



EX POST

Baseball cards, vinyl records, snow globes, and fidget spinners all have “value expressible in terms of money.” Even that “priceless” Picasso has a price. Really, almost *anything* can be reduced to a “value expressible in terms of money.” But in ordinary usage does “money” mean almost *everything*?

Neil M. Gorsuch

Wisconsin Central Ltd. v. United States,
138 S.Ct. 2067 (2018)



A GLOBAL INVESTIGATION

Bryan Gividen

The back cover of our Autumn 2019 issue featured this picture . . .



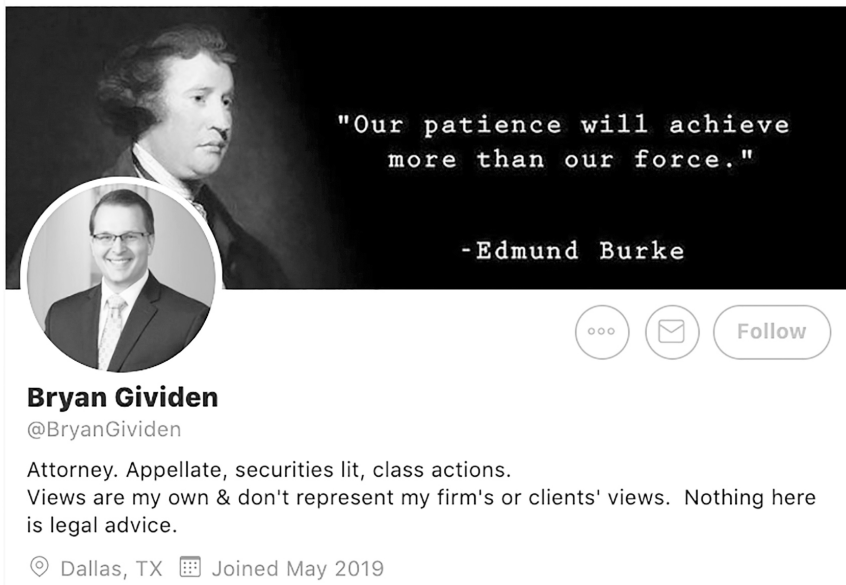
. . . with this caption: “Coming in 2020. We’ve been waiting a long time for a reason to make this.” Many of our readers assumed, quite reasonably, that this was a preview of a John McLean bobblehead doll. In recent years we have made several bobbleheads of past and present members of the U.S. Supreme Court, and this does look a bit like McLean (which is a relief, since it is indeed supposed to be him), who served on the Court from 1829 to 1861. Speculation began among readers, as it sometimes does when a picture of a new bobblehead appears, about possible symbolic significances of details in the portrayal of the character and of the accompanying accoutrements. One of the

Bryan Gividen practices in the Dallas office of Vinson & Elkins. Copyright 2020 Bryan Gividen.

Bryan Gividen

details with which we were most pleased in this instance – mostly because of the numerous interesting and obscure observations invited – was the small volume of the *United States Reports* under McLean's left arm. But alas, before we could deliver a clever reveal, astute reader Bryan Gividen did a better job of it than we could have. He took to Twitter and delivered the thread of superbly useful and entertaining reasoning reproduced below.

— The Editors



A Global Investigation



Bryan Gividen
@BryanGividen

Latest edition of the Green Bag is promoting it's 2020 Bobblehead, which appears to be Justice John McLean. I love this pick, but I think @GB2d may have made a typo (or it is being 14-dimensional-chess clever).

More in the thread. /1



COMING IN 2020. WE'VE BEEN WAITING
A LONG TIME FOR A REASON TO MAKE THIS.

12:58 PM · Jan 28, 2020 · Twitter Web App



Bryan Gividen
@BryanGividen

The best part about Justice McLean is his dissent in *Dred Scott*. It uses standard tools of originalist interpretation to come to the right result. It is a hall-of-fame dissent based on reason and logic instead of prejudice and passion. /2

scholar.google.com

Dred Scott v. Sandford, 60 US 393 - Supreme Court 1...

of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The first section of the second article of the Constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest, ⁵⁷⁷ and thus to continue British subjects. (*McIlvain v. Cox's Lessee*, 4 Cranch, 209; *Inglis v. Sailors' Snug Harbor*, 3 Peters, p. 99; *Shanks v. Dupont*, *Ibid*, p. 242.)

The Constitution having recognised the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

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@BryanGividen



Justice McLean also wrote the opinion in *Wheaton v Peters*. Long before the US reports reported SCOTUS decisions, the Court contracted individuals to report the decisions. Peters was a reporter who revised a previous reporter's (*Wheaton's*) work and reissued the old opinions. /3

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@BryanGividen



With a new addition out, *Wheaton* realized demand for his copies would drop and he would lose out on new sales. So he sued. Justice McLean wrote for the court and held that individuals cannot hold copyright in the Court's opinions, giving Peters the win. /4

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Bryan Gividen
@BryanGividen



If you think this seems arcane and outdated, think again. This term, one of my colleagues, Josh Johnson, argued to SCOTUS about the meaning of *Wheaton v Peters*. Check him out: oyez.org/cases/2019/18-... /5

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Bryan Gividen
@BryanGividen



Which brings me to @GB2d's potential error. Notice the book Bobblehead McLean is holding? That seems to say US 8 (1834). I think that's supposed to point to *Wheaton v Peters*, which was decided in 1834. Here is the problem... /6



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A Global Investigation



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@BryanGividen



When Wheaton v Peters was decided, the US reports still wasn't around. Peters was still writing reports and making bank, like the contracted reporters before him. Every time a new reporter came on the scene, the volume numbers started over. /7

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Bryan Gividen
@BryanGividen



When the US reports came around in the late 1800s, it went back and designated the previous volumes with US reports numbers. Which brings us back to Bobblehead McLean... /8

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Bryan Gividen
@BryanGividen



The volume number 8 on the reporter matches the original Peters volume-numbering - not the US volume numbering. But the reporter on the book is styled US, which I think is an anachronistic mismatch. (If the US reports numbering was used, it would be 33.) /9



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Bryan Gividen
@BryanGividen

So this is either a typo, or @GB2d is going super meta on Wheaton v Peters and seeing if we are witty enough to keep up. (Or I've just missed something completely and this a terribly constructed Sonia Sotomayor bobblehead.) /end

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Bryan Gividen
@BryanGividen

Addendum: @GB2d, if this was some sort of National Treasure inspired contest, I will willingly take payment in the form of a Scalia and Ginsburg Bobblehead.

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There is, however, one flaw in Gividen's reasoning. He assumes he is writing about a picture of a bobblehead. But it is not a bobblehead. It is a snow globe — our first foray into this field of toymaking. We are, however, bringing to snow globes the same design principles that we have long applied to bobbleheads.¹ And so, while Gividen is wrong in one respect (through no fault of his own — from the picture we printed it was not obvious that McLean was awash in filtered water rather than a-bobble in fresh air), his good scholarship and good spiritedness are spot on.

— The Editors



¹ See greenbag.org/globes/globes.html.