Not the Most Insignificant Justice: Reconsidering Justice Gabriel Duvall's Slavery Law Opinions Favoring Liberty

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Joseph Story and Gabriel Duvall began their careers as Supreme Court Justices on the same day in February 1812, but the reputations of these nominees of President James Madison diverged widely. Story is ranked among the Court's leading Justices. Duvall's standing, in contrast, fell so far by the 1930s that Ernest Sutherland Bates, in his book **The Story of the Supreme Court**, labeled him "probably the most insignificant of all Supreme Court judges[.]" Bates implied that, at nearly sixty years of age, Duvall was too old when he was nominated to the Court; he thus devalued Duvall's nearly twenty-four years as a Maryland lawyer, state court judge, and legislator; his two years as a United States Congressman; and his nine years as the first Comptroller of the United States Treasury. Bates also suggested that Duvall should have resigned from the Court soon after his appointment because "he became a few years later so deaf that he could not hear a word said in Court[.]"[1] Others based later critiques on the dearth of Duvall's published Supreme Court output—fifteen opinions for the Court and one dissenting opinion—although they acknowledged that, during this era, Chief Justice John Marshall dominated the Court with his collegial approach to decision making and opinion writing.[2]

On the other hand, Irving Dilliard, who wrote the entry on Duvall in **The Justices of the United States Supreme Court 1789-1969**, accused Bates of making "a manifestly unfair judgment" about Duvall's almost twenty-three-year career on the Court.[3] Indeed, Duvall deserves further reevaluation, but not because of the recently revealed genetic link that he, President Barak Obama, and Vice President Richard Cheney have to Mareen Duvall, a mid-1600s Huguenot immigrant from France and an early

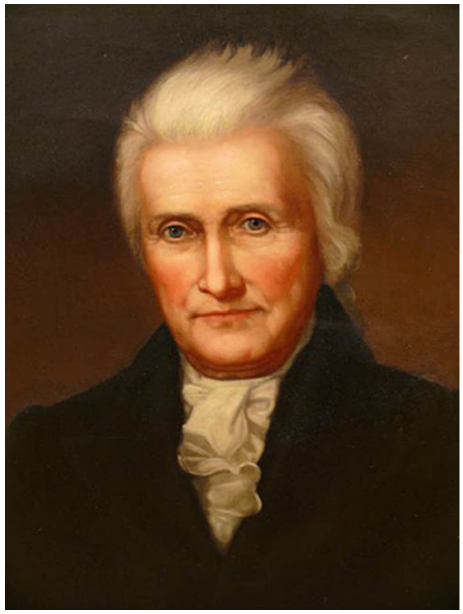
Maryland slave owner.[4] Instead, Duvall's two slavery-law opinions favoring liberty when enslaved peoples' freedom was at issue, reconsidered in their historical context, enhance Duvall's place in Supreme Court history. Duvall's only dissenting opinion, which he filed in *Mima Queen v. Hepburn* (1813),[5] contradicted Marshall's version of the hearsay rule, which Duvall believed would deny "reasonable protection" to "people of color." And in *Le Grand v. Darnall* (1829),[6] Duvall used the implied manumission doctrine to affirm a judgment in an interracial diversity suit confirming that Nicholas Darnall was freed by his father and owner. These opinions by Duvall, who in 1783 owned at least eight slaves and whose 1844 estate included thirty-six slaves, stand in contrast to the anti-manumission and pro-slavery trend that swept through the antebellum Southern courts and legislatures, reaching the Supreme Court in *Scott v. Sandford* (1857).[7]

Duvall's Freedom Suits and the Early Hearsay Rule

Duvall's experiences as a Maryland lawyer between 1778 and 1796, when he became a Maryland General Court judge, may have influenced his slavery law jurisprudence. He was among the lawyers who represented enslaved claimants seeking freedom under the law. Other prominent Maryland lawyers who pursued these claims included Philip Barton Key; Philip's nephew Francis Scott Key, writer of the lyrics to our national anthem; and Francis's brother-in-law, future Chief Justice Roger B. Taney. Maryland law, like the law in most slave societies, provided enslaved people with procedures to assert and establish that they were unlawfully held in bondage. The successful claimants generally advanced two primary theories of relief. Manumission suit claimants alleged that their masters freed them or one of their ancestors, and freedom suit claimants contended that they could not be enslaved under the applicable law.[8]

When the United States gained its independence, in most states only Africans or those with African female ancestors could lawfully be enslaved. Many Maryland freedom suits arose, however, because its legislature in 1664 adopted its first law intended to deter "freeborn English women" from marrying "Negro slaves." This law enslaved "freeborn women" who married "any slave" for the term of their husbands' lives. It also provided that the children of these marriages were to follow their fathers' condition, except for those already born, who were to serve until they were "thirty years of age and no longer." This act was amended in 1681, but 1692, 1715, and 1728 laws subjected both white women and their mixed-race children to fixed terms of servitude. This punishment of children for their parents' perceived indiscretions was repealed in 1796. These laws, and others freeing slaves illegally imported into Maryland, spawned freedom suits in which litigants claimed that they were no longer legally enslaved.[9]

Many of these freedom and manumission suit claimants relied on hearsay evidence to prove that they had non-African or free black maternal ancestors. Hearsay evidence, by the late eighteenth and early nineteenth centuries, was defined as an assertion offered at a trial or hearing to prove the truth of the matter asserted by a person who was not testifying at the trial or hearing and who thus could not be cross examined. This hearsay evidence often was the only proof available to enslaved litigants, in part because the testimony of slaves and free blacks against whites generally was forbidden.[10] The early Southern courts used the common law hearsay exception permitting evidence of family history, reputation, or pedigree. They allowed anyone who knew a freedom claimant's family to offer hearsay evidence of both the identities of the



Gabriel Duvall (left) and Francis Scott Key (right) were both Maryland lawyers who owned slaves and litigated on behalf of slaves for their freedom. Many of these freedom and manumission suit claimants relied on hearsay evidence to prove that they had non-African or free black maternal ancestors. One of Key's many cases for enslaved litigants included a successful 1828 freedom suit filed against Duvall on behalf of a family of Duvall's own slaves. Duvall never publicly condemned slavery, unlike Key, who called slavery "a great moral and political evil amongst us."

claimant's family members and the reputation or general understanding among people in the relevant community of those family members' race and servile or free status. This evidence was uniquely relevant in freedom suits.[11]

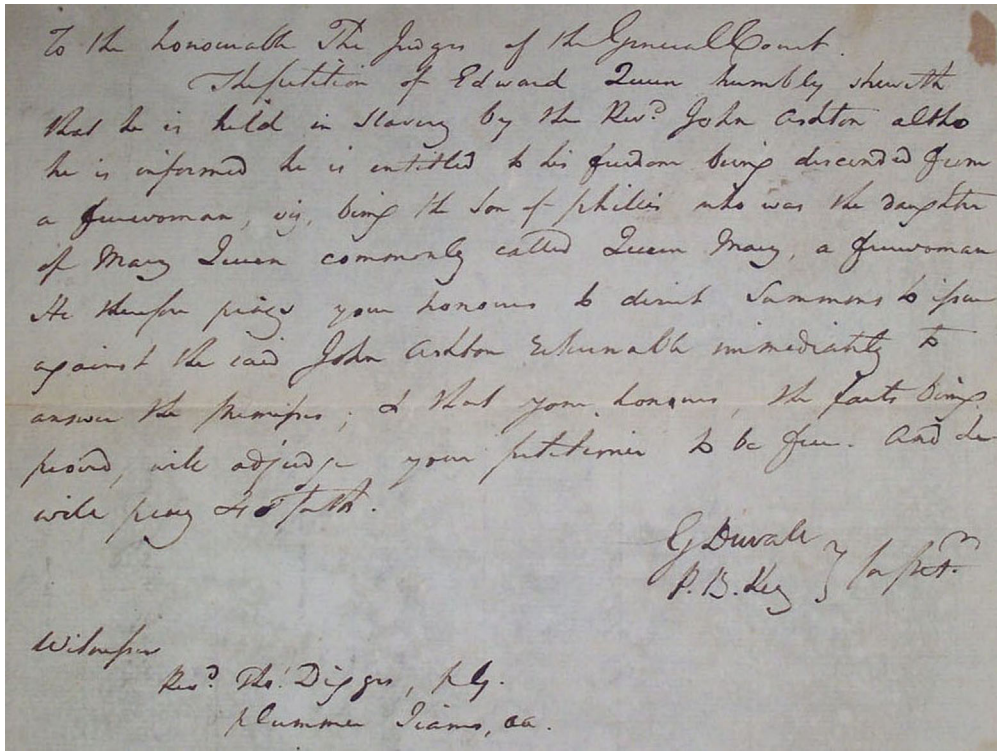
Duvall relied on this expansive hearsay exception in early reported Maryland freedom suits, including *Mahoney v. Ashton*.[12] Duvall started that case on October 18, 1791, by filing a freedom petition for Charles Mahoney against Father John Ashton, who claimed Mahoney was his slave. Ashton was an influential Jesuit priest who was among the founders of Georgetown College, now Georgetown University. By 1790 he also had eighty-two slaves under his command.[13] Duvall based Mahoney's case on a broad reading of Lord Mansfield's landmark decision in *Somerset v. Stewart*.[14] Duvall alleged that Mahoney was the great-great grandson of Ann Joice, who was freed in the 1670s by the laws of England when Lord Baltimore brought her from Barbados to England and then to Maryland. Duvall began a four-and-one-half-year search for evidence, and Jonathan Roberts Wilmer succeeded Duvall as Mahoney's lawyer when Duvall became a General Court judge in 1796. The case languished in Maryland's courts for almost eleven years. It was tried before juries three times. Maryland's General Court and Court of Appeals issued decisions permitting both sides to introduce hearsay pedigree and reputation evidence about Ann Joice from non–family members. The jury in the second trial, which was held in June 1799, found for Mahoney, apparently based upon Mahoney's hearsay pedigree and reputation evidence, but the Court of Appeals reversed this verdict. Another jury in October 1802 found for Ashton, apparently because they were convinced by Ashton's hearsay pedigree and reputation evidence, which included the depositions of Samuel Douglass and Thomas Lane.[15]

Although this liberal hearsay rule was not beneficial to Mahoney in court, Ashton manumitted Charles and Patrick Mahoney in 1804. One year later he freed their younger brother Daniel Mahoney. The Mahoney family members "were so grateful for Duvall's assistance that Charles's brother Patrick christened his son Gabriel."[16]

Duvall and Philip Barton Key in October 1791 filed another freedom petition with the General Court against Ashton on behalf of Edward (Ned) Queen, who alleged that he was the son of Phillis, whose mother, known as Mary Queen, was born a free person. Ashton admitted that Mary Queen was Edward's grandmother but alleged that she always was enslaved. Mary Queen was sold for a term of years to James Carroll, a successful planter and businessman. His home plantation, Fingual, was in Anne Arundel County on Maryland's western shore. Carroll was a Catholic single man when he died in 1729. His will left most of his property and slaves to the Catholic Church.[17]

At the May 13, 1794 trial, the lawyers for both sides relied on hearsay evidence confirming or denying Mary's free status. Edward Queen's case included four hearsay depositions. Richard Disney, who was seventy-five years old when he gave his May 14, 1792 deposition, stated that he knew Phillis and her sister Nanny Cooper since his childhood. He described Phillis as "a mulatto" and said that Nanny Cooper was "as black as most negroes," but he did not remember their mother. Disney also said he knew James Carroll and Fingual "very well[.]" His late mother was a midwife. She said that Nanny was the first child she delivered and that "it was a shame that the mother of Phillis and Nanny was [sic] kept in slavery[.]" Disney recalled being told a story about Captain Larkin bringing "a fine Lady from London," and that nobody would buy her until Carroll did so. Disney was referring to Thomas Larkin (1673-1731), the son of early Maryland settler John Larkin (1615-1702). Disney also heard John Jiams, an overseer, say that "Phillis ought to be free[.]" Disney worked at Fingual when Lewis Lee, who was many years older than Disney, was Carroll's overseer. Disney heard Lee say that "Phillis ought to be free, and Phillis then lived in a house by herself[.]"[18] Thomas Warfield stated that, in 1783, he was working as an overseer in Anne Arundel County. He heard the late John Jiams, the late Reverend John Carrick's overseer, say that Phillis's mother Mary Queen was free when Captain Larkin brought her to the county, that Mary was sold for seven years, and that Mary "was as free as he was if she had her right[.]" He recalled that Mary Queen "afterwards belonged to James Carrick who lived in Fingal in Anne Arundel County." James Carrick later left his plantation and personal property to the Catholic Church, according to Warfield, who also said that Phillis had a "yellow" complexion and "appears to be a bright mulatto[.]"[19] George Davis asserted that, "between twenty one and twenty two years" before his May 23, 1793 deposition, a man named Lewis Lee told him that Edward "ought to be free for his grandmother was a free woman[.]"[20]

Caleb Clarke was forty-seven years old when he was deposed on October 23, 1793. He was a member of the Duvall family. His mother Mary Clarke, who had died about eight years before the deposition when she was sixty-nine years old, was a daughter of Marsh Mareen Duvall, who was a son of Mareen Duvall, the family's immigrant ancestor. Caleb Clarke described Phillis as "a mulatto woman who lives with . . . Ashton[.]" He recalled hearing his mother speak of "a yellow woman called Mary Queen [who] was brought to the County by Captain [Thomas] Larkin," whose father John was Mareen Duvall's friend and neighbor. Thomas Larkin frequently visited Marsh Mareen Duvall's house, as did James



To the honourable The Judges of the Genl Court.
The petition of Edward Queen humbly sheweth
that he is held in slavery by the Revd John Ashton altho
he is informed he is entitled to his freedom being discended from
a Freewoman, viz, being the son of Phillis who was the daughter
of Mary Queen commonly called Queen Mary, a Freewoman
He therefore prays your honours to direct Summons to issue
against the said John Ashton returnable immediately to
answer the premises; & that your honours, the facts being
found, will adjudge your petitioner to be free. And he
will pray &c &c &c.

E Duvall
P.G. Cty

Witnesses
Revd Th. Digges, P.G.
Thomas Sims, do.

On October 15, 1791, Duvall signed this petition for Edward Queen in his case before the Maryland General Court, writing that Queen "humbly sheweth that he is held in slavery by the Revd. John Ashton altho he is informed he is entitled to his freedom being descended from a freewoman, viz, being the son of Phillis who was the daughter of Mary Queen commonly called Queen Mary, a freewoman. He therefore prays your honours to direct Summons to issue against the said John Ashton returnable immediately to answer the premises; & that your honours, the facts being found, will adjudge your petitioner to be free. And he will pray & so forth." Many witnesses presented hearsay evidence and the court ruled to grant Queen his freedom in 1794.

Carrick, who "owned" Mary Queen. Caleb Clarke said his mother "often in conversation" said "that her father had often heard . . . [James] Carrick and Mary Queen quarrelling and wrangling about her freedom[.]" In these arguments, James Carrick would say to Mary Queen "poh! have patience you will be free by and by, or you will get your freedom, by and by, or words to that effect, and would promise what he would do for her[.]" Caleb also heard his mother's older sisters Anne Carrick (who was married to John Carrick) and Susanna Fowler tell this story. James Carrick did not free Mary Queen; instead, Caleb said she "was left or given . . . to Anthony Carrick and sent across the Bay to him."[21]

The jury on May 23, 1794 found for Edward and the court's judgment freed him. Many Queen family members later won freedom judgments based on Edward Queen's success.[22]

Marshall vs. Duvall on the Hearsay Rule

Other Joice and Queen family members later filed freedom suits with the Circuit Court of the District of Columbia. They relied on much of the same hearsay evidence that the Maryland courts admitted. However, the Circuit Court advanced a more exacting hearsay rule beginning with its 1808 decision in *Joice v. Alexander*.[23] The court permitted

Francis Scott Key to use Thomas Lane's deposition on behalf of Key's slave owner client, Robert Alexander, to defeat the freedom claim of Clem Joice, who was another descendent of Ann Joice. But the court also sustained Key's objection to Joice's lawyer's questions about Ann Joice's "general reputation of the neighbourhood" and "whether she was a free white woman." The court ruled "that evidence of general reputation of a fact, can only be given when the reputation was among free white persons who are dead, or presumed from the length of time to be dead."[24]

The United States Supreme Court also adopted a more restrictive version of this hearsay rule exception, over Justice Duvall's dissent, beginning with Chief Justice John Marshall's opinion in *Mima Queen v. Hepburn*.[25] Francis Scott Key initiated that case in January 1810 with a petition filed with the Circuit Court of the District of Columbia for Washington County. He alleged that John Hepburn illegally held in slavery Minor or Mina Queen and her daughter Louisa. The official case reports spelled Mina's name Mima. Key also filed petitions at the same time against other defendants who claimed Priscilla, Alexis, and Hester Queen as their slaves. Mina's trial was held in late June 1810, when the judges were William Cranch, Nicholas Fitzhugh, and Bruckner Thurston. Key presented depositions from Edward Queen's case to prove that the claimants' ancestor, Mary Queen, was a free woman who was sold for a seven-year term of service. Key read to the jury part of Caleb Clarke's deposition. But the court sustained Hepburn's objection to Clarke's statement of what his mother told him she was told by her father Marsh Mareen Duvall.[26] Key read, without objection, Benjamin Duvall's deposition containing the declaration of Mary Queen, Mina's great grandmother. Benjamin was the name of Gabriel Duvall's father and his great uncle. The court also permitted Hepburn's lawyer to read depositions in response asserting that Mary was a slave. But the Court did not permit Key to read from the deposition of Freeders Ryland relaying Mary Queen's declarations about her residence, place of birth, and condition. The court also denied Key's request to read all of the depositions of Richard Disney, Thomas Warfield, and George Davis, although the court allowed the jury to hear, over Hepburn's objection, the portion of Davis's deposition containing Lewis Lee's statement that Edward Queen's grandmother was a free woman.[27]

The Court permitted Key to read Richard Disney's hearsay deposition stating what Disney said he heard others say about Mary Queen but instructed the jury that if they found that Disney gave evidence from what was communicated to him many years after the fact "without its [sic] appearing by whom or in what manner the same was communicated to him," then the evidence "is incompetent to prove either the existence of such report and noise or the truth of it[.]" The Court also allowed Key to read the part of Thomas Warfield's deposition that included John Jiams's assertions but again instructed the jury that if they "find from the evidence that these declarations of Capt[.] John Jiams . . . were founded on hearsay or report, communicated to him many years after the importation and sale of the said Mary Queen without its appearing by whom or in what manner such communication was made to him; then his said declarations are not competent evidence in this cause."[28]

The jury's verdict was for Hepburn. Key filed an appeal to the United States Supreme Court. He and James S. Morsell argued that the Maryland courts had in the past admitted hearsay evidence when enslaved people sued for their freedom and that if the courts were to exclude this evidence future freedom suits will likely fail. John Law and Walter Jones argued for Hepburn that the courts should

apply the common law hearsay rule with equal force to these suits.[29]

Chief Justice Marshall's majority opinion affirmed the Circuit Court's judgment with the "general principle" that he applied to all of the evidence rulings on appeal; "hearsay evidence is incompetent to establish any specific fact, which . . . is in its nature susceptible of being proved by witnesses who speak from their own knowledge." He also directed the courts to enforce the evidence rules of general application when enslaved people sued for their liberty:

> However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which the right to property may be asserted.

He quoted a "great judge" who stressed how the "rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in support of these rules," which reflect the "wisdom of the ages[.]"[30]

Marshall acknowledged hearsay rule exceptions that "are said to be as old as the rule itself[,]" including "cases of pedigree, of prescription, of custom, and in some cases of boundary." He also referred to "matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact." But he found that these exceptions did not apply to the hearsay evidence of Mary Queen's reputed free status as the plaintiffs' ancestor. He questioned the reliability of hearsay evidence and stated that the court "was not inclined to extend the exceptions further than they have already been carried."[31]

Justice Duvall's dissenting opinion appealed to both precedent and public policy. He wrote that, under Maryland law, it was:

> for many years settled that on a petition for freedom where the petitioner claims from an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the [G]eneral Court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct. Hearsay evidence was admitted upon the same principle, upon which it is admitted to prove a custom, pedigree and the boundaries of land; —because from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony. To exclude hearsay in such cases, would leave the party interested without remedy. It was decided also that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right. It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree or in controversies relative to the boundaries of land. It will be universally admitted that the right to freedom is more important than the right of property.[32]

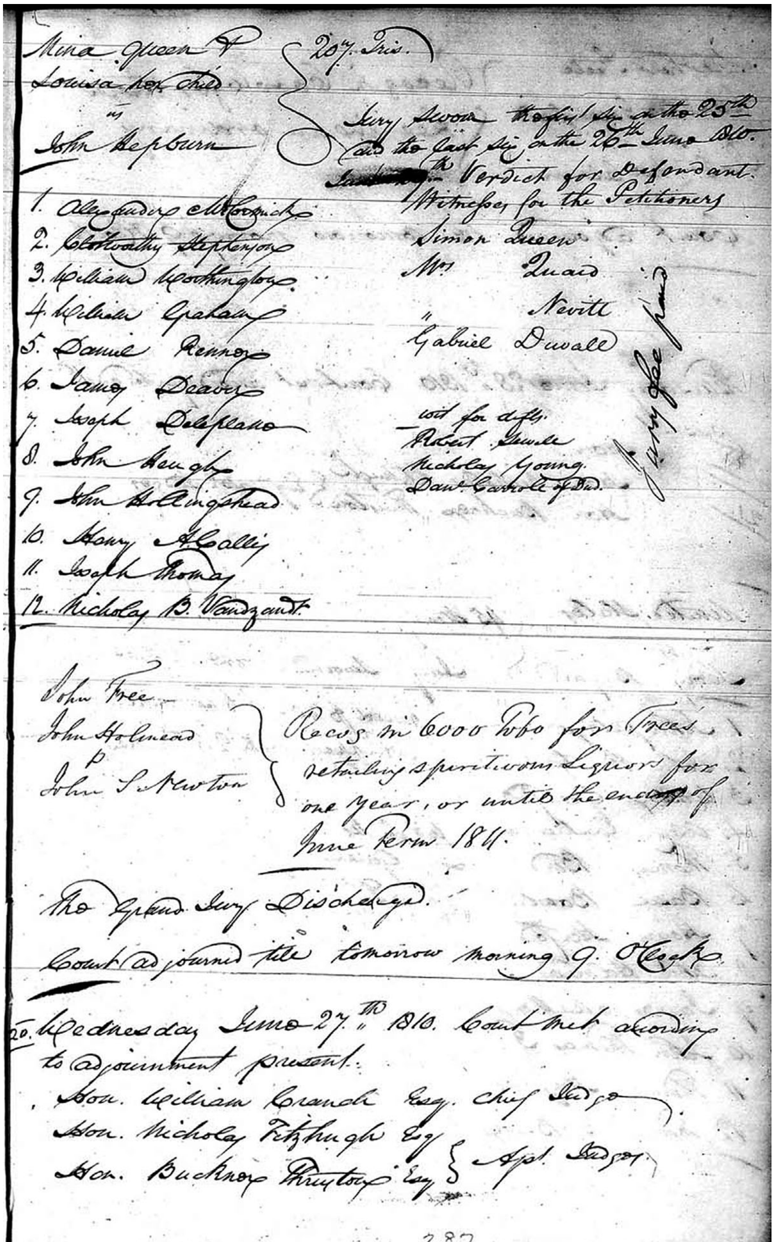
Duvall also noted that "people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection." He predicted that the majority's decision "cuts up by the root all claims of this kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur."[33] Marshall reaffirmed the *Mima Queen* rule in a very brief 1816 opinion. Duvall did not file an opinion dissenting from that decision affirming the dismissal of a freedom suit.[34]

Scholars have debated how best to understand Marshall's decisions in these cases. Was he "imposing the slaveholder's values on the hearsay rule," or was he "simply applying the technical rules of evidence in accordance with the English precedents he cites"?[35] The answer is not clear, but Duvall's dissenting opinion suggests that he and Marshall may have had different slaveholder values. It also is unclear why *Mima Queen v. Hepburn* was the only case in which Duvall filed a dissenting opinion, although he later dissented without an opinion in *Trustees of Dartmouth College v. Woodward*.[36] Duvall served on the Court during the era that produced the lowest percentage of dissenting or concurring opinions—only seven percent. This dissenting opinion's singularity suggests how important it must have been to Duvall.[37]

Duvall's Hearsay Rule Prevails—Eventually

The Southern courts at first offered mixed responses to Marshall's hearsay rule. However, the majority of the reported decisions in freedom and manumission suits eventually adopted Duvall's broader pedigree exception. For example, the Maryland Court of Appeals followed *Mima Queen* and rejected evidence of the claimants' maternal ancestors' general reputation while permitting evidence "identifying an ancestor from whom the pedigree is attempted to be traced[.]"[38] In contrast, the Tennessee Supreme Court of Errors and Appeals in *Vaughan v. Phebe*[39] adopted Duvall's approach. Phebe, who was born in Virginia, offered proof that her mother Beck "was always called an Indian by descent[.]" Phebe's great grandmother Murene "was a copper color," and, it was said, she "was always reputed an Indian, and was free[.]" Phebe also presented evidence that other family members won their freedom, including her maternal aunt Tab's Virginia Superior Court freedom judgment, which was supported by proof that Tab was a descendent of Murene. Justice Henry Crabb's opinion for the court noted that "[s]lavery, in our sense of the word, is not known in England." He therefore applied the hearsay rule and exceptions in view of the realities of slavery, stating that Marshall's hearsay decisions do not have "the approbation of our judgments, and we must dissent from them." Accordingly, Crabb held that hearsay evidence of the "pedigree or common reputation as to freedom" of Phebe and her maternal ancestors was admissible, unlike hearsay "evidence of several family members having recovered their freedom by due course of law[,]" which should have been proven with court records.[40]

This broader pedigree exception was a mixed blessing for freedom and manumission suit claimants, however, because slave owners also used the rule to offer hearsay evidence of the claimants' maternal ancestors' alleged enslaved status. Charles Mahoney's eleven-year freedom suit illustrates this point, as does the Kentucky Court of Appeals 1839 decision in *Chancellor v. Milly*.[41] The plaintiff in that case was Milly, "apparently a white woman, about forty years old," who had been treated as a slave from her birth. She filed a freedom suit, relying on her white color as the only evidence supporting her claim. The trial judge held that the defendant could


Mima Queen &
Louisa her child
vs
John Hepburn
207. Tris.
Jury sworn the first six on the 25th and the last six on the 26th June 1810.
[illegible] Verdict for Defendant.
Witnesses for the Petitioners
Simon Queen
Mrs Quaid
" Nevitt
Gabriel Duvall
wit for defts.
Robert [illegible]
Nicholas Young
Danl. Carroll of Dn.
Jury fee paid
1. Alexander McCormick
2. Timothy Stephenson
3. William Worthington
4. William Graham
5. Daniel Renner
6. James Deaver
7. Joseph Delaplane
8. John Heugh
9. John Hollingshead
10. Henry [illegible]
11. Joseph Thomas
12. Nicholas B. Vanzandt
John Free
John Holmead
p
John S. Newton
Recog in 6000 lbs for Free retailing spirituous Liquors for one year, or until the end of June term 1811.
The Grand Jury Discharged.
Court adjourned till tomorrow morning 9 O'clock
20. Wednesday June 27th 1810. Court met according to adjournment present.
Hon. William Cranch Esq. Chief Judge
Hon. Nicholas Fitzhugh Esq
Hon. Buckner Thruston Esq } Asst. Judges
287

Justice Duvall's only dissenting opinion on the Supreme Court, which he filed in *Mima Queen v. Hepburn* (1813), contradicted Chief Justice John Marshall's version of the hearsay rule, which Duvall believed would deny "reasonable protection" to "people of color." Francis Scott Key had initiated that case in January 1810 with a petition filed with the Circuit Court of the District of Columbia (see above). Duvall must have felt strongly about his dissent as he served on the Supreme Court during the era that produced the lowest percentage of dissenting or concurring opinions—only seven percent.

not rebut the presumption of freedom that arose from Milly's white color with hearsay evidence offered "to prove that, in the family in which she was born and reared from infancy, [Milly] had ever been called and reputed the child of a woman of color, who was a slave and the property of the family." The Court of Appeals opinion by Chief Justice George Robertson reversed a judgment for Milly, holding that the trial judge should have allowed the jury to hear the defendant's reputation evidence because, "[a]fter the lapse of forty years, such a fact would scarcely ever be susceptible of any other proof than that of reputation." Robertson "perceive[d] no reason" to exclude the evidence "in a suit for freedom, as well as in all other suits in which proof of pedigree becomes material." He also observed that the courts would permit reputation evidence in Milly's favor "if her reputed mother had been free; and that which she might have proved to create a presumption in her favor, her adversary should be permitted to show against her."[42]

The majority of the United States courts in other types of cases initially adopted Marshall's more restrictive hearsay exception limiting both the scope of hearsay pedigree evidence and the identity of those who could testify, while a minority of jurisdictions, including some Southern states, continued to follow Duvall's broader rule. Evidence law commentators also criticized the more restrictive majority rule.[43] Duvall's more liberal version eventually was included in *Federal Rules of Evidence* 803(19) and 804(b)(4)(B), and it now is the prevailing rule nationwide. This is not to suggest that Duvall should be added to the list of the leading evidence law theorists. Nor does his only dissenting opinion rank among the most important in the Court's history. Yet a dissenting opinion's significance can be evaluated only over time, and many dissenting Justices eventually win the argument years in the future.[44]

Duvall and the Implied Manumission Doctrine

Duvall's other slavery law opinion, *Le Grand v. Darnall*,[45] also is significant because the Court adopted the implied manumission doctrine to affirm Nicholas Darnall's manumission by Bennett Darnall—his father and owner. Future Chief Justice Roger B. Taney was the lawyer for the appellant, Claudius F. Le Grand, in what one commentator called "[p]robably the friendliest case decided by the Court . . . ."[46] Bennett Darnall was a member of a prominent family in Anne Arundel County, Maryland. Nicholas and his brother Henry were the sons of Bennett and Susanna, a slave owned by Bennett. Bennett's August 4, 1810, will devised seven tracts of lands to Nicholas, including one 596-acre parcel in a larger tract that was called Portland Manor. Bennett's will also referred to manumission deeds that he executed in 1805 and in 1810, which included Nicholas among the slaves to be freed. (These deeds, however, were not exhibits in the case.) Bennett later signed two codicils to his will. The last was dated January 20, 1814, and was proved before the register of wills eleven days later. Bennett apparently died on January 23, 1814, when Nicholas was only about ten or eleven years old.[47]

After Bennett died, Nicholas and Henry were sent to Pennsylvania by their then guardian John Mercer to study under the care of Benjamin Tucker, a Quaker who ran a school near Philadelphia. Robert Welch, as the later guardian for Nicholas, on July 17, 1824, filed a petition with the Maryland Chancery Court seeking permission to sell part of Portland Manor for Nicholas because Nicholas did not wish to own the land, which was being worked by enslaved labor. The Chancellor appointed commissioners who valued the land at $13,495 (almost $300,000 in 2017 dollars) and recommended the sale. Welch was appointed trustee to sell the land, but the sale was not completed before Nicholas came of age.[48]

In Duvall's other slavery law opinion, *Le Grand v. Darnall* (1829), the Court adopted the implied manumission doctrine to affirm Nicholas Darnall's manumission by Bennett Darnall—his father and owner. Above is a miniature titled "Three Young Scholars Seated around a Table": Nicholas is at left, and his brother, Henry, at right. In the center is Richard Bennett Darnell, their first cousin.

After Nicholas achieved legal age, he entered into a contract on April 26, 1826, to sell Portland Manor to Le Grand for $13,112, payable in six annual installments with interest. Le Grand signed notes and Nicholas executed a bond agreeing to transfer title upon payment. Le Grand also agreed to care for several "old and infirm" slaves who lived on the property. In return, Nicholas permitted Le Grand to continue to use twelve named slaves for four years. Nicholas filed a manumission deed freeing these slaves effective May 4, 1830.[49] Le Grand entered into possession under this land sale contract. Later, however, doubts were suggested to Nicholas about his title's legality because a provision in a 1796 Maryland law permitted masters to free slaves who were "under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence."[50] The Maryland Court of Appeals in 1823, in *Hamilton v. Cragg*,[51] had interpreted this statute to prohibit the manumission of a young child. Nicholas deposited Le Grand's first $3,000 payment to be held by Benjamin Tucker, subject to an examination into the title to Portland Manor. Bennett Darnall's heir-at-law then claimed the land based on *Hamilton v. Cragg* and threatened to sue. Le Grand, further alarmed about the validity of his title, refused to make any more payments. Nicholas responded with a suit against Le Grand in the United States Circuit Court for the District of Maryland, most likely alleging that the Court had diversity of citizenship jurisdiction. Nicholas obtained a judgment against Le Grand for the second

payment. Le Grand responded with a bill of complaint in equity against Nicholas, which also was filed in the Circuit Court in Maryland. Le Grand obtained a preliminary injunction against any further proceedings at law by alleging that Nicholas was not more than ten years of age when his father died, was unable to work and gain a sufficient maintenance and livelihood, and thus was not free under Maryland's laws. Nicholas answered that he was able to work and gain a sufficient livelihood and maintenance when his father died.[52]

Le Grand's equity bill, however, sought to confirm Nicholas Darnall's manumission and Le Grand's title. John Mercer and Robert Welch testified at the trial that Nicholas was about eleven years old when his father died. They said Nicholas was "a fine, healthy, intelligent boy, able by his work to maintain himself." And Dr. James Stewart and Samuel Moore stated "that boys of eleven in Maryland are able to support themselves by their own labour, and specif[ied] the kind of work in which they may be usefully employed."[53]

The trial court found that this undisputed evidence confirmed that the manumission was valid. The court thus dissolved the injunction and dismissed Le Grand's equity bill. Le Grand filed an appeal to the United States Supreme Court, but his lawyer Taney "submitted the case without argument; stating, that it had been brought up merely on account of its great importance to [Darnall]; which rendered it desirable that the opinion of the [S]upreme [C]ourt should be had on the matters in controversy."[54] In contrast, Darnall's lawyer Stewart argued at length, stating, "It is proper to say, that the whole of these proceedings have been amicable that Le Grand is willing to pay if his title is a safe one, and that Darnall does not wish Le Grand to pay unless he can make a good title to him." Stewart further asserted, "By the [Maryland] act of 1796, chap. 67, sec. 13, slaves may be manumitted in Maryland by last will; provided they be under forty-five years of age, and able to work and gain a sufficient maintenance and livelihood; at the time the freedom given shall commence."[55] He contended that Nicholas was freed by Bennett's will, according to the Maryland Court of Appeals decision in *Hall v. Mullin*,[56] which "decided that a devise of property real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication."[57] He also distinguished *Hamilton v. Cragg*,[58] arguing that before that decision "it had been generally supposed" that the Maryland statute

> was intended to guard against the manumission of slaves who, although under forty-five years of age, were suffering under incurable diseases or constitutional infirmities which would most probably always disable them from maintaining themselves by their own labour, and make them a charge upon the public. It had not been generally supposed to apply to the case of children for whose maintenance provision could perhaps always be made by binding them to serve as apprentices, and especially was considered inapplicable to those children for whose support abundant provision was made by the testator who gave the freedom.

Stewart thus concluded that the proof offered at trial confirmed that Nicholas Darnall was entitled to his freedom when his father died.[59]

Duvall's opinion affirming the Circuit Court's judgment asserted that "[f]our respectable witnesses" from the neighborhood testified that when Bennett died "Nicholas was well grown, healthy and intelligent, and of good bodily and mental capacity: that he and his brother Henry could readily have found employment, either as house servant boys, or on a farm, or as apprentices; and that they were able to work and gain a livelihood."

Accordingly, Duvall concluded that Nicholas later conveyed good title to Le Grand. Duvall's reasoning consists of his statement that the Maryland Court of Appeals, in *Hall v. Mullin*, "decided, that a devise of property real or personal by a master to his slave, entitles the slave to his freedom by necessary implication. This Court entertains the same opinion." He also expressed no opinion "as to the correctness of the decision of the court of appeals in the case of Hamilton vs. Cragg. It is unnecessary in reference to the case under consideration."[60] Duvall thus validated Bennett Darnall's manumission of Nicholas Darnall.

With his title confirmed, Le Grand later sold Portland Manor and in 1836 moved to Louisiana, where he became a wealthy planter and slave owner.[61] In that year the Court applied Duvall's pro-manumission approach to the age limits in Maryland's 1796 act and affirmed a judgment enforcing a manumission deed freeing Sarah Ann Allen and her two young children. Justice James M. Wayne's opinion held that the children's manumission did not offend the statute's purpose because Allen was "able, by her labour [sic], to maintain her offspring[.]"[62]

The Southern Courts Reject Implied Manumission

Duvall's endorsement of the implied manumission doctrine is significant because this doctrine permitted lawmakers and judges to express in their actions any inclinations they had in favor of liberty when they interpreted ambiguous evidence of the masters' intentions to free their slaves. Roman law by the time of Justinian in 531 A.D. applied this doctrine of implied or tacit manumission to free slaves, as did the thirteenth-century Spanish law *Las Siete Partidas* and the 1685 French *Code Noir*.[63] Nevertheless, no statute in the Southern United States enacted this rule. In their decisions, the Southern courts also refused to favor freedom over slavery by applying this doctrine in doubtful cases, holding instead that "[a] slave cannot take by descent, there being no inheritable blood."[64] Even the Louisiana Civil Code, following the 1724 *Code Noir* that was adopted for Louisiana, stated that a master's intention to free a slave by will "must be express and formal, and shall not be implied by any other circumstances of the testament, such as a legacy, an institution of heir, testamentary executorship or other dispositions of this nature, which in such case, shall be considered as if they had not been made."[65]

A close reading of *Hall v. Mullin* also suggests that Duvall was not hostile to manumission because he may indeed have extended its holding interpreting the same Maryland law that was at issue in *Le Grand*. Henry L. Hall's 1817 will bequeathed to Dolly Mullin two young slaves named Joan and Aaron and a life tenancy in 141 acres of land, with the remainder after Dolly's death to go to her son Henry Mullin and his heirs. Hall's will mentioned by name his other slaves, whom he devised to other named beneficiaries, and it contained a residuary clause declaring that Hall set "all the remainder part of my negroes free." Hall apparently believed that Dolly was free when he wrote his will because, in 1810, he had sold Dolly to her father, Basil, who a month later executed Dolly's manumission deed. Hall also believed that the 1803 will of his father Benjamin Hall had freed "my carpenter, called old Basil." But Basil was older than forty-five when Benjamin Hall died. If Basil remained a slave, he could not buy and then free Dolly.[66] The Maryland Court of Appeals majority opinion by Judge John Johnson nonetheless held that Henry Hall's will freed Dolly because Henry intended "that none of his slaves should remain slaves after his death, other than those he named and bequeathed as slaves[.]"[67] Johnson also declared that "without the aid of the residuary clause [Dolly] would have a right to freedom,

under those parts of the will by which property was given to her; her freedom by implication is indispensably necessary to give efficacy to those clauses of the will." Chief Judge Jeremiah Chase's concurring opinion stated: "The testator imagined Dolly was free; she was not free, but a slave, at the time the will was made, and being a slave, the will operated to give her freedom, and the lands devised to her."[68]

The *Hall* holding, therefore, was based, at least in part, on Henry L. Hall's mistaken belief that Basil was legally freed or on the effect of the residuary manumission clause in Henry's will. The judges also may have been more willing to award freedom claims than other slave state judges who rejected the implied manumission doctrine because it was contrary to law or public policy. The one exception is the dictum in South Carolina Justice John B. O'Neall's opinion in *Guillemette v. Harper*,[69] which endorsed the implied manumission doctrine. This was not a freedom or manumission suit, although it involved the interpretation of the will of Edward Quinn, a native of Ireland, whose slaves included Patrick E. Quinn. As in *Hall,* Edward's devise of property to Patrick was not the only evidence supporting the conclusion that he intended to free Patrick. The other South Carolina cases decided before and after *Guillemette* held that bequests to slaves were void.[70] O'Neall, moreover, was unique among Southern antebellum judges because he resisted the anti-manumission trend. He even published a book calling for slave law reforms—including liberal manumission laws—which he thought would best protect and defend slavery.[71]

Duvall, Taney, and *Dred Scott*

Duvall's *Le Grand* opinion endorsing the implied manumission doctrine, like the dicta in *Hall* and *Guillemette*, was a "decided novelty" in the U.S. Southern slavery law.[72] Duvall also did not question the Circuit Court's diversity of citizenship jurisdiction under article 3, section 2 of the United States Constitution, which extends the federal judicial power "to Controversies . . . between Citizens of different States." Indeed, Nicholas Darnell's right as a Pennsylvania citizen to sue Maryland citizen Claudius Le Grand in federal court was the foundation for the "friendly" rulings in law and equity that resulted in what in today's practice would be a declaratory judgment establishing the parties' rights under the Maryland statute and their agreement. Le Grand's equity bill implicitly admitted that Darnall was a citizen of another state against whom Le Grand had a controversy that could be adjudicated in the federal courts.[73] Although no reported decision had explicitly held that free blacks could file diversity suits in the federal courts, *Le Grand v. Darnall* was not the first antebellum interracial federal diversity case. In 1793, Peter Elkay, an African American from Stockbridge, Massachusetts, had successfully sued two white Connecticut defendants who kidnapped Elkay's daughters. Stanton D. Krauss noted that many newspapers reported Elkay's $250 judgment, but Krauss found no evidence that members of the founding generation publicly criticized the federal court's exercise of interracial diversity jurisdiction.[74]

In contrast, Le Grand's lawyer Taney, later as Chief Justice, closed the federal courthouse door to African-Americans when, in his *Scott v. Sandford*[75] opinion, he included a section declaring that the founding generation intended to exclude African Americans from United States citizenship. Montgomery Blair, a well-connected Missouri free-soil Democrat who represented the Scotts before the Supreme Court, had cited the *Le Grand* decision and Taney's participation as Le Grand's counsel to support the Scotts' right to sue in diversity for their freedom. This argument no doubt prompted Taney to explain at some length why he believed he

was not being inconsistent when he denied the right to sue under the constitution's diversity jurisdiction clause to enslaved litigants like Dred Scott and his family and to free people whose ancestors were imported in the African slave trade.[76] Taney foreshadowed his interpretation in legal opinions that he authored in 1832 while serving as Andrew Jackson's Attorney General, and Taney repeated these views in an 1840 opinion for the Circuit Court for the District of Maryland.[77]

Conclusion

When Gabriel Duvall resigned from the Supreme Court, he sent a January 15, 1835 letter that is lost to history; this epitomizes his relative obscurity as a Justice. John Marshall's reply letter, which was not published in full until 2006, expressed his "regret at the separation that has taken place[.]" Marshall offered some insight into Duvall's personality by acknowledging "the cordiality with which we have proceeded together in the performance of our official duties, and the fidelity with which you have discharged the part which has devolved to you," while praising Duvall's "private virtues, and the purity of [his] public life . . . ."[78] After Duvall died in 1844, Joseph Story remembered Duvall's "irbanity [sic], his courtesy, his gentle manner, his firm integrity and undependence [sic], and his sound judgment," although not his contributions to the Court's body of precedent.[79] Like most of the Justices of his day, Duvall, who filed few opinions, played a supporting role to Marshall. Yet Duvall's two Supreme Court slavery opinions provided enslaved litigants with potential legal pathways to freedom. "These are not bad opinions to be remembered by."[80]

Duvall's work as a lawyer and his slavery law judicial opinions pose interesting contrasts to the actions and views of his fellow Maryland slave owners Francis Scott Key and Roger B. Taney. Duvall's advocacy for Charles Mahoney and Ned Queen was a model for Key, whose many cases for enslaved litigants included a successful 1828 freedom suit that Key filed against Duvall on behalf of a family of Duvall's own slaves.[81] Duvall never publicly condemned slavery, unlike Key, who called slavery "a great moral and political evil amongst us" and said that "duty, honor and interest call upon us to prepare the way for its removal." But Key made these statements while prosecuting Reuben Crandall for "publishing libels tending to excite sedition among [Washington's] slaves and free colored persons . . . ."[82] While Duvall was a Justice, Key argued before the Supreme Court for the liberation and return to Africa of the alleged slaves found aboard the slave ship *Antelope*.[83] John Noonan called Duvall the Justice with "the smallest reputation" among those who decided the *Antelope* case, but he cited Duvall's *Mima Queen* dissenting opinion to support his suggestion that Duvall was one of the three Justices who adopted Key's argument that the Africans claimed as slaves were presumed to be free people, thus requiring the claimants to prove their alleged ownership.[84] Key also testified before a congressional committee advocating legislation to prevent the kidnapping of free blacks into slavery, but he opposed slavery's immediate abolition and supported the colonization in Africa of free African Americans.[85]

Taney alone among the three freed all of his slaves during his lifetime, excluding those whom he contended could not provide for themselves. Moreover, in 1818, while successfully defending Reverend Jacob Gruber on the charge of conspiracy to raise a slave insurrection, Taney called slavery an "evil" to be "gradually, wiped away[.]"[86] But Taney also supported colonization. And his *Dred Scott* opinion later declared that all free and enslaved African Americans were people without rights under the United States Constitution.

In contrast, Duvall expressed no reservations when the federal courts exercised diversity of citizenship jurisdiction to establish Nicholas Darnall's legal rights as a mixed race United States citizen. This permits us to wonder whether Duvall would have dissented from Taney's opinion denying this legal right to African Americans, as he dissented when he thought that John Marshall denied "reasonable protection" to "people of color."[87]

ENDNOTES

[1] *See* Ernest Sutherland Bates, **The Story of the Supreme Court** (1936), pp. 109-10. For biographical summaries and evaluations of Duvall, *see* Shirley Baltz, **Gabriel Duvall: A Short Biography** (Society of Mareen Duvall Descendants, no date); G. Edward White, **The Marshall Court and Cultural Change, 1818-1835** (Abridged Edition, 1991), pp. 321-31, 697-98; Harry Wright Newman, **Mareen Duvall of Middle Plantation: A Genealogical History of Mareen Duvall** (1952), pp. 484-86; James O'Hara, "Gabriel Duvall: 1811-1835," in **The Supreme Court Justices: Illustrated Biographies, 1789-2012** (Clare Cushman, ed.) (2013), pp. 71-75; Christopher L. Tomlins, ed., **The United States Supreme Court: The Pursuit of Justice** (2005), pp. 476-77; Richard B. Ellis, "Gabriel Duvall (1752-1844)," in **The Oxford Companion to the Supreme Court of the U.S.** (Kermit L. Hall, *et al*., ed.)(2d ed. 2005), pp. 278-79; Timothy L. Hall, "Gabriel Duvall (1752-1844)," in **Supreme Court Justices: A Biographical Dictionary** (2001), pp. 62-64; Jan Onofrio, "Duvall, Gabriel (1752-1844)," in **Maryland Biographical Dictionary** (1999), pp. 192-96; John Paul Jones, "Gabriel Duvall," in **The Supreme Court Justices: A Biographical Dictionary** (Melvin I. Urofsky, ed.)(1994), pp. 153-54; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789** (Edward C. Papenfuse, *et al*., ed.)(1979), pp. 290-92; Irving Dilliard, "Gabriel Duvall," in 1 **The Justices of the United States Supreme Court 1789-1969** (Leon Friedman and Fred L. Israel, eds.)(1969), pp. 419-28; James B. O'Hara, "Justice Gabriel Duvall," 38 *The Supreme Court Historical Society Quarterly* 1, 8-10 (2015); Ross E. Davies, "Recognition and Volition: Remembering the Retirement of Justice Gabriel Duvall," 4 *Journal of Law: Opening Remarks* 1 (2014).

[2] *See* David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years 1789-1888** (1985), p. 142, n. 131; David P. Currie, "The Most Insignificant Justice: A Preliminary Inquiry," 50 *U. Chi. L. Rev*. 466 (1983) (endorsing the Bates view after analyzing only constitutional law opinions); *see also* Frank H. Easterbrook, "The Most Insignificant Justice: Further Evidence," 50 *U. Chi. L. Rev*. 481, 495-96 (1983) (rating Duvall the runner up to Thomas Todd as most inconsequential Justice after reviewing all of these Justices' Supreme Court opinions). On Marshall's influence on the Court's opinions, *see*, *e.g*., Charles F. Hobson, "Defining the Office: John Marshall as Chief Justice," 154 *Univ. of Penn. L. Rev*. 1421, 1442-50 (2006).

[3] Dilliard, "Gabriel Duvall," in 1 **The Justices of the United States Supreme Court 1789-1969**, pp. 419-28, quotation at 428.

[4] *See* Nicholas Wade, "Cheney and Obama: It's Not Genetic," *New York Times* (October 21, 2007), accessed April 10, 2016, http://www.nytimes.com/2007/10/21/weekinreview/21basic.html; Anne E. Kornblut, "Obama and Cheney, Making Connection," *Washington Post* (October 17, 2007), accessed April 10, 2016, http://www.washingtonpost.com/wpdyn/content/article/2007/10/16/AR2007101602362.html; David Nitkin and Harry Merritt, "A New Twist to an Intriguing Family History," *Baltimore Sun* (March 2, 2007), accessed, April 10, 2016, http://www.baltimoresun.com/news/bal-te.obama02mar02-story.html.

[5] 11 U.S. (7 Cranch) 290, 3 L. Ed. 348 (1813).

[6] 27 U.S. (2 Pet.) 664, 7 L. Ed. 555, 1829 U.S. LEXIS 427 (1829).

[7] 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857). On Duvall's slaveholdings, *see* Newman, **Mareen Duvall of Middle Plantation**, p. 486; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789**, p. 291.

[8] *See* Andrew Fede, **Roadblocks to Freedom: Slavery and Manumission in the United States South** (2011), pp. 2-3, 148-49; *see also* Marc Leepson, **What So Proudly We Hailed: Francis Scott Key, A Life** (2014), pp. 5, 25-27, 101-02, 125, 159-60, 191; Edward S. Delaplaine, **Francis Scott Key: Life and Times** (1937), pp. 191-95; Victor Weybright, **Spangled Banner: The Story of Francis Scott Key** (1935), pp. 180-203; Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," 97 *J. of Am. Hist*. 17, 19 (2010). Other lawyers who represented enslaved clients included Thomas Jefferson, John Marshall, Abraham Lincoln, and Andrew Jackson. *See id*.; James W. Ely, Jr. and Theodore Brown, Jr., eds., **Legal Papers of Andrew Jackson** (1987), pp. 32-33; *see also* Anne Twitty, **Before *Dred Scott*: Slavery and Legal Culture in the American Confluence, 1787-1857** (2016), pp. 96-125 (discussing lawyers who represented St. Louis freedom claimants).

[9] *See, e.g*., Ira Berlin, **The Long Emancipation: The Demise of Slavery in the United States** (2015),

pp. 54-57; Fede, **Roadblocks to Freedom**, pp. 12, 247-74; Paul Heinegg, **Free African Americans of Maryland and Delaware from the Colonial Period to 1810** (2000), pp. 1-12; Martha Hodes, **White Women, Black Men: Illicit Sex in the Nineteenth Century South** (1997), pp. 19-38; Peter W. Bardaglio, **Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South** (1995), pp. 51-52; George M. Fredrickson, **White Supremacy: A Comparative Study of American and South African History** (1981), pp. 94-108; John Codman Hurd, **The Law of Freedom and Bondage in the United States** (1858 & 1862), Vol. 2, pp. 19-20; *id*., at Vol. 1, pp. 249, 250, 252, 253; Cynthia Hawkins DeBose, "'Colonial White Mater Privilege': An Above-Ground Railroad to Freedom and Land Reclamation," 55 *How. L. J*. 455, 459-91 (2012); Karen A. Getman, "Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System," 7 *Harv. Women's L. J*. 115, 122-34 (1984). On the legal history of Native American slavery in the United States, *see, e.g.,* Margaret Ellen Newell, **Brethren by Nature: New England Indians, Colonists, and the Origins of American Slavery** (2015); Gregory Ablavsky, "Making Indians 'White': The Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy," 159 *U. Penn. L. Rev*. 1457 (2011).

[10] *See*, *e.g*., Thomas Peake, **A Compendium of the Law of Evidence** (1806), pp. 10-11; *see also* Fede, **Roadblocks to Freedom**, pp. 339-40; 2 **McCormick on Evidence** (Kenneth S. Broun, ed.)(6th ed. 2006) §246, pp. 128-31. On the history of the hearsay rule, *see*, *e.g*., 2 *id*. §§244-45, pp. 122-28; David Alan Sklansky, "Hearsay's Last Hurrah," 2009 *Sup. Ct. Rev*. 1, 10-30; T. P. Gallanis, "The Rise of Modern Evidence Law," 84 *Iowa L. Rev*. 499, 509-37 (1999).

[11] *See* Fede, **Roadblocks to Freedom**, pp. 340-43; Duncan J. MacLeod, **Slavery, Race and the American Revolution** (1974), pp. 112-17; Michael L. Nicholls, "'The squint of freedom': African-American Freedom Suits in Post-Revolutionary Virginia," 20 *Slavery & Abolition* 47, 47-51 (2001); Michael L. Nicholls, "Passing Through this Troublesome World: Free Blacks in the Early Southside," 92 *Va. Mag. of Hist. & Bio*. 50, 56-60 (1984); *see also*, on the hearsay exceptions, 2 **McCormick on Evidence** §322, pp. 396-99; Peake, **A Compendium of the Law of Evidence**, pp. 11-13; *Jackson, ex dem. Wilson v. Cooley*, 8 Johns 128, 1811 N.Y. LEXIS 89 (Sup. Ct. 1811).

[12] 4 H. & Mc H. 295, 1799 WL 397 (Md. Gen. Ct. 1799), *rev'd*, (Md. Ct. App. 1802), 4 H. & Mc H. 210, 1798 WL 411 (Md. Gen. Ct. 1798), 4 H. & Mc H. 63, 1797 WL 583 (Md. Gen. Ct. 1797). The discussion of this case is in part taken from Fede, **Roadblocks to Freedom**, pp. 149, 294-96, 341-42, 347.

[13] *See* Maryland State Archives ("MSA"), Schweninger Collection, Document 8, Volume 4239-2, page 3, Race and Slavery Petitions Project, Petition 20979115; "Rev.; John Ashton (b. circa 1742 - d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715; Eric Robert Papenfuse, "From Redcompense to Revolution: Mahoney v. Ashton and the Transfiguration of Maryland Culture, 1791-1802," 15 *Slavery & Abolition* 38, 39 (1994). On Jesuit slaveholdings in Maryland and at Georgetown, *see* Thomas Murphy, **Jesuit Slaveholding in Maryland, 1717-1838** (2001); Rachel L. Swarns, "Georgetown Confronts Its Role in Nation's Slave Trade: What Does the University Owe Descendants of 272 Slaves?" *New York Times* (April 17, 2016), pp. 1, 16.

[14] Lofft 1, 98 Eng. Rep. 499, 20 How. St. T. 1 (K.B. 1772).

[15] *See* MSA, Schweninger Collection, Document 8, Volume 4239-2, page 3, Race and Slavery Petitions Project, Petition 20979115; Papenfuse, "From Redcompense to Revolution" at 38-62; *see also Shorter v. Boswell*, 2 H. & J. 359, 1808 WL 669 (Md. 1808); *Shorter v. Rozier*, 3 H. & McH. 238, 1794 WL 463 (Md. Gen. Ct. 1794).

[16] *See* Papenfuse, "From Redcompense to Revolution," at 55, n. 6; *see generally* Heinegg, **Free African Americans of Maryland and Delaware**, pp. 239-41; "Rev. John Ashton (b. circa 1742;d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715. For differing evaluations of Duvall's theory of the Mahoney case, *see* Fede, **Roadblocks to Freedom**, p. 296 (arguing that the case had a "sound basis" within the context of the cases decided when Duvall filed the petition); Robert B. Shaw, **A Legal History of Slavery in the United States** (1991), p. 116 (calling Duvall's reliance on the *Somerset* decision "certainly far fetched [sic] in the light of the prevailing attitudes and it is remarkable that it ever reached the courts at all.").

[17] *See Edward Queen v. John Ashton, Petition for Freedom*, October 15, 1791, *O Say Can You See: Early Washington, D.C., Law & Family* ("*Early Washington*"), accessed January 2, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0338; *Edward Queen v. John Ashton, Judgment*, May 23, 1794, at *Early Washington*, accessed January 2, 2016; Papenfuse, "From Redcompense to Revolution," at 52; *see also* Lorena S. Walsh, **Motives of Honor and Pleasure: Plantation Management in the Colonial Chesapeake, 1607-1763** (2010), pp. 324-29; Murphy, **Jesuit Slaveholding in Maryland, 1717-1838**, pp. 35-38.

[18] *See Edward Queen v. John Ashton, Deposition of Richard Disney*, May 14, 1792, filed July 28, 1792, at *Early Washington*, accessed January 2, 2016. On the Larkins, *see* Jane Wilson McWilliams, **Annapolis City on the Severn: A History** (2011), pp. 30-31; William Kenneth Rutherford and Anna Clay Zimmerman

Rutherford, **Genealogical History of the Gassaway Family** (1981), p. 122; J.D. Warfield, **The Founders of Anne Arundel and Howard Counties, Maryland** (1905), pp. 104, 171.

[19] *See Edward Queen v. John Ashton, Deposition of Thomas Warfield*, October 11, 1792, filed October 25, 1793, at *Early Washington*, accessed January 2, 2016.

[20] *See Edward Queen v. John Ashton, Deposition of George Davis*, May 27, 1793, filed June 1, 1793, at *Early Washington*, accessed January 2, 2016.

[21] *See Edward Queen v. John Ashton, Deposition of Caleb Clarke,* filed October 23, 1793, at *Early Washington*, accessed January 2, 2016; *see also* Newman, **Mareen Duvall of Middle Plantation**, pp. 209-10, 215, 222-24, 263-64.

[22] *See Edward Queen v. John Ashton, Judgment,* May 23, 1794, at *Early Washington*, accessed January 2, 2016; Papenfuse, "From Redcompense to Revolution," at 52; Heinegg, **Free African Americans of Maryland and Delaware**, pp. 296-99; "Rev. John Ashton (b. circa 1742 - d. 1815)," *MSA (Biographical Series)*, MSA SC 5496-041715; *see also* Fede, **Roadblocks to Freedom**, p. 353 (discussing Edward Queen's unsuccessful damage suit *Queen v. Ashton*, 3 H. & McH. 439, 1796 WL 630 (Md. Gen. Ct. 1796)).

[23] 13 F. Cas. 907 (C.C.D.C. 1808)(7,435).

[24] *See Joice v. Alexander*, 13 F. Cas. at 908; *see also* Fede, **Roadblocks to Freedom**, p. 348; Papenfuse, "From Redcompense to Revolution," at 62, n. 95.

[25] 11 U.S. (7 Cranch) 290, 3 L. Ed. 348 (1813). The discussion of this case is taken in part from Fede, **Roadblocks to Freedom**, pp. 343-45.

[26] *See Mima Queen & Louisa Queen v. John Hepburn*, Petition, January 8, 1810, at *Early Washington*, accessed January 2, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0011; *Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 1*, June 26, 1810, at *Early Washington*, accessed January 2, 2016; Baltz, **Gabriel Duvall: A Short Biography,** p. 1; James O'Hara, "Gabriel Duvall: 1811-1835," in **The Supreme Court Justices: Illustrated Biographies, 1789-2012**, p. 71; *see also* William G. Thomas, III, "The Timing of *Queen v. Hepburn*: An Exploration of African American Networks in the Early Republic," at *Early Washington*, accessed January 2, 2016, http://earlywashingtondc.org/stories/queen_v_hepburn.

[27] *See Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 2*, June 26, 1810, at *Early Washington*, accessed January 2, 2016; *Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 5,* June 28, 1810 and Defendant's Bill of Exceptions, June 27, 1810, at *Early Washington*, accessed January 2, 2016; "Duvall, Gabriel (1752-1844)," in 1 **A Biographical Dictionary of the Maryland Legislature, 1635-1789**, p. 290; Dilliard, "Gabriel Duvall," in 1 The **Justices of the United States Supreme Court 1789-1969**, pp. 420-22.

[28] *See Mima Queen & Louisa Queen v. John Hepburn, Petitioners Bill of Exceptions No. 6*, no date, at *Early Washington*, accessed January 2, 2016. The petitioners also called as trial witnesses Simon Queen (who was freed by Ashton in 1796 along with other Queen family members), Gabriel Duvall, and two women identified only as Mrs. Quiad and Mrs. Nevitt. Their testimony is not preserved. *See Mima Queen & Louisa Queen v. John Hepburn*, Defendant's Bill of Exceptions, no date; *Mina Queen & Louisa her child v. John Hepburn*, Minute Book 287, no date, at *Early Washington*, accessed January 2, 2016.

[29] *Mima Queen v. Hepburn,* 11 U.S. (7 Cranch) at 290-93.

[30] *Id.* at 295.

[31] *See id*. at 296-98, quotations at 296-97.

[32] *Id.* at 298-99.

[33] *Id.* at 299.

[34] *See Davis v. Wood*, 14 U.S. (1 Wheat.) 6, 4 L. Ed. 22 (1816); *see also Wood v. Davis*, 11 U.S. (7 Cranch) 271, 272, 3 L. Ed. 339 (1812)(Justice Duvall refers to Maryland freedom suits including *Rawlings v. Boston*, 3 H. & McH. 139, 1793 WL 394 (Md. Gen. 1793)).

[35] *See* 30 Charles Alan Wright and Kenneth W. Graham, Jr., **Federal Practice & Procedure, Federal Rules of Evidence, Hearsay and Confrontation** (1997 & supp. 2014) §6321, p. 18, n. 83-84; *see also, e.g*., on the Marshall court and slavery, R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001), pp. 426-31; Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996), pp. 165-66, 169-70; Peter Charles Hoffer, **The Law's Conscience: Equitable Constitutionalism in America** (1990), pp. 117-19; MacLeod, **Slavery, Race and the American Revolution**, pp. 117-18; Leslie Freidman Goldstein, "Slavery and the Marshall Court: Preventing 'Oppressions of the Minor Party'?," 67 *Md. L. Rev*. 166, 177 (2007); Kent Newmyer, "On Assessing the Court in History: Some Comments in the Roper and Burke Articles," 21 *Stan. L. Rev*. 540, 542-43 (1969); Donald M. Roper, "In Quest of Objectivity: The Marshall Court and the Legitimation of Slavery," 21 *Stan. L. Rev*. 532, 533, 537 (1969).

[36] 17 U.S. (4 Wheat.) 518, 713, 4 L. Ed. 629 (1819).

[37] *See* Melvin I. Urofsky, **Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue** (2015), pp. 46-54.

[38] *See Walkup v. Pratt*, 5 H. & J. 51, 1820 WL 912, at 5 (Md. 1820); *Walls v. Hemsley*, 4 H. & J. 343, 1817 WL 959 (Md. 1817); *see also Glover v. Millings*, 2 Stew. & P. 28, 1832 WL 551 at 6-7 (Ala. 1832)(citing *Mima Queen* with approval); Fede, **Roadblocks to Freedom**,

p. 345; MacLeod, **Slavery, Race and the American Revolution**, p. 118.

[39] 8 Tenn. (Mart. & Yer.) 5, 1827 WL 613 (1827).

[40] *Vaughan v. Phebe*, 1827 WL 613 at 1-2, 11-13. For other cases allowing reputation evidence of enslaved or free status, *see* Fede, **Roadblocks to Freedom**, pp. 345-47; MacLeod, **Slavery, Race and the American Revolution,** pp. 119-23; *see also Gregory v. Baugh*, 29 Va. (2 Leigh) 665, 1831 WL 1924 (1831)(judges equally divided on the hearsay pedigree exception issue, but reversing freedom judgment on other grounds); A. E. Keir Nash, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *32 Vanderbilt L. Rev. 7*, 137-38 (1979).

[41] 39 Ky. (9 Dana) 23, 1839 WL 2577 (1839).

[42] *Chancellor v. Milly*, 1839 WL 2577 at 1; *see* Fede, **Roadblocks to Freedom**, pp. 348-49; Jason A. Gillmer, "Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South," 82 *N.C. L. Rev*. 535, 587 and n. 338 (2004); *see also Humphries v. Tench*, 12 F. Cas. 883, 2 Cranch C.C. 337 (C.C.D.C. 1822)(6,873)(denying defendant's request to read depositions from Maryland county court case in freedom suit, verdict for petitioner).

[43] *See* W. R. Habeeb, "Admissibility of Declarations of Persons Other Than Members of Family as to Pedigree," 15 *A.L.R*. 2d 1412 (1951)(listing and discussing majority rule and minority rule decisions). For antebellum Southern decisions adopting the minority rule in cases other than manumission and freedom suits, *see*, *e.g*., *State v. Patrick*, 51 N.C. (6 Jones) 308, 1859 WL 2030 (1859); *State v. Tucker*, 24 Ala. 77, 1854 WL 330 (1854); *Horry v. Glover*, 11 S.C. Eq. (2 Hill Eq.) 515, 1837 WL 1538 (1837); and for post–Civil War decisions citing slavery hearsay cases, including cases enforcing Jim Crow segregation and anti-miscegenation laws, *see*, *e.g*., *Stewart v. Profit*, 146 S.W. 563 (Tex. Ct. Civ. App. 1912); *Cole v. District Bd. of School Dist. No. 29, McIntosh County*, 32 Okla. 692, 123 P. 426 (1912); Frank W. Sweet, **The Legal History of the Color Line: The Rise and Triumph of the One-Drop Rule** (2005), pp. 403-32; Charles Frank Robinson II, **Dangerous Liaisons: Sex and Love in the Segregated South** (2003); J. Allen Douglas, "The 'Most Valuable Sort of Property': Constructing White Identity in American Law, 1880-1940," 40 *San Diego L. Rev*. 181 (2003).

[44] *See, e.g*., Glen Weissenberger, "Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant," 55 *U. Cin. L. Rev*. 1079, 1129-34 (1987); *see also Porter v. Quarantillo,* 722 F. 3d 94, 97-99 (2d. Cir. 2013); *Blackburn v. United Parcel Service, Inc.*, 179 F. 3d 81, 98-102 (3d. Cir. 1999); *Ware v. Beach*, 322 P. 2d 635, 639-40 (Ok. 1957), *cert. denied*, 358 U.S. 819 (1958); *Daniels v. Johnson*, 216 Ark. 374, 226 S.W. 2d 571, 576-77 (1950); Richard J. Biunno, *et al*., **Current N.J. Rules of Evidence** (2016), pp. 903-04; 2 **McCormick on Evidence** §322, pp. 396-99. On dissenting opinions, *see* Urofsky, **Dissent and the Supreme Court**, pp. 36, 339, 414-15; Mark V. Tushnet, "Conclusion," in **I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases** (Mark V. Tushnet, ed.)(2008), p. 221.

[45] 27 U.S. (2 Pet.) 664, 7 L. Ed. 555, 1829 U.S. LEXIS 427 (1829). The discussion of this case is taken in part from Fede, **Roadblocks to Freedom**, pp. 181-82.

[46] 13 Charles Alan Wright, *et al*., **Federal Practice & Procedure, Jurisdiction and Related Matters 3d, The Federal Judicial System** (2008 & Supp. 2014) §3530, p. 717, n. 69.

[47] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 2-7; Robert Barnes, **Marriages and Deaths for the Gazette 1727-1839** (1973), p. 44; Pat Melville, "Research Notes," *The Archivists' Bulldog* Vol. 4, No. 31 (September 17, 1990), accessed, January 9, 2016, http://msa.maryland.gov/msa/refserv/bulldog/bull90/html/bull90.html.

[48] *See* Kathryn Grover, **The Fugitive's Gibraltar: Escaping Slaves and Abolitionism in New Bedford, Massachusetts** (2001), p. 74; Melville, "Research Notes;" "The Brothers Darnall," **Frontline: The Blurred Racial Lines of Famous Families**, accessed January 8, 2016, http://www.pbs.org/wgbh/pages/frontline/shows/secret/famous/darnall.html.

[49] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 3, 7-8; Deed of manumission and supporting papers, dated July 18, 1826 and recorded July 26, 1826, *Archives of Maryland Online*, Anne Arundel County Court, Manumission Record, 1816-1844, Volume 831, page 336-43, MSA CM 48-3, accessed January 8, 2016, http://aomol.msa.maryland.gov/000001/000831/html.

[50] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 11; "An ACT relating to negros [sic], and to repeal the acts of assembly therein mentioned," Votes and Proceedings of the Senate of the State of Maryland November Session, 1796, at *Archives of Maryland Online*, volume 105, page 251, 255, accessed January 21, 2016, http://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000105/html/am105–1.html; Fede, **Roadblocks to Freedom**, p. 96.

[51] 6 H. & J. 16 (Md. 1823).

[52] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 8-11.

[53] *See id.* at 4.

[54] *See id.* at 2, 10, quotation at 10.

[55] *See id.* at 2-5, quotation at 5.

[56] 5 H. & J. 190, 1821 WL 476 (Md. 1821).

[57] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 5.

[58] 6 H. & J. 16 (Md. 1823).

[59] *See Le Grand v. Darnall*, 1829 U.S. LEXIS 427 at 5-6.

[60] *See id.* at 11-12.

[61] *See* Saul S. Freidman, **Jews and the American Slave Trade** (1998), p. 177; Lyle Saxon, **Old Louisiana** (1989), p. 133-39; Clement Eaton, **The Growth of Southern Civilization** (1961), p. 138; Kaye Mason Rowland and Mrs. Morris L. Croxall, eds., "Biographical Sketch," in **The Journal of Julia LeGrand New Orleans 1862-1863** (1911), pp. 13-23. For other discussions of the case, *see, e.g.,* Bernie D. Jones, **Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South** (2009), pp. 23-24; Peter Wallenstein, **Tell the Court I Love My Wife: Race, Marriage, and Law—An American History** (2002), pp. 46-47.

[62] *See Wallingsford v. Allen*, 35 U.S. 583, 593, 9 L. Ed. 542 (1836); *see also Fenwick v. Chapman*, 34 U.S. 461, 9 L. Ed. 193 (1835)(affirming freedom judgment finding manumission was not prejudicial to creditors under 1796 act because decedent's real estate could be sold to pay estate's debts); *but see Miller v. Herbert*, 46 U.S. 72, 12 L. Ed. 55 (1847)(following Maryland cases strictly enforcing another provision of the 1796 act requiring that manumission deeds be recorded within six months of execution).

[63] *See* Fede, **Roadblocks to Freedom**, pp. 174-75.

[64] Thomas R.R. Cobb, **An Inquiry into the Law of Negro Slavery in the United States of America** (photo. reprint 1968) (1858), p. 238; *see* Fede, **Roadblocks to Freedom**, pp. 177-81.

[65] *See* **Civil Code of Louisiana with Annotations** (Wheelock B. Upton and Needler R. Jennings, ed.) (1838), p. 29, Art. 184.

[66] *Hall v. Mullin*, 1821 WL 476 at 2-3.

[67] *Id*. at 4.

[68] *Id*. at 5. For other discussions of the case, *see* Fede, **Roadblocks to Freedom**, pp. 175-76; 4 Helen Tunnicliff Catterall, **Judicial Cases Concerning American Slavery and the Negro** (reprint ed. 1968)(1926-1937), pp. 6-7.

[69] 38 S.C.L. (4 Rich.) 186, 1850 WL 2766 (1850).

[70] *See, e.g*., *Mallett v. Smith,* 27 S.C. Eq. (6 Rich. Eq.) 12 (1853); *Thorne v. Fordham,* 24 S.C. Eq. (4 Rich. Eq.) 222 (1852); *Swinton v. Egleston,* 24 S.C. Eq. (3 Rich. Eq.) 201 (1851); *Fable v. Brown*, 11 S.C. Eq. (2 Hill Eq.) 378, 1835 WL 1408 (S.C. App. 1835); Fede, **Roadblocks to Freedom**, pp. 176-77.

[71] *See* John Belton O'Neall, **Negro Law of South Carolina** (1848); *see also*, on O'Neall, Fede, **Roadblocks to Freedom**, pp. 372-73.

[72] *See* 4 Catterall, **Judicial Cases Concerning American Slavery and the Negro**, p. 6; *see also Smith v. Doe*, 33 Md. 442, 447-48, 1871 Md. LEXIS 4 (1871) (citing *Hall* and holding no implied manumission); *Bell v. McCormick*, 3 F. Cas. 107, 5 Cranch C.C. 398 (C.C.D.C. 1838)(No. 1,255)(denying implied manumission).

[73] *See U. S. Const*., art III, § 2, cl. 1. On declaratory judgments, *see* Declaratory Judgments Act, 28 *U.S.C.A.* §§2201-2202 (2006 & sup. 2015); Donald L. Doernsberg and Michael B. Mushlin, "The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction while the Supreme Court Wasn't Looking," 36 *U.C.L.A. L. Rev*. 529, 547-93 (1989).

[74] *See* Stanton D. Krauss, "New Evidence That *Dred Scott* was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction," 37 *Conn. L. Rev*. 25, 27-65 (2004).

[75] 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

[76] 60 U.S. (19 How.) at 400-28. Taney's discussion of *Le Grand v. Darnall* is at 423-26. Justice Benjamin R. Curtis's dissenting opinion contended that the federal courts had diversity jurisdiction but did not dispute Taney's reading of the procedural history distinguishing *Le Grand*. *See id*. pp. 447-49; *see also, e.g.,* Earl M. Maltz, **Dred Scott and the Politics of Slavery** (2007), pp. 101-12, 118-21, 132-36; Austin Allen, **Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court 1837-1857** (2006), pp. 150-51; Walter Eherlich, **They Have No Rights: Dred Scott's Struggle for Freedom** (1979), pp. 90-92; Don E. Fehrenbacher, **The Dred Scott Case: Its Significance in American Law and Politics** (1978), pp. 281-82, 295-96, 362, 675, n. 42 (1978); Krauss, "New Evidence That *Dred Scott* was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction," at 26, n. 5.

[77] *See United States v. Dow*, 25 F. Cas. 901, 901-04, 1 Taney 34 (C.C.D. Md. 1840)(14,990);Walker Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney** (1965), pp. 355-60, 506-07; Carl Brent Swisher, **Roger B. Taney** (1935), pp. 149-59; Bernard C. Steiner, **Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court** (1922), pp. 136, 455-56; Michael A. Schoeppner, "Status across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision," 100 *Journal of American History* 46, 46-67 (2013); Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," at 34-37; H. Jefferson Powell, "Attorney General Taney and the South Carolina Police Bill," 5 *Green Bag* 2d 75-76, 84-86, 90-91, 99-109 (Autumn 2001); Paul Finkelman, "'Hooted Down the Page of History': Reconsidering the Greatness of Chief Justice Taney," 19 *Journal of Supreme Court History* 83, 90-91 (1994).

[78] *See* Davies, "Recognition and Volition," pp. 1-3; *see also* 12 **The Papers of John Marshall** (Charles F. Hobson, ed.)(2006), pp. 432-33; White, **The Marshall Court and Cultural Change**, p. 327.

[79] *See Obituary*, 43 U.S. x, xi-xii (1844).

[80] *See* William L. Reynolds, "Maryland and the Constitution of the United States: An Introductory Essay," 66 *Maryland L. Rev*. 923, 932 (2007).

[81] *See Butler v. Duvall*, 4 F. Cas. 901, 4 Cranch C.C. 167 (C.C.D.C. 1831)(2,239); *Butler v. Duvall*, 4 F. Cas. 898, 3 Cranch C.C. 611 (C.C.D.C. 1829)(2,238); *Thomas Butler, Sarah Butler, Matilda Butler, Airy Butler, Reason Butler, Sally Butler, Liddy Butler, & Eliza Butler v. Gabriel Duvall*, at *Early Washington*, accessed November 25, 2016, http://earlywashingtondc.org/cases/oscys.caseid.0217; Leepson, **What So Proudly We Hailed,** pp. 26-27.

[82] *See* Leepson, **What So Proudly We Hailed,** p. 182; *see also* Newmyer, **John Marshall and the Heroic Age of the Supreme Court,** p. 95 (warning that "[l]awyer's arguments, like judge's opinions . . . are not always reliable statements of personal belief.").

[83] *See The Antelope*, 23 U.S. (10 Wheat) 66, 6 L. Ed. 268 (1825).

[84] *See* John T. Noonan, Jr., **The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams** (1977), pp. 107-08, 112-16; *see also* Jonathan M. Bryant, **Dark Places of the Earth: The Voyage of the Slave Ship Antelope** (2015), pp. 235-37, 346, n. 12; Leepson, **What So Proudly We Hailed**, pp. 103-07; White, **The Marshall Court and Cultural Change, 1818-1835**, p. 699, n. 92; Delaplaine, **Francis Scott Key: Life and Times**, pp. 208-16.

[85] *See* Nicholas Guyatt, **Bind Us Apart: How Enlightened Americans Invented Racial Segregation** (2016), pp. 262-75, 285; Leepson, **What So Proudly We Hailed**, pp. 77-107, 123-24, 191-93; P. J. Straudenraus, **The African Colonization Movement 1816-1865** (1961), pp. 25-30, 189-90, 208; Delaplaine, **Francis Scott Key: Life and Times**, pp. 191-218, 441-58.

[86] *See* Huebner, "Roger B. Taney and the Slavery Issue: Looking beyond—and before—*Dred Scott*," 19-26, quotation at 25; *see also* Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney,** pp. 360-62; Straudenraus, **The African Colonization Movement,** pp. 25, 70, 111. Key freed some of his slaves during his lifetime. His will freed any slaves he still owned upon his wife's death. *See* Leepson, **What So Proudly We Hailed**, pp. 190-91.

[87] For more discussion of antebellum theories and evidence of free black citizenship, *see* Mark A. Graber, **Dred Scott and the Problem of Constitutional Evil** (2006), pp. 46-57; *see also* Ryan C. Williams, "Originalism and the Other Desegregation Decision," 99 *Va. L. Rev*. 493, 511-20 (2013).