

BIRTHRIGHT CITIZENSHIP AND THE FOURTEENTH AMENDMENT: JOHN MCLEAN'S DRED SCOTT DISSENT IN HISTORICAL PERSPECTIVE

PAUL BRICKNER, J.D., LL.M., US ADMINISTRATIVE LAW JUDGE*

ABSTRACT

The dissent of Associate Justice John McLean in the famed 1857 Dred Scott case has been disparaged by some as the Justice's self-promotion of his presidential ambitions. McLean was indeed politically ambitious and aspired to be a Presidential candidate. However, thanks to eminent law librarian Ervin H. Pollack we have a more satisfactory basis for evaluating whether McLean's dissent was a fair and impartial analysis or a statement by a politicized judge. In an 1817 opinion published by Professor Pollack, McLean expresses the same opposition to slavery that he would put forth forty years later. This article is an exploration of the language used by John McLean in both opinions how it affirms his opposition to slavery.

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* Paul Brickner received his B.A. from the University of Richmond in 1962, his J.D. from Case Western Reserve University in 1966 and his LL.M. from Cleveland State University in 1983. He has been admitted to practice in Ohio, Virginia, and the Federal Courts to U.S. Supreme Court. From 1968-1969 he served as an Assistant U.S. Attorney in Columbus, Ohio, and from 1972-1976 he served as an Assistant U.S. Attorney in Cleveland, Ohio. He has been an Appellate Judge in the U.S. Army Court of Criminal Appeals from 1989-1995. He has also taught legal courses at Cleveland State University College of Law (1991-1993), Notre Dame College (1986) and the University of Akron School of Law (1987-1995) where he won the John R. Quine Adjunct Faculty Award. He served as a U.S. Administrative Law Judge in Cleveland, Ohio from 1981-2003 and as a Senior Administrative Law Judge in Falls Church in Virginia from 2004-2006. He is currently a candidate for the 11th District of the Ohio Court of Appeals.

I. INTRODUCTION

Richard Lunsford, a Kentucky slave, could have never known that his judicial victory in an 1817 Ohio Supreme Court decision would be an important step towards the dissent in the *Dred Scott*¹ case. This preliminary dissent in *Ohio vs. Carneal* led to the 14th Amendment to the United States Constitution that revolutionized American Constitutional law. John McLean, a young judge and relatively new member of the Ohio Supreme Court in 1817, first approached the issue of slavery while deliberating the Lunsford case.

The three judges of the Ohio Supreme Court deciding the Lunsford case issued seriatim opinions. McLean's was the first, but all agreed that the slave should be granted his freedom. McLean relied on the decision of Lord Mansfield in the famed *Sommersett's Case*, 1772; he found that Lunsford was a free man because he resided in Ohio, a free state, during his employment in Cincinnati. Once a U.S. Supreme Court Justice, McLean took the same position in the *Dred Scott* case. However, he did not cite his opinion from the *Ohio v. Carneal* case. Authorities recognize that McLean's famous dissent led to the language of the 14th Amendment; that persons born in the United States are citizens of the United States and the states in which they reside. This notion of birthright citizenship as a 14th Amendment right has become controversial in recent years in discussions of anchor babies born to illegal aliens.

II. MCLEAN, JOHN QUINCY ADAMS AND SLAVERY

John McLean (1785-1861) served as both a Judge of the Ohio Supreme Court (1816-1822) and a Justice of the U.S. Supreme Court (1829-1861) but is remembered mostly as a *Dred Scott* dissenter. While *Dred Scott* (1857) represents the judicial culmination of McLean's lifelong opposing to slavery, he expressed the same viewpoint that he'd written in the opinion he wrote 40 years earlier as a Judge in *State of Ohio v. Carneal* (1817).² The Ohio Supreme Court opinion and the U.S. Supreme Court dissent constitute a tale of two slaves: Richard Lunsford of Kentucky who worked in free Ohio, and Dred Scott of Missouri who lived in free Illinois and Western Territory lands. Though an opponent of slavery, McLean was not an abolitionist. He conceived of slavery as the price of creating one nation from the 13 colonies. As much as McLean opposed the "repugnant" institution, he understood that slavery represented the South's vested

¹ *Dred Scott v. Sanford*, 60 U.S. 393 (1857), McLean dissent 529-564.

² Ervin H. Pollack, ed., *Ohio Unreported Judicial Decisions: Prior to 1823*, 133 (1952).

interest in what would become the compromise essential to forming the new nation. In writing of the Fugitive Slave provision of the Constitution, McLean expressed, "That the Constitution was adopted in a spirit of compromise is a matter of history."³ The eminent Justice Joseph Story, a friend and admirer of McLean, wrote more expansively and more skillfully of the Fugitive Slave provision in the same case.

As to slavery itself, "the Great Chief Justice" John Marshall skillfully noted,

That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission...Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful...war is no longer considered as giving the right to enslave captives. But this triumph of humanity has not been universal...and Africa has not yet adopted them...Can those who have themselves renounced this law, be permitted to participate in its effects by purchases the being who are its victims?⁴

Chief Justice Marshall merits the case as of "momentous importance; claims in which the sacred rights of liberty and property come in conflict which each other."⁵ However, slavery remained lawful after the decision and Chief Justice Marshall's opinion. It would remain a point of contention for the courts and the nation until the Civil War and the Civil War Amendments engendered its conclusion.

A. McLean's Earliest Judicial Pronouncements on Slavery

McLean became a Judge on the Ohio Supreme Court in 1816. With little over a year's experience as a Judge, he wrote the lead opinion in *State of Ohio v. Thomas D. Carneal*⁶, a case reported on June 16 and 30, 1817, in Liberty Hall and the Cincinnati Gazette and reprinted in 1952. The case was a habeas corpus action against Thomas D. Carneal who was the administrator of the estate of his father, Thomas Carneal. The suit sought to bring about the release of Lunsford from slavery. Lunsford initiated the lawsuit through the State of Ohio against Carneal. Two of McLean's three fellow judges, Ethan Allen Brown and Jessup Nash Couch, issued separate opinions that agreed with McLean on the outcome of the case: that the

³ *Prigg v. Pennsylvania*, 51 U.S. 539 (1842), separate opinion of M'Lean 658-673.

⁴ *The Antelope*, 23 U.S. 66 (1825), 120-122.

⁵ 23 U.S. 114.

⁶ Ervin H. Pollack, ed., OHIO UNREPORTED JUDICIAL DECISIONS: PRIOR TO 1823, 133 (The Allen Smith Company 1952).

slave was a free man. Supreme Court Judge Calvin Pease, a fourth member of the court, does not appear to have participated in the case.

The case was somewhat unusual among those heard by the Ohio Supreme Court. The *Carneal* case was approached on the grounds of first instance or original jurisdiction, instead of on review or appeal from a lower court. In *Carneal* the Supreme Court acted as a trial court rather than as an appellate court. In addition to reviewing the Writ of Habeas Corpus and the Return, the Ohio Supreme Court judges heard and evaluated the testimony of witnesses who were present and testified before the court⁷.

The case was typical of the slavery questions that arose in legal contexts in Border States where slavery and freedom were in close proximity. Richard Lunsford had been a slave in Kentucky where the practice was lawful. Across the Ohio River in Ohio, the State Constitution prohibited slavery.⁸ The notion that a slave became free upon entering into free territory was at issue.⁹ Many legal ambiguities arose—for example, could slaves travel in Ohio, with or without their masters, or work in Ohio? Could they work as slaves in Ohio during the day, return home to Kentucky in the evening, and thus continue to be slaves? If a slave merely set foot on Ohio soil, did the Constitution act to release that slave from bondage?

McLean, as a young new state jurist, provides an noteworthy opinion in this habeas corpus case. Forty years later, he would expound his view of slavery more fully in his famed *Dred Scott* dissent. Until then, the *Carneal* case remained his primary judicial pronouncement on slavery. He explained that the defendant, Thomas D. Carneal, held Richard Lunsford, who had been his father's property at the time of his death. Carneal claimed that, as the administrator of his father's estate, he had the right to detain Lunsford. Complicating the issue was the fact that the deceased Carneal had mortgaged the slave in 1799 as security for a debt. The debt remained unpaid at the time of the hearing before the Supreme Court. Further complicating the situation was the statement in the pleadings that the late Thomas Carneal had willed Richard Lunsford and other blacks to his wife. Moreover, one of the heirs of the deceased was a minor.

The slave produced evidence that Coleman acted as the original administrator until 1815, when the court removed him and replaced him the defendant Carneal. Moreover, Richard Lunsford claimed that Coleman had

⁷ O.H. Const. art. III, §2.

⁸ Ordinance of 1787, art. VI (1787). The section also contained a fugitive slave provision. "Slavery Issues in Ohio Courts," in, *History of the Courts and Lawyers of Ohio*, 593 (Carrington T. Marshall ed.), suggests, "...Ohioans were agreed always that they did not want cheap slave labor in their section, but had slight objection to slavery elsewhere."

⁹ *Somerset's Case*, 98 Eng. Rep. 499 (K.B. 1772). This English decision by Lord Mansfield had a profound influence on American law.

sold him to James Riddle. Riddle had him work as a slave in Cincinnati, sometimes for 8 to 10 days without his returning to Kentucky. In addition, James Riddle testified that when he purchased the slave from Coleman the administrator, Coleman said that he did not have authority to sell Lunsford because of the unsatisfied mortgage. He said that Coleman informed him he would make good at a future date, because they knew one another.

McLean deftly dismissed some of the issues that could keep Lunsford a slave. Without power of attorney, Carneal could not argue on behalf of his mother that she had inherited the slave from her husband. Nor could Carneal argue that the mortgagee had a rightful claim to the slave. Carneal had no standing to pursue the claim of his mother, the devisee, or of the mortgagee. He did not allege that he had a power of attorney to act on behalf of either the devisee or the mortgagee. In the end, Judge McLean and Judges Brown and Couch agreed that the slave Lunsford, now emancipated, was a free man. The Judges said the slave was no longer in bondage. The Supreme Court manumitted him. Although the opinion did not cite legal authority for some of McLean's principles, he clearly stated his reliance on the U.S. and Ohio Constitutions and existing case law.

B. Judge John McLean and the Language of Slavery and Race

In some ways, Ohio Supreme Court Judge McLean displays a modern sensitivity to linguistic usage of racially descriptive terms—a sensitivity that we might not expect of a mid-nineteenth century jurist. His most frequent description of Richard Lunsford is “black man”; he also makes one reference to him as “the boy”. In one instance, McLean calls Lunsford a “fellow creature” This comment by Judge McLean reveals his thinking or mindset as a guardian responsible to protect the liberty of another human being. Judge McLean, in 1817, appears to have shown prevision in relation to the sensitive issue of the labels we use in describing race. This usage of a man who found slavery repugnant does not mean that McLean was in 1817 a thinker who held more enlightened 21st century racial beliefs. He was partly bound by the thinking of his times.

1. McLean Looks at Slavery as a Man and as a Judge

In his *Carneal* opinion, McLean presents an unambiguous view of slavery. McLean was then a Judge of the Ohio Supreme Court. He noted that the case raised some important questions that are not necessarily involved in the decision. One is the “abstract principle of slavery”. He explained,

Some important questions have been raised in the discussion of this cause, which are not, necessarily, involved in the decision. Were it

proper to consider it, the Court, as well from their own sentiments on the subject, as from the principles recognized by our Constitution and Laws, could not hesitate in declaring, that SLAVERY [emphasis in original], except for the punishment of crimes, is an infringement upon the sacred rights of man: Rights, which are derived from his Creator, and which are inalienable.¹⁰

He continued by noting that slavery should be reserved as a form of punishment for crimes; not as a social practice. Additionally, he contended, “Viewing the question abstractly, I would not hesitate to declare, that a slave in any state or country...is entitled to his freedom.”¹¹ His descriptive references to the origins of slavery are telling.

However, McLean observed that an abstract interpretation of the question of slavery was inconsistent with his duty to uphold and the support the Constitution of the United States. As a judge, he recognized that laws made under the Constitution of the United States are superior to the obligation created by the constitution and laws of Ohio:

I am bound to respect that, which the laws of any state have dominated [McLean seems to have meant denominated] property, and in giving construction to the above provision of the Constitution of Ohio, it is my duty, while I endeavor to guard the liberty of a fellow creature on the one hand, not wholly to disregard rights, which have been sanctioned by the laws and policies of another state.¹²

McLean here refers to the law of Kentucky that allowed whites to own black slaves and denominated the slaves as real property. Professor Alan M. Dershowitz has an interesting take on McLean’s *Dred Scott* language. Dershowitz claims that McLean’s language indicates that he was a proponent of the idea that slaves were property rather than human beings.¹³ He quotes McLean without noting that his views were in opposition to the quote and that he found slavery repugnant. McLean was merely stating the law as it existed in states that allowed slavery.

As a judge, McLean was obligated to uphold the fugitive slave law of 1793 enacted by Congress pursuant to the Constitution. He continued by saying, “On this subject, I confess it is difficult to deliberate without feeling—exertions to suppress every emotion would be in vain—to guard against any improper influence is all that can be expected.” Some 40 years

¹⁰ 135.

¹¹ *Id.* at 139.

¹² *Id.* at 139.

¹³ Alan M. Dershowitz, *America on Trial: Inside the Legal Battles that Transformed Our Nations*, 122 (Warner Books 2004). Dershowitz writes, “Even the dissenting justices [McLean] ... conceded that a slave could be sold, reclaimed, and given as inheritance.” His usage of the word concede implies that McLean accepted that as correct. McLean certainly did not believe in slavery. He merely was acknowledging the state of the law in states that allowed slavery.

later, he wrote his *Dred Scott* dissent with similar poignancy, yet there were those who stated that his dissent was artificial and designed to promote his Presidential aspirations. Perhaps his *Carneal* opinion would have shed light on McLean's true intentions. He continued by expressing regret that the state had not legislated on the subject of manumission of slaves from a neighboring state who traveled to Ohio for varying reasons. The Ohio legislature, he suggested, thought the words of the Ohio Constitution sufficiently clear to entrust such questions to its judiciary.

Having expressed his personal views on slavery, McLean provided legal commentary on the issue at hand:

From the nature of our federal compact, and the laws of our national legislature, this Court are bound to respect as property, to a certain extent, that which is made property by the laws of a sister state, however repugnant, in our conception, to justice, and contrary to the policy of our own laws. If a slave escaped from Kentucky, his master, under a law of Congress, has a right to pursue him into this state, as a fugitive from labor, and obtain possession of his person. The right of a citizen of Kentucky to the ownership and labor, of his slave, when presented for judicial investigation, must be tested, like every other right, by the laws governing the case.¹⁴

He further noted,

A departure from this principle by the Court, would, in my opinion, be a dereliction of duty in the violation of their oaths. Judicial functions can but seldom be exercised in a discussion of policy: this is the peculiar province of the legislator.¹⁵

Judge McLean then uses language reminiscent of Benjamin N. Cardozo. This similarity is echoed in McLean's notions of the role of legislator, the role of the judge and of the judicial process,

He may look to consequences, and investigate them. He may trace a measure in all its bearings, and reject or sanction as the correct policy may dictate. The course of the judge is marked by law; and the construction of which he may only exercise a legal discretion.

...

Every cause must be decided on the merits as presented to the Court. In the cause under consideration, the Court are called upon to say, whether the defendant is entitled to the possession and control of this black man: And his title must be viewed, *as set out* [emphasis in original] in the return to the Habeas Corpus.¹⁶

McLean was earnest about the roles of the judiciary and of a judge in

¹⁴ See *Supra* note 14.

¹⁵ See *Supra* note 14.

¹⁶ See *Supra* note 14.

deciding cases. He did not blindly undertake his responsibilities.

2. McLean Looks at Slavery as a Justice of the U.S. Supreme Court

Several cases involving slavery came before the U.S. Supreme Court when McLean was an Associate Justice. However, the decisions are far less important and revealing than McLean's words in *Dred Scott*.

His linguistic usage is markedly different in *Dred Scott*. In the 1857 case, unlike the 1817 case, he uses the word negro, without capitalization, primarily, almost to the exclusion of the term black man. One exception was his statement that, "there is no power in the Constitution by which Congress can make either white or black men slaves."¹⁷ He also uses the word colored several times. The change in his verbiage from the *Carneal* case to *Dred Scott* is interesting. For no reason at all, he seems to be regressing—by modern-day standard of linguistic correctness.

In *Dred Scott*, he displays an important sensitivity to usage of others. He notes:

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution. We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact, that *James Madison*, that great and good man, a leading member of the Federal Convention, was *solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man* [emphasis added].¹⁸

This subtle linguistic avoidance of the words slave or slavery in the Constitution by Madison allows us in the 21st century to cherish and revere this document to an extent that we could not had those words been used. McLean paid close attention to the words and intent of James Madison, the "father of the Constitution," because he was in agreement with the spirit expressed by Madison. Sixteen years before *Dred Scott*, McLean wrote in another dissent, "The Constitution treats slaves as persons."¹⁹

However strongly he opposed the institution of slavery, which he

¹⁷ *Dred Scott v. Sanford*, 60 U.S. 393, 542 (1857).

¹⁸ *Id.*, at 537

¹⁹ *Graves v. Slaughter*, 40 U.S. 449, 456 (1841). In his dissent, McLean noted that some states treat slaves as property.

called repugnant, McLean was not completely modern in his thinking. For example, he believed that Congress could exclude free blacks and slaves from settling in a Territory.

If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducting to lessen the value of public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it.²⁰

We must not forget McLean's service as Land Commissioner. No doubt, this influenced his understanding of the law as having room for de jure segregation. Almost 100 years before *Brown v. Board of Education*²¹ that should not be surprising. The equal protection clause had not taken on its modern usage.

As Postmaster General, MacLean advertised for carriers to transport the mail long distances. The carrier had to be white males, while stipulating that congress had legislated only white males could serve.²²

III. JUSTICE STORY VIEWS THE CONSTITUTION'S FUGITIVE SLAVE PROVISIONS

Justice Joseph Story, the pre-eminent legal scholar and Harvard educator, was a friend of John McLean. Story he may well have played a hand in the award of an honorary degree by Harvard University on Justice McLean.

In reviewing the fugitive provisions of the Constitution, Justice Story addressed both fugitives from justice and fugitives from bondage. He addressed Art. IV, Sec. 2 and explained the history of the fugitive slave provision.

Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles

²⁰ *Id.* at 543

²¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²² Wesley Everett Rich, *THE HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829*, 95-96 (Harvard University Press 1924); Richard R. John, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 138, 140-143. (Harvard University Press 1995).

prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

...

The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.²³

IV. McLEAN'S *DRED SCOTT* DISSENT AS A 14TH AMENDMENT FRAMEWORK

Some authorities have credited McLean's widely broadcast dissent in *Dred Scott* as providing the framework for the 14th Amendment.²⁴ Aside from brief comments by three authorities, little has been written on the precursory nature McLean's dissent in relation to the 14th Amendment. For example, Burnett Anderson has written, "When the war was won, McLean's dissent was virtually written into the Fourteenth Amendment. Thus, a single dissenting opinion from his pen may have done more to direct the course of American history than his three decades of casting in the troubled political waters of presidential politics for a prize that forever eluded him."²⁵ Such conclusory comments warrant fuller explanation. A forthcoming article in *The American Journal of Legal History* will address the issue more fully.²⁶

The *Dred Scott* decision contains three distinct viewpoints or opinions on citizenship. The Chief Justice, Roger B. Taney, in his racist opinion wrote that blacks, whether slave or free, could not be citizens because they were racially inferior as descendents of African brought to America to serve as slaves for white people. Taney's views reflected those prevalent in the racist and slave owning Maryland society that he called home. McLean's dissenting colleague, Justice Benjamin R. Curtis was of the opinion that the individual states determined who was a citizen, just as they had made that determination before the Constitution became the supreme law of the land. He was a New Englander who had spent his entire life in Massachusetts. It was natural for him to think of the Commonwealth as

²³ *Prigg v. Pennsylvania*, 41 U.S. 539, 611-612 (1842).

²⁴ Burnett Anderson, *John McLean* in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993*, Clare Cushman ed. 103 (Congressional Quarterly, Inc. 1993); Barbara Ann Perry, *Lawyer-Presidents and Their Supreme Court Appointments in AMERICA'S LAWYER PRESIDENTS: FROM THE LAW OFFICE TO THE OVAL OFFICE*, Norman Gross ed. 307 (Northwestern University Press, 2004).

²⁵ Anderson, *THE SUPREME COURT JUSTICES*, *infra*-THIS SOURCE WAS NOT LISTED ELSEWHERE-publishing info needed..

²⁶ Paul Brickner, *John McLean*, VOLUME, PAGE NUMBER??*THE AMERICAN JOURNAL OF LEGAL HISTORY* (2007).

making the determination of who were its citizens. Curtis's dissenting opinion, generally considered academically superior to McLean's opinion, remained a great dissent. Neither opinion lived on in Supreme Court adjudication to return as a majority opinion. Instead, the amending provisions of the Constitution were used to pass the Civil War Amendments that overturned the *Dred Scott* case. McLean's opinion found its way into the 14th Amendment as its cornerstone. Indeed, it might have been responsible for the outlook and wording much of the amendment. Justice McLean tried to persuade his dissenting colleague, Justice Benjamin R. Curtis, to remain on the High Court so they could uphold major constitutional principles in dissent. But Curtis, in late 1857, became the only Justice to resign from the Court in protest.

McLean in his dissent treats citizenship as federal, relating to the national purpose. His own background as the son of immigrants gave him a different insight and sensitivity to the issue. He saw citizenship as arising from birth in the nation. People like his foreign-born immigrant parents who arrived in American in the mid-nineteenth century, when *Dred Scott* was decided, applied for citizenship through the Federal government, pursuant to Constitutional provision. People like himself and his siblings and his own children were Americans by birth on American soil and did not have to file an application. We naturally tend to think of persons born in a free country as being citizens of that country. McLean's own experiences were broader than those of a person who had lived in only one state. His family moved from the state of his birth, New Jersey, to Virginia when he was a youngster. He lived in Kentucky when it was a new state. His family then moved to Ohio in the Western Territory, before it became a state in 1803.

Justice Curtis observed, "it may be safely said that the citizens of the several States were citizens of the United States under the Confederation." He continued as follows:

That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the Government of the Confederation, to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action, that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, 'The United States of America.'²⁷

McLean viewed immigration and citizenship as being Federal because

²⁷ See *Supra* note 14.

of the power of naturalization granted to the United States. The Federal Government, not the states, had the power under the Constitution to naturalize and determine which immigrants could become citizens. As one who had served as both a state and Federal official, he had a practical understanding of our. He saw citizenship as an important factor in our relations with other nations. As Postmaster General he was aware of the interplay of nations in the transportation of mail to and from foreign countries. His outlook has a statesmanlike approach of a jurist with broad experience as a government official including service in Congress. Almost all of his writings show that considered the importance of state government in our federal Democracy.

The 14th Amendment's applicability to "anchor" babies born to illegal aliens might become a matter of 21st century litigation. The idea of birthright citizenship is based squarely on the language of the 14th Amendment that is taken from the McLean dissent. The amendment leaves open the question of which births on American soil do not result in automatic citizenship. Children born to diplomats do not automatically become citizens. The Supreme Court has not directly ruled on this question. Might diplomats and illegals have a legal equality? A court might well read the word "lawfully" into the language of the 14th Amendment, thereby eliminating children born to illegals just as the language of the 14th Amendment does not include children born to diplomats. Chief Justice Rehnquist wondered whether the Steel Seizure case would have been decided differently if it had been decided during World War II rather than during the Korean War. The times affect decision of even our highest court. Chief Justice Charles Evans Hughes writing in the Blaisdell case²⁸ upheld the Minnesota Mortgage Moratorium Law as a needed depression era measure. Surely the case would have been decided differently in prosperous times. While immigrants were needed during the 1850s when *Dred Scott* was decided, in 2007 popular opinion largely opposes the entry of illegal aliens and might lead to a change in judicial outlook.

McLean's dissent did appeal to the brooding spirit of the law. However, his vision appeared not as later majority opinion but as a Constitutional Amendment. If amendments listed and footnoted their authorities, McLean would be paramount.

The spark of simple genius in the dissent deserves our attention. As John Quincy Adams said,

In most inspirations of genius, there is a simplicity, which when they are familiarized to the general understanding of men by their effects,

²⁸ Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

detracts from the opinion of their greatness.²⁹

Justice John McLean's influence on American law is worthy of additional study. He has had a greater influence on our thinking than we have realized. His idea that those born in America are American citizens is both simple and easy to apply and "familiarized to the general understanding of men": United States citizenship by birth and state citizenship in the state of residence.

Our greatest jurists, Chief Justice Marshall, Story, Holmes, Brandeis and Cardozo, not only shared the brilliance common in the uppermost ranks of the profession, but also possessed a prevision that enabled them to write opinions not just for the hour and the day but for generations to come. John McLean's *Dred Scott* dissent provided a vision that all Americans share in the blessing of liberty and justice proclaimed in our sacred documents and in our Pledge of Allegiance. His famed dissent created the cornerstone of the 14th Amendment.

²⁹ John Quincy Adams, *THE LIVES OF JAMES MADISON AND JAMES MONROE* 31 (G.H. Derby & Co., 1850).