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Cover Page Footnote

Associate Professor, Fordham Law School. I am grateful to Martin Flaherty, James Fleming, and Abner Greene for their extraordinary helpful comments on an earlier draft of this paper, to Evan Wolfson for his powerful insights about Lincoln and to Allison Treanor and Liam Treanor for the wonderful lives they have shared with me.

LEARNING FROM LINCOLN

*William Michael Treanor**

THE most arresting aspect of Jack Balkin's thought-provoking paper about the consequences of fidelity to the Constitution is his use of Abraham Lincoln. Professor Balkin offers Lincoln as a prime example of someone blinded by fidelity to the Constitution. Lincoln's fidelity to the Constitution, Balkin tells us, allowed him to make a kind of peace with slavery, to think that it was "not so great an evil that it had to be abolished immediately."¹ This is such a powerful point because, 130 years after Lincoln's assassination, we mourn him still. We mourn him because we miss his leadership, we miss his integrity, we miss his moral vision. In the first day of this Symposium, Bruce Ackerman sadly observed, "There is nobody like Abraham Lincoln around,"² and that is absolutely true. He was and is our nation's secular saint. And so, if his fidelity to the Constitution blinded *Lincoln* to an evil so hideous and so manifest as slavery, we must ask: What of us? What are we missing? What evil do we fail to see?

But I think that Professor Balkin is wrong about Lincoln and that the lesson we can learn from Lincoln is very different from the one Balkin offers. Lincoln teaches us both why we should be faithful to the Constitution and what fidelity is.

While Professor Balkin, in discussing "[t]he pressure of constitutional fidelity," suggests that the "pressures to reduce cognitive dissonance affect not only our attitudes about what is just or unjust, but also our attitudes about what forms . . . the ideal Constitution,"³ Lincoln did not fall unthinkingly into acceptance of the constitutional system. He regarded slavery as a moral abomination even when he believed, prior to the Emancipation Proclamation, that the Federal government could not constitutionally end slavery in the states. For example, as Professor Balkin acknowledges, when Lincoln in his Peoria speech of October 1854 denounced the Kansas-Nebraska Act, he made "no secret of his hatred of slavery and his recognition of it as a serious moral evil."⁴ Slavery, Lincoln thundered, was a "monstrous

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1. Jack Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703, 1734 (1997).

2. Remarks, Bruce Ackerman, *Fidelity as Synthesis: Colloquy*, 65 *Fordham L. Rev.* 1581, 1581 (1997).

3. Balkin, *supra* note 1, at 1733-34.

4. *Id.* at 1734 n.63.

injustice”⁵ and proponents of its spread were at “open war with the very fundamental principles of civil liberty.”⁶ He announced: “This *declared* indifference, but as I must think, covert *real* zeal for the spread of slavery, I can not but hate,”⁷ and he proclaimed: “[T]here can be no moral right in connection with one man’s making a slave of another.”⁸ Similarly, when he debated Stephen Douglas in 1858, he framed their senatorial contest as a contest about the morality of slavery: “The real issue in this controversy—the one pressing upon every mind—is the sentiment on the part of one class that looks upon the institution of slavery *as a wrong*, and of another class that *does not* look upon it as a wrong.”⁹

On another level, rather than falling easily into acceptance of the constitutional status quo, he resented the dead-hand control of the Founders in a very personal way. He feared that he would never be able to achieve the glory he passionately desired because of what the Founders had achieved. In one of his early speeches, in 1838, as a young state legislator, he said:

[The Founders’] ambition aspired to display before an admiring world, a practical demonstration of the truth of a proposition, which had hitherto been considered, at best no better, than problematical; namely, *the capability of a people to govern themselves*. If they succeeded, they were to be immortalized; their names were to be transferred to counties and cities, and rivers and mountains; and to be revered and sung, and toasted through all time. If they failed, they were to be called knaves and fools, and fanatics for a fleeting hour; then to sink and be forgotten. They succeeded. The experiment is successful; and thousands have won their deathless names in making it so.¹⁰

5. Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 *The Collected Works of Abraham Lincoln* 247, 255 (Roy Basler ed., 1953) [hereinafter *Peoria Speech*]. Lincoln first gave this speech in Springfield, Illinois, but that speech was not fully reported. Lincoln gave essentially the same address in Peoria later in the month, this time writing out his address for publication, and the citations that follow are to the Peoria speech. On the two versions of the speech, see David Herbert Donald, *Lincoln* 174, 626 n.174 (1995).

6. *Peoria Speech*, *supra* note 5, at 255.

7. *Id.*

8. *Id.* at 266.

9. *Created Equal?: The Complete Lincoln-Douglas Debates of 1858*, at 390 (Paul M. Angle ed., 1958).

10. Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 *The Collected Works of Abraham Lincoln*, *supra* note 5, at 108, 113 [hereinafter *Lyceum Address*]. Edmund Wilson first brought the speech to prominence and suggested that Lincoln implicitly viewed himself as the individual who threatened to undermine the constitutional order. Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 106-08 (1962). Harry Jaffa, responding to Wilson, contended that Lincoln viewed himself as the opponent of that individual. See Harry V. Jaffa, *Crisis of the House Divided* 182-86 (1959). Wilson had first put forth his thesis in a 1954 *New Yorker* article. A series of psychobiographers have accorded the speech central importance in understanding Lincoln. See Dwight

Even as he celebrated the Founders' triumph, Lincoln viewed them with envy: "[T]he game is caught; and I believe it is true that, with the catching, end the pleasures of the chase. The field of glory is harvested, and the crop is already appropriated."¹¹ He added, however, that "[N]ew reapers will arise, and they, too will seek a field. . . . Towering genius disdains a beaten path. . . . It thirsts and burns for distinction."¹² There were two ways in which, in his generation, distinction could be won: "emancipating slaves, or enslaving freemen."¹³

So, for Lincoln it was not easy to be faithful to the Constitution. The constitutional order simultaneously protected a moral abomination and barred him from achieving the glory he desired. And yet he was faithful. Why?

There are two reasons. First, because he thought things would be better within the constitutional system than outside of it. He believed that, through the constitutional system, the spread of slavery could be stopped, and that if the spread of slavery were stopped then, in time, slavery itself would be abolished. For example, in his Peoria speech, he noted that

[a]t the framing and adoption of the constitution, they [the Founders] forbore to so much as mention the word 'slave' or 'slavery' in the whole instrument. . . . Thus, the thing is hid away, in the constitution, just as an afflicted man hides away a wen or a cancer, which he dares not cut out at once, lest he bleed to death; with the promise, nevertheless, that the cutting may begin at the end of a given time.¹⁴

In contrast, were the Constitution to be displaced, unchecked pro-slavery interests would insure that slavery would spread and thereby survive. As historian Phillip Shaw Paludan has written, Lincoln's response to the Garrisonian claim that the Constitution was an agree-

G. Anderson, *Abraham Lincoln: The Quest for Immortality* 68-78 (1982); George B. Forge, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age* 83-86, 249-70 (1979); Charles B. Strozier, *Lincoln's Quest for Union: Public and Private Meanings* 61 (1982). Other scholars have accorded it less significance. Thus, Garry Wills observes that the speech reflects the "[o]ratorical heroism . . . [that] was the currency of public address in what was considered a golden age of oratory," Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* 82 (1992), and adds, "It was only in one of their many moods that Americans of Lincoln's time considered themselves puny descendants of giant fathers." *Id.* at 83. While the speech has inspired a range of readings, my claim here—which is, in essence, that Lincoln envied the Founders' historical reputation, but nonetheless supported the Constitution—is modest and is consistent with most, if not all, of these scholarly analyses. For further discussion of the Lyceum speech, see William Michael Treanor, *Fame, the Founding and the Power to Declare War*, 82 *Cornell L. Rev.* (forthcoming 1997).

11. Lyceum Address, *supra* note 10, at 113.

12. *Id.*

13. *Id.*

14. Peoria Speech, *supra* note 5, at 274.

ment with hell was that “equality would be realized only through the proper operation of existing institutions.”¹⁵

This illustrates that Professor Balkin is wrong when he says: “Our fidelity to the Constitution requires us to believe that it is a basically good and just document, and that it frames the legal system of a basically good and just polity.”¹⁶ Fidelity does not require that. Fidelity only requires that we believe that the Constitution is better than what we would have if we abandoned it. Winston Churchill famously observed: “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.”¹⁷ And that is all we have to believe about the Constitution for it to merit our fidelity—not that it is perfect, but that it is better than the alternatives.

The second reason why Lincoln was faithful to the Constitution was because he believed in the existence of an ideal Constitution. He described that Constitution in his Gettysburg Address and, through that expression, the “on-the-wall”¹⁸ Constitution was transformed. Lincoln’s central points are established by his opening sentence: “Four score and seven years ago our fathers brought forth upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹⁹ The opening words of the sentence establish the defining moment of the nation, its moment of origin. Four score and seven years ago is not 1787, the constitutional convention, nor is it 1789, ratification. It is 1776 and the Declaration of Independence. And the closing words of the sentence establish what the nation is about, its foundational principle: It is “dedicated to the proposition that all men are created equal.” Equality—nowhere mentioned in our unamended Constitution—has become the fundamental commitment of the constitutional order. Garry Wills has written that Lincoln “cleans[e] [d] the Constitution—not, as William Lloyd Garrison had, by burning an instrument that countenanced slavery. He altered the document from within, by appeal from its letter to the spirit, subtly changing the recalcitrant stuff of that legal compromise, bringing to it its own indictment.”²⁰ Lincoln invoked the Declaration

15. Phillip S. Paludan, *The Presidency of Abraham Lincoln* 19 (1994). Paludan’s treatment of the issue is to be found in *id.* at 16-20.

16. Balkin, *supra* note 1, at 1729.

17. Winston Churchill, *Parliament Bill*, Nov. 11, 1947, House of Commons, in *Winston S. Churchill: His Complete Speeches, 1897-1963*, at 7563, 7566 (Robert R. James ed., 1974).

18. Balkin, *supra* note 1, at 1735.

19. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, reprinted in Wills, *supra* note 10, at 263.

20. Wills, *supra* note 10, at 38.

of Independence “as a way of correcting the Constitution itself without overthrowing it.”²¹

It is important to realize that the Lincoln of the Gettysburg Address was being faithful to the Constitution even as he sought to change it because there are two ways in which we can meaningfully talk about fidelity.²² While the participants in this Symposium on fidelity and the Constitution have principally discussed this topic from the vantage point of the legal system, that is not the only way to approach the matter. Fidelity also has meaning in our political system. If fidelity in our legal system is best thought of as a chain novel, to use Ronald Dworkin’s metaphor,²³ fidelity in our political system can involve the same narrative told from a different perspective, as Lincoln did at Gettysburg. Legal precedent limits and shapes what the judicial system can do. But fidelity in the political system allows for a return to the principles that underlie our society. And here the problem of constitutional evil can be completely confronted. In other words, one can draw on our constitutional text, history, and principles and argue for equality, liberty, limited government, or democracy, highlighting the aspiration. The ultimate audience is not a court, but “We the People,” and if “We the People” can be convinced, a vision of the Constitution—though legally, to use Professor Balkin’s phrase, “off-the-wall”²⁴—can become constitutional reality. Lincoln, the masterful storyteller who knew the power of narratives, used that power to transform the Constitution. Wills writes:

The crowd [at Gettysburg] departed with a new thing in its ideological luggage, that new Constitution Lincoln had substituted for the one they brought with them. They walked off, from those curving graves on the hillside, under a changed sky, into a different America. Lincoln had revolutionized the Revolution, giving people a new past to live with that would change their future indefinitely.²⁵

If there are many legitimate ideal constitutions, as I have suggested, then the question becomes: How do we pick the version to which we owe fidelity? The answer is, again, suggested by Lincoln. It is suggested by the farewell address he gave when he left Springfield, Illinois to become President, never to return.

Lincoln always worried over his text. Despite the myth about the Gettysburg Address—that he hastily wrote his comments on the back of an envelope—he was always careful, always prepared well in advance. His farewell to Springfield was one of the few times in which

21. *Id.* at 147.

22. For a different perspective on Lincoln and constitutionality, one that treats Lincoln’s constitutional attachment as a deeply problematic issue, see Sanford Levinson’s very interesting account in *Constitutional Faith* at 139-42 (1988).

23. See Ronald Dworkin, *Law’s Empire* 228-32 (1986).

24. Balkin, *supra* note 1, at 1729.

25. Wills, *supra* note 10, at 38.

he spoke absolutely extemporaneously.²⁶ As he boarded his train, he turned to his neighbors and said:

My friends [he began]—No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington.²⁷

As Lincoln set about his task of defining his constitutional commitments and giving them life, he was not thinking about grand abstractions. He was thinking about the life he had led, the things he had seen, the struggles he faced, the people he knew, the son he had lost. And so it should be with us. Constitutional fidelity is not about something external to us. The Constitution that deserves our fidelity is the Constitution that reflects our hopes, our lives, our struggles, our commitments. And when we are faithful to that Constitution, what we are faithful to, ultimately, is ourselves.

26. *Id.* at 27-29, 268 & n.13.

27. Abraham Lincoln, Farewell Address at Springfield, Illinois (Feb. 11, 1861), in 4 *The Collected Works of Abraham Lincoln*, *supra* note 5, 190, 190 (footnote omitted) (“A. Version”). For background, see Donald, *supra* note 6, at 273.