Review Essay:  

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Paul Finkelman has led a long and distinguished career as a legal historian of slavery and race in the United States. He is truly a peripatetic scholar, having held a dizzying number of academic appointments throughout this country and abroad. Most recently, he has alighted as president of Gratz College in Philadelphia. The present book is an outgrowth of the Nathan I. Huggins Lectures, delivered at the W.E.B. Dubois Center at Harvard University in 2009.

While compiling an extensive list of publications over the past four decades, Finkelman established his scholarly credentials in two principal works: *An Imperfect Union: Slavery, Federalism, and Comity* (1981) and *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (1996 third edition, 2014). The former traced the breakdown in “comity” between northern and southern legal systems regarding the transit of enslaved and freed persons during the two decades preceding the Civil War. This collapse, signified by increasing emancipations of slaves brought northward by sojourning masters and re-enslavement of freed blacks who returned to the south, was the prelude to the breakup of the federal Union in 1860.

From this specialized study, Finkelman enlarged his scope in *Slavery and the Founders*, a series of connected essays elaborating his great theme “that slavery was a central issue of the American founding.”¹ With this book, Finkelman secured his reputation as a harsh critic of the founding generation for its failure to confront the contradiction between its idealistic rhetoric in favor of liberty and equality and the reality that vast numbers of black persons were held in bondage. It was not just that the founders failed to translate Revolutionary idealism into effective action to challenge slavery but that
they actually strengthened the institution by providing constitutional and legal protections.

Finkelman has deservedly drawn praise for his critical assessment of the nation’s fateful unwillingness at its founding moment to deal effectively and honorably with the institution of slavery. No one has done more to place this painful truth at the forefront of our early national history. As both a historian and engaged activist on behalf of racial justice, he believes that a realistic understanding of our imperfect past is essential if Americans “are to do better in our own times.” He forthrightly denies the charge of presentism, of interpreting the past through the distorting lens of the present. He insists that he judges past actors by the standards of their day, not our own, though acknowledging that statesmen like Thomas Jefferson should be held to the highest standards of their day. They are not to be excused for merely being “better than the worst” of their generation. He has little patience for letting the founders off the hook by portraying them as tragically bound by their historical milieu, stumbling uncertainly into an unknown and unknowable future. Finkelman believes that an important part of the historian’s duty is to render moral judgments. He is not one of those excessively contextualizing historians who in seeking to understand or explain past actions in terms of particular exigencies of time and place risk excusing or exonerating.

At the heart of the moral historian’s enterprise is the assumption that past actors had clear choices and the freedom to choose one course of action or another. For Finkelman early national statesmen too often and with ill intent rejected policies that could have ameliorated the conditions of slavery and pointed toward its eventual demise. Phrases like “could have,” “should have,” and “might have” (sometimes paired with “easily”) regularly recur in his depressing narrative of politicians failing the moral test by choosing “slavery” over “freedom.” Finkelman professes to take no joy in his project, noting that the “stain of racism and the legacy of slavery” make for unpleasant reading. Still, it is evident that he derives some grim satisfaction in bringing the revered founders down from their exalted level to the realm of flawed humanity.

Supreme Injustice is of a piece with the author’s previous work, at once enlightening and argumentative, aimed at challenging received wisdom. The title perfectly captures the book’s thesis, promising readers to expect an unsparing judgment of the antebellum Supreme Court’s record on slavery. To be accurate, it is not the Court as an institution that Finkelman brings to account but rather its “three most important justices” (at p. 1): Chief Justice John Marshall, Associate Justice Joseph Story, and Chief Justice Roger B. Taney. With Story and Taney, the focus is primarily on two famous (or perhaps infamous) opinions: Prigg v. Pennsylvania (1842), in which Story held that a Pennsylvania law to prevent the forcible removal of black persons into slavery was void as clashing with the federal Fugitive Slave law of 1793 and Dred Scott v. Sandford (1857), in which Taney in the course of denying a freedom claim declared that blacks could not be citizens and that the federal government had no power to regulate slavery in the territories acquired after the creation of the United States (thereby overturning the Missouri Compromise of 1820).

Unlike Story and Taney, Marshall has largely avoided close scrutiny of his slavery jurisprudence, apparently because there is too little to yield much substance. No case directly bringing in issue the legitimacy or constitutionality of slavery came before the Marshall Court. Yet it did hear a number of cases arising from petitions for freedom and from slave trade violations whose decision turned on the free or slave status of black persons. These constituted a small but not insignificant portion of the court’s docket. Historians and legal scholars are familiar with two cases that come closest to revealing the Court’s views on slavery and the slave trade:
Mima Queen v. Hepburn (1813), a freedom suit, and The Antelope (1825), which dealt with the legality of the international slave trade. The latter case has received the most attention, including a book-length study. Finkelman has delved deeply into the early U.S. Reports and gleaned additional cases that he believes previous scholarship has overlooked. Taking these cases and considering them in conjunction with Mima and Antelope, he finds a clear pattern of bias against freedom on the part of the “great chief justice.” The evidence is sufficiently incriminating to join Marshall with Story and Taney as a trio of “supremely unjust” Justices.

Finkelman has previously written on Prigg and Story and on Dred Scott and Taney. The greater part of the present book is devoted to Marshall, who has not previously drawn the author’s particular notice. What follows focuses almost entirely on the Marshall chapters because they present new information about the Chief Justice as a Virginia slaveholder. Such emphasis also better fits my background as a student of Marshall and annotator of his collected papers.

Finkelman wastes no time in stating his case that Marshall, along with Story and Taney, should be held personally responsible for the institutional failure of the Supreme Court to exercise its authority in a way that favored freedom over slavery in the decades before the Civil War. He sketches an alternative scenario in which these three Justices could have contributed to a “political solution to the problem of slavery” or at least have ameliorated the system by upholding more claims to freedom and vigorously protecting the rights of free blacks. A “different jurisprudence,” he says, “would have left the nation with a legacy of liberty and justice, rather than one of slavery, racism, and oppression.” Such a jurisprudence was readily available for adopting, consistent with the ideals set forth in the Declaration of Independence and the preamble to the otherwise proslavery Constitution, with public opinion north and south that condemned slavery as morally wrong and a threat to national security, and with the legal rule that in cases of doubt courts should lean toward life and liberty. Instead of embracing a jurisprudence more friendly to freedom, Marshall, Story, and Taney, quite the contrary, “continuously strengthened slavery in the American constitutional order” and thereby “helped” bring on the Civil War and “the death of some 630,000 young Americans” (at p. 1-3).

This is a heavy charge for these three jurists to bear, made in the confident belief that individuals have great capacity to shape history and therefore to be assigned blame for history’s failings. These Justices, Finkelman writes, “profoundly altered the politics of slavery and the course of national history.” Notwithstanding “constraints” on their ability to act, they had “great flexibility” to choose a jurisprudence of freedom that “would have changed the course of history” (at p. 220). Finkelman seems particularly eager to consign Marshall to this judicial hall of shame, having already done so with Story and Taney. In taking his first critical look at Marshall, he is pumped with new information that he believes should radically revise our estimate of the “great chief justice.”

Marshall as a Slaveholder

Thanks to Finkelman’s research, we now know that Marshall owned many more slaves than was previously believed to be the case. Earlier historians and biographers have been content to pass on the received knowledge that Marshall owned a small number of slaves at his Richmond home and on his Chickahominy farm a few miles outside town in Henrico County. According to the 1830 federal census, Marshall owned seven slaves in Richmond and sixty-two in Henrico. The same census for Fauquier
County lists forty-odd slaves under Marshall’s overseer and at his “quarter.” Add to these (as Finkelman does) those listed under the names of Marshall’s five sons, Fauquier County farmers, and you have a substantial Marshall family investment in slave property—more than 250 slaves in 1830 (at p. 36-37, 46-47, 233 n. 9). Until Finkelman, no one had bothered to check the Henrico census records, even though Marshall’s correspondence mentions slaves at Chickahominy and a passage in his will apportions his slaves there. The Fauquier records were overlooked as well, even though Marshall made annual summer visits there to see his sons and tend to his own property interests.

The misconception that Marshall owned relatively few slaves in the urban setting of Richmond crept into the literature seemingly as a consequence of unexamined assumptions. In his monumental biography early in the twentieth century, Albert Beveridge barely touched on the subject beyond noting that Marshall inherited a few slaves from his father and recorded purchases in his early account books. Subsequent researchers showed a surprising lack of curiosity to dig deeper. Even Irwin S. Rhodes, who unearthed real and personal property records pertaining to Marshall with antiquarian zeal, missed counting the slaves at Chickahominy and in Fauquier. More recently, Jean Smith states that, since Marshall “was never involved in large-scale agriculture, he had no significant holdings.” Kent Newmyer describes Marshall as “a small urban slaveholder,” though noting that he had slaves at Chickahominy and was involved to some extent in plantation slavery through his sons. Frances Howell Rudko cites Rhodes’s compilation of federal census records for 1810, 1820, and 1830 to show that Marshall’s “slave ownership was never large,” but these count only the Richmond numbers. My own book, which was not a full-scale biography, did not question the view that Marshall possessed “a modest number of slaves.” However, in annotating Marshall’s collected papers, notably his will, I should have searched the Henrico census records on microfilm, which now can be quickly accessed online through Ancestry.com.

In his analysis of Marshall as a slave owner, Finkelman, like others before him, draws on an account book covering the years 1783 through 1795. Using the annotated text in the Papers of John Marshall, he counts some twenty distinct purchases between 1783 and 1790. He also cites Richmond city tax records as compiled by Marshall’s editors for information on slaveholdings through 1795. Marshall, he notes, was also at this time “populating” his estates in Henrico and Fauquier with slaves, though he does not cite any records for those counties (at p. 40). From 1795, Finkelman jumps forward to 1827, when Marshall wrote the first of several wills. The wills, coupled with the 1830 census records, indicate the extent of his slave-owning at that time. Thus armed with data from both ends of Marshall’s adult life, Finkelman conjures an image of Marshall as actively, constantly, and aggressively involved in the business of buying and selling slaves “throughout his life” (at p. 37). Sentences to this effect pop up recurrently, often within the space of a few paragraphs, as if repetition strengthens the argument. Usually, he adds the qualifier “sometimes” or “occasionally” when speaking of Marshall as a seller. But the only transaction of this kind he cites is the sale of the slaves on the estate of John Marshall, Jr., after the son’s death in 1833. No extant documents—deeds, bills of sale, or correspondence—show Marshall in the act of buying after the 1790s, though surely his acquisition of slaves must have continued beyond this time. For Finkelman, the records unambiguously reveal Marshall as a lifelong trader in slaves.

According to Finkelman, “the fact of Marshall’s vast slaveholding forces a reconsideration of his personal feelings on slavery” (at p. 48). With revisionist ardor, he casts in
No scholar had made a full accounting of John Marshall’s slaveholding records before Paul Finkelman, who estimates that the Chief Justice and his five sons owned more than 250 enslaved persons in 1830. At his Chickahominy farm in Henrico County he owned sixty-two.

an unfavorable or unsympathetic light practically everything Marshall did or said regarding slavery, rarely cutting him any slack by giving him the benefit of the doubt. Even the Chief Justice’s seemingly compassionate hope to liberate his manservant Robin Spurlock is presented in a disparaging way. In this and other matters, Finkelman does not shy away from taking speculative leaps from the record—and sometimes from what is not in the record—to make sweeping assertions about Marshall’s supposed bad faith if not mean-spiritedness. He seeks to demolish the image of Marshall as a benevolent master in the tradition of southern paternalism, one who treated his slaves kindly and recognized their humanity. In its place, he portrays a Marshall who regarded slaves as mere producers of wealth, as objects of commerce to be bought and sold. He scolds Marshall, author of the

Life of George Washington, for not measuring up to “his hero,” for failing to learn how “a true hero of the Republic—even a slaveholder’s republic—should treat people, including slaves.” He quotes Washington as famously refusing “to buy or sell slaves ‘as you would do cattle at a market.’” The paraphrase is somewhat misleading, for Washington actually said that he was “principled against selling negros, as you would do cattle in the market.” Finkelman likes the “cattle at a market” phrase so much that he repeats it a few pages later when he again chastises Marshall as a buyer and seller of slaves (at p. 45, 48). The passage contrasting Marshall with Washington is indicative of the author’s insinuating style of argumentation.

Space precludes a full review of the author’s catalog of Marshall’s moral failings as a slaveholder. Certain of his charges that go
unnoticed here should not be taken as implied assent. At the outset and throughout, Finkelman strives to fashion a portrait of Marshall as a “very wealthy man,” “a wealthy southern gentleman with a significant number of slaves,” a “wealthy lawyer and planter,” and “a wealthy landowner” (at p. 33, 40, 44, 221). Even toned down from his draft describing him as “stunningly” or “fabulously wealthy,” his depiction of the Chief Justice as a man of large fortune does not ring true to those who have studied Marshall and visited the modest houses and homesteads owned by him and his family. To be sure, Marshall lived in comfortable circumstances but certainly not in the grand style. Visitors to his Richmond home spoke of the republican simplicity of his lifestyle. From 1800, he was in government service, including thirty-five years as Chief Justice. If instead he had remained a private citizen and practiced law, he might well have become very wealthy like his lawyer-neighbor John Wickham, whose Richmond townhouse was truly grand.

By all accounts, Marshall’s country place on the Chickahominy did not rate the status of a “plantation.” True, he once lightheartedly referred to it as “a plantation productive only of expence & vexation,” but more often simply as his “farm.” Today, a historical marker (“John Marshall’s Farm”) sits on the site where the farm and other buildings once stood. The house was evidently a small dwelling—“our little place in the country,” as Marshall described it in 1829. Marshall bought the place primarily as a retreat from the bustle of town life, most importantly for his invalid wife Polly, who because of an extreme nervous condition could not tolerate loud noises. Here, too, the Chief Justice could pursue farming, mostly as an avocation rather than as a source of productive income.

Whatever his true net worth might have been, Marshall never saw himself as entirely free of financial concerns, even in his later years. He had a large family to support, five sons and a daughter, whose wellbeing was a constant preoccupation. At age sixty, the Chief Justice had three adolescent sons. He was over seventy when his youngest son graduated from college. The three younger sons, notably John, Jr., had a distressing habit of incurring large debts. In 1827, John’s pecuniary indiscretions involved the father in debts which require all my resources and from which I shall be several years in extricating myself.” The next year he was “surprised as well as grieved” to learn the “magnitude” of son James’s debts. He was chagrined that his sons did not “feel the proper horreur at owing money which cannot be paid.” In drawing his will, Marshall expressed a certain anxiety about being surety for his son-in-law Jaquelin Harvie “in considerable sums of money which I hope my estate will never be required to pay.”

In overstating the degree of Marshall’s wealth, Finkelman creates the misleading impression that the basis of that wealth was large holdings of slaves. Marshall “owned hundreds of slaves during his life,” he writes, and “also a number of plantations around the state” from which “he clearly profited” (at p. 31). But, apart from his Henrico farm, he owned no other “plantations,” unless he is including the lands farmed by his sons in Fauquier. How he “profited” from their apparently debt-encumbered estates, or even from his Chickahominy farm, is not made clear.

Marshall did indeed possess vast quantities of land, not just in Henrico and Fauquier, but in distant counties of what is now West Virginia. His profits from these lands did not come from plantations worked by slave labor but his serving as a landlord selling lots and larger tracts, collecting rents on long-term leases, and selling the reversionary interest in these leases. Land, indeed, was the principal source of his income apart from his official salary as Chief Justice ($4,000, increased to $5,000 in 1819). He acquired most of his lands as a result of the one great business venture of his life. In 1793, he contracted to purchase the manor lands of the Fairfax family, the former proprietors of Virginia’s
Northern Neck. Marshall brought this deal to fruition in 1806 with the final payment to the Fairfax heirs, having in the intervening years devoted all his resources and income to this project—including writing a five-volume biography of George Washington that proved disappointing in its monetary returns.

Marshall’s real business was real estate, which he truly did buy and sell all his life. From a prudent economic standpoint, Marshall at some point would have ceased buying more slaves and relied on natural increase to meet his needs and those of his sons. Even as slaves were essential to agricultural enterprise, he and other proprietors of enslaved persons in antebellum Virginia were acutely anxious about the increasing economic burden of such ownership. Slave property yielded less profit while adding more expense, as he noted in a letter written in 1825: “The general fact is known to be that it requires a combination of industry skill and economy in a proprietor of slaves to accumulate even a moderate fortune in the course of a long life. In truth, the profits of their labour, in the general, will barely support a family and rear up the young slaves.” He made the additional observation that “[o]ld negroes too who have humane masters, continue for many years a burthen on their owners.” Marshall here spoke from direct experience, as owner of a farm “productive only of expence & vexation,” and from his sons’ difficulties in keeping out of debt as Fauquier farmers. He surely believed himself to be a “humane” master with a paternalistic duty to clothe, feed, and provide care for his slaves through life.

Finkelman does concede that “[s]ometimes Marshall recognized the humanity of his slaves,” as in his will providing for the distribution of his slaves in a way that “kept families together” as near as possible. Almost immediately, however, he reverts to his portrait of Marshall the lifelong slave dealer whose transactions necessarily entailed exiling “many of his slaves” from “family and friends. This is a kind of cruelty that exceeds physical punishment” (at p. 37). As a buyer of slaves, Marshall signified his acceptance of slavery’s evil consequences. In such transactions he probably never gave a thought to whether he was inflicting cruelty. If he did think about it, perhaps he rationalized that any enslaved person he bought would be well treated.

On Marshall’s treatment of slaves, Finkelman extends a backhanded compliment mixed with innuendo. We cannot “actually know how these slaves were treated,” he writes, acknowledging that there is “no evidence that Marshall whipped his slaves in Richmond, and such treatment coming directly from him seems unlikely.” “But,” he continues, “we also have no evidence of how Marshall’s overseers, sons, nephews, and other men in his family treated the vast majority” of his slaves “in the countryside.” He makes an invidious reference to Jefferson, who did not personally whip his slaves but left that “unpleasant business to underlings” (at p. 47). The lack of a documentary record of mistreatment of slaves does not deter Finkelman from supposing the worst. He wonders what John, Jr., might have done in a drunken and violent fit, though admitting “we cannot know how he behaved” (at p. 47-48). Thus the imagined sins of the son are visited upon the father.

In August 1832, Marshall added the following codicil to his will:

It is my wish to emancipate my faithful servant Robin and I direct his emancipation if he choses to conform to the laws on that subject, requiring that he should leave the state or if permission can be obtained for his continuing, to reside in it. In the event of his going to Liberia I give him one hundred dollars, if he does not go thither I give him fifty-dollars. Should it be found impracticible to liberate him consistently with law
According to family tradition, Robin Spurlock was given to Marshall as a wedding gift from his father in 1783. After the Chief Justice’s death in 1835, the elderly servant chose to remain in slavery in the family of Mary Marshall Harvie.

Marshall’s hope to emancipate “one slave among so many,” writes Finkelman, was “hardly compelling evidence” of “paternalism and humanity.” The choice presented to Robin was “hardly attractive”: leave the state with some money and abandon friends and family or be “penniless” if he somehow could gain freedom and remain in the state. In effect, the offer of freedom with these “impossible conditions” virtually compelled Robin to remain in slavery. Marshall, “the wealthy lawyer and planter,” writes Finkelman, “could easily have” provided the means and money for his “faithful servant” to live out his years in Richmond as a free man. But he took no steps to secure Robin’s freedom because it was never his intention to add to Richmond’s free black population by liberating him. The codicil thus “speaks volumes about [Marshall’s] ‘paternalism,’ his views on race, and his lifelong support for slavery.” For good measure, Finkelman berates the codicil’s author for not dignifying Robin “with a last name” (at p. 43-44, 74-75, 236 n. 33). He seldom resists an opportunity to register his moral indignation, noting, for example, that “Marshall spent Independence Day buying slaves” (at p. 37, 38).

The constraints on Marshall in devising his estate were greater than Finkelman supposes; the choices facing him were not as easy as the author would have us believe. He assures us that the Chief Justice “could easily have” emancipated his servant, but how can he or anyone really know all the circumstances that entered into Robin’s continuing as a slave? Even if Marshall did not really expect Robin to accept the offer, for Finkelman to scorn the codicil’s bequest as insincere or cynical, an act of bad faith, is unduly harsh. A fairer reading would see an aging Chief Justice in the very public way of a last will and testament expressing his high esteem for Robin “as a rational man capable of deciding his own fate.” Marshall was comparable to other testators who did not free their slaves but in allowing a choice of masters “came the closest to recognizing their humanity” and thereby acknowledged “a will, however constrained, in the slave.” The codicil spoke to a long and intimate relationship—between master and slave, to be sure, but also between two fellow humans who by all accounts enjoyed each other’s company.

Late in 1833, John Marshall, Jr., died at the age of thirty-five, leaving a widow and three children. Fond of drink and gambling, this prodigal son had caused the Chief Justice no little anguish, dating at least from his expulsion from Harvard in 1815. In response to the son’s financial “indiscretions,” the father drafted a will in 1827 placing the property intended for John in the hands of trustees for the benefit of his family. This provision was also in the final will of 1832, but the expedient did not prevent the estate, Mont Blanc, from being heavily encumbered with debts at the time of John’s death. Marshall advised his son James Keith, one of the trustees, on the various measures to meet this crisis, one of which was a sale of the estate’s slaves.

Finkelman uses this episode—the one documented instance of selling slaves—to castigate Marshall, virtually accusing him of being an ungenerous owner of the enslaved, oblivious to their feelings. Once again, in his telling, Marshall had an easy choice. He could have paid off his son’s creditors by drawing
on his own considerable assets—bank and turnpike stock, lands, and interest on loans—but “chose not to” and directed the sale of slaves for this purpose. The “admirable goal” of protecting the widow and children was thus accomplished “by increasing the misery of the slaves who had worked for years to support his son’s family.” The sale “would inevitably destroy slave families—separating husbands from wives and children from parents” (at p. 45).

Most of what we know about the sale of the Mont Blanc slaves comes from letters to James, who in addition to being a trustee was also his late brother’s executor. In April 1834, Marshall reported that he had sent $700 “for the purpose of paying off the executions with my opinion that it will be advisable, unless you perceive strong reasons against it, to sell as far as the 700$ will go under the executions and buy in my name for the family. The negroes &c I think should be sold on credit. Those which Elizabeth wishes to keep or which you think to keep—may be purchased in my name also.” The father goes on to say that James’s concern “about suits renders this sale absolutely proper. I do not know how other wise you can act safely, since the appraisement I am told is too high to act upon it as the real value. I do not know how you can plead unless you know the actual amount of assets. You must act safely so as to expose yourself to no loss from illegal proceedings.” In the same letter, Marshall announced his willingness to secure a loan of $5,000 by a mortgage on Mont Blanc, although he left that up to James, who had better knowledge of the “situation of the estate and the temper of the creditors.” He also said he would soon send another $1,000. In a subsequent letter, he advised James that it would “be proper to allow creditors to bid” at the sale of the slaves and that those intended to be reserved for the family should be sold with the others and purchased in my name.”  

Marshall, though at a distance, was closely involved in decisions about how to preserve some semblance of Mont Blanc’s solvency and to keep his widowed daughter-in-law and grandchildren on the farm. The sale of the estate’s assets, including the slaves, was regarded as “absolutely proper” for this purpose. Contrary to Finkelman’s insinuation, the Chief Justice did draw from his own funds, as he had done in earlier attempts to bail out his impecunious son.

According to the 1830 census, thirty-one slaves lived and worked at Mont Blanc. How many were sold at the 1834 sale, how many were bought back, and how many families were separated cannot be known. The slaves who had to leave Mont Blanc, or some of them, perhaps were able to stay in Fauquier on the farms of the other Marshall sons or of their neighbors.

Without question, Marshall participated more actively and deeply in slavery than was previously suspected. Yet there is still much we do not know—and perhaps will never know—about Marshall’s personal engagement with the institution. Having opened up a fresh field of inquiry, Finkelman might have added depth and context to the story by a closer examination of Marshall’s slaveholding over time. For example, he could have looked at the 1810 and 1820 censuses as well as that for 1830; the 1790 and 1800 Virginia census records were destroyed by fire. He could have carried his investigations even further by looking at personal property records to cover the years between the censuses. Virginia taxed slaves aged twelve and above, so the records do not count those under twelve. Between 1787 and 1835, the number of taxed slaves in the Marshall’s Richmond household remained fairly constant, fluctuating between seven and eleven. According to Henrico County land tax records, Marshall bought about a thousand acres of land “on Chickahominy Swamp” in 1799. 20 Personal property records for that year show that Marshall paid taxes on nine slaves. By 1807, that number had reached sixteen. In 1810, he was taxed on nineteen slaves out of a total of forty recorded on the federal census of

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that year. Over the next ten years, the number of taxed slaves rose from twenty-two to twenty-eight in 1820, when the federal census counted a total of thirty-nine. In 1830, Marshall paid taxes on thirty-one slaves, just under half the total of sixty-two reported on the federal census.21

As for Fauquier County, the 1810 federal census recorded eight slaves under “John Dawson for Marshall”; in 1820, seventeen slaves were listed under “J Judge Marshall.” As noted above, the 1830 federal census counted forty plus slaves under an overseer’s name and at Marshall’s quarter.22 Marshall appears in the county personal property books as early as 1783 as owner of one taxable slave. That same year, his father, Thomas Marshall, is shown holding twenty-one slaves, including twelve not taxed. Both father and son then disappear from the books, the former moving to Kentucky in 1785 and the son to Richmond around the same time. From 1806 through 1826, Marshall’s name shows up intermittently in the Fauquier tax records, recorded as paying taxes on slaves ranging in number from a high of thirteen down to three. Marshall’s two oldest sons, Thomas and Jaquelin, first appear as slaveholding taxpayers in 1812, joined by John, Jr., in 1817, James in 1822, and Edward in 1828.23

The federal census and Virginia personal property records need to be analyzed more closely to obtain a clearer picture of Marshall’s slaveholding as it developed over time, from one slave in 1783 to hundreds owned by the Chief Justice and his five sons in 1830. This is a task future biographers cannot ignore. One question to pursue is how and why Marshall came to own so many more slaves than he was previously known to possess. Did he initially intend to make sizeable investments in this sort of property?

Marshall by age thirty had settled permanently in Richmond and begun to practice law. This suggests a deliberate decision not to depend on slave labor, at least not directly, as the means of building up the family fortunes. The Fairfax lands purchase was undertaken to provide a steady source of income as a landlord. Of particular interest to Marshall was Leeds Manor, situated mostly in his native Fauquier County. At the time of the 1793 purchase contract, Marshall had two sons. A daughter followed in 1795, and then three more sons were born between 1798 and 1805. Marshall hoped his sons would take up professions. He was disappointed when Thomas did not follow him into law. Another son was educated to be a physician. Marshall surely did not anticipate that all five sons would become farmers. Eventually, he set aside a portion of Leeds Manor, as well as the Oak Hill estate inherited from his father—not part of Leeds—for his sons. Against his original anticipation and inclination, Marshall was drawn into deeper engagement with slavery through his farmer
sons. Conceivably, the slaves belonging to Thomas Marshall’s estate in 1784 formed the core group on which the Chief Justice drew to give to his sons as they came of age and married.

Farming land with slave labor on the Chickahominy may not have figured in Marshall’s long-term plans as he settled into law practice in Richmond during the 1780s. As with his other lands, he appears to have bought the Chickahominy tract with the intention of selling or leasing. In time he set up a farm and built a small house as a refuge for his wife and as a place for him to engage in the “laborious relaxation” of agriculture. Presumably, he acquired additional slaves to work the farm, or perhaps he had a ready supply in the surplus beyond what he needed for his Richmond household. In any event, as time passed, Marshall found himself becoming more deeply entrenched in slavery.

**Slavery Jurisprudence**

The long discussion of Marshall as a slave owner is but a prelude to the exposé of the “unjust” Justice. In Finkelman’s eyes, Marshall’s “vast slaveholding,” his deep personal investment in slavery, “seems to have affected his jurisprudence” (at p. 48). Finkelman later drops the “seems” and asserts unequivocally that Marshall was so deeply implicated in slavery that it shaped him into a jurist peculiarly hostile to claims for freedom and unwilling to support efforts to suppress the slave trade. Finkelman verges on a crudely reductionist explanation of Marshall’s slavery jurisprudence as a reflection of selfish material interests. He also sees racism lurking. “Marshall’s most aggressive racism and hostility to free blacks never appeared on the pages of U.S. Reports or in a book like Jefferson’s Notes on the State of Virginia,” he writes, “but he carried these ideas to the bench when he heard cases involving slavery” (at p. 51-52).

Marshall surely partook of the racism that permeated white antebellum society north and south. He unreflectingly accepted that blacks were a subordinate or degraded class. Like most white Americans of the time, he did not believe that whites and blacks could live together in freedom and equality. He was alarmed by the growing numbers of free blacks, especially after the Nat Turner uprising in 1831. He publicly supported efforts of the American Colonization Society, of which he was a member, to colonize free blacks in Liberia, though in private he probably thought colonization was a mere palliative. He shared the nearly universal belief among whites that emancipation without removal would expose the nation to a dangerous underclass of free blacks.

In the wake of the Nat Turner episode, Marshall, as chair of the Colonization Society of Virginia, submitted a petition to the Virginia legislature in December 1831 urging that body to provide funds to expedite colonization. To sound the alarm and prompt quick legislative action, the memorial spoke “of the miseries of the condition, and the vices of the life of the free person of colour. The one is an anomaly of wretchedness; the other a vegetation of sloth, or an activity of mischief and roguery.” It went on to say that “half the criminals” tried for larceny in Richmond were “free persons of colour. Their idleness is proverbial ...” After expressing alarm about their rapidly multiplying numbers, the memorial concludes:

If it be fixed as destiny, that the slave on the day of his subjection loses half his worth, it seems equally certain that the free negro on the day of his emancipation, loses all. And yet this same individual, the pest of a land which gives him only birth, when transported to a seat where his industry may have excitement and object, becomes the active, thriving and happy Colonist of Liberia.
Shocking as it is to modern ears, this characterization of free blacks was sadly commonplace at the time even among those who sincerely hoped for some sort of general emancipation. The Colonization Society’s memorial was one of dozens presented to the legislature, many repeating this harsh language as if following a prescribed text.26 James Madison, who agonized over the contradiction between slavery and the future of his beloved republic, noted that free blacks were “every where regarded as a nuisance, and must really be such as long as they are under the degradation which public sentiment inflicts on them.” Even Madison’s great admirer, Frances Wright, the Scottish-born social reformer and utopian advocate for emancipation, agreed that free blacks “form the most wretched and consequently the most vicious portion of the black population.”27

Although one cannot help but wince at the description of free blacks as idle, prone to mischief and criminality, and as pests, Marshall, like Madison and Wright, seems to treat these characteristics as arising not from their blackness but from their “wretched condition” that reduced them below the level of slaves. When this “pest” is transported to Liberia, “his industry may have excitement and object,” and he “becomes the active, thriving and happy Colonist of Liberia.” However preposterous, do these comments mark the chief justice as a racist on a par, say, with Jefferson or Taney? From the 1831 memorial with its fateful “pest” remark, Finkelman extrapolates a lifelong racial animosity toward free blacks that predisposed Chief Justice Marshall to rule against slave freedom.28

Having to his satisfaction posited a deep-seated racism and self-interest as a slave-owner as determinants of Marshall’s jurisprudence, the author considers some thirty Supreme Court cases dealing with slavery between 1805 and 1830. He divides these into two classes: suits for freedom and cases involving the African slave trade. He identified these cases by computer search, though he was apparently unaware that this work had already been done and subjected to analysis by legal scholar Leslie Friedman Goldstein, whose 2007 article includes a table conveniently summarizing all the Marshall Court slavery cases and their dispositions. Her careful study shows that the Marshall Court often failed to uphold black freedom, even in cases that presented a legally respectable alternative. This was particularly true, Goldstein says, up until around 1817; after that year, she finds the Court moving “the law in a more pro-liberty direction.”29

Finkelman might not dispute Goldstein’s conclusions about the overall trend of Marshall Court decisions on slavery. However, his focus is not on the Court as an institution but on the Chief Justice as an individual. If the Court did shift toward freedom, this was not true of Marshall, who “never” supported a slave’s claim to liberty or punished illegal participation in the slave trade (at p. 5). Although one might quibble with Finkelman’s emphatic assertion that no Marshall opinion came down on the side of “freedom,” even the Chief Justice’s warmest admirers must acknowledge that he “adhered to the law of slavery with a rigor that is painful to observe.”30 He resolutely shied away from judicial rulings that could be perceived as challenging the system.

With characteristic prosecutorial zeal, Finkelman impugns Marshall’s very integrity as a jurist. It is not only that Marshall hid behind the “mask of the law”—that when claims to freedom clashed with property rights he invariably and timidly invoked the judge’s duty to obey the “mandate” of the law rather than moral “feelings.”31 It was that, in cases dealing with slaves, Marshall ignored or flouted accepted and widely prevailing legal principles and rules. He acted arbitrarily and callously in denying freedom to claimants. Marshall’s “proslavery jurisprudence dovetailed with his lifelong, ambitious accumulation of slaves; his hostility to freedom cases reflected his lifelong fear and loathing of free blacks” (at p. 222).
According to Finkelman’s exacting standards, there seems to be but one correct outcome in freedom suits. Given that Marshall was enmeshed in a system that sanctioned the legality of slavery and that recognized ownership of human beings as a property right no different in kind from other “sacred” rights of property, could a decision in favor of an owner’s title claim and against an enslaved person’s claim to freedom meet his test? Each party in a freedom suit has at least a plausible case supported by evidence and authorities. If the ruling goes against the slave petitioner—against the evidence and authorities adduced in support of the petition—does this in itself show bias against slave freedom? Is it possible for a judge in such a system to adjudicate competing claims in a disinterested and impartial way that denies slave freedom? If a decision in favor of freedom could only be accomplished by disregarding established rules of property, what is a judge to do? In a legal system that was so brutally weighted against the rights of black slaves, how do we distinguish between the bias of the law and the bias of the judge? Finkelman gives no indication of taking these questions into account as he castigates Marshall for misreading law, ignoring relevant precedent, or otherwise refusing to interpret precedent or a statute to free a slave. All is bright and clear; there is no ambiguity or nuance.

The Marshall Court decided thirteen freedom suits. Many of these came up from the U.S. Circuit Court for the District of Columbia. In these cases, the Supreme Court was a highest appellate court applying the laws of Maryland and Virginia in the District’s two counties of Columbia and Alexandria. In eight cases, the Court ruled against the petitioning slave.\(^\text{32}\) With the exception of *Mason v. Matilda* (1827), in which Justice William Johnson spoke for the Court, Chief Justice Marshall gave the opinion denying the claim of freedom. In four decisions against freedom, the Court upheld the lower court.\(^\text{33}\) In the other four cases, the Court reversed the lower court and sent the case back for a new trial. One might ask if eight rulings against freedom, four of which sustained the lower court, constitute a sample large enough to reveal a consistent pattern of bias rather than mere coincidence. If it does show partiality against liberty for slaves and for the property rights of the master, is this result attributable to a law that is inherently biased or to the particular prejudices of Marshall? This brings up the question of who is on trial here—Marshall or the Marshall Court. When the Chief Justice delivers the decision against freedom, he alone bears the full brunt of Finkelman’s obloquy. However, when another Justice gives the opinion—for example, Johnson in *Mason v. Matilda*—blame is diffused from the individual to the institution. In this case, it was the “Marshall Court” that once again “snatched” freedom from slaves (at p. 67-68). The Chief Justice, of course, often wrote or delivered the opinion, leaving a large paper trail. Perhaps we need to be reminded that Marshall was but one of seven Justices who decided the case. There is no doubt that he fully subscribed to the opinions he delivered denying freedom. It should also be acknowledged that those judgments, however severe their effects in keeping claimants in bondage, were reached through deliberation and consensus.

Finkelman creates a false picture of a Chief Justice as an autonomous agent, seemingly free to act arbitrarily and in complete disregard of law and precedent to deny freedom. With characteristic confidence, he assures us that Marshall “might easily have upheld” freedom, “chose to read the statute in favor of slavery,” “might easily have given” a statute a pro-freedom construction, “should have” rejected an argument as a “nonstarter,” “ought to have held” in favor of freedom, “could easily have found an exception to hearsay rules in freedom suits” (at p. 58, 60, 61, 62, 64). In his telling, there are no legal or institutional constraints that might have narrowed judicial discretion. Invariably, he
attributes Marshall’s anti-freedom jurisprudence to free and deliberate choice, reflecting “his concerns with the ownership of private property, his persistent acquisition of slaves, and his hostility to the presence of free blacks in his society” (at p. 63). If Marshall’s opinions so egregiously and maliciously misread the law, why, except for Mima Queen v. Hepburn, did they not provoke outraged dissent? Finkelman appears to believe that the Chief Justice was so dominant or his brethren so craven that he could easily impose his ungenerous and mean-spirited views as the opinion of the Court.

In five cases, the Court upheld freedom.34 “Significantly,” writes Finkelman, Marshall did not write the opinion in any of these cases (at p. 68, 80). As the Chief Justice takes the heat for opinions denying freedom, he gets no credit when the Court decides “correctly.” In a backhanded way, Finkelman does acknowledge that Marshall’s silence in one such case might have signified more than mere acquiescence. “We have no way of knowing whether Marshall agreed with this result,” he says of Justice McLean’s opinion in Menard, “or, having been outvoted on the court, simply acquiesced in the outcome” (at p. 73). Likewise, in Marshall Court decisions that upheld suppression of the African slave trade, the chief justice “remained strangely silent.” In a kind of repetitive mantra, Finkelman lets us know that Marshall did not write any of these opinions, usually prefacing his comment with “significantly” or “however.” The clear implication is that the Chief Justice either opposed the opinion or that his acquiescence was so tepid that he could not bring himself to write for the Court (at p. 85, 87, 90, 102). In the 1827 sequel to The Antelope, Justice Robert Trimble’s opinion for the Court “recognized the humanity of the remaining Africans and of their right to be returned to Africa. Significantly, Chief Justice Marshall did not write this opinion.” (at p. 101-102). Was this because he did not recognize the “humanity” of these Africans?

In three early freedom cases decided between 1806 and 1812, the Supreme Court reversed circuit court judgments for freedom. Two of them turned on the construction of Maryland and Virginia laws for preventing importation of slaves, each containing a proviso for masters intending to move into the respective states. Finkelman harshly condemns the Chief Justice’s rulings that the claiming masters came within the proviso. In the first of these cases, Marshall “might easily have upheld freedom” by adopting the reasoning in other state cases. Only one such case had occurred earlier, however, and none were cited in argument (at p. 56-59). The Chief Justice, joined by the other four Justices present, treated the matter as a straightforward and uncontroversial exercise of statutory construction that was faithful to the “letter” and “spirit” of the law. In the second case, Finkelman baldly accuses Marshall of refusing “to interpret a law to emancipate a slave” (p. 60). The Chief Justice himself admitted that the act’s language was ambiguous, conceding that “the one construction or the other may be admitted.” But he went on to explain why the Court, after “an attentive consideration of that language,” decided as it did. The slave claimant lost his bid for freedom, but this unhappy result came after careful deliberation by the five Justices. All was not lost, however. On a new trial in the circuit court, the slave claimant obtained a verdict in his favor.35

In the third case reversing yet another verdict for freedom, Finkelman blames the outcome on “Marshall’s hostility to free blacks and freedom suits.” (at p. 60). The slaves in this case were children of a mother who had obtained a verdict for freedom based on descent from a free white woman in England. On the trial of the children’s case, the lower court instructed the jury that the verdict for the mother in a case against a different party was “conclusive evidence” on their behalf. In a brief opinion with all seven judges present, Marshall stated for the Court that the verdict
for the mother was not “conclusive evidence” in the children’s case because there was “no privity” between the two different persons against whom the freedom claims were filed. Singling out Marshall for particular opprobrium, Finkelman rebukes him for so readily accepting an argument “completely at odds” with “universally accepted” American law. Because of his obsession with property rights, the Chief Justice “was more concerned about the nature of contract law than about the settled law of every slave jurisdiction in the country or the freedom of a handful of African Americans.” He “abused his power to deny liberty” to persons “considered free under the laws of every state in the union.” (at p. 60-62). One wonders why this seemingly egregious departure from settled law provoked no murmur of dissent from Justices Washington, Johnson, Todd, Duvall, and Story.

Mima Queen v. Hepburn was the Marshall Court’s most well-known freedom suit. That the Court actually affirmed the lower court’s denial of freedom in this case perhaps only slightly mitigates the censure directed at that opinion for disallowing hearsay evidence to prove the ancestry of a slave claimant. Mima (Mina) Queen based her claim on descent from Mary Queen, a mulatto, who was alleged to be a free woman. Marshall for the Court found against this claim on the principle that “hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.” Mostly silent during twenty-five years on the bench, Duvall uttered a brief but pointed dissent that has gained him a measure of acclaim among students of the Court. The Justice had been a witness on behalf of Queen at the trial below in 1810. In his dissent, he appeared to agree with the lower court’s exclusion of “double hearsay” (hearsay of hearsay): “The Court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This Court has decided that hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion I dissent.” It is not clear whether his actual vote was for or against the lower court’s ruling. In any event, Duvall’s objection was to the exclusion of all hearsay evidence, which he contended was contrary to Maryland law and practice. “It will be universally admitted,” he wrote, “that the right to freedom is more important than the right of property,” adding that “people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection.” These words constitute a powerful rebuke to the majority opinion. Many have since wondered why the Court did not adopt Duvall’s position, so accordant with modern sensibilities.

Marshall spoke on behalf of Washington, Johnson, Livingston, and Story. Perhaps knowing what Duvall was about to say, the Chief Justice acknowledged that in deciding the case, the Court had to subordinate individual “feelings” that might be “interested on the part of a person claiming freedom.” If this indicated some discomfort, the opinion otherwise betrayed no hint of doubt that it stated the law correctly and rested on good authority. To Finkelman, Mima Queen was just another illustration of Marshall’s “callous attitude toward black freedom,” which in turn derived from ownership of “hundreds” of enslaved persons. (at p. 62, 65). Kent Newmyer agrees that Mima Queen was “a harsh decision and difficult not to judge harshly.” The case “put Marshall to the test,” he writes, suggesting that he failed the test by expounding the law in a way that so clearly favored the property rights of the master. The failure did not spring from the Chief Justice’s personal animus against freedom, Newmyer says; rather, it lay in choosing “objective law” and reading it in a way that admitted no exceptions in favor of a freedom claim in this case. He is also careful to point out that all but Duvall subscribed to the Chief Justice’s opinion.
Finkelman considers some sixteen Marshall Court opinions pertaining to the slave trade. In several of these, it is difficult to say whether the decision fell clearly on one side or the other of suppressing or not suppressing the trade. Marshall wrote the opinion in six cases, in all of which Finkelman, employing his usual “might have” or “could certainly have,” portrays the Chief Justice as having virtually a free hand to “strike a blow against the African slave trade” (a phrase that appears twice in the same paragraph) but instead “chose to protect slave traders” (at p. 80, 81). Anyone who reads these opinions—including one that was just one unsigned sentence—might have difficulty detecting partiality toward slave traders unless predisposed to see it. Nor is there persuasive evidence of proslavery bias in the Court’s reversals of two decrees forfeiting vessels for illegal trading. The reversals were for imperfectly drawn or flawed libels. The Court remanded them for new trials on amended libels. In one, the Court upheld the forfeiture on the amended libel—in an opinion, Finkelman is quick to remind us, not by Marshall. In the other amended libel, the case did not come up again to the Supreme Court, perhaps indicating that the vessel owners did not contest a forfeiture decree. Finkelman does rightly fault Marshall in these cases for being too rigid and technical, in contrast with his great opinions in constitutional law.

Finkelman devotes his greatest attention to The Antelope (1825), a case that has been closely studied and in which Marshall’s opinion in particular has been subjected to critical scrutiny. Finkelman predictably reproaches Marshall for refusing the opportunity to outlaw the slave trade as contrary to natural law, the law of nations, American piracy laws, and precedents of his own court. Among these precedents was The Josefa Segunda, in which the Supreme Court in 1820 affirmed a decree forfeiting a cargo of slaves claimed by Spanish owners. Finkelman accuses Marshall of gratuitously ignoring a precedent (“not a decision he had written”) that he could have applied against the Spanish claimants in The Antelope (at p. 96). If this precedent was so on point, why was it not cited in argument by counsel for the Africans, particularly by William Wirt, who had won the 1820 case? Indeed, the only citation of this case was by counsel for the claimants.

“That [the slave trade] is contrary to the law of nature will scarcely be denied,” wrote Marshall in The Antelope. Finkelman draws an unfavorable and facile contrast between Marshall’s use of natural law to support property and contractual rights while he “emphatically rejected the legitimacy of using natural law to decide” this case (at p. 52, 97-98). The Chief Justice, particularly in Ogden v. Saunders (1827), did appeal to natural law, but this was in support of an argument that the Constitution embraced a natural-law meaning of the obligation of contract. He decided the case on the “positive” written law of the Constitution. In The Antelope, he could not find any positive law such as an international compact to declare the slave trade illegal. Natural law was not sufficient by itself to interdict that trade.

In The Antelope, Chief Justice Marshall did have “an element of choice,” as Newmyer points out, but he stubbornly resisted the temptation to make a ringing pronouncement that the slave trade was contrary to the law of nations. To do so would be to exceed the bounds of judicial duty and competence as he perceived it. He would not allow moral “feelings” to seduce him “from the path of duty” and would “obey the mandate of the law.” He truly believed, says Newmyer, “that it was possible to separate morals from law.” His deeply felt constraints on judicial discretion to act in this case cannot be dismissed as hypocritical, as if they were merely cover for ingrained proslavery views. “The more tragic truth,” writes Newmyer, “is that he did not have to abandon his legal objectivity to uphold slavery and the slave trade.”
This comment on The Antelope may well stand as the appropriate judgment on the Marshall Court’s slavery jurisprudence. Neither absolving nor condemning, Newmyer holds the “great chief justice” to proper account by assessing his actions within multiple layers of context, by doing the historian’s job of defining the spaces within which his subject could realistically act. His critique, grounded in inquiry that seeks to understand and explain, is far more persuasive than Finkelman’s ex parte indictment. The author of Supreme Injustice ascribes determinative influence to Marshall’s “vast slaveholding,” a fact that apparently made an even greater impression because he was the first to uncover the full extent of the Chief Justice’s slave ownership. This revelation, indeed, looms so large that it appears to have led Finkelman to forsake scholarly caution, to have decided early on that Marshall must have been an “unjust justice” and then to have assembled and laid out the evidence to prove this charge. He allowed the conclusion to drive the presentation and interpretation of the evidence.

Author’s note: Before publication, Professor Finkelman sent me a late draft of his book and invited my comments. I complied with extensive dissenting remarks. He in turn accorded me a friendly, even fulsome, acknowledgment (at p. 265-266).

ENDNOTES

2 Ibid., at p. 193.
3 Ibid., at p. x.
4 John T. Noonan, Jr., The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James


21 Personal Property Tax Records for Henrico County, microfilm reels 171, 172, Library of Virginia; 1810; Census Place: Henrico, Virginia; Roll: 69; Page: 1004; Image: 00260; Family History Library Film: 0181429; 1820 U S Census; Census Place: Henrico, Virginia; Page: 231; NARA Roll: M33_132; Image: 206 1830; Census Place: Henrico, Virginia; Series: M19; Roll: 195; Page: 326; Family History Library Film: 0029674.

22 1810; Census Place: Fauquier, Virginia; Roll: 68; Page: 235; Image: 00435; Family History Library Film: 0181428; 1820 U S Census; Census Place: Fauquier, Virginia; Page: 77; NARA Roll: M33_136; Image: 92; 1830 U S Census; Census Place: Fauquier, Virginia; Series M19; Roll: 194; Page: 473; Family History Library Film: 0029673; 1830 U S Census; Census Place: Fauquier, Virginia; Series M19; Roll: 194; Page: 470; Family History Library Film: 0029673.


28 In a brief aside, he attempts to reinforce the notion of Marshall as a racist by a gross misreading of Marshall’s Indian cases (at p. 5, 108-9, 227 n. 6, 237 n. 47).


36 *Mima Queen v. Hepburn*, 7 Cranch 295.

37 Minutes of the U.S. Circuit Court for the District of Columbia, 1801-1863, June 26, 1810, in *O Say Can You See*.

38 *Mima Queen v. Hepburn*, 7 Cranch 298, 298-299.


42 The Josefa Segunda, 5 Wheat. (18 U.S.) 338 (1820).

43 *The Antelope*, 10 Wheat. (23 U.S.) 100.

44 *The Antelope*, 10 Wheat. (23 U.S.) 120.