CLEANSING THE CONSTITUTION:
THE DUTY OF OFFICEHOLDERS IN THE ANTEBELLUM PERIOD

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"The Congress regulates our stewardship; the Constitution devotes the domain to union, to justice, to defence, to welfare, and to liberty. But there is a higher law than the Constitution, which regulates our authority over the domain, and devotes it to the same noble purposes."
— William Seward

ABSTRACT: *Prior to the Civil War and the abolition of slavery, anti-slavery judges and other government officials faced a dilemma: either keep their oaths to uphold the laws and Constitution of the United States (which countenanced slavery) or fulfill their natural law duties to oppose racially-based chattel slavery. This problem prompts a larger question for republican government: when purifying a regime of grave evil, how should the prudent public official balance his duty to principle with his duty to the Constitution? This paper analyzes the question from a Christian natural law perspective and argues that government officials have a duty to uphold absolute moral principles above manifestly unjust positive law. Various approaches to avoid direct conflict between one's oath and the natural law are proposed. Nevertheless, in circumstances where conflict between oath-keeping and natural law cannot be avoided, cautious nullification of pro-slavery laws is defended as an alternative to resignation from office.*

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The most hotly debated constitutional question of the 19th century was the extent to which the United States Constitution recognized, tolerated, or protected slavery. The carefully-phrased verbal gymnastics of the Constitution in regard to these "other persons" belied an uncomfortable cohabitation between the American creed and slavery. Nevertheless, the founding document of the United States countenanced the existence of slavery to some degree.[1] This "founding sin" created a quandary for statesmen and jurists.

The debate over slavery in the United States prompts a larger question for republican government: when purifying the regime of a grave evil, how should the prudent public official balance his duty to principle with his duty to the Constitution? Should the republican official hold his oath of office above his moral convictions? Reasoning from the Scriptural principles and natural law framework that many of the Founders followed, the answer to these questions must be principle and conviction, for the public servant must obey God rather than men.[2]

Aquinas calls law "nothing else than an ordinance of reason for the common good, made by him who has care of the community."[3] Proceeding from eternal law, an expression of God's nature by which all human action is measured,

1 Don E. Fehrenbacher, Slavery, the Framers, and the Living Constitution, in Slavery and Its Consequences: the Constitution, Equality, and Race 1-22 (Robert A. Goldwin & Art Kaufman eds., American Enterprise Institute for Public Policy Research 1988).

2 *Acts* 5:29.

3 Thomas Aquinas, The Summa Theologica of St. Thomas Aquinas I-II 90.4 (Fathers of the English Dominican Province trans., Burns, Oates & Washburn 2d Revised Ed. 1920) (Online ed. 2008).

man's rational participation in natural law grasps general principles of promoting good and restraining evil to develop positive law.[4] The first principle of natural law is that "good is to be done and pursued, and evil is to be avoided."[5] All "human law always must give way to divine law in cases of conflict."[6]

Human government is merely instrumental to the pursuit of justice, for "justice is the end of government."[7] God delegates authority to governments "to punish those who do evil and to praise those who do good."[8] Governments exercise no authority apart from what Nature and Nature's God has entrusted to them. A government has no authority to legalize behavior that is contrary to natural law. If racial slavery conflicts with natural law, then the positive law that protects it is illegitimate. Yet the republican official must take an oath of office to "preserve, protect, and defend the Constitution of the United States"[9] a Constitution which countenances slavery. Supposing one can conscientiously swear such an oath, how can the republican official execute it without violating natural law?

Though Lincoln found abolition just, he felt

4 Jack Donnelly, *Natural Law and Right in Aquinas' Political Thought*, 33 The Western Political Quarterly 521 (1980).

5 Thomas Aquinas, The Summa Theologica of St. Thomas Aquinas I-II 94.2 (Fathers of the English Dominican Province trans., Burns, Oates & Washburn 2d Revised Ed. 1920) (Online ed. 2008).

6 Donnelly, *supra* note 3, at 525.

7 James Madison, The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, Independent Journal, Feb. 6, 1788.

8 *1 Peter 2:15*.

9 U.S. Const. art. II, § 1.

constrained by his oath: "No one who has sworn to support the Constitution can conscientiously vote for what he understands to be an unconstitutional measure, however expedient he may think it."[10] Lincoln explains in his first inaugural address his belief that he has "no lawful right" and "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists." He views his oath to uphold the fugitive slave clause to be just as binding as toward any other part of the Constitution.[11]

Lincoln calls self-government "the leading principle, the sheet-anchor of American republicanism" and readily acknowledges that "the relation of master and slave is *pro tanto* a total violation of this principle"[12] ("Speech at Peoria"). Yet he affirms the constitutional legitimacy of slavery, despite its incompatibility with the American creed. While expressing his personal desire that "all men, everywhere, could be free," Lincoln admits that his "paramount object in this struggle is to save the Union, and is not either to save or destroy Slavery. If I could save the Union without freeing any slave, I would do it" ("Reply to Horace Greeley").[13]

By elevating the Union above abolition, Lincoln violates his duty to natural law. The union is not an end in itself, but rather a means toward fulfilling government's end.

10 Abraham Lincoln, 16th U.S. President, Cooper Union Address (Feb. 27, 1860).

11 U.S. Const. Art. IV, § 2.

12 Abraham Lincoln, 16th U.S. President, Speech at Peoria, Illinois in reply to Sen. Douglas, Illinois (Jan. 1, 1863).

13 Abraham Lincoln, 16th U.S. President, Reply to Horace Greeley: Slavery and the Union, The Restoration of the Union the Paramount Object (Aug. 22, 1862).

A United States serves expediency by avoiding inevitable conflict arising from two competing American nations, but the founding of two nations rather than one would not have been by nature unjust. Constitutional processes designed by man are only valid insofar as they accord with the justice of divine law; processes which deviate "must in no wise be observed."[14]

Aquinas answers that an oath "which is useful and morally good in itself and considered in general," such as an oath to uphold the Constitution, "may be morally evil and hurtful in respect of some particular" such as the provision to return fugitive slaves. He concludes that "anything morally evil or hurtful is incompatible with . . . an oath" so therefore it "admits of dispensation."[15]

President Andrew Jackson offers a second answer regarding the oath of office, one to which Lincoln himself could be sympathetic. Jackson argues that "each public officer who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others."[16] Understanding and upholding a contradiction requires Orwellian doublethink: an official cannot consistently uphold "all men are created equal" while enforcing laws that reaffirm racial inequality. For statesman bound to obey to higher law, this tension is unbearable.

14 Aquinas, *supra* note 5, at I-II 96.4.
15 *Id*. at II-II 89.9.
16 Henry Clay, The works of Henry Clay: Comprising His Life, Correspondence, and Speeches 19 (Calvin Colton ed., G.P. Putnam's Sons Fed. ed. 1904).

Hebrew scripture describes the double-minded as "unstable in all they do"[17] and contrasts them with those who "love [God's] law."[18]

Like all regimes, America is established upon a moral foundation, not merely a system of governance. The American republic declares a set of virtuous ideals based upon natural law, including that all men are created equal. Lincoln describes the Constitution as a "picture of silver" framed around the "golden apple" of the Declaration ("Fragment").[19] Because "the picture was made for the apple—not the apple for the picture," the republican official ought to side with the Declaration's just principle rather than the Constitution's unjust text enforcing inequality. When evils are so corrupting to the regime as to obscure its founding ideals and render the official's oath contradictory, then "defending the Constitution as one understands it" should mean affirming the ideals rather than strictly adhering to the base processes.

Of course, Jackson's doctrine is subject to Henry Clay's critique, that "there would be general disorder and confusion throughout every branch of the administration."[20] Aquinas suggests that "obedience [to such unjust laws] would preserve public order but only at the infinitely greater

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17 *James* 1:8.

18 *Psalm* 119:13.

19 Unpublished letter of Abraham Lincoln, 16th U.S. President, Fragment on the Constitution and Union re. Alexander H. Stephens, Governor, Geor. (Jan. 1861) (sourced from: 4 The Collected Works of Abraham Lincoln 168-69 (Roy P. Basler ed., Rutgers University Press 1953).

20 Henry Clay, The Works of Henry Clay, 19.

cost of the loss of eternal beatitude."[21] Nevertheless, to avoid the tumult that frequent invocation of Jackson's principle would surely cause, the republican official should not take liberties in constitutional interpretation when the matter does not violate the first principles of justice. A representative does not possess authority to disregard secondary, amoral provisions such as the number of representatives per state or the rules of Presidential succession. Aquinas suggests that an individual may consider consequences as prudence dictates to determine his course of action on first principles, so long as he does not violate the natural law that human law is based upon.[22]

Perhaps the best way to evaluate Lincoln's statesmanship as it regards slavery is by his own words, "standing with him while he is right, and part with him when he goes wrong."[23] President Lincoln ultimately did emancipate the slaves "as a fit and necessary war measure for suppressing . . . rebellion," based on his understanding of the Constitution's delegation of wartime powers to the executive.[24] Although he was more motivated by preservation of the Union than respect for natural law, Lincoln achieved a just end consistent with both his obligation to the Constitution and his duty to justice. He "sincerely believed [the Emancipation Proclamation] to be an act of justice,

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21 Donnelly, *supra* note 3, at 525.

22 Aquinas, *supra* note 5, at I-II 96.4.

23 Lincoln, Speech at Peoria, at 66.

24 Abraham Lincoln, 16th U.S. President, The Emancipation Proclamation (Jan. 1, 1863).

warranted by the Constitution." The eventual adoption of the 13th and 14th Amendments extended the guarantee of equal protection and justice to all former slaves.

While the statesman is tasked with *executing* the law, the judge must *interpret* the law. In Aquinas' thought, positive laws are only "binding insofar as they do not diverge from the natural law."[25] Since natural law obligations respecting the dignity of persons exists *a priori* to man's positive law, the judge's duty to rule in accordance with the natural law outweighs his duty to the positive law as such when they conflict. Such unjust human laws, which do not participate in eternal or natural law, fail to meet the formal conditions of law and therefore "do not have the nature of law but, rather, of a kind of violence."[26] In practice, however, many antebellum judges ruled to uphold positive law protecting slavery against natural law.

New England's leading jurist, Justice Joseph Story, upheld the stringent Fugitive Slave law in his 1842 *Prigg v. Pennsylvania* decision by interpreting the case in light of other commerce clause decisions promulgated by the court, indicating his opinion of slaves as property. Story "laid the basis for the subsequent nationalization of slavery in the Dred Scott decision of 1857" by upholding and strengthening "the slaveholder's absolute right to have his property protected in every state in the Union." (Mayer 311)[27]. Justice Story believed "that emancipation could only

25 Donnelly, *supra* note 3, at 525.

26 Aquinas, *supra* note 5, at I-II 93.3.

27 Henry Mayer, All on Fire: William Lloyd Garrison and the Abolition of

gradually be accomplished and regarded the abolitionists as malicious obstacles" (Mayer 317).[28]

Story again faced the "conflicting obligations of Constitution and conscience" in a subsequent case concerning George Latimer, a fugitive slave, but upheld his own precedent from *Prigg*.[29] Disregarding any transcendent standard for justice, Story believed that "the Constitution and the Union, for all their compromises, represented the highest possible good."[30] In some ways, this opinion was self-serving. Despite his forward-looking rulings on matters related to his own class of commercial entrepreneurs, he deferred to "the old ways of precedent and compromise"[31] when it came to racial justice, in order to "transmit the Constitution *unimpaired*" to the next generation.[32]

Massachusetts Chief Justice Shaw declared himself personally sympathetic to Latimer, but declined involvement in the federal case, making explicit his view that "an appeal to natural rights and the paramount law of liberty could not override an obligation to the Constitution and the laws".[33] Shaw, like Story, argued that positive law trumped natural rights, for judges and people alike "were bound to [the laws] under a compact which could not have been secured on any other terms."[34] In upholding the ever more stringent fugitive

Slavery 311 (1998).

28 *Id.* at 317.

29 *Id.*

30 *Id.*

31 *Id.* at 318.

32 *Id.* at 317.

33 *Id.*

34 *Id.* at 318.

slave laws, Shaw and Story conscripted every citizen to become a slave-catcher regardless of conscientious objection.

Many conservatives of their day defended Story and Shaw by saying they merely performed their duty, properly detaching themselves from their personal views and upholding the law. Was this the only legal avenue available to Shaw and Story? Was there nothing they could have done to uphold both their duty to the natural law and to the Constitution?

One permissible strategy would be to interpret charitably. If one's oath to uphold the Constitution implies a duty to protect its founding principles, then a judge might charitably interpret the Constitution to reach a ruling consistent with natural law. Presented with a case like Latimer's, the judge might rule him to be free on a reasonable technicality or by gently affirming the ideational natural law principles of the Constitution. Indeed, contemporary commentators suggested that the justices could have exercised "sufficient discretion to interpret the law more generously in Latimer's favor."[35]

Justice John McLean exercised this sort of discretion in his *Dred Scott v. Sandford* (1857) dissent. McLean cast the intentions of the Founding Fathers in the best possible light, recalling that "James Madison . . . was solicitous to guard the language of that instrument [the Constitution] so as not to convey the idea that there could be property in man."[36]

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35 *Id.*

36 Scott v. Sandford, 60 U.S. 393, 11 (1857) (McLean, J., dissenting).

McLean invokes "the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution" and elucidates their belief that "the institution of slavery would gradually decline, until it would become extinct."[37] Operating based on his presuppositions, yet still acting within constitutional confines, McLean renders his decision based on lengthy precedent and established laws. This judgment could be consistent with Aquinas's natural law guidelines for officials.

McLean controverted his charitable interpretation, however, in his reaffirmation of slavery's legitimacy. Based on long precedent, he acknowledges the states' right to sanction slavery within its jurisdiction and excludes any federal interference. McLean cites the *Somersett* decision, which declares that "slavery is of such a nature . . . that nothing can be suffered to support it but positive law."[38] Rather than declaring the positive law's subservience to natural law principles, McLean encourages the court to recognize the sovereign power of the states "emanating from the voluntary action of the people," by respecting each state's right to prohibit or admit slavery.[39] Reaffirming the *Prigg* decision, he proudly underscores his own role in dutifully upholding the fugitive slave laws brought before his judicial circuit. When long precedent supports an unjust positive law, the charitable interpretation approach appears less plausible.

A secondary response could be to resign or recuse oneself from the case at hand. This reaction allows the jurist

37 *Id.*
38 *Id.* at 9.
39 *Id.* at 36.

to avoid becoming the agent responsible for upholding an unjust law, while still maintaining his oath. Agents participating in an otherwise just system are free to refrain from particular acts within the system that would require them to perform an injustice. Because of the judge's position of authority and his role in promulgating the law as a moral teacher, however, recusal or resignation may appear feckless.

Abolitionist Lysander Spooner advances another theory of keeping one's oath without resigning office. If a constitutional office is understood as a measure of power conferred upon an individual, granted with the condition that "he will use that power to the destruction or injury of some person's rights," then the condition is certainly void. Yet the officeholder maintains the power with the same legitimacy as if there had been no such unjust condition. Entrusted with "certain power over men," a just officeholder "is bound to retain and use [that power] for their defense."[40] Spooner likens the power to a sword, handed to the officeholder by a criminal with the condition it be used on an innocent bystander. One has neither a duty to use the sword unjustly nor to return the sword to the criminal, but a positive obligation to use the sword in the innocent's defense. Indeed, returning the sword, knowing it would merely be used to kill the innocent bystander by another would nearly make one an accomplice to the crime ("Ought Judges Resign Their Seats?").

From a natural law perspective, neither the executive nor the jurist is excused from moral culpability because he

40 Lysander Spooner, The Unconstitutionality of Slavery 150 (1860).

simply followed the process: the blood on Pilate's hands was not cleansed because he procedurally followed the legal custom. At the Nuremberg trials, Nazi judges claimed their judicial duty had forced them to follow Germany's constitutionally instituted laws and that they had only reluctantly upheld death sentences against Jews. Allied judges did not judge them by their personal feelings toward the Jews, but found them guilty on the basis of natural law. Regardless of the positive laws in a country, a judge is still obligated to protect the innocent.

The legal positivism espoused by Story, Shaw, and the German judges contradicts natural law by suggesting that legal truth is decided by the will of the state. Without access to a transcendent standard of justice, legal positivism becomes the equivalent of moral relativism in the courtroom. Critics may accuse judges who side with natural law over positive law where the two conflict, of ruling based on their own moral predilections. Yet legal positivism is guilty of the same defect, leaving the determination of truth to the whims of the majority and relegating justice to upholding the law regardless of its morality. As the increasingly pro-slavery gloss on the antebellum Constitution (culminating in *Dred Scott*) demonstrates, strict construction of the text cloaks the moral discretion of judges just as easily.

Spooner asserts that no "majority, however large, [has] any right to rule so as to violate the natural rights of any single individual. It is as unjust for millions of men to

murder, ravish, enslave, rob, or otherwise injure a single individual, as it is for another single individual to do it."[41] He criticized judges who "continually offer . . . statutes and constitutions as their warrant for such violations of men's rights," since such positive laws can in no sense be a "higher authority than the principles of justice and natural law" ("The Supreme Power of a State")[42].

William Lloyd Garrison believed that "Story and Shaw had read the law correctly" and took the Latimer fugitive slave decision as evidence that the Constitutional compact was incorrigibly corrupted. Garrison advocated "come-outerism," which beckoned Americans to abandon the Constitution for the sake of the regime's founding principles. In Garrison's view, one could not conscientiously swear to uphold the document which he called "a covenant with death and an agreement with Hell."[43]

To be clear, Garrison was not fundamentally opposed to union. He preferred disunion to the indefinite perpetuation of slavery and sought rectification of the "Founding sin" of the Constitution through the introduction of a new national compact reflecting the ideals of the Declaration. Garrison argued that tacit approval of the soul-corrupting evil of slavery was too high a price to pay for Union.[44]

Nevertheless, even Garrison called on elected officials to exercise whatever Constitutional power they

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41 *Id.*

42 Lysander Spooner, THE UNCONSTITUTIONALITY OF SLAVERY 154 (1847)

43 MAYER, *supra* note 27, at 327.

44 *Id.* at 300-330.

might have in favor of the natural law. An early abolitionist aim was to "choose representatives courageous enough to abolish slavery where no constitutional compromise restrained them, in the capital city itself."[45] Some legislators, like John Quincy Adams, heeded the call and pursued policies consistent with both natural law and their delegated authority. The president-turned-representative entertained the petitions of abolitionists seeking to abolish slavery in the territories or the end of the slave trade in Washington D.C. He presented them to the House of Representatives at every opportunity in the innocent guise of supporting the citizens' right to petition for a redress of grievances. Despite the "gag-rule" that prevented Adams from formally introducing the petitions and referring them to committee, Adams used his position as a pulpit to advocate for anti-slavery positions as best he could.

Others, however, accepted compromises with slavery in the interest of Union. Senator Daniel Webster, who in 1820 called upon Americans to "cooperate with the laws of man, and the justice of Heaven" through efforts "to extirpate and destroy" the wicked institution of slavery, shamefully departed from his first principles in the Compromise of 1850.[46] Unlike his strong denunciations of slavery as a moral evil years before, the Senator ridiculed the natural law perspective that some grave evils can be identified with <u>moral certitude</u> and portrayed disagreements over slavery

45 *Id.* at 66.

46 Daniel Webster, 14th & 19th U.S. Sec'y of State, Address on the Compromise of 1850 (Mar. 1850).

as a "difference of opinion," questioning man's ability to know which side was right about slavery.[47] While Webster's policy recommendations may have been constitutional, they abandoned the natural law principles that undergirded the American regime in the first place. When Webster's call for "liberty and Union" in 1850 rang hollow in the ears of many Northerners, it was an abolition-minded audience that began to question the viability of union as long as slavery continued.

Such a Union was indeed "divided against itself," between the practice of slavery and the principle that "all men are created equal" as much as between North and South. Lincoln correctly predicted that such a "government cannot endure permanently half slave and half free."[48] The incompatibility of slavery with the American creed eventually snapped the cords of union. By the end of the Civil War, that nation "conceived in liberty" had truly experienced "a new birth of freedom" and could re-consecrate itself "to the proposition that all men are created equal."[49] Today's statesmen ought to dedicate themselves to this proposition once more. Only this devotion, under God, to the transcendent principles of justice and righteousness can sustain a nation of self-government "of the people, by the people, for the people."[50]

47 *Id.*

48 Abraham Lincoln, 16th U.S. President, Address to the Illinois Republican State Convention: A House Divided (June 16, 1858).

49 Abraham Lincoln, 16th U.S. President, Gettysburg Address (Nov. 19, 1863).

50 *Id.*