The U.S. Supreme Court and Minority Races

Leslie Friedman Goldstein
Political Science, University of Delaware, and Visiting Scholar Fordham Law School.

Introduction

Alexander Hamilton, urging his fellow New Yorkers to ratify the pending U.S. Constitution in the summer of 1788, wrote that people need not fear the provision for lifetime tenure of Supreme Court justices: such tenure would keep the justices independent from majoritarian political pressures, thereby enabling them both to stand firm in defense of the constitutional rights of the individual and of the "minor party," and also to "mitigat[e] the severity" of "unjust and partial laws" that operate with harshness on "particular classes of citizens" but do not amount to an "infraction[] of the Constitution." [1] Justice Joseph Story in his magisterial *Commentaries on the Constitution*, published while he served on the Court, similarly justified independence of the judiciary from electoral politics:

> "There can be no security for the minority in a free government, except through the judicial department….[I]n free governments, where the majority who obtain power for the moment, are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one…..In free governments …the independence of the judiciary …is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence, acquired under accidental excitements, to overthrow the institutions and liberties which have been the deliberate choice of the people."[2]

Alexander Hamilton, himself one of the founders of the Abolition Society of New York, could not have been unaware of the racial dimension of the matter of minority rights. Justice Story while on the Court participated in several important cases involving slaves, a quintessential example of an oppressed minority. Outside

[1] *Federalist Papers* #78.

[2] *Commentaries on the Constitution of the United States* section 833 abr. (Section 1606 orig.) (Carolina Academic Press, 1987, repr. of 1833.) Thanks to William Ford for this reference.

of his judicial role he consistently expressed the view that slavery was an unjust and immoral institution, and within his judicial role he did the same for trade in slaves.[3]

The U.S. Supreme Court is both notorious for having issued the dictum that under the Constitution of this country, "[The black man] had no rights which the white man was bound to respect,"[4] and famous for having declared the unconstitutionality of *de jure* segregated public schools, a system that harmed black children because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[5] These well-known judicial pronouncements show the Court first re-entrenching (indeed, arguably exacerbating) the majority's oppression of a racial minority, and the second, the Court fighting against it, as Hamilton and Story predicted the Court would. Which is the more apt, or more typical, picture of the Court's tendencies over the course of U.S. history? Has the judicial branch, staffed by lifetime appointees intended to be immune from political pressures, in fact as a general matter served to protect the rights of the "minor party" more typically than the elected branches have? That is the answer this book aims to uncover. And if Hamilton and Story were correct, or if they were mistaken, which aspects of U.S. institutions explain why?

White British settlers established the first British colony in North America at Jamestown, Virginia in 1607. They were preceded here by French to the north and Spaniards to the south, not to mention the native Americans, who preceded all of the Europeans. By the time of the British landing, the European diseases to which indigenous people had been exposed for a hundred years had already decimated perhaps as many as ninety percent of the natives, known as Indians to the

---

[3] Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975), 238-243; Roper 1969, 532. For instance, at a public meeting in Salem in 1819, Story insisted that the principles of the Declaration of Independence and the spirit of the Constitution demand that Congress ban slavery in the territories. *Ibid*. As to the slave trade, on circuit in *U.S. v. La Jeune Eugenie,* 26 F. Cas. 832 (1822), Story went on for page after page to condemn it as "breach[ing] all the maxims of justice, mercy and humanity," as involving "corruption, plunder and kidnapping" of "the young, the feeble, the defenceless and the innocent," as "desolate[ing] whole villages and provinces," as resulting in massive numbers of deaths in transit due to the "cold blood[ed]" and "inhuman" treatment of the captives, and as "incurably unjust and inhuman." 26 F.Cas., 845-848.

[4] *Dred Scott v. Sanford,* 60 U.S. 393, 407 (1857).

[5] *Brown et al. v. Board of Education et al*., 347 U.S. 483, 494 (1954).

Europeans.[6] In 1619, blacks too were brought to Jamestown, and initially were treated as indentured servants, who were freed after their period of servitude. Only in the second half of the seventeenth century did laws begin to make sharper distinctions between indentured persons and slaves, and to link slavery specifically to persons of African descent.[7]

By the time of the U.S. Constitution, although several states in the northern U.S. had freed their slaves by legislation, and Massachusetts had done so by judicial interpretation of her state Constitution, slavery was firmly entrenched by law in the majority of states.[8] At some point or other, prior to the Civil War, every single state, along with the federal government, discriminated against blacks in some way.[9]

Because the myriad of law-enforced discriminations in both the pre- and the post-Civil War U.S. discriminated between "white" and "other" people or between white and "colored," questions eventually arose in courts over what counted as "white." Such cases involved not only east Asians, such as Chinese or Japanese people, but also simply darker complexioned people such as Mexican-Americans, people of India, Afghans, Filipinos, Syrians, Lebanese, and Armenians. This book aims to explore the rights of racial minorities, as so perceived by the Supreme Court, in order to judge whether the constitutional project of establishing judicial review to be exercised by judges with lifetime appointments as a protection for the "rights of the minor party" has succeeded, as weighed against the behavior of the more popularly accountable branches.

---

[6] R.M. Smith 1997, 520, n.30. Historians previously estimated 50%, but the more recent consensus is toward ninety percent.

[7] Higginbotham 1978, 21-22. Finkelman 1986, 1.

[8] Completing the post-Revolutionary-War trend of abolition in the states north of Delaware, New York in 1799 and New Jersey in 1804 adopted legislation that freed the slaves but did so quite gradually. By 1830, more than 3500 (elderly) blacks remained in slavery in the North, two thirds of them in New Jersey. Litwack 1961, pp. 3 and 14.

[9] *Ibid*., passim. Some examples were white preferences for the militia, segregated schools, laws against miscegenation (interracial marriage), laws imposing on blacks stiffer property qualifications for voting, and laws requiring of blacks proof of freedom and a posted bond in order to enter the state (The latter went unenforced).

Of course, the case can be made that each of the branches to one degree or another is "undemocratic," but there can by no doubt that the federal judiciary has less of institutionalized accountability to the electorate than the other two branches do. All but the two top members of the executive bureaucracy is appointed rather than elected, but the two at the top do face election; the Chief Justice does not. Similarly, Congressional staff members, who are unelected, have great influence over the legislation of the land, but, again, at least their bosses do have to stand for re-election. Have these facts mattered in the way they were expected to? This book aims to uncover the answer.

CHAPTER ONE 1789-1861

The Elected Branches

One year after the Bill of Rights was ratified, the Congress of the United States adopted the Uniform Militia Act (1 Stat. 271), requiring that every free, able-bodied *white* male citizen between the ages of eighteen and forty-five enroll in the national militia and supply himself with a proper weapon and ammunition (emphasis added.) Prior to this law many states had allowed blacks into their state militias (although some did not, a tradition dating to the colonial period), and the meritorious service of black soldiers during the Revolutionary War was still a relatively fresh memory. Even with the federal law in place, many states, North and South, ignored the racial restriction (if it was meant as a restriction, rather than simply as a minimum membership) and enrolled free blacks in their militias, especially during times of invasion.[10]

But militia discrimination was not the whole story. In 1790 Congress limited access to naturalization for U.S. citizenship to whites, a limit that it re-enacted in 1802 with the phrase "free white persons." Senator Charles Sumner after the Civil War failed in his attempt to have the word "white" removed from this statute. Instead Congress modified it in 1870 by adding to whites the permission for naturalization of "aliens of African nativity and to persons of African descent" (pointedly, albeit silently, excluding Chinese).[11]

---

[10] Cottrol and Diamond 1991, 331-333.

[11] Lyman 1991, 204; Nieman 1991, 20.

In 1810 Congress forbade blacks to be postal carriers, and in 1820 authorized the *white* citizens of the District of Columbia to create a municipal government and to adopt legal codes governing blacks and slaves.[12] Congress specifically authorized the District government to ban meetings of free blacks at night and to use whippings in the punishment of slaves.[13]

In most states (including in the South) free blacks had been allowed to vote in the late eighteenth century.[14] In the 1830s, as pro-slavery sentiment heated up (see below), a number of these states cut back on black suffrage rights, and the newly admitted states were not extending the vote to blacks (with Oregon adding Chinese to the unenfranchised category).[15] By the time of the Civil War, the number of states allowing blacks to vote had fallen to five.[16]

Some states even barred entry by free blacks, although these laws went unenforced.[17] On some occasions, but not on others, the Attorney General of the U.S. refused to U.S.-born, free blacks the right to passports or to apply for publicly available land, on the grounds that they were not U.S. "citizens" in the full legal sense.[18]

The judicial system in the country, too, was infected with racial subordination. Several northern states refused to allow blacks to testify against a white person, and only Massachusetts allowed blacks to serve on juries.[19]

---

[12] R.M. Smith 1997, 175; Nieman 1991, 20.

[13]

[14] Blacks were "clearly prohibited" from voting, as of 1790, in only three states Virginia, Georgia, and South Carolina. (email from Paul Finkelman, 11/11/2005).

[15] R.M. Smith 1997, 105-6 and 215; Nieman 1991, 28. New Jersey took the vote from blacks in 1807, and Connecticut did so in 1808.

[16] Litwack, 1961, 91. These were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont.

[17] *Ibid*., 67-74.

[18] R.M. Smith 1997, 258; Graber 2006, 29, n.84.

[19] Litwack 1961, 93-94.

As to unfree blacks, as the country was a mix of slave states and free states, the Constitution and pre-Civil War legislation show a mixed record. The Constitution omitted any explicit mention of slaves or slavery, a stylistic choice that James Madison's notes claimed to be a reflection of a deliberate effort to avoid entrenching the institution of slavery in the constitutive document of a free republic.[20] On the other hand, the Constitution notoriously contains serious compromises with the institution. (1)The slave states were given a representation bonus by counting each slave as an extra 3/5 of a person, instead of as zero (as might have been appropriate, since they had zero say in who governed them). This fact meant that the voters in the Southern slaveholding states were given a boost both in clout in the House of Representatives (moving their numbers to 46% of the total rather than the 41% it would have been) and in the Electoral College, whose numbers were pegged to Congressional membership.[21] (2) Congress was forbidden to ban the international importation of slaves prior to 1808. In that year the Congress did enact the ban. (3) Article IV, §2, cl.3 says "No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." (Incidentally, each of these clauses refers to slaves as "persons," never as "property," so if the Constitution were read literally, the Fifth Amendment due process clause would have freed all slaves in federal jurisdictions.)

Congress did re-enact the prohibition on slavery in the Northwest Territory (which had been in place under the Articles of Confederation) and in 1794 ban the export or international transport of slaves. In negotiating the Jay Treaty the executive branch did abandon the demand, desired by many slaveowners, that Britain pay reparations for slaves she had freed during the Revolutionary War. On the other hand, Congress permitted slavery in the District of Columbia and in the federal territory that later became Kentucky, Tennessee, Mississippi, and Alabama, and in 1793 enacted a Fugitive Slave Law. This law arranged for the recapture of slaves, even though the relevant constitutional clause said nothing of federal power, but simply prohibited state laws from releasing slaves and ordered nameless parties to "deliver up" such runaways "on claim" of a party to whom service was owed. The 1793 federal law ordered local justices of the peace to issue a warrant allowing a purported slave-owner (or his agent) who had captured a

---

[20] Farrand, *Records,* 2:417.

[21] Nieman 1991, 11. See also Paul Finkelman, "The Proslavery Origins of the Electoral College," *Cardozo Law Review* 23:1147- .

particular person to remove that person from the state (to take back to slavery) whenever that purported owner could present certification that he had sworn before his home justice of the peace that he owned a particular runaway. Under this federal law the black person accused as a slave had no right to testify or to be defended by an attorney against the claim of ownership.[22]

What had been basically a mixed picture evolved after 1820 to one in which the proslavery forces increased their influence in all three branches of government. Southerners (probably due to the increased importance of cotton in the regional economy) became more intransigently pro-slavery, while abolitionist and anti-slavery sentiment grew more widespread and more intense in the north. Southerners claimed that abolitionist essays might stimulate slave revolts (even though teaching a slave to read was a crime in most of the slave states[23]), and this argument convinced President Andrew Jackson to have the national postmaster authorize local postmasters (federal employees) to destroy anti-slavery tracts rather than allow them through the mails, in flagrant contravention of existing federal law and the First Amendment's freedom of press clause. The House of Representatives from 1836 through 1844 observed a "gag rule" to forbid the reading aloud of, or discussing, petitions against slavery, despite the right "to petition government for redress of grievance" enshrined in the First Amendment.[24] The House in the early 1840s, in the context of a controversy over the Southern imprisonment of free black sailors while they were stationed in the South, voted to reject a committee's resolution, which resolution would have declared, in effect, that free (native-born) blacks had rights as citizens of the United States.[25]

Presidents with Senate confirmation appointed Supreme Courts that from the beginning contained a dominant presence of justices from the South—twenty of the thirty-five appointed prior to the Civil War came from slave states.[26] How these appointments played out in Court decisions is detailed in the section below.

---

[22] R.M. Smith 1997, 142-143; Nieman 1991, 15-17.

[23] R.M. Smith 1997, 219.

[24] Nieman 1991, 16.

[25] Nieman 1991, 22-24.

[26] Graber 2006, 116.

In 1850 Congress did ban the slave trade from the District of Columbia but also adopted the Fugitive Slave Act. The latter responded to the moves by several northern states legislating to forbid their own judges to cooperate with the 1793 Fugitive Slave Act. The paucity of federal judges was making slave recapture increasingly difficult. The 1850 Act thus created hundreds of federal officials (commissioners) who would hear the claims of slave-owners in quest of runaways. If the owners showed a home-state-court-issued certificate of loss of a runaway slave, the commissioner was obliged to appoint marshals to help in the recapture and these could in turn demand assistance from bystanders. Once caught, the accused black had no right to testify or to an attorney, and commissioners received ten dollars for every "guilty" finding but only five dollars if they exonerated the person accused of being a runaway.[27] In the Kansas-Nebraska Act of 1854 Congress for the first time allowed slavery (according to the will of the people voting in the territory, or "popular sovereignty") into the territory of Kansas and Nebraska, from which it had been barred in the 1820 Missouri Compromise.

The Supreme Court Cases

"Feelings that Might Seduce It from the Path of Duty" -- The Marshall Court and Slavery[28]

It is within this context of widespread anti-black sentiments formalized into law throughout the U.S. and the post-1820s intensified polarization of opinion on slavery that the Supreme Court decisions are best assessed. The racial discriminations (against free blacks) prevalent in state and federal law did not in the antebellum years produce any Supreme Court cases.[29] The most prominent of

---

[27] R.M. Smith 1997, 259 and 262; Nieman 1991, 30.

[28] Quote is from John Marshall in *The Antelope*, 23 U.S. 66, at 114 (1825).

[29] They did produce some circuit court cases, e.g. *Elkison v. Deliesseline*, 8 F.Cas. 493 (1823) (Justice Johnson declaring unconstitutional on commerce clause grounds a South Carolina law that imprisoned free persons of color who worked on ships that landed in South Carolina for the duration of the ship's stay, and according to which, if the ship abandoned them there, they would be sold as slaves); and *The Wilson v. U.S.*, 30 F.Cas.239 (1820) (Justice Marshall declaring on rather tortured reasoning that the Virginia law meant to keep free Negro seamen imprisoned while docked, did not apply to the seamen "of color" in question) .

the antebellum slavery cases concerned fugitive slaves, but these did not reach the Supreme Court until the chief justiceship of Roger Taney. By the 1820s, the absence of procedural protections for the accused in the 1793 and later in the 1850 Fugitive Slave Act angered many northerners. Several northern states began to intervene, both by legislating procedural protections for the accused runaway and ordering their own judges and sheriffs not to cooperate with the slave-chasing enterprise. These clashes between federal and state authority would eventually produce two well-known Supreme Court decisions in the two decades preceding the Civil War: *Prigg v. Pennsylvania* (1842), and *Ableman v. Booth* (1857).

Although slaves were mentioned in the Court's first important decision, *Chisholm v. Georgia* (1793) in the context of being the only persons in the U.S. who did not share in equal rights of citizenship,[30] the Supreme Court took no slavery cases as such until after 1801 (the same year that John Marshall became chief justice). This was the year that Congress adopted the extant slave law of Virginia and Maryland for the parts of their territory that became the District of Columbia. In many of its earliest slave cases, the Supreme Court's role was that of highest appellate court applying the law of this territory. Prior to 1801, other than in *Chisholm*, the only mention of slaves in Supreme Court decisions occurred in lists of types of property. In these listings, slavery was not singled out as warranting special treatment (apart from the mandate regarding taxes in the three-fifths clause) nor was it presented as involving special moral issues.[31]

During the Marshall Court years issues concerning slavery arose in the following contexts: (1) property disputes between white people over particular

---

[30] *Chisholm v. Georgia*, 2 U.S. 419 (1793) at 471-472: The statement is, "[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens…" The Court's implication here that free blacks were equally free citizens contrasts with Congress's untroubled assertion in 1820 that whites in DC were authorized to impose special restrictions on free blacks (See above, text at n.13.), and with the Court's notorious 1857 remark in *Dred Scott* to the effect that free blacks in the U.S. had no rights (See above, text at n.5.)

[31] *Hilton v. U.S.*, 3 U.S. 171 (1796); *Ware v. Hylton*, 3 U.S. 199 (1796); *Wiscart v. Duchy*, 3 U.S.321 (1796). The decision by Marshall in 1803, *Hamilton v. Russell*, 5 U.S. 309, similarly, simply lists the slave as chattel along with "other personal property" that was in dispute. 5 U.S., at 315. Marshall continued this practice of dealing with slaves as it dealt with other property in various property disputes that came before him, e.g. *Ramsay v. Lee*, 8 U.S. 401 (1807); *Spiers v. Willison*, 8 U.S. 398 (1807).

slaves, which the Court handled according to rules that would have applied to other chattel property; (2) lawsuits by slaves claiming their freedom on one or another ground, and (3) questions of criminal law once federal law banned the export[32] and import of slaves. If one puts aside those cases where the Court was simply settling property disputes over who owned which chattel, and focuses on the cases involving slavery as such (i.e., on the latter two categories), what comes into view is a picture of a Court considerably less opposed to slavery, at least for the first sixteen years, than one might expect based on the public pronouncements of Justice Story or the privately expressed detestation of slavery of Chief Justice Marshall.[33] It is even more puzzling if one accepts the assessment of historian Donald Roper that in terms of private sentiments a majority of the Marshall Court opposed slavery: two, strongly (Story and McLean); and two (Marshall and Washington) at least, "tepidly," in the sense of "wish[ing] it would go away."[34]

Whereas some biographers tend to single out various dicta or rulings where John Marshall's opinions helped slaves toward freedom,[35] in fact, as Table One below reveals, he or his Court rather often sealed the enslavement in question, EVEN in cases that were reasonably contestable to the degree of (1)producing a non-unanimous vote on his own court, (2)provoking a written dissent in the Supreme Court, (3)overturning a circuit court reading to the contrary (in favor of

---

[32] E.g., *Adams v. Woods*, 6 U.S. 336 (1805), dealt with the application of the federal statute of limitations (on criminal penalties) to someone accused of engaging in the forbidden export of slaves.

[33] E.g., "Nothing portends more calamity & mischief to the southern states than their slave population; Yet they seem to cherish the evil…" 1826 letter to Thomas Pickering, cited in Rudko 2001, at 79-80. Marshall himself owned a small number of slaves throughout his life, and also bought them, and gave and received them as gifts. At the end of his life, he freed one in his will and bequeathed the others. He lobbied privately and publicly for a program of voluntary emancipation to be funded by the federal government which would then "colonize" (which he understood as repatriate) the freed slaves in Africa. Rudko 2001, 77-79.

[34] Roper 1969, 534. He does not say where the others fell. McLean did not join the Court until 1829. Justice Duvall (who joined in 1811) was sufficiently antislavery to argue in dissent that "the right to freedom is more important than the right of property." *Mima Queen v. Hepburn*, 11 U.S. 290, 299 (1813). Justice Johnson, who joined the Court in 1804, angered the southern public by insisting on due process for slaves charged in the Denmark Vesey uprising. Roper, 533-4.

[35] An example of this practice occurs in Jean Edward Smith 2000, 1123-1126

freedom), (4)presenting an argument of the (indirectly electorally accountable) U.S. Attorney General to the contrary, or (5)involving a statute that if read literally would have freed the slave, but where the Court constructed a legal argument elaborate enough to produce an anti-freedom result. (These indicia of legal contestability are noted in bold in the table). Moreover, the Marshall Court was inconsistent in its fidelity to the relevant state common law when it came to applying the slave code of the District of Columbia adopted from the states of Maryland and Virginia, varying its approach so as both times to produce a pro-slavery result. In one instance the Marshall opinion for the Court, when interpreting the D.C. law on slavery that governed the formerly Maryland part of the District, substituted its own judgment as to prudent law rather than follow a particular common law rule of Maryland on hearsay, which common law rule had produced a decision freeing the slave.[36] (This court opinion provoked Justice Duvall, of Maryland, to author the only dissenting opinion of his life). Then, in a later decision where following the plain meaning of Virginia statutory law for the formerly Virginia part of the District had caused a jury to set free a slave, the Supreme Court announced itself relieved that it had discovered a Virginia (i.e. common law) precedent to follow (from 1818, 17 years after Congress had adopted the Virginia law as part of the DC code) which resulted in reversing the judge's instruction to the jury and thereby the jury's decision.[37] In light of this degree of available latitude at the edges in these cases, one must conclude that the Marshall Court was clearly paying attention to more than the sometimes-cited common law maxim that statutes are in doubtful cases to be construed "*in favorem libertatis.*" And one must certainly question Kent Newmyer's 1969 explanation of this body of decisions: "The Marshall Court did not have substantial lawmaking discretion in the slavery cases."[38]

Other scholars, and Newmyer himself in a detailed reconsideration thirty years later, have produced a variety of explanations for the degree to which this Court, a majority of whose members opposed slavery "attitudinally" (as the contemporary jargon of political science would phrase it) produced so many proslavery decisions. Historian Donald Roper was the first to analyze the topic, and he concluded that internal division on the Court as to the morality of slavery, compounded by fear of antagonizing Congress into restricting its jurisdiction and

---

[36] *Mima Queen v. Hepburn,* 11 U.S. 290 (1813).

[37] *Mason v. Matilda,* 25 U.S. 590, at 592 (1827).

[38] Newmyer 1969, 540-544.

by the Court's own strong commitment to property rights, caused the Court under Marshall to hide behind the posture that it was obliged to apply the objectively discovered law in favor of slavery, even in cases where the law on the subject was contestable and open to meliorative interpretation.[39] Newmyer, in a biography-length reconsideration of the subject revised his earlier critique of Roper far enough to acknowledge that there was some "indeterminacy in the common law of slavery" that would have permitted Marshall "to extend the area of freedom," and that he often chose not to.[40] Still, he insists (as anyone would grant) that political and legal forces did constrain the Court in terms of the big picture; the Court could not simply announce, "We believe that slavery is wrong and therefore will no longer uphold it." So one is discussing here amelioration at the edges; producing decisions that free particular slaves, that uphold and facilitate punishment of illegal traders in slaves, that facilitate judicial demonstration by one held in slavery that the situation is unlawful, or that facilitate voluntary manumission. In response to the query, "Why did the Marshall Court not do more in this direction?" Newmyer retreats to the view that the Court did feel bound both by commitment to property rights and to a federal system that left control of slaves to each state. He also flirts with the possibility that Marshall's very public involvement in the colonization movement (as president of his local chapter from 1823 until his death, and a lifetime member of, and big donor to, the American Colonization Society, beginning in 1819) is more properly read as an expression of a racist desire to rid America of blacks than of Marshall's "intellectual opposition" to slavery.[41]

By contrast, law professor Frances Rudko aligns with Marshall biographer Jean Edward Smith in reading Marshall as one who genuinely "hated" the institution of slavery as a moral and social evil, and sees him as having believed the best approach to fighting it was by promoting Congressional financial support for colonization as the only realistic hope for creating incentives for voluntary manumission. Marshall believed that such a program could be effective at least in large portions of the upper South, and would be fair – Rudko depicts it as an early nineteenth century version of "forty acres and a mule." Thus she reads Marshall as basically temporizing in those decisions that strengthened slavery, while he worked

[39] Roper 1969, 532-539.

[40] Newmyer 2001, 426

[41] Ibid. 414-434; on colonization, 419-423. On Marshall's active involvement in colonization, Rudko 2001, 84.

diligently off the bench toward the goal of having Congress deliver the U.S. from this evil.[42]

Table One below, a systematic compilation of all the slavery cases that came before the Marshall Court, is presented in an effort to sort through these competing interpretations. The Table makes apparent two things. (1) As already noted, most of these cases did present a legally respectable alternative to whichever holding ended up winning over the Court. (2) The Court observably changes direction around 1816-1817. Out of a total of 29 cases, eleven go in an anti-liberty direction. All but one of these occurs prior to 1817. Eleven of the decisions move the law in a pro-liberty direction (the other seven producing mixed results or one without an obvious direction regarding liberty). The pro-liberty decisions ALL occur in or after 1817.

It is not obvious what causes this change. One candidate for explanation is that the cases that begin in 1817, much more typically involve the slave trade, where Congressional sentiment has been clearly expressed. In 1807, Congress first outlawed the importing of slaves, with a law to take effect after December 31. It reiterated and refined this law in 1818. In 1819 it changed the law's disposition of captured slaves; instead of allowing states to sell them off, they had to be turned over to the President to be returned to Africa, and Congress appropriated $100,000 therefor. In 1820, Congress declared it piracy to seize or decoy any "negro or mulatto" from Africa into slavery or onto a boat intended for the slave trade and imposed the death penalty therefor.[43]

Still, this explanation does not cover all the cases; there are a couple of early cases on the slave trade, with respect to the 1794 law banning export or foreign transport of slaves on U.S. vessels, and the Marshall Court responds leniently toward the accused slave trader. Also there are cases regarding the freeing of individual slaves in the 1816-1835 period where the Court produces a pro-freedom decision, something it never did before 1817.

Another possibility is that because the so-called Marshall Court comprised several different natural courts, it was the personnel change that produced the shift of decisions. Duvall joined the Court in 1811 and Story in 1812. No one joined

---

[42] Rudko 2001.

[43] James Kent, Commentaries I: 179-187 (1826). Slave Trade Act of March 3, 1819, U.S. Statutes At Large, Vol.III, Fifteenth Congress, Session II, Ch.101, pp.532-534.

between1812 and 1823. Perhaps the post-1816 Court was a product of the fact that the seven personalities on the Court needed a few years to gel as a group around the new personnel mix, which now included the relatively ardently anti-slavery Justice Story.

Finally, there is the possibility that the shift has something to do with colonization policy. The American Colonization Society was founded in 1816[44] or 1817.[45] John Marshall "was involved in it almost from its beginning," according to Frances Rudko, having in 1819 signed up for a lifetime membership and become in 1823 local chapter president (which he remained throughout his life). Justice Bushrod Washington was the national president of the ACS in 1819. It is certainly conceivable that for the judicial votes of these two morally troubled slaveowners, being able to conceive of a way to set the slaves free without imposing millions of unlettered black people on Southern society was what freed up their consciences to rule in more pro-liberty ways from 1817 on.

Whichever of these explanations eventually carries the day, it seems clear from this systematic look at the Marshall Court's slavery decisions that something definitely changed around 1816-1817. This something is worth further scholarly exploration. The core details of the rulings from these cases that raise these questions about the Marshall Court and slavery appear in the table below.

KEY TO TABLE ONE:

1) The direction column uses a plus sign for pro-freedom rulings and a minus sign for anti-freedom rulings.

2) Bold indicates some element of contestability in Court ruling.

3) Where opinion author not noted, it is Chief Justice John Marshall.

[insert Table One here : MARSHALL COURT SLAVERY CASES]

[44] Newmyer 2001, 419.

[45] Rudko 2001, 84.

REFERENCES

Cottrol, Robert J. and Raymond T. Diamond. 1991. "The Second Amendment: Toward an Afro-Americanist Reconsideration," *Georgetown Law Journal* 80:309-361.

Farrand, Max, ed. 1911. *Records of the Federal Convention of 1787*. 3 Volumes. New Haven: Yale University Press.

Finkelman, Paul. 1986. *The Law of Freedom and Bondage*. New York: Oceana Press.

Graber, Mark. 2006. *Dred Scott and the Problem of Constitutional Evil*. New York: Cambridge University Press.

Higginbotham, A. Leon. 1978. *In the Matter of Color: Race and the American Legal Processs: The Colonial Period*. NewYork: Oxford University Press.

Jordan, Winthrop. 1968. *White Over Black: American Attitudes Toward the Negro 1550-1812*. New York: Norton.

Kent, James. 1826. *Commentaries*. (FILL IN).

Litwack, Leon. 1961. *North of Slavery*. Chicago: University of Chicago Press.

Lyman, Sanford. 1991. "The Race Question and Liberalism: Casuistries in American Constitutional Law," *International Journal of Politics, Culture, and Society* 5: 183-247.

Newmyer, Kent. 1969. "On Assessing the Court in History: Some Comments on the Roper and Burke Articles," 21 *Stanford Law Review* 540-547.

------. 2001. *John Marshall and the Heroic Age of the Supreme Court*. Baton Rouge: Louisiana State University Press.

Nieman, Donald G. 1991 *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present*. New York: Oxford University Press.

Roper, Daniel.1969. “In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery,” 21 *Stanford Law Review* 532-539.

Rudko, Frances Howell. 2001. “Pause at the Rubicon, John Marshall and Emancipation: Reparations in the Early National Period?” 35 *J. Marshall L. Rev*. 75-89.

Jean Edward Smith 2000. “Marshall Misconstrued: Activist? Partisan? Reactionary?” 33 *J. Marshall L. Rev*. 1109-1129

Smith, Rogers M. 1997. *Civic Ideals: Conflicting Visions of Citizenship in U.S.History*. New Haven: Yale University Press.

Story, Joseph. 1987. *Commentaries on the Constitution of the United States*. Durham: Carolina Academic Press, repr. of 1833.

1805	Adams v. Woods, 6 U.S.336	U.S. statute of limitations interpreted so as NOT to impose penalty on illegal exporter of slaves.	Answer to Q. from divided Circuit panel. **Against U.S. Att'y. Gen.**	-
1805	U.S. v. Schooner Sally, 6 U.S.406	Ct. rejected plea of U.S. to decide case by stricter rules of the common law rather than maritime and admiralty law, and thus refused to reverse the acquittal for engaging in slave export contrary to U.S. law of 1794.	Affirmed district and circuit court decisions. **Against U.S. Att'y Gen.**	-
1806	Scott v. London, 7 U.S.324	D.C. (originally VA.) statute requiring new residents to take oath within sixty days of intent to reside and not to import slaves, without which slaves of new residents would be set free after one year in the state, is relaxed to allow heir to take the oath after father neglected to but before one year had elapsed.	**Reverses** circuit court. **Opinion speaks for "Majority of the Court."** No recorded dissent.	-
1810	Scott v. Ben, 10 U.S. 1	Accepted that procedures listed in statute banning import of slaves to D.C. (originally MD.) for proving qualification under exceptions (for owner moving into state with own slaves) were not the exclusive means by which lawful importer of slaves could prove lawfulness of import.	**Reverses** circuit court.	-
1810	Brigantine Amiable Lucy v. U.S., 10 U.S.330	U.S. 1803 statute forbidding importation of slaves into any state that shall have banned such importation, and 1804 one extending this statute to the territory of LA., and forbidding importation of slaves into Orleans territory except by bonafide new residents for own use, interpreted to PERMIT importation of slaves into Orleans because territorial legislature created in 1805 had not acted to ban the import.	**Reverses** district court, **Against U.S. Att'y. Gen**.	-
1812	Wood v. Davis I, 11 U.S.271	Responded to suit for freedom by the offspring of Susan Davis. Suit claimed that previous judicial determination of Davis's freedom on the grounds that she was born of a white mother rendered her own offspring free. Wood argued that prior decision had settled the law only as to her freedom not as to her birth. Supreme Court sides with Wood.	**Reverses** circuit court.	-

1813	Mima Queen v. Hepburn, 11 U.S.290	Rejected common law rule that had prevailed in MD. (for D.C.) to allow hearsay of hearsay when facts at issue were so ancient that direct witnesses no longer alive to testify.	Upholds circuit court **5-1 against district court. (Duvall dissents.)**	-
1813	Brig Caroline v. U.S., 11 U.S.496	Reversed a sentence of forfeiture of the ship as a slave trader, because original version of the charge—the "libel"--was too vague to justify forfeiture but sent the case back to Circuit Court to allow the libel (formal charge) to be amended.	Reversed circuit court but remanded for amended charge.	+/-
1815	Brig Alerta v. Moran, 13 U.S.359	Slavetrading ship belonging to a Cuban Spanish national (for whom the slave trade was lawful) had been captured by a privateer commissioned in France, at war with Spain, and where slave trade was not lawful. Prior to the capture the capturing vessel had put in at New Orleans for repairs and had augmented its crew with U.S. residents. Because U.S was neutral in the French-Spanish conflict, use of such augmented crew for a capture of "cargo" (i.e., cargo of 150 slaves) violated U.S. law and law of nations. (There was no likelihood, Court noted, that the French privateer planned to free rather than sell the slaves.) Court orders the slaves returned to their Cuban Spanish owner.	Affirmed circuit court. Opinion by Justice Washington; Justice Todd absent.	-
1816	Negress SALLY HENRY v. BALL, 14 U.S. 1	Ruled that DC [formerly MD] law banning importing out-of-state slaves but exempting bonafide new resident owners bringing own slaves and also owners on temporary sojourns, would also exempt someone who for a seven month period employed a slave owned by a Virginian, Ball, but then repossessed by Ball, taken back to Virginia, and then brought anew into DC.	Affirmed circuit court decision.	-

1816	Davis v. Wood II, 14 U.S. 6	(1)Reaffirms hearsay rule of Mima Queen. (2)Rules that prior judgment as to ancestor's freedom cannot be treated as evidence of offspring's freedom.	Affirmed circuit court.	-
1817	Beverly v. Brooke, 15 U.S.100	Master of ship who had hired 3 slaves, from whom slaves had escaped while docked in Liverpool, England (where slavery is unlawful), did not owe compensation for the escape to owner who had hired out the slaves, because the hiring contract implied such risks.	Affirmed circuit court.	+
1820	The Josef Segunda 18 U.S. 338	Ruled that pursuant to U.S. law banning slave importation after 1807, ship and cargo including 175 slaves, captured by commissioned privateers of Venezuela from Spain (and therefore property of the privateer due to ongoing war between Venezuela and Spain) that had then unlawfully entered waters of Louisiana must be forfeited to U.S., with the slaves delivered to overseers of the poor in the port where ship confiscated or other persons appointed by state for this purpose.	Affirmed district court. Opinion by Justice Livingston.	+
1823	The Mary Ann 21 U.S. 380	Reversed decree ordering forfeiture of slave-transporting ship for violating federal law requiring documentation of all "Negroes, mulattoes and persons of color" on board, on grounds that the libel from the district attorney had neglected to charge that the ship weighed forty tons or more, but remanded to allow the decree to be so amended.	**Reversed** decision of district court. **Against U.S. Att'y. Gen.**	-/+
1824	The Emily and Brig Caroline, 22 U.S. 381	(1) Charge for violating U.S. law forbidding export or import of slaves (because under admiralty law) did not require the formality and technical precision of an indictment at common law. (2) The offense of preparing a ship	Affirmed decrees of district and circuit court. By Justice Thompson.	+

		for the slave trade can be proved before the ship is completely sea-ready, so long as the intent is clearly manifest. (3) Thus the two ships at issue were forfeited to the U.S.		
1824	The Merino, The Constitution, and The Louisa, 22 U.S. 391	(1) As to The Merino and The Louisa (U.S. vessels attempting to transport Spanish slaves from one Spanish port to another), the charge against them is not supported by the evidence but the evidence shows that they did violate other sections of U.S. slave-trade laws, so decree is reversed and remitted so that the libel against them may be amended to accord with the evidence.* (2) The decree condemning and ordering forfeited the cargo and vessel of The Constitution (a similar boat and activity) is upheld except as to the 84 slaves on board. (3) The 84 slaves go back to their Spanish owners who held them lawfully in Spanish territory; had the boat capturing them been a commissioned vessel capturing a U.S. boat engaged in transporting slaves from one foreign place to another (as was true of The Merino and The Louisa), then the slaves would be forfeited to the U.S., along with the rest of the cargo. Since The Constitution was captured first by a non-commissioned boat, to be brought to court so the captain could sue to be awarded the slaves, but then while not engaged in the slave trade was captured by a U.S. revenue boat and only then (i.e. not while engaged in slave trade) taken to court, the owners may retake their slaves from The Constitution. Situation is governed	Reversed and remitted for amended charges to district court on The Merino and Louisa libels (implying approval of amended charge with sentence of forfeiture of slaves, cargo and ships). Upheld decree as to forfeiture of ship and cargo **of The Constitution**, but **as to its slaves, reversed decree and returned those slaves to Spanish owners.** By Justice Washington. As to slaves on The Constitution, **against the U.S. Att'y. Gen. as to return of**	+/-

		by the 1800 law which forfeits the slaves only if their owners had an economic interest in the boat or the voyage.	**slaves.**	
1825 Mar.14	The Plattsburgh, 23 U.S. 133	Slave-trading schooner seized by U.S. ship of war off coast of Africa must be forfeited to U.S. because, despite ruse of a purchase by Spaniards in Cuba in mid-voyage (where boat was fully equipped for slave trade), voyage originated in Baltimore with manifest intent to continue to Africa, and U.S. crew stayed on boat to Africa. These facts made voyage violate U.S. law.	Affirmed District and Circuit Court. By Justice Story.	+
1825 Mar.15	The Antelope, 23 U.S. 66	Spanish vessel that had been captured by a (piratical) U.S. crew from Spanish owners, and that held the surviving remnant of 25 Africans captured from a U.S. slaver, and of a total of 255 slaves from a Portuguese slaver and from the original Antelope crew, now having been captured by U.S. revenue cutter in U.S. coastal waters was in U.S. court for violation of U.S. law, with Spanish and Portuguese consuls in court demanding return of the slaves to their respective countries, and claiming that they were lawfully owned property under their laws. (Preceded by 1822 decision on circuit by Story, *La Jeune Eugenie*, where French consul had intervened re: captured French slaver, and U.S. President had also intervened in aid of French consul. Story had ruled that French slave trader vessel seized on high seas by U.S. commissioned vessel in peacetime would have been tortiously seized only if the vessel seized were not involved in piracy, but that slave trading must count as piracy since it was unlawful	U.S. Attorney General is arguing for freedom of all surviving slaves, c.180; circuit court had freed only 16. Supreme Court frees eventually 80%, and turns over to the Spanish government to distribute to the proven owners the 20% whose owner could clearly identify and prove ownership of them. **Partly against U.S.Att'y Gen., but not as much as**	+/-

		under laws of the country of the boat seized. Boat and cargo [including slaves] returned to France for adjudication. Additional dictum: slave trade is by now contrary to the law of nations and therefore always piracy UNLESS permitted by laws of particular sovereign governments; alleged slave trader has burden of proof to show this permission.) Rules slave trade NOT *contra* law of nations (rejecting Story's dictum), since so many states allowed it within modern times (even though the recent trend is outlawing it), but grants that it is *contra* the law of nature. Slavetrade vessel is engaged in piracy ONLY if ITS government so rules. Only such ships may be seized on high seas and if so will be turned over to own courts for trial. U.S.treaty requires return to Spain of [slave] property captured by U.S. pirates. Court says in this case, "The sacred rights of liberty and property come in conflict with each other." Court says since **it IS (equally) DIVIDED as to whether all these slaves should be returned**, it will follow principles set forth by the circuit court. Spanish government claims 150 slaves were theirs but, Supreme Court adds, they bear the burden of proving specific ownership. Hearings eventually reduced the returned Spanish slaves to 20% of the total. No proof of Portuguese owners has come forth in five years since capture. Supreme Court rules all other surviving slaves are free.	**Circuit Court was**.	
1825	The Joseph Segunda II, 23 U.S. 312	Boat forfeited and sold as per the 1820 decision, had its slaves sold pursuant to Louisiana law adopted	CIrcuit court decision awarding	0

		to carry out the U.S.1807 law against slave trade. Louisiana law gave ½ proceeds from the slave sale to the "commanding officer of the capturing vessel," and other half to a charitable hospital. Court read the ambiguous U.S. law as implying that (1) a federal district court had jurisdiction to decide who received the proceeds under state law; (2) under the state law the "commanding officer of the capturing vessel" had to be one who followed up on the seizure by prosecuting the case in federal court and also had to be an officer of U.S. "armed vessel or revenue cutter." (This decision was superseded by the re-worded 1818 (April 20) U.S. law, which awarded ½ the forfeiture proceeds to whomever prosecuted the ship as a slaver.)	one half the proceeds of sale of slaves to man who prosecuted the libel was overturned. The money from ship and its contents remained with U.S. government. [Disposition of money from sale of slaves not clarified until 1830 decision, Segunda III.] By Justice Story (with U.S. Att'y. Gen.)	
1827	Mason v. Matilda, 25 U.S. 590	D.C. (originally VA.) statute requiring new residents to take oath before a magistrate within sixty days of move to the state, declaring intent to reside and not to import slaves, without which slaves of new residents would be set free after one year in the state is here interpreted as NOT applying to set free slaves who had been held in VA. part of D.C. for more than twenty years without any evidence that owner had ever taken the required oath. Undoes decision of jury below that Matilda et al. are free. Rules that twenty years possession of a slave should be viewed as creating a "presumption" that the oath was taken, so judge's instruction to jury erred.	**Reverses decision of county court of D.C.** ; re-enslaves Matilda et al. , who had been declared free by the jury of that court, following judge's instructions as to meaning of the law. Opinion by Johnson.	-

1827	U.S. v. Gooding, 25 U.S. 460 [future Justice Taney att'y for defense]	Federal criminal prosecution of slave trader challenged as to validity of the indictment. Supreme Court "**express[ed its] anxiety, least, by too great indulgence to the wishes of counsel, questions of this sort should be frequently brought before this Court, and thus, in effect, an appeal in criminal cases become an ordinary proceeding to the manifest obstruction of public justice, and against the plain intendment of the acts of Congress" [at 467-468],** and ruled unwarranted six of defense counsel's objections ([1]to admissibility of testimony from the captain of the slaver vessel, [2]to admissibility of testimony from a mate the captain tried to hire, [3] to the indictment of the ship's owner for "aiding and a betting" slave trade on the basis of actions and testimony of the ship's captain without prior conviction of the captain, [4]to indictment for equipping a ship intended for the slave trade without proving that it had been fully equipped in the U.S. or [5]that the owner had been present during the equipping, and [6]to failure to specify detailed acts of equipping the boat instead of equipping it in general); and ruled two as valid ([1] sloppy wording on failure to say "intent to employ the ship in slave trade," and [2]charging as a crime the mere sending out from a U.S. port of a boat intended for slave trade, as distinguished from there equipping it as such—on this point Story admitted he had erred in two prior circuit court decisions – and noted that he was differing from the U.S. Att'y. Gen. but noted that the AG's position would	Answered questions certified from **circuit court** due to a **division of opinion** there, prior to its decision. Result: three of the indictments fatally defective but four still valid. **Against argument of U.S. Attorney General** on convicting a ship for merely setting forth from U.S. port to engage in slave trade. Opinion by Story.	+/-

		[unintentionally] entail guilt for FOREIGN slavers who accidentally landed in a U.S. port and then sailed forth, and that this position followed from the literal words of earlier statutes but had been corrected by Congress in 1818.		
1828	Sundry Slaves v. Madrazo	Undid District and Circuit Court decisions that took 20-30 slaves from governor of state, who was planning pursuant to state law to give them to Colonization Society for delivery to Africa, and that rendered them to the proven Spanish owner (and that gave him the proceeds from additional slaves of his that had been stolen by U.S. pirates and then judicially forfeited and sold by Georgia). Reason: since State of Georgia was a party, jurisdiction was original in the U.S. Supreme Court.	**Reversed** District and Circuit Court decisions. **Johnson dissented**.	+
1829	Boyce v. Anderson, 27 U.S. 150	Rejected strict liability standard that applied to common carriers transporting <u>freight</u> --"most skilful and careful management" --in context of carelessness in loss of slaves transported by steamship company, and applied the more lenient standard used for transporting <u>persons</u>, namely, absence of negligence. In opting for the "persons" rule, Marshall avoided arguments made by counsel that the rule should apply because slaves were "intelligent beings" with "power and rights of locomotion and self-preservation." Instead he posed their difference from "inanimate matter" as lying in their having "volition" and "feelings": "In the nature of things, and in his character, he resembles a passenger, not a package of goods."	Affirmed Circuit Court.	+

1829	Le Grand v. Darnall, 27 U.S. 664 [Taney for appellant, urging simply that the law be settled.}	Friendly suit posed issue whether slaveboy of eleven {Darnall], freed by father's will could qualify as free (and thereby legally capable of selling real estate to Philadelphian) under Maryland law that allowed testamentary manumission of only those slaves able to earn a livelihood. In light of undisputed testimony that Darnall at eleven was able to maintain himself by such work as household servant, Court upheld circuit court ruling that he qualified under Maryland law, such that the sale was valid.	Affirmed Circuit Court. Opinion by Duvall.	+
1830	(Josefa Segunda III) U.S. v. Preston, 28 U.S. 57	Att'y Gen. of LA. argued that LA. deserved the proceeds from the sale of slaves on the Josefa Segunda, carried out pursuant to LA. law of 1818, adopted to carry out the U.S. law of 1807. Supreme Court ruled that U.S. law of 1819, adopted while appeals in the case still pending caused the slaves to be ordered rendered to the President for return to Africa. Money paid for them ($68,000) was to be returned to purported purchasers.	**Reversed decree of U.S. district court.** Opinion by Johnson (with U.S. Att'y Gen.)	+
1831	Menard v. Aspasia, 30 U.S. 505	Because of prior treaty with France, 1787 Northwest Ordinance's ban on slavery in NW territory and its later re-enactments by Congress and in the IL.Constitution, had been treated as implicitly exemptlng the slaves owned by the French pre-1787 inhabitants of NW territory. Menard (of French descent in IL) claims that he therefore has right to own Aspasia as the offspring of such a slave. He tried to take her from MO. where they had resided from 1821-1827, back to IL., but she sued for	Court refuses to review pro-freedom decision of Missouri Supreme Court. Upshot is that post-1787offspring of former slaves still being held in IL. can now claim freedom.	+

		her freedom in MO. and won there in both the local and State Supreme Court. U.S Supreme Court denies that it has jurisdiction, since the Missouri decision did not "call into question" the Congressional re-enactment of the Northwest Ordinance, but simply honored its ban on slavery.	Opinion by McLean**.**	
1834	Lee v. Lee	Court ruled that jury instructions below had erred in not allowing jury to consider whether hiring slaves out temporarily in one county of DC before importing them into another had been a fraudulent attempt to evade the DC (formerly MD) law against slave import, as modified in 1812 by Congress to allow moving slaves from one DC county to another. Court divided in half on how strictly to interpret the 1812 act; half would have viewed the act as freeing the slaves in this context.	**Reversed Circuit Court decision and remanded** for new jury instructions. Did NOT free the slaves on point where Supreme **Court split 50-50**. Opinion by Thompson.	+/-
1834	McCutcheon v. Marshall, 33 U.S. 220	Court rejected claim of purported [out-of-state] heirs to slaves set free by will of Tenneseean. Court ruled that Tennesee law was clear in permitting such freeing of slaves (contrary to allegation of heirs). Court ruled that offspring born after death of testator of two to-be-freed women slaves who had not yet reached 21, the age at which these mothers were to become free, remained legally slaves under Tennesee law (although court might rule otherwise "if this were an open question"), but that description of these offspring in the lawsuit was "too vague and uncertain" for court action against their manumission, so lawsuit should be dismissed.	Affirmed decree of Circuit Court, dismissing the lawsuit, with costs. Opinion by Thompson.	+

1835	Fenwick v. Chapman 34 U.S. 461	Court rules that executor of estate erred in allowing orphan's court to sell as slaves two persons who had already been set free under terms of will of deceased Marylander. Maryland law allowed such manumission as long as it was not "in prejudice to creditors." Sale of slaves was unlawful on two grounds: (1) "If an executor permits manumitted slaves to go … free from the death of the testator, it is an assent to the manumission, which he cannot recall any more than he can, after assenting to a legacy, withdraw that assent" [at 475]; and (2) when testator declares will to free slaves, other property, including real estate, must be used to satisfy debts (i.e., orphan's court had erred in attempting to preserve real estate of decedent above freedom of the named slaves.	Circuit Court judgment affirmed, with costs. Opinion by Wayne.	+

*NOTE re: 1824 *Merino* case: These slaves were brought to Alabama for trial. Under 1818 U.S. law, if vessels found in violation, slaves would be dealt with according to law "adopted hereafter" of state where slaves brought in, and slaves in this case had been so rendered to Alabama authorities. Alabama law of 1822 made such slaves labor for the state or else auctioned them to highest bidder. U.S. law changed in 1819 to order such captured slaves free and made U.S. president obliged to arrange transport back to Africa for them. Josefa Segundo III (U.S. v. Preston) made clear that the 1819 change of U.S. law (ordering the slaves to be sent to Africa and freed) took effect upon all decrees still pending in 1819 and thereafter.

Title-- Table One: Marshall Court Slavery Cases

Leslie Friedman Goldstein,
University of Delaware & Visiting Scholar at Fordham Law School.