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Lincoln at 200: On Lincoln's Statesmanship, Dred Scott and Constitutional Evil

Harry F. Tepker, Jr., *University of Oklahoma College of Law*

LINCOLN AT 200: ON LINCOLN'S STATESMANSHIP, *DRED SCOTT* AND CONSTITUTIONAL EVIL

HARRY F. TEPKER*

February 12, 2009, was Abraham Lincoln's 200th birthday. Just over one hundred and fifty years ago, the Lincoln-Douglas Senate race captured the attention of the republic because of celebrated "debates that defined America."[1] Until 2015—the sesquicentennial of the Civil War's end—we will witness renewed attempts to remember, reconstruct, and reconsider almost all the lessons of the nation's greatest and most costly moral conflict. Central to the debate is the reputation of Abraham Lincoln.

Few men suffered as much mockery in life as Lincoln. Even after martyrdom, historian David Donald wrote it took time for his heroic reputation to capture the imagination. However, by the middle of the twentieth century, "everybody was for Lincoln."[2] As Donald writes,

> [Strom Thurmond's] Dixiecrats remembered that Lincoln, as a fellow Southerner, preferred letting the race problem work itself out. Henry Wallace's Progressives asserted that they were heirs of Jefferson, Jackson, *and* Lincoln. Thomas E. Dewey, according to his running-mate, [California Governor and future Chief Justice Earl Warren,] bore a striking resemblance to Lincoln—spiritual rather than physical, one judges—and President Truman claimed that if Lincoln were alive, he would be a Democrat. . . . Lincoln has become a nonpartisan, nonsectional hero. It seems, as Congressman Everett Dirksen solemnly assured his Republican colleagues, that these days the first task of a politician is "to get right with . . . Lincoln."[3]

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* Calvert Chair of Law and Liberty and Professor of Law, University of Oklahoma. This essay is an expansion of several talks, including a Constitution Day speech to the Honors College of the University of Oklahoma. The author thanks Dean Robert Con Davis of the Honors College for the invitation and opportunity and Michael Brooks for his assistance in the research and editing of this essay.

1. ALLEN C. GUELZO, LINCOLN AND DOUGLAS: THE DEBATES THAT DEFINED AMERICA (2008).

2. DAVID DONALD, *Getting Right with Lincoln*, *in* LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 3, 17 (2d ed. 1972).

3. *Id.*

Mr. Dirksen, of course, was talking politics. Less clear was Lincoln's importance as a shaper of the Constitution. Talk of "framers' intent" often focuses on 1787 and 1791, so he is not usually mentioned in the same way as Madison or Hamilton, or even Jefferson, as a "framer" of the Constitution. Of course, he is acknowledged as the man who "saved the Union," and his role in the enactment of the Thirteenth Amendment and his inspirational influence for the constitutional traditions of the Fourteenth and Fifteenth Amendments are real. He still carries weight in debate, though.

As the Second World War was beginning, two feuding Supreme Court justices squabbled over what Lincoln would do about state laws requiring school students to recite the flag salute. In 1940, going where no judge had gone before—or since—Justice Felix Frankfurter claimed the issue was one of national security, and to prove it, he invoked Lincoln's memory and his famous reply to critics.[4] Lincoln had suspended the writ of habeas corpus, and he had urged federal authorities to prosecute copperhead Democrats who seemed to incite resistance to the draft, as well as a policy of yielding to the demands of southern quest for independence. In reply, the President invoked a principle of national security in a famous question: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"[5]

Three years later, after Pearl Harbor, as America joined the fight to preserve western civilization against Germany, Italy, and Japan, Justice Robert H. Jackson wrote an opinion holding that governments may not compel patriotism or flag salutes.[6] He offered a more prudent perspective of Lincoln: "It may be doubted whether Mr. Lincoln would have thought that the strength of the government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school."[7]

If everyone wanted to "get right" with Lincoln in the past, today America suffers from "[t]he great historical amnesia."[8] Honest Abe's birthday is no longer a holiday. Though President Barack H. Obama consciously invoked the memory of Mr. Lincoln, and magazines and books followed his lead in anticipation of the birthday bicentennial, the more dominant truths of American life were hard to justify. Fully two-thirds of American high school graduates cannot place the Civil War in the right half century of U.S. history.[9]

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4. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940).
5. *Id.*
6. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
7. *Id.* at 636.
8. ANDREW FERGUSON, LAND OF LINCOLN: ADVENTURES IN ABE'S AMERICA at xi (2007).
9. *Id.*

In preparation for a speech about Lincoln's influence on the Constitution, and in an informal and completely inadequate assessment of popular culture, I asked a number of my students and colleagues about their specific memories of seeing an image, depiction, or portrayal of the "Great Emancipator." All, of course, thought of the penny, the $5 bill, or the iconic Lincoln memorial. A few students could remember an episode of Star Trek from the 1960s, in which he was Captain Kirk's hero brought back to life for a galactic war game.[10] More remembered that in the 1980s, he was a subject of comedy in a film celebrating historical ignorance of the young: *Bill and Ted's Excellent Adventure*.[11] Many of my students remembered a commercial for sleep medication, in which Abe plays chess with a beaver. Almost as many remembered a *South Park* episode, in which Lincoln's ghost saves a school from arson by the "ugliest boy in school."[12] Still others remembered, oh, so vaguely, their own elementary school recitals of the Gettysburg Address—just like *Kindergarten Cop*.[13] Not one recalled seeing Henry Fonda portray "Young Mr. Lincoln" in John Ford's 1939 film by the same name.[14]

When national news magazines and presidential candidate Obama invoked Lincoln, students were quick to express reservations or criticism—of Obama—but few seemed conscious of still worse news about American memory. It is conventional wisdom—whether accurate or not—that the party of Lincoln had become the party of Jefferson Davis, the President of the so-called confederacy. Senator Trent Lott, a majority leader when Republicans controlled the upper chamber of the national legislature, expressed both his admiration for Jefferson Davis and his confidence that "the spirit of Jefferson Davis lives in the [1984] Republican platform."[15]

And not to be outdone in contributions to national loss of memory, some so-called liberals seem embarrassed by any attempt to defend the greatness of the "Great Emancipator" because he once said things we cannot abide in the twenty-first century—forgetting, of course, Lincoln died in the middle of the nineteenth century.

As one of the outnumbered traditionalists in academia,[16] I lack confidence that there is much wisdom or sense in deconstructing and reconstructing

10. *Star Trek: The Savage Curtain* (NBC television broadcast Mar. 7, 1969).

11. BILL AND TED'S EXCELLENT ADVENTURE (Metro Goldwyn Mayer 1989).

12. *South Park: The List* (Comedy Central television broadcast Nov. 14, 2007).

13. KINDERGARTEN COP (Universal Pictures 1990).

14. YOUNG MR. LINCOLN (Twentieth Century Fox 1939).

15. THOMAS L. KRANNAWITTER, VINDICATING LINCOLN: DEFENDING THE POLITICS OF OUR GREATEST PRESIDENT 6 (2008).

16. *See* FERGUSON, *supra* note 8, at 85.

history so it will be therapy for the inequalities of the past,[17] and I do not share the view of many law teachers that principle means nothing, and law is only a mask for the powerful. Distorting the past for contemporary agendas is just like forgetting the past, and it is a principal cause of "[t]he great historical amnesia" of America.[18]

The Constitution and Constitutional Evil

In 2006, a modern version of the case against Lincoln was published by a scholar, a law professor, and political scientist. Mark Graber's book, Dred Scott *and the Problem of Constitutional Evil*,[19] is thought-provoking, impressively researched, sophisticated in its review of nineteenth century American politics, and formidably logical. I assigned it to my students in a seminar on Mr. Lincoln's impact on the Constitution because it is a book worth reading and because it represents a sophisticated recent attempt to shift responsibility from the South to Mr. Lincoln. It is also quite wrong. And dangerously so.

Professor Graber makes four basic points. First, a constitution's primary objective is peace.[20] Second, our Constitution sought to promote peace between North and South by developing constitutional and political structures that would prevent any one section from imposing a national slavery policy against the will and consent of another section.[21] Third, Lincoln's politics were a challenge to this antebellum constitutional order, because he proposed to adopt antislavery policies with only a sectional majority and with the moral claim rooted in the Declaration of Independence.[22] The result was civil war.[23] Finally, judges and statesmen respectful of our constitutional tradition must tolerate "constitutional evil" in order to guarantee peace.[24] Graber believes Stephen Douglas understood the constitutional order better than Lincoln,[25] and that a vote for John Bell, the candidate of the Constitutional Union Party, the old Whigs, was the wisest vote to avoid the "irrepressible conflict."[26]

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17. *See* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 80 (1992).

18. FERGUSON, *supra* note 8, at 85.

19. MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

20. *Id.* at 5-6, 247-48.

21. *Id.* at 92.

22. *Id.* at 179, 181, 205.

23. *Id.*

24. *Id.* at 252-54.

25. *Id.* at 239-41.

26. *Id.* at 247-54. "Lincoln was wrong to fight the Civil War, Bell voters believe, even if he was right about the best interpretation of the Constitution, because just causes are better

To blame Mr. Lincoln for the war—and to place this blame because of Lincoln's constitutional argument against *Dred Scott*—is to misunderstand Lincoln's views, to misrepresent the Constitution, and to ignore Lincoln's rightful claim to be, as Allen Guelzo argued, the "redeemer president."[27] The older historical consensus is trustworthy: it was the southern decision to rend the Constitution that permitted and justified Lincoln's efforts to defend the "last best, hope of earth."[28]

To begin, the central purpose of a constitution is peace, order, and stability, as Professor Graber suggests and as Lincoln understood, but it is also liberty, the protection of the weak, and progress toward a more perfect justice. In Essay No. 51 of *The Federalist*, James Madison reminded: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."[29] True, Madison proceeded to warn against allowing stronger factions to "unite and oppress the weaker . . . ."[30] The principle can be applied to regions, as does Professor Graber, but it also governs the doctrines of justice applied to individuals, as did Lincoln. Madison warned of factionalism like "anarchy" in a "state of nature," when "the weaker individual is not secured against the violence of the stronger . . . ."[31] In the memorable phrases of the Gettysburg Address, the President remembered that the nation was conceived in liberty and dedicated to the proposition that all men were created equal; and that the basic question posed by civil war was whether our nation, so conceived and so dedicated, could long endure.[32] If the people are denied the right to seek progress, the right to search and find finer principles of liberty and equality, it must be based on a clear, unmistakable principle in the Constitution.

The purpose of a Constitution is only one point at issue; the deeper differences relate to the means of achieving peace and justice adopted by "we the people." The Constitution was written, but it was ambiguous and not yet interpreted. On basic issues, the founding of the Republic was incomplete and the antebellum constitutional order was changing, dynamic, complex, and uncertain. The Constitution was neither the embodiment of John C. Calhoun's philosophy nor Abraham Lincoln's deepest hopes. It was a compromise. In

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realized by persuasion than by force." *Id.* at 253.

27. ALLEN C. GUELZO, ABRAHAM LINCOLN: REDEEMER PRESIDENT (1999).

28. Abraham Lincoln, Second Annual Message to Congress (Dec. 1, 1862), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 393, 415 (Don E. Fehrenbacher ed., 1989).

29. THE FEDERALIST NO. 51, at 283 (James Madison) (J.R. Pole ed., 2005).

30. *Id.*

31. *Id.*

32. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, *supra* note 28, at 536.

dispute are the details of the compromise. While Lincoln famously described and defended "government of the people, by the people, for the people,"[33] Professor Graber seems to defend a government of compromise, by compromise, and for compromise.

> Parties to controversies over fundamental constitutional values may win small victories, but the more common outcomes are further compromises and vague provisions capable of being interpreted as supporting conflicting values.
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> . . . .
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> These and related constitutional compromises are the means by which persons who share civic space agree to cooperate despite disagreeing over fundamental political principles.[34]

We all know the words that describe the Constitution's structure: the separation of powers, checks and balances, and, most pertinent, federalism. And the Madisonian system did far more, does far more than protect slavery in the south. Perhaps the framers were not as committed to the prophecy that slavery would wither and die as Lincoln believed, but surely the case for the Constitution of 1787 rested on more than worries about the conflict between North and South. Still, in Graber's view, the framers understood, even desired, that the constitutional order implement a more particular understanding about slavery. The framers thought the constitutional arrangements of 1787 would allow, encourage, and even require legislation about slavery to reflect a "spirit of compromise and political accommodation."[35] The framers chose not to "bind government in advance to a specific set of policies," but to "design[] governing institutions they thought would always be exquisitely sensitive to Southern concerns."[36] Whatever the framers' actual intentions, advocates of the Southern point of view, some Jacksonian, some Calhounian, saw a constitutional structure that protected their values, including slavery and white supremacy.[37]

All, including Lincoln, agreed that a state's positive law—a written slave code—was beyond the powers of Congress. If appropriate majorities were mustered, perhaps the power to regulate commerce among the states might prevent interstate slave traffic. But Congress did not attempt this, and when a Mississippi ban on importing slaves into the state was challenged on grounds it was a regulation inconsistent with congressional authority, the Court,

33. *Id.*
34. GRABER, *supra* note 19, at 9.
35. ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, SLAVE NATION 249 (2005).
36. GRABER, *supra* note 19, at 101.
37. *Id.* at 76.

including a concurring Chief Justice Roger Taney, found that the ban was rarely enforced, and there was no case to decide.[38] The implication of possible congressional power was ducked.

The real so-called "security" for slavery was in political structure: the processes and rules of representation, the infamous "three-fifths" clause, presidential election by the electoral college, and equal state representation in the Senate.[39] National legislation was difficult, and a constitutional amendment was nearly impossible. However, a compromise based on a guess about the future course of politics is different than law. On this point, Graber turns away from the nationalism of John Marshall and the republican wisdom of James Madison toward the brilliantly contrived, but provincial, obstructionism of South Carolina's John C. Calhoun. The professor argues the Constitution was structured so Congress could adopt no national policy on slavery without southern consent.[40] But, the text does not say this. Specifically, interpretation of text and an assessment of specific expression of the framers' expectations and understandings does not yield the conclusion that Congress was obliged not to adopt any policy on slavery without southern consent. If constitutional theory does not surely eradicate constitutional evil, as Professor Graber suggests, it also does not yield any obvious or compelling support for *Dred Scott*'s holding that the federal government was barred from restricting the spread of slavery.[41]

The complications of *Dred Scott* defy easy summary. Scott had been a slave taken by an army officer to Illinois and then to the Upper Louisiana territory.[42] He then came back to Missouri with his owner.[43] Eventually, Scott sued in state court for his freedom, but the Missouri Supreme Court overruled its own precedents.[44] Southern courts had agreed that an indefinite stay on free soil resulted in emancipation. No longer did that principle of comity govern. Scott became a slave—again—when he came back to Missouri.[45]

Scott turned to federal court.[46] He argued he was free because he once lived on free soil when he accompanied his owner.[47] Led by Chief Justice Taney, the court sought to end the great national turmoil. Taney sought peace, as

38. Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) (Taney, J., concurring).
39. *See* GRABER, *supra* note 19, at 93-94.
40. *See id.* at 92.
41. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452 (1857).
42. *Id.* at 431.
43. *Id.*
44. *Id.* at 453.
45. *Dred Scott*, 60 U.S. at 453.
46. *Id.*
47. *Id.* at 452-53.

Professor Graber says he was prudent to do. Chief Justice Taney's opinion made two points. First, the slave had no standing to bring a suit.[48] He was not among "we the people"; he was not a citizen; and no slave or descendant of slaves could ever be a citizen.[49] Second, Congress lacked power to bar slave owners from taking slaves into the west.[50] The Missouri Compromise and all federal interference with slavery's expansion violated southern rights.[51] Only organized states could ban slavery. Slavery could—must—expand with the nation.

The opinion is filled with errors of logic and distortions of history.[52] The Court said free blacks were not citizens, never had been citizens, and could never be citizens. This was not true factually, as the dissents pointed out.[53] The Court said Congress could not ban slavery in western territories, though the text seemed to give Congress the full sovereign authority over territories prior to statehood,[54] and though Congresses before and after the Constitution's ratification did legislate to ban slavery in the west.[55]

John C. Calhoun was dead when *Dred Scott* was decided, but the opinion seemed to borrow his notions as completely and as thoroughly as John Marshall borrowed from Alexander Hamilton. *Dred Scott* injected the philosophy and politics of Calhoun and Dixie—about slavery and white supremacy—into constitutional law without basis in text, original understandings, tradition, or precedent. *Dred Scott* was wrong on the day it was decided, March 6, 1857. Lincoln knew this; regrettably, the professor does not:

> *Dred Scott* was constitutionally permissible because American popular majorities supported racist practices, the framers in 1787 provided some degree of protection for that racist institution, many framers had racist aspirations, and proponents of slavery had

48. *Id.* at 454.

49. *Id.* at 423.

50. *Id.* at 452.

51. *Id.*

52. The best discussion of the *Dred Scott* case remains the Pulitzer Prize winning history, DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

53. *Dred Scott*, 60 U.S. at 529-64 (McLean, J., dissenting); *id.* at 564-633 (Curtis, J., dissenting).

54. *See* U.S. CONST. art. IV, § 3, cl. 2.

55. The first theme of Mr. Lincoln's *Cooper Institute Address* is to show a consensus of framers' views in favor of a general congressional authority over territories, including a power to exclude slavery. Abraham Lincoln, Cooper Institute Address (Feb. 27, 1860), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, *supra* note 28, at 111-30.

> established additional precedents supporting their practice during the years between ratification and the Civil War.[56]

This is not *legal* analysis. Most of Graber's argument centers on a speculative, though sophisticated, assessment of population trends. The framers thought the nation would expand; and they wanted it, but they thought it would expand in the direction of Texas, not California and the Oregon territory. When the population of the north and the northwest expanded beyond expectations, the South was surrounded, geographically and politically. The geographical, political, constitutional, and moral "center" of the nation changed, and only judicial review could enforce older bargains. Graber sees the politics much as the South did: "As population moved northwestward and attitudes toward slavery hardened, a constitution designed to promote bisectional compromise proved a better vehicle for promoting candidates and parties with sectionally divisive platforms."[57] Changing political realities favored Mr. Lincoln. Antislavery politicians could seek the presidency by appealing to coalitions in the North. A national consensus was no longer necessary. In 1860 came victory.

Graber's analysis is subtle. He does not argue that *Dred Scott* was a correct interpretation of the Constitution; only it *may* be correct as a prudent act of statesmanship to enforce the original political bargain between North and South. The decision respected southern expectations, slave owner reliance on the existing order. It does not matter if expectations had no roots in text or doctrine.

> When public opinion on any bitterly contested issue is geographically concentrated, an institution staffed exclusively by persons elected by local constituencies is unlikely to be capable of reaching a middle ground. Moderation is particularly unlikely when the decision-making process includes numerous veto points that enable sizable minorities to defeat centrist proposals. The institution most likely to fashion a workable compromise is one whose members are selected by a national political process that favors political moderates and whose decision rules empower the median member. The Taney Court was such an institution.[58]

In this view, Graber believes *Dred Scott* deserves the same respect usually accorded to the work of Abraham Lincoln's hero, Henry Clay, and Lincoln's

56. GRABER, *supra* note 19, at 85-86.
57. *Id.* at 115.
58. *Id.* at 36.

great rival, Stephen Douglas.[59] Graber's view is anachronistic: his defense of Taney's Court is modern. He relies on an approach quite out of step with legal argument of the nineteenth century. He finds "law" in political, even philosophical, expectations. He infers principle from a guess about what the framers anticipated about the course of American politics. He does not read text and history in the straightforward manner of Lincoln's *Cooper Institute Address* of 1860. He argues the Court was prudent to try to preserve peace, and objective alone is enough to make *Dred Scott* legitimate.

Professor Graber ignores another side of constitutional tradition, one better rooted in text and history. Chief Justice John Marshall taught the Constitution was meant to be flexible and durable, and it was made for the crises of ages to come. Marshall's framework is for a politics capable of progressive action. Instead, Graber celebrates political incapacity, inaction, passivity, a grand deadlock: he believed the north was obliged to do nothing about slavery, not even to restrict its expansion. It was obliged to appease the constitutional evil of slavery—and the commercial effort to expand slavery. The *Dred Scott* decision was permissible and prudent, if not mandatory. It was Lincoln's duty to tolerate it.[60]

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59. The three most important congressional acts on the issue of slavery become the Compromise of 1820, the Compromise of 1850, and the most famous work of Douglas, the Kansas Nebraska law.

60. GRABER, *supra* note 19, at 13.

> When *Dred Scott* was litigated, Americans were renegotiating the original constitutional bargain in a political environment where forces uninterested in accommodation had the power under the rules laid down in Article V to block any constitutional amendment from being passed. Although all parties to the slavery controversy claimed to be defending the old constitutional order, their real debate was over whether the original constitutional commitment to bisectionalism should be modified or abandoned. The national party leaders who foisted responsibility for slavery on the federal judiciary attempted to maintain bisectionalism by vesting veto power over slavery policies in the only remaining national institution with a Southern majority. In *Dred Scott*, the Supreme Court fostered sectional moderation by replacing the Constitution's failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in the free and slave states.... Lincoln abandoned the original constitutional hope that conflicts over slavery would not disrupt union. His claim that the persons responsible for the Constitution intended to place slavery "in the course of ultimate extinction" was faulty constitutional history. Taney was more faithful to the original Constitution when he championed policies that could be supported by Jacksonians throughout the nation.

Id. (footnote omitted).

Lincoln's Statesmanship

Lincoln understood his duty, and the truth is he agreed with some of what Professor Graber preaches. Constitutional peace depended on tolerating constitutional evil to the extent required, but Lincoln, like Madison, knew a principle should not always be pressed to its ultimate conclusion. Specifically, the Union could not interfere with slavery where it existed, in southern states willing to protect the practice with their written law, but the Union could and should prevent its spread. He hoped, as he believed the framers hoped, that a contained slavery ultimately would wither and die. The Constitution did not establish a right to move across state lines with slaves or to establish residence in a new territory with slaves. If Lincoln's views threatened southern preferences, it does not follow—automatically, at least—that his views violated the region's constitutional "rights." Lincoln's vision was majoritarian, as Graber suggests, but it was also limited, checked, and balanced. Lincoln's majoritarianism was "neither an axiom of democratic theory nor the fundamental procedural commitment underlying the Constitution of 1787."[61] But neither was it unconstitutional.

Professor Graber's accusation against Mr. Lincoln is, in the final analysis, neither new, nor novel. In many ways, it traces elements of the South's arguments in the years preceding Fort Sumter. *Dred Scott* was law; it created rights the North was bound to respect; free blacks and slaves had no rights in the Constitution that white people were bound to respect; any attempt to alter *Dred Scott* would cause secession and disunion. The constitutional compromise—the bisectional veto—meant the opponents of slavery could not seek to undermine it—gradually, legally, politically—though not a word in the Constitution guarantees the permanence of slavery. It is odd: the Union exists at the sufferance of each state's majority, but a national majority could do nothing to restrain economic spread and reinforcement of slave owners' political power.

Graber's indictment of Lincoln is haunting. Military victory was not inevitable; neither was Lincoln's reelection. Some believe there were opportunities to reach a compromise even after Lincoln's election, though many states seceded even before his inauguration.[62] Death took 620,000 young men.[63] Graber blames Lincoln because he stood firm in his moral, political, and constitutional beliefs. But he is responsible only because he would not surrender all discretion on disputed policy questions to a concurrent

61. *Id.* at 187.
62. WILLIAM MARVEL, MR. LINCOLN GOES TO WAR 3 (2006).
63. *Id.* at xvi.

southern majority. Graber maintains Lincoln was obliged to do nothing (or much less) to threaten the existing constitutional order.

Lincoln won an uncertain victory, which made matters worse. Lincoln did not, in fact, have a working majority in favor of banning slavery in the territories. He was elected in 1860 with the smallest portion of the popular vote for any president in American history, and his Republican Party captured only 31 of 64 seats in the Senate and 106 of 237 in the House.[64] Lincoln won the White House with no southern votes.

In this perspective, Lincoln really is like all other abolitionists—William Lloyd Garrison, John Brown, agitators—all traitors to the antebellum constitutional order, and the Constitution is caricatured to be much like the "covenant with death and an agreement made in hell" described by Garrison.[65] Professor Graber's argument, at its core, endorses the naked southern threats of the era as a prudent constitutionalism. Missing in this damning comparison, of course, is evidence of Mr. Lincoln's state of mind. The problem has interested scholars for many years, and an unstated premise is that Mr. Lincoln was either reckless or deliberate as he endangered peace and Union. Lord Charnwood's classic biography offered the older, prevailing view of Mr. Lincoln's state of mind:

> It is impossible to estimate how far Lincoln foresaw the strain to which a firm stand against slavery would subject the Union. It is likely enough that those worst forebodings for the Union . . . were confined to timid men who made a practice of yielding to threats. Lincoln appreciated better than many of his fellows the sentiment of the South, but it is often hard for men, not in immediate contact with a school of thought which seems to them thoroughly perverse, to appreciate its pervasive power, and Lincoln was inclined to stake much upon the hope that reason will prevail. Moreover, he had a confidence in the strength of the Union . . . .[66]

Now, of course, is a moment for an intricate law professor's theoretical dissertation on why Lincoln's critics are wrong. But nothing improves on what Mr. Lincoln himself offered in his famous *Cooper Institute Address*.[67] Lincoln is straightforward and elegant in his logic. He searched the law library for the views of all thirty-nine signatories of the Constitution. A clear

64. GRABER, *supra* note 19, at 186-87.

65. *Id.* at 226-27

66. LORD CHARNWOOD, ABRAHAM LINCOLN: A BIOGRAPHY 99 (Madison Books 1996) (1916).

67. Abraham Lincoln, Cooper Institute Address (Feb. 27, 1860), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, *supra* note 28, at 111.

majority, including Washington and Madison, voted for federal statutes banning slavery in the western territories. Their votes proved that "no proper division of local from federal authority, nor any part of the Constitution, forbade the Federal Government to control slavery in the federal territories."[68] But apart from an approach to history and law not much admired by many law professors today, Lincoln offers a proper allocation of moral responsibility that our nation dare not forget.

Speaking to an audience in New York City, he addressed a "few words to the Southern people."[69] He understood the south would "break up the Union rather than submit to a denial of your Constitutional rights."[70] What rights? At issue was *Dred Scott*.

> When you make these declarations, you have a specific and well-understood allusion to an assumed Constitutional right of yours, to take slaves into the federal territories, and to hold them there as property. But no such right is specifically written in the Constitution. That instrument is literally silent about any such right. We . . . deny that such a right has any existence in the Constitution, even by implication.[71]

Lincoln was attempting to show the south could not claim to be either "conservative" or "right."

> Your purpose, then, plainly stated, is, that you will destroy the Government, unless you be allowed to construe and enforce the Constitution as you please, on all points in dispute between you and us. You will rule or ruin in all events.
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> . . . .
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> . . . [Y]ou will not abide the election of a Republican President! In that supposed event, you say, you will destroy the Union; and then, you say, the great crime of having destroyed it will be upon us! That is cool. A highwayman holds a pistol to my ear, and mutters through his teeth, "Stand and deliver, or I shall kill you, and then you will be a murderer!"[72]

Lincoln's plea was for moderation.

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68. *Id.* at 117.
69. *Id.* at 120.
70. *Id.* at 125.
71. *Id.* at 126.
72. *Id.* at 126-27.

> Wrong as we think slavery is, we can yet afford to let it alone where it is, because that much is due to the necessity arising from its actual presence in the nation; but can we, while our votes will prevent it, allow it to spread into the National Territories, and to overrun us here in these Free States? If our sense of duty forbids this, then let us stand by our duty, fearlessly and effectively.[73]

It was the South that denied the right of citizens to petition for abolition, to speak for emancipation. It was the South that demanded that all doors be closed against the possibility that slavery might wither and die. It was the South that took a course that even Colonel Robert E. Lee denounced as unjustified revolution and anarchy.[74] It was the South that threatened the last best hope of Earth, not Lincoln.

Lincoln's Growth

Over the years, Lincoln's reputation suffered because some attacked his caution and moderation: he was, it is said, too respectful of the constitutional status quo. Some wanted him to be John Brown. Others wanted him to be John Calhoun. In this view, he was too aggressive in an assault on the constitutional status quo. Still others measure him by moral standards of the late twentieth century.

We cannot reconstruct Lincoln into a modern man, but we ought to remember how much he grew and how well he helped the Constitution to

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73. *Id.* at 129-30.

74. ALAN T. NOLAN, LEE CONSIDERED: GENERAL ROBERT E. LEE AND CIVIL WAR HISTORY 34-35 (1991) (quoting Letter from Robert E. Lee to G.W.P. Custis (Jan. 23, 1861)).

> As an American citizen, I take great pride in my country, her prosperity and institutions, and would defend any State if her rights were invaded. But I can anticipate no greater calamity for the country than a dissolution of the Union. It would be an accumulation of all the evils we complain of, and I am willing to sacrifice everything but honor for its preservation. I hope, therefore, that all constitutional means will be exhausted before there is a resort to force. *Secession is nothing but revolution.* The framers of our Constitution never exhausted so much labor, wisdom and forbearance in its formation, and surrounded it with so many guards and securities, if it was intended to be broken by every member of the Confederacy at will. It is intended for "perpetual union," so expressed in the preamble, and for the establishment of a government, not a compact, which can only be dissolved by revolution, or the consent of all the people in convention assembled. *It is idle to talk of secession. Anarchy would have been established, and not a government, by Washington, Hamilton, Jefferson, Madison, and the other patriots of the Revolution.*

Id. (emphasis added).

grow. It is true he resisted the race-baiting of opportunistic political opponents with language we now see as undercutting faith in the equality of man, but his passion was always for equality of rights, not utopian equality of talent, equality of wealth, or equality of property.[75] He had the doubts of a rational man of the nineteenth century. And the prejudice. Early in his career he said enough to show he had not grown up free from the bias and stereotypes of his time. But he grew.[76]

Necessity was the key. He came to understand that emancipation need not be defended solely on moral grounds; it was a practical strategy to win the war. In a public letter addressed to a political rally in Springfield, Illinois—his home town—President Lincoln was direct in his response to critics of the Emancipation Proclamation: "[T]o be plain, you are dissatisfied with me about the negro."[77] Critical historians say he cared more about Union than liberty. Perhaps. But he also articulated the moral case for citizenship:

> You say you will not fight to free negroes. Some of them seem willing to fight for you; but, no matter. Fight you, then, exclusively to save the Union. I issued the proclamation on purpose to aid you in saving the Union . . . .
>
> . . . [I]n your struggle for the Union, to whatever extent the negroes should cease helping the enemy, to that extent it weakened the enemy in his resistence to you . . . . [W]hatever negroes can be got to do as soldiers, leaves just so much less for white soldiers to do, in saving the Union.[78]

His aspirations were idealistic, even if his rhetoric emphasized the practical.

> But negroes, like other people, act upon motives. Why should they do any thing for us, if we will do nothing for them? If they stake their lives for us, they must be prompted by the strongest motive--even the promise of freedom. And the promise being made, must be kept.[79]

Lincoln's eyes had been opened. He had been moved by the courage of black soldiers only recently pressed into battle. The promise of freedom—of

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75. GUELZO, *supra* note 1, at 82-85.

76. A recent, useful, and balanced summary of this debate over Lincoln's racial views is GEORGE M. FREDRICKSON, BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE (2008).

77. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, *supra* note 28, at 495-96.

78. *Id.* at 498.

79. *Id.*

citizenship—"must be kept." All depended on victory. And when victory comes, he continued:

> [T]here will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind on to this great consummation; while, I fear, there will be some white ones, unable to forget that, with malignant heart, and deceitful speech, they have strove to hinder it.[80]

Lincoln needs only a character witness. Lincoln's advocates need only call on Frederick Douglass, who had been an idealist, even a radical, who could admire a moderate. Douglass had experienced the confusion and frustration of a passionate advocate of abolition and racial equality, who was often not quite sure of Lincoln's priorities. Still, his conclusions are generous and realistic.

> [Lincoln's] great mission was to accomplish two things: first, to save his country from dismemberment and ruin; and second, to free his country from the great crime of slavery. To do one or the other, or both, he must have the earnest sympathy and the powerful coöperation of his loyal fellow-countrymen. . . . Viewed from the genuine abolition ground, Mr. Lincoln seemed tardy, cold, dull, and indifferent; but measuring him by the sentiment of his country, a sentiment he was bound as a statesman to consult, he was swift, zealous, radical, and determined.[81]

80. *Id.* at 499.

81. Frederick Douglass, Oration In Memory of Abraham Lincoln (Apr. 14, 1876), *in* FREDERICK DOUGLASS: AUTOBIOGRAPHIES 915, 921 (Henry Louis Gates, Jr. ed., 1994).