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Lincolnian Natural Right, Dred Scott, and the Jurisprudence of John McLean*

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John McLean's opinion in Dred Scott v. Sandford *(1857) has been considered by most scholars as the weaker of the case's two dissenting opinions. McLean's presidential ambitions were well known, and, as a consequence, much of the moral language employed in his opinion has been interpreted as* obiter dictum *directed at placating the abolitionist sentiment of the emerging Republican Party. In this essay, I argue that much of the contemporary criticism of McLean's opinion is ill-founded. Don Fehrenbacher's observation that McLean's opinion is not as "thorough, scholarly, and polished" as the fellow dissent of Benjamin Curtis seems, in some sense, to be correct; nevertheless, McLean offers a powerful challenge to some key aspects of Curtis's celebrated dissent. Specifically, McLean shares in common with Lincoln a theory of constitutional aspiration and an understanding of natural right that is absent from Curtis's opinion and that compels McLean to differ from Curtis on the Fifth Amendment question.*
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Introduction

"Our independence was a great epoch in the history of freedom," asserted the anti-slavery jurist John McLean in response to the Court's limited and

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racist interpretation of the significance and meaning of the Declaration of Independence in *Dred Scott v. Sandford* (1857). In what has come to be considered the majority opinion, Chief Justice Taney sought to establish "too clear[ly] for dispute" the prevailing animus toward members of the African race during the founding era, the intent of the constitutional framers to exclude members of that "unfortunate" race from political society, and the acquiescence of the Founders to—and their participation in—a system of race-based chattel slavery that was already well established in the states by 1776 and was left untouched by the events of 1787. McLean, while conceding that the "Government was not made especially for the colored race," nonetheless noted that as a matter of historical fact "many of them were citizens of the New England States, and exercised the rights of suffrage when the Constitution was adopted." Yet quite independent of any historical squabble over the intentions and motivations of those men who wrote the document, McLean asserted that "all slavery has its origin in power, and is against right."[1]

Perhaps the moral indignation evident in McLean's dissent has rendered it less serious to scholars, who nearly universally have considered it the weaker of the case's two dissenting opinions. McLean's presidential ambitions were well known, and, as a consequence, much of the moral language employed in his opinion has been interpreted as *obiter dictum* directed at placating the abolitionist sentiment of the emerging Republican Party. A brief survey of some of the relevant literature reveals that McLean's dissent "was not an impressive legal document,"[2] that it contained "more emphasis than logic,"[3] exhibited "more bluster than sound reasoning,"[4] and marshaled arguments that were both "erroneous and beside the point."[5] Moreover, scholars have identified the impetus behind McLean's second-rate judicial opinion—with its "seemingly gratuitous assaults on the institution of slavery"[6]—as the Ohio justice's "blind[ing] . . . political ambition,"[7] which compelled him always to keep "one eye on the Constitution and another on political fortune."[8]

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1. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) at 537 (McLean, J., dissenting).
2. James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers* (New York: Simon and Schuster, 2006), 127.
3. David M. Potter, *The Impending Crisis: 1846–1861*, ed. Don Fehrenbacher (New York: Harper and Row, 1976), 278.
4. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* (Chicago: University of Chicago Press, 1985), 279.
5. Edward S. Corwin, "Dred Scott," in *The Doctrine of Judicial Review*, ed. Corwin (Princeton: Princeton University Press, 1914), 145.
6. Earl Maltz, *Dred Scott and the Politics of Slavery* (Lawrence: University of Kansas Press, 2007), 132.
7. Frank H. Hodder, "Some Phases of the Dred Scott Case," *Mississippi Valley Historical Review* 16 (June 1929): 22.
8. Donald Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (Westport, CT: Praeger Publishers, 1992), 441.

In this essay, I seek to recover an appreciation for the depth and importance of the constitutional vision articulated by McLean in his *Dred Scott* dissent. To this end, I note the great affinity between McLean's opinion and certain aspects of Lincoln's constitutional thought. It perhaps should be noted that in appealing to the opinions of Lincoln on this subject, I am neither proffering an *argumentum ad verecundiam* in favor of McLean nor am I claiming that Lincoln's arguments regarding *Dred Scott* are somehow indebted to McLean's dissent (though certainly Lincoln was familiar with the various opinions in the case). Rather, I reference Lincoln's subsequent comments on the *Dred Scott* case in order to illuminate some of the principles at work in the antebellum antislavery movement generally and in McLean's dissenting opinion specifically. In particular, I argue that McLean shares in common with Lincoln an aspirational theory of the Constitution and an understanding of natural right that are both absent from Curtis's dissenting opinion and that compel McLean to differ from Curtis on the Fifth Amendment question.[9] Additionally, I argue that it is inadequate to treat McLean's opinion as "political rather than legal."[10] In his discussion of the nature of law and constitutional aspirations, as well as property rights and the humanity of the slave, McLean makes several arguments that add substantive content to "the keen discrimination and masterly reasoning of Curtis"[11] while simultaneously challenging some key aspects of Curtis's constitutional thought. Contemporary scholarship celebrates both Lincoln's opposition to the *Dred Scott* case and Curtis's dissenting opinion, but it often casts a skeptical eye on the arguments made by McLean. The scholarly literature strikes a discordant note in praising

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9. For a history of the case, see Don E. Fehrenbacher, *Slavery, Law, & Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981). The parties to the case agreed on these facts: Mr. Scott was a Missouri slave who traveled with his master to the free state of Illinois and the free territories north of Missouri. Scott later returned with his master to Missouri where he sued for his own freedom, alleging that his residence in a free territory effectively manumitted him from his former state of slavery. After his master's death, Scott's ownership was transferred to a citizen of New York, and the case entered the federal court system under the diversity of citizenship requirement for federal law suits (U.S. Const., Art. 3 §2). On the preliminary question of jurisdiction, Taney considered whether Scott was a citizen within the meaning of the word "citizen" as it is used in the Constitution. Because part of Scott's claim to the status of citizen rested on his prior claim that he was made free by his residence in free federal territories, Taney considered whether the piece of legislation (i.e., the Missouri Compromise of 1820) that barred slavery from the territories was constitutional. When considering the constitutionality of the Missouri Compromise, moreover, Taney inquired into whether the Fifth Amendment's protection against deprivation of property without due process of law prevented the national government from prohibiting slave property in the federal territories. Taney argued that it did: Justices Curtis and McLean dissented from Taney's conclusion, but, as I argue, they did so for substantially different reasons.

10. Roy F. Nichols, review of *The Life of John McLean: A Politician on the Supreme Court* by Francis Weisenburger, *The Mississippi Valley Historical Review* 25 (June 1938): 113.

11. *Memorial Biographies of the New England Historical-Genealogical Society*, Vol. IV (1885), 275. Quoted in Francis P. Weisenburger, *The Life of John McLean* (Columbus: The Ohio State University Press, 1937), 187.

Lincoln while dismissing McLean, and, for that reason, a reevaluation of McLean is warranted.

I also make the normative argument that much of the criticism of McLean's opinion rests on an inchoate view of law that is dismissive of natural law reasoning.[12] Laying aside all conjectures as to the influence of McLean's political ambitions upon his judicial motivation, I evaluate his *Dred Scott* dissent in light of a more nuanced model of law. For this task, I particularly rely on certain insights from John Finnis's discussion of legal injustice.[13] Don Fehrenbacher's observation that McLean's opinion is not as "thorough, scholarly, and polished"[14] as Curtis's seems, in some sense, to be correct; nevertheless, within his somewhat desultory opinion, McLean both supplements and challenges Curtis's legal reasoning.

In the first section of this essay, I discuss the nature of law through a framework that relies on one aspect of John Finnis's natural law theory, which claims in part that what is "legal" is not limited to positive law but extends, in its focal sense, to what is just and unjust *simpliciter*. In the second section, I use this framework to analyze the theory of constitutional aspiration as it is put forward by McLean and Lincoln, respectively. In the third section, I then analyze the respective arguments put forward by McLean and Lincoln regarding the nature of man and the logic of substantive property rights in the Fifth Amendment. Throughout the paper, I contrast the McLean–Lincoln argument with the argument put forward by fellow dissenter Benjamin Curtis. In the fourth section, I conclude that the moral-philosophical aspect of the McLean–Lincoln position is an essential supplement, and at times a challenge, to Curtis's institutional–historical approach.

The Nature of Law

Given McLean's frequent use of natural rights language and his sometimes explicit appeal to the natural law tradition, it is perhaps appropriate to note that within the context of eighteenth- and nineteenth-century Anglo legal philosophy, "propositions of natural law or natural justice had an accepted, nonrevolutionary role to play."[15] The nonrevolutionary character of McLean's natural law

12. Part of my argument is that the influence of legal positivism has led to an unwarranted characterization of McLean's opinion as less "legal" than Benjamin Curtis's opinion. Scholars in the legal positivist school are suspicious of any moral claim made in the process of legal reasoning that is based on an authority collateral to the posited or implied intra-systemic legal rules or principles. Accordingly, many of McLean's arguments are dismissed as "political" or "emotional" or otherwise less than "legal." McLean's biographer, for instance, asserted that that his "judicial policy implied a flexibility in the application of the law that . . . left the door open especially to opinions based upon emotional reactions." See Weisenburger, *The Life of John McLean*, 228.

13. See John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 351–67.

14. Fehrenbacher, *Slavery, Law and Politics*, 221.

15. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Have: Yale University Press, 1975), 17.

jurisprudence is most evident in cases where he perceives a clear disjuncture between what the law requires and what is just.[16] Quoting approvingly from the case of *Rankin v. Lydia*, McLean writes in his *Dred Scott* dissent, "In deciding the question, (of slavery), we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be."[17] Yet even within McLean's "retreat to formalism"—such as his assertion that the judge should decide the law as it is rather than as it ought to be—natural law reasoning plays a foundational jurisprudential role.[18] As Robert Cover notes, ". . . the natural law tradition was more important for what it said about law than for what it said as law."[19] And although McLean likely was more familiar with the distinctly modern natural law theories of the seventeenth and eighteenth centuries, still there is a philosophical strand running through the whole of the natural law tradition that sheds light on McLean's foundational premises concerning the convoluted question, "What is law?"

It is a famous caricature of natural law theory that the theory itself may be summed up by the words of Augustine, given force by Aquinas, that "an unjust law seems to be no law at all."[20] Yet a sympathetic stance toward the theory of natural law coupled with a careful examination of concrete examples of legal injustice will reveal that this phrase represents the way in which one and the same grammatical form (e.g., "law") may assume different meanings in different contexts. Perhaps the inadequacy of understanding natural law theory simply as the phrase "*lex injusta non est lex*" lies in the tendency of such an understanding to collapse the necessary distinction between the various senses of the word "legal," thus collapsing the necessary distinction between what is, in some sense, "legal" and what is "just."[21]

In his discussion of natural law and legal injustice, Finnis further distinguishes analytically between various types of normative statements, such as the statement that some laws are not laws at all. For example, Finnis argues that one who makes

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16. For an in-depth treatment of the moral–formal dilemma faced by antislavery jurists, see Cover, *Justice Accused*, 197–267: ". . . the judge's problem in any case where some impact on the formal apparatus could be expected, was never a single-dimensioned moral question—is slavery or enslavement, or rendition to slavery, morally justified or reprehensible? Rather, the issue was whether the moral values served by antislavery (the substantive moral dimension) outweighed interests and values served by fidelity to the formal system when such values seemed to block direct application of the moral or natural law proposition" (197).

17. *Dred Scott* at 562 (McLean, J. dissenting), quoting from the Kentucky Court of Appeals, 1820 (2 A.K. Marshall's Rep.). McLean cites this case within his discussion of the locality of slavery.

18. See Cover, *Justice Accused*, Part II: "Rules, Roles, and Rebels: Nature's Place Disputed," 119–92.

19. Cover, *Justice Accused*, 19.

20. See Thomas Aquinas, *Summa Theologica*, I–II, Q.95, A.II.

21. See Finnis, *Natural Law and Natural Rights*, 364. "For the statement is either pure nonsense, flatly self-contradictory, or else it is a dramatization of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term 'law' [i.e., *simpliciter*] notwithstanding that it is law in a secondary sense of that term [i.e., *secundum quid*]."

a normative statement about law may intend to assert one of three meanings within one and the same grammatical form:

> (S_1) what is justified or required by practical reasonableness *simpliciter* [i.e., what is "just"], or (S_2) what is treated as justified or required in the belief or practice of some group, or (S_3) what is justified or required *if* certain principles or rules are justified (but without taking any position on the question whether those principles or rules *are* so justified).[22]

With these distinctions in mind, the proposition "an unjust law is not law" becomes less enigmatic: The statement is asserting that (S_2/S_3) a rule has the status of law in a given community; that the community's law is judged to be unjust by a source collateral to the legal system itself; and, therefore, that an unjust law is not (S_1) law in the focal sense of the word because it commands what is unjustified by practical reasonableness (i.e., it commands one to do what one ought not to do). Or, in other words, the statement is asserting (S_2) that some law has obtained force in the community through the administration of the municipal law and/or (S_3) that such a law is justified or required according to some set of intra-systemic legal rules or principles, yet (S_1) the law is without foundation in justice or natural right.

I mention the different possible connotations of the same grammatical form "law"—and the application of this distinction to the classical formula "*lex injusta non est lex*"—in order to emphasize a broader way of thinking about law that permeates McLean's dissenting opinion. When McLean asserts in protest to Taney's Due Process argument that "the slave is not mere chattel," he is making an (S_1) assertion without regard to whether or not the slave, from the (S_2/S_3) perspective, is merely chattel. McLean recognizes, for instance, that fugitive slave laws have force according to the Constitution and that the municipal laws of various communities under the Constitution sanction systems of chattel slavery; yet, McLean's statement that the slave is more than just property is not in any way inconsistent with Justice Curtis's assertion that whether or not "the slave is known to the law simply as chattel, with no civil rights" is determined by the municipal law in force. As it happens, McLean also agrees with Curtis against Taney that the right to property in a slave is neither distinctly nor expressly affirmed in the Constitution and that Congress in its regulation of the federal territories has never considered any such property right to be so enshrined.[23] It is important to keep in mind that McLean, while considering the requirements of the law, frequently

22. Finnis *Natural Law and Natural Rights*, 365.

23. To demonstrate the analytical separation of these perspectives, consider that Chief Justice Taney and the Garrisonian abolitionists *both* considered (S_2) the right to property in a slave to be "distinctly and expressly affirmed in the Constitution" while disagreeing on the (S_1) reasonableness or justness of slavery itself.

shifts from one of these three viewpoints to another, often asserting multiple types of normative statements within the same discussion.

It is precisely because McLean thinks the intra-systemic legal rules laid down by the Constitution do not sanction and enforce a right to own property in slaves that he assents to the justness of the legal order itself. Or, as Cover notes in a somewhat Lincolnian allusion:

> A judge like John McLean respected the formal structure of his role because of a faith in the ultimate necessity and utility of a legal system with integrity. But that respect was founded in large part on a firm conviction that the Constitution—the ultimate source of formalism—was not itself committed to slavery. It was that conviction that was at the heart of his dissent in *Dred Scott*.[24]

McLean recognizes that the polity's present sins are in some sense codified in its formal legal order even while he asserts that the formal legal order itself provides the materials necessary for the polity's future redemption.[25] In a certain respect, then, McLean shares an important premise with Lon Fuller: "If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss the mark."[26] For McLean, no less than Lincoln, the general direction of human effort represented by the Constitution is toward liberty; slavery is anomalous to the liberal aspirations of the constitutional order and, as such, is illegitimate in principle even while obtaining force through local legislation.

Natural Law and the Theory of Constitutional Aspiration

The theory of constitutional aspiration is a theory of constitutional interpretation that emphasizes the moral foundations of American constitutionalism and views American constitutional development, in part, as the progressive realization of the axioms of the American Founding.[27] As the various opinions in *Dred Scott* make clear, however, there are ambiguities and even injustices codified in varying degrees in the Constitution. Indeed, the interpretive difficulty

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24. Cover, *Justice Accused*, 209.

25. For a similar discussion, in a different context, see J.M. Balkin, "Agreements with Hell and Other Objects of Our Faith", *Fordham Law Review* 65 (1997): 1703–38.

26. Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (February 1958): 632.

27. The theory of constitutional aspiration, as it is used in this context, should be distinguished from aspirational theories that self-consciously reject the principles of the Declaration of Independence and the Constitution of 1787 and/or deny the relevance of nature as a source of moral norms.

is compounded by the existence of competing liberal and illiberal constitutional commitments.[28] Still, the aspirational claims of a jurist like McLean are, first, that one need not remain neutral with respect to competing and even disparate aspects of the constitutional order and, second, that the constitutional text is predominantly committed to true principles of right. Moreover, the most famous exposition of this position is found in the celebrated debates between Abraham Lincoln and Stephen Douglas. In his exchange with Douglas, Lincoln argued that the Supreme Court's ruling in *Dred Scott* did not fully settle the constitutional question, in part because the Court rejected true principles of natural right, which serve to undergird the logic of the constitutional text.

Constitutional Aspirations in Dred Scott

The positions taken by Taney and McLean (and, to a lesser extent, Curtis) concerning the meaning and purpose of certain pre-constitutional principles with respect to American citizenship and slavery are precursors to those great senatorial debates between Lincoln and Douglas. According to Taney, colonial laws regarding the status of the African race support, and the intent and practice of the signers of the Declaration of Independence affirm, the claim that the sovereign political body created by the Constitution of 1787 did not—nor could it ever—include Africans held in slavery. Moreover, members of this class of persons did not constitute foreigners such that they might be naturalized by congressional legislation. Rather, they were an altogether separate class, neither members of the sovereign body nor members of a foreign nation. Being esteemed by the colonists to be "so far inferior, that they had no rights which the white man was bound to respect . . . [Africans] were bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[29] Given that the system of race-based chattel slavery continued throughout the revolutionary era, it was inconceivable to Taney that the Founders intended to declare—or even to entertain the possibility of—the equality (political or otherwise) of members of the African race, who lived in a state of perpetual subordination and bondage to the continent's white inhabitants.

While conceding that the Declaration's language "would seem to embrace the whole human family," Taney nonetheless insisted that "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration."[30] The inconsistency

28. See, for example, Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1999) and Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006).

29. *Dred Scott* at 407 (Taney, J.).

30. *Dred Scott* at 407 (Taney, J.).

between the conduct of the authors of the Declaration and the great principle that "all men are created equal" was, for Taney, enough to prove that the Founders could not have meant what the plain construction of the language seemed to imply.

Curtis, I think, offers an adequate rejoinder to Taney's charge of inconsistency, though there are, no doubt, conflicting and convoluted historical sources:

> My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts.[31]

Yet what is perhaps more important for this inquiry is that Curtis disavows the relevance to the *Dred Scott* case of any such speculation over the intent of the authors of the Declaration. "As I conceive," Curtis writes, "we should deal here not with such disputes . . . but with those substantial facts evinced by the written Constitution of States, and by the notorious practice under them." Curtis's complaint against Taney is primarily that the Declaration is irrelevant to the construction of the legal rules at play in *Dred Scott*. If one is to inquire into whether Africans were meant, without exception, to be excluded from national citizenship, one need only examine the constitutions and practices of the original thirteen states. "And they show," Curtis claims, "in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution were citizens of those states."[32]

McLean agrees with Curtis's historical claim that "free colored persons" were admitted to citizenship in some states at the time of the Founding, but McLean does not treat the historical question of state policy as solely relevant. Responding to Taney's review of pre-revolutionary state policies enacted to enlarge and protect the slave trade, McLean declares, "We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country." While acknowledging the operation of illiberal principles in colonial America, McLean declines to afford such principles interpretive authority. Rather, when interpreting the Constitution, McLean writes, "I prefer the lights of Madison, Hamilton and Jay . . . than to look behind that

31. *Dred Scott* at 575 (Curtis, J. dissenting).
32. *Dred Scott* at 575 (Curtis, J. dissenting).

period, into a traffic which is now declared to be piracy, and punished with death by Christian nations." And the lights of Madison, Hamilton and Jay, McLean seems to suggest, will show that the Constitution itself is antislavery in its tendencies. "James Madison," he asserts, ". . . was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man." Moreover, McLean observes, "In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution."[33]

Within this discussion, McLean largely is silent regarding the meaning of the Declaration of Independence and its insistence that "all men are created equal." While Taney and Curtis engage in a short dialectic concerning the intent of the Founders with respect to those Jeffersonian principles, McLean simply declares that "our independence was a great epoch in the history of freedom." In his judicial opinion, McLean does not treat the text of the Declaration as determinative of the Founders' moral understanding. Rather, he limits himself to the era surrounding the Constitution's ratification, and he takes for granted what Hadley Arkes has described as "the principles of natural right that stood behind the Constitution, and guided even its compromises."[34] McLean finds evidence of the Founders' moral understanding in the "well-known fact that a belief was cherished by leading men, South as well as North, that the institution of slavery would gradually decline until it would become extinct."[35] While there were certainly historical elements at work during and before the Founding era that were opposed to the liberal principles championed by McLean, he insists that a principled preference for historical sources that embody true principles of right is hermeneutically legitimate: "If we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right."[36]

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33. *Dred Scott* at 537 (McLean, J. dissenting).

34. Hadley Arkes, "Natural Law and the Law: An Exchange," *First Things* (May 1992), 48.

35. Cf. Lincoln's argument that behind the constitutional compromises with the slave interest was the intention of the framers to place slavery on a path toward ultimate extinction: "I entertain the opinion upon evidence sufficient to my mind, that the fathers of this government placed that institution where the public mind did rest in the belief that it was in the course of ultimate extinction. Let me ask why they made provision that the source of slavery—the African slave trade—should be cut off at the end of twenty years? Why did they make the provision that in all the new territory we owned at that time slavery should be forever inhibited? Why stop its spread in one direction and cut off its source in another, if they did not look to its being placed in the course of ultimate extinction?" Lincoln's speech at Alton, in *The Complete Lincoln–Douglas Debates of 1858*, ed. Paul M. Angle, 2nd ed. (Chicago: University of Chicago Press, 1991), 384. Cf. Lincoln's speech at Chicago, *Lincoln-Douglas Debates*, 33, and Lincoln's speech at Charleston, *Lincoln-Douglas Debates*, 270.

36. *Dred Scott* at 538 (McLean, J. dissenting).

Within McLean's opinion, the *telos* of the American regime, in opposition to the opinions of both Taney and Curtis, is to be understood in terms of justice. Yet McLean was the inheritor of an American legal tradition that discounted "the notion that out beyond [the posited law] lay a higher law to which the judge *qua* judge was responsible."[37] As a matter of social fact, McLean conceded, slavery is sanctioned by the laws of the states, and the right to own property in a slave is protected by the municipal regulations of various jurisdictions within the United States. The Court, therefore, ought not to pronounce illegal what is "unquestionably" a legally established institution. Yet where there is a conflict of law situation or where the applicable legal rules are ambiguous, McLean's opinion seems to suggest that a judge may properly maintain a preference for what is just. Viewed within the "intellectual milieu that accepted the natural law tradition on slavery," McLean's jurisprudence may fitly be described as insisting that "slavery has no source in right, and the ultimate end (*telos*) of the law ought to be liberty."[38] When coupled with a commitment to judicial positivism, such a jurisprudence could not, by itself, decide any particular point of law; but such a jurisprudence, anchored in the tradition of natural law, nevertheless did breathe life into the judicial enterprise by recognizing an end or aspiration toward which it could strive. Soon after the *Dred Scott* ruling, such a theory of constitutional aspiration was taken up by Lincoln in the Senate campaign of 1858, where the principle issue in contention was slavery in the territories and the soundness of the *Dred Scott* decision.

Constitutional Aspirations in the Lincoln–Douglas Debates

"The long political duel between Stephen A. Douglas and Abraham Lincoln," observes Harry Jaffa, "was above all a struggle to determine the nature of the opinion which should form the doctrinal foundation of American government."[39] This struggle principally was concerned with the meaning and purpose of the proposition "all men are created equal," and Lincoln, no less than Douglas, centered the debate on the opinions expressed in *Dred Scott*. As Jaffa notes, "For Lincoln there was, indeed, 'only one issue,' but that issue was whether or not the American people should believe that 'all men are created equal' in the full extent and true significance of that proposition."[40] For Douglas, however, the central issue in the debate with Lincoln concerned the right of the people to maintain popular sovereignty over their own domestic institutions, including the institution

37. Cover, *Justice Accused*, 29.
38. Cover, *Justice Accused*, 30.
39. Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Chicago: University of Chicago Press, 1982), 308.
40. Jaffa, *Crisis of the House Divided*, 309.

of slavery: Douglas famously asserted his own indifference to whether or not slavery was voted up or down in a given community. But in so making popular sovereignty the central issue, Douglas was forced to deny explicitly the Lincolnian interpretation of the Declaration's meaning and significance.

The *telos* of the American regime was, for Douglas, the "great principle of self-government, which asserts the right of every people to decide for themselves the nature and character of the domestic institutions and fundamental law under which they are to live."[41] As David Zarefsky aptly notes, "Douglas . . . was not an amoral man. Rather, his highest moral value was procedural: the principle of local self-government, the right of each community to make its own decisions about its domestic affairs."[42] Yet in conceding that slavery was a matter reasonably resolved by the democratic process—and in expressing his "don't care" policy as to whether or not slavery was voted up or down—Douglas had to deny the full extent of the Declaration's insistence on human equality. "The signers of the Declaration of Independence," declared Douglas, "never dreamed of the negro when they were writing that document. They referred to white men, to men of European birth and European decent, when they declared the equality of all men."[43] Douglas did not go so far as to defend slavery as morally right; but he did find refuge for his position in asserting that neither the Declaration of Independence nor the great principle of self-governance declared it to be wrong. For Douglas, "moral judgment of the slaveholders was not a subject for political debate but was a matter for their consciences and their God."[44]

Lincoln accuses Douglas of inconsistently claiming that slavery could rightfully be voted up or down in a community, regardless of the moral status of slavery itself: "When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong."[45] While conceding that democratic self-governance is one of the great principles of the American regime, Lincoln declares that the principles of the Declaration antecede the Constitution

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41. Douglas's speech at Galesburg in *Lincoln-Douglas Debates*, 288.
42. David Zarefsky, foreword to *Lincoln-Douglas Debates*, xv.
43. Douglas's speech at Galesburg in *Lincoln-Douglas Debates*, 294.
44. Zarefsky, foreword to *Lincoln-Douglas Debates*, xvi. See, for example, Douglas's speech at Quincy, *Lincoln-Douglas Debates*: 351: "I hold that the people of the slaveholding states are civilized men as well as ourselves, that they bear consciences as well as we, and that they are accountable to God and their posterity and not to us. It is for them to decide therefore the moral and religious right of the slavery question for themselves within their own limits . . . . I repeat that the principle is the right of each state, each territory, to decide this slavery question for itself, to have slavery or not, as it chooses, and it does not become Mr. Lincoln, or anybody else, to tell the people of Kentucky that they have no consciences, that they are living in a state of iniquity, and that they are cherishing an institution to their bosoms in violation of the law of God. Better for him to adopt the policy 'judge not lest ye be judged.'"
45. Lincoln's speech at Quincy in *Lincoln-Douglas Debates*, 334.

and are "the principles and axioms of a free society."[46] And yet, Lincoln later reflected, the principles of the Declaration are "denied and evaded, with small show of success. One dashingly calls them 'glittering generalities'; another bluntly calls them 'self-evident lies'; and still others insidiously argue that they apply only to 'superior races.'"[47]

In the Lincolnian interpretation, the Declaration declares that all men, without exception, are created equal, and the Founders intended to assert that proposition in its most expansive meaning and significance. Nonetheless, for Lincoln, the real issue at stake in the debate over territorial expansion and slavery—a debate centered on the opinions in the *Dred Scott* case—is whether or not slavery is intrinsically right.

> You may turn over everything in the Democratic policy from beginning to end, whether in the shape it takes on the statute book, in the shape it takes in the *Dred Scott* decision, in the shape it takes in conversation or the shape it takes in short maxim-like arguments—it everywhere carefully excludes the idea that there is anything wrong in it.
>
> That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle.[48]

While slavery is legally established by local legislation, still it is contrary to right, and it is contrary to the Jeffersonian axioms declared by the Declaration of Independence, which undergird the logic of the constitutional text.[49] "Let us turn slavery from its claims of 'moral right,'" declared Lincoln, "back upon its existing legal rights, and its arguments of 'necessity.' Let us return it to the position our

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46. Abraham Lincoln, "The Principles of Jefferson: Letter to Henry L. Pierce and Others," April 6, 1859. In *Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings*, ed. Don E. Fehrenbacher (Stanford: Stanford University Press, 1964), 120.

47. Lincoln, "The Principles of Jefferson," 120.

48. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 393.

49. Lincoln on the relevant clauses in the Constitution: "Again; the institution of slavery is only mentioned in the Constitution of the United States two or three times, and in neither of these cases does the word 'slavery' or 'negro race' occur; but covert language is used each time, and for a purpose full of significance. . . ." [Lincoln goes on to discuss the language used in the 1808 Clause, the 3/5 Clause, and the Fugitive Slave Clause] ". . . . And I understand the contemporaneous history of those times to be that covert language was used with a purpose, and that purpose was that in our Constitution, which it was hoped and is still hoped will endure forever—when it should be read by intelligent and patriotic men, after the institution of slavery had passed from among us—there should be nothing on the face of the great charter of liberty suggesting that such a thing as negro slavery had ever existed among us." See Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 384–85.

fathers gave it; and there let it rest in peace. Let us readopt the Declaration of Independence, and with it, the practices, and the policy, which harmonize with it."[50] In Lincoln's interpretation, the Declaration of Independence and the Constitution of the United States—that "great charter of liberty"—are understood as incorporating enduring principles of justice that are substantively true even when they are existentially denied.[51] Or, to bring the point back to the *Dred Scott* case, the reason why the "judges were tragically mistaken," as Gary Jacobsohn argues, ". . . [was] precisely because they did not take the Constitution seriously; that is, they failed to acknowledge the moral dimensions of American constitutionalism."[52] The failure of the judges in this regard becomes most explicit within the discussion of property rights and the requirements of the Fifth Amendment.

Slavery and the Fifth Amendment

The Fifth Amendment stipulates that the Federal Government shall not deprive anyone of "life, liberty, or property without due process of law." In his opinion, Chief Justice Taney argues that the *due process* clause contains a substantive component, which ensures that a man may not be deprived of his property in slaves while entering the federal territories. McLean and Lincoln both interpret this provision as including a substantive component as well, yet the emphasis in their exegesis is not on the words *due process* so much as it is on the word *property.* According to both McLean and Lincoln, the Constitution presupposes a distinction between species of things that can be held *rightfully* as property and species of things—including rational beings—that cannot be held *rightfully* as property and which may only be held as such under a regime of local positive legislation.[53] In other words, it mattered immensely what was the substantive nature of the property being claimed for protection under the Fifth Amendment.

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50. Lincoln's speech at Peoria. Quoted in Paul M. Angle, "Introduction" to *Lincoln-Douglas Debates*, xxv.

51. Lincoln's speech at Springfield in *Lincoln-Douglas Debates*, 379: "I think the authors of that notable instrument intended to include all men, but they did not mean to declare all men equal in all respects. They did not mean to say all men were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what they did consider men created equal—equal in certain inalienable rights, among which are life, liberty and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They mean simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit."

52. Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, NJ: Rowan & Littlefield Publishers, 1986), 8.

53. Cf. U.S. Constitution, Art. 4 § 2: "No person held to service or labor in one State *under the laws therof* . . ." [emphasis added].

Nature and Property in Dred Scott

After discussing the nature of the federal government as a government of limited and enumerated powers, Chief Justice Taney declares:

> These powers, and others, in relation to rights of person, which it is not necessary to enumerate here, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[54]

In his treatment of Taney's Fifth Amendment argument, Curtis takes the position that the Constitution grants to the Federal Government the authority to enact general legislation respecting the territories. Because the Constitution is devoid of any specific provisions *protecting* slavery in the territories, it is reasonable to conclude that Congress has the power under the "needful rules and regulations" clause to limit or sanction slavery rights as it sees fit. The legal issue for Curtis, then, is whether

> . . . it can be shown, by anything in the Constitution itself, that when it confers on Congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it; [and if it can] I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.[55]

Concerning the guarantee against deprivation of property without due process of law, Curtis notes that this guarantee is based on Magna Carta and that

54. *Dred Scott* at 450 (Taney, J.).
55. *Dred Scott* at 621 (Curtis, J. dissenting).

prohibitions and restrictions on rights to certain species of property have been entertained by England as well as by all of the state legislatures (whose state constitutions also incorporate Magna Carta) and by the national legislature through the passage of the Northwest Ordinance and the Missouri Compromise. If the Founders intended to declare through the Fifth Amendment such a vested right to property in a slave, it is the first time that their intention has been so declared, and, if nothing else, custom has abolished whatever theoretical protection the Constitution gives to an individual's right to bring slaves into the territories.[56]

As Mark Graber notes in his recent book *Dred Scott and the Problem of Constitutional Evil*, Curtis "implicitly denied the constitutional right to bring personal property into the territories by treating persons seeking to bring slaves into the territories as demanding a special 'exception.'"[57] McLean, however, disagreed with Curtis over "whether persons had a constitutional right to bring personal property into the territories"; and, according to Graber, McLean "disputed Taney's conclusion only because the Ohio justice maintained that 'a slave is not mere chattel.'"[58] Graber's characterization of McLean's position on this point perhaps is uncharitable: while McLean certainly did maintain that "a slave is not mere chattel," he also based his argument against slavery in the territories on a nuanced understanding of the nature of the powers of the federal government and the nature of the right in question. "By virtue of what law is it," McLean asks, "that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress."[59] In making this argument, McLean implicitly sides with Taney's assertion that the federal government does not possess the authority to wantonly prohibit any property whatever from entering into the federal territories, and, as Graber suggests, part of the reason for his disagreement with Taney is his conviction that there is no rightful claim to property in another man because a man, by nature, is not "mere chattel." But McLean also appeals to the Constitution, to the state policies of Missouri and Illinois, to the common law, to international law, and to legal precedent in Britain and America, before he asks, "Will it be said that the slave is taken as property, the same as other property

56. *Dred* Scott at 627 (Curtis, J. dissenting). Curtis: "I think I may at least say, if the Congress then did violate Magna Charta by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition?"

57. Graber, *Dred Scott and the Problem of Constitutional Evil*, 61.

58. Graber, *Dred Scott and the Problem of Constitutional Evil*, 62.

59. *Dred Scott* at 548 (McLean, J. dissenting).

which the master may own? To this I answer, that colored persons are property by the law of the State, and no such power has been given to Congress."[60]

On this point, Curtis is agreed: "The constitution refers to slaves as 'persons held to service in one State, under the laws therof.' Nothing can more clearly describe a *status* created by municipal law . . . [and this court has declared in *Prigg v. Pennsylvania* that] 'The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws.'"[61] In their characterizations of the legal status of slavery, Curtis and McLean draw upon "the understandings that [run] back to the classic teachers of jurisprudence, on the difference between the natural law and the 'municipal,' or the positive law (the law that was posited, or set down, in a particular place)."[62] McLean's dispute with Curtis, then, is a dispute over the breadth and scope of the positive grant of power to the federal government: As a government of limited and enumerated powers, McLean argues, the federal government no more has the authority to prohibit slavery in local jurisdictions than it does to introduce slavery into federal jurisdictions. The "needful rules and regulations" clause does not abolish other constitutional restrictions that may be placed on the federal government by the text and design of the Constitution. According to McLean, it is the locality and artificiality of slavery ordinances—rather than the general power of the federal government—that legitimizes the Northwest Ordinance and the Missouri Compromise.[63]

To claim for the federal government such a sweeping grant of power over property rights would, for McLean, run counter to his understanding of the limited nature of the power conferred upon the federal government and would

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60. *Dred Scott* at 548 (McLean, J. dissenting). Cf. Lincoln at Charleston in *Lincoln-Douglas Debates*, echoing McLean's argument that a slave is not to be regarded in the same class as other "common matters of property": "The other way is for us to surrender and let Judge Douglas and his friends have their way and plant slavery over all the states—cease speaking of it as in any way a wrong—regard slavery as one of the common matters of property, and speak of negroes as we do of our horses and cattle" (270). Cf. Lincoln's speech at Quincy, in *Lincoln-Douglas Debates*, against Douglas's characterization of the nature of this property: "When he says that slave property and horse and hog property are alike to be allowed to go into the territories, upon the principles of equality, he is reasoning truly, if there is no difference between them as property; but if the one is property, held rightfully, and the other is wrong, then there is no equality between the right and the wrong; so that, turn it any way you can, in all the arguments sustaining the Democratic policy, and in that policy itself, there is a careful, studied exclusion of the idea that there is anything wrong in slavery" (334–35).

61. *Dred Scott* at 624 (Curtis, J. dissenting).

62. Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990), 44.

63. See Michael Zuckert, "Legality and Legitimacy in *Dred Scott*: The Crisis of the Incomplete Constitution," *Chicago-Kent Law Review* 82 (2007): 291–328. Zuckert argues that McLean's denial of the constitutional authority of the federal government to make slaves was an implicit denial of the constitutionality of the Missouri Compromise. I do not think this is McLean's claim, but Zuckert raises a strong point: If slavery can be established only by local law—and if Congress makes all "needful rules and regulations" for the territories—then it seems to follow that Congress has no authority to strike a compromise that would maintain a system of slavery in *some* of the federal territories.

frustrate the design and spirit of the Constitution. In the majority opinion, it was "said [that] the Territories are common property of the States, and that every man has a right to go there with his property." In McLean's dissent, "This is not controverted."[64] At the same time, McLean suggests that failure to discriminate between legitimate and illegitimate property would equally frustrate the design and spirit of the Constitution, for "property in a human being does not arise from nature or from the common law"; and the "Constitution, in express terms, recognizes the status of slavery as founded on the municipal law."[65] However, according to McLean, the majority opinion in *Dred Scott* asserts to the contrary that a slave is a common article of chattel—the same as "a horse, or any other kind of property"—and that each citizen has a right to bring his slave into the federal territories. McLean disagrees, but if a jurist is to discriminate between legitimate and illegitimate species of property, the question properly arises how one is to make such a distinction. Insomuch as there is any ambiguity or conflict in what the law may require, the answer for McLean, like Hamilton in a different context, is to be found in the "nature and reason of the thing."[66]

As I mentioned previously, Graber asserts that McLean disagrees with Taney's due process argument "only" because McLean "maintained that 'a slave is not mere chattel.'"[67] Graber is dismissive of this argument; but, like Lincoln, McLean thinks it matters immensely "whether a negro is *not* or *is* a man." Lincoln declared in his speech at Peoria, within the context of the debate over popular sovereignty in the territories, that "if [the slave] is not a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*?"[68] McLean asks this same question within the context of *Dred Scott*: If there is some property right that attaches to a man *qua* man (i.e., in the absence of local legislation), then is it not a total

64. *Dred Scott* at 549 (McLean, J. dissenting).

65. *Dred Scott* at 549 (McLean, J. dissenting). McLean, referring to the U.S. Constitution, Art. 4 § 3: "'No person held to service or labor in one State, under the laws thereof, escaping into another, shall' &c."

66. *The Federalist: A Commentary on the Constitution of the United States*, ed. Robert Scigliano (New York: Random House, 2000), 499. Hamilton in *Federalist* No. 78, speaking of the Federal Judiciary: "The exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing."

67. Graber, *Dred Scott and the Problem of Constitutional Evil*, 62.

68. Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers University Press, 1953), vol. 2, 265–66. Quoted in Arkes, *Beyond the Constitution*, 43.

destruction of property rights if the property itself *is* a man? For McLean, there can be no doubt as to the humanity of the slave: "He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."[69] Within the natural law tradition that McLean so heavily draws upon, as Arkes rightly notes, it was a common understanding that "human beings did not deserve to be ruled in the way that humans ruled dogs, horses, and monkeys. Creatures who could give and understand reasons deserved to be ruled through the giving of reasons, by a government that would seek the consent of the governed."[70] It was part of the nature and reason of the thing that a being "amenable to the laws of God and man"—a creature, in other words, that could give and understand reasons—was not "merely chattel." Whatever abstract property rights were presupposed by the Fifth Amendment, the right to own another man could not, by its very nature, have been among them.

Nature and Property in the Lincoln–Douglas Debates

Upon the question of vested property rights is perhaps where there is the greatest divergence between Douglas's insistence on the principle of popular sovereignty and Taney's declared "right to property in a slave." For if the Constitution protected slave property in the federal territories, slavery would cease to be a local institution. Douglas's solution to this problem was to declare the right of local communities to nullify the Court's decision by failing to provide legislation that would protect this particular type of property. When recast in this light, Lincoln charged, Douglas's interpretation of the *Dred Scott* decision became "the strongest abolition argument ever made."[71] If one is to argue that a right, enshrined in the Constitution, may be disregarded by local communities, then one "cannot avoid furnishing an argument by which Abolitionists may deny the obligation to return fugitives, and claim the power to pass laws unfriendly to the right of the slaveholder to reclaim his fugitive."[72] When the principles of Douglas's argument were applied in this way, Lincoln asserted, there had "never been as outlandish or lawless a doctrine from the mouth of any respectable man on earth."[73]

For Lincoln, the relevant question was whether or not the Court had decided *correctly* in *Dred Scott*; whether or not there was, in fact, a constitutional right to own another man. Lincoln intended to exploit the contradictory principles championed by Douglas (i.e., popular sovereignty in the territories *and*

69. *Dred Scott* at 549 (McLean, J. dissenting).
70. Arkes, *Beyond the Constitution*, 43.
71. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 395.
72. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 395.
73. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 394.

adherence to the Supreme Court's decision in *Dred Scott*), and he did so by emphasizing the nature of the right in question and by denying the persuasiveness of the Supreme Court's reasoning in the case. As Lincoln made clear, he believed "that the Supreme Court and the advocates of that decision may search in vain for the place in the Constitution where the right of property in a slave is distinctly and expressly affirmed."[74] But upon the question of the federal government's general power to curtail property rights in the territories, Lincoln sides with McLean over Curtis. The federal government does not possess an unlimited grant of power under the "needful rules and regulations" clause, and the nature of the property in question is wholly relevant to the legal discussion in *Dred Scott*: "When [Judge Douglas] says that a slave property and horse and hog property are alike to be allowed to go into the territories, upon the principles of equality, he is reasoning truly, if there is no difference between them as property; but if the one is property, held rightfully, and the other is wrong, then there is no equality between the right and the wrong . . . ."[75]

Like McLean, the reason Lincoln declares that a slave is not among that species of property "held rightfully" is because of his consideration of the nature and reason of the thing in question. The spirit that says to another man, "You work and toil and earn bread, and I'll eat it," Lincoln argues, is based upon a tyrannical principle "no matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race."[76] While the Founders of the American government intended to place slavery on a course toward ultimate extinction and the Constitution itself neither distinctly nor expressly affirms the right to hold property in men, the "real issue in this controversy—the one pressing upon every mind—is the sentiment on the part of one class that does look upon [slavery] *as a wrong*, and another class that *does not* look upon it as a wrong."[77] While such moral considerations are subject to the charge of "abstract reasoning," the thing at stake in this controversy, according to Lincoln, "is rather *concrete* than *abstract*."[78] Lincoln, no less than McLean, would have agreed with the assessment made by Jaffa a century later that the "attempt to legitimize the extension of slavery was impossible without denying the Negro's humanity or without denying the moral right of humanity or both."[79] And McLean, no less than Lincoln, thought that the illiberal principles behind the slave interest were too heavy for the Constitution to bear.

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74. Lincoln's speech at Galesburg in *Lincoln-Douglas Debates*, 309.
75. Lincoln's speech at Quincy in *Lincoln Douglas Debates*, 334–35.
76. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 393.
77. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 390.
78. Lincoln's speech at Springfield in *Lincoln-Douglas Debates*, 79–80.
79. Jaffa, *Crisis of the House Divided*, 313.

Conclusion: Lincolnian Natural Right and the Jurisprudence of John McLean

The reason McLean supports fidelity to the Constitution, even when the law is unambiguous in its accommodation of what is unjust, such as in the fugitive slave clause, is because of his conviction that the Constitution is essentially antislavery. In other words, fidelity to law is, for McLean, a moral consideration; the reason it is his duty to support the Constitution is because the Constitution incorporates moral understandings that are substantively just. McLean finds evidence for this in the text of the document, but his reading of that text is informed by a moral understanding that antecedes the Constitution; an understanding, shared by Lincoln, that

> the ground of right and wrong . . . in regard to slavery, could not depend on any moral judgments stipulated in the Constitution. The wrongness of slavery was rooted in the understandings of right and wrong that *preceded* the Constitution. Indeed, as Lincoln recognized, the right of human beings to be ruled only with their own consent was a necessary part of that moral ground on which the Constitution was founded.[80]

McLean, like Lincoln, withheld his support from the majority's decision in *Dred Scott* partly because he perceived that the decision ran counter to the moral understandings that undergirded American constitutionalism.

Nonetheless, the legal issues at stake in the *Dred Scott* decision are multi-tiered, and there are many facets that run beyond a simple consideration of justice. I do not intend to suggest that McLean reduces the legal question (merely) to a question of justice or injustice, policy or impolicy. The authority and jurisdiction of the Supreme Court, considerations of federalism and the separation of government powers, the legal and moral obligation of fidelity to law, constitutional design and the ground of constitutional rights, the scope of congressional power, the status of the federal territories, and the intent of the Framers with regard to territorial expansion are all questions that cannot be answered merely by an appeal to simple justice. Yet while substantially agreeing with Curtis on many of the legal questions at issue in *Dred Scott*, McLean's jurisprudence is unique in that it undertakes a serious consideration of the nature of law, constitutional aspirations, and property rights within the context of the humanity of the slave. While Curtis tenders a powerful dissent in *Dred Scott*, particularly with respect to the historical materials put forward by Taney, McLean challenges Curtis's opinion by incorporating a style of legal reasoning that was seemingly out of vogue on the High Court in 1857.

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80. Arkes, *Beyond the Constitution*, 44.

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Contemporary constitutional jurisprudence suffers from a dilemma that is foreshadowed by the *Dred Scott* case. In *The Supreme Court and the Decline of Constitutional Aspiration*, Jacobsohn questions what modern relevance is to be found in the eighteenth century idea of "inalienable rights," once the intellectual status of that doctrine is held in disrepute.[81] Similarly, Jaffa made this observation at the centennial of the Lincoln–Douglas debates:

> Modern social science appears to know neither God nor nature. The articulation of the world, in virtue of which it is a world and not undifferentiated substratum, has disappeared from view. The abolition of God and nature has therefore been accompanied by the abolition of that correlative concept, man, from this same world.[82]

Modern commentary on the *Dred Scott* decision particularly is affected by this dilemma. For if man is a non-teleological being, then the nature of man ceases to bear any jurisprudential relevance. The law is not made for man, because man himself is not made for anything. There is a radical cognitive separation between what the law requires and what the law *ought* to require, because, strictly speaking, the realm of *ought* exists as mere feeling or value and not as fact. The contemporary legal community has ever felt the holding of *Dred Scott* to be odious, but modern commentators seek to ground their opposition in something more concrete than personal distaste. This may explain, in part, why modern schools of jurisprudence are quick to claim Curtis—who devoted much of his opinion to debunking Taney's history—as their legitimate precursor. Keith Whittington laments that the road not taken in *Dred Scott* was the road offered by Justice Curtis's dissent.[83] Jack Balkin asserts, "The appropriate rejoinder [to Taney's substantive due process argument] is Justice Curtis's in his dissent in *Dred Scott*."[84] Robert Bork writes that "Justice Benjamin Curtis of Massachusetts dissented in *Dred Scott*, destroyed Taney's reasoning, and rested his own conclusions upon the original understanding of those who made the Constitution."[85] Christopher Eisgruber, responding to Bork's claim that Curtis is the original originalist, attempts to claim Curtis as a "fundamental values" jurist.[86] Yet all of

81. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration*, 2.

82. Jaffa, *Crisis of the House Divided*, 11.

83. See Keith E. Whittington, "The Road Not Taken: Dred Scott, Judicial Authority and Political Questions," *The Journal of Politics* 63 (May 2001): 365–91.

84. J.M. Balkin, "Dred Scott and Kelo," (August 11, 2005). http://www.balkinization.com. Accessed May 14, 2008.

85. Robert H. Bork, *The Tempting of America*: *The Political Seduction of the Law* (Free Press, 1990), 33.

86. See Christopher L. Eisgruber, "Dred Again: Originalism's Forgotten Past," *Constitutional Commentary*, 10(31) (1993). Eisgruber is sympathetic to arguments based on natural law, and he attributes more natural law legal reasoning to Curtis's opinion than I do. Nonetheless, within a discussion

these appeals to Curtis's dissent have in common a rejection of the eighteenth-century natural rights tradition.[87]

McLean's dissent in *Dred Scott* can at least be viewed as one instantiation of an older understanding. Instead of drawing such a stark distinction between what is "political rather than legal," as many of McLean's detractors have been tempted to do, perhaps his dissent is better perceived in light of Lincoln's subsequent arguments on this very subject. For in the senatorial debates between Lincoln and Douglas, Lincoln insists that the "real issue" with the democratic policy "in the shape it takes in the *Dred Scott* decision . . . [is that it] carefully excludes that there is anything wrong in [slavery]."[88] As Jaffa argues, the question at the heart of *Dred Scott* was the question "which took precedence when a slave owner entered a Territory with his slave, the Negro slave's human personality, under 'the laws of nature and nature's God,' or his chatteldom, under the laws of the slave state whence he came."[89] And speaking to that issue, McLean responds relevantly that the slave, by his very nature, is not "mere chattel."

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of Joseph Story on natural law and property rights, Eisgruber indicates that the "out-moded language of natural law," the "rhetoric of natural rights," and "the Declaration's references to a 'Creator'" are superfluous and unnecessary to a modern aspirational and justice-seeking constitutionalism (44).

87. See Sanford Levinson, "Slavery in the Canon of Constitutional Law," in *Slavery and the Law*, ed. Paul Finkelman (Madison, WI: Madison House, 1992). "If one wishes to attack *Dred Scott*, therefore, an obvious question is whether one must go after Taney's originalist modality or, instead, after his specific historical analysis. Many students, for example, endorse Justice's Curtis's dissent, which attacks Taney's history. I ask them if this means they would in fact support Taney if further historical research called Curtis's assertion into question and supported Taney's account instead" (103).

88. Lincoln's speech at Alton in *Lincoln-Douglas Debates*, 390.

89. Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery Gateway, 1994), 68.