Maryland Law Review

Volume 67 | Issue 1 Article 13

Slavery and the Marshall Court: Preventing "Oppressions of the Minor Party"?

Leslie Friedman Goldstein

SLAVERY AND THE MARSHALL COURT: PREVENTING "OPPRESSIONS OF THE MINOR PARTY"?

LESLIE FRIEDMAN GOLDSTEIN*

When Alexander Hamilton was defending the life tenure of the federal judiciary on the grounds that it would secure judicial independence under the new Constitution, he argued that such independence from electoral pressures was needed for the judges to fulfill successfully their appointed task of guarding against legislative attacks on the constitutional "rights of individuals" and against "serious oppressions of the minor party in the community."[1] As a member of the New York Manumission Society, Hamilton could not have been unaware of the implications of his argument for black Americans.[2] If any branch of government were going to protect the rights of blacks, Hamilton seemed to suggest, it would be the judges, whose lifetime tenure would protect them against those "ill humors" that might sometimes take hold of popular majorities.[3] Hamilton knew that not every oppressive piece of legislation would be so blatant that it would violate the Constitution, but he hoped and predicted that judicial independence would move the judges to "mitigat[e] the severity and confin[e] the operation of" such "unjust and partial laws" that might "injur[e] . . . the private rights of particular classes of citizens."[4]

This Essay takes a close look at his prediction with respect to the fate of black Americans during the tenure of the Marshall Court, the first Supreme Court to deal extensively with slavery cases.[5] It first locates the Court within the context of what the political branches were doing on matters of race and slavery in order to assess how the judicial branch measured up in light of Hamilton's prediction.[6] In the pro-

---

* Judge Hugh M. Morris Professor of Political Science, University of Delaware. Thanks to my excellent University of Delaware research assistant, Andrew Whitacre, and thanks to Fordham Law School for generously sharing their facilities for my work as a visiting research scholar.

1. THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

2. *See* EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 168 (1966) (discussing Hamilton's involvement with the New York Manumission Society).

3. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 437.

4. *Id.* at 438.

5. *See generally* Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969) (discussing various contexts in which the Marshall Court addressed the issue of slavery).

6. *See infra* Part I.

cess, it uncovers and explores the fact that the Marshall Court appears to have shifted in its treatment of slaves about midway through Marshall's term, around the year 1817.[7] Until 1817 the Court appears to have given priority to firming up the property rights of slave holders where laws applied in arguably ambiguous or debatable ways. From 1817 onward, the Marshall Court often gave priority to liberty, interpreting the laws in pro-liberty directions when the laws spoke ambiguously enough to make this feasible.[8] The Essay then considers possible explanations for why the Marshall Court shifts, and identifies as the most promising explanation the formation of the American Colonization Society in December 1816, of which Justice Bushrod Washington and Chief Justice John Marshall were nationally prominent leaders.[9] Then the Essay returns to the question of assessing Hamilton's prediction.

I. THE EARLIEST AMERICAN LEGISLATION ON RACE AND SLAVERY

White British settlers established the first successful British colony in North America at Jamestown, Virginia in 1607.[10] In 1619, the first Africans known to have arrived in an American colony were (forcibly) brought to Jamestown, and evidence suggests that initially they were treated as indentured servants, who were freed after their period of servitude.[11] 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.[12]

By the time of the United States Constitution, although several states in the northern U.S. had freed their slaves by legislation, and Massachusetts had done so by judicial interpretation of its state Constitution, slavery was firmly entrenched by law in the majority of states.[13] At some point or other, prior to the Civil War, every single

---

7. *See infra* notes 90–92 and accompanying text.

8. *See infra* Table (compiling the slavery cases decided by the Marshall Court).

9. *See infra* notes 104–108 and accompanying text.

10. PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE 1 (1986).

11. *Id.*; A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 20–22 (1978).

12. *See* Higginbotham, *supra* note 11, at 32–40 (discussing the series of legislative acts in the second half of the seventeenth century that reduced most Africans in Virginia to permanent servitude); *see also* Finkelman, *supra* note 10, at 1 (same).

13. FINKELMAN, *supra* note 10, at 27; LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 3 & n.1 (1961); *see also* Douglas Harper, *Slavery in the North* (2003), http://www.slavenorth.com (discussing the history of slavery in the Northern states). 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

state, along with the federal government, discriminated against blacks in some way.[14]

One year after the Bill of Rights was ratified, the Congress of the United States adopted the Uniform Militia Act, 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.[15] Prior to this law a number of states had allowed blacks into their state militias, and the meritorious service of black soldiers during the Revolutionary War was still a relatively fresh memory.[16] 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.[17]

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 "[f]ree white persons."[18]

In 1810 Congress forbade blacks to be postal carriers, and in 1820 authorized the *white* male citizens of the District of Columbia to create a municipal government and to adopt legal codes governing blacks and slaves.[19] Congress specifically authorized the District government

---

slaves but did so quite gradually. FINKELMAN, *supra* note 10, at 27; LITWACK, *supra.* Pennsylvania's Abolition Act of 1780 also had been quite gradual; it liberated only persons born after the Act and established indentured servitude until the age of 28 for all offspring of present slaves. FINKELMAN, *supra* note 10, at 41; LITWACK, *supra.* By 1830, more than 3,500 blacks remained in slavery in the North and more than two thirds of them resided in New Jersey. LITWACK, *supra* at 14.

14. *See* LITWACK, *supra* note 13, at 30 (noting that both the states and the federal government "generally agreed . . . that the Negro constituted an inferior race and that he should occupy a legal position commensurate with his degraded social and economic condition"). Some examples were white preferences for the militia, segregated schools, laws against miscegenation, 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).

15. Uniform Militia Act, ch. 33, 1 Stat. 271 (1792) (repealed 1903) (emphasis added).

16. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 331–33 (1991).

17. *Id.* at 331–32.

18. Sanford M. Lyman, *The Race Question and Liberalism: Casuistries in American Constitutional Law*, 5 INT'L J. POL., CULTURE & SOC'Y 183, 204 (1991); DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 20 (1991).

19. ROGER M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 175 (1997); NIEMAN, *supra* note 18, at 20.

to ban meetings of free blacks at night and to use whippings in the punishment of slaves.[20]

In most states (including in the South) free blacks had been allowed to vote in the late-eighteenth century.[21] 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 did not extend the vote to blacks (with Oregon adding Chinese to the disenfranchised category).[22] By the time of the Civil War, the number of states allowing blacks the equal right to vote had fallen to five.[23]

Some states even barred or restricted entry by free blacks, although these laws were only sporadically enforced.[24] On some occasions, the Attorney General of the U.S. refused to U.S.-born, free blacks the right to apply for publicly available land, and Secretaries of State were sometimes unwilling to give free blacks passports, on the grounds that they were not U.S. "citizens" in the full legal sense.[25]

The judicial system in the country, too, was infected with racial subordination.[26] Several Northern states refused to allow blacks to testify against a white person, and only Massachusetts allowed blacks to serve on juries.[27]

As to unfree blacks, since 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 suggest reflected a deliberate effort to avoid entrenching the institution of slavery in the constitutive document of a free republic.[28] On the

---

20. Act of May 4, 1812, ch. 75, 2 Stat. 721, 725 (amending the charter of the city of Washington, D.C.).

21. SMITH, *supra* note 19, at 105–06; *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 572–74 (1856) (Curtis, J., dissenting) (discussing the voting rights of blacks in various states under the Articles of Confederation). Blacks were clearly prohibited from voting, as of 1790, in only three states: Virginia, Georgia, and South Carolina. EMIL OLBRICH, THE DEVELOPMENT OF SENTIMENT ON NEGRO SUFFRAGE TO 1860, at 7–9 (1969).

22. NIEMAN, *supra* note 18, at 28; SMITH, *supra* note 19, at 215. New Jersey took the vote from blacks in 1807, Connecticut did so in 1818, and Pennsylvania in 1838. NIEMAN, *supra* note 18, at 28.

23. LITWACK, *supra* note 13, at 91. These were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. *Id.*

24. *Id.* at 67–74.

25. SMITH, *supra* note 19, at 258; MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 29 n.84 (2006).

26. *See* LITWACK, *supra* note 13, at 93–97 (discussing racial discrimination in the courtroom and the "significant qualifications" added by various states to a black person's right to legal protection and a redress of injuries).

27. *Id.* at 93, 94.

28. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 417 (Max Ferrand ed., 1911) ("Mr. Madison thought it wrong to admit in the Constitution the idea that there

other hand, the Constitution notoriously contains serious compromises with the institution:[29]

(1) The slave states were given a representation bonus by counting each slave as an extra three-fifths of a person, instead of as zero[30] (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 more than forty-six percent of the total rather than the forty-one percent it would have been) and in the Electoral College, whose numbers were pegged to congressional membership.[31] (2) Congress was forbidden to ban the international importation of slaves prior to 1808.[32] However, in that year, Congress did enact the ban.[33] (3) The Fugitive Slave Clause says:

> No Person held to Service or Labour 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 Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[34]

(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 should arguably have freed all slaves in federal jurisdictions.).[35]

Congress did immediately re-enact the prohibition on slavery in the Northwest Territory (which had been in place under the Articles of Confederation), and in 1794 it banned the export or international transport of slaves and the use of U.S. vessels for the same.[36] In nego-

---

could be property in men."); *see also* NIEMAN, *supra* note 18, at 13 (noting that many of the Framers agreed with Madison and therefore "refused to give explicit recognition to the institution" of slavery in the Constitution).

29. *See* NIEMAN, *supra* note 18, at 10 (discussing the concessions made by the North to the Southern states on the issue of slavery for the sake of constitutional reform and continued union).

30. U.S. CONST. art. I, § 2, cl. 3.

31. NIEMAN, *supra* note 18, at 11; *see also* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1147 (2002) (discussing the connection between slavery and the decision to create the Electoral College).

32. U.S. CONST. art. I, § 9, cl. 1.

33. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

34. U.S. CONST. art. IV, § 2, cl. 3.

35. *See id.* amend. V (stating that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law").

36. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50–53, 51 (adapting the provisions of the Northwest Ordinance, in place under the Articles of Confederation, to the United States Constitution); Act of Mar. 22, 1794, ch. 11, 1 Stat. 347–49 (prohibiting the export of slaves from the United States to any foreign country); SMITH, *supra* note 19, at 142.

tiating 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.[37]

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.[38] The Fugitive Slave Law arranged for the recapture of slaves, even though the Fugitive Slave Clause of Article IV of the United States Constitution said nothing of federal enforcement 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.[39] This Fugitive Slave Clause appears in the article on interstate relations, not in any list of federal powers, and it mentions only state actions, not federal enforcement.[40] This is probably because the Clause was adapted from a clause in the 1787 Northwest Ordinance,[41] itself adopted under the Articles of Confederation which contained no federal enforcement institutions. The model for the Clause was state extradition, not federal rendition, just as with criminals.[42] The 1793 law, by contrast, was a federal mandate. It ordered federal district judges and local justices of the peace (who were far more numerous) to issue a warrant allowing a purported slave-owner (or his agent) who had captured a 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 run-

37. SMITH, *supra* note 19, at 142.

38. NIEMAN, *supra* note 18, at 16–17; SMITH, *supra* note 19, at 143; Fugitive Slave Act of 1793, ch. 7, §3, 1 Stat. 302, 302–05.

39. U.S. CONST. art. IV, § 2, cl. 3; *see* Robert J. Kaczorowski, *Fidelity Through History and to It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1673 (1997) (noting that the Fugitive Slave Clause in Article IV, section 2 delegates no enforcement power to Congress).

40. U.S. CONST. art. IV, § 2, cl. 3; NIEMAN, *supra* note 18, at 13; Kaczorowski, *supra* note 39.

41. RICHARD B. BERNSTEIN, ARE WE TO BE A NATION?: THE MAKING OF THE CONSTITUTION 177 (1987); *see* Northwest Ordinance of 1787, sec. 14, art. VI (providing that "any person escaping into the [Northwest Territories], from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid").

42. The immediately preceding constitutional clause mandates state extradition of criminals "fleeing from justice." Paul Finkelman agrees with this reading. *See* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 613–21 (1993) (discussing the origins of the Fugitive Slave Clause in Article IV and its relation to the provision concerning the extradition of criminals). The Fugitives from Justice Clause in Article IV declares that fugitive criminals must be delivered up "on [d]emand of the executive [a]uthority of the State from which he fled." U.S. CONST. art. IV, § 2, cl. 2.

away.[43] 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.[44]

What had been basically a mixed picture evolved after 1830 to one in which the pro-slavery 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.[45] Southerners claimed that abolitionist essays might stimulate slave revolts[46] (even though teaching a slave to read was a crime in many of the slave states),[47] leading to President Andrew Jackson's decision in the 1830s 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.[48] 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 the Government for a redress of grievances" enshrined in the First Amendment.[49] 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 would have declared, in effect, that free (native-born) blacks had rights as citizens of the United States.[50]

Presidents, with Senate confirmation, appointed Supreme Courts that from the beginning contained a dominant presence of justices

---

43. Fugitive Slave Act of 1793, ch. 7, §3, 1 Stat. 302, 302–05; *see also* NIEMAN, *supra* note 18, at 16–17 (noting that the second part of the 1793 Act, which dealt with runaway slaves as opposed to criminal fugitives, contained federal enforcement provisions); SMITH, *supra* note 19, at 143 (noting that Congress actively perpetuated slavery through the enforcement provisions of the 1793 Act, even though there was no clear mandate in the Constitution for congressional enforcement of Article IV's fugitive slave provision).

44. NIEMAN, *supra* note 18, at 17.

45. *See* LITWACK, *supra* note 13, at 19–20 (noting that by 1830, while abolitionism established itself by reputation and numbers in the North, it had virtually disappeared in the South); NIEMAN, *supra* note 18, at 16 (discussing the hundreds of pamphlets and thousands of petitions to Congress criticizing slavery by radical abolitionists from the North during the 1830s).

46. NIEMAN, *supra* note 18, at 16.

47. WILLIAM GOODELL, THE AMERICAN SLAVE CODE 319–25 (New Am. Library 1969) (1853); SMITH, *supra* note 19, at 219.

48. NIEMAN, *supra* note 18, at 16.

49. *Id.*

50. *Id.* at 22–24.

from the South. Of the justices who served up to the end of John Marshall's term in 1835, fourteen out of twenty-four came from slave states.[51] The section below details the Court decisions produced during Marshall's chief justiceship (1801–1835),[52] a period that covered a sizable portion of this period of geographic bias.

II. SUPREME COURT CASES 1801–1835: THE MARSHALL COURT AND SLAVERY

It is within this context of widespread anti-black sentiments formalized into law throughout the U.S. and the post-1830 intensified polarization of opinion on slavery that the Supreme Court decisions are best assessed. The racial discrimination (against free blacks) prevalent in state and federal law did not in the antebellum years produce any Supreme Court cases, although they did produce a couple of important circuit court decisions from Marshall Court Justices.[53] The most prominent of the antebellum slavery cases concerned fugitive slaves, but these did not reach the Supreme Court until the chief justiceship of Roger Taney (1836–1864).[54] By the 1820s, the absence of procedural protections for the accused in the 1793 Fugitive Slave Act (and continuing later with respect to the 1850 Fugitive Slave Act) angered many Northerners; several Northern states began to intervene, both by legislating procedural protections for the accused runaways, and ordering their own judges and sheriffs not to cooperate with the slave-chasing enterprise.[55] 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*[56] and *Ableman v. Booth*,[57] but no such fugitive case reached the Marshall Court.

---

51. *Id.* This follows the standard practice of counting that includes the four-month chief justiceship of John Rutledge who failed to get confirmed by the Senate.

52. Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1421 (2006).

53. *See* Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366) (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); The Wilson v. United States, 30 F. Cas. 239 (C.C.D. Va. 1820) (No. 17846) (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).

54. The first of these was Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

55. NIEMAN, *supra* note 18, at 17–18; L.F. Goldstein, *State Resistance to Authority in Federal Unions: The Early USA (1790–1860) and the European Community*, 11 STUD. AM. POL. DEV. 149, 164 (1997).

56. 41 U.S. 539 (1842).

Although slaves were mentioned in the Court's first important decision, *Chisholm v. Georgia*,[58] in the context of being the only persons in the U.S. who did not share in equal rights of citizenship,[59] the Supreme Court took no slavery cases as such until after (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.[60] In many of its earliest slave cases, the Supreme Court's role was that of highest appellate court applying the law of this territory.[61] Prior to 1801, other than in *Chisholm*, the only mention of slaves in Supreme Court decisions occurred in lists of types of property.[62] In these listings, slavery was not singled out as warranting special treatment (apart from the mandate regarding taxes in the Three-Fifths Clause)[63] nor was it presented as involving special moral issues.[64]

---

57. 62 U.S. 506 (1859).

58. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

59. *Id.* at 471–72. 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 the District of Columbia were authorized to impose special restrictions on free blacks, *see supra* note 19 and accompanying text, and with the Court's notorious 1856 remark in *Dred Scott v. Sanford*, to the effect that free blacks in the U.S. had no rights. 60 U.S. (19 How.) 393, 407 (1856).

60. NIEMAN, *supra* note 18, at 16; *see supra* note 38 and accompanying text.

61. *See, e.g.*, Fenwick v. Chapman, 34 U.S. (9 Pet.) 461 (1835); Lee v. Lee, 33 U.S. (8 Pet.) 44 (1834); Mason v. Matilda, 25 U.S. (12 Wheat.) 590 (1827); Davis v. Wood, 14 U.S. (1 Wheat.) 6 (1816); Henry v. Ball, 14 U.S. (1 Wheat.) 1 (1816); Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813); Wood v. Davis, 11 U.S. (7 Cranch) 271 (1812); Scott v. Ben, 10 U.S. (6 Cranch) 3 (1810); Scott v. London, 7 U.S. (3 Cranch) 324 (1806); *see also* Table *infra*.

62. *See, e.g.*, Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 321 (1796) (listing slaves, alongside goods, chattel and land, in the description of property comprising an estate); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 201 (1796) (describing a 1779 Virginia statute stating that all the property of British subjects left within Virginia at the time would pass by escheat and forfeiture to the Commonwealth, including "the lands, slaves, and other real estate"). This conclusion is derived from a LexisNexis search for "slave" and "negro."

63. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (discussing how the Framers of the Constitution contemplated the large number of slaves and extensive tracks of thinly settled land owned by Southerners as compared with Northerners in limiting Congress's power to tax).

64. The decision by Marshall in 1803, *Hamilton v. Russell*, similarly simply lists the slave as chattel along with "other personal property" that was in dispute. 5 U.S. (1 Cranch) 309, 314–15 (1803). Marshall continued this practice of dealing with slaves as the Court dealt with other property in various property disputes that came before him. *See, e.g.*, Ramsay v. Lee, 8 U.S. (4 Cranch) 401 (1807); Spiers v. Willison, 8 U.S. (4 Cranch) 398 (1807).

During the Marshall Court years, issues concerning slavery arose in the following contexts: (1) property disputes between white people over particular slaves, which the Court handled according to rules that would have applied to other chattel property;[65] (2) lawsuits by slaves claiming their freedom on one or another ground;[66] and (3) questions of criminal law once federal law banned the export and import of slaves.[67] 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., in the latter two categories), what comes into view is a picture of a Court considerably *less* opposed to slavery, especially for the first sixteen years, than one might expect based on the public pronouncements of Justice Story,[68] or the privately expressed detestation of slavery by Chief Justice Marshall.[69] 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);

---

65. *See supra* note 64.

66. *See, e.g.*, *Lee*, 33 U.S. (8 Pet.) at 44 (slaves brought petition for freedom under a 1796 Maryland statute making it illegal to import slaves for sale or to reside in Maryland); Menard v. Aspasia, 30 U.S. (5 Pet.) 505 (1831) (Missouri slave, born in Illinois, brought suit claiming freedom under the Northwest Ordinance).

67. *See, e.g.*, Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805) (dealing with the application of the federal statute of limitations on criminal penalties to someone accused of engaging in the forbidden export of slaves). Congress banned slave importation in 1807 with a law that went into effect after midnight December 31. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 202 (William M. Lacy ed., Blackstone Publ'g Co. 1889) (1826).

68. Outside of his judicial role, Justice Story 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. For instance, at a public meeting in Salem, Massachusetts in 1819, Justice Story insisted that the principles of the Declaration of Independence and the spirit of the Constitution demand that Congress ban slavery in the territories. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 238–43 (1975); Roper, *supra* note 5, at 532. As to the slave trade, on circuit in *United States v. La Jeune Eugenie*, Story went on for page after page to condemn it as "breach[ing] . . . all the maxims of justice, mercy and humanity," as involving "corruption, and plunder, and kidnapping" and seizing of "the young, the feeble, the defenceless, and the innocent," as "desolat[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. 832, 845–48 (C.C.D. Mass. 1822) (No. 15551).

69. *See* Frances Howell Rudko, *Pause at the Rubicon, John Marshall and Emancipation: Reparations in the Early National Period?*, 35 J. MARSHALL L. REV. 75, 79–80 (2001) (citing an 1826 letter to Timothy Pickering in which Marshall stated that "nothing portends more calamity & mischief to the southern states than their slave population; Yet they seem to cherish the evil . . ."). Marshall himself owned a small number of slaves throughout his life, and also bought them, and gave and received them as gifts. *Id.* at 77. At the end of his life, he freed one in his will and bequeathed the others. *Id.* He also supported 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. *Id.* at 84–88.

and two (Marshall and Washington) at least "tepid[ly]," in the sense of "wish[ing] that slavery would somehow go away."[70]

Whereas some biographers tend to single out various dicta or rulings where John Marshall's opinions helped slaves toward freedom;[71] in fact, as the Table 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 (e.g., *Lee v. Lee* (1834)), (2) provoking a written dissent in the Supreme Court (e.g., *Mima Queen v. Hepburn* (1813)), (3) overturning a circuit court reading to the contrary (in favor of freedom) (e.g., *Wood v. Davis* (1812)), (4) presenting an argument of the (indirectly electorally accountable) U.S. Attorney General to the contrary (e.g., *United States v. Schooner Sally* (1805)), or (5) in a case involving a statute that if read literally would have freed the slave, constructing a legal argument elaborate enough to produce an anti-freedom result (*Mason v. Matilda* (1827)). (These indicia of legal contestability are noted in italics 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.[72] (This Court opinion provoked Justice Duvall, of Maryland, to author the only dissenting opinion of his life.)[73] Then, in a later decision where following the plain meaning of Virginia statutory law for the formerly Virginia part of the

---

70. Roper, *supra* note 5, at 534. He does not say where the others fell. McLean did not join the Court until 1830. Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Nov. 19, 2007). Justice Duvall, who joined in 1811, was sufficiently anti-slavery to argue in dissent that "the right to freedom is more important than the right of property." Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 299 (1813) (Duvall, J., dissenting). 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, *supra* note 5, at 532–33. Presumably Roper would rate these two as moderately anti-slavery.

71. *See, e.g.*, Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1123–24 (2000) (citing Marshall's anti-slavery positions in The Antelope, 23 U.S. (10 Wheat.) 66, 119–20 (1825); Boyce v. Anderson, 27 U.S. (2 Pet.) 150, 156 (1829); and various pro bono cases that Marshall undertook as the leader of the Richmond bar).

72. *Mima Queen*, 11 U.S. (7 Cranch) at 298–99.

73. *Id.*

District had caused a jury to set free a slave, the Supreme Court announced itself relieved that it had discovered a Virginia precedent (i.e., common law) to the contrary to follow, (from 1818, seventeen years after Congress adopted the Virginia law as part of the D.C. code),[74] which choice resulted in reversing the judge's instruction to the jury and thereby the jury's decision.[75] In light of this degree of available latitude at the edges in these cases, one must conclude that the Marshall Court in these cases saw itself as engaged in an effort to firm up property rights in the nascent republic, even when doing so conflicted with its common law obligation that statutes in doubtful cases are to be construed "*in favorem libertatis*."[76] And one must certainly question Kent Newmyer's 1969 explanation of this body of decisions: "[T]he Marshall Court did not have substantial lawmaking discretion in the slavery cases."[77]

Other scholars, and Newmyer himself in a detailed reconsideration thirty years later,[78] 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)[79] produced so many pro-slavery 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 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 ameliorative interpretation.[80] 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 ex-

74. *See* NIEMAN, *supra* note 18, at 16 (noting that in 1801 Congress adopted the laws of Virginia and Maryland for the District of Columbia).

75. *See* Mason v. Matilda, 25 U.S. (12 Wheat.) 590, 592–94 (1827) (citing a Virginia Court of Appeals case, Abraham v. Matthews, 20 Va. (6 Munf.) 159 (1818), in reversing a judgment and finding in favor of a slave master).

76. BLACK'S LAW DICTIONARY 793 (8th ed. 2004). The rule "in favor of liberty" says to free someone from bondage where there is doubt as to status.

77. Kent Newmyer, *On Assessing the Court in History: Some Comments on the Roper and Burke Articles*, 21 STAN. L. REV. 540, 540–44 (1969).

78. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 424–34 (2001).

79. J. SEGAL & H. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

80. Roper, *supra* note 5, at 532–39.

tend the area of freedom," and that he chose not to.[81] Still, he insists (as anyone would grant) that political and legal forces did constrain the Court in terms of the big picture;[82] the Court could not simply announce, "We believe that slavery is wrong and therefore will no longer uphold it."

So my analysis here is discussing 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.[83] In response to the query, "Why did the Marshall Court not do more in this direction?" the later 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.[84] 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 with attendance in December 1816, at its founding meeting)[85] is more properly read as an expression of a racist desire to rid America of blacks than of Marshall's intellectual opposition to slavery.[86]

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.[87] 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

---

81. NEWMYER, *supra* note 78, at 426.

82. *Id.*

83. This refers to those cases indicated by italicized comments in the Table *infra* in which the Marshall Court refused to do these things, even though other legal actors would have.

84. NEWMYER, *supra* note 78, at 424–34.

85. JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS 105–06 (1977); Rudko, *supra* note 69, at 84.

86. NEWMYER, *supra* note 78, at 419–23.

87. Rudko, *supra* note 69, at 75; *see also* Smith, *supra* note 71, at 1124 (asserting that Marshall viewed slavery as "unjust and oppressive to blacks, [and] pernicious and debilitating for whites").

mule."[88] Thus she reads Marshall as basically temporizing in those decisions that strengthened slavery, while he worked diligently off the bench toward the goal of having Congress deliver the U.S. from this evil.[89]

The Table below, a systematic compilation of all the slavery cases that came before the Marshall Court, was initially compiled 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; and (2) The Court observably changes direction between 1816 and 1817. Out of a total of thirty-three cases, eleven go in an anti-liberty direction. All but one of these occurred prior to 1817. It seems impossible to deny that, as a Court, prior to 1817 the Marshall Court was not only willing to treat slaves as property, but also in borderline situations showed a much stronger commitment to the property rights of the slaveholder than the liberty rights of the enslaved. Thirteen of the decisions move the law in a pro-liberty direction (eight produced mixed results; one presented no obvious direction regarding liberty). The pro-liberty decisions *all* occur in or after 1817.

It is true that none of these cases display the Court directly reversing itself, not even *sub silentio*, on a single re-litigated point of law. Nonetheless, a clear shift of policy inclination is observable. Something of the flavor of this shift can be seen by consideration of the following pair of contrasting cases.[90] In *Davis*, a case where litigation at the Supreme Court continued from 1812 to 1816, the Marshall Court reversed the first of the circuit court holdings to rule that a prior judicial ruling that had established a woman as free on the grounds that she had been proven to be white could not operate to establish that her children were descended from a white woman and on that basis legally free.[91] By contrast, in *M'Cutchen* in 1834, in applying the will of a Tennessean that freed his slaves upon their reaching age twenty-one, the Supreme Court, although acknowledging that under Tennessee law offspring born of such a slave before she reached twenty-one would remain slaves, nonetheless ruled that a lawsuit by heirs making a claim to such slave offspring had to be dis-

88. Smith, *supra* note 71, at 75, 89.

89. *See generally id.* at 75–89.

90. *Compare* Wood v. Davis, 11 U.S. (7 Cranch) 271 (1812), *and* Davis v. Wood, 14 U.S. (1 Wheat.) 6 (1816), *with* M'Cutchen v. Marshall, 33 U.S. (8 Pet.) 220 (1834) in the Table *infra*.

91. *Wood*, 11 U.S. (7 Cranch) at 273.

missed (and the offspring set free) because the description of the offspring was too "vague and uncertain."[92]

It is not obvious what caused this pro-liberty shift. One candidate for explanation is that the cases that begin in 1817 much more typically involved the slave trade, where congressional sentiment had been clearly expressed.[93] In 1807, Congress first outlawed the importing of slaves, with a law to take effect after December 31.[94] It reiterated and refined this law in 1818.[95] 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 marshal of the district into which they are brought," or "to such person or persons as shall be lawfully appointed by the President of the United States" to be returned to Africa, and Congress appropriated $100,000 for that purpose.[96] 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.[97] Moreover, in the period from 1814–1820, a flurry of diplomatic activity in the maritime nations of Europe resulted in some restrictions on the slave trade by France (1817), Portugal (1818) and Spain (1820), preceded by Britain's total ban in 1807.[98] Thus, one might argue that as to the slave trade at least, legal proscription was beginning to look like the civilized thing to do.

Still, this explanation does not cover all the cases. There are a number of early cases on the slave trade, with respect to the 1794 law (and follow-up legislation) banning export or foreign transport of slaves on U.S. vessels, and the Marshall Court responded leniently toward the accused slave trader despite the facts that Congress had acted against this trade and the U.S. Attorney General was asking for conviction.[99] Also, there are cases having no direct bearing on the

92. *M'Cutchen*, 33 U.S. (8 Pet.) at 241.

93. See discussion of case facts under the column headed "Ruling" in the Table *infra*. *See, e.g.*, The Emily, 22 U.S. (9 Wheat.) 381 (1824) (involving provisions of the 1794 and 1807 Acts); The Josef Segunda, 18 U.S. (5 Wheat.) 338 (1820) (interpreting and discussing the 1807 Act prohibiting slave importation).

94. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

95. Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

96. Act of Mar. 3, 1819, ch. 101, 3 Stat. 532, 532–34.

97. Act of May 15, 1820, ch. 113, sec. 4, 5, 3 Stat. 600, 600–01.

98. KENT, *supra* note 67, at 204–05.

99. Brigantine Amiable Lucy v. United States, 10 U.S. (6 Cranch) 330 (1810); Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805); United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805). See also Brig Alerta v. Moran, 13 U.S. (9 Cranch) 359 (1815); Brig Caroline v. United States, 11 U.S. (7 Cranch) 496 (1813), for similar cases of leniency toward the slave trade prior to 1817.

slave trade—cases regarding the freeing of individual slaves in the 1817–1835 periods—where the Court produced a pro-freedom decision, something it never did before 1817.[100]

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 between 1812 and 1823.[101] 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.[102]

Finally, there is the possibility—the one that appears most likely—that the shift has something to do with colonization policy. The American Colonization Society was founded in December of 1816.[103] Frances Rudko dates Marshall's involvement in the society as "almost from its beginning," since he signed up for a lifetime membership in 1819 and in 1823 became local chapter president (which he remained throughout his life).[104] But legal scholar (and now federal judge) John Noonan dates Marshall's involvement as literally from the beginning moment of the organization: Marshall attended that founding meeting in December of 1816.[105] Justice Bushrod Washington was the founding president of the National ACS and remained president for many years.[106] Noonan notes that the ACS was "[f]irmly tied to the judicial branch at its highest level" and that on at least one occasion several Justices on the Court attended an annual Colonization Society meeting held at the Supreme Court.[107]

---

100. Fenwick v. Chapman, 34 U.S. (9 Pet.) 461 (1835) (upholding a contestable testamentary manumission); M'Cutchen v. Marshall, 33 U.S. (8 Pet.) 220 (1834) (same); Le Grand v. Darnall, 27 U.S. (2 Pet.) 664 (1829) (same); *see also* Lee v. Lee, 33 U.S. (8 Pet.) 44 (1834) (reversing a circuit court decision for failure to give a jury instruction that was favorable to the slaves petitioning for freedom); Menard v. Aspasia, 30 U.S. (5 Pet.) 505 (1831) (refusing to interfere with a decision of the Missouri Supreme Court setting free a slave on grounds of bona fide residence in the state); Boyce v. Anderson, 27 U.S. (2 Pet.) 150 (1829) (making it more difficult to recover damages for failure to prevent slaves from escaping); Beverly v. Brooke, 15 U.S. (2 Wheat.) 100 (1817) (same). *But cf.* Mason v. Matilda, 25 U.S. (12 Wheat.) 590 (1827) (rejecting a slave's suit to be declared free).

101. The Associate Justices who served with Marshall in this period were Bushrod Washington, William Johnson, Henry B. Livingston, Thomas Todd, Gabriel Duvall, and Joseph Story.

102. *See supra* note 68 and accompanying text.

103. NOONAN, *supra* note 85, at 105.

104. Rudko, *supra* note 69, at 84.

105. NOONAN, *supra* note 85, at 105.

106. *Id.* at 16, 106–07.

107. *Id.* at 17, 91.

It is certainly conceivable that for the judicial votes of these two morally troubled slaveowners, Marshall and Washington, their 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.[108]

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:

1) The direction column uses a plus sign for pro-freedom rulings and a minus sign for anti-freedom rulings.
2) Italics indicates some element of contestability in Court ruling.
3) Where opinion author not noted, it is Chief Justice John Marshall.
4) Where case listed more than once (e.g., *Josefa Segundo*), later versions present new issues rather than merely clarifying earlier holding.

108. *See supra* notes 84–89 and accompanying text.

MARSHALL COURT SLAVERY CASES

DATE	CASE	RULING	ACTION	+/-
1805	Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805).	Court ruled that a two-year statute of limitations applied broadly to fines and forfeitures under any penal act. The effect of this ruling was to bar a penalty against an illegal exporter of slaves.	*Court, on a certified question from a divided circuit panel, ruled against U.S. Att'y Gen.*	–
1805	United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805).	Court rejected plaintiff's request to apply the stricter rules of the common law, in place of maritime and admiralty law. Court thus affirmed the acquittal of a defendant accused of engaging in the slave trade in violation of a 1794 statute.	Court affirmed the district and circuit court decisions. *Court ruled against U.S. Att'y Gen.*	–
1806	Scott v. London, 7 U.S. (3 Cranch) 324 (1806).	Court ruled that a Virginia slave was not free despite a state statute freeing slaves after one year if the slave-owner fails to take a certain oath within sixty days of leaving his prior state to move to Virginia. Because the slave and slave-owner arrived in Virginia at different times and because the slave-owner took the oath within sixty days of leaving his prior state, the Court liberally interpreted the statute in the slave-owner's favor.	*Court reversed circuit court's decision. Opinion speaks only for "Majority of the Court." No recorded dissent.*	–
1810	Scott v. Ben, 10 U.S. (6 Cranch) 3 (1810).	Court ruled that a slave-owner seeking to import his own slaves into Maryland may prove to a jury the lawfulness of such importation, notwithstanding a statute requiring such proof to be presented to a naval officer or tax collector.	*Court reversed circuit court's decision.*	–
1810	Brigantine Amiable Lucy v. United States, 10 U.S.	Court reversed the conviction of a person accused of unlawfully importing slaves from the West Indies	*Court reversed district court's decision, ruling against U.S.*	–

DATE	CASE	RULING	ACTION	+/-
	(6 Cranch) 330 (1810).	into the territory of Orleans. The Court reasoned that the defendant did not violate an 1803 federal statute that forbade the importation of slaves into any state that banned such importation because the Orleans legislature never prohibited slave-importation.	*Att'y Gen.*	
1812	Wood v. Davis, 11 U.S. (7 Cranch) 271 (1812).	Court ruled in Wood's favor that a previous judgment declaring that a mother was free on the grounds that she was proved white was not itself conclusive evidence that her children were free, although the law said that any child born of a white mother was free.	*Court reversed circuit court's decision.*	–
1813	Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 290 (1813).	Court rejected Maryland's common law rule permitting admission of hearsay when eye witnesses were no longer alive to testify about facts at issue.	*Court affirmed circuit court's reversal of the district court in a 5-1 ruling. Justice Duvall dissented.*	–
1813	Brig Caroline v. United States, 11 U.S. (7 Cranch) 496 (1813).	Court reversed a sentence of forfeiture of a slave trader's ship because the charge of "libel" was too vague.	*Court reversed circuit court's decision.* Court also remanded to permit amended charge.	+/–
1815	Brig Alerta v. Moran, 13 U.S. (9 Cranch) 359 (1815).	Court ruled that U.S. district courts have jurisdiction to restore slaves to a Spanish national whose "property" (i.e. slaves) was captured by a French vessel that unlawfully augmented its crew in the United States. Spain and France were at war at the time of the events at issue and slavery was lawful in Spain. Because the U.S was neutral in the French-	Court affirmed circuit court's decision.	–

DATE	CASE	RULING	ACTION	+/-
		Spanish conflict, the use of crew (augmented in the U.S.) to capture "cargo" (i.e. 150 slaves) violated U.S. law and the law of nations. The Court ruled that there was no likelihood that the French privateer who captured the slaves planned to free rather than sell them.		
1816	Negress Sally Henry v. Ball, 14 U.S. (1 Wheat.) 1 (1816).	Court ruled that a D.C. ban on importing slaves from out of state, which exempts slaves brought with slave owners who are on temporary sojourn or who are new residents, also exempts someone who employed a slave for seven months in D.C who was then repossessed by Virginia owner, Ball, and brought back into D.C.	Court affirmed circuit court's decision.	–
1816	Davis v. Wood, 14 U.S. (1 Wheat.) 6 (1816).	Court (1) reaffirmed the hearsay rule of *Mima Queen* and (2) ruled that a prior judgment as to ancestor's freedom cannot be treated as evidence of an offspring's freedom.	Court affirmed circuit court's decision.	–
1817	Beverly v. Brooke, 15 U.S. (2 Wheat.) 100 (1817).	Court ruled that a ship's master who hired 3 slaves who escaped while the ship was docked in Liverpool, England (where slavery was illegal), did not owe compensation for the escape because the slave-owner hired out the slaves knowing of the risk of escape.	Court affirmed circuit court's decision.	+
1820	The Josef Segunda, 18 U.S. (5 Wheat.) 338 (1820).	Court ruled that pursuant to a U.S. law banning slave importation after 1808, a ship and its cargo of 175 slaves (captured from Spain by commissioned privateers of Venezuela and therefore property of	Court affirmed district court's decision.	+

DATE	CASE	RULING	ACTION	+/-
		the privateers due to the ongoing war between Venezuela and Spain) that unlawfully entered U.S. waters must be forfeited to the U.S.		
1823	The Mary Ann 21 U.S. (8 Wheat.) 380 (1823).	Court reversed a decree ordering the forfeiture of a slave-transporting ship for violating a federal law that required documentation of any "negro, mulatto, or person of colour" on board. The Court reasoned that the libel charge (1) did not sufficiently state the port in which the alleged offense was committed and (2) did not allege that the brig weighed at least forty tons. Court remanded to allow the libel to be amended.	*Court reversed district court's decision, ruling against U.S. Att'y Gen.* However, Court remanded to allow the libel charge to be amended.	−/+
1824	The Emily and The Caroline, 22 U.S. (9 Wheat.) 381 (1824).	Court ruled that two ships were properly condemned as forfeited for the following two reasons: (1) A charge for violating a U.S. law forbidding the export or import of slaves did not require the formality and technical precision of an indictment at common law; and (2) The offense of preparing a ship for the slave trade can be proved before the ship is completely sea-ready, so long as the intent is clearly manifest.	Court affirmed the decrees of the district and circuit courts.	+
1824	The Merino, The Constitution, The Louisa, 22 U.S. (9 Wheat.) 391 (1824).	Court ruled as follows: (1) As to The Merino and The Louisa (U.S. vessels attempting to transport Spanish slaves from one Spanish port to another), the evidence did not support the charges but did show that the vessels violated other sections of U.S. slave-trade laws. The decree is reversed and remitted so that the libel charge may be amended to	*Court reversed.* The Court, however, remitted for amended charges to district court on The Merino and Louisa libel charges (implying approval of amended charge with sen-	+/−

DATE	CASE	RULING	ACTION	+/-
		accord with the evidence;[109] (2) The decree condemning The Constitution (a similar vessel charged with similar offenses) and ordering the forfeiture of its cargo is upheld except as to the 84 slaves on board; and (3) The 84 slaves shall be returned to the Spanish owners who held them lawfully in Spanish territory. Because The Constitution was captured first by a non-commissioned boat (rather than a commissioned boat), then by a U.S. revenue boat (not while engaged in the slave trade), and only then taken to court, the owners may retake their slaves from The Constitution. This situation is governed by the 1800 law that forfeits the slaves only if their owners had an economic interest in the boat or its voyage.	tence of forfeiture of slaves, cargo and ships). Court upheld decree as to forfeiture of ship and cargo of The Constitution. *As to The Constitution's slaves, Court reversed decree and returned those slaves to their Spanish owners.*	
1824	The St. Jago, 22 U.S. (9 Wheat.) 409 (1824).	Court interpreted an imperfectly worded libel charge against a slave trader, so as to sustain the libel. The Court refused to reimburse the wages of seamen and materials from suppliers, reasoning (and agreeing with Att'y Gen.) that there was ample evidence that defendants knew the boat was fitted out as a slaver.	*Court reversed circuit court's decision.*	+

109. 1824 *Merino* case: These slaves were brought to Alabama for trial. Under the 1818 U.S. law, if the vessels were found in violation, slaves would be dealt with according to law, "adopted hereafter," of the state where the slaves were brought in. The slaves in this case were rendered to Alabama authorities. Alabama law of 1822 made such slaves state laborers or auctioned them to highest bidder. U.S. law in 1819 ordered that such captured slaves were free and compelled the U.S. president to arrange their transportation back to Africa. Josefa Segundo III (*U.S. v. Preston*) made clear that the change of U.S. law in 1819 (ordering the slaves to be returned to Africa and freed) took effect upon all decrees still pending in 1819 and thereafter.

DATE	CASE	RULING	ACTION	+/-
1825	The Plattsburgh, 23 U.S. (10 Wheat.) 133 (1825).	Court ruled that a slave-trading schooner seized by U.S. ship of war off coast of Africa must be forfeited to the United States because, despite the ruse of a mid-voyage purchase by Spaniards in Cuba, where boat was fully equipped for slave trade, the voyage originated in Baltimore with manifest intent to continue to Africa and the American crew stayed on boat to Africa in violation of United States law.	Court affirmed district court and circuit court.	+
1825	The Antelope, 23 U.S. (10 Wheat.) 66 (1825).	Court ruled that the slave trade is not against the law of nations (rejecting Story's dictum of 1822 (see below)), because so many states allowed it in modern times (despite the recent trend of outlawing it). Court does say slavery violates the law of nature. The case involved a piratical United States crew that captured the vessel Antelope from Spanish owners. The ship held twenty-five Africans captured from an American slaver and a total of 255 slaves from a Portuguese slaver and from the original Antelope crew. In court, Spanish and Portuguese consuls demanded the return of the slaves to their respective countries, claiming that they were lawfully owned property under their countries' laws. The Court reasoned that a slave trade vessel was engaged in piracy only if its government so ruled, and only those ships may be seized and turned over to their own country's courts for trial. Furthermore, a United States treaty required that slave property captured by American pirates be returned	*Court affirmed all of the circuit court decision not contrary to its opinion, freeing all but thirty-nine slaves. (Circuit court had originally freed only 16, chosen by lot. The U.S. Attorney General had argued for freeing all of the approximately 200 still surviving.)* As a result, the circuit court turned over the other slaves whose owners could be clearly identified to the Spanish government to distribute to the owners. *The Court's decision was partly against the Att'y Gen., less so than the circuit court decision had been.*	+/−

DATE	CASE	RULING	ACTION	+/-
		to Spain. The Court noted a conflict between "[t]he sacred rights of liberty and of property." *Antelope*, 23 U.S. (10 Wheat.) at 114. As the Court was equally divided as to whether all these slaves should be returned, it followed the principle set forth by the circuit court that required the return of all lawfully owned slaves. The Supreme Court added that the Spanish government bore the burden of proving both the number of Spanish slaves and which individuals belonged to Spain. Portugal offered no proof, and the Supreme Court ruled that all slaves were freed except the twenty percent that Spain proved belonged to Spain. (This decision was preceded by the 1822 circuit decision by Justice Story, *La Jeune Eugenie*, where a French consul had intervened for a captured French slaver, and the United States President had intervened in aid of the French consul. Justice Story had ruled that French slave trader vessel seized on high seas by commissioned United States vessels in peacetime would have been tortiously seized only if the vessels seized were not involved in piracy. He asserted that slave trading must count as piracy since it was unlawful under laws of the country of the boat seized. The boat and cargo, including slaves, returned to France for adjudication. Additionally, in dictum, Justice Story noted that the slave trade was by that time contrary to the law of	*In Antelope III (1827), which dealt with the final disposition of the slaves, the U.S. Att'y Gen. argued that proof as to the identity of the slaves was not adequate and all should be freed.*	

DATE	CASE	RULING	ACTION	+/-
		nations and therefore always piracy unless permitted by the laws of particular sovereign governments. He assigned to the alleged slave traders the burden of proof to show this permission.)		
1825	The Josefa Segunda II, 23 U.S. (10 Wheat.) 312 (1825).	Court ruled that the slaves on board a boat forfeited and sold as per the 1820 decision, were sold pursuant to a Louisiana law adopted to carry out the 1807 federal law against slave trade. Louisiana law gave one half of the proceeds from the slave sale to the "commanding officer of the capturing vessel" and other half to a charitable hospital. Court read the ambiguous federal law as implying that (1) a federal district court had jurisdiction to decide who received the proceeds under state law and (2) under the state law the "commanding officer of the capturing vessel" had to be an officer of U.S. "armed vessel, or revenue cutter" who followed up on the seizure by prosecuting the case in federal court. (This decision was superseded by the re-worded 1818 (April 20) federal law, which awarded one half of the forfeiture proceeds to whomever prosecuted the ship as a slaver.)	*Reversed circuit court decision, awarding one half the proceeds of sale of slaves to man who prosecuted the libel.* The money from ship and its contents remained with the federal government. (Disposition of money from sale of slaves not clarified until 1830 decision, Segunda III.)	0
1827	Mason v. Matilda, 25 U.S. (12 Wheat.) 590 (1827).	Court ruled on a D.C. (originally Virginia) statute requiring new residents to take oath before a magistrate within sixty days of move to the state and to declare intent to reside and not to import slaves. Without this oath, slaves of new residents would be set free after one year in the state. The Court inter-	*Reversed D.C. county court decision.* Re-enslaves Matilda et al., who had been declared free by the jury of that court, following judge's erroneous	–

DATE	CASE	RULING	ACTION	+/-
		preted the statute as not setting free slaves who had been held in the Virginia part of D.C. for more than twenty years even if there was no evidence that the owner had ever taken the required oath. The Court reasoned that twenty years possession of a slave should be viewed as creating a "presumption" that the oath was taken.	instructions as to the meaning of the law.	
1827	Lear v. Armstrong, 25 U.S. (12 Wheat.) 169 (1827) (followed by Estho v. Lear, 32 U.S. (7 Pet.) 130 (1833); Armstrong v. Lear, 33 U.S. (8 Pet.) 52 (1834)).	Court ruled on the first in a series of three Supreme Court cases reviewing competing claims against bequest by Polish republican activist Thaddeus Kosciuszko. The bequest consisted of a fund for purchasing Thomas Jefferson's slaves and providing them with vocational training and freeing them. Each case concluded with the Court demanding fuller documentation of relevant foreign laws and competing claims, one of which would take away the entire fund.[110]	Affirmed circuit court in 1827. *Reversed circuit court in 1833. Reversed circuit court in 1834.*	+/−
1827	U.S. v. Gooding, 25 U.S. (12 Wheat.) 460 (1827) (future Justice Taney att'y for defense).	Court ruled on federal criminal prosecution of slave trader challenged as to validity of the indictment. *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 proceed-*	*Answered questions certified from a divided circuit court prior to its decision.* The result was that three of the indictments were fatally defective, but four	+/−

110. Eventually, long after John Marshall's death the estate was settled. "Undergoing protracted litigation, the bequest to Jefferson remained legally blocked until 1852 when the U.S. Supreme Court awarded the American investments to relatives in Europe, thus frustrating Kosciusko's original intent . . . . [M]ost of the funds, which had grown several times in the intervening years, were embezzled by one of the administrators." Albert Cizauskas, *The Unusual Story of Thaddeus Kosciusko*, 32 LITIANUS 1 (1986), *available at* http://www.cizauskas.net/acc/thaddeus_kosciusko.html.

DATE	CASE	RULING	ACTION	+/-
		ing to the manifest obstruction of public justice, and against the plain intendment of the acts of Congress." *Gooding*, 25 U.S. at 467-68. Then the Court concluded that six of the defense counsel's objections were unwarranted, and two were valid. The valid objections were to (1) the sloppy wording on failure to say "intent to employ the ship in slave trade," and (2) the charging as a crime the mere sending out from a United States port of a boat intended for slave trade, as distinguished from there equipping it as such. On this point, Justice Story admitted that he had erred in two prior circuit court decisions and noted that he was differing from the United States Attorney General. He did note that the Attorney General's position would unintentionally entail guilt for foreign slavers who accidentally landed in a United States 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.	indictments were still valid. *The Court decided against argument of the United States Attorney General on convicting a ship for merely setting forth from a United States port to engage in slave trade.*	
1828	Sundry African Slaves v. Madrazo (Madrazo I), 26 U.S. (1 Pet.) 110 (1828).	Court ruled against lower court decisions that took twenty to thirty slaves from Georgia's governor, who, pursuant to state law, was planning to give them to the Colonization Society for delivery to Africa, and that instead rendered them to the proven Spanish owner. This action gave the owner the proceeds from his other slaves that had been stolen by United States pirates, judicially forfeited,	*Reversed district court and circuit court decisions. Justice Johnson dissented.*	+

DATE	CASE	RULING	ACTION	+/-
		and sold by the state. The Court reasoned that because the state was a party, jurisdiction was original in the Supreme Court. Case returned on original jurisdiction in 1833 as *Ex Parte Madrazo* (Madrazo II), 32 U.S. (7 Pet.) 627 (1833).		
1829	Boyce v. Anderson, 27 U.S. (2 Pet.) 150 (1829).	Court rejected the strict liability standard of "most skilful and careful management" that applied to common carriers transporting freight in the context of carelessness in the loss of slaves transported by a steamship company. Instead the Court applied the more lenient standard used for transporting persons, namely the absence of negligence. In opting for the "persons" rule, Chief Justice 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," noting that "[i]n the nature of things, and in his character, he resembles a passenger, not a package of goods." *Boyce*, 27 U.S. at 154-55.	Affirmed circuit court.	+
1829	Le Grand v. Darnall, 27 U.S. (2 Pet.) 664 (1829) (Taney for appellant, urging simply that the law be settled).	Court ruled that Darnall, an eleven year-old Maryland slave boy freed by his father's will, could qualify as free and therefore could legally sell his real estate to a Philadelphian under a Maryland law that allowed testamentary manumission only of those slaves able to earn a livelihood. Testimony was	Affirmed circuit court.	+

DATE	CASE	RULING	ACTION	+/-
		undisputed that Darnall was able to maintain himself by work such as household servant; Court ruled the land sale valid under Maryland law.		
1830	U.S. v. Preston (Josefa Segunda III), 28 U.S. (3 Pet.) 57 (1830).	Court rejected the argument of the Attorney General of Louisiana that Louisiana deserved the proceeds from the sale of slaves on the Josefa Segunda, carried out pursuant to the state law of 1818, adopted to carry out the federal law of 1807. The Supreme Court ruled that the federal law of 1819, adopted while appeals in this case were still pending, caused the slaves to be rendered to the President for return to Africa. The $68,000 paid for them was to be returned to purported purchasers.	*Reversed decree of district court.*	+
1830	Lagrange v. Chouteau, 29 U.S. (4 Pet.) 287 (1830).	Court ruled not to set free a slave owned in Missouri who sued his master, alleging that eight days spent with his master in Illinois (after which he was brought back to and sold in Missouri) freed him under the Northwest Ordinance. In response to this allegation, the jury had been instructed that if it found that his master had carried him to Illinois "with a view to a residence" there, it should declare him free. *Lagrange*, 29 U.S. at 290. Court ruled this a correct construction of the Northwest Ordinance.	Affirmed state court jury instruction to jury (the rules of which conflict with the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).	+/−
1831	Menard v. Aspasia, 30 U.S. (5 Pet.) 505 (1831).	Court ruled that it did not have jurisdiction because the Missouri decision under appeal did not question the Congressional re-enactment of the Northwest Ordinance, but simply honored its ban on slavery. The 1787 Northwest Ordinance's ban	Dismissed appeal from the decision of the Missouri Supreme Court. Dismissal enabled former slaves' offspring born	+

DATE	CASE	RULING	ACTION	+/-
		on slavery in the Northwest Territory and its later re-enactments in Congress and in the Illinois Constitution had been treated as implicitly exempting the slaves owned by the pre-1787 French inhabitants of the Northwest Territory because of a prior treaty with France. Menard, an Illinoisan of French descent, claimed that he therefore had a right to own Aspasia because she was the offspring of such slaves. He tried to take her from Missouri, where they had resided from 1821-1827, back to Illinois, but she sued for and won her freedom in the Missouri local and supreme courts.	after 1787 and still being held in Illinois to claim freedom.	
1833	*Ex Parte* Madrazo (Madrazo II), 32 U.S. (7 Pet.) 627 (1833).	Court ruled that it did not have jurisdiction on the grounds that the issue was covered by the Eleventh Amendment rather than admiralty. Madrazzo tried to sue Georgia under the Supreme Court's admiralty jurisdiction in order to regain his lawfully-owned twenty-seven to thirty slaves who were being held by the state, awaiting transfer to the American Colonization Society, shipment back to Africa, and liberation.	Dismissed the appeal. Dismissal lets Georgia retain the twenty-seven to thirty slaves with the freedom to follow through on its pledge to turn them over for liberation in Africa.	+
1834	Lee v. Lee, 33 U.S. (8 Pet.) 44 (1834).	Court ruled that the court below had erred in not allowing the jury to consider whether hiring slaves out temporarily in one county of D.C. before importing them into another had been a fraudulent attempt to evade the D.C. (and formerly Maryland) law against slave import, as modified in 1812 by Congress to allow moving slaves from one D.C.	*Reversed circuit court decision and remanded for new jury instructions. Did not free the slaves on point where Supreme Court split 50-50.*	+/−

DATE	CASE	RULING	ACTION	+/-
		county to another. Court divided in half on how strictly to interpret the 1812 act with half viewing the act as freeing the slaves in this context.		
1834	McCutchen v. Marshall, 33 U.S. (8 Pet.) 220 (1834).	Court rejected purported out-of-state heirs' claim to slaves set free by the will of Tennessean. Court reasoned that Tennessee law was clear in permitting such freeing of slaves contrary to the allegation of the heirs. Court determined that the offspring born after the testator's death to two women slaves who had not yet reached twenty-one, the age at which they were to become free, remained legally slaves under Tennessee law, although, Court acknowledged that it might rule otherwise "[i]f this was an open question." Nonetheless, the description of these offspring in the lawsuit was "too vague and uncertain" for the Court to deny their manumission. *McCutchen*, 33 U.S. at 241.	Affirmed decree of circuit court, dismissing the lawsuit, with costs.	+
1835	Fenwick v. Chapman, 34 U.S. (9 Pet.) 461 (1835).	Court ruled that executor of estate erred in allowing orphan's court to sell as slaves two persons who had already been set free under the terms of a deceased Marylander's will. Maryland law allowed such manumission as long as it was not "in prejudice to creditors." Sale of the slaves was determined to be 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	Affirmed circuit court judgment with costs.	–+

DATE	CASE	RULING	ACTION	+/-
		that assent," *Fenwick*, 34 U.S. at 475, and (2) when testator declares his intention to free his slaves, other property, including real estate, must be used to satisfy his debts. Accordingly, the orphan's court had erred in attempting to preserve the real estate of the decedent above the freedom of the named slaves.		

CONCLUSION

One preliminary conclusion here about the Marshall Court is that, despite whatever doubts a majority of the Justices harbored about a clash between moral or natural law and slavery, they systematically voted prior to 1817 to uphold slavery or go easy on slave traders, even in many cases where a legally respectable conclusion could have gone the other way. Beginning in 1817, the situation changed. The Justices appeared to begin to pay much more attention to the common law principle of "*in favorem libertatis*." Why this is so is not definitively discoverable, although this Essay has suggested tentatively that the most likely candidate for triggering the change was the coming into being of the American Colonization Society. In any event, that a marked shift took place is hard to dispute.

For a second conclusion, one can now reconsider the inquiry that began this Essay. Did Hamilton's prediction about the tendency of judicial independence to "mitigate[ ] the severity" of "unjust and partial laws" prove valid for the federal judiciary up until 1835?[111] One would have to answer that it varied across time. In the time period from 1776 through 1791, legislatures and constitutional conventions were exceptionally pro-liberty, freeing slaves,[112] outlawing slavery in the Northwest Territory,[113] and writing a twenty-year limit on the import of slaves into the Constitution.[114] But Congress quickly retrenched, adopting a Fugitive Slave Law by 1793 that appeared to be more anti-liberty than the Fugitive Slave Clause of the Constitution actually warranted,[115] and imposing both slavery (in 1801) and racial hierarchy (in 1812) on the District of Columbia.[116] Until 1817 the U.S. Supreme Court undeniably supported the slavery system in its decisions, supported it more than law itself demanded, if one can assume that the lower federal courts and the U.S. Attorney General knew law as well as the Justices did.[117] Between 1817 and 1820 Congress adopted a number of increasingly strict laws opposing the slave trade,[118] and the Court too became harsh on slave traders and also relatively lenient toward slaves.[119] At this point a divergence begins: Southern state legislatures cracked down on free black sailors, refus-

111. *See supra* notes 1–4 and accompanying text.
112. *See supra* note 13 and accompanying text.
113. *See supra* note 36 and accompanying text.
114. *See supra* note 32 and accompanying text.
115. *See supra* notes 38–44 and accompanying text.
116. *See supra* notes 19–20, 38, and 60 and accompanying text.
117. *See* Table *supra*.
118. *See supra* notes 93–97 and accompanying text.
119. *See* Table *supra*.

ing to let them circulate freely, and insisted on banning free discussion of slavery.[120] With the latter, the Jackson Administration basically cooperated.[121] In this period the federal judiciary did offer some resistance and also continued its post-1816 toughness toward participants in the slave trade and leniency toward slaves who could make a plausible legal case for their freedom.[122] So from 1820–1835 one can conclude that the Marshall Court was somewhat more anti-slavery and more the defender of free blacks than was either Congress or the President. The difference at this point is not stark, but perhaps in light of the youth of the institution, it is all that even Hamilton might have expected from the "least dangerous branch."

120. *See supra* note 53 and accompanying text.
121. *See supra* text accompanying note 48.
122. *See* Table *supra*.