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JOHN BROWN, ABRAHAM LINCOLN, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL

Professor Kenneth Stampp concluded the preface to his And the War Came by asking readers “how many more generations of black men should have been forced to endure life in bondage in order to avoid its costly and violent end.”¹ Almost forty years later, Professor Evan Carton concluded his Patriotic Treason by raising the same concerns. “There were opportunities to avert the war and opportunities to end it quickly that were not seized,” he states, “(b)ut four million other Americans—along with millions more of their descendants for perhaps many years to come—would also have remained enslaved.”² Their similar language masked fundamentally different purposes. Professor Stampp was justifying Abraham Lincoln’s decision in the spring of 1861 to go to war.³ Professor Carton was justifying John Brown’s decision in 1859 to raid Harper’s Ferry,⁴ a decision repeated and vigorously condemned by both Lincoln and the Republican Party.⁵

From John Brown’s perspective, Abraham Lincoln resembled the many northern politicians who found more or less comfortable means for accommodating human bondage. Lincoln’s consistent support for fugitive slave laws led Wendell Phillips to dub him “the Slave-Hound of Illinois.”⁶ The first Republican president’s speeches before assuming that office offered little relief to those antebellum Americans most concerned with the plight of enslaved persons of color. Lincoln’s constitutional attacks on the pro-slavery policies associated with Dred Scott v. Sandford⁷ were consistently balanced with constitutional defenses of other pro-slavery policies.⁸ The Republican platform of 1860, he admitted, would have almost no impact

¹ Kenneth M. Stampp, And the War Came: The North and the Secession Crisis, 1860-1861 (Louisiana State University Press: Baton Rouge, 1970), p. xvii.

² Evan Carton, Patriotic Treason: John Brown and the Soul of America (Free Press: New York, 2006), pp. 338-40.

³ See Stampp, And the War Came, pp. 285-86.

⁴ See Carton, Patriotic Treason, p. 337.

⁵ Abraham Lincoln, “Address at Cooper Institute, New York Cty,” The Collected Works of Abraham Lincoln (Vol. III) (edited by Roy P. Basler) (Rutgers University Press: New Brunswick, New Jersey, 1953), p. 538; “Republican Party Platform of 1860,” <http://www.presidency.ucsb.edu/ws/index.php?pid=29620>. See William W. Freehling, The Road to Disunion: Secessionists Triumphant (Oxford University Press: New York, 2007), p. 220.

⁶ Irving H. Bartlett, Wendell Phillips, Brahmin Radical (Beacon Press: Boston, 1961), p. 222.

⁷ 60 U.S. 393 (1856).

⁸ See Part II, below.

on the lives of those in bondage before the Civil War. The man who became known as the “Great Emancipator” “did not suppose that” after a congressional ban on slavery in all territories was implemented “ultimate extinction would occur in less than a hundred years at the least.”⁹ Some prominent abolitionists, uninspired by repeated Republican assertions about “the right of each state to order and control its own domestic institutions according to its own judgment exclusively,”¹⁰ concluded that Lincoln and his political supporters offered little more of value than such Jacksonians as Stephen Douglas and Roger Taney to the vast majority of the enslaved. A Republican victory in 1860, Lydia Maria Child believed, would yield only “a miserable mush of concession, leaving the country in a worse state than it found it.”¹¹

This essay explores whether Abraham Lincoln from 1854 until 1861 successfully fashioned a viable middle ground between Dred Scott’s pro-slavery constitutionalism as interpreted by Stephen Douglas and John Brown’s antislavery violence. Part I presents evidence that Lincoln and John Brown were largely engaged in an argument over tactics. Both found violence and lawless conduct necessary to emancipate slaves, but Lincoln did so in ways that gained support from crucial border states. Part II presents evidence that Lincoln and Douglas were largely haggling over the price of Union. Both assured southerners that their policies were leave untouched the lives of most slaves for the foreseeable future, but Lincoln thought slaveholders not willing to move to the western territories would be willing to accept grudgingly a prohibition on slavery in those regions. The concluding paragraph briefly raises questions about whether any alternative existed to arguing tactics with Brown or haggling over price with Douglas. Lincoln alleged teaches lessons about “the politics of the possible,”¹² but the precise nature of those lessons and possibilities are obscured by scholarly failures to acknowledge the proslavery compromises necessary in 1861 to preserve the Union peacefully or the justification of the violence actually responsible for the abolition of slavery.

Roger Taney/Stephen Douglas and John Brown may provide more realistic constitutional alternatives than Abraham Lincoln. The central question Americans faced during the late 1850s was how much slavery they were willing to accept to maintain national union. Roger Taney and Stephen Douglas insisted that the price for northerners was high, that a good deal of accommodation was necessary to preserve the Constitution of 1789. John Brown forthrightly insisted that all mainstream politicians proposed too dear a bargain for national union, that violence was the only means by which substantial numbers of slaves would be freed in the foreseeable future. By pretending that Lincoln’s proposal to place slavery “in the course of ultimate extinction” over the course of a century or more might have both preserved Union and justified the constitutional order, contemporary Americans fail to acknowledge just how much constitutional evil must be tolerated to maintain constitutions in divided societies and the necessity of violence as the only alternative for **possibly** advancing the good.

⁹ Lincoln, “Fourth Debate with Stephen A. Douglas, at Charleston, Illinois,” 3 Collected Works, p. 181.

¹⁰ Lincoln, “First Inaugural Address,” The Collected Works of Abraham Lincoln (Vol. III) (edited by Roy P. Basler) (Rutgers University Press: New Brunswick, New Jersey, 1953), p. 263.

¹¹ Carton, Patriotic Treason, p. 278 (quoting Lydia Maria Child).

¹² Sean Wilentz, “Homegrown Terrorist,” **The New Republic** (October 24, 2005).

I. Arguing over Tactics: Abraham Lincoln as John Brown

While “he hoped to have God on his side,” Abraham Lincoln insisted that he “must have Kentucky.”¹³ Concerned with maintaining Union support in the border states, the sixteenth president chastised more abolitionist Union officers who ordered emancipation in their military districts. “[L]iberating slaves of traitorous owners,” Lincoln wrote in the late summer of 1861, might “ruin our rather fair prospect for Kentucky.”¹⁴ “I think to lose Kentucky is nearly the same as to lose the whole game,” he later added to a correspondent who supported more aggressive emancipatory policies, for with “Kentucky gone, we can not hold Missouri, nor, as I think, Maryland.”¹⁵ Lincoln displayed the same concern with the border states during the first months of his administration. As Kenneth Stampp details, Lincoln upon taking office did not seek to avoid war, but to find a means for forcing the Confederacy to fire the first shot. Doing so, he believed, would keep Kentucky and other states in the Union, thereby maximizing the Union chance of military success.¹⁶

Lincoln was less fastidious when considering the constitutional limitations on Civil War policies. As numerous commentators have detailed, the Illinois Republican frequently made unprecedented assertions of executive power in support of the Union effort. These constitutionally questionable presidential actions included the suspension of habeas corpus, the imposition of martial law without congressional approval, the emancipation proclamation, the blockade, and unilateral press censorship.¹⁷ Lincoln was particular prone to toss constitutional restrictions and legality aside when taking actions designed to ensure that Kentucky and other border states would be “on his side.” Lincoln administration officials arrested numerous Maryland legislators thought to have pro-southern sentiments when preventing that state from adopting a secession ordinance. Some were held for more than a year without trials or even notice of the evidence against them.¹⁸ Martial law and summary arrests played crucial roles when state elections were held in Maryland, Kentucky, and Missouri.¹⁹ Federal troops frequently prevented voters opposed to the Civil War from casting ballots in other close elections. “[T]hose merely suspected of hostilities to the Republican party,” Richard Bense

¹³ James M. McPherson, Battle Cry of Freedom: The Civil War Era (Oxford University Press: New York, 1988), p. 284.

¹⁴ Lincoln, “To John C. Fremont,” 4 Collected Works, p. 507

¹⁵ Lincoln, “To Orville H. Browning,” 4 Collected Works, p. 533.

¹⁶ See Stampp, And the War Came, p. 285.

¹⁷ For an excellent discussion of this issues, see Daniel Farber, Lincoln’s Constitution (University of Chicago Press: Chicago, 2003).

¹⁸ See McPherson, Battle Cry of Freedom, pp. 289-90; Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties (Oxford University Press: New York, 1991), pp. 14-18.

¹⁹ Forrest McDonald, States’ Rights and the Union: Imperium in Imperio, 1776-1876 (University Press of Kansas: Lawrence, Kansas, 2000), p. 201.

documents, “were often physically ejected from the polling place.”²⁰ Lincoln throughout the Civil War denied that he had ever acted illegally or unconstitutionally,²¹ but he as vigorously insisted that illegal or unconstitutional action would have been justified in order to maintain the Union. “[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” he famously asked.²²

Many contemporary commentators endorse Lincoln’s claim, “[e]ven in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?”²³ Larry Alexander and Frederick Schauer assert that moral commitments may sometimes override legal commitments, and that both Lincoln’s continued opposition to Dred Scott and his actions during the Civil War are rare instances where lawless executive action was justified. “If it was important for winning the Civil War that Lincoln suspend habeas corpus and infringe on other civil liberties,” they write,

then the moral importance of winning the war was sufficient to justify his actions. Reaching this conclusion, however, does not mean that suspending habeas corpus was right. It just means that this wrong was outweighed by the greater wrong that would have occurred had the war been lost. Once we see that overridable obligations are still obligations, we need not say that Lincoln should have followed Dred Scott, all things considered, just because Lincoln had an overridable obligation to follow Dred Scott because of its source.²⁴

Richard Fallon similarly maintains that “the practical imperatives confronting the President” during the early years of the Civil War “morally justified his violation of constitutional law.”²⁵

Contemporary Americans who celebrate how Lincoln was able to provoke the Confederacy into firing the first shots of the Civil War and defend his unconstitutional exercises of executive power regard Lincoln and John Brown as engaged in an argument over tactics. Both recognized that violence was necessary to achieve their goals in the foreseeable future. Both recognized that this violence would not necessarily be entirely lawful. The difference between John Brown and Abraham Lincoln was over when lawless violence is justified than over the intelligent use of violence. Lincoln was successful because he recognized that the violence necessary to achieve his goals had to be employed in ways that maintained at least the passive

²⁰ Richard Franklin Bense, The American Ballot Box in the Mid-Nineteenth Century (Cambridge University Press: New York, 2004), p. 217. See McDonald, States’ Rights and the Union, p. 201.

²¹ Lincoln, “Message to Congress in Special Session,” 4 Collected Works, pp. 430-31.

²² Lincoln, “Message to Congress in Special Session,” 4 Collected Works, p. 430.

²³ Lincoln, “Message to Congress in Special Session,” 4 Collected Works, p. 430.

²⁴ Larry Alexander and Frederick Schauer, “On ExtraJudicial Constitutional Interpretation,” 110 **Harvard Law Review** 1359, 1383 (1997).

²⁵ Richard H. Fallon, Jr., “Executive Power and the Political Constitution,” 2007 **Utah Law Review** 1, 21 (2007).

support of the border states. Too confident that God was on his side, John Brown forgot that he also needed Kentucky.

Brown and Lincoln might even have been part of an implicit conspiracy to bring about a violent emancipation. Professor Carton probably exaggerates when he insists that the raid on Harper's Ferry "decisively tipped the balance of power and influence in the south in favor of the fire-eating secessionists, who had persuaded their constituents that, sooner or later, the Republican administration would allow or even encourage legions of John Browns to descend upon them."²⁶ Secession was overdetermined. Crucial events took place before and after John Brown's raid.²⁷ Nevertheless, John Brown almost certainly increased the probability that southern states would secede upon Lincoln's election.²⁸ No secession in 1860 would have meant no Civil War in 1861, no emancipation proclamation in 1863, no use of African-American troops in 1864 and 1865, and no post-Civil War Amendments during Reconstruction. Brown and Lincoln, from this perspective, engaged in a "bad cop/good cop" routine that provoked southern secession while ensuring Union support sufficient to triumph in the subsequent hostilities.

If the distinction between Lincoln and Brown is something more than an argument (or implicit agreement) about tactics, the reason must lie in their different justifications for violence. Brown was fighting to free slaves. Lincoln at the beginning of the Civil War announced that combat was necessary solely for preserving national unity. "I would save the Union," he informed Horace Greeley in 1861.

I would save it the shortest way under the Constitution. The sooner the national authority can be restored; the nearer the Union will be "the Union as it was." If there be those who would not save the Union, unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe what I am doing hurts the cause, and I shall do more whenever I shall believe doing more helps the cause.²⁹

This rhetoric might have been aimed solely at appeasing Kentucky, whose citizens in 1861 were unwilling to fight to free slaves but might be induced to fight to preserve Union. If so, then the

²⁶ Carton, *Patriotic Treason*, pp. 338-39.

²⁷ See especially, Freehling, *Secessionists Triumphant*.

²⁸ See Freehling, *Secessionists Triumphant*, pp. 205-21.

²⁹ Lincoln, "To Horace Greeley," *The Collected Works of Abraham Lincoln* (Vol. V) (edited by Roy P. Basler) (Rutgers University Press: New Brunswick, New Jersey, 1953), pp. 388-89

disagreement between Brown and Lincoln remains tactical, over when the public commitment to emancipation should have been declared. If Lincoln's actual goal was preserving the Union independent of any effect on human bondage, however, then such an effect to preserve "the Union as it was" might have best been accomplished by a public commitment to maintaining all Jacksonian policies on sectional issues. The conventional defense of Lincoln's lawless violence, in short, threatens to transform his argument over tactics with John Brown to mere haggling over price with Stephen Douglas and Roger Taney.

II. Haggling over Price: Lincoln as Stephen Douglas/Roger Taney

Abraham Lincoln during his debates with Stephen Douglas acknowledged only three differences between his position on slavery and that publicly championed by Douglas (and Chief Justice Roger Brooke Taney). First, Lincoln believed the national government had the power to prevent the westward expansion of slavery. He was "pledged to a belief in the right and duty of Congress to prohibit slavery in all the United States Territories."³⁰ Douglas maintained that elected officials were obligated to act consistently with the Supreme Court's ruling in Dred Scott v. Sandford that slaveholders had a constitutional right to bring their human property into all American territories.³¹ Second, Lincoln repeatedly declared in public that slavery was evil. Slavery, he asserted during the sixth debate with Douglas, "is a moral, a social and a political wrong."³² Douglas professed public indifference to whether persons voted "slavery up or down,"³³ although in private he declared human bondage to be "a curse beyond computation."³⁴ Third, Lincoln expressed concern that American expansion might fan sectional flames. While he was "not generally opposed to honest acquisition of territory," the Illinois Republican would consider whether "such acquisition would or would not a[g]gravate . . . the slavery question

³⁰ Lincoln, "Mr. Lincoln's Speech, Second Debate with Stephen A. Douglas at Freeport, Illinois," 3 Collected Works, p. 40. Lincoln sometimes suggested that Congress had the power, but not the constitutional obligation to ban slavery in the territories. He regarded the Missouri Compromise, which divided the West in slave and free territories, as a "sacred compact." The First Inaugural declares:

May Congress prohibit slavery in the territories? The Constitution does not expressly say. **Must** Congress protect slavery in the territories? The Constitution does not expressly say.

Lincoln, "First Inaugural," 4 Collected Works, p. 267 (emphasis in original).

³¹ Stephen Douglas, "Mr. Douglas's Speech, Third Debate with Stephen A. Douglas at Jonesboro, Illinois," 3 Collected Works, p. 112.

³² Lincoln, "Mr. Lincoln's Speech, Sixth Debate with Douglas at Quincy, Illinois," 3 Collected Works, p. 254.

³³ Douglas, "Mr. Douglas Reply, Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois," 3 Collected Works, p. 241.

³⁴ See Robert W. Johannsen, "Stephen A. Douglas and the South," 33 **Journal of Southern History** 26, 32 (1967).

among ourselves.”³⁵ Douglas disagreed. He contended, “whenever it becomes necessary, in our growth and progress to acquire more territory, . . . I am in favor of it, without reference to the question of slavery.”³⁶

Lincoln denied or blurred other possible differences between Douglas’s positions and his on slavery, race and sectional politics. During the second debate, the Illinois Republican stated that he was opposed to the “unconditioned repeal of the fugitive slave law,” would vote to admit additional slave states, and was not “pledged to the abolition of slavery in the District of Columbia” or “the abolition of the slave trade between the different states.”³⁷ Lincoln repeatedly stated that federal power over slavery was limited to the territories. He had “no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists.”³⁸ When president-elect, he urged the repeal of every personal liberty law in the North. Lincoln informed Thurlow Weed that “all opposition, real and apparant, to the fugitive slave [clause] of the constitution ought to be withdrawn.”³⁹ He promised to forego “strict legal right” and refrain from appointing “obnoxious strangers” to federal positions in the middle and lower south,⁴⁰ practically guaranteeing that federal postmasters in most slave states would not deliver abolitionist tracts. Lincoln bluntly stated that he “never ha[d] complained **especially** of the Dred Scott decision because it held that a negro could not be a citizen”⁴¹ and vigorously opposed black citizenship in Illinois.⁴² The language Lincoln used when making these remarks permit the inference that he may have privately favored greater rights for persons of color and was waiting for a politically more opportune moment. Still, at no point before assuming the presidency did that more opportune moment occur. Instead, Lincoln maintained that the territories should be an “outlet for free white people everywhere,”⁴³ apparently sanctioning state laws prohibiting free black residents. Lincoln championed colonization for free persons of color until the last years of his life.⁴⁴ When president, he took far more conservative positions than most Republican Congressmen on confiscation of slaves and the rights of former slaves during reconstruction.⁴⁵

³⁵ Lincoln, “Mr. Lincoln’s Speech, Second Debate with Stephen A. Douglas, at Freeport, Illinois,” 3 Collected Works, p. 41.

³⁶ Douglas, “Mr. Douglas’s Speech, Second Debate with Stephen A. Douglas, at Freeport, Illinois,” 3 Collected Works, p. 54.

³⁷ Lincoln, “Mr. Lincoln’s Speech, Second Debate with Stephen A. Douglas at Freeport, Illinois,” 3 Collected Works, p. 40.

³⁸ Lincoln, “First Inaugural Address,” 4 Collected Works, p. 263.

³⁹ Lincoln, “To Thurlow Weed,” 4 Collected Works, p. 154.

⁴⁰ Lincoln, “First Inaugural Address,” 4 Collected Works, p. 266.

⁴¹ Lincoln, “Mr. Lincoln’s Reply, Seventh Debate with Stephen A. Douglas,” 3 Collected Works, pp. 298-99.

⁴² Lincoln, “Mr. Lincoln’s Rejoinder, Fourth Debate with Stephen A. Douglas, at Charleston, Illinois,” 3 Collected Works, p. 179.

⁴³ Lincoln, “Mr. Lincoln’s Reply, Seventh Debate with Stephen A. Douglas,” 3 Collected Works, p. 312.

⁴⁴ Lincoln, “Annual Message to Congress,” 5 Collected Works, p. 530.

⁴⁵ See Daniel W. Hamilton, The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War (University of Chicago Press: Chicago, 2007),

Lincoln's willingness to support constitutionally controversial proslavery policies casts doubt on whether he was as committed as some contemporary commentators to interpretive strategies aimed at making the constitution "the best it can be."⁴⁶ Prominent antislavery advocates made plausible constitutional arguments against federal power to pass Fugitive Slave laws.⁴⁷ Lincoln, as noted above, insisted that such laws were constitutional and urged free states to repeal personal liberty laws. Although the Supreme Court in Gibbons v. Odgen declared that the national government had the power to regulate "commerce which concerns more states than one,"⁴⁸ Lincoln publicly asserted that Congress had no power to ban the interstate slave trade and that he would not support prohibition even if bans were constitutionally permitted. These concessions cannot be explained entirely by Lincoln's personal constitutional beliefs or as tactics necessary to gain electoral college majorities. Lincoln publicly claimed that the Fugitive Slave Act of 1850 did not provide constitutionally adequate safeguards for free persons of color.⁴⁹ While calls for repealing all federal slave laws were politically risky,⁵⁰ Lincoln would not have lost many northerner voters by insisting more emphatically on the protections for free citizens of color already on the books in many free states.⁵¹ Personal liberty laws were fairly popular in the crucial northern regions Republicans needed for control of the national government. Lincoln refrained from attacking some proslavery constitutional wrongs and exercising some constitutional antislavery powers in order to preserve Union. "[I]t will be much safer for all, both in official and private stations," he stated with discussing the rendition process, "to conform to, and abide by, all those acts which stand unrepealed."⁵²

Many prominent constitutional commentators endorse Lincoln's commitment to tempering constitutional justice with expediency. Alexander Bickel regarded Lincoln's moderation as the model for constitutional statesmanship. "Principled government by the consent of the governed," Bickel claimed Lincoln taught American citizens,

often means the definition of principled goals, and the practice of the art of the possible in striving to attain them. The hard fact of an existing evil institution such as slavery and the hard practical difficulties that stood in the way of its

pp. 74-78; Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 (Harper & Row Publishers: New York, 1988), pp. 61-62.

⁴⁶ See Sotirios Barber and James E. Fleming, Constitutional Interpretation: The Basic Questions (Oxford University Press: New York: New York, 2007), p. xiii; Ronald Dworkin, Law's Empire (Harvard University Press: Cambridge, 1986), p. 379.

⁴⁷ Salmon Portland Chase, Speech of Salmon P. Chase in the Case of the Colored Woman, Matilda (Cincinnati: Pugh & Dodd, Printers, 1837), pp. 17-27; Salmon Portland Chase, Reclamation of Fugitives From Service (B.P. Donogh: Cincinnati, 1847), pp. 75, 96-106.

⁴⁸ 22 U.S. 1, 194 (1824).

⁴⁹ Lincoln, "First Inaugural Address," 4 Collected Works, p. 264.

⁵⁰ See William C. Harris, Lincoln's Rise to the Presidency (University Press of Kansas, Lawrence, Kansas, 2007), p.205.

⁵¹ See Thomas D. Morris, Free Men All: The Personal Liberty Laws of the North, 1780-1861 (Johns Hopkins University Press: Baltimore, 1974), p. 199.

⁵² Lincoln, "First Inaugural Address," 4 Collected Works, p. 264.

sudden abolition justified myriad compromises short of abandoning the goal. The goal itself--the principle--made sense only as an absolute, and as such it was to be maintained. As such it had its vast educational value, as such it exerted its crucial influence on the tendency of prudential policy. But expedient compromises remained necessary also, chiefly because a radically principled solution would collide with widespread prejudices, which no government resting on consent could disregard, any more than it could sacrifice its goals to them.⁵³

Harry Jaffa similarly praises Lincoln for “never attempt[ing] to propose what was more than one step ahead of the great body of political public opinion.” Lincoln correctly realized, Jaffa claims, that the best political actors can achieve “the highest degree of equality for which general consent [can] be obtained.”⁵⁴

To the extent Lincoln was seeking this “highest degree of equality for which general consent can be obtained,” he may be best characterized as doing little more than haggling with his political rivals over the constitutional accommodations necessary for preventing secession. Taney, Douglas, and Lincoln each justified their preferred policies as the measures most likely to preserve Union. The Southern Jacksonians on the Supreme Court who determined that slavery could not be banned in the territories insisted that “the peace and harmony of the country required” their decision.⁵⁵ Douglas maintained “neither can the Union be preserved or the Democratic party maintained upon any other basis” than his interpretation of Dred Scott as consistent with popular sovereignty. Lincoln disagreed with the means by which Taney and Douglas would secure Union, but some speeches suggest agreement with their end. Lincoln claimed slave states would not secede should antislavery forces drive a harder bargain.⁵⁶ He assured followers that he had “many assurances . . . from the South that in no probable event will there be any very formidable effort to break up the Union.”⁵⁷ The combination of federal support for slavery in the states and federal bans on slavery in the territories, he insisted, would best guarantee “the peace of society” than the northern or southern Jacksonian alternatives.⁵⁸ Events proved Lincoln wrong. If “general consent” is understood as the consensus necessary to secure “the peace of society,” then Douglas was the proper “one step ahead of the great body of public opinion” when opposing the Lecompton constitution, while Lincoln’s demand for bans on slavery in the territories was the “radically principled solution” Bickel would have constitutional

⁵³ Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Bobbs-Merrill Company, Inc.: Indianapolis), p. 68.

⁵⁴ Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debate (Doubleday & Company, Inc.: Garden City, New York, 1959), pp. 386, 377.

⁵⁵ Dred Scott, at 493. See Philip Auchampaugh, “James Buchanan, the Court, and the Dred Scott Case,” 9 **Tennessee Historical Magazine** 231, 236 (1929); Freehling, Secessionists Triumphant, pp. 109-22.

⁵⁶ Robert W. Johannsen, “Stephen A. Douglas, “Harper’s Magazine,” and Popular Sovereignty,” 45 **Mississippi Valley Historical Review** 606, 609 (1959) (quoting Douglas).

⁵⁷ Lincoln, “To John Fry,” 4 Collected Works, p. 95.

⁵⁸ Lincoln, “Speech at Leavenworth, Kansas,” 3 Collected Works, p. 501.

actors foreswear. The price Lincoln asked citizens to pay for maintaining the Union was particularly imprudent because much evidence suggests that the Republican program in 1861 was not much more likely than the Jacksonian alternatives to achieve the antislavery end of placing human bondage “in a course of ultimate extinction.”⁵⁹

Persons committed to securing the liberty of many actually enslaved persons before the Civil War had little reason to prefer Lincoln’s position on human bondage in the territories to that of Stephen Douglas or even Roger Taney. The number of slaveholders willing to move west during the 1850s was insufficient to gain a popular proslavery majority in any territory. Douglas and his Jacksonian political allies stood firm when southerners sought to secure statehood on the basis of a fraudulent proslavery majority. Kansas was the only territory where slaveholders even put up a fight. The number of slaves in other territories before the Civil war was negligible. When Lincoln was elected president, many political actors had concluded that Dred Scott resolved the constitutional status of “an imaginary Negro in an impossible place.” The southern failure to colonize the west explains why Lincoln expressed no objections to leaving slavery alone in the New Mexico territories⁶⁰ and the Republican Congress waited for more than a year before passing a largely symbolic ban.⁶¹ Future political or economic developments, of course, might have eventually made the west more hospitable to the south’s peculiar institution. Whether slavery had reached its natural limit remains a subject for intense scholarly debate.⁶² Nevertheless, given the circumstances on the ground in 1861, a Republican ban on territorial slavery would be better characterized as ratifying the status quo than as a means for hurrying the demise of human bondage.

Whether presidential assertions that slavery was wrong would have had a significant impact on human bondage is doubtful. Lincoln maintained that for the first “eighty years” of American constitutional life, “[t]he public mind did rest in the belief that [slavery] was in the course of ultimate extinction.”⁶³ Before Douglas proposed the Kansas-Nebraska Act, Lincoln claimed to find nothing objectionable about his Jacksonian rival’s positions on slavery.⁶⁴ When the public philosophy in the United States committed Americans to what Lincoln believed were sufficiently antislavery principles, however, the number of slaves and slave states in the United

⁵⁹ Lincoln, “Mr. Lincoln’s Reply, First Debate with Stephen A. Douglas at Ottawa, Illinois,” 3 Collected Works, p. 18.

⁶⁰ Lincoln, “To William H. Seward,” 4 Collected Works, p. 183.

⁶¹ 12 Stat. 432 (1862).

⁶² See, i.e., Chas. W. Ramsdell, “The Natural Limits of Slavery Expansion,” 16 Mississippi Valley Historical Review 151 (1929); Michael A. Morrison, Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War (University of North Carolina Press: Chapel Hill, North Carolina, 1997), pp. 112-13.

⁶³ Lincoln, “Mr. Lincoln’s Reply, First Debate with Stephen A. Douglas at Ottawa, Illinois,” 3 Collected Works, p. 18.

⁶⁴ Lincoln, “Fragment: Last Speech of Campaign at Springfield, Illinois,” 3 Collected Works, p. 334. See Harris, Lincoln’s Rise to the Presidency, p. 145.

States increased dramatically, as did the political power of slaveholders.⁶⁵ Presidents George Washington, John Adams, Thomas Jefferson, James Madison, James Monroe and John Quincy Adams each asserted that slavery was wrong.⁶⁶ During their administrations, Americans determined that Congress had no power to emancipate slaves in existing states and began the process of national expansion that was thought to privilege slave states.⁶⁷ Perhaps Lincoln would have done better. Nevertheless, the evidence suggests that, in the absence of strong antislavery policies, human bondage flourished in a regime whose leaders did little more than call the institution wrong.

Contemporary reproductive politics cast further doubt on whether the combination of calling some behavior wrong and placing relative weak limits on that behavior are likely to cause dramatic changes in the incidence of that behavior. American presidents and both major political parties for the past thirty years have either condemned abortion or asserted that public policy should be directed at reducing the number of abortions. The Republican Party Platform in 2004 declared that “the unborn child has a fundamental individual right to life which cannot be infringed.”⁶⁸ “Abortion,” the Democratic Party Platform of 2004 stated, “should be safe, legal, and rare.”⁶⁹ The Supreme Court during this time period, while prohibiting state bans on abortion,⁷⁰ has sustained laws requiring parental notification,⁷¹ imposing waiting periods and “informed” consent,⁷² refusing to fund even medically necessary abortions,⁷³ and prohibiting

⁶⁵ See Don E. Fehrenbacher, The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery (completed and edited by Ward M. McAfee) (Oxford University Press: New York, 2001)

⁶⁶ George Washington, George Washington: A Collection (edited by W.B. Allen) (Liberty Classics: Indianapolis, 1988), p. 319; John Adams, The Works of John Adams, Second President of the United States (Vol. IX) (edited by Charles Francis Adams) (Little, Brown and Company: Boston, 1854), p. 480; Thomas Jefferson, The Portable Thomas Jefferson (edited by Merrill D. Peterson) (Penguin Books: New York, 1975), pp. 185-86; James Madison, The Papers of James Madison (Volume XII) (edited by Charles F. Hobson and Robert A. Rutland) (University Press of Virginia: Charlottesville, 1979), p. 437; Arthur Scherr, “Governor James Monroe and the Southampton Slave Resistance of 1799,” 61 **The Historian** 557, 577 (1999); John Quincy Adams, Memoirs of John Quincy Adams, Comprising Portions of His Diary From 1795 to 1848 (Volume V) (edited by Charles Francis Adams) (Books for Libraries Press: Freeport, New York, 1969), p. 9-10.

⁶⁷ See Mark A. Graber, Dred Scott and the Problem of Constitutional Evil (Cambridge University Press; New York, 2006), p. 115-26.

⁶⁸ 2004 Republican party Platform,
<http://www.presidency.ucsb.edu/ws/index.php?pid=25850>.

⁶⁹ Democratic Party Platform of 2004,
<http://www.presidency.ucsb.edu/ws/index.php?pid=29613>.

⁷⁰ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

⁷¹ See Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006).

⁷² See Planned Parenthood of Southeastern Pennsylvania v. Casey.

⁷³ Maier v. Roe, 432 U.S. 464 (1977); Harris v. McCrae, 448 U.S. 297 (1980).

certain means of performing abortions.⁷⁴ The influence of anti-abortion rhetoric and policies on the number of abortions has been quite weak. The abortion rate in the United States has declined only modestly since 1980 and much of that decline is explained by similar declines in the number of unwanted pregnancies. Significantly, the rate of decline appears to have no relationship to which party controls the national government. The decline in the number of abortions slowed during the Bush Administration in the years for which there is good data.⁷⁵ Calling abortion “wrong” has seemingly had no impact on public opinion.⁷⁶ A Gallup Poll taken in May, 2007 found unchanged from 1982 the percentages of Americans who believe abortion should always be legal or sometimes be legal. Yearly fluctuations have occurred, but there are no long term changes in the percentages of Americans who regard themselves as pro-choice. Given the strong support for reproductive liberty in such states as New York and California, states where the gubernatorial candidates from both parties take pro-choice stands, even a Supreme Court decision overruling Roe v. Wade is unlikely to place abortion in a course of ultimate extinction. Assuming the Republican Party’s analogous antislavery rhetoric and policies would have approximately the same impact as contemporary anti-abortion rhetoric and policies, few persons of color at the turn of the twentieth century would have had much reason for praising Lincoln. We might expect only that the number of slaves would have been reduced by 15%, that most of that reduction would have been unrelated to any official antislavery policy, that the rate of decrease would be slowing down, and that public opinion would be about as evenly divided on slavery issues as was the case when Lincoln was first elected to the presidency.

Lincoln and Douglas were doing something more than haggling over the price of Union when their conversation during the debates briefly turned to expansion. Douglas was committed to making the United States an “ocean-going republic.”⁷⁷ His call for unlimited acquisition of new territories throughout the Western hemisphere promised new lands for both free and slave state settlers. Lincoln condemned the likely “grab for the territory of poor Mexico” followed by an “invasion of the rich lands of South American, then the adjoining islands”⁷⁸ should Douglas become President. Harry Jaffa is surely correct to praise Republican politicians who recognized that “[o]nly a national commitment to confine slavery . . . would put an end to the drive for foreign conquest and domination.”⁷⁹ Radical abolitionists who ignored Lincoln’s position on expansion⁸⁰ grossly underestimated the different impacts Republican and Democratic administrations were likely to have on the immediate future of human bondage.

⁷⁴ Gonzales v. Carhart, ___ U.S. ___ 127 S. Ct. 1610 (2007).

⁷⁵ See Lawrence B. Finer and Stanley K. Henshaw, “Estimates of U.S. Abortion Incidence, 2001-2003,” Guttmacher Institute, August 3, 2006, http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf

⁷⁶ The data discussed below can be found at <http://www.pollingreport.com/abortion.htm>.

⁷⁷ **Congressional Globe**, 28th Cong., 2nd Sess., App., p. 68.

⁷⁸ Lincoln, “Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois,” 3 Collected Works, p. 235.

⁷⁹ See Jaffa, Crisis of the House Divided, p. 405.

⁸⁰ See Harris, Lincoln’s Rise to the Presidency, p. 215.

While Lincoln's opposition to acquiring new territories for slaveholders obviously distinguished his position from that of both Stephen Douglas and John Brown, both the nature and moral adequacy of this middle ground are problematic. Lincoln placed far more emphasis on preventing slavery's expansion westward than southward. He attacked the Kansas-Nebraska Act at every opportunity, but never publicly condemned efforts to annex Cuba.⁸¹ Several speeches suggest that Lincoln might have tolerated southern expansion in return for opening up more territory for free state settlers. The Compromise of 1850 was a legitimate bargain, he insisted, because "[t]he North gained two measures and the South three."⁸² A new party was hardly necessary to prevent further expansion. The Whig party had historically been opposed to extending the borders of the United States.⁸³ John Bell, the Constitutional Union party's candidate in 1860, led those fights against territorial expansion.⁸⁴ Finally and most important, a Republican policy limited to preventing southern expansion was unlikely to have any immediate impact on the lives of those already enslaved. As Lincoln informed his friend Alexander Stephens, "there is no cause for [southern] fears" that "a Republican administration would, directly, or indirectly, interfere with their slaves, or with them, about their slaves."⁸⁵

Lincoln might have been employing a deeper strategy for emancipating most slaves in the foreseeable future. He may have intended that his combination of strong antislavery rhetoric and tepid antislavery proposals provoke southern secession while retaining enough support in the crucial border states to make a Union victory highly probable. That victory, in turn, laid the groundwork for the thirteenth amendment. While Lincoln publicly doubted whether slave states would secede should Republicans be elected, he always insisted secession was treason and would be put down militarily. "[T]he Union," he declared,

won't be dissolved. We don't want to dissolve it, and if you attempt it, we won't let you. With the purse and sword, the army and navy and treasury in our hands and at our command, you couldn't do it. . . .

All this talk about the dissolution of the Union is humbug---nothing but folly. We ``WON'T'' dissolve the Union, and you ``SHAN'T''⁸⁶

Alternatively, Lincoln may have been prepared to announce bolder antislavery policies, perhaps after being reelected with increased support from the border states in 1864. A high tariff designed to raise the revenue necessary to buy most slaves from their middle south owners

⁸¹ See, i.e., Lincoln, "To Lyman Trumbull," 3 Collected Works, p. 356 ("I do not perceive that there is any feeling here about Cuba; and so I think, you can safely venture to act upon your own judgment upon any phase of it which may be presented").

⁸² Lincoln, "Speech at Bloomington, Illinois," The Collected Works of Abraham Lincoln (Vol. II) (edited by Roy P. Basler) (Rutgers University Press: New Brunswick, New Jersey, 1953), p. 238.

⁸³ See Robert E. May, The Southern Dream of a Caribbean Empire, 1854-1861 (Louisiana State University Press: Baton Rouge, 1973), pp. 194-205.

⁸⁴ See Graber, Dred Scott and the Problem of Constitutional Evil, p. 240-41.

⁸⁵ Lincoln, "To Alexander H. Stephens," 4 Collected Works, p. 160.

⁸⁶ Lincoln, "Speech at Galena, Illinois," 2 Collected Works, p. 355.

would either immediately emancipate slaves in that region or result in a broader emancipation after southern secession and Union success in the resulting Civil War.

These strategies acquit Lincoln of the charge that he was merely haggling over price with Douglas and Taney by portraying him as arguing over tactics with Brown. Lincoln's tactics, Part I asserted, were aimed at ensuring that Kentucky was on his side when violence broke out. If with Kentucky on his side, Lincoln as Stephen Douglas could peacefully implement aggressive antislavery policies, so much the better. On this account, however, Lincoln recognized that possibility as unlikely. Once the border states were committed to placing slavery on a course of fairly immediate extinction, Lincoln as John Brown intended to begin an antislavery program that would leave slaveholders only with the option of surrendering their slaves before or after most were slaughtered by Union military forces.

III. Skipping the Middleman

Abraham Lincoln is consistently presented as occupying the happy ground between John Brown and Stephen Douglas. Unlike Brown, Lincoln was committed to freeing slaves peacefully within the law. Unlike Douglas, Lincoln was committed to placing slavery "in a course of ultimate extinction." The problem with this position is that Americans in 1861 did not have the option of adopting peaceful means that would place slavery on a course of ultimate extinction. Lincoln's program might have stopped the expansion of slavery, but he offered almost nothing of value to persons enslaved before the Civil War. If the question is, as Kenneth Stampp insists, "how many more generations of black men should have been forced to endure life in bondage in order to avoid its costly and violent end" perhaps we ought to focus more on the differences between Stephen Douglas and John Brown, cutting out the middleman.

"Constitutional 'evil' is an unsettling idea. It is a wrenching and embarrassing part of American constitutional history, but it is often painted with a light brush. In this fascinating book, Mark Graber has brilliantly compelled us to do much more. No longer can we ignore evil in our own experience." "Mark Graber shows that, sadly, the Dred Scott decision's grim affirmation of slavery's constitutionality was an all too reasonable reading of American law. He then poses an even more painful question: whether the Civil War was the best route to eradicating that great constitutional evil. His sobering reflections will stimulate disagreements but also deeper understanding of monumental issues that are very much with us today." Rogers M. Smith, University of Pennsylvania. The Dred Scott decision of 1857 held that Americans of African descent, whether free or enslaved, were not American citizens. Among the laws cited are the Missouri Compromise, the Dred Scott Decision, the Kansas Nebraska Act, and the Emancipation Proclamation. Interim Archives / Getty Images. History & Culture. African American History. The Institution of Slavery & Abolition. The Black Freedom Struggle. Major Figures and Events. My claim that the result in Dred Scott v. Sandford may have been constitutionally correct "and that Stephen Douglas understood the antebellum constitutional order better than Abraham Lincoln" is likely to startle, puzzle, and probably offend readers reared on a steady diet of constitutional advocacy. No decent person living at the dawn of the twenty-first century supports the proslavery and racist policies that Douglas and Chief Justice Roger Taney championed. Nevertheless, important normative, historical, and constitutional reasons exist for rehabilitating the Dred Scott decision. Dred Scot... Dred Scott challenges persons committed to human freedom to determine whether antislavery northerners should have provided more accommodations for slavery than were constitutionally strictly necessary or risked the enormous destruction of life and property that preceded Lincoln's new birth of freedom. Description. Dred Scott and the Problem of Constitutional Evil concerns what is entailed by pledging allegiance to a constitutional text and tradition saturated with concessions to evil. The Constitution of the United States was originally understood as an effort to mediate controversies between persons who disputed fundamental values, and did not offer a vision of the good society. John Brown and Abraham Lincoln: A Study in Contrasts. John Brown, Abraham LincolnCredit...Library of Congress. Buy Book ¾. Amazon. Late in 1859, news of John Brown's failed raid on the federal armory at Harpers Ferry alarmed Abraham Lincoln, and his dismay worsened when prominent Northerners celebrated Brown as a saint. For five years, Lincoln had been working to build an antislavery political coalition across the North that would finally break the Southern slaveholders' domination of the government. Fending off absolutists who proclaimed a moral law higher than the Constitution, battling Northern racists who hurled slurs unprintable today, Lincoln and the fledgling Republican Party would put slavery on what Lincoln calle