

JUDGE JOHN McLEAN'S QUEST FOR THE PRESIDENCY:  
EXPEDIENCY OR DEDICATION TO PRINCIPLE

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YOUNGSTOWN STATE UNIVERSITY

JUDGE JOHN McLEAN'S QUEST FOR THE PRESIDENCY:  
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by  
Thomas E. Carney

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and slavery and his **ABSTRACT** to the American legal tradition. McLean, however, could not set aside his desire for Judge John McLean, who sat on the United States Supreme Court from 1829 to 1861, was driven by his desire to be president. From 1844 to 1856, he sought the nomination of the Whigs, Know Nothings, Free Soilers and Republicans. His movement between these various political parties was controlled by his responses to the questions of his day. Unfortunately, of these responses confused many of the electorate. Although he had withdrawn his name from two previous conventions, soon after Henry Clay's defeat in 1844, McLean's supporters encouraged him to seek the 1848 Whig nomination. This campaign required him to face such issues as the Mexican War, the slavery question and the propriety of a sitting Supreme Court justice seeking the office of the president. McLean also sought the support of parties other than the Whigs. He corresponded with the Know Nothings, and through his agents unsuccessfully worked to unite the Whigs and Know Nothings in his nomination. When both parties rejected him, McLean turned his interest to the Free Soil Party, but the political deals which had given birth to the fledgling party had promised the nomination to Martin Van Buren. In the years following 1848, McLean withdrew from the political arena. During this period, his private correspondence revealed his opposition to political machines

and slavery and his dedication to the American legal tradition. McLean, however, could not set aside his desire for the presidency. In the years after the Whigs' disastrous defeat of 1852, he again turned his eyes toward the presidency. He was contacted by the Know Nothings, but the meteoric rise of their American party was matched by its decline. The criticism which had been levelled against him in the 1848 campaign was resurrected. Some newspapers questioned the propriety of his quest for the presidency while remaining on the bench; others questioned his commitment to the opposition of slavery.

This was a tumultuous time which was reflected in the rise of a new party, the Republicans. In response to a call by leaders of several state parties for a national convention of all persons who opposed the spread of slavery into the territories, the party met for the first time in Philadelphia in 1856 to select its candidate for the presidency. This time, however, it was the ineptitude, or possible treachery, of Judge Rufus P. Spalding, which denied him the nomination.

The path of McLean's search for the presidency was directed by his personal philosophy which included three overwhelming principles: conservatism, dedication to the American legal tradition and his opposition to slavery. These principles operated with unequal force. His conservatism and dedication to the legal tradition molded his opposition to slavery, and the three principles provide the key for

understanding McLean's relationship with the Whigs, the Know Nothings, the Free Soilers and the Republicans. His philosophy, however, was not apparent and as a result confused many voters and led them to oppose him. He might have set aside these principles and possibly been nominated and elected president. Instead Judge John McLean remained true to his philosophy and never became president.

I wish to extend special thanks to Dr. Frederick J. Blue and Professor Hugh Earnhart who spent so many hours reading this thesis and giving me the benefit of their insight and suggestions. Truly, if there is value to this effort, they deserve the credit for it.

I also wish to recognize and thank the staff members of the libraries at the Ohio Historical Society and the Western Reserve Historical Society. This was my first major research endeavor, and the assistance given by these individuals was greatly appreciated.

Finally, the most important note of thanks must be given to the individual who had to endure both me and my thesis on a daily basis! To my wife, Dorothy, I wish to extend my heartfelt thanks for her patience, support and love.

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The successful writing of a thesis is not a task which one completes without the assistance of many supportive friends and colleagues. In this case, I wish to extend my thanks to the entire staff and professors of the History Department at Youngstown State University for the support and direction which they have given so freely to me during my Masters studies. In particular, I wish to extend special thanks to Dr. Frederick J. Blue and Professor Hugh Earnhart who spent so many hours reading this thesis and giving me the benefit of their insight and suggestions. Truly, if there is value to this effort, they deserve the credit for it.

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John McLean stands out as a singular figure in American legal history. He was appointed to the United States Supreme Court by President Andrew Jackson in 1829 and served until his death in 1861, when the Union, which he loved so dearly, collapsed into the Civil War. He was the third individual from west of the Appalachian Mountains appointed to the high court, and he authored one of the two dissenting opinions in the infamous Dred Scott case. But none of these accomplishments accounts for his singularity. It was McLean's open and aggressive political involvement which differentiates him from his peers. No other Supreme Court justice has expended such efforts so often in the pursuit of the office of President of the United States.

This work focuses upon McLean's efforts to win the presidency during the period of 1840-1856. It emphasizes his

movement from the Whig to the Republican party (with brief encounters with the nativists and Free Soilers) during the campaigns and conventions of 1848 and 1856. It will also discuss McLean's response to the issues of the day, such as immigration and slavery. These responses, which were often misunderstood, became obstacles to his goal.

## INTRODUCTION

John McLean stands out as a singular figure in American legal history. He was appointed to the United States Supreme Court by President Andrew Jackson in 1829 and served until his death in 1861, when the Union, which he loved so dearly, collapsed into the Civil War. He was the third individual from west of the Appalachian Mountains appointed to the high court, and he authored one of the two dissenting opinions in the infamous *Dred Scott* case. But none of these accomplishments accounts for his singularity. It was McLean's open and aggressive political involvement which differentiates him from his peers. No other Supreme Court justice has expended such efforts so often in the pursuit of the office of president of the United States.

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CHAPTER 1  
THE ORIGINS OF POLITICAL AMBITION  
John McLean was born in Morris County, New Jersey, in 1785, the first child of Fergus and Sophia McLean. In 1789 the family began an eight-year journey through Virginia and Kentucky before arriving in southwestern Ohio. The family settled for varying periods in the areas of Morgantown, [West] Virginia; Lexington, Kentucky, and Maystock County, Kentucky. During this time of migration to the West the McLean family grew to include three sons, John, Nathaniel, and William, and one daughter, Mary. McLean received no formal education before his family's arrival in Ohio, where he first received his elementary education at a neighborhood school in Warren County. Thereafter, in order to get the necessary funds to continue his education, in addition to his own chores on the family farm, he worked for his neighbors to clear their land. He used the proceeds from these jobs to pay for two more years of private tutoring, first with Reverend Matthew Wallace in

Cincinnati and later in Kentucky with Robert Stubbs. At nineteen he was apprenticed to John Stites Gross, Clerk of Courts of Hamilton County, and, while maintaining this apprenticeship, continued his education by reading law at the offices of Arthur St. Clair, Jr., son of Governor Arthur St. Clair and the first Attorney General of the Northwest Territory. Some three years however, McLean left both of these positions and began publication of the Western Star in

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At this time, the members of the Ohio Supreme Court were selected by the Legislature, and in 1816 McLean was the near unanimous choice. The state supreme court in this early period of its history had both appellate and original jurisdiction. The bench was composed of four judges who alternated riding in tandem to visit each county in the state

annually. Such traveling, however, caused several problems: it negatively affected on the health of the judges, and it caused the continuance of many cases until two judges could combine to rule. Little is known of the actual work of the state supreme court during its early history because no official record was maintained. We do know, however, that McLean was responsible for the acceptance of English common law principles into Ohio law.<sup>3</sup>

But McLean's political involvement did not end with his appointment to the Ohio Supreme Court. He was a candidate for United States senator from Ohio in 1822 but was defeated by the very popular Governor Ethan Brown on the ninth ballot in the legislature. Later, in 1822, McLean left the state supreme court bench to accept an appointment as commissioner of the federal Public Land Office in Washington, D.C. This move was prompted by McLean's growing family and his need to provide for them. The appointment was the result of the combined influence of John C. Calhoun and President James Monroe. McLean was a supporter of Calhoun, and Calhoun, in turn, exercised his influence to reward his supporters. A great deal of influence was not necessary since Monroe remembered the efforts which McLean had made on his behalf in 1816.

In fact, Monroe again remembered McLean less than a year later when he appointed him postmaster general. McLean's tenure as postmaster general established his reputation as an

effective administrator. He completely reorganized the Post Office, streamlined its operations, reduced costs, and expanded service while serving in both the Monroe and Adams administrations. Even President John Quincy Adams, who suspected McLean's allegiance and was not fond of him, stated that he was probably "the most efficient officer" who ever served as postmaster general.<sup>4</sup>

This efficiency maintained him in this position through the Adams administration despite the numerous calls for his removal. These became particularly intense as the Adams administration came to an end, and many questioned his loyalty to the President. Although McLean denied any activities which were disloyal to Adams or supportive of Jackson, observers from both camps claimed that such conduct occurred.<sup>5</sup> Of course, the strongest evidence in support of the allegations that McLean did support Jackson is that McLean was Jackson's first appointment to the United States Supreme Court.

Despite his ascension to the Supreme Court the period of 1829 to 1861 marks the high point in Justice McLean's political activities. During this period McLean became the perennial presidential candidate. His name was mentioned at more than five different nominating conventions, and on at least two occasions he withdrew his name from consideration.

By the mid-1830s Justice John McLean had lost his mentors. President Monroe had died in 1831. Political ambition separated him from both Calhoun and Jackson. As late

as Christmas 1829 McLean's earliest mentor, Calhoun, had written to a friend to dispel the rumor of a rift between McLean and himself. Calhoun assured his correspondent that "the report as to Judge McLean is entirely false. Our friendship has never been interrupted, and he is warm in his expression in my favor."<sup>6</sup> However, the political ambitions of both men put them on a collision path. In early 1831, reacting to the mention of McLean's name in the presidential race, Calhoun, writing to Samuel Ingham, described the presidential race as being between McLean and himself.<sup>7</sup> Thereafter Calhoun took every opportunity to attack McLean's suitability for the presidency and deny any possibility of his election.<sup>8</sup> *the Whig party was later questioned by many critics*

*who* In 1831 McLean was mentioned for the presidency for the first time at the Anti-Masonic Convention in Baltimore, Maryland. As early as 1833, several Ohio newspapers again began to press for McLean.<sup>9</sup> If there was a relationship between McLean and Jackson, it was not long-lived. As mentioned above, McLean's name was quite prominent among the possible candidates to oppose Jackson in 1832, and Jackson's supporter's kept the president well-informed of the work of McLean's supporters.<sup>10</sup> It was at this point that McLean abandoned any connection with Jackson and the Democrats and joined the anti-Jacksonists, the Whigs.

In these early years, McLean was supported by such young (and later, prominent) politicians as Thomas Hart Benton and

Joshua Giddings,<sup>11</sup> and by 1835 a group of Ohio Whigs, including Salmon P. Chase, Elisha Whittlesey, Thomas Corwin, and Lewis D. Campbell, formed a state correspondence committee to advance McLean's presidential aspirations.<sup>12</sup> Ultimately McLean withdrew from this campaign and did so again at the Whig convention in Baltimore in 1844, when Reverdy Johnson of Maryland, who later represented that state in the United States Senate, read a letter to the delegates from Judge McLean withdrawing his name from consideration.<sup>13</sup>

The 1830s saw the rise of the second major political party system in America. This upheaval necessarily involved the movement of voters from one party to another. McLean's move into the Whig party was later questioned by many critics who characterized it as politically opportunistic. This criticism was spawned by the fact that President Jackson appointed him to the Supreme Court. The truth was that, as a conservative, McLean was more comfortable with the Whigs than the Democrats. Few, however, understood McLean's philosophy, and therefore, this criticism and confusion over his politics would continue into the 1840s.

This reversal was most likely the result of the fact that McLean's name was mentioned by people from various groups and from Clay's own paragon. But Clay's fears never materialized as he was selected the Whig presidential nominee by acclamation. Being nominated, however, had not really been Clay's problem, for he had previously been nominated in 1824 and 1832 and each time had

lost the election. It would be no different in 1844. Such a dismal record could bear no other fruit: Clay would never again be selected to represent the Whig party in the quest for the presidency. Nevertheless, in the years immediately after the election of 1844 some attempt was made to rejuvenate Clay. Horace Greeley wrote to him that Chapter 2 masses, who act from the heart rather than the head, they won't hear of any other candidate than the old one [Clay], at least until he

In the advent of the 1844 Whig presidential nomination Henry Clay feared a repeat of the 1840 convention when he had been by-passed in favor of William Henry Harrison. He believed that the attempt would again be engineered by the "Intriguers of 1839": Thurlow Weed, William H. Seward, Daniel Webster, and Frances Granger.<sup>1</sup> This time Clay thought that the object of the Intriguers' interest was Justice John McLean. By the fall of 1843, however, Clay had reversed himself and considered McLean to be in "open and unreserved" support of his candidacy,<sup>2</sup> only to revert back to his original suspicions less than a month later.<sup>3</sup> This reversal was most likely the result of the fact that McLean's name was mentioned by people from various groups and from Clay's own paranoia. But Clay's fears never materialized as he was selected the Whig presidential nominee by acclamation. Being nominated, however, had not really been Clay's problem, for he had previously been nominated in 1824 and 1832 and each time had



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Nevertheless, in the years immediately after the election of 1844 some attempt was made to rejuvenate Clay. Horace Greeley wrote to him that "the great masses, who act from the heart rather than the head, protest that they won't hear of any other candidate than the old one [Clay], at least until he publicly and peremptorily refuse to run."<sup>4</sup> Later he wrote to the aged Whig leader that ". . . should you determine not to consent to be the candidate, we shall have one grand fight and probably fall to pieces."<sup>5</sup> all as lost & retire from the field

The information, however, which came to Judge McLean clearly indicated to him that Clay's decline was sure and imminent. Even before the election of 1844 one writer had confided to McLean that "Mr. Clay is out of the question, and his friends should be told so."<sup>6</sup> Another close confidant reluctantly advised McLean not to run for the vice-presidency on Clay's ticket, warning him: "If Mr. Clay is defeated the West will suffer enough without your company."<sup>7</sup> This dismal forecast was reiterated by a New England writer who pointedly told McLean "[T]he feeling is very strong that you had better not have your name identified with his [Clay's]."<sup>8</sup> Such information certainly affected McLean, for he would no longer consider Clay a major force in the race for the Whig

nomination. Early in the campaign of 1848, McLean wrote to John Teesdale, one-time editor of the *Ohio State Journal* and a long-time supporter of the Judge, that although he had previously supported Clay, he believed that "[I]t would be extraordinary if Mr. Clay's friends should again bring him before the country."<sup>9</sup> McLean would often repeat this position during this campaign, and on this point, at least, he was correct. The *New York Telegraph* wrote that "...when they

Clay's decline heralded the rise of Judge McLean. Immediately following Clay's disappointing canvass in 1844, a disgusted Calvary Morris, the former congressman from Athens County, Ohio, wrote to McLean: "Now my dear Sir, what is to be done? Shall we give up all as lost & retire from the field in disgust or shall we make an effort to put down the 'dictators' & take command of our own forces?"<sup>10</sup> Morris was truly disgusted, but he was also eager to see what thoughts his friend had concerning the next presidential election, and Morris was not alone. Two weeks later another supporter wrote to McLean in a much more direct fashion than Morris had: "I hope the Whig party will make a selection of a candidate in whom the country can confide & in whom they can unite when they come to the next contest - The public mind are now looking & must I think settle on you."<sup>11</sup> Among these members of

The letters of support and encouragement continued into 1846 and indicated a broadening support for McLean. In late January 1846, Morris wrote again to McLean: "I believe you

can carry in addition to the Whig strength a number of the moderate part of the Democratic party. I have heard a number say that in the event of you being a candidate they will support you in preference to any other man."<sup>12</sup> Another supporter wrote that the Indiana Whigs would nominate him for the presidency at their convention in January 1846.<sup>13</sup>

McLean's growing support was now being publicly expressed. The *New York Telegraph* wrote that ". . . when they [Whigs] come to their senses, and really begin to exhibit any unity of purpose, or dexterity of management, they will cast a broad and brilliant figure on the curtain, at which the public will pleasurably gaze. It will be that of John McLean, of Ohio."<sup>14</sup> In Henderson County, Tennessee, the county Whig organization unanimously nominated McLean for the presidency, "[B]elieving, also, that his chance of success would be the best."<sup>15</sup>

The letters of support and encouragement from friends--primarily Whigs--who had long supported his desire for the presidency continued throughout this campaign and afterwards. Morris identified McLean's supporters as including not only Whigs but also the moderate members of the Democratic party.<sup>16</sup> What did McLean represent that evoked this expression of support? The common thread running among these members of opposing parties who supported McLean was that they were of like disposition. They were conservative and eager for a return to that earlier period, "the Era of Good Feelings." As

Morris said, they were "tired of the great excitement that has existed for years past."<sup>17</sup> McLean's dislike for the antagonism between the parties was the reflection of these conservative sentiments.

Discontent, however, had earlier taken some people in another direction. The 1840s saw another outbreak of political efforts by nativists. These were native-born Protestant Americans who believed that the waves of foreigners who were coming into the United States in the early 1840s brought with them disorder and political corruption. These foreigners were drawn to the Democratic party and often voted in blocks for Democratic candidates. This further served to infuriate the nativists who saw the Democratic party as catering to the foreigners in exchange for their votes. The nativists in New York responded by forming the American party in 1843. Then in 1844 they entered into an arrangement with the Whigs whereby the nativists would support Clay for president, while the Whigs would support the nativist candidates in the local races. Although this arrangement failed to provide any effective benefit for Clay, the entire local nativist ticket in New York was elected, and three of four nativist candidates for Congress were elected in Philadelphia.<sup>18</sup>

It is not surprising that the nativists, inflated by their success, would consider Judge McLean. Just as 1845 began, McLean received his first contact from the nativists.

A nativist, F. C. Messinger, describing himself as "a fellow citizen who feels deeply the importance of a radical change in the Naturalization Laws of this country," asked the rhetorical question: "[W]ho is the man upon whom we can all unite without rousing the old partisan feelings and prejudices which all, more or less, entertain in regard to almost every public man?"<sup>19</sup> He obviously believed that McLean was the answer, but before making his final decision he sought to get McLean's opinions on these subjects. Soon after this letter McLean received a similar letter from another nativist, Jesse Mann of Charleston Massachusetts, who identified himself as one who desired "to do all that in my power lies to rescue my country from the grasp of foreign Ecclesiastical Politicians and demagogues of whatever growth or party."<sup>20</sup> Like Messinger, Mann also believed that McLean was the candidate for the American Republican party, if McLean could assent to the doctrines of the party, which included the extension of the residency period for naturalization from five to twenty-five years, granting the United States courts sole authority to naturalize citizens, and denying the states the right to enfranchise any alien until he was naturalized.

McLean began his response by agreeing with the nativist concerns, but he quickly turned to his own concerns:

The doctrine, that to the victor belongs the spoils had then only been named to be detested. But now it is the political lever of party action. This is the foundation of the evils that you enumerate. It leads to fraud and

perjuries under the naturalization laws, and the to the shameless frauds on the ballot public but box. It has converted the electioneering arena into a bean garden where prize McLean's fighters exhibit themselves.<sup>21</sup>

This antagonism toward the spoils system is not something which McLean developed just for this letter. In fact, his distaste for the spoils system was well known as early as the late 1820s when he served as the postmaster general in the Adams' administration.<sup>22</sup> But this concern for the spoils system was only symptomatic of the real disease: the party system itself! McLean's development as a national politician occurred during the "Era of Good Feelings" in the administration of James Monroe, who remained a close personal friend of McLean until his death in 1831. During this period the two party system had vanished, and the experience confirmed in the minds of Monroe, McLean, and many others that political parties were not only unnecessary but were also corruptive of the American system of government. McLean carried this view with him as he ascended the bench, and he often expressed it at different times such as in his correspondence with the nativists.

The value of a relationship with the nativists, however, was seriously questioned by some of McLean's supporters. Samuel Whitcomb, Jr. wrote to the Judge fearing such an attachment. He had heard that McLean's "name would probably be presented by the 'Native' party at some convention." Whitcomb very directly warned McLean "that this, if not

prevented, might do injury."<sup>23</sup> This warning would end the public but not the private contacts between the nativists and McLean's supporters.

Sometime in early 1847 McLean met with several of his supporters in regards to the nativists. At this meeting General Henry A.S. Dearhorne, who had represented Roxbury, Massachusetts, in Congress from 1831 to 1832, suggested that efforts be made to convince the nativists to delay their convention scheduled for May 1847 until sometime in the spring of 1848. The purpose of this strategy was to gain the support of the nativists and use the combined nominations of the nativists and Whigs to catapult McLean into the White House. In addition, if the nativists should have nominated McLean in 1847, the mixture of politics and judicial power would have been so distasteful to the public that McLean would have had no choice but to resign from the Supreme Court.<sup>24</sup>

Before anyone could determine how to implement this strategy, Elisha Whittlesey, a long time friend and supporter of McLean who at that time served as the Comptroller of the Currency, received a letter from Jesse Mann, who was then a delegate to the American party's Pittsburgh convention. He asked Whittlesey to give him his views as to the convention and the candidacy of John McLean.<sup>25</sup> Whittlesey promptly responded, "[I]n the fitness of Judge McLean for the Presidency, I have the fullest confidence." He then repeated the argument that the early nomination of McLean would force

his premature departure from the bench; whereas, a delay in any nomination by the American party until 1848 and a united nomination by the Americans and the Whigs would guarantee McLean's election.<sup>26</sup> The failure to accomplish this goal of a combined nomination, however, was not the fault of McLean's supporters. The success of the American party in 1844 was followed by a period of decline. This was illustrated by the fact that a mere twenty delegates appeared at the Pittsburgh convention in May 1847.<sup>27</sup>

Some writers have indicated that McLean was the earliest entry in the race for the Whig nomination in 1848.<sup>28</sup> Such a perspective, however, is a clear example of placing short periods of time under the microscope. For McLean, as well as Clay, in the long view, it was not a matter of entering a particular presidential race; it was the continuation of an ongoing effort.

The first new face in the Whig race was General Winfield Scott. As early as June 1845, Whittlesey advised McLean of Scott's presence and warned him to avoid any attack upon Scott.<sup>29</sup> But McLean did not take Scott's candidacy seriously, at least at the onset. He explained that Scott's candidacy was launched when someone at a dinner party that Scott was attending, jokingly suggested that he run for president. Unfortunately, according to McLean, Scott and his friends took this bad joke seriously.<sup>30</sup>

Besides the appearance of an opponent, issues also began



to arise which McLean would have to address not only in this campaign but also time and time again in future campaigns. An early supporter of McLean posed two questions which demanded McLean's "mature reflection":

1st. And of importance to yourself, can you resign the judgeship, in view of probable defeat, in justice to yourself and your family? And if not then

2nd. To what extent will it injure you as a candidate for the Presidency to hold onto the office of judge?<sup>31</sup>

This was a fundamental question: was it proper for a sitting justice of the Supreme Court to seek the presidency while remaining on the bench? In this instance, the questioner was his supporter, but in the years to come this question would come from his critics.

Another criticism which arose out of McLean's judgeship and would follow him through his various campaigns was that of Jacksonianism. In 1846 many still believed that McLean had won his position on the bench by supporting Jackson in his campaign of 1828. McLean, in a letter to John Teesdale, with whom he corresponded on a regular basis, offered his explanation. He denied ever voting for Jackson or ever influencing any one else to cast a ballot for Jackson. In fact, he said he had done nothing to advance Jackson's candidacy. Nevertheless, he was offered a place in the administration, but it soon became evident that he would not work out. Then he was offered the seat on the Supreme Court. But despite taking this seat, McLean remained a critic of the

Jackson administration. He observed that he knew the original charge of Jacksonism was made for the purpose of forcing his removal from the Adams administration, but because of his pride he had refused to respond. He ended his letter, "So much for my Jacksonism."<sup>32</sup>

On the issues, however, McLean proved to be a true Whig. Again writing to Teesdale, he clearly adopted the basic tenets of Clay's American system: He supported a national bank; he believed in "a tariff to meet the economic expenditures so graduated, as to encourage our own industry", and he favored the distribution of the proceeds from the sale of public lands to the states to finance internal improvements.<sup>33</sup>

Although it was the old Whig warhorse, John McLean, who occupied the presidential field in 1845 and 1846, the following year saw the rise of new issues which, in turn, promoted the rise of new candidates. Ohioan Thomas Corwin was elected to the House of Representatives in the 1820s and had been an early supporter of McLean. In late 1845 McLean learned that Corwin might also be a candidate for the presidency, but he was further advised that Corwin's chances for success were, at best, quite meager.<sup>34</sup>

As the months passed, however, it became more and more apparent to McLean that Corwin was a candidate. Nevertheless McLean continued to doubt his chances. In fact, McLean explained Corwin to his supporters by saying that Corwin was in the race "for the benefit of some one else."<sup>35</sup> But

McLean's analysis of Corwin was faulty. Some of his correspondents had informed him of a possible effort in the Ohio legislature on behalf of Corwin. McLean scoffed at this: "No one here [Washington] supposes that Corwin can be a candidate."<sup>36</sup> During December 1846 and January 1847 McLean continued to mock Corwin's candidacy, claiming that Corwin had no support in Congress and his efforts were nothing more than a stalking horse for someone else.<sup>37</sup> There can be no doubt that McLean resented Corwin's candidacy; such a reaction was predictable. Corwin's presence divided the allegiance of the people and politicians of Ohio. This was the base group which McLean needed to solidify, if his candidacy was to be successful. "[L]et the press and the people declare against

The error of McLean's analysis soon became evident. On 11 February 1847 Thomas Corwin delivered his historic three hour attack upon the three million dollar appropriation bill for the Mexican War. His opposition to this war gained for him the support of many young Whigs, such as Charles Sumner and Joshua Giddings, who mistakenly believed that Corwin was a staunch opponent to slavery.<sup>38</sup> In Ohio Corwin's speech generated widespread enthusiasm for his candidacy. A meeting of the Geauga County Whigs in April endorsed Corwin for the presidency, and a few weeks later the *Ashtabula Sentinel* added its voice to the growing support for Corwin.<sup>39</sup>

Obviously irritated by the overwhelming positive response of the press to Corwin and some members of Congress, McLean

responded in a rather immature manner that the speech "is really surpassed by more than half of the speeches delivered in either house."<sup>40</sup> Although McLean tried to downplay the importance of the Mexican War to his close friends and supporters, he penned, without byline, an editorial that appeared in the *Cincinnati Gazette* on 26 March 1847. In this editorial he soundly attacked the war as the result of an "act of the President" and characterized it as unnecessary and political. He told his Whig readers that although they might oppose the war, to summarily cut off supplies to the troops fighting in Mexico was to abandon those brave men who had taken up arms in defense of their nation. To end this war, McLean said, "[L]et the press and the people declare against the acquisition of territory from the enemy. This will bring us peace, in a very short time."<sup>41</sup> While this was certainly a clear statement of Judge McLean's opposition to the war, it was, nevertheless, a futile action because it was published as an editorial. Because of his anonymity, McLean not only denied himself the support of those many Whigs who opposed the war but also left himself open to the subsequent criticism which he received for not opposing the war. he "ispulse" for

Even before McLean's editorial was printed the fortunes of war had catapulted another candidate into the public eye. On 23 February 1847 General Zachary Taylor, leading an American force of 5,000 men, met the Mexican Army of 14,000 led by General Antonio Lopez de Santa Anna at a place called

Buena Vista. Despite the numerical superiority of the Mexicans, they were no match for the American artillery. Taylor's forces were victorious, and he became a national hero. Several weeks passed before the news of the victory made its way back to Washington, but when it did arrive it opened a floodgate of support for the candidacy of General Taylor for president. Numerous newspapers and political meetings in both the North and the South endorsed Taylor for president.<sup>42</sup>

McLean looked upon the Taylor movement with great suspicion, but his analysis of the source of Taylor's support varied at times. On an early occasion, he saw it as a conspiracy: "The effort to bring out Gen. Taylor has been a combined one, extending to several gentlemen, whose names were mentioned for the presidency but who, despairing of success, were determined as the next best step for themselves, to elevate a man, who would look to them for counsel and direction."<sup>43</sup> Several weeks later, however, writing to his close friend and supporter, Elisha Whittlesey, McLean said that the supporters of Clay, who were upset with him for displacing their venerable leader, were the "impulse" for Taylor's candidacy.<sup>44</sup>

Part of McLean's opposition to Taylor was a reflection of a fear shared with many Americans of that period - especially the conservative Whigs, who feared the intrusion of military power into their civilian government. McLean and others felt

that to elect Taylor president might "at the next election, encourage the army, on some pretext, to make a president."<sup>45</sup>

As summer came, McLean became more satisfied with this opinion: "In my late tour through Indiana, Illinois and Michigan, . . . I did not find a Whig that was not opposed in principle to the military movement."<sup>46</sup> This viewpoint certainly contributed to his impression that by the summer of 1847 Taylor's "Buena Vista movement" was quietly subsiding.<sup>47</sup>

The Mexican War had not only given rise to new opposition for McLean in the race for the presidency; it also brought forth a new issue with which his old enemies could attack him. On 30 November 1847 Henry Clay delivered his speech in Lexington on his Mexican War Resolutions. In this speech Clay vehemently attacked President James Polk and the war. He ended his speech with eight resolutions, two of which called for Congress to disavow both any intention to annex additional Mexican territory and any intention to utilize any such annexation for the purpose of expanding slavery into these areas.<sup>48</sup> Most people saw that Clay was motivated by politics in taking this position. But how one felt about this speech was really a reflection of how one felt about Clay himself, and although most Whigs liked the speech, it did little to advance Clay's presidential aspirations. William Miner, writing to McLean from Columbus, best summarized the effect of the speech: "I believe Mr. Clay's late effort, although very well received by the Whigs, has not had the effect of

of the previous fall.

strengthening him for the Presidency."<sup>49</sup> Even such a great oratorical event as this in his twilight years could not dislodge from the Whig mind the long history of Clay's defeats.

One must wonder then what was in McLean's mind as the election year of 1848 dawned. For a mere twenty months before he had been the clear Whig choice for president, but now he had been quite unceremoniously pushed from that spotlight by the likes of Thomas Corwin and Zachary Taylor. What was he to do? Judge Wright wrote to him of another problem: "But there are many men, younger than this, that really know little of you. Your position is not one calculated to place you much before the public and the present generation of young and [?] spirits, have come upon the stage since you took your seat on the bench."<sup>50</sup> Wright encouraged McLean to "write a letter to some friends here [Columbus] giving your views upon the war, slavery, and internal improvements" that could be used to inform the voters of McLean's position on these issues.<sup>51</sup> McLean responded quickly. He immediately penned a letter to the *Cincinnati Gazette* under his own name in which he forceably put forth his opinion of the Mexican War. He said that it was "unnecessarily and unconstitutionally commenced" by an act of aggression by the United States! He outlined a procedure by which Congress could act to end the war, one which sounded surprisingly similar to Clay's eight resolutions of the previous fall.

The focus, however, for the Whigs of Ohio in the early winter of 1848 was on the Whig state convention that was scheduled to convene on 19 January 1848 in Columbus. McLean, fearful of being defeated at the convention, wrote to his friend and political confidant, John Teesdale, that he did not want his name to be placed in nomination at the convention.<sup>52</sup> But he also lamented the lost opportunity: "Ohio might have controlled the election of chief magistrate had she been united, but the time has passed, and she has only to follow other states instead of being at their head as she might have been."<sup>53</sup> Judge John Wright, a long-time supporter and friend of

McLean. Others looked forward to the Ohio Whig convention with great anticipation. The supporters of General Taylor hoped that the respective supporters of Judge McLean and Thomas Corwin would battle each other to a stalemate and thereby leave the door open for the nomination of Taylor.<sup>54</sup> But the expected bloodshed never occurred. Although Teesdale and the delegates supporting Judge McLean were careful to observe the Judge's wishes and did not place his name in nomination, they solidly opposed any nomination whatsoever. But they nearly failed. During the evening of 19 January 1848 Lewis D. Campbell and Ohio Governor William Bebb, the leaders of the Corwin supporters, drafted resolutions which called for convening a second convention in April for the purpose of nominating a candidate for the presidency. Campbell presented these resolutions in a speech to the full convention in which



he complained that the convention had disappointed the Whig party by failing to nominate Corwin. The delegates, however, responded with boos and hisses and adjourned.<sup>55</sup> McLean was quite pleased with the actions of his friends and supporters and told them that he would "never cease to feel grateful to them."<sup>56</sup> Many other Whigs were also guilty of this type of

Jack. But McLean's satisfaction with the campaign must have soon evaporated as in February 1848 a recurring theme developed in the attacks on McLean. The Cincinnati Gazette ran an editorial entitled "The Presidency - John McLean." The editor, Judge John Wright, a long-time supporter and friend of McLean, sought to correct misrepresentations of McLean's politics, most notably the charge of Jacksonism: "it is intimated that he [McLean] used the influence of the Post Office to promote the election of General Jackson, and to further the views of the South. Is it true? Far from it. . . ."<sup>57</sup> Wright argued that McLean's commitment to the Whig standard was clearly evidenced by the attacks on him by the Jackson administration and by his support of Clay in 1844.

The Ohio State Journal immediately responded to the Gazette. It agreed with the Gazette that McLean did not use his patronage powers at the Post Office, but this did not clear McLean of the charge of Jacksonism. The Journal continued: "We are, however, of the number of those who supposed that Judge McLean regarded with entire complacency the election of Gen. Jackson, if indeed he did not contribute

his influence to bring about that catastrophe."<sup>58</sup> With this, the charge of Jacksonism rose to a new level: even if McLean had not used his political influence to further Jackson's election, he was guilty of Jacksonism because he failed actively to oppose Jackson's election. But if this is true, how many other Whigs were also guilty of this type of Jacksonism?

Nevertheless, the Cincinnati Gazette continued its work of advancing the nomination of Judge McLean. In a subsequent editorial, Wright again stressed McLean's Whigism. "In politics he is a reliable Whig in principle and in practice," wrote Wright. "He is in favor of a Tariff. . . . In regard to the constitutional power and policy of the General Government, to establish harbors on the lakes, and remove obstructions from our rivers, &c., he never entertained a doubt. . . . In relation to the war, the extension of slavery, and all other questions of governmental policy, his sentiments are Whig sentiments."<sup>59</sup> This identification of McLean with traditional Whig positions was certainly important, but in his conclusion Wright pressed his most important point: McLean was an Ohioan, a northerner!<sup>60</sup>

Despite the apparent victory of McLean's supporters at the Ohio state convention and Wright's editorial efforts, McLean had little influence among his fellow Ohioans. During the early months of 1848 many counties in Ohio held their Whig conventions. Of these, ten declared for Corwin, six for Clay,

and two for Scott.<sup>61</sup> This was a very unsettled time. Clay was nominated at the New York state Whig convention by a single vote, but this result failed to dampen the enthusiasm of Taylor's supporters. On the other hand, Scott, whose impetus had soared earlier, now soured with the establishment of a Mexican War Board of Inquiry which implied some misdeed on Scott's behalf.<sup>62</sup> McLean sensed this unsettled time. But more importantly, McLean sensed his own weakness: "No one can be more sensible than I am of my want of popularity, and that no enthusiasm is excited, anywhere at the mention of my name."<sup>63</sup> But his supporters continued to provide positive reports. Colonel Noah Haynes Swayne, who would succeed McLean on the Supreme Court bench in 1861, sent him the most surprising news a month before the National Whig Convention: his rival, Thomas Corwin, had returned to Ohio "to publish a card--declining himself to be considered a candidate and to rally his friends for you."<sup>64</sup> Others also reported that efforts were being made to convince Corwin to support McLean, but, in the end, McLean was convinced that Corwin supported the candidacy of General Scott.<sup>65</sup> All these efforts could not change the tide. In early May 1848 Whittlesey wrote to McLean that the supporters of General Taylor were better organized than the supporters of any other potential candidate and believed that their candidate would be nominated as the Whig presidential

candidate.<sup>66</sup> Such statements were prophetic; by the end of May Taylor had garnered more than the necessary delegates to claim the nomination.

The Whig delegates made their way to Philadelphia for the opening of the convention on 7 June 1848. On the second day of the convention, Thomas Galloway of Columbus, Ohio, placed Judge McLean's name in nomination for the presidency and then, just as quickly, withdrew it, for Galloway, in consultation with several other McLean supporters, had calculated that the Judge could secure a meager seventeen votes.<sup>67</sup> John Davenport of Ohio and J. W. Grimes of Iowa, however, refused to give up the ghost and cast the only two votes on behalf of McLean's nomination.<sup>68</sup> Taylor, on the other hand, increased his vote count from 114 on the first ballot to 171 on the fourth ballot and claimed the Whig nomination.<sup>69</sup>

The nomination of General Taylor, however, rather than unifying the Whig party was a cause of dissension. The reason for this dissent was the fact that Taylor was a slaverholder and unacceptable to the antislavery element of the party. The slavery question had been a dilemma in the history of the United States since its very beginning. In the 1840s, the divisiveness of this problem was reflected in practical politics with the establishment of the Liberty party. The Liberty party supporters broke with the followers of William Lloyd Garrison in 1840 as they determined to utilize political

action to further their belief in abolitionism. In the 1840 and 1844 presidential elections the party had nominated James G. Birney, who by the 1844 election drew in excess of 62,000 votes. By 1847, however, the party itself had fragmented. One faction was led by Salmon P. Chase who emphasized the practical approach, adopting an anti-extension philosophy which was also a methodology for the fusion which he sought between the Liberty party and anti-extensionist Whigs and Democrats.<sup>70</sup> Immediately after the Whig convention of 1848,

Ohio Another prominent anti-slavery faction in the Whig party was the Conscience Whigs of Massachusetts. These young Whigs adopted the name "conscience" to differentiate themselves from the "cotton" Whigs, whose interests, especially their economic interests, were tied to the Southern agrarian economy and providing cotton for the New England textile industry. At the 1847 Whig state convention the Conscience Whigs proposed that "the Whigs of Massachusetts will support no men as candidates for the Offices of President and Vice President, but those who are known by their acts or declared opinions to be opposed to the extension of slavery."<sup>71</sup> But the convention rejected this resolution. ward to a convention in Buffalo where they would

meet The scene for the fusion of the Chase Liberty supporters and the Conscience Whigs, who included Charles Sumner and Charles F. Adams, was now set--and McLean would unknowingly be part of it! Early in 1848 Sumner wrote to Chase that "if John McLean could be induced to take any practical ground against

the extension of slavery he would be a popular candidate." <sup>72</sup> Chase quickly responded, hoping to bolster Sumner's interest in McLean. He explained that McLean believed that the effect sought by the Wilmot Proviso was already present in the Constitution. He argued as strongly as possible that McLean was "the most reliable man, on the slavery question, now prominent in either party."<sup>73</sup> He told McLean that the Southern

wing The viability of a third-party challenge became real in the period immediately after the Whig convention of 1848. Ohioans gathered in Columbus on 20 June 1848 to repudiate the Whig and Democrat nominations and to organize a "People's Independent party." Whig dissidents in Massachusetts came together in Worcester to support "the formation of a new party composed of friends of Free Soil in all parties."<sup>74</sup> The Barnburners of New York and their friends from Wisconsin, Ohio, Connecticut, and Massachusetts met in Utica, New York, in opposition to the Democratic convention at Baltimore. They nominated Martin Van Buren for president and announced their opposition to the extension of slavery into the free territories.<sup>75</sup> By early July all these dissidents were looking forward to a convention in Buffalo where they would meet to choose the "Free Soil" candidate for the presidency. And there was no shortage of candidates: Martin Van Buren, John P. Hale, Joshua Giddings, and, of course, John McLean.

The possibility of a nomination by the Free Soil party posed a very difficult dilemma for Judge McLean. On the one

hand, such a nomination offered McLean what he had desired for so long: a chance, albeit remote, at the presidency! McLean, however, was by nature conservative and had long been quite comfortable in the ranks of the Whig party. The old Whigs who had previously supported him wrote to encourage him to hold fast to the true party, the Whigs. One writer from New York used a two-pronged argument. He told McLean that the Southern wing of the party would never support Corwin, Seward, or Webster; therefore, by default, McLean would be the choice in 1852. Besides, the *New Yorker* wrote, both New York and Pennsylvania would support the "Hero of Buena Vista."<sup>76</sup> McLean's old friend, Elisha Whittlesey, wrote to him to express not only his own concern but also the concern of McLean's longtime supporter, Caleb B. Smith. He attempted to reassure McLean that he would be the Whig nominee in 1852.<sup>77</sup> A Pennsylvania man took another path. He told McLean that if he would support General Taylor, then Taylor would surely carry the Keystone state.<sup>78</sup>

The proponents of the Free Soil movement lost no time in urging McLean to accept their nomination. The Free Soil support for McLean was the result of his opposition to the extension of slavery into the territories. Whereas David Wilmot, the Democratic representative from Pennsylvania, unsuccessfully sought to limit the spread of slavery by congressional action, McLean found such legislation unnecessary. The existence of slavery required a positive act

of the legislature. The Constitution, however, did not grant Congress the authority to establish slavery, and by logical extension the territorial governments could not establish slavery because they must rely on the powers of Congress. Therefore, McLean proclaimed there could be no slavery in the territories.

A writer from the Western Reserve begged McLean to "permit us to present your name to the Buffalo Convention as a candidate for President."<sup>79</sup> But the true strength of McLean's following is reflected in the petitions that he received that called for his candidacy. "The Central Committee of the People's Convention," which had been formed by various antislavery proponents in Columbus after the nomination of Taylor, sought permission to present McLean's name at the Buffalo Convention as a candidate for president. The "Citizens of Cleveland" also sought to convince McLean, and while they knew that McLean was reluctant, they sought to change his mind because he was the "anti-extension of slavery" candidate whom they sought. Another group set the entire future of the Free Soil Movement upon McLean's shoulders: "Without it [McLean's name], we fear the triumph of True Principles over the Slave Power must be postponed four years; perhaps, finally, defeated, in which event, it is impossible to foresee what terrible convulsions may ensue."<sup>80</sup>

Practical politics, however, would never allow the nomination to go to McLean. The Free Soil party was an uneasy



alliance of Democrats, Whigs, and Liberty party men, and even such shared adamant opposition to the extension of slavery was insufficient to ensure either unity or success at the ballot box. The price for the participation of the Democratic "Barnburners" was the nomination of the Little Magician, Martin Van Buren, for the presidency. But it was also important to maintain the allegiance of the Whigs. The price for Whig allegiance was to be the vice presidency. With this in mind, Bradford R. Wood, a former New York Democratic congressman, wrote to McLean that "[F]rom the demonstration now making among the Whigs of cooperation with us, it is due to them, that one should be selected particularly agreeable to them and not objectionable to the democratic portion of what must soon be the predominant party. You, I think are that man."<sup>81</sup>

The efforts to effect this coalition did not stop with letters to McLean. H. B. Stanton of Seneca Falls, New York, an ardent abolitionist and one of the drafters of the Free Soil platform of 1848, wrote to Salmon P. Chase: "Mr. B.[enjamin] F.[ranklin] Butler says, the Democracy will support 'any competent and judicious Whig,' with V.[an] B.[uren] And the friends of the latter are exceedingly anxious that Mr. McLean should be the man. So also, the Whigs in all this part of the state."<sup>82</sup> But it was not just the Democrats who saw the practical political need for a Whig nominee for vice president. Charles Sumner, a leader of the

Conscience Whigs, renewed his efforts and wrote to McLean. He believed that Van Buren's success was inevitable, but he also believed that it was necessary to have McLean on the ticket as the Free Soil candidate for vice president to maintain Whig support of the fledgling party.<sup>83</sup>

Salmon P. Chase also understood and accepted these practicalities of politics, for although Chase personally favored a ticket of John McLean and John Van Buren for president and vice president, respectively, he too encouraged McLean to accept the vice presidency on the Martin Van Buren ticket.<sup>84</sup> In the last days before the Buffalo convention, Chase wrote to McLean almost daily applying whatever pressure he might to convince the Judge to accept the vice presidency. Chase and many Whigs feared that the control of the new party would devolve upon the Democratic sympathizers. In a prophetic note, he told McLean that his failure to accept the vice presidential nomination from the Free Soilers would result in the nomination of John P. Hale of New Hampshire. He wrote that "the movement will take a more exclusively democratic character than it would otherwise assume, in which event the Free Democracy would draw large accessions for the Whig party, and prepare for it a complete overthrow in 1852."<sup>85</sup> Chase's prediction of the cause of the fall of the Whigs was in error, but his vision of 1852 would prove accurate.

From the end of July 1848 until the Buffalo convention

McLean received daily correspondence from supporters who requested him to allow his name to be used at the Free Soil convention.<sup>86</sup> Most understood that McLean could not gain the presidential nomination but wanted him to accept the vice presidential nomination on the Martin Van Buren ticket. Those supporters made two arguments: first, that the vice presidential nomination in 1848 would assure him of the presidential nomination in 1852,<sup>87</sup> and second, that his presence on the Free Soil ticket was necessary to prevent the Democrats from taking over the Free Soil movement.<sup>88</sup>

But all these efforts were futile, for McLean had decided the matter and written his regrets. "I have delayed an answer to your communication of the 11th inst.," he began, "that I might have time for mature reflection."<sup>89</sup> In this correspondence McLean stated the factors which he thought important and his decision:

The great and exciting questions of slavery extension, in the judicial form that it has assumed by the act of the Senate, as it bears upon my position on the bench; the use of my name in the present canvass, and the rejection of it by the Ohio delegates to the National Convention; the relation which Mr. Van Buren maintains to the public; have all been deliberately considered, and I am brought to the conclusion that I ought not to go before the Buffalo Convention as a candidate [sic] for the Presidency.<sup>90</sup>

What conclusions did McLean draw from these factors? First, he realized that the extension of slavery was the leading question of the election. It had permeated all other

considerations such as the Mexican War and expansion, and now it would demand a candidate who was well-known for his opposition to the extension of slavery. Although he had been a part of this opposition, his sentiments were not widely known. Furthermore, his decisions in such cases as *Van Zandt* had confused many of his supporters who now questioned the sincerity of his opposition to the extension of slavery.<sup>91</sup>

There was also the darkside of McLean's considerations in this matter: the rejection of the Ohio voters. McLean had placed a great deal of emphasis on the support of Ohio in his quest for the presidency. This support, however, was splintered by Corwin's efforts to gain the presidency, by the animosity of other Ohio politicians, and by the younger voters' unfamiliarity with Judge McLean. Regardless of the causes of the splintering of Ohio support, the failure of the much wanted and needed Ohio support left McLean particularly bitter. "My enemies have triumphed," McLean wrote to John Teesdale, "but they have gained nothing for the country or for Ohio. . . . Ohio could have controlled the nomination, had she been united in the convention."<sup>92</sup>

Judge McLean did not attend the Buffalo Convention, and the convention, as expected by most, acted quickly to nominate the Barnburners' candidate, Martin Van Buren. But McLean was not without information as to the convention. "Had you have been nominated [for the vice presidency]," wrote E. L. Hamlin, "the Barnburners would have supported you for they were

compelled by the imposing attitude of the Convention. . . ."93  
Of course, the information was slanted. But even in the midst  
of the propaganda, Hamlin was able to tell McLean of the  
importance of the Free Soil movement: "The foundation of a  
new party is thus laid, destined, I think, to control  
eventually the destinies of this nation."<sup>94</sup> From this and  
other sources McLean was quick to realize that the winds of  
unrest which had encircled the campaign of 1848 would not soon  
quiet. With this understanding McLean withdrew entirely from  
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### THE MCLEAN IDEOLOGY: SLAVERY AND PARTIES

Justice McLean withdrew from all political activity after the 1848 Free Soil Convention, supporting neither General Taylor nor Martin Van Buren. This was a period for McLean of self-imposed political non-involvement, lasting from 1849 until after the election of 1852. It was not for lack of opportunity, for in 1849 McLean received several requests that he seek election from Ohio to the United States Senate, and prior to 1852 his supporters again encouraged him to seek the Whig presidential nomination. There were two primary causes for McLean's withdrawal: first, his injured pride which resulted from his rejection by the Whigs, and second, the brutal attack upon him by Senator Henry S. Foote.

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Justice McLean responded immediately with a letter to the *National Intelligencer*, in which he denied all the charges that Foote had leveled against him.<sup>3</sup> In regards to the slavery question, McLean explained that he had only said "that 'slavery existed by virtue of the local law, and consequently could not exist without the sanction of law.'<sup>4</sup> McLean reminded Foote and his readers that "[t]his had been settled by several Judicial decisions, and I supposed was doubted by no one."<sup>5</sup>

Not wanting to let Justice McLean have the last word on this question, Senator Foote again used the Senate as the forum in which to respond to McLean's letter. He scoffed at McLean's explanation of the slavery question, labelling it a

"gratuitous doctrine."<sup>6</sup> Foote argued that the matter had not been previously determined by the Supreme Court; rather it was an "open question . . . which the ablest legal minds of the republic were at issue."<sup>7</sup> Foote reiterated his charge that McLean had "disqualified" himself in any future consideration of this question. He ended "declaring again most deliberately my opinion that Justice McLean . . . is wholly unfit to hold and exercise the high office once occupied by men whose fame is as enduring as the eternal mountains, . . . ."<sup>8</sup> Although Foote's charges were overly dramatic and more personal than necessary, McLean had been wrong. The slavery question had not been resolved and McLean's statement on the matter should have, at the very least, disqualified him from sitting on any subsequent case involving this question.

This very public debate certainly upset McLean and may also have embarrassed him, for no judge looks lightly upon charges that he is unfit to sit on the bench. But the real issue of this debate, which was unfortunately obliterated by the personalities and rhetoric, was the role of judges in politics. This issue had been raised in the letter from Daniel H. Whitney but had not yet crystalized in the American mind.<sup>9</sup> For although the theory of separation of powers had been established in the Constitution, it had not yet been applied to this particular question. In fact, the fuzziness of the question of a judge's involvement in politics is spotlighted by this very incident. Senator Foote attacked



McLean for his letter writing in which he alleged that McLean had shown his prejudice on the question of slavery, but Foote had failed to address the whole issue of McLean's political involvement. Certainly, this can be explained in part by Foote's concern, if not preoccupation, with the slavery question, but part of the reason also was that the American mind had not yet arrived at the conclusion that judges should not be involved in politics.

It was during this period that McLean had the opportunity to discuss at some length his opinions on the subject of slavery. The first such instance involved a northern abolitionist minister, the Reverend Jonathan Wald, who borrowed from Senator William H. Seward and argued that the "higher law" found in the Bible required McLean to rule against slavery.<sup>10</sup> McLean's response was well-thought out and well written. He began by reminding Wald that he had taken an oath to uphold the Constitution and the laws of the land. Therefore, he argued: "I could not have so decided without a total disregard of my oath and of the fundamental laws of my country."<sup>11</sup> Then McLean became more aggressive as he recalled all the wars that had been caused by opposing interpretations of the "higher laws." He pointed out that the puritans had fled the religious intolerance of England, only to establish their own in New England.

McLean then changed the perspective of his argument to review the history of the institution of slavery in the United

States. He noted that slavery at one time existed in all the colonies, and although some had abolished it by the time of the formation of the Constitution, the slave question held the approval of the Constitution in the balance. "On this ground the destiny of our country trembled in the balance," he wrote. "The stoutest hearts, that had fearlessly borne the colors of then colonies aloft in the battles of the revolution, quaked at that moment."<sup>12</sup> But the fugitive slave clause passed and the "fruits of the revolution" were not lost.<sup>13</sup> McLean found that the price paid for the Constitution was, indeed, high, but having adopted it, "good faith requires that we should stand by it, until it shall be amended in the mode provided. If we disregard its provisions, how can we of the free states require obedience to it from the South."<sup>14</sup> This is an application of the classical rule of law argument: we may not like a particular law, but if each individual is permitted to pick and chose which law to obey, then there will be no law at all.

In the closing portion of the letter McLean became quite personal. "No one has held in greater abhorrence than myself, the principles of slavery." he wrote.<sup>15</sup> He then recounted how he personally had freed several slaves that he had owned, even though at the time he was in great debt and selling those slaves would have helped reduce that debt. He ended this comment wondering "how many of those who now denounce me for obeying the law have done more than I have to liberate

individuals from bondage."<sup>16</sup>

This letter seems to clarify McLean's position on slavery. He vehemently opposed the institution of slavery, and, if he is to be believed, he had even freed his own slaves. This position appears to explain his acceptance by those opposed to slavery. There is, however, another current which runs through this letter which is indicative of the problem which McLean had in dealing with the slavery question and which, in turn, caused political problems for him. McLean did not accept the "higher law" argument advanced by Wald; nor had he accepted it when it was originally advanced by Senator Seward in his speech in opposition to the Compromise of 1850.<sup>17</sup> McLean believed that his first duty was to protect and administer the law and the Constitution as they were written. If he could reject or refuse to enforce the fugitive slave law--where could he draw the line? Unfortunately, the dedication to the rule of law was lost on many abolitionists who would accept nothing less than complete resistance to slavery.

Within a few months of his correspondence with Wald, McLean received a letter from the other side of the slavery question. In February 1851, a southern slaveholder, Donald Mackintosh, wrote to McLean from his home in Charleston, North Carolina, seeking from McLean answers to several questions: "What I desire most to be instructed upon is this, Is the total eradication of this institution [slavery] contemplated?"

Have we any promise of a termination of these perplexing Questions? and what is the ultimatum that it is aimed at? Is there any hope for the institution?"<sup>18</sup> Mackintosh hoped to influence McLean, for he spent some effort in depicting slavery as a magnanimous institution which was absolutely necessary to care for a people whom he characterized as being completely incapable of taking care of themselves.<sup>19</sup>

As with his response to Reverend Wald, McLean's response to Mackintosh was carefully thought out. He began by admitting that "the Free States are opposed, on principle, to slavery, they consider it a great political and moral evil."<sup>20</sup> Then he explained that the North did not wish to interfere in the rights of the Southern states to maintain slavery within their respective boundaries. In support of this position, he made two more points. First, McLean said that in extensive discussions with the people within his judicial district (which included Ohio, Indiana, Michigan and Illinois) and numerous addresses to juries on this subject, and "I have never met with an individual who claimed the right to interfere with slavery, as it exists in the South."<sup>21</sup> This must be seen as an overstatement. Second, he reverted to his legal nature. "So far as I know the opinion in general," he wrote, "that slavery is a local question, and that its continuance, modification, or abolition belongs exclusively to the state where it is sanctioned by law."<sup>22</sup> As McLean concluded his letter, he levelled a surprising charge that the

agitation over the slavery question was not limited to the Northern states, and, in fact, "those states of the South who have suffered least from the agitation, are the loudest in their complaints, and the only ones who threaten a dissolution of the Union."<sup>23</sup> This is a reference to South Carolina, Mississippi and Alabama.

McLean's letter to Mackintosh is a strange one for at first impression, it appears that this letter is an appeasement to slavery, an attempt by McLean to win support in the South for his political aspirations. This is further reenforced by the fact Mackintosh subsequently requested McLean's permission to publish the letter. But such analysis fails to recognize the historical facts as they existed at the time. McLean did travel extensively throughout the Old Northwest as he rode his circuit, and he did have extensive contact with the people of this area, albeit the contact he had was probably not with the common man. Therefore, he could rightfully represent the legitimate opinion as to what people in this area thought. Furthermore, this was the period in which free soil sentiments were expanding especially in the Old Northwest. The people of this area--for the most part--were not particularly concerned with the existence of slavery in the South. They were, however, concerned with its development in the western territories, in so far as they perceived such a development as a negative impact upon their chances of betterment in these new territories. What McLean

stated is really nothing more than the free soil position-- lacking the romantic abolitionism which sometimes accompanied it.

This letter is also a repetition of the legal analysis and perspective which McLean personally held. For some time, McLean had espoused the position that slavery was not a decision to be made by Congress, but rather one to be made by the states themselves. To this extent, McLean's position is consistent with the free soil philosophy which opposed the imposition of slavery on the territories by Congress.

In his letter to Reverend Ward, McLean had written: "[a]s regards the fugitive law lately passed, I have scarcely read it. It has never come before me. When called to act upon it my opinion of its provisions will be expressed."<sup>24</sup> That opportunity soon arose. In 1853, McLean was faced with the case of *Miller vs. McQuerry*<sup>25</sup> in which he had to determine for the first time the constitutionality of the Fugitive Slave Law of 1850. George McQuerry was a black who had run away from his master, Miller, who resided in Washington County, Kentucky. McQuerry lived in Ohio as a freeman for four years before he was arrested in Troy, Ohio. In his opinion, McLean found that both the Fugitive Slave Law of 1793 and 1850 were constitutionally proper, based upon Article IV, Section 3 of the Constitution and that "under the law, I am bound to remand him [McQuerry] to the custody of his master."<sup>26</sup>

Obviously, the first judicial review of the

constitutionality of the Fugitive Slave Law of 1850 was of great interest and received various reactions. Charles Sumner, writing to Salmon P. Chase, expressed his utter disappointment in McLean: "My soul is sad & sick. . . . Why could he not have risen to the occasion?"<sup>27</sup> Not all, however, were as disappointed, but they were certainly surprised. A newspaper in Virginia found the decision noteworthy ". . . as being the first case in which any judge of the Sup. Court had decided the Fugitive Slave Law of 1850 to be constitutional, and secondly, as being the opinion of one who had hitherto been regarded as 'an abolitionist of the worst sort.'"<sup>28</sup>

Reverend Elijah Pilcher of Adrian, Michigan, shared Sumner's disappointment and sent to McLean a copy of an address on the unconstitutionality of the Fugitive Slave Law of 1850 which he based upon the Declaration of Independence and the Constitution.<sup>29</sup> McLean responded with a vehement attack upon the minister's argument. The Declaration of Independence, he pointed out, "was intended to produce a moral effect, but it never had any legal force."<sup>30</sup> As to the constitutional prohibition that "no person shall be deprived of life, liberty, or property without due process of law" forbade slavery, McLean pointed out that this provision applied only to freemen.<sup>31</sup> "It [slavery] was wrong in principle, and originated in violence," he wrote, "but it acquired the force of law by long usage, by legislative action, by judicial enforcement, and the assent of the whole

frame of society."<sup>32</sup> of government that he was ever to make.

The confusion which occurred over McLean's position on slavery was the result of the inability or the refusal of both his pro-slavery and antislavery critics to grasp an important concept which is essential to the judicial system of the United States. A court may not interpret the law as parties may wish it to be written as opposed to the law as it was passed by the legislature and must interpret the law to give full force to all portions of the law, even though such an interpretation may have results which the judge or the public may not prefer. Nevertheless, this confusion had been a constant element in McLean's campaign in 1848 and would be so again in 1856. And if any single element can be said to have been the cause of the failure of any of the political parties from fully accepting him, this was the cause.

On November 22, 1853, Judge McLean delivered an address to the Young Men's Mercantile Library Association in Cincinnati, simply entitled "A Lecture on Government." The address was the introduction to the Association's winter series of lectures. The judge began this lecture with an apology because he had been busy with official duties and "had time only to throw together, hastily, some remarks on government; especially on our government, as to the objects of its establishment, its operations and tendencies."<sup>33</sup> From a historical perspective, however, no apology was necessary for this was the most specific, complete statement of Judge



McLean's philosophy of government that he was ever to make.

The address itself is twenty-four printed pages. The first few pages are dedicated to a history of government from the beginnings of society through the Greek and Roman periods to the establishment of monarchies and finally to the American democracy. McLean then turned his attention to a discussion of American government. He addressed the American experience under the Articles of Confederacy and the nature of the constitutional union. All this, however, was merely introductory to his primary topic: the American system of political parties.

McLean began his analysis of political parties saying that "no free government can be maintained without the exercise of virtue and intelligence."<sup>34</sup> This was a subtle statement of McLean's belief that the party system was detrimental to the American system of government. As he continued this attack, he relied upon the position of leaders of the early republic, such as President James Monroe whom McLean quoted: "...if party politics and caucus contrivances should be introduced into the Federal Government, it would soon become thoroughly corrupted."<sup>35</sup> This is the theme which permeated McLean's presentation for he was convinced that the inevitable result of the presence of political parties was the destruction of democratic government.

McLean saw two specific problems with political parties. First, he viewed them as a device to manufacture and control

public opinion. The obvious difficulty with such a situation is that the individual or small group of individuals who control the party will endeavor to manufacture and control opinion to ensure their continued power and benefits. The second problem is, in part, an outgrowth of the first: the spoils system. This practice, which gained its name during the rough and tumble development of the Democratic party under President Andrew Jackson, was to McLean a clear example of a control mechanism. "No system which mainly rests on political rewards and punishments," he told his audience, "can work beneficially for a free people. . . . In such a contest the public interest will be lost sight of in the scramble for promotion."<sup>36</sup> Such a practice was completely repugnant to McLean. He had worked very hard throughout his life, but especially in his early life, and as a result felt that one should be rewarded for his efforts and abilities--not for political endeavors.

The extent to which others in American society shared McLean's distaste for political parties cannot be accurately measured. What is known is that many in his Cincinnati audience did share his sentiments for it was this group which requested and received his permission to publish this address. It is also reasonable to assume that those who attended the lecture were not the common laborers, for the funds necessary to belong to such library associations of this period were better spent by the laboring and poorer classes on the

essentials of life, such as food and housing. There is a second reason for presuming that those who shared McLean's opposition to political parties did not include the laboring and poorer classes. Unlike those of McLean's social class, the lower classes of this period had little political power of influence. The political parties and the accompanying spoil system, on the other hand, offered a point of access for these people to the political process and the benefits which accompanied it.

There is a common thread which runs through this address and the previous letters to Wald, Pilcher and Mackintosh. This unifying principle arises from what McLean said to them-- and did not say. Everything which McLean said in these letters and the lecture is a restatement of what he had been saying for some time. One can say that this merely indicates that McLean had become embedded in his old thoughts and opinions and committed to an outmoded method of politics which had disappeared twenty-five years earlier and was unable to move forward. But this is a superficial analysis. To understand what was happening in McLean's mind, what was simultaneously occurring in the early 1850s must not be ignored. This was a period of great unrest and change. The second two-party system in American history came to an end in the aftermath of the election of 1852 with the overwhelming defeat of the Whigs. Meanwhile many in the North worked to contain the spread of slavery into the territories. Others

sought to turn off the flow of immigrants into the United States, while those who had recently arrived in this country sought to retain their newly acquired rights and assure these rights for their brothers and sisters who still awaited entrance. Beneath this cauldron of bubbling and boiling disputes and antagonisms roared the fire of slavery, which would soon engulf the entire nation in the flames of war.

It was against this background that McLean sought to examine his thoughts. The correspondence and the lecture of this period offered to McLean the opportunity to do this review and set forth his thoughts on these important issues in a reasonable and proper form. It was for McLean a time to learn again what he already knew and, more importantly, come to an understanding of how these ideas related to the problem which would have to be addressed in the election of 1856.

winning a mere four states and their accompanying forty-two electoral votes. Thereafter, the divisiveness of the slavery question and the attractiveness of nativist doctrine advanced the cause of the Know Nothings, or as it was known, the American Party. The Know Nothings' avowed purpose was to save the republic from the threat posed by the increased number of immigrants, in particular Catholic immigrants. This anti-Catholic emphasis and a youthful leadership, unassociated with the old politics, initially proved very attractive to many Americans who had suffered at the hands of conniving politicians.

In this period of political unrest, the call for the fusion of common interests was often heard. However, each of the many forces -- the Democrats, Whigs, Know Nothings and Free Soilers -- sought to control the fusion. The success of any possible fusion was obstructed by the hate and suspicion with which each party and its members viewed all others. It was against this background that Chapter 4 McLean began his quest for

#### McLEAN AND THE REPUBLICANS: A FINAL FRUSTRATION

McLean's quest for the 1856 presidential nomination began in the 1850s a dynamic new party system evolved and gained momentum in the United States. The election of 1848 had proved the viability of the Free Soil party which had announced a more conservative approach to the slavery question: containment of slavery to the then existing slave states. The Whig party suffered a disastrous defeat in 1852, winning a mere four states and their accompanying forty-two electoral votes. Thereafter, the divisiveness of the slavery question and the attractiveness of nativist doctrine advanced the cause of the Know Nothings, or as it was known, the American Party. The Know Nothings' avowed purpose was to save the republic from the threat posed by the increased number of immigrants, in particular Catholic immigrants. This anti-Catholic emphasis and a youthful leadership, unassociated with the old politics, initially proved very attractive to many Americans who had suffered at the hands of conniving politicians.<sup>1</sup>

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McLean's quest for the 1856 presidential nomination began no differently than had his previous attempts. For although McLean was indeed a very proud and arrogant individual, his belief in his capacity to serve as president and the country's need for his services was not solely in his mind. In early 1853, McLean received a letter from Orville Hickman Browning, a prominent Whig politician from Quincy, Illinois. Browning told McLean that the Illinois Whigs were searching for a candidate who could unite "all the elements of the Whig party," and that the growing opinion was that he was such a candidate.<sup>3</sup> This revealing letter tells the reader many things: first, that although the Whig party was still viable in Illinois, it was encountering difficulties and needed some strong personage to rally the several factions back to the party; and second, Browning definitely believed, along with others, that McLean was that person.

Later in 1855 McLean wrote to John Teesdale, the former editor of the *Ohio State Journal*, with whom McLean had

developed a strong friendship. In his letter, McLean responded to Teesdale's inquiries about a run for the presidency negatively.<sup>4</sup> But Teesdale was not discouraged, or maybe he truly understood his friend's desire for the presidency, for he wrote to the Judge again on this matter. McLean responded: "I thank you for your kind letter. Feeling no desire to change my position, I shall remain passive and await popular action."<sup>5</sup> This letter reflected McLean's pride and arrogance for he believed that the American people would demand his presidency!

But this sentiment was not without some basis, for the day after McLean wrote to Teesdale, Leonidas Jewitt wrote to him. Jewitt, a local politician from Athens, Ohio, who also served on the Ohio University Board of Trustees, had just returned to Athens after a lengthy stay in Columbus and was eager to pass the news that he had received on to McLean. "[T]he Republican members of Congress," he wrote, "were in favor of yourself for the Candidate for the Presidency." In addition, he believed that "a large Majority" of the state legislature also favored his candidacy.<sup>6</sup> Such news had to bring a smile to McLean's face. He now had information that his candidacy was supported by his political cohorts in the State Legislature, the Whigs in Illinois, and the Republican leaders in Washington.

But McLean did not sit back and await accolades of support. In late 1854, McLean had received a letter from Dr.

James Prettyman of Philadelphia. Prettyman had not previously met McLean, but he placed a new consideration before him: Americanism. He told the Judge that Americanism, or Know Nothingism, had swept the Nation "like a tornado," and now the search was on for a presidential candidate. According to Prettyman, many of the American party "are instinctively turned towards the great west, indeed toward your my dear sir."<sup>7</sup>

Before McLean could respond, another American party supporter, Hector Orr, a Philadelphia printer by trade, wrote to him that the country was in need of "a President thoroughly American in his practice," and that "such a man we believe you to be."<sup>8</sup> He concluded promising to do all that he could on behalf of McLean's nomination.

The offer of support by the Know Nothings was a Trojan horse. On the surface it appeared to open the door to a nomination for the presidency, but there were serious problems. In 1847 he had decided to remain in the Whig party and attempted to convince the Know Nothings to support his nomination by the Whigs. That strategy had failed not only because the Whigs had not nominated him but also because the Know Nothings, as a political force, disappeared. But in the interim, the ebb and flow of power had once more changed the political landscape. The crushing defeat of the Whigs' nominee, General Winfield Scott, left many wondering if there would be a Whig party in 1856.<sup>9</sup> Furthermore, the Know



Nothings were quickly moving to replace the Whigs and would win significant victories in Massachusetts, New York, New Jersey and Pennsylvania by 1855. So it is not surprising that McLean sought to build another political base.<sup>10</sup> In his response to Prettyman, he said what the nativist physician wanted to hear: "I see the movement now that I had long desired to see. A movement which will make this government a government of the people."<sup>11</sup> Responding to Orr, the Judge again praised the Know Nothing movement as a "people" movement and unequivocally accepted the principles of nativism.<sup>12</sup>

The Know Nothings continued to press themselves upon him. Donald MacLeod, a local nativist, wrote to McLean expressing further support for his nomination: "Should the choice of the K N fall on you (and why should it not) all Americans would rejoice at the prospect of National Administration being restored."<sup>13</sup> Then early in 1855, MacLeod wrote again to the Judge and assured him that his views were acceptable to the majority of the nativist party members.<sup>14</sup> Even his fellow jurists encouraged his nativist aspirations. Judge Robert Wilkens of Detroit wrote approvingly to McLean that his name was prominently mentioned "among the Know Nothings as their candidate for the Presidency."<sup>15</sup>

But McLean could not forget the rapid decline of the Know Nothings in the late 1840s, and although they were clearly a rising political force, they were not yet established. His letters to his Know Nothing supporters reveal this reluctance

to being too closely associated with their movement. In concluding his letter to Dr. Prettyman, he admonished the doctor: "I therefore write this letter to you in confidence, that it shall not be published."<sup>16</sup> And again to Hector Orr, he wrote: "But I cannot consent to the publication of this letter."<sup>17</sup> The perennial candidate--the politician--wanted the support of the Know Nothings, but he also wanted to maintain the support of the Free Soilers. This was a serious problem since many antislavery advocates both hated and feared the Know Nothings. George Julian, the 1852 Free Soil vice-presidential nominee, described nativism as a "heresy . . . which skulked into our camp to divide our friends and break the force of our movement."<sup>18</sup> So now McLean sought to silence his correspondents and hopefully maintain the support of both opposing political organizations. much like following in the

foot Between the devastating defeat of the Whigs in 1852 and 1855, a new party--the Republican--developed in several states.<sup>19</sup> As 1856 approached, several questions arose: could the fledgling state organizations unite in a national party? What other interests would be involved? Could the youthful national party engage in a national contest? And, if so, how should the party choose its candidates? In an attempt to resolve these questions, the leaders of the state Republican parties in Maine, Massachusetts, New York, Pennsylvania, Ohio, Michigan, Indiana and Wisconsin published a notice in papers throughout the country inviting Republicans and other

interested parties to come to Pittsburgh on 22 February 1856 "for the purpose of perfecting the National Organization, and providing for a National Delegate Convention of the Republican party, at some subsequent day, to nominate candidates for the Presidency and Vice-Presidency. . . ."20

The Pittsburgh convention was, indeed, "informal." There was no limitation as to the number of delegates which each state could send, and, as a result, numerous representatives from various states made the trip to the meeting. Although the attendees determined that the party would hold a national convention in Philadelphia and established a national executive committee, they did not agree on all issues. George Reemlin, a Democratic state senator from Cincinnati, voiced his opposition to the use of the convention to select the party's candidates: "It looks too much like following in the footsteps of the old parties. . . . Jefferson didn't come from a convention; Jackson nor Washington didn't come from conventions. The Republican movement would obtain more success by going out among the people."<21 Other delegates, including Horace Greeley and George W. Julian of Indiana opposed the involvement of the Know-Nothings in the new party because of the nativists' opposition to emigrants.<sup>22</sup>

McLean's interest, however, was not forgotten at this first meeting of the Republican party. And although he did not personally attend the Pittsburgh meeting, others did attend who were sensitive to McLean's interest. One such

person was John Teesdale, McLean's close friend, who wrote gleefully of the news from the meeting that: "your name is quite prominently mentioned by the delegates of the strong Free Soil proclivities."<sup>23</sup> As 1856 began, McLean must have felt that this time he would certainly gain the presidency. His support ran the whole spectrum of politics from Whigs and Republicans to Know Nothings and Free Soilers. There were two issues, however, which had previously caused McLean difficulty, which re-emerged. These were articulated by the *New York Tribune* in an editorial opposing the candidacy of Justice McLean. The *Tribune's* first reason went to McLean's professional status:

He is a Justice of the Supreme Court, and the Judges of the Court ought to be lifted above even the suspicion of looking to the Presidency, or any other public trust than that they already hold. That Court has palpably sunk in the public confidence for the last twenty years; if it gets to be a nursery of Presidential aspirations, it will soon divest itself of the little public respect yet left it.<sup>24</sup>

Under present day standards, this is a very legitimate criticism. It is quite reasonable to fear that judges may abuse their powers if they can seek other offices while remaining on the bench. Therefore, under present day ethical standards, Justice McLean could not have pursued the presidency while remaining on the bench.

As has been indicated previously, this complaint was not a novel one for McLean. Almost ten years earlier, John M.

Clayton predicted his loss for several reasons including that "He is a Judge, with drawn, or who, it will be thought, ought to have been entirely with drawn from the political Arena."<sup>25</sup>

The fiercest such attack upon McLean on these grounds had come from Senator Foote of Mississippi in early 1849. Foote, however, did not come to this question with clean hands, as his underlying purpose was to defend the institution of slavery. Nevertheless, his criticism was valid, and the attack did have an effect. In 1856, the United States Supreme Court had completed its opinion on the infamous Dred Scott case, but for reasons which certainly included political considerations, the case was set for re-hearing after the presidential election. Surely McLean must have thought about publishing his completed opinion as a means of engendering further support for his political aspirations. Just as certain, he must have remembered Foote's accusations and decided that such action was, indeed, contrary to the ethics of this office.

For the record, the *New York Tribune* subsequently repeated its opposition to judges running for the presidency, saying "we differ as to the fitness of a statesman being at the same time a Judge of the Supreme Court and a candidate for President."<sup>26</sup> It is important to note that the criticism of McLean by the *Tribune* probably had more to do with the fact that Horace Greeley, the editor, was a supporter of William H. Seward for president.

Whereas the *Tribune's* concern was solely with the judicial impropriety of a sitting judge being involved in politics, others thought that McLean's years on the bench had left him unfeeling and incapable of performing the duties of the president. W. C. Howells, editor of the *Ashtabula Sentinel*, wrote the harshest criticism of McLean on these grounds:

Of all men, who could be named in this connexion, he has the least claim upon the hearts of free men. Iced up in his judicial position, for thirty years, he has been chilled off from all sympathy with the warm hearted masses; and his nomination would be but the starting of some glacier from a mountain-side, to slip, and grind, and crush its way, cooling, and freezing by its presence all the living forms that stand in its path.<sup>27</sup>

One might think that such vicious criticism was personal to McLean. However, in a letter to Joshua Giddings, not long after this editorial, Howells gives us a glimpse of how he viewed judges in general: "I think our U. S. Judges are the worst men we have and the last to whom we should entrust our liberties; and he (McLean) is a particularly obnoxious specimen."<sup>28</sup>

Judges of this period were obviously not held in high esteem. This lack of respect for the judiciary was most often the result of the decisions which they issued, and during this period it was the decisions on questions related to slavery which most inflamed resentment for the judiciary. Even worse, this resentment did not arise out of a reasonable and

considered review of any of the opinions. The parties on both sides of the slavery question resented any victory for the other - regardless of how well reasoned and legally correct it was.

McLean took great care in his writings, both private correspondence and judicial opinions, to state clearly those legal principles which supported the decisions that he rendered. In a letter to a newspaper, he set forth his understanding of the principle of the rule of law:

It is known to everyone that Judges are sworn to support the Constitution and laws. They cannot consider slavery in the abstract. If they disregard what they conscientiously believe to be the written law in any case, they act corruptly and are traitors to their country. The Constitution and Acts of Congress give to the master of the slave a right to reclaim him in a free state. So plain are the provisions on this subject that no one can mistake them. How is it expected or desired that a Judge shall substitute his own notions of positive law? While this shall become the rule of judicial action, there will be no security for character, property, or life.<sup>29</sup>

This is a very judicial viewpoint which properly emphasized the limits of judicial interpretation and its relationship to the rule of law. It is not the function of the court to determine what the law/policy of a state or the nation should be. McLean understood this, and he repeated it in his instructions in Giltner v Gorham:

However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity have adopted it. And

you are sworn to decide this case according to law - the law of Kentucky as to slavery, and the provisions of the Constitution and the act of Congress in regard to the reclamation of fugitives from labor.<sup>30</sup>

These were proper statements of what the law was. If this viewpoint was not followed, McLean told the public that "[I]f convictions . . . of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and protection."<sup>31</sup> But McLean did not merely recite proper words. In Prigg v Pennsylvania,<sup>32</sup> he voted to uphold the constitutionality of the Fugitive Slave Act of 1793. This action, although clearly proper and correct, earned him the condemnation of the antislavery advocates that would follow him even to the 1856 campaign. The difficulty which McLean's attachment to this principle caused arose because its application most commonly occurred in the context of a case having to do with slavery. The magnitude of the importance which slavery played in American politics of the 1850s cannot be overestimated. There were hard lines drawn between those who opposed and supported slavery. Neither side had any appreciation for the gray in the middle--the subtle but important legal issues which McLean raised. Instead McLean's dedication to the law confused the public who incorrectly labelled him pro-slavery.

The question of the constitutionality of the Fugitive Slave Act of 1850 arose in 1853 in Miller v McQuerry.<sup>33</sup> In this case, McLean upheld the Fugitive Slave Law and ordered



the return of a slave, Washington McQuerry. The antislavery advocates howled in protest. Charles Sumner wrote to fellow Republican Salmon P. Chase: "I have just read under the telegraphic head a brief abstract of Judge McLean's decision. My soul is sad & sick."<sup>34</sup>

In 1855, the northern newspapers began their assault on McLean's record on slavery. The *New York Tribune* painted the Judge as a southern extremist.<sup>35</sup> But this criticism was not limited to the east. *The Anti-Slavery Bugle* of Salem, Ohio, printed another exaggerated criticism:

He extends Slavery and Kentucky Slave-laws over Ohio Sovereignty - affirms the supremacy of the slave rendition and the slave catching law over the law and Constitution of the State; and for the support of Slavery on Ohio soil, puts slave Commissioner Pendery above Judge Parker and the whole State Judiciary.<sup>36</sup>

Such criticism, of course, had no basis in fact. But as was said earlier, the antislavery supporters viewed every decision in favor of slavery as morally repugnant and therefore wrong. Unfortunately, everything immoral is not illegal, and as McLean pointed out the rule of law cannot be maintained if based upon personal convictions.

As the slavery question turned to the expansion of slavery, McLean and his supporters took the offensive. In December 1847, an article, "Has Congress Power to Institute Slavery," was printed and credited to McLean. In response to the negative criticism which he received in 1856, this article was reprinted in the weeks immediately before the 1856

Republican convention. In this article, McLean had forcefully argued that the Constitution granted the Congress no power to institute slavery in the territories, and by logical extension, Congress could grant no such power to the territorial governments. Therefore, slavery could not exist in the territories.<sup>37</sup> This argument was classic McLean--an argument which he maintained from the mid-1840s to his death.

That article was quickly followed up by a letter to the editor of the *National Intelligencer* which again emphasized McLean's contention that Congress lacked the power to institute slavery in the territories. The writer concluded summarizing McLean's position that "Congress has no power to institute slavery in the Territories, and, a fortiori, cannot delegate that power to a Territory, and that a Territorial Government cannot exercise that power." The conclusion was obvious: slavery could not exist in the territory.<sup>38</sup>

In a period of two days, the *National Intelligencer* stated and repeated McLean's argument opposing the expansion of slavery into the territories. Such arguments would not satisfy *The Anti-Slavery Bugle*. However, these were not intended to placate or convert the abolitionists. These were specifically aimed at the Republicans of Free Soil persuasion, Republicans, who since 1847 had opposed the extension of slavery into the territories.

The early months of 1856 saw an increased activity in the campaign, which focused on McLean's alleged judicial

impropriety and the question of slavery. The *New York Tribune* and the *Ashtabula Sentinel* attacked McLean's impropriety, and the *Tribune* provided the best summary of McLean's problem with the slavery question: "some of his decisions in Slave Questions--the Van Zant (sic) especially--leaned very hard against him in the canvass."<sup>39</sup> But McLean and his supporters struck back with repeated articles in the *National Intelligencer* that clearly placed him within the ranks of the budding Republican party which opposed the expansion of slavery into the territories. All that was left now was the first Republican convention.

In late May and early June, as the convention approached, political activity among the supporters of the fledgling Republican party increased. This up tempo mood was further intensified by the beating of Senator Sumner by Preston Brooks of South Carolina in the Senate and the sacking of Lawrence, Kansas, by proslavery elements. With these events in mind, John Allison, the Beaver County, Pennsylvania, congressman, wrote to Judge McLean encouraging him to answer immediately the letter of Judge Joseph C. Hornblower, chairman of the New Jersey delegation to the convention. Allison was also greatly concerned with the split of the Ohio delegates at large between Colonel John C. Fremont and Salmon P. Chase.<sup>40</sup> In Illinois, former Whigs were also taking action on McLean's behalf. Abraham Lincoln wrote to Lyman Trumbull of his concern that James Buchanan's nomination by the Democrats

would draw conservative Whigs with "slight pro-slavery proclivities" away from the Republicans. He heralded McLean's nomination saying that it "would save every Whig."<sup>41</sup> Elisha Washburne, definitely optimistic, requested that the candidate provide him with background on himself so that he could prepare an appropriate address "[I]n the event of your nomination for the Presidency by the approaching Philadelphia Convention."<sup>42</sup>

During this time, McLean corresponded constantly with Judge Rufus P. Spalding of Cleveland. Judge Spalding had been born in Massachusetts and came to Warren, Ohio in 1821 to practice law. In 1849, then a member of the Democrat party, he was appointed to the Ohio Supreme Court where he served until 1852. Moving to Cleveland, he became prominent for his defense of fugitive slaves. His free soil proclivities made him an early member of the Ohio Republican party where he assumed a leadership position in the Cuyahoga county organization.<sup>43</sup> It was Spalding who headed the McLean delegates at the convention, but how he gained this position is unclear. Writing from Cleveland, Spalding indicated that there was great sentiment for Fremont, but that "my best judgment informs us that your name will combine, more strongly than his, the essential elements of success."<sup>44</sup>

The day before the convention, the Hornblower-McLean letters were published, and even the *New York Tribune*, which opposed McLean's nomination, revealed in the agreement of the

two distinguished jurists that the answer to the Kansas problem was federal intervention and the immediate admission of Kansas into the Union as a free state.<sup>45</sup> McLean had adeptly picked up the sentiments of the elderly Hornblower and had responded in terms that warmed the hearts of the antislavery Republicans as he blamed Bloody Kansas on "that ill-advised and mischievous measure--the repeal of the Missouri Compromise."<sup>46</sup> Such a response was geared to secure the votes of the New Jersey delegation for McLean.

As the delegates arrived in Philadelphia, it was felt that McLean was the definite favorite of the Illinois, Indiana, and New Jersey delegations<sup>47</sup> and that he was also the favorite among most Republican members of the Congress. It was these Congressional leaders who now went to work. The Washburn brothers of Maine cajoled and exhorted their respective delegations from Illinois and Maine.<sup>48</sup> But it was Thaddeus Stevens of Pennsylvania who proved to be the real champion. On the evening of 17 June, Stevens, speaking to the Pennsylvania delegates, presented and persuaded the delegation to pass a resolution stating that "Judge McLean was the most available man to secure the vote of Pennsylvania."<sup>49</sup>

The hearts of McLean's supporters must have soared when Edwin D. Morgan, a prominent New York merchant-banker and Chairman of the National Executive Committee of the Republican party, opened the convention with these words:

You are here today to give direction to a movement which is to decide whether the

people of these United States are to be hereafter and forever chained to the present national policy of the extension of human slavery.<sup>50</sup>

Thereafter, however, the emotions of McLean's supporters varied from surprise and astonishment to anger and frustration. Judge Spalding mounted the podium and announced the withdrawal of Justice John McLean's name from consideration for the nomination for the presidency. Most were probably too dumb-struck to respond but not Thaddeus Stevens, who immediately asked for time to consider this matter. The convention recessed. We can only imagine the fervor and frustration with which Stevens, Noah Swayne, Robert Schenck, and others worked as they attempted to save the nomination. But it was fruitless. When the convention reconvened, it nominated Fremont on informal ballot and then unanimously on a formal ballot.<sup>51</sup>

Spalding had sent a telegram to McLean that the nomination could not be won, and after consultation with Stevens, Swayne, and others, Spalding was withdrawing his name.<sup>52</sup> But the facts do not support Spalding. Stevens's actions, obtaining the approval of the Pennsylvania delegation and his request for a recess after Spalding withdrew McLean's name, indicate that he was unaware of any possible withdrawal.

Furthermore, subsequent to the convention, a delegate, John Allison, wrote to McLean that "Judge Spalding never spoke to me after I discussed his conduct on the platform. . . . his course was exceedingly ill advised, and I do not believe

that he was at heart your friend. I cannot believe it."<sup>53</sup>

Soon after, he wrote again. But this time, it was a full scale indictment of Spalding:

Judge Spalding did not consult me or any of the Ohio delegation but Mr. Swayne, who would not advise the withdrawal of your name at that time. Our delegation was greatly surprised and very indignant and some of us denounced the act in very emphatic language. Upon consultation with friends from Ohio, Indiana, Illinois and Maine we concluded that it was best to vote for you although your name had been withdrawn. I would not like to charge Judge Spalding with treachery, but I think his conduct was unpardonable. I believe that he had become a Fremont man, and at heart wished for his success.<sup>54</sup>

But it is not only the words of others who charge Spalding with treachery; his words too convict him. For when he wrote McLean before the convention, he said that "I do not suffer myself to stand committed to anyone, but will do the best I can in view of the whole promises."<sup>55</sup> Later, he also wrote: "If there be no hope of success with your name, I shall not be satisfied to leave it in the 'ballot box' for an hour."<sup>56</sup> These statements, at best, indicate but lukewarm support for McLean's candidacy.

It can not be proven "beyond a reasonable doubt" that Judge Spalding purposely withdrew McLean's name in order to secure the nomination for Fremont. It is clear, however, that at the very least Spalding exercised faulty judgment and failed to consult with the other leaders of McLean's supporters. Had he not withdrawn the Judge's name, the

results of the informal ballot would have been closer, and McLean possibly could have won the nomination, for the untimely withdrawal and the resulting confusion certainly lost votes for McLean.

Justice John McLean's quest for the nomination for the presidency covered a thirty year period. When that prize seemed to be at hand, two forces would, intentionally or unintentionally, unite to deny him that prize. It may have been possible for McLean to survive his baggage of thirty years in politics--his position on the United States Supreme Court, his decisions on the Fugitive Slave Law, and his inconsistent movement from one party organization to another --which were more than any one political campaign could normally bear. But combined with the weak-kneed, incompetent, and possibly treacherous leadership of Judge Spalding, McLean became Don Quixote in search of the unreachable goal.

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Three principles of his philosophy profoundly affected



political movements during this period: his political conservatism, his dedication to the American legal tradition and his opposition to slavery. Each had a different history in McLean's life. Each exerted a varying degree of influence upon McLean, and at times they operated in opposition to one another, but such is the case in the lives of most people.

## Chapter 5

### CONSERVATISM TRIUMPHANT

McLean was a political conservative. He had been schooled in this philosophy from childhood, but the strongest influence came from President James Monroe. McLean had G. K. Chesterton once wrote that "...there are some people who think that the most practical and important thing about a man is still his view of the universe."<sup>1</sup> Commenting on that text ten years later in a lecture, the great American philosopher and writer, William James said: "I know that you, ladies and gentlemen, have a philosophy, each and all of you, and that the most interesting and important thing about you is the way in which it determines the perspective in you several worlds."<sup>2</sup> These statements provide a direction for understanding Judge McLean's political activities between 1840 and 1856. It was, indeed, his own personal philosophy which determined his movement through and contacts with the Whigs, Nativists, Free Soilers and Republicans. This, however, is merely a statement of the obvious. The more profound questions are what was his philosophy, and how did it affect his politics during this period.

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Know McLean was a political conservative. He had been schooled in this conservatism since his childhood, but the strongest influence came from President James Monroe. McLean had supported Monroe's candidacy and had been rewarded with the position of postmaster general. A strong personal relationship developed between the two politicians which lasted until Monroe's death in 1831.

This political conservatism which Monroe and McLean shared sought to preserve the existing political structures, opposing such developments as political parties and the spoils system. It was this conservatism which brought McLean to the Whig party and kept him there until its dissolution following the election of 1852, for the Whig party was the conservative party of the 1840s and 1850s. It originated as the loyal opposition to "King Andrew" Jackson and rejected the levelling efforts of Jackson and his Democrats.<sup>3</sup> should be introduced

This conservatism was also exhibited in McLean's contacts with the Know Nothings and their American party who were locked in a battle with the Catholic immigrants. The growing number of foreigners and their overwhelming association with

the Democratic party brought the fear of great changes. Because the Know Nothings opposed the immigrants and any resulting changes, it is not surprising that McLean considered joining them. Although there is no evidence that McLean accepted their position, it offered him an opportunity to advocate his own conservatism. In his admonitions to his Know-Nothing correspondents, McLean argued that the spoils system was the "foundation of the evils" which they opposed.<sup>4</sup> He supported the Know-Nothing anti-immigrant positions, but he did so on the basis of the Whig position. This indicated that McLean maintained his strong ties to the Whigs and that he would remain a member of the Whig party until it ceased to exist. This political conservatism, expressed in his opposition to organized political machines, was something which he exhibited throughout his life. The most notable statement of this position was his 1853 lecture to the Young Men's Mercantile Library Association in Cincinnati, which offered him the opportunity to rail against the contemporary political machines. But the address also revealed the influence of President Monroe, for McLean quoted him as saying "[T]hat if party politics and caucus contrivances should be introduced into the Federal Government, it would soon become thoroughly corrupted."<sup>5</sup> Such a quotation confirms McLean's conservatism and the continued strength of Monroe's influence.

The second aspect of McLean's philosophy was his

dedication to the American legal tradition. Under this tradition, this country is a land of laws, and no person is above the law. The function of judges is to interpret--but not make--laws. The capstone of the tradition is that the Constitution is the supreme law of the land, and any law, whether state or federal, which contradicts it is void.

The importance and the influence which this rich legal tradition had upon him cannot be overestimated. The tradition itself originated in England and Europe. As it developed in the United States, two points became paramount: first, the tradition began early and developed consistently, and second, the focal point was the Constitution. One of the earliest expressions of the American tradition was made by Sam Adams in 1768: ". . . in all free states the Constitution is fixed; and as the supreme legislature derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."<sup>6</sup> This statement illustrates that even before the Constitution was adopted, the colonial mind clearly understood its role as the supreme law of the land. Ohio, and in 1816, he was elected to the Supreme

Court. The function of the courts in relation to this pivotal document was recognized in the midst of the debate over ratification. "A constitution is in fact, and must be, regarded by the judges as a fundamental law." wrote Alexander Hamilton. "It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act

proceeding from the legislative body."<sup>7</sup> This interpretation was subsequently adopted by Chief Justice John Marshall as he proclaimed in *Marbury v. Madison*<sup>8</sup> that the Constitution was the supreme law of the land and the Supreme Court the interpreter of that document.

The American legal tradition grew quickly, and its influence was readily ascertainable not only by Americans but also by visitors. During his trip through the United States in 1831-32, Alexis de Tocqueville quickly recognized the "great political importance" of the courts.<sup>9</sup> He also understood that the Constitution was "first of the laws" and that "the tribunals should obey the constitution in preference to any law."<sup>10</sup> These impressions by de Tocqueville establish that even by the early 1830s Americans had developed a clear understanding of their legal tradition and a great respect for the Constitution and the courts.

McLean's exposure to the legal tradition of his nation began in 1804, as he read the law in Arthur St. Clair, Jr.'s office in Cincinnati. By 1807, he had opened his own office in Lebanon, Ohio, and in 1816, he was elected to the Supreme Court of Ohio. Thirteen years later he was appointed to the United States Supreme Court. There can be no doubt that by the 1840s McLean too had a clear understanding of the legal tradition of this country.

McLean's understanding and appreciation of this tradition was evidenced in his opinions of the 1840s and 1850s. The

clearest statement he made was in *Miller v. McQuerry*,<sup>11</sup> where he was sitting as a circuit judge and upheld the constitutionality of the Fugitive Slave Law of 1850. Defense counsel had raised the "higher law" argument, which had been made popular by Senator Seward. The judge rejected this argument, saying that the making of constitutions and laws, which included the consideration of the laws of nature, was the responsibility of the people and the legislature respectively. "This is a field which judges cannot explore," he wrote. "They look to the law, and to the law only. A disregard of this by the judicial powers, would undermine and overturn the social compact."<sup>12</sup> This was a clear statement of the interpretative function of the judicial process and the rejection of any legislative function by a judge, as being improper.

McLean also expressed these same sentiments in a private context. In response to Reverend Jonathan Wald's admonition that he should observe the mandates of the holy scripture, McLean observed that the elevation of the "Jewish law" above the Constitution and the laws enacted by Congress would have placed him in a "sad dilemma" as he had sworn to protect and preserve these laws of men.<sup>13</sup> This response was more than an attempt by McLean to keep his oath. It was the recognition of the American legal tradition.

The third principle of McLean's philosophy was his opposition to slavery. There are several earlier opinions

which indicated his antislavery inclinations, but it was his non-judicial writings of this period which proved this point conclusively. On one occasion he wrote that ". . . [N]o one has held in greater abhorrence than myself the principles of slavery,"<sup>14</sup> and to emphasize his dedication to antislavery he further revealed that years earlier he had freed his own personal slaves. To another correspondent he announced that slavery "was wrong in principle, and originated in violence."<sup>15</sup> Even to a slaveholder McLean wrote that slavery was a "great political and moral evil."<sup>16</sup> These statements and many others like them evidence McLean's opposition to slavery, but it would be wrong to conclude that he was an abolitionist. His opposition to slavery developed over the years within the shadow of his other philosophical consideration: his dedication to the American legal tradition. In accordance with this superior principle, he could not advocate nor could he accept the abolition of slavery since such power was locked in the hands of the individual states. McLean, however, was an imaginative judge. In 1847, he authored an article entitled "Has Congress Power To Institute Slavery" which was republished just weeks before the 1856 Republican convention.<sup>17</sup> In this work, he categorically denied that either Congress or a territorial government could establish slavery in the territories. The Constitution, he argued, gave no power to Congress to establish slavery; therefore, Congress had no such power.

Furthermore, Congress, having no power itself, could not grant it to the territorial government.

But how did these three elements of McLean's philosophy relate to his political activities between 1840 and 1856? The strongest of the three was his conservatism. This is the force which kept him tied to the Whig party until its demise. Strangely enough, it was also the force which made the Know-Nothings and their American party attractive to McLean. He was in the nativist movement a conservatism similar to his own, in that it sought to maintain the old order by eliminating the flow of immigrants, who by their very nature brought change with them. They had a different culture and sense of values and generally associated with the Democratic party. But in the end there was more fanaticism connected with the Know-Nothings than the conservatism which attracted him, so McLean remained in the Whig party.

It would, however, be foolish to say that had Whittlesey's attempt to gain the American party nomination for McLean in 1848 been successful that McLean would have rejected it. His paramount political desire was to be president, and had he been able to unify the Whig and American parties presidential nomination in 1848, he would most assuredly have accepted the American party nomination.

This driving desire to be president was also exhibited in McLean's interlude with the Free Soilers in 1848. Like many of his contemporaries, the 1840s required McLean to re-examine



and redefine his position on slavery, but once again his conservatism was the controlling force as his opposition to slavery developed for it was the conservative position of the Free Soilers which attracted him. They were not abolitionists. They did not seek to abolish slavery in the United States, rather to restrict its practice to those states where it then existed. This position dove-tailed nicely with McLean's own views, especially those that developed from his legal analysis of the problem. Operating within his perception of the American legal tradition, in particular the supremacy of the Constitution, he found abolition to be a legal impossibility under constitutional principles. These same principles, however, were the basis for his interpretation that Congress could not establish slavery in any territory. supporting slavery without the slightest

This interpretation is a point deserving further comment. Some present day commentators have taken the position that some jurists of this period, most notably McLean and Judge Joseph Story, acted in complicity with the slaveholders because they failed to refute the peculiar institution on the basis of some "higher law."<sup>18</sup> Such criticism fails to recognize two important considerations. First, the judicial destruction of slavery would have required the destruction of the American legal tradition, including the Constitution, for implicit in such action is the recognition that the judicial branch of the government may rewrite the Constitution as it

sees fit. Such unrestrained power, never recognized in the Constitution, would be the end of the Constitution and the American system of democratic government. Second, this criticism fails to acknowledge the legitimate constitutional opinions which did, in fact, limit slavery. McLean's position denying Congress the authority to establish slavery in the territories is an excellent example of positive judicial efforts in this respect. of McLean's godfly efforts to gain the This current criticism, however, is not new. Many of McLean's contemporaries, such as Chase and Sumner, whose first loyalty was to the antislavery movement, were severely critical of McLean's opinion upholding the Fugitive Slave Law of 1850 in *Miller v. McQuerry*.<sup>19</sup> In both the 1848 and 1856 campaigns many individuals and newspapers criticized McLean for allegedly supporting slavery without the slightest consideration of the American legal tradition. man moved from party Until the 1856 campaign the competing forces of McLean's philosophy had driven him in various and often conflicting directions. With the death of the Whig party, however, a sense of unity among these forces made it comfortable for McLean to come to rest in the Republican party. This new party was an amalgamation of Whig conservatism, the Free Soil brand of antislavery and a dedication to the established form of government--a perfect match with his philosophy. Nevertheless, the confusion which his philosophy had generated over the years made him unacceptable to the Republicans for he

was perceived by some as being overly conservative and by others as not sufficiently antislavery. *only interest was to*

*become* McLean's desire for the presidency became a driving force in his life from 1840 to 1856. During this period he was an announced presidential candidate of the Whig, Free Soil and Republican parties and mentioned by some members of the American party. On a superficial basis, it would appear that this it merely indicative of McLean's gadfly efforts to gain the presidency. Such an interpretation, however, fails to appreciate fully the context of the times and, most importantly, the strength of McLean's philosophy.

The 1840s and the 1850s were a period of transition--of change. The existing political structure of the United States was forced to confront many intense issues, most notably expansion, immigration and slavery. As this confrontation occurred, political parties rose and fell, and men moved from party to party as their interests and consciences dictated. John McLean was among this incalculable mass.

What made McLean different was not his desire for the presidency, for this preoccupation was shared by many, such as Clay, Calhoun, Chase and Seward. The difference lay in McLean's dedication to his own philosophy, for as he attempted to maintain it, he was forced to attempt to balance these principles--conservatism, dedication to the American legal tradition and antislavery sentiments--and this balancing act resulted in confusion which led people to misunderstand him

and oppose his efforts for the presidency. Contrary to what many have said and written, if McLean's only interest was to become president, he could and would have simply set aside any philosophical impediments, avoided the confusion, and he would have been president. Instead John McLean remained true to his philosophy and never became president.

1. The biographical material found in the "Introduction" is a Life of John McLean: A Politician on the United States Supreme Court, (New York: DeCapo Press, 1971). This work discusses McLean's life with particular attention to his court years and his efforts to win the presidency. The author, however, does not discuss or offer any explanation for McLean's involvement with the political forces of his time, such as the Know Nothings, Free Sellers and Republicans. Hopefully, this thesis will provide some insight into McLean (without becoming too speculative) which can explain his political relationships. See also Dumas Malone, ed., *Dictionary of American Biography*, (New York: Charles Scribner's Sons, 1935), XII, 127.

2. The War Hawks were Republican members of the Twelfth Congress (in 1811) who under the leadership of Henry Clay, John C. Calhoun, Langdon Cheves and William Lowndes advocated war with Great Britain. For a discussion of this group see Donald R. Hickey, *The War of 1812: A Forgotten Conflict*, (Urbana, IL: University of Illinois Press, 1989), 304 n.8.

3. Weisenburger, *The Life of John McLean*, 28-29.

4. Charles F. Adams, ed., *Memoirs of John Quincy Adams*, (Philadelphia: J. B. Lippincott & Co., 1847-1877), VII, 343.

5. Charles Hammond to Henry Clay, 4 January 1826, James F. Hopkins and Mary W. M. Hargreaves, eds. *The Papers of Henry Clay*, (Lexington: University Press of Kentucky, 1973) Vol. 5, 7-8; Sam Houston to Andrew Jackson, 4 February 1827, John Spencer Bassett, ed. *Correspondence of Andrew Jackson*, (Washington: Carnegie Institute of Washington, 1928; reprinted New York: Kraus Reprint Co., 1969) Vol. 6/7, 492.

6. Calhoun to Christopher Vandevanter, 25 December 1830, Clyde N. Wilson, ed. *The Papers of John C. Calhoun*, (Columbia: University of South Carolina Press, 1978), Vol. 11, 96.

7. Calhoun to Samuel Ingham, 25 May 1831, *ibid.*, Vol. 11, 193.

8. Calhoun to Vandevanter, 5 August 1831; Calhoun to Virgil Maxcy, 5 August 1831, *ibid.*, Vol. 11, 450, 452.

## ENDNOTES

9. Weisenburger, *Life of John McLean*, 87-88.
10. Notes sent to Jackson, 11 October 1831, Basset, ed., *Correspondence of Andrew Jackson*, Vol. 4, 250, 253.
11. Weisenburger, *Life of John McLean*, 83-86.

## Chapter 1.

1. The biographical material found in the "Introduction" is taken from Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court*, (New York: DeCapo Press, 1971). This work discusses McLean's life with particular attention to his court years and his efforts to win the presidency. The author, however, does not discuss or offer any explanation for McLean's involvement with the political forces of his time, such as the Know Nothings, Free Soilers and Republicans. Hopefully, this thesis will provide some insight into McLean (without becoming too speculative) which can explain his political relationships. See also Dumas Malone, ed., *Dictionary of American Biography*, (New York: Charles Scribner's Sons, 1935), XII, 127.
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3. Weisenburger, *The Life of John McLean*, 28-29.
4. Charles F. Adams, ed., *Memoirs of John Quincy Adams*, (Philadelphia: J. B. Lippincott & Co., 1847-1877), VII, 343.
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6. Calhoun to Christopher Vandevanter, 25 December 1829, Clyde N. Wilson, ed. *The Papers of John C. Calhoun*, (Columbia: University of South Carolina Press, 1978), Vol. 11, 90.
7. Calhoun to Samuel Ingham, 25 May 1831, *ibid.*, Vol. 11, 393. LC.
8. Calhoun to Vandevanter, 5 August 1831; Calhoun to Virgil Maxcy, 6 August 1831, *ibid.*, Vol. 11, 450, 452.

9. Weisenburger, *Life of John McLean*, 82-83.
10. Notes sent to Jackson, 11 October 1831, Basset, ed., *Correspondence of Andrew Jackson*, Vol. 4, 250, 355.
11. Weisenburger, *Life of John McLean*, 85-86.
12. *Ibid.*, 91.
13. *Ibid.*, 99, 105.

## Chapter 2.

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2. *Ibid.*, V. 9, p. 857.
3. *Ibid.*, V. 9, p. 865.
4. Horace Greeley to Henry Clay, 15 November 1846, *ibid.*, V. 10, p. 290.
5. *Ibid.*, 30 November 1846, V. 10, p. 382.
6. Edward Bates to McLean, 12 February 1843, McLean Mss., Library of Congress (hereinafter referred to as "LC").
7. Calvary Minor to McLean, 15 January 1844, McLean Mss., LC.
8. Herman Lincoln to McLean, 16 March 1844, McLean Mss., LC.
9. McLean to John Teesdale, 27 March 1846, McLean Papers, Ohio Historical Society (hereinafter referred to as "OHS").
10. Calvary Morris to McLean, 20 November 1844, McLean Mss., LC.
11. James Dunlop to McLean, 29 November 1844, McLean Mss., LC.
12. Calvary Morris to McLean, 29 January 1845, McLean Mss., LC.
13. Humphrey Marshall to McLean, 19 November 1845, McLean Mss., LC.
14. *New York Telegraph*, quoted in the *Cincinnati Gazette*, 21 September 1846, p. 1, col. 4.

15. Cincinnati Gazette, 30 October 1846, p. 1, col. 4. LC.
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18. This background material is taken from Ray Allen Billington, *The Protestant Crusade 1800-1860: A Study of the Origins of American Nativism*, (New York: The Macmillan Company, 1938).
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22. John C. Calhoun to Joseph Swift, 2 February 1828, W. Edwin Hemphill, ed., *The Papers of John C. Calhoun*, (Columbia: University of South Carolina Press, 1976), X, 343.
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24. McLean to Elisha Whittlesey, 6 February 1847, Elisha Whittlesey Papers, Western Reserve Historical Society (hereinafter referred to as "WRHS").
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83. Charles Sumner to McLean, 31 July 1848, McLean Mss., LC.
84. S. P. Chase to McLean, 2 August 1848, McLean Mss., LC.
85. S. P. Chase to McLean, 2 August 1848, McLean Mss., LC.

86. H. W. Stanton to McLean, 28 July 1848, McLean Mss., LC; W. H. P. Denny to McLean, 29 July 1848, McLean Mss., LC; Charles Sumner to McLean, 31 July 1848, McLean Mss., LC; Ripley group to McLean, 2 August 1848, McLean Mss., LC; Salmon P. Chase to McLean, 2 August 1848, McLean Mss., LC; James W. Taylor to McLean, 3 August 1848, McLean Mss., LC; C. Vaughn to McLean, 3 August 1848, McLean Mss., LC; Salmon P. Chase to McLean, 4 August 1848, McLean Mss., LC.

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7. Dr. James Prettyman to John McLean, 21 November 1854, McLean Mss., Library of Congress.

8. Hector Orr to John McLean, 23 November 1854, McLean Mss., Library of Congress.

9. Cienapp, *The Origins of the Republican Party*, 160-166, for a concise statement of the Whig defeat of 1854.

10. McLean's interest in the Know Nothings was not unique. Many politicians, such as Simon Cameron of Pennsylvania and former President Millard Fillmore, who had not achieved the political success that they desired, moved into the American party. In fact, Michael Holt believes that this influx of opportunistic politicians is one of the causes of the demise of the Know Nothings, Holt, *Political Crisis of the 1850s*, 174.

11. National Antislavery Standard, 17 January 1856, p. 2, col. 1.

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10. McLean's interest in the Know Nothings was not unique. Many politicians, such as Simon Cameron of Pennsylvania and former President Millard Fillmore, who had not achieved the political success that they desired, moved into the American party. In fact, Michael Holt believes that this influx of opportunistic politicians is one of the causes of the demise of the Know Nothings, Holt, *Political Crisis of the 1850s*, 174.

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