>189</sup>

Justice Miller’s regard for the opinions of Justice McLean is important because of the high standing of Justice Miller.<sup>190</sup> That Miller, who joined the Court shortly after McLean’s death, valued McLean’s opinions and ability is an important endorsement of the quality of his judicial work, since it dates from a time when McLean’s work and reputation were still fresh and contemporary.

More important is the opinion of Justice Joseph Story, the eminent and distinguished jurist and scholar who served with McLean from McLean’s appointment in 1829 until Story’s death in 1845.<sup>191</sup> Story’s son records:

The appointment of Mr. Justice M’Lean was exceedingly agreeable to my father, and an intimate friendship was established between them, from which he received great pleasure, and which remained unbroken to the day of his death. He had entire confidence in Mr. Justice M’Lean’s purity of purpose, and great respect for his talents, and in after years was warmly interested that he should become a candidate for the Presidency.<sup>192</sup>

At the time President Jackson named McLean to the Supreme Court, Justice Story wrote to William Fettyplace, Esq. that “[i]t is a good and satisfactory appointment, but was, in fact, produced by other causes than his fitness, or our advantage.”<sup>193</sup> William W. Story’s observations suggest that Justice Story’s regard for McLean grew stronger as they served together. As noted below, the “other causes” for the appointment are not as cryptic as they first appear.<sup>194</sup>

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189. See *id.* at 63-64; *Gelpcke v. Dubuque*, 1 Wall. 175, 68 U.S. 175, 213 (1863) (Miller, J., dissenting) (stating “[t]he opinion of Judge McLean is long, and the case is presented with his usual ability . . .”).

190. See ABRAHAM, *supra* note 167, at 369-70 (rating Justice Miller as “Near Great”).

191. See David T. Pride, *Joseph Story*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993* 88-90, 101, 103, 105 (Clare Cushman ed., 1993).

192. 2 *LIFE AND LETTERS OF JOSEPH STORY*, *supra* note 19, at 35.

193. *Id.* at 564.

194. See *infra* Part B.

*G. Treacherous Double-dealer or Unkindly Maligned by Presidential Elections Suspicions? John Quincy Adams, Andrew Jackson, and John McLean*

*1. The Accusations*

Although John McLean was an able Postmaster General, President John Quincy Adams did not trust him.<sup>195</sup> His diary entries that disparaged McLean have been published and widely noted as authority for attributing to McLean the unfortunate labels that John Quincy Adams used.<sup>196</sup> Adams is quoted as writing there was “no doubt in my mind McLean is a double dealer,” although he did not fire him.<sup>197</sup>

Professor Abraham has written that President Jackson’s choice of John McLean as his first Supreme Court appointment “was dictated by the contemporary partisan politics concerning personalities as well as the range and degree of federal authority that reflected the intraparty struggle among the Democrats.”<sup>198</sup> Jackson paid attention to geography.<sup>199</sup> McLean was from the same circuit as the Justice he replaced, Robert Trimble.<sup>200</sup> Trimble was from Kentucky as was John J. Crittenden, who had been nominated by President John Quincy Adams in 1828 but not confirmed by the Senate.<sup>201</sup> Kentucky and Ohio were in the same circuit.<sup>202</sup> Indeed, McLean had lived in Kentucky as a youngster before his family moved across the river into Ohio.<sup>203</sup> He was the third Supreme Court Justice from west of the Alleghenies.<sup>204</sup>

Pulitzer Prize winner Samuel F. Bemis writes, somewhat typically, of McLean’s “treachery:”

Most conspicuous example of Adam’s refusal to remove a civil servant who was opposed to him was that of Calhoun’s friend John McLean of Ohio, Postmaster General, originally appointed by President Monroe. This officer had by his position a vast influence over petty appointments in every city, town, and village of the land.

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195. See WEISENBURGER, *supra* note 4, at 47; see also PAUL C. NAGEL, JOHN QUINCY ADAMS: A PUBLIC, A PRIVATE LIFE 317 (1998).

196. See NAGEL, *supra* note 195, at 54-55; see also BEMIS, *supra* note 17, at 139.

197. NAGEL, *supra* note 195, at 317.

198. See ABRAHAM, *supra* note 167, at 72.

199. See *id.*

200. See *id.*

201. *Id.* at 70 (stating Crittenden’s nomination was postponed by the Senate after a month).

202. *Id.*

203. WEISENBURGER, *supra* note 4, at 2.

204. ABRAHAM, *supra* note 167, at 69-72, 377-78 (The three Justices include Justice Thomas Todd from Kentucky, Justice Robert Trimble from Kentucky, and Justice John McLean from Ohio).

He had brought the postal service to the highest level of efficiency ever attained, and Adams had reappointed him on the basis of his unexampled merit and qualifications. McLean hated Clay and had no real respect for Adams. Despite protestations of loyalty he did not hesitate to closet himself with Opposition leaders. Soon the President began to sense the Postmaster General's exertions in favor of Calhoun and Jackson. Clay and Barbour both complained bitterly, but it was difficult to prefer a specific charge. Toward the end of his term the President became abundantly convinced of McLean's duplicity and treachery, convinced also that it was too late to remove him, even though there was by then good reason: for example, McLean's recommendation, in collusion with Ingham and Dallas, of the shuffling Thomas Sergeant, whom Adams appointed as postmaster at Philadelphia. By the summer of 1828 the damage was done, and there was little chance that the hostile Senate would confirm any Presidential nomination of a successor to McLean. It was better to let him stay on than to fire him in the midst of the campaign. McLean's complete immunity from attack or criticism by the Opposition, either in Congress or in the newspapers, is sufficient proof, out of those days, of where his real loyalties lay.<sup>205</sup>

Of course, the fragment or final page of McLean's letter to the newspaper editor, as discussed below, and the newspaper's editorial on McLean refute the idea that McLean was immune from criticism.<sup>206</sup> McLean's letter to a pro-administration newspaper complains about coverage in opposition papers.<sup>207</sup>

As Postmaster General, McLean did have serious problems with his appointments to the office of Postmaster in Philadelphia. President Adams records:

I sent for Mr. McLean, the Postmaster-General, who came, and I had a long conversation with him respecting the post-office at Philadelphia. I told him that the attempt of Bache to draw the funds of the public from the bank after he had been removed was essentially a fraud; . . . [after discussing another individual at that

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205. BEMIS, *supra* note 17, at 139.

206. *See infra* Part C.

207. *See infra* Part C.



post office] Mr. McLean said he wished to God he had never been appointed . . . .<sup>208</sup>

Similarly, Burnett Anderson, in a book issued through the Supreme Court Historical Society, writes of McLean as using his “power of appointment to cultivate ties to Andrew Jackson, the only serious contender . . .” faced by John Quincy Adams in the presidential contest.<sup>209</sup>

Anyone making a large number of appointments, even an able administrator like McLean, is bound to make a mistake on occasion. McLean was forthright in his discussions with the President. “[I] wish to God [I] had never been appointed . . .” is the statement of an honest administrator, not the words of a manipulative Postmaster General who was working to undermine the very President in whose administration he served.<sup>210</sup> This openness and honesty negates the idea that McLean was secretly advancing the candidacy of General Andrew Jackson.

## 2. Accuracy or Extreme Suspicion?

Bemis’s complaints about McLean are in many ways typical of the criticism that he faced as Postmaster General under John Quincy Adams.<sup>211</sup> But the accusations seem overly suspicious and even somewhat paranoid. For example, they seem to suggest that McLean was so clever that he hid his duplicity. This is reminiscent of typically paranoid thinking, *e.g.*, they are following me but are so clever that I can never catch them in the act, or they are always listening to me, but are so careful that I can never catch them in the act.<sup>212</sup>

The DSM-IV (Diagnostic and Statistical Manual of Mental Disorders) provides diagnostic criteria for paranoid personality disorder, including a definition:

A pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent . . . as indicated by four (or more) of the following: (1) suspects, without sufficient basis, that others are exploiting, harming, or deceiving him . . . (2) is

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208. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 12.

209. Anderson, *supra* note 113, at 103.

210. *Id.*

211. See BEMIS, *supra* note 17, at 139.

212. See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

preoccupied with unjustified doubts about the loyalty or trustworthiness of friends or associates . . . .<sup>213</sup>

The above is quoted not to suggest that the President and those around him had paranoid personalities as a mental disorder. Rather it is quoted to suggest that they had a “situational paranoia” brought on by the intensity and long duration of a major political contest. Suspiciousness is part and parcel of election contests, just as depression is a normal aftereffect of death or other tragedy. In regard to McLean, Adams and those who were providing him with “proof” of the Postmaster General’s disloyalty probably reached the wrong conclusion. Extreme election year suspiciousness is no more a true “mental disorder” than “Potomac fever” is a true fever.

At the heart of the complaints against McLean are suggestions that he was providing political favors to Jacksonians.<sup>214</sup> But McLean, with respect to his official duties, held himself above politics (“I chose to rest my character on the propriety of my course”),<sup>215</sup> although he was politically ambitious as a presidential aspirant.<sup>216</sup> He steadfastly maintained that his duties were to serve the people and provide them with the best postal service and the best postal employees.<sup>217</sup> Indeed, one historian recently concluded “[t]hese unfounded charges against McLean [that he used the influence and patronage of his office against the administration], have been restated by modern historians, but they too have failed to bring forth any evidence to support their charges.”<sup>218</sup> In contrast, we have the opinion of Justice Story, as stated by his son, that McLean possessed “purity of purpose” and great talents.<sup>219</sup>

A history published during McLean’s lifetime reflected on the vast amount of post office patronage:

The office of Postmaster-general had, even by Jefferson, been coveted, by reason of the vast amount of petty patronage pertaining to it; and Jackson was resolved to make it a Cabinet office. But M’Lean, who had been appointed by Monroe, refused to turn his department, which was especially one of public utility, into an engine to serve mere party purposes;

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213. *Id.* at 637.

214. WEISENBURGER, *supra* note 4, at 55.

215. Letter from John McLean, *supra* note 7.

216. *See generally* WEISENBURGER, *supra* note 4, at 48-65.

217. Carney, *supra* note 75, at 121, 126 (noting that McLean had written “I am the servant of the people, not the administration. The patronage placed in my hands is to be used for the public benefit.”).

218. *Id.* at 125-26; *see* ROBERT V. REMINI, JOHN QUINCY ADAMS 109 (2002).

219. *See* 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 19, at 35.

wherefore, he was removed to a bench in the Supreme Court, and William T. Barry, an old friend and follower of the President, was put into his place.<sup>220</sup>

McLean's refusal to go along with changes to satisfy the President's desire for patronage, the spoils of victory, was at the heart of his own removal from office and his appointment to the High Court.<sup>221</sup> Later the authors specified the turnover in post office officeholders during the Jackson regime, under the newly appointed Postmaster General Barry.<sup>222</sup> Jackson's desire to remove McLean to advance his plans for patronage represents the "other causes" spoken of by Justice Story.<sup>223</sup> Jackson did not appoint McLean to the High Court for the good of that court, rather the Supreme Court appointment was made so that the Jacksonians could claim the spoils of their election victory that they coveted in the Post Office.<sup>224</sup>

John Quincy Adams' willingness to believe the worst about McLean may reflect elements of his privileged upbringing. His father's presidency was followed by diplomatic service in Europe.<sup>225</sup> John Adams would have liked his wife Abigail to accompany him to France, but they feared that the former President might be taken captive en route, so Abigail stayed home.<sup>226</sup> However, the ten-year-old John Quincy Adams insisted on going and accompanied his dad.<sup>227</sup> His years in Europe were an important experience in his life; however, he missed out on much of the harassment, manipulation, and teasing that is a part of the upbringing of adolescent and teenage boys.<sup>228</sup> As a result, John Quincy Adams may have been somewhat naive because he did not see that the people who were soliciting him to remove John McLean as Postmaster General may have been speaking for the politicians or may have been the politicians who "gave him no rest."<sup>229</sup> The President's son may not have been as street-wise as he should have been because of deficits in his childhood.

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220. 3 W. H. BARTLETT & B. B. WOODWARD, *THE HISTORY OF THE UNITED STATES OF NORTH AMERICA FROM THE DISCOVERY OF THE WESTERN WORLD TO THE PRESENT DAY* 358 (1856).

221. *Id.*

222. *Id.* at 361.

223. See 1 *LIFE AND LETTERS OF JOSEPH STORY*, *supra* note 19, at 564.

224. See BARTLETT & WOODWARD, *supra* note 220, at 361; see also 1 *LIFE AND LETTERS OF JOSEPH STORY*, *supra* note 19, at 564.

225. COKIE ROBERTS, *FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION* 102 (2004).

226. *Id.* at 102.

227. *Id.*

228. See EDWARD EVERETT, *A EULOGY ON THE LIFE AND CHARACTER OF JOHN QUINCY ADAMS, DELIVERED AT THE REQUEST OF THE LEGISLATURE OF MASSACHUSETTS, IN FANEUIL HALL, APRIL 15, 1846* 17-25 (1848).

229. See SPRAGUE, *supra* note 9, at 22.

Machiavelli, in his legendary work written nearly five hundred years ago, cautioned the princes on advice and advisors:

Therefore a prudent prince will pursue a third course, choosing the wise men of his state and granting only to them the freedom to tell him the truth, but only concerning those matters about which he asks, and no others . . . . Except for these men, he should listen to no one, but rather pursue the course agreed upon and do so resolutely.<sup>230</sup>

Edward Everett, in an impressive eulogy of John Quincy Adams, suggests that he never attended school in America and that in Europe he associated mainly with adults.<sup>231</sup> Adams' privileged youth or upbringing had its drawbacks.

Rather than accepting the charges against McLean at face value, Adams should have been skeptical and aware that his informants might have been speaking with their own self-interests in mind. Even Machiavelli cautioned the prince to limit the number of advisors.<sup>232</sup> Adams seemed to have an open-door policy and was willing to listen to anyone and everyone.<sup>233</sup> When a named individual was presented as a possible Postmaster General to replace McLean, Adams should have perceived that the person was being advanced not because he was a more competent administrator than McLean, but because he was expected to be more willing to hear requests for contracts and patronage. Perhaps at some level, Adams perceived that McLean was not disloyal and that his own aversion to political patronage and contracts was an unstated reason for his retention of McLean as the officeholder.

Bartlett and Woodward record the vast changes in the Post Office Department under President Jackson and the newly appointed Postmaster General Barry that occurred following the departure of John Quincy Adams and John McLean:

The introduction of the Postmaster-general into the Cabinet was the means of effecting yet more spreading "reforms," through the "enormous patronage" vested in that functionary. Within year and day of the beginning of this good work, four hundred and ninety-one postmasters had been displaced, and others appointed in their

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230. NICCOLO MACHIAVELLI, *THE PRINCE* 88 (Daniel Donno ed. & trans., Bantam Books 2003) (1513).

231. EVERETT, *supra* note 228, at 16-25.

232. MACHIAVELLI, *supra* note 230, at 89.

233. *See* REMINI, *supra* note 218, at 77.

room. And, as if for the purpose of precluding the possibility of dispute, respecting the ground of this “root and branch” proceeding, the number removed in eleven States or Territories, which had given their votes, wholly or in part, at the Presidential election, to Adams; or were (like Michigan,) Northern in all their sympathies; was three hundred and nineteen; whilst in seventeen States or Territories, which had voted wholly for Jackson, or (like Arkansas,) were Southern in all their interests, only half that number, a hundred and sixty-one, had been removed! The number of “removals,” in the first year of Jackson’s Administration, was thus very *nearly seven hundred*. And even this falls short of the total of party “appointments” in the same time . . . .<sup>234</sup>

### 3. McLean explains

In an undated fragment or final page of a letter, probably a draft, McLean wrote to the Editor of *The National Advocate*, a New York City paper published five or six days a week that strongly supported Adams and vigorously opposed Jackson.<sup>235</sup> McLean wrote:

Some of the administration papers have stated that I was favorable to Gen. Jackson’s election and endeavored to promote it. I have not contradicted them, because I thought they treated me unkindly and I [sic, did not lined out] chose to rest my character on the propriety of my course rather than on certificates. That such an intimation would be caught at, by the opposition Editors, was to be expected. This scroll is written to you in the greatest confidence – My course has been taken, and I will not be driven from it. I rest upon high principles and devotion to the public interest – These shall be my aim regardless of consequences.<sup>236</sup>

McLean was wise to write to a pro-administration newspaper and probably chose to do so because of the everyday wisdom contained in the aphorism “when you get into a pissing contest with a skunk, you can’t win.” McLean’s statement contradicts Bemis’s assertion that opposition members of Congress and newspapers did not criticize McLean.<sup>237</sup> Moreover, McLean’s choice of a pro-Adams newspaper demonstrated where his loyalties laid. An administration-oriented newspaper would receive his

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234. 3 BARTLETT & WOODWARD, *supra* note 220, at 361.

235. Letter from John McLean, *supra* note 7.

236. *Id.*

237. BEMIS, *supra* note 17, at 139.

words kindly, while an opposition paper would, like a skunk, continue to offend.

*The National Advocate* published an editorial, *Post Master General*, in May 1828, stating:

We had been in the habit of looking at Mr. McLean with some suspicion, previous to the appearance of his late answer to the charges advanced against him relative to the Post Master at Philadelphia. We had understood he was what is called a Jackson

man; and holding a place in the cabinet and having at his disposal a strong power through the extensive patronage of his office, we were fearful of the consequences, and awake to the detection of any case in which he might swerve from the rule which it was said governed all the appointments and transactions in his department; namely a total disregard of politics.<sup>238</sup>

The newspaper editorial continued:

We have read his answer above alluded to with unmingled satisfaction; not that pleasure alone which might arise from feeling that the interests of the administration party were secure from open or insidious attack from that quarter, but pleasure of a higher grade in knowing that the nation itself is protected in a department where “the usages of party” can never be introduced without creating universal disquietude, jealousy and fear. We felt rejoiced to see, as is now our firm conviction, that the office of Post Master General is filled by one who conducts it upon national, not party principles, and who conscious of the motives which have governed him is able to “*defy the world*,” to point to a single deviation from the rule which he acts upon--that of consulting exclusively the public good. In this course originally adopted by Mr. McLean, and undeviatingly adhered to, he states that he has the approbation of President Adams himself, for whom he avows the highest respect arising out of their personal and official intercourse.<sup>239</sup>

Although historians make a strong case against McLean, they have done so without hearing his side of the debate. Francis Weisenburger, for example, makes a powerful case against McLean.<sup>240</sup> He suggests that McLean’s

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238. Editorial, *supra* note 12.

239. *Id.*

240. WEISENBURGER, *supra* note 4, at 48-65.

antipathy towards Henry Clay cooled McLean's loyalty towards the John Quincy Adams camp when Clay was named Secretary of State.<sup>241</sup> In addition, McLean's advice on appointments, which had been sought often by President Monroe, was less often consulted by the Adams' administration.<sup>242</sup>

Weisenburger points out that since the 1824 presidential election had been decided by the House of Representatives (because no candidate had won a majority of the electoral votes)<sup>243</sup> John Quincy Adams' entire four-year term in office "became practically a contest between the opposing parties of Adams and Jackson to obtain the presidency in 1828."<sup>244</sup> Jackson's supporters looked upon the 1824 election, in which their candidate actually had the highest number of electoral votes, as being stolen through a political promise or "corrupt bargain" to make Clay Secretary of State.<sup>245</sup> Adams was always aware of the Jacksonians' claim that "Old Hickory" should be elected in 1828 to vindicate the 1824 election.<sup>246</sup> The importance of the office of Secretary of State is evidenced by the number, in those days, of such office holders who achieved the office of President.<sup>247</sup>

The heightened sensitivity of John Quincy Adams to whether important figures supported or opposed him and to the importance of patronage appointments can be seen in a letter he wrote to Ninian Edwards, Governor of Illinois, on August 22, 1827.<sup>248</sup> Adams stated:

Your frank and cordial letter of the 22d ulto. [sic] has been duly received. I am entirely satisfied with the assurance that you are neither personally nor politically unfriendly to me, and that the measures of the present Federal Administration have received your cordial support.

Your recommendation for the appointment of a sub-agent at Peoria will, in the event of a vacancy in that office, receive the deliberate

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241. *Id.* at 50.

242. *Id.* at 51.

243. EVERETT, *supra* note 228, at 40.

244. WEISENBURGER, *supra* note 4, at 51.

245. *Id.* at 49-51.

246. *Id.* at 51.

247. Previous Presidents that were Secretaries of State include: Thomas Jefferson (*Thomas Jefferson*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/thomasjefferson> (last visited Oct. 28, 2011)); James Madison (*James Madison*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/jamesmadison> (last visited Oct. 28, 2011)); and James Monroe, (*Former Secretaries of State*, THE WHITE HOUSE, <http://www.state.gov/secretary/former> (last visited Oct. 29, 2011)).

248. See NINIAN WIRT EDWARDS, HISTORY OF ILLINOIS FROM 1778 TO 1833 AND LIFE AND TIMES OF NINIAN EDWARDS 514 (1870).

consideration to which it is entitled, and a disposition altogether friendly to him as re-commended by you; and your opinion in regard to any appointments of the General Government, in the State of Illinois, will always be acceptable to me, whenever you may incline to communicate it to me.<sup>249</sup>

When Adams broached the subject and had direct discussions with the Postmaster General about what he had heard, McLean's responses were both clear and consistent. John Quincy Adams' diary contains several entries that indicate the matter was discussed and that John McLean maintained he was loyal both to the President and to his administration.<sup>250</sup> Weisenburger's insightful and analytical observations are generally on target, except that another explanation might be equally plausible at times. For example, he suggests that McLean's advice to former President James Monroe (that he not take sides in the presidential election contest) was the product of an effort to benefit Andrew Jackson.<sup>251</sup> On the other hand, it may have been no more than the best advice McLean could give to an old friend who had appointed him to two important government positions. Bemis suggests that McLean, "had no real respect for Adams."<sup>252</sup> Assuming that is an accurate statement, McLean would have been more likely to advise Monroe to stay out of the race for his own good, rather than to boost Jackson's campaign.

The accusations against McLean are non-specific. It seems that patronage was at the heart of all or most of the accusations. However, McLean, if true to his stated desire to appoint the best qualified people to postal openings, would necessarily appoint supporters of Andrew Jackson at times because he made so many appointments.<sup>253</sup> McLean took over a Post Office that had been "inefficient and disorganized" and—through diligence, dedication, skilled management, and hard work—converted it into an agency that was organized and efficient.<sup>254</sup> In doing so, "he acquired a

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249. *Id.*

250. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 531-34; 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 534 ("I told him that my confidence in him had been unqualified."); 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 536; 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 275 ("There is an opinion abroad that the Postmaster-General is hostile to the Administration, which he, however, very earnestly disclaims."); 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 343 ("while he himself has repeatedly protested his firm and faithful attachment to the Administration . . .").

251. WEISENBURGER, *supra* note 4, at 56.

252. BEMIS, *supra* note 17, at 139.

253. 3 BARTLETT & WOODWARD, *supra* note 220, at 361.

254. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, at 127.



national reputation as an able administrator.”<sup>255</sup> Some of the reports against McLean that were passed along to the President may have been based on professional jealousy, a common phenomenon. Others who had the ear of President Adams might simply have wanted the office of Postmaster General to be given to another more pliable person who would be more receptive to requests that he dispense patronage and other spoils. Indeed, Adams himself speaks of the “morbid terror of patronage, this patriotic anxiety lest corruption should creep in by appointments” in writing of a Constitutional prohibition.<sup>256</sup>

Within the world of historians, criticism and harsh comments about McLean could not have come from a more authoritative source than John Quincy Adams. John Quincy Adams was well educated, a Phi Beta Kappa graduate of Harvard College, a scholar, a published author, and a man who held many important government posts, including U.S. Senator, Congressman, Minister to the Netherlands, and Minister to Russia.<sup>257</sup> After leaving the Presidency he was elected to Congress<sup>258</sup> and died on the Congressional floor.<sup>259</sup> Long after he had left the White House he was noteworthy as an attorney for his 1841 representation of slaves in the now-famous *United States v. Amistad* case.<sup>260</sup> He was an intellectual. When Adams spoke, modern-day historians listened. It was easy for them to take Adams’ words at face value with little or no scrutiny. Indeed, when Adams argued the *Amistad Schooner* case before the Supreme Court of the United States, McLean heard those arguments too, since he was then a sitting Justice.<sup>261</sup> Interestingly, the *National Advocate* editorial suggests that McLean had the support or “approbation of President Adams . . . .”<sup>262</sup> Adams’ diary entries reflect that McLean showed Adams a paper that he prepared to publish the next day in a newspaper in response to accusations in Democratic newspapers.<sup>263</sup> Whether this conversation related directly to the undated letter fragment and the editorial of May 26, 1828, is unclear.<sup>264</sup>

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255. *Id.*

256. JOHN QUINCY ADAMS, AN EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, DELIVERED AT THE REQUEST OF THE MAYOR, ALDERMEN, AND COMMON COUNCIL OF THE CITY OF BOSTON, SEPTEMBER 27, 1836 28 (1836).

257. REMINI, *supra* note 218, at 161-63.

258. John Quincy Adams, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/johnquincyadams> (last visited Oct. 28, 2011).

259. EVERETT, *supra* note 228, at 55.

260. 40 U.S. 518 (1841) (opinion by Justice Joseph Story).

261. *Id.*; DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 31, 127-28.

262. Editorial, *supra* note 12.

263. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 532.

264. *Id.* at 531-34.

It may have been a similar, though not identical, item.<sup>265</sup> In any case, this diary entry establishes credibility for McLean's claim reported in the *National Advocate* editorial that McLean had the approbation of President Adams and that McLean had the highest respect for Adams.

#### 4. Other Criticism of Judge John McLean

McLean's positive reputation for honesty and good character faced criticism in only two other respects: his outspokenness on slavery and his candidacy for President while he was a sitting Justice.<sup>266</sup> Although we might not agree with him, McLean rationalized that he could be a candidate for president without offending judicial propriety. Justices should not generally speak publicly on issues that might come before them.<sup>267</sup> Certainly, slavery was an issue that almost always loomed over the court in the mid-18th century.<sup>268</sup> In modern times, Justice O'Connor quoted President Calvin Coolidge to explain why Justices should not speak in public on important issues: "If you don't say anything, you won't be called upon to repeat it."<sup>269</sup> She was referring to the possibility that a Justice's extra-judicial comments might be quoted in briefs or arguments made to the court rather than official comments from published court opinions.<sup>270</sup> Yet as she gained more experience, she became more relaxed in her comments to law student and professional audiences.<sup>271</sup> Similarly, Justice Anthony Kennedy was outspoken in his criticism of Federal Mandatory Sentencing Guidelines when he spoke before the American Bar Association's annual meeting in 2003.<sup>272</sup> Indeed, he seemed to invite the issue to be brought before the Court or to ask Congress to revisit the issue.<sup>273</sup>

Slavery, after all, was such a monumental moral, political, and constitutional issue in American history that it is hard to fault Justice McLean for making public comments. The idea that judges should lead a monastic existence may be a thing of the past; certainly the standards of

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265. *See id.* at 532.

266. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 269-72 (1926).

267. *See generally* MODEL CODE OF JUDICIAL CONDUCT R. 1.2, 3.1 (2007).

268. *See, e.g.*, *Strader v. Graham*, 51 U.S. 82 (1850); *Groves v. Slaughter*, 40 U.S. 449 (1841); *Amistad*, 40 U.S. 518.

269. Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 1 (1985) (quoting J. BARTLETT, *FAMILIAR QUOTATIONS* 736 (1980)).

270. *Id.*

271. *See generally* JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 331-34 (2005).

272. ABA JUSTICE KENNEDY COMM'N, *REPORTS TO THE HOUSE OF DELEGATES* 3 (2004).

273. *Id.* at 1, 3-4.

what judges may say off the bench have been relaxed.<sup>274</sup> But more important is the idea that the criticism of Postmaster General McLean by the President was of a different nature from the criticism directed at him for speaking out about slavery or being an active or passive candidate for president. The criticism by John Quincy Adams was personal and spoke to the moral integrity of the man: double-dealer and treacherous.<sup>275</sup> Aside from the suspiciousness of the Adams camp in a presidential election year, there seems to be no parallel outpouring of criticism in the career of John McLean, except for his own presidential ambitions and his outspokenness on slavery.

McLean was a deeply religious man who, as an Associate Justice, served as President of the American Sunday School Union.<sup>276</sup> Under the inspiration of Reverend John Collins, he and one of his brothers had converted to Methodism from their family's Calvinist faith.<sup>277</sup> The depth of McLean's religious faith can be observed in the one hundred ninety-page volume he prepared while a sitting Justice on the Reverend Philip Gatch, a Methodist minister.<sup>278</sup> Moreover, he was sensitive to moral issues relating to Court personnel, as indicated by the letter that his friend Associate Justice Joseph Story wrote to him about the removal of the official Supreme Court reporter Richard Peters.<sup>279</sup> Story was responding to a letter that he had received from McLean.<sup>280</sup>

The Reverend William B. Sprague, a Presbyterian minister, spoke of more than a thirty-year friendship with McLean in a eulogy delivered the week after John McLean's death.<sup>281</sup> He described John McLean as "one of the most transparent of men; that he was incapable of even the slightest exaggeration; . . . truthful and honest . . ." <sup>282</sup> Rev. Sprague continued:

I had it from his own lips that, while he was holding one of the highest offices under the Government, the politicians gave him no

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274. Compare MODEL CODE OF JUDICIAL CONDUCT R. 1.2, 3.1 (2007), with Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U.L. REV. 647, 655 n.18 (1994).

275. See WEISENBURGER, *supra* note 4, at 54.

276. *Id.* at 223.

277. John F. Wright, *Hon. John McLean, LL.D., One of the Judges of the Supreme Court of the United States*, 19 THE LADIES' REPOSITORY 6, 66 (1859).

278. See generally M'LEAN, AN ADDRESS, *supra* note 8.

279. JOSEPH STORY: A COLLECTION OF WRITINGS BY AND ABOUT AN EMINENT AMERICAN JURIST 159 (Mortimer D. Schwartz & John C. Hogan, eds., 1959).

280. *Id.* at 159.

281. SPRAGUE, *supra* note 9, at 17. The acquaintance of McLean and Sprague dates back at least to 1828, when McLean responded to a request for assistance in obtaining "the handwriting of any gentlemen you may designate." Sprague, who had sent McLean a copy of one of his sermons with the request, was an early autograph collector. Letter from John McLean, *supra* note 7.

282. SPRAGUE, *supra* note 9, at 20.

rest, because he would give them no satisfaction—that is, he would not bow to party dictation—he would not displace from any office within his control acknowledged intelligence and integrity, from considerations of mere partisanship; and he added that it was to this circumstance that he owed his appointment to the Supreme Judiciary, where his persistence in following out his convictions would occasion less inconvenience to office seekers.<sup>283</sup>

Of course Rev. Sprague could not have known of the aspersions cast upon the reputation of John McLean in the diary of John Quincy Adams because they would not be published until the following decade.<sup>284</sup> The minister's statements correlate well with the opinion expressed by the editor of *The National Advocate* that McLean was a man of convictions, who followed “national not party principles” and who could “*defy the world*” and tell the politicians where to get off.<sup>285</sup>

##### 5. *Supreme Court Appointment Not a Political Payoff*

It is easy to conclude—if one believes that Postmaster General McLean was supporting the election efforts of Andrew Jackson while claiming loyalty to President Adams and the administration—that Jackson's appointment of McLean to the Supreme Court was a political payoff. However, that is not the case. Pulitzer Prize-winning historian Samuel F. Bemis states “John McLean of Ohio had been the efficient but treacherous and double-dealing Postmaster General in Adams's Administration; he received his reward when the Old Hero came into office and appointed him to the Court.”<sup>286</sup> Bemis is drawing a modern-day conclusion, not reporting a fact otherwise established. His view that the appointment was a “reward” is incorrect. Other historians have perpetuated this error, even in recent years.<sup>287</sup>

Even President John Quincy Adams himself did not view the matter in that light. John Quincy Adams recorded in his diary on February 25, 1829, that “President Jackson's Cabinet is arranged.”<sup>288</sup> He lists “J. McLean, Postmaster-General.”<sup>289</sup> On March 4, 1829, “Andrew Jackson . . . was

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283. *Id.* at 22.

284. *Preface* to THE DIARY OF JOHN QUINCY ADAMS, *supra* note 79 (“published by Charles Francis Adams in twelve large volumes between 1874 and 1877.”).

285. Editorial, *supra* note 12.

286. BEMIS, *supra* note 17, at 406.

287. See REMINI, *supra* note 218, at 109.

288. 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 99.

289. *Id.*

inaugurated as President . . . .”<sup>290</sup> But on March 6, 1829, Adams recorded that Mr. Southard “first informed me that Mr. John McLean, the Postmaster-General, was nominated a Judge of the Supreme Court of the United States—a totally new arrangement, made within the last two days—and Mr. Barry, of Kentucky, Postmaster-General.”<sup>291</sup> Finally, Adams recorded on March 10, 1829, “The Cabinet is now complete: . . . McLean is made a Judge of the Supreme Court to set him aside. He declined serving as the broom to sweep the post office.”<sup>292</sup> Leonard Baker, a biographer of John Marshall, explained that “McLean was put on the Court by Andrew Jackson to get him out of the cabinet because he would not play the kind of politics the President was interested in.”<sup>293</sup> Jackson wanted a postmaster who would clean house to make way for political appointments.<sup>294</sup> To the victor belong the spoils. Rev. Sprague explained above the circumstance to which McLean owed his Supreme Court appointment.

These diary accounts of John Quincy Adams are consistent with other records, including McLean’s claim that he told Jackson that he would be unwilling to discharge competent employees and that he told him further that, contrary to any reports he had heard, he had not worked to secure his election as President.<sup>295</sup> While selecting his cabinet, Jackson sent for McLean to determine “whether or not he was willing to remain in Washington.”<sup>296</sup> McLean “replied that, as the preliminary to any conversation on that subject, he desired to explain that, if the General had been led in any manner to believe that the patronage of the Post Office Department had been used to advance his election, he was entirely mistaken.”<sup>297</sup>

Justice Story’s letter to William Fettyplace makes this clear as he continues and explains:

The truth is, that a few days since, he told the new President, that he would not form a part of the new Cabinet, or remain in office, if he was compelled to make removals upon political grounds. The President assented to this course, but the governing ultras were dissatisfied, and after much debate and discussion, Mr. McLean

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290. *Id.* at 105.

291. *Id.* at 107.

292. *Id.* 109-10.

293. BAKER, *supra* note 22, at 703.

294. *Id.*

295. See WEISENBURGER, *supra* note 4, at 55.

296. VERITAS, *supra* note 38, at 13.

297. *Id.*; see also, JOHN LIVINGSTON, PORTRAITS OF EMINENT AMERICANS NOW LIVING; WITH BIOGRAPHICAL AND HISTORICAL MEMOIRS OF THEIR LIVES AND ACTIONS 64 (New York 1854).

remaining firm to his purpose, they were obliged to remove him from the Cabinet, and to make the matter fair, to appoint him (not much to his will) a Judge.<sup>298</sup>

The comments of John Quincy Adams and Joseph Story should put to rest any suggestion that McLean's appointment was a political payback. It was not. He was "promoted" to the Supreme Court to clear the way for a new Postmaster General who would clean house and create openings to be filled by Jacksonian spoil seekers.<sup>299</sup> McLean's successor at the Post Office did clean house and replaced hundreds of postal employees.<sup>300</sup>

## II. FATHER OF THE 14TH AMENDMENT

### A. Background

Justice McLean's dissent in *Dred Scott* has long been regarded as inferior in legal and professional workmanship to the dissent of Justice Benjamin R. Curtis.<sup>301</sup> Professor David P. Currie of the University of Chicago Law School described Justice Curtis's dissent as "one of the great masterpieces of constitutional opinion-writing, in which, calmly and painstakingly, he dismantled every argument of his variegated adversaries."<sup>302</sup> In referring to Justice Curtis's adversaries, Professor Currie was speaking of the justices who were in the majority in the *Dred Scott* case.<sup>303</sup> Indeed, the professor continues by quoting from the Curtis dissent one of his favorite statements on constitutional interpretation:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.<sup>304</sup>

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298. 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 19, at 564.

299. *Id.*

300. See 3 BARTLETT & WOODWARD, *supra* note 220, at 361.

301. See *Dred Scott*, 60 U.S. 393.

302. David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 737-38 (1983).

303. Currie, *supra* note 302, at 737-38.

304. *Id.* at 739 (quoting *Dred Scott*, 60 U.S. at 621 (Curtis, J., dissenting)).

Professor Currie, in a footnote to his description of Justice Curtis's dissent as a great masterpiece, explains that therefore he refers repeatedly to the Curtis dissent rather than to "McLean's pedestrian counterpart."<sup>305</sup> He then quotes Professor Weisenburger, a non-lawyer and McLean's biographer, who described the Curtis dissent as "much the abler."<sup>306</sup>

Similarly, Julius J. Marke, the noted legal historian and law librarian at the New York University School of Law, dismissed McLean's dissent as "of little importance, for he was seeking a presidential nomination and mainly used it as a sounding board for his political views."<sup>307</sup> Marke praised Justice Curtis's dissent.<sup>308</sup> Professor Earl M. Maltz stated that, "McLean's opinion, however, was not tightly reasoned and was rather clearly designed to advance his presidential ambitions; thus, Curtis has been most often portrayed as the embodiment of judicial virtue in *Dred Scott*."<sup>309</sup> Professor Maltz pointed out that Curtis differed from McLean's position that "all native-born free persons were citizens . . ." and maintained "that each state had the authority to decide (at least as an initial matter) which of its native-born residents should be considered citizens of the United States."<sup>310</sup> Maltz noted "Curtis's analysis of the citizenship question fell far short of advanced antislavery positions. First, under his theory, if a black was born in a state that would not consider him a citizen, he could never achieve that status."<sup>311</sup> Professor Maltz noted this important deficiency in the Curtis dissent (by the standards of some).<sup>312</sup> However, Curtis's dissenting opinion remains generally superb in its lawyerlike and professional response to each of Chief Justice Taney's arguments.

### B. *McLean's Statesmanlike Dissent*

McLean's dissenting opinion has a statesmanlike simplicity to it. Professor Paul Finkleman, a noted authority on slavery, said that McLean's dissent "was in many ways more powerful and thoughtful than the more

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305. *Id.* at n.272.

306. *Id.* (quoting WEISENBURGER, *supra* note 4, at 203).

307. JULIUS J. MARKE, *VIGNETTES OF LEGAL HISTORY* 100 (Frederick B. Rothman & Co. ed., 1965).

308. *Id.* at 100.

309. Earl M. Maltz, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography: Slavery and the Constitution: the Unlikely Hero of Dred Scott: Benjamin Robbins Curtis and the Constitutional Law of Slavery*, 17 *CARDOZO L. REV.* 1995, 1995 (1996).

310. *Id.* at 2009; see Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 *ARIZ. ST. L.J.* 1135, 1138 (1996) (citing *Dred Scott*, 60 U.S. at 404).

311. Maltz, *supra* note 309, at 2009.

312. *Id.*

famous dissent of Justice Benjamin R. Curtis. Moreover, it was more firmly grounded in antislavery theory.<sup>313</sup> McLean had decided slavery cases as an Ohio Supreme Court Judge and as a Supreme Court Justice for the United States.<sup>314</sup> He had also decided cases dealing with immigration, including *The Passenger Cases*.<sup>315</sup> McLean had served for more than six years with John Marshall, the great Chief Justice, and with the scholarly Justice Joseph Story for a longer period.<sup>316</sup> In his dissent, McLean seems to demonstrate some of the statesmanship-like qualities of Marshall that made that jurist's opinions so memorable.<sup>317</sup> Chief Justice Burger has spoken of Marshall's great "building block" cases that laid the foundation for many of the most enduring principles of our democracy.<sup>318</sup> McLean's dissent can be considered a building block dissent. However, it provided the foundational analysis of the 14th Amendment rather than the legal analysis needed for a later Supreme Court decision to overrule *Dred Scott*.<sup>319</sup> As a functional expression of statesmanship and political wisdom, Justice McLean's dissent can be viewed as a great constitutional masterpiece that would lead to the overturning of *Dred Scott*, not by a later decision of the High Court but through the constitutional process of amendment.<sup>320</sup> The *Encyclopaedia Britannica* notes "[h]is [dissent] was reflected in the Fourteenth Amendment to the U. S. Constitution (1868)."<sup>321</sup>

Some of Justice McLean's values can be seen in his words commemorating Chief Justice John Marshall, who died July 6, 1835:

The Court feel[s] great satisfaction in directing that the proceedings of the members of the bar, on this melancholy occasion, shall be placed upon their record. It is the highest respect which we can show, officially, to the memory of that exalted citizen, whose loss we all deplore.

For more than six years, I have had the honor to be intimately associated with the deceased, in the discharge of public duties; and

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313. Paul Finkleman, Symposium, *Practitioner's Guide to the 1998-1999 Supreme Court Term: You Can't Always Get What You Want . . . : Presidential Elections and Supreme Court Appointments*, 35 TULSA L.J. 473, 479 (2000).

314. Anderson, *supra* note 113, at 102-05.

315. *Smith v. Turner*, 48 U.S. 283 (1849).

316. WEISENBURGER, *supra* note 4, at 153.

317. *See generally Dred Scott*, 60 U.S. 393 (McLean, J., dissenting).

318. *See Burger*, *supra* note 2, at 391.

319. *John McLean, United States Jurist*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/355057/John-McLean> (last updated Nov. 16, 2011).

320. *See id.*

321. *Id.*



this has been more than sufficient, to give me the highest admiration and respect for his eminent qualities, professional, intellectual and moral.

This is not the place nor the occasion, to speak at large of those great talents, and of that elevation of character, which, in the station he occupied, secured to him, beyond that of any other individual, the public confidence. His monument is seen in the judicial history of this country; and it is as imperishable as are those great principles, which, in so distinguished a manner, he contributed to establish. He has fallen, and though he has fallen ripe in years and full of honors, yet his whole country will lament the loss—the profession will lament it—and most of all will the loss be felt and deplored by those who were associated with him on that bench, of which he was the distinguished ornament.<sup>322</sup>

Certainly, the “Great Chief Justice” had a profound impact on John McLean.

### C. Religious and Moral Values

McLean’s strongly-religious outlook was held in check by his fidelity to the law. Professor Paul Finkleman, in discussing McLean’s view that “no earthly power [had] a right to interpose between a man’s conscious and his Maker[,]” believes McLean’s belief applied only to private matters.<sup>323</sup> Professor Finkleman quotes McLean’s instruction to a grand jury where he explained in his charge:

[G]eneral rules have been adopted, in the form of laws, for the protection of the rights of persons and things. These laws lie at the foundation of the social compact, and their observation is essential to the maintenance of civilization. In these matters, the law, and not conscience, constitutes the rule of action.<sup>324</sup>

McLean separated religion from the judicial process just as he also separated politics from the judicial process.<sup>325</sup> For all their allegations of politics as too weighty a factor in McLean’s life, his critics have pointed to

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322. 1 N.C. MCLEAN, *supra* note 5, at 556-57.

323. Paul Finkleman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of “Justice Delayed,”* 78 IOWA L. REV. 89, 116 (1992).

324. Finkleman, *supra* note 323, at 116 (quoting *Norris v. Newton*, 18 F. Cas. 322, 326 (1850)).

325. *Id.* at 115-16.

no specific instance of politics affecting any of his judicial decisions. No critic has accused McLean of reaching a decision in any particular judicial case on the basis of politics, or of deciding a case to benefit a political friend or to injure a political enemy. One critic faulted McLean for his *Dred Scott* dissent by suggesting that the dissent itself was issued to help secure the Republican presidential nomination for McLean.<sup>326</sup> That opinion, a contemporaneous one, lacks the shared perspective of today that the two dissents in the *Dred Scott* case were noble judicial pronouncements. Certainly, no one would fault Justice Curtis's dissent by suggesting that it was politically motivated, designed to enhance his presidential aspirations, or devised to enhance his private law practice should he leave the Court and return to practice. The idea that McLean's dissent was designed to promote his presidential ambitions may have started in the Taney camp as a simple effort to disparage his opinion and bolster the opinion of the Chief Justice.<sup>327</sup> The *Dred Scott* case was decided March 6, 1857, just a few days before McLean turned 72. At that age he must have been cognizant that he was beyond the age when he could be elected President.

#### D. *The Fugitive Slave Act, Racism, and the Constitution*

McLean's perspective on the Fugitive Slave Act<sup>328</sup> explains much of his thinking. He noted in 1853 that no court had found the 1793 law unconstitutional despite widespread abhorrence of slavery in northern states and despite widespread abhorrence of slavery by many of the judges deciding cases involving fugitive slaves.<sup>329</sup> In another article, Professor Kaczorowski quoted Justice McLean as stating that the Constitution's Fugitive Slave Clause "was deemed so important, that, as a matter of history, we know the constitution could not have been adopted without it."<sup>330</sup>

Justice McLean looked upon the Fugitive Slave Clause as essential to the adoption of the Constitution and the creation of our nation.<sup>331</sup> In order to form a united nation, the North had agreed to accept the abhorrent

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326. WEISENBURGER, *supra* note 4, at 197.

327. See KENNETH B. UMBREIT, OUR ELEVEN CHIEF JUSTICES: A HISTORY OF THE SUPREME COURT IN TERMS OF THEIR PERSONALITIES 240-41 (Harper & Bros. ed., 1938).

328. 2 Cong. Ch. 7, 1 Stat. 302 (1793).

329. Robert J. Kaczorowski, Symposium, *Federalism in the 21<sup>st</sup> Century: Historical Perspective: The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 KAN. L. REV. 1015, 1027-28 (1997).

330. Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153, 243 n.92 (2004) (citing *Giltmer v. Gorham*, 10 F. Cas. 424, 432 (C.C.D. Mich. 1848)).

331. *Id.* at 243.

institution of slavery in the south and had agreed to return to their Southern owners slaves who had fled to free states.<sup>332</sup> The compact between the North and the South was elevated to constitutional status and could not lightly be ignored or overruled.<sup>333</sup> Once again, Justice McLean saw importance in divorcing his personal opinions and abhorrence of slavery from his sworn duty to uphold the Constitution and the laws of the United States.<sup>334</sup> The compact, entered into by the North and the South, was therefore an essential part of the Constitution.<sup>335</sup> Religious beliefs and personal opinions, no matter how strongly held, are not a basis for ignoring the plain statement of the law. During the judicial process, McLean was able to divorce himself from his strongly-held personal beliefs on slavery, just as Justice Benjamin N. Cardozo was able to segregate his personal opposition to the death penalty from his decision-making duties on capital cases.<sup>336</sup> Cardozo and McLean followed the law rather than their own personal beliefs. The ability to do that is essential to good judging.

Even so, McLean seemed compelled to respond with religious conviction in his dissent to the racist arguments of the Chief Justice.<sup>337</sup> The often-quoted language that Chief Justice Taney used to describe Americans of African descent is offensive to modern readers.<sup>338</sup> The language of Chief Justice Taney was part of the rationale for Charles Evans Hughes to describe the case as a “self-inflicted wound.”<sup>339</sup> Chief Justice Taney wrote:

They had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.<sup>340</sup>

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332. See *Dred Scott*, 60 U.S. at 546-47 (McLean, J., dissenting).

333. See *id.*; see Kaczorowski, *supra* note 330, at 178-83.

334. See *Dred Scott*, 60 U.S. at 546-47 (McLean, J., dissenting).

335. See *id.* at 556-58.

336. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 93-95 (1931); Paul Brickner, *Benjamin N. Cardozo: A Fresh Look at a Great Judge*, 11 OHIO N.U. L. REV. 1, 3 (1984).

337. See generally *Dred Scott*, 60 U.S. 393, 529-51 (McLean, J., dissenting).

338. See *id.* at 427 (majority opinion).

339. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928).

340. *Dred Scott*, 60 U.S. at 407.

In dissent, McLean could speak out as he chose, much more openly than if he were writing a majority opinion for the Court. He broke from his conviction that religious beliefs should be kept out of judicial opinions and answered Taney's racism with a memorable line.<sup>341</sup> Had McLean been writing for the Court or a majority, a different set of dynamics would have been at work. Professor David M. O'Brien quotes McLean on the operation of the Court in days gone by:

Before any opinion is formed by the Court, the case after being argued at the Bar is thoroughly discussed in consultation. Night after night, this is done, in a case of difficulty, until the mind of every judge is satisfied, and then each judge gives his views of the whole case, embracing every point of it. In this way the opinion of the judges is expressed, and then the Chief Justice requests a particular judge to write, not his opinion but the opinion of the Court. And after the opinion is read, it is read to all of the judges, and if it does not embrace the views of the judges, it is modified and corrected.<sup>342</sup>

In dissent, without the restraints that would restrict him were he writing for the Court or for a majority of the justices, McLean answered Taney with succinct wisdom that expressed his profound religious convictions: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."<sup>343</sup>

Taney supporters may have been the first to propose that McLean, in his dissent, spoke not as a jurist, not as a man of conviction, but as a presidential aspirant.<sup>344</sup> This take on the dissent was intended to bolster the importance of Chief Justice Taney's opinion and to diminish the significance of the McLean dissent.

#### *E. Resolution of Ohio's Legislature*

The Ohio Legislature quickly resolved against the majority opinions of the Supreme Court in the *Dred Scott* case by adopting a resolution on April

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341. *See id.* at 550 (McLean, J., dissenting) (stating "[a] slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.").

342. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 150 (W. W. Norton & Co. ed., 3rd. ed. 1993).

343. *Dred Scott*, 60 U.S. at 550 (McLean, J., dissenting).

344. *See generally* WEISENBURGER, *supra* note 4, at 197.

17, 1857.<sup>345</sup> Of course they favored the position expressed by the Ohioan, Justice McLean, more so than the position of the Massachusetts native, Justice Curtis.<sup>346</sup> The resolution expressed regret over the decision of the Court as penned by Chief Justice Taney and described as repugnant certain slavery-related doctrines expressed by him, including the concept of slaves as mere chattel.<sup>347</sup> It continued:

That in the judgment of this General Assembly, every free person, born within the limits of any state of this union is a citizen thereof, and to deny to such person the right of suing in the courts of the United States, in those cases where that right is guaranteed by the Constitution to all citizens of the United States, is a palpable and unwarrantable violation of that sacred instrument.<sup>348</sup>

Justice McLean's health would begin to fail in a few years. He died in 1861, but the seeds of wisdom that he had planted in his memorable dissent would be carried forward by others.<sup>349</sup> The Ohio resolution tells us that the dissent had been noticed by prominent persons.<sup>350</sup>

#### F. Fourteenth Amendment, Section 1

Section 1 of the 14th Amendment provides, quite simply, that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>351</sup>

Justice McLean had written in his *Dred Scott* dissent “[b]eing born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is ‘a freeman.’”<sup>352</sup> He later discussed naturalization and stressed that the Constitution gave Congress the exclusive power “to establish a uniform rule of naturalization.”<sup>353</sup> Congress, not the states, determines who is a naturalized citizen.<sup>354</sup> Here McLean differed

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345. *Ohio on the Dred Scott Decision*, in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 296 (Herman V. Ames ed., 1906).

346. *See Ohio on the Dred Scott Decision*, *supra* note 345, at 296.

347. *Id.*

348. *Id.*

349. Anderson, *supra* note 113, at 105.

350. *See Ohio on the Dred Scott Decision*, *supra* note 345, at 296.

351. U.S. CONST. amend. XIV, § 1.

352. *Dred Scott*, 60 U.S. at 531 (McLean, J., dissenting).

353. *Id.* at 533.

354. *Id.*

from Justice Curtis.<sup>355</sup> McLean states the power of naturalization is “intimately connected with our Federal relations.”<sup>356</sup> Following the passage of the 13th Amendment, all Americans were free.<sup>357</sup> The 14th Amendment continues:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny too any person within its jurisdiction the equal protection of the laws.<sup>358</sup>

In 1995 one author wrote:

*Dred Scott* fanned the fires that eventually led to the Civil War. When the war was won, McLean’s dissent was virtually written into the Constitution as the Fourteenth Amendment. Thus a single dissenting opinion from his pen may have done more to direct the course of American history than his three decades of casting in the troubled political waters of presidential politics for a prize that forever eluded him.<sup>359</sup>

We can wonder why it has taken so long for McLean to be credited with providing the foundation or rationale for the 14th Amendment. Part of the explanation is that he died in 1861, immediately before the outbreak of the Civil War.<sup>360</sup> He was not around at the end of the war to advocate or to advise those who were seeking to frame the Civil War Amendments.<sup>361</sup> In addition, the war diverted attention from the dissenting opinions.

However, there were others who could and did carry on the principles that McLean helped establish.<sup>362</sup> For example, the Ohio Legislature adopted the resolution quoted above.<sup>363</sup> Professor Alexander Bickel, the noted Yale Law School authority on constitutional law, pointed out that Representative John A. Bingham, an Ohio Republican, was responsible for the amendment’s phrase, “privileges [and] immunities.”<sup>364</sup> He also notes that

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355. *See id.* at 531; *see also id.* at 588 (Curtis, J., dissenting).

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

357. U.S. CONST. amend. XIII, § 1.

358. U.S. CONST. amend. XIV, § 1.

359. Anderson, *supra* note 113, at 105.

360. *Id.*

361. *Id.* *See also* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

362. *See* Anderson, *supra* note 113, at 101-05 (discussing McLean’s aspirations, majority and dissenting opinions, and accomplishments for the principles he established).

363. *See Ohio on the Dred Scott Decision*, *supra* note 345, at 296-97.

364. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 40-41 (1975).

Justice Miller stated in the *Slaughter-House* cases that the main purpose of the citizenship definition of the 14th Amendment was to overrule Taney's decision and "to establish the citizenship of the negro."<sup>365</sup>

Another reason may be the simplicity with which he spoke in his dissenting opinion. John Quincy Adams said it so well: "In most of the inspirations of genius, there is a simplicity, which, when they are familiarized to the general understanding of men by their effects, detracts from the opinion of their greatness."<sup>366</sup>

The greatness of McLean's dissent lies in the fact that he stepped away from unrestricted legalese and slipped into his statesman mode of thinking. The idea that every free person born in the United States is a citizen both of the national government and of the state of his or her residence appears so simple and obvious that it provokes no argument.<sup>367</sup> He was not merely concerned with the case before him, but with the law as it related to the good of the nation.<sup>368</sup> Charles Evans Hughes, the brilliant legal scholar who left the Supreme Court to run for president and later returned to the Court as Chief Justice, provides an interesting and frequently-quoted insight into dissenting opinions that seems especially applicable to John McLean.<sup>369</sup>

Dissenting opinions enable a judge to express his individuality. He is not under the compulsion of speaking for the court and thus of securing the concurrence of a majority. In dissenting, he is a free lance. A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.<sup>370</sup>

The individuality that McLean expressed drew on his family origins and vast public and private experience in government, business, and the law.<sup>371</sup> He understood immigration, its importance, and the importance of naturalization.<sup>372</sup> His dissenting opinion mentioned postal offices, public

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365. *Id.* at 43 (citing *The Slaughter-House Cases*, 83 U.S. 36, 73 (1873)). See also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L. J.* 57 (1995).

366. JOHN QUINCY ADAMS, *THE LIVES OF JAMES MADISON AND JAMES MONROE* 31 (Phillips, Sampson & Co. et al. eds., 1850). Adams had used the same language in 1836 in his Eulogy for James Madison. ADAMS, *AN EULOGY*, *supra* note 256, at 23.

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

368. See generally *id.* at 529-64.

369. See HUGHES, *supra* note 339, at 68; *Politics and Public Service 1862-1948*, U.S. HISTORY.COM, <http://www.u-s-history.com/pages/h1347.html> (last visited Oct. 28, 2011).

370. HUGHES, *supra* note 339, at 68.

371. See generally *Dred Scott*, 60 U.S. at 529-64 (McLean, J., dissenting); see also Anderson, *supra* note 113, at 101-05.

372. See *Dred Scott*, 60 U.S. at 531-32 (McLean, J., dissenting).

lands, legislative enactment, judicial cases involving slavery, Lord Mansfield, and Lord Hardwicke.<sup>373</sup> He even breached his own wall of separation between religion and judicial business when he responded to the notoriously-racist statements of Chief Justice Taney.<sup>374</sup>

The accusations of some critics that McLean was too political miss their target when we consider McLean's influence on the 14th Amendment. Once the 13th Amendment's abolition of slavery took effect, McLean's thinking was unfettered.<sup>375</sup> His approach reflected not a narrow lawyerlike outlook, but rather the outlook of a politician and statesman, the kind of outlook that was needed to create and draft a major constitutional amendment.<sup>376</sup> His approach provided an easily-envisioned symmetry. If the national government, not the states, had the power under the Constitution to naturalize aliens, it made no sense to allow the states to strip some of those naturalized aliens of citizenship because of race or ancestry.<sup>377</sup> In his analysis, Justice John McLean displays the analytical abilities that make the great legal geniuses of our age, Judge Richard A. Posner and Professor Akhil Reed Amar, so impressive. They compare, contrast, and juxtapose words and struggle over their meaning until clarity is achieved. They make it seem so simple, "the inspirations of genius . . . ."<sup>378</sup> They make complexities comprehensible and then the greatness of what had seemed too complex "detracts from the opinion of their greatness."<sup>379</sup>

As to slavery and citizenship, there were three positions, all expressed in *Dred Scott*.<sup>380</sup> First, there was the Chief Justice Taney position that blacks could not be citizens because of the racist reasons he expressed.<sup>381</sup> Second, there was the position of Justice Curtis that the states determined who could be citizens.<sup>382</sup> Finally, there was the opinion of Justice McLean that all free persons born in the United States are citizens of the United States and the states in which they reside.<sup>383</sup> As the Ohio Legislature's resolution shows, it did not take long for the McLean opinion to be accepted

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373. *See id.* at 533-36, 539.

374. *See id.* at 549-50.

375. *See id.*; *see also* U.S. CONST. amend. XIII, § 1.

376. *See Dred Scott*, 60 U.S. at 529-64 (McLean, J., dissenting).

377. *Id.* at 533.

378. *See* 8 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 15, at 31.

379. *See id.*

380. *Dred Scott*, 60 U.S. 393.

381. *See id.* at 393-529.

382. *See id.* at 588 (Curtis, J., dissenting).

383. *See id.* at 529-88 (McLean, J., dissenting).



in some quarters.<sup>384</sup> In others, no doubt, it required more time to percolate. In time, McLean's opinion won out in the market place of ideas.

## V. CONCLUSION

Justice John McLean was a politician and a man of integrity—a rare bird in the eyes of today's general public, a public skeptical of politicians. He was driven to succeed and was a hard worker throughout his life. As a jurist, he seems underrated. He understood our democracy, the Constitution, and the foundations established by the great Chief Justice, John Marshall, with whom he served for several years.<sup>385</sup>

The antipathy of John Quincy Adams seems, in retrospect, to have been an aberration in the life of John McLean. His own claim that he had done no political favors for Andrew Jackson is indirectly corroborated by Rev. Sprague's eulogy.<sup>386</sup> He even explains, attributing it to McLean's words, that he was elevated to the High Court because of his unwillingness to discharge postal employees for "mere partisanship . . ."<sup>387</sup> Jackson placed McLean on the Court so that he could achieve his goal of gathering up the "spoils" of his election victory by replacing McLean as Postmaster General.<sup>388</sup> Like Adams, he did not want to remove McLean because of his popularity and because of his competence in office.

The Post Office was a major governmental entity in those days. Thomas Jefferson wrote to McLean after Jackson's election to ask that he establish a postal facility or "deposit" at the University of Virginia campus.<sup>389</sup> The students used the mails as an excuse to go into town every day, a distance of one mile.<sup>390</sup> The sage of Monticello explained that "besides the time wasted in the walk, they are liable, when there, to get into irregularities inconsistent with the college regulations and injurious to themselves."<sup>391</sup> Was Jefferson primarily interested in keeping the students from injurious irregularities or was he merely seeking a patronage position for a friend? He concluded the letter by recommending the appointment of Arthur S. Brockenbrough, Proctor of the University as postmaster for the

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384. See *Ohio on the Dred Scott Decision*, *supra* note 345, at 296-97.

385. WEISENBURGER, *supra* note 4, at 153.

386. See generally SPRAGUE, *supra* note 9, at 17. "I could not have inferred from any[thing] he said what political party had the best right to claim him—he seemed to me to be a man by himself,—towering far above all parties; devoted to, and yet well-nigh despairing of, the perpetuity of his country's liberties." *Id.* at 22-23.

387. *Id.* at 22.

388. BAKER, *supra* note 22, at 703-04.

389. Letter from Thomas Jefferson, *supra* note 6.

390. *Id.*

391. *Id.*

University.<sup>392</sup> Of course, as founder of the university, Jefferson always looked out for the school's best interests.<sup>393</sup> As to the answer to the question, McLean knew.<sup>394</sup>

In his eulogy for James Monroe, a magnificently-crafted tribute to the late President that can be considered a masterpiece, McLean expresses high regard for the President who appointed him to two important government positions.<sup>395</sup> He recalls favorably a time when he (McLean) hired someone to a postal position other than the person who was likely favored by Monroe.<sup>396</sup> Monroe assured him that he had no problem with the appointment, since Congress had given the Postmaster General, not the President, the appointing authority over these positions.<sup>397</sup> McLean states:

In the use of patronage, that most delicate and important branch of executive power, Mr. Monroe was governed by those enlarged and elevated views required by the interests of his country. The utmost deference, in making appointment, was paid to public sentiment; whilst at the same time, irreproachable character and high qualifications were indispensable requisites.<sup>398</sup>

One senses that these are the kind of observations McLean would have liked others to say about him. After all, there is common wisdom in Jerome Frank's observation that "[a] biography is often an unconscious autobiography."<sup>399</sup>

Finally, the pallbearers at John Quincy Adams' funeral included none other than Justice John McLean.<sup>400</sup> It is difficult to interpret that appearance. It may demonstrate that he did not know of Adams' strong negative feelings toward him. It may have meant that he was a well-adjusted individual who knew of those feelings but harbored no resentment

392. *Id.*

393. *Id.*; see also *Founding of the University*, U. OF VA., <http://www.virginia.edu/uvatours/shorthistory/> (last modified Aug. 3, 2010).

394. See 3 BARTLETT & WOODWARD, *supra* note 220, at 361 (discussing Jefferson's familiarity with Post Office patronage).

395. See JOHN MCLEAN, AN EULOGY ON THE CHARACTER AND PUBLIC SERVICES OF JAMES MONROE, LATE PRESIDENT OF THE UNITED STATES: DELIVERED IN CINCINNATI, AUGUST 27, 1831, IN COMPLIANCE WITH AN INVITATION FROM THE CITIZENS 25 (1831).

396. MCLEAN, AN EULOGY, *supra* note 395, at 25-26.

397. *Id.*

398. *Id.*

399. Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 693 (1957) ("[s]o Learned Hand, purporting to describe Harlan Stone, instead described Learned Hand.").

400. TOKEN OF A NATION'S SORROW: ADDRESSES IN THE CONGRESS OF THE UNITED STATES, AND FUNERAL SOLEMNITIES ON THE DEATH OF JOHN QUINCY ADAMS WHO DIED IN THE CAPITOL AT WASHINGTON 39 (1848).

towards Adams. Or it may mean that he served out of respect for the office of President, despite differences with the person.

We have become accustomed to regarding the giants of the law as those Justices whose decisions become the building-block cases and landmarks in the law, or whose dissenting opinions become, in time, majority opinions of the Supreme Court in important issues. The great decisions of Chief Justice John Marshall and the compelling dissents of Justices Holmes and Brandeis are prime examples of our current thinking. But in the case of Justice John McLean, his dissent brought us down the path of the law not by a later judicial decision but by an amendment to the U.S. Constitution. McLean's dissenting opinion in *Dred Scott* that led to the 14th Amendment has the same importance to the law as a dissent that led to the overruling of a major Supreme Court decision. His opinion achieved greatness not as a work of precise legal analysis, but because of its statesmanlike qualities based on a lifetime of acquired wisdom. For this achievement, Justice John McLean has earned the right to be recognized as one of our leading American jurists.