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## The Ten Year War: What if Lincoln Had Not Exited After Four Years?

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## THE TEN YEAR WAR: WHAT IF LINCOLN HAD NOT EXITED AFTER FOUR YEARS?

Sanford Levinson\*

GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (HARVARD UNIVERSITY PRESS 2015). PP. 342. HARDCOVER \$ 32.95.

GEORGE KATEB, *LINCOLN'S POLITICAL THOUGHT* (HARVARD UNIVERSITY PRESS 2015). PP. 236. HARDCOVER \$24.95.

LOUIS P. MASUR, *LINCOLN'S LAST SPEECH: WARTIME RECONSTRUCTION AND THE CRISIS OF REUNION* (OXFORD UNIVERSITY PRESS 2015). PP. 247. HARDCOVER \$ 24.95.

“[I]t is one of the traumatic features of civil war that even after the enemy is defeated he remains in place and with him the memory of the conflict.”<sup>1</sup>

### I. INTRODUCTION: AMERICAN SESQUICENTENNIALS

Michael Zuckert, an unusually perspicacious student of American political thought and history—and the editor of a fine new journal *American Political Thought*, introduces a 2015 symposium in that journal on “The Last Days of Lincoln” with the following comment:

One hundred and fifty years ago this spring, three momentous events occurred: Abraham Lincoln delivered his second inaugural address, perhaps the greatest speech ever given by an American; *the long and bloody Civil War ended*; and Lincoln was assassinated by a die-hard supporter of the Confederacy.<sup>2</sup>

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1. TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 35 (2006).

2. Michael Zuckert, *Editor's Introduction*, 4 AM. POL. THOUGHT 438 (2015) (emphasis added).

There is nothing unusual in the italicized language. One of our leading legal historians, G. Edward White, titled the first volume of his projected two-volume overview of American legal history *Law in American History: From the Colonial Years Through the Civil War*,<sup>3</sup> and he, too, views Appomattox as providing the proper end point of his narrative.

But now consider the well-merited blurb offered by Yale Professor of Law John Fabian Witt<sup>4</sup> with regard to one of the books under review, Gregory Downs's *After Appomattox: Military Occupation and the Ends of War*.<sup>5</sup> Witt describes Downs as offering "[a] fundamental rethinking of what we can now call *America's Ten Years' War*."<sup>6</sup> That is, it is absolutely crucial to understand, *pace* both Zuckert and White (and, no doubt, hundreds more first-rate academic historians and political scientists, not to mention law professors reliant on their research) that Appomattox did *not* "end" the Civil War. It was a way station, albeit an important one, at less than even the halfway point to 1871, when the war, as a legal matter, arguably *did* come to an end. The year 2015 might have been the sesquicentennial of Appomattox, but now it is crucial to recognize that Appomattox did not constitute the conclusion of the Civil War. As Mary Dudziak has reminded us, it is no small matter to date either the beginning or ending of a war.<sup>7</sup> Most readers easily understand this with regard to the gross error of placing a banner proclaiming "Mission Accomplished" behind President George W. Bush, when he flew onto the aircraft carrier USS Abraham Lincoln in 2003 to assure Americans that the Iraq War that he chose to initiate was in fact a success. As we know now, the rout of Saddam Hussein's Republican Guard and the flight of the dictator from Baghdad was only the beginning of a war that in 2016 is in its thirteenth year, even though President Obama had proclaimed it at an end in 2011, when he ostensibly withdrew the final American troops from that country. Interestingly enough, as we shall see, Lincoln did not make a similar error in his Second Inaugural Address. The error is our own, and its consequences are, shall we say, more than merely of academic interest.

As one acknowledges the multiple sesquicentennials of 1865, there are yet other events very much worth mentioning: On the day preceding Lee's surrender to Grant on April 9, the Senate voted to submit the Thirteenth Amendment to the states for ratification, following the vote of the House of Representatives on January 31, 1865 (the subject of Steven Spielberg's *Lincoln*). On April 11th, Lincoln spoke to an audience outside the White House on the implications of Appomattox; three days later, of course, he was dead, and the new president was Andrew Johnson, a "War Democrat" from Tennessee placed on the ticket as a symbol of national unity. The Thirteenth Amendment, in part thanks to Johnson's vigorous actions, was ratified on the sixth of December. However, on December

3. G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* (2012).

4. Witt is the prize-winning author of *Lincoln's Code: The Laws of War in American History* (2012), which focuses on the development of Francis Lieber's extraordinarily important and interesting Code of War during the Lincoln Administration.

5. GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (2015).

6. *Id.* (focusing on Witt's comment on the back jacket of the book).

7. MARY DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012).

5th, Congress—or, more accurately, the Republicans who controlled Congress—had refused to seat any of the representatives or senators sent to Washington by the purportedly “restored” states whose governments had been recognized by Johnson. They clearly did not believe that the Thirteenth Amendment was sufficient, even if it was necessary to bring about the “new birth of freedom” promised at Gettysburg.

All of these events raise gripping issues of the most profound import. Beyond the obvious human and political dimensions are those of presumably primary interest to lawyers, especially those labeled “constitutional lawyers.” What do we have to learn—and, for those who are teachers, convey to our students—from these momentous events? The three books under review are essential reading for anyone interested in confronting the conundrums attached to the American Civil War,<sup>8</sup> including developing a more accurate sense of its actual duration. Perhaps the overarching question of all of these books involves the incomplete second term of Abraham Lincoln’s presidency. We know, more or less, what happened, at least in the strictest positivist sense, with the political leadership we had, including his successors Andrew Johnson and then, in 1869, Ulysses Grant, who had accepted Lee’s surrender. In the nature of the case, we can never really know what might have happened had Lincoln lived; it is all surmise. That said, it is almost irresistible for anyone interested in American history to ask the kinds of hypothetical, counter-factual questions that professional historians tend to avoid—like what would Lincoln have done, and what difference would it have made to our history thereafter?

If one is a full-blown structuralist, then the answer is that it really does not matter: History is determined by a variety of social forces beyond the control of the so-called “great men” we construct as part of our perhaps comforting standard narratives of heroes and villains. If, on the other hand, one believes that it does, at least occasionally, matter who occupies certain roles at certain times, then the question “what would Lincoln have done,” seems worthy of contemplation. Adopting a structuralist analysis *in toto* would make nonsense of the reverence most Americans feel in approaching the Lincoln Memorial.

Obviously we might begin by looking at what Lincoln *did* do (or say) during his life. However, as already suggested, the central question informing two of these books, and of this review, is what he *would have done* had he lived. Perhaps the most stunning sentence in any of the books under review is the comment by Indiana Radical Republican Senator George Julian, who pronounced that “the universal feeling among radical men here is that [Lincoln’s] death is a godsend,”<sup>9</sup> given the Radicals’ “hostility toward [his] policy of conciliation and contempt for his weakness.”<sup>10</sup> One might, as Julian apparently did, regard

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8. Assuming, of course, we are content to stick to conventional nomenclature. As David Armitage has incisively argued, the “Civil War” is misnamed if by that term we refer to battles over who will establish control over the national polity. The Confederacy no more wanted to take over the entire national government than did American Revolutionaries in 1776 envision marching on London and displacing King George III with George Washington. 1776-1783 was a secessionist war, not a civil war, and the same is true of the bloodbath of 1861-1865. See David Armitage, *Secession and Civil War*, in DON H. DOYLE, *SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA’S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS* 37 (2010).

9. JOHN MCKEE BARR, *LOATHING LINCOLN: AN AMERICAN TRADITION FROM THE CIVIL WAR TO THE PRESENT* 50 (2014).

10. *Id.*

John Wilkes Booth as having engaged in a “dastardly attack” on “the great leaders in this policy of mercy,”<sup>11</sup> apparently without regretting that its victim would not remain around to play out whatever that policy might require from Lincoln’s perspective. Is it possible that Julian was correct, even if we might initially be tempted to reject his comment as that of a crazed zealot?<sup>12</sup> Louis Masur almost literally concludes his book by quoting Frederick Douglass’s lament that “to the colored people of the country his death is an unspeakable calamity.”<sup>13</sup> Masur’s own concluding words are that “had he lived his humanity *might* have led the nation toward the righteous peace that he envisioned for all Americans.”<sup>14</sup> The conditional “might” speaks volumes (and itself justifies further scholarly volumes).

I shall discuss the three books under review in chronological order of their subject matters, beginning with George Kateb’s *Lincoln’s Political Thought*, which offers a brief overview of central aspects of Lincoln’s thought.<sup>15</sup> Next is Louis P. Masur’s *Lincoln’s Last Speech: Wartime Reconstruction & the Crisis of Reunion*, which focuses on the post-Appomattox speech of April 11, 1865.<sup>16</sup> The final book, by Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War*,<sup>17</sup> is quite different in that Lincoln barely appears. But Lincoln is a brooding omnipresence, for Downs addresses a number of central questions not only about the politics of Reconstruction, but also, and more important from the perspective of legally oriented readers, about the most profound constitutional issues underlying the actions taken (or not taken) by the national government in the years following Appomattox. Downs’s book fully justifies Witt’s appraisal. Our accepted periodization of the war no longer seems adequate. Were I to quibble, it might be with stopping with ten years; this obviously is well short of the Compromise of 1877 that is often thought to have brought Reconstruction to an end. In any event, we should realize that Lincoln did *not* in fact live to see the conclusion of “the War,” however important Appomattox surely was with regard to bringing to a conclusion a certain mode of fighting.

To put it mildly, the political and constitutional problems that plagued Lincoln while he was alive did not become any easier after his death; one can even argue they became more difficult, inasmuch as actions of the national government continued to be predicated on a “war power” even after the most visible aspect of the war had apparently concluded at Appomattox. But it would behoove us in the future to talk about what we can recognize as the “first stage” of the war from Sumter-Appomattox, followed by the “second stage” that concludes only in 1871 with the seating of Georgia’s representatives and senators in

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11. LOUIS P. MASUR, *LINCOLN’S LAST SPEECH: WARTIME RECONSTRUCTION AND THE CRISIS OF REUNION* 175 (2015).

12. I cannot forbear noting Felix Frankfurter’s oft-cited comment that the first proof he ever had of the possibility of divine providence was the timely death of Chief Justice Fred Vinson in 1953 and his replacement by Earl Warren, which may have made all the difference with regard to the fate of *Brown v. Board of Education*. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 656 (2004).

13. MASUR, *supra* note 11, at 187.

14. *Id.*

15. GEORGE KATEB, *LINCOLN’S POLITICAL THOUGHT* (2015).

16. MASUR, *supra* note 11.

17. DOWNS, *supra* note 5.

Congress. At this point, Downs argues, the Union had become fully reconstituted inasmuch as every state now enjoyed once more full representation in Congress and in the Electoral College.

Perhaps the most profound question involves the degree to which we really care about constitutional niceties. Former Justice Benjamin Curtis, who turned into an adamant opponent of what he believed to be Lincoln's constitutional overreaching as our War President, attacked the Emancipation Proclamation as unconstitutional.<sup>18</sup> He concluded his screed by lamenting the fact that "a respectable and widely circulated journal" had written "that 'nobody cares' whether a great public act of the President of the United States is in conformity with or is subversive of the supreme law of the land. . . . [O]ur great public servants," Curtis wailed, "may themselves break the fundamental law of the country, and become usurpers of vast powers not intrusted [sic] to them, in violation of their solemn oath of office; and 'nobody cares.'"<sup>19</sup>

So what *do* we really "care" about when looking at the career of Abraham Lincoln, viewed by many as our greatest President? As important is how we should respond to the crucial decisions made after Appomattox. Is it possible that we were actually better off without Lincoln than with his distinctive voice and power? Full development of these questions would justify a book of its own. All I can do in this review is indicate how these three books illuminate the host of questions that any such book would have to wrestle with.

## II. GEORGE KATEB MEDITATES ON LINCOLN'S ACTUAL CAREER

Like Masur's and Downs's books, Kateb's book is short, only 208 pages, but every page equally repays careful reading and thought. How did Lincoln, an exceptional politician, weave together what at some level was certainly a hatred of slavery with the practical exigencies of governance, not to mention his own political ambitions? In some ways, Kateb offers his own take on how, if at all, one can ultimately overcome the gulf between what Max Weber called the politics of "ultimate ends" and the quite different responsibilities of those who choose "politics as a vocation."<sup>20</sup> Michael Walzer's own reflections on the problem emphasized the potential necessity of the political leader to "dirty" his or her hands.<sup>21</sup> But, of course, we admire only *certain* political leaders for submitting to such necessities; others we justifiably deem opportunists or even tyrants.

Lincoln always took great care to distance himself from Abolitionists. And even when he abolished at least some slavery in the Emancipation Proclamation, he took equally great, and legalistic, care to specify the particular territories within which slavery was abolished—and equally important, those in which slavery would, at least formally, remain untouched. As many have noted, emancipation as a legal matter extended neither to the four slave states—Delaware, Maryland, Kentucky, and Missouri—that had remained loyal to the Union nor even to the conquered territories of the states that purported to form the

18. BENJAMIN R. CURTIS, A MEMOIR OF BENJAMIN R. CURTIS, LL.D. 306-35 (1879).

19. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 281 (5th ed. 2006); see also Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?* 2001 U. ILL. L. REV. 1135-58 (2001).

20. MAX WEBER, THE VOCATION LECTURES: POLITICS AS A VOCATION 83-84 (David Owen & Tracy B. Strong eds., Rodney Livingston trans., 2004).

21. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 162-64 (1973).

new Confederacy. Thus, the Proclamation as a formal matter did not cover New Orleans or Norfolk, both of which were back in Union hands at the time of the Proclamation. (Informally, it was increasingly clear that slavery was doomed and that there would be no turning back, though the specifics of the “anti-slavery settlement” were far from clear.) Does one admire him for being a careful legalist, inasmuch as the claimed foundation for the Proclamation was the “war powers” he enjoyed as President and Commander-in-Chief? Or does one see this as yet another example of the limited vision of what he could do as President or, perhaps, as a candidate for re-election in 1864 when he could not be confident of electoral success? And, of course, what does this portend for a fully realized second term of office had Lincoln lived to enjoy that? Furthermore, beyond the imperatives of correct description and careful historical analysis, how does one *assess* Lincoln as a political model? For a normative political theorist, that is surely the central question.

John Burt describes Kateb as “the most interesting and important philosopher of liberalism alive today.”<sup>22</sup> As one would expect, Kateb is fully attentive to—one might even say obsessed by—the difficulties that Lincoln generates for a political theorist who is aware of the problems presented when “abstractions” must be given concrete forms that can even result in death. Paul Kahn has suggested in his own trenchant critique of liberal political theory<sup>23</sup> that political liberals tend to pay far too little attention to “sacrifice,” the willingness to kill and in turn, to be killed as a constitutive feature of political reality. Lincoln was, of course, quite willing to accept the reality of sacrifice; he rejected the more pacifist policies of James Buchanan. His hapless predecessor in fact shared Lincoln’s view that secession was unconstitutional, but he also believed that the Constitution provided no mechanism by which the country as a whole could prevent it should it occur, except for imploring the would-be secessionists to stay. Force, however, was out of the question. Buchanan’s own last words, delivered to Congress in his Message of December 6, 1860, emphasized that “our Union . . . can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day perish.”<sup>24</sup> One might view Buchanan, rightly despised for his overt support of the Slavocracy in Kansas and on other occasions, as summoning up his own spirit of “charity.” That “spirit” was repudiated by Lincoln’s attempts both to fortify Fort Sumter and call out federal forces following the ill-advised attack by General Beauregard and Confederate forces.<sup>25</sup>

Lincoln was clearly not a systematic political theorist in the sense that we usually use that term. He wrote no books or even ruminative essays. His speeches, however eloquent, often wilt when exposed to the rigorous examination of the seminar. Kateb fully recognizes this feature of Lincoln’s oeuvre; he is more prone to focus on isolated sentences or paragraphs than on full speeches or, for example, the extended arguments set out in the Lincoln-Douglas debates. This is probably not the first book for those unfamiliar with Lincoln to turn to. But for anyone who has crossed that hurdle it may well be as Danielle

22. KATEB, *supra* note 15, at back jacket.

23. PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2012). See also Sanford Levinson, *Not for the Squeamish*, *THE IMMANENT FRAME* (Sep. 23, 2011, 11:59 AM), <http://blogs.ssrc.org/tif/2011/09/23/not-for-the-squeamish>.

24. BREST ET AL., *supra* note 19, at 304.

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

Allen has written, “essential reading.”<sup>26</sup>

The problems posed by Lincoln—as with the issues surrounding Reconstruction—cannot be cabined in the long distant past. William Faulkner’s reminder—“[t]he past is never dead. It’s not even past”<sup>27</sup>—has become something of a cliché because, at least with regard to the Civil War, it remains all too apt. We have most recently been reminded of this with regard to the status of the Confederate battle flag and the causes it is said to symbolize. But, of course, the ultimate issue posed by any war is the willingness to temper justice, perhaps with mercy or perhaps with a prudence that can reduce the costs (but also the spoils?) of victory.

Lincoln declared in January 1861, by which time seven states had announced their purported secession, that “[c]ompromise is not the remedy, not the cure. . . . The system of compromise has no end.”<sup>28</sup> One might compare this to the heartfelt defense of “compromise” in Dennis Thompson’s and Amy Gutmann’s recent book *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It*.<sup>29</sup> What would readers of this review think, for example, if the present political figure quoting Lincoln’s statement were Texas Senator Ted Cruz or former Senator Rick Santorum, referring, say, to abortion and the funding of Planned Parenthood? Is the proper response simply to paraphrase Ecclesiastes and suggest that there is a time for compromise and a time for insistent resolution? So when *is* the time for understanding and “mercy” towards one’s opponents, and when, instead, is it appropriate to engage in what critics, at least, will undoubtedly view as “malicious” actions designed to achieve objectives they find repellent, including the possibility of provoking death and destruction?

Kateb writes that any inquiry into Lincoln’s political thought “must have a sense of retrospective urgency that does not really suit standard academic discourse.”<sup>30</sup> One might well suspect that this book itself was written out of just such a sense of urgency. Something really rides, Kateb suggests, on the answers we give to the questions posed by Lincoln and his career. He focuses on what he calls “the period of Lincoln,” that is the period from “1854 to 1865, from passage of the Kansas-Nebraska Act to his murder.”<sup>31</sup> The Kansas-Nebraska Act repealing the 1820 Missouri Compromise and its apparent resolution of the territorial boundaries within which slavery might extend jolted Lincoln back into the political arena and, ultimately, to the presidency. It is the point at which Lincoln’s writing and speechifying shifts in focus from the economic benefits connected with Whiggery to the evils of slavery and, more to the point, slavery’s possible unanticipated extension into even more territories. Lincoln based much of his career on his opposition to slavery, but it was without much operational significance. Things were now different.

But, of course, what made the problem difficult is that slavery was itself protected

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26. Danielle Allen, *Tyranny of Democracy*, DISSENT MAG. (Spring 2015), <https://www.dissentmagazine.org/article/tyranny-of-democracy-review-lincoln-political-thought-george-kateb>.

27. WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, sc. 3.

28. KATEB, *supra* note 15, at 20 (internal quotation marks omitted).

29. AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* (2012).

30. KATEB, *supra* note 15, at 3.

31. *Id.* at 1.



by the Constitution, most importantly by the three-fifths clause giving slave states extra representation in the House of Representatives and, therefore, the electoral college. Most visible, however, especially in the 1840s and '50s, was the consequences of the Constitution's requirement that so-called "free states" return fugitives who attempted to escape from slave states. If, as Lincoln proclaimed in his famous 1838 speech, "reverence for the laws" as instantiated in the Constitution is to become "the political religion of the nation,"<sup>32</sup> then it becomes impossible to adopt, for example, any kind of position that unjust laws lose their status as law.

Kateb only alludes to but does not otherwise discuss the contortions by which Lincoln argued that a faithful constitutionalist was obligated to support the Fugitive Slave Laws inasmuch as it was part of the more fundamental compromise of 1787 that brought about the Union in the first place. Yes, he might have proclaimed in his Peoria Speech of October 16, 1854, to which Kateb frequently adverts, that slavery was a "monstrous injustice." Yet, as Kateb notes, whatever is Lincoln's "passion against the act that repealed the Missouri Compromise," the speech is vitiated in important ways "by an evenhandedness that was so contorted it was spurious."<sup>33</sup> It is not only that he took great care to describe slaveowners, some of whom were members of his own wife's family in Kentucky, as "really good men" in spite of their willingness, in Kateb's words, to "openly renounce[] the ideal of equal liberty in the Declaration of Independence."<sup>34</sup> More striking was his reaffirmation of the duty of the faithful constitutionalist, which Lincoln always proclaimed himself to be, to support the Fugitive Slave Act. Northerners must recognize "not grudgingly, but fully, and fairly," their duty to cooperate in the return of fugitives to the states from which they had fled.<sup>35</sup> To be sure, this was "a dirty, disagreeable job,"<sup>36</sup> but whoever said that that it was easy to live in a constitutionalist regime predicated on the proposition that deeply conflicting views that had to be settled by peaceful political means?

But, obviously, this reality makes hash of the oft-quoted comment made by Lincoln at Kalamazoo, Michigan, on August 27, 1856: "Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties."<sup>37</sup> This comment exemplifies the kinds of Orwellian convolutions required of anyone committed equally to the general value of liberty and veneration of the 1787 Constitution. To be sure, one can save Lincoln, if one wishes, by reading "our liberties" to refer exclusively to the liberties of whites like himself. Not only, however, is that ungenerous to Lincoln (even if accurate); it also requires ignoring the fact that Lincoln well knew that many whites had their liberties infringed while attempting to spread the Abolitionist gospel or, even worse, attempting to protect fugitive slaves from recapture.

Justice Story's opinion in *Prigg v. Pennsylvania*<sup>38</sup> fully instantiates the reality of the subordination of liberty to the maintenance of slavery. My own view—and what I teach

32. RICHARD N. CURRENT, *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* 16-17 (1967).

33. KATEB, *supra* note 15, at 28-29.

34. *Id.* at 29.

35. ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 68 (2010).

36. *Id.*

37. Abraham Lincoln, President of the United States, Speech at Kalamazoo, Michigan (Aug. 27, 1856).

38. 41 U.S. 539 (1842).

my students—is that if one can tolerate *Prigg* as an exercise of legitimate “constitutional interpretation,” then Justice Taney’s opinion in *Dred Scott*<sup>39</sup> is almost a piece of cake inasmuch as both were ultimately based on a heartfelt desire to maintain the Union against threats posed by Abolitionists and other critics of the “Settlement of 1787.” My own view—and what I teach my students—is that William Lloyd Garrison got it basically right when referring to the Constitution as a “Covenant with Death and Agreement with Hell.” Indeed, with regard to secession itself, we should ask what our response would be if the Abolitionists had become sufficiently strong to make their cry “No Union With Slaveholders” the justification for secession by, say, New England, from a Union basically dominated by the Slavocracy.

In his preface, Kateb acknowledges that the course of his meditations on Lincoln’s words (and actions) led him “to a less unmixed Lincoln than I began with. My intense admiration remains, but is now joined to some dismay.”<sup>40</sup> He may remain, for Kateb, “a great man, a good man, and a great writer,”<sup>41</sup> but he is also a flawed one, in a sense going beyond the recognition that all of us are human, all too human, and thus necessarily flawed in one respect or another. For Kateb, I believe, Lincoln’s central flaw may be his commitment to the Constitution and the almost unbearable tension it creates for someone who attempts to combine the demands of justice and legal fidelity (not to mention the temptations to compromise arising out of individual political ambition).

Although Kateb does not endorse Garrison’s dour view of the Constitution—indeed, Garrison does not appear in the index—he has no illusions that it is an inherently good and defensible document. Kateb refers critically to Lincoln’s “calculation,” spelled out in his Chicago speech of July 10, 1858, that, in Kateb’s words, “incorporating slavery into the Constitution was a necessary price to pay to secure the great good of the Constitution.”<sup>42</sup> It may be one thing to say, as Publius did in *Federalist 62*, that the egregious allocation of equal voting power in the Senate was a “lesser evil” than achieving no constitutional Union at all; it is quite another to say that a truly vicious system like racialized chattel slavery was also merely a “lesser evil.” If chattel slavery passes that test, then one is entitled to wonder if *anything* would constitute a bridge too far to cross in order to achieve Union. Surely Kateb is correct that “[s]lavery was incalculably evil to the slaves, and the evil would grow with the numbers enslaved.”<sup>43</sup>

Here, frankly, is where we come up against the limits of Lincoln as a systematic thinker (which, to be sure, may be too high a standard to bring to bear against any political leader). Kateb quotes from an 1845 letter in which Lincoln had told his correspondent that “not to do evil that good may come” of it is as a “general proposition. . . doubtless correct.”<sup>44</sup> Quite obviously, though, this “general proposition” was manifestly violated by

39. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 82 (2007) (questioning whether Taney can simply be viewed as a “judge on a rampage” rather than a faithful servant to the 1787 Constitution); see also GRABER, *supra* note 25 (noting that *Dred Scott* can be defended using any of the approaches to “constitutional interpretation” that are available today).

40. KATEB, *supra* note 15, at ix.

41. Is Kateb engaging in conscious use of the rhetorical phenomenon of the anti-climax? Is it not more important to be a “good man” than a “great writer” and even, perhaps, a “great man” in a political sense?

42. KATEB, *supra* note 15, at 114.

43. *Id.*

44. *Id.* (internal quotation marks omitted).

acceptance of slavery as a means to the good of procuring the Constitution. Perhaps it is the “general proposition” that is incorrect; any utilitarian would ask, of course, that if the end doesn’t justify the means, what does? But, as we all know, anti-utilitarians are skilled in asking whether there are any limits, any “side constraints,” that protect against the slippery slope to moral perdition.

Perhaps because the book is a deeply personal meditation about Lincoln’s political thought, Kateb does not really discuss any of the massive secondary literature on Lincoln. It would have been interesting, though, had he mentioned his own reaction to Avishai Margalit’s *On Compromise and Rotten Compromise*, in which the distinguished Israeli philosopher, while recognizing the necessity in any operating political system of a willingness to compromise, nonetheless draws the line at truly “rotten political compromises.”<sup>45</sup> He defines these “rotten political compromises” precisely as ones that serve “to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans.”<sup>46</sup> I suspect that Kateb would agree. He writes, after all, that Northern cooperation with slavery or, for that matter, “benefiting from its products” did not constitute the “greatest guilt” of most Americans. Instead, “[a]greement” to sustain slavery by incorporating it into the Constitution and protecting it thereafter as a constitutional and legal practice . . . was the worst criminal offense. Union was preferred to the most elementary justice.”<sup>47</sup> Accepting this argument must cause us to have mixed views not only about Lincoln, but also, necessarily, about the Founders who manifested that preference by their support of the Constitution.

But perhaps Lincoln did not in fact prefer Union “to the most elementary justice.” After all, there can be little doubt that Union could have been preserved had Lincoln acquiesced to the further expansion of slavery into some of the remaining American territories, most of which would have been distinctly inhospitable, in terrain and topography, to slave-based agriculture. Perhaps, though, he justifiably feared that slave owners, recognizing this quotidian reality, would insist that the United States move southward to conquer slave-saturated Cuba or those parts of Central America where a plantation economy worked by slaves could easily be envisioned. In any event, it was issue of expansion that triggered war, not the maintenance of slavery where it already existed. Lincoln never once hinted that he would—or could—do anything about slavery in Virginia, Mississippi, or any of the other thirteen slave states in the Union, eleven of which attempted to secede. The basis of this distinction, of course, is the brute fact that the Constitution, correctly read, *did* protect slavery in the states where it was already established but did not, at least according to Lincoln and other critics of *Dred Scott*, prevent Congress from prohibiting extension of that terrible practice into territories that had not yet become states.

Once war broke out, Lincoln did whatever he thought necessary to win it, though that, too, generates a number of exquisite questions, given, say, the necessity to keep slaves states like Kentucky within the Union. The Fugitive Slave Law was not, after all, repealed

45. See generally AVISHAI MARGALIT, *ON COMPROMISE AND ROTTEN COMPROMISE* (2009).

46. SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 44 (2012).

47. KATEB, *supra* note 15, at 117.

until 1864. But for most twenty-first century analysts of the Lincoln presidency, it is other actions by Lincoln that are troubling. Kateb as a genuine liberal is rightly worried about unlimited state power. He notes Lincoln's enlistment of the trope of "indispensable necessity" as a justification for quite remarkable exercise of executive power.<sup>48</sup> Examples can range from his unilateral suspension of habeas corpus to his imposition of a blockade on Southern ports to the Emancipation Proclamation to his enrolling black soldiers as members of the army. "Thus," writes Kateb, "in time of war, the president becomes sovereign and may wield powers that suspend or abridge basic rights, the soul of the fundamental law."<sup>49</sup> And we should be clear that we are accepting not simply the vague "sovereignty" of the nation, perhaps speaking through an elected Congress, as problematic as that might be. Rather, it is the "pernicious idea of the sovereignty of a branch of government (unlimited political will within national boundaries), which is the contamination of all constitutionalism," that Lincoln in effect "imposed on the polity."<sup>50</sup> "I do not know," Kateb writes, "which is more troubling: to think that the Constitution allows its own suspension or that the Constitution in an emergency needs to be supplemented by a doctrine external to it and contradictory to it."<sup>51</sup> As we shall see, Downs's volume raises obvious questions for someone with Kateb's views, for a central motif of that book is the near-irrelevance of constitutional "abstractions" when faced with the exigencies of protecting the freed people. What would Lincoln have done, and what, precisely, would Kateb have had Lincoln do following Appomattox?

Consider Kateb's suggestion that Lincoln realized that to end slavery—which had become a war aim regardless of its status at the outset—required the de facto "enslavement" of the defeated Confederacy itself.<sup>52</sup> Kateb, a gifted student of liberalism, knows full well that "slavery" has a rich history in Anglo-American thought that goes well beyond its one particular form of "chattel slavery," even if one can readily agree that it is the worst genus of the broader species.<sup>53</sup> It originally encompassed all illegitimate domination, all forms of what Kateb calls "actual despotism." The white Confederate South needed to taste and to live under what its members would no doubt view as "political slavery,"<sup>54</sup> where it would be they who would be deprived of the franchise and thus under the rule, representing the "new birth of freedom" and the "equality" promised by the Declaration, of those they had hitherto held in contempt. It would be, as was the English Revolution, "the world turned upside down."<sup>55</sup> One can only wonder how this could possibly be viewed by its self-proclaimed victims as representing any kind of absence of "malice" or "charity." Should they really have expected better treatment and, more to the point, should

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48. *Id.* at 153.

49. *Id.*

50. *Id.*

51. *Id.* at 155. For a fine recent overview of this fundamental dilemma of constitutionalism, see Oren Gross, *Emergency Powers*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 785 (Mark Tushnet, Mark A. Graber, & Sanford Levinson, eds., 2015).

52. KATEB, *supra* note 15, at 175.

53. Jack Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1481 (2012).

54. KATEB, *supra* note 15, at 175.

55. CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (1984).

we as twenty-first century normative analysts be at all sympathetic to their ostensible plight?

The final chapter of Kateb's book is a remarkable analysis of Lincoln's political theology. Lincoln was by no plausible reckoning a conventional believer, let alone a church-going Christian, but as seen most memorably in the Second Inaugural, he thought long and hard about what might be discerned of God in the charnel house of war. Kateb focuses on what he calls "his single greatest sentence":

Yet if God wills that . . . [the war] continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "the judgments of the Lord, are true and righteous altogether."<sup>56</sup>

Kateb doubts that Lincoln subscribed to any specific theological outlook. He suggests that Lincoln was in effect employing a kind of theological *jui jitsu*, turning traditional Christian arguments against those who made them in other contexts. Consider, for example, the assertion that we bear responsibility, both individually and collectively, for our sins, and the proper punishment for committing evil is an eye for an eye—what might this mean if one fully grasps the sinfulness of a socio-political system founded on slavery? For, I have no doubt, one reason that Lincoln could express a certain kind of understanding of Southern slave owners is that, like Kateb, he saw the entire country as implicated in the primal sin of slavery. Perhaps *all* of us deserved the full measure of retribution visited upon the Nation by the War.<sup>57</sup> As Kateb notes, there is nothing in the Second Inaugural that should count as consolation, unlike, perhaps the Gettysburg Address, which at least suggests that the Union soldiers would not have died in vain given the "new birth of freedom" their sacrifices were making possible.

There is, moreover, more than a hint of the apocalypse in the Second Inaugural. There is no good reason to believe that God—assuming, of course, that there *is* a providential force behind the carnage—will exhibit any mercy or stay the hand of continuing malicious destruction. Indeed, the real point is that we cannot truly grasp the providential narrative, other than to be confident that it has something to do with exacting the full cost for our collective delusionary belief—shared by North and South alike—that Union justified enslavement of our fellow human beings. To view Appomattox as concluding *that* epic struggle within America is truly delusionary.

Kateb concludes his excellent book as follows:

I find that I have been driven in different directions, all of them rather extreme: extreme praise of Lincoln but not before he became president; sharp criticism before and after he became president; great sympathy for him with a touch or more than a touch of unforgiving censure. I cannot

56. KATEB, *supra* note 15, at 209.

57. *Id.* at 21.

offer a balanced judgment or a steady attitude or a portrait other than rough . . . . But we should remember that political greatness almost always comes with an exorbitant moral cost, even if that achievement, by some method of reasoning, exceeds in worth its cost.<sup>58</sup>

### III. LINCOLN'S LAST SPEECH

Louis Masur, in 2012, published a fine book on the Emancipation Proclamation, one of whose central themes was the truly controversial nature of the Proclamation and the opposition that Lincoln had to ignore in order to issue it. His new, equally fine book also focuses on a single episode in Lincoln's presidency. *Lincoln's Last Speech: Wartime Reconstruction and the Crisis of Reunion* is part of an Oxford University Press series on "Pivotal Moments in American History," and the "pivotal moment" around which this book is organized is the last speech that Abraham Lincoln gave before his assassination on April 14, 1865. On April 11, following Lee's surrender at Appomattox Courthouse, Lincoln spoke to a crowd that assembled outside the White House, and addressed some of the issues posed by "reconstruction," that is, not only the return to full membership in the Union by the would-be Confederate States of America, but also, and just as importantly, the terms of that return. Masur notes that some historians distinguish between the terms "reconstruction" and "restoration" and assign to the former a "more or less radical remaking of southern society whereas the latter simply meant returning the states to full political membership in the nation."<sup>59</sup> Masur is more cautious. Yes, Lincoln used the term "reconstruction," but Masur suggests that, in context, it meant simply "the states submitting to federal authority and returning to the nation."<sup>60</sup> What the terms of submission would be was left entirely up in the air, save for the obvious fact that the Thirteenth Amendment, *if ratified*, would irretrievably abolish slavery. The importance of this condition, as we shall see, is central to the all-important questions raised by Downs in his book.

In particular, would the victorious Union forces speaking in the name of the United States attempt to impose what we would today call full-scale "regime change" as a condition of re-entry? Or, on the contrary, would the meaning of the War, so to speak, be reduced to acceptance of two propositions, one of them the constitutional impossibility of secession, the other the elimination of (only the worst forms of) slavery as a constitutive feature of the American republic.<sup>61</sup> Each, obviously, is important, but neither comes close to offering a complete account as to what the War was truly about, if, that is, one has a somewhat Radical sensibility.<sup>62</sup> Lincoln never lacked for eloquence, but eloquence is not a substitute for policy. As Mario Cuomo, another unusually gifted orator, once noted,

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58. *Id.* at 217.

59. MASUR, *supra* note 11, at 7.

60. *Id.*

61. See, e.g., DON FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* (2001).

62. For an excellent demonstration of this argument, see PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999), which details conflict within the central post-War decisions of the Supreme Court as to the central meaning of the war.

“[y]ou campaign in poetry, you govern in prose.”<sup>63</sup>

One could, of course, define the end of formalized chattel slavery as constituting and completing whatever might be meant by the “new birth of freedom.” This possibility is well captured in the title of Eric Foner’s *Nothing but Freedom: Emancipation and Its Legacy*, the title of which is taken from the comment by Confederate General Robert V. Richardson that “[t]he emancipated slaves own nothing, because nothing but freedom has been given to them.”<sup>64</sup> Indeed, the Republican moderate Senator John Sherman of Ohio had earlier expressed his fear that the presence of widespread antipathy toward blacks would mean that emancipation would grant only a quite hollow freedom, “stripped of everything but the name.”<sup>65</sup> Contrast this only with the widespread hope, at least among former slaves and such champions as Thaddeus Stevens, that they would receive “40 acres and a mule” as partial reparation for their years of uncompensated toil, not to mention the visions of political (and even perhaps social) inclusion that can be found, at least if one is looking for those visions, in the Fourteenth and Fifteenth Amendments. There had been limited “confiscation acts” during the War itself, regarding active participants in the war against the Union, though Lincoln had scarcely been a strong supporter of them. The strongest precedent for the redistribution signified by “40 acres and a mule” lay in the actions of General William T. Sherman, prior to Appomattox, regarding conquered land along the coasts of Georgia and South Carolina.<sup>66</sup> Such actions “went well beyond anything Lincoln had previously envisioned or supported.”<sup>67</sup>

The defeat of some of the Confederacy even prior to Appomattox, particularly Arkansas, Tennessee, and much of Louisiana, had forced Lincoln to address the terms upon which they would be welcome back to full membership in the United States of America. His initial inclination was to accept the organization of a recognized government when only ten percent of a state’s residents declared their oath of allegiance to the Union.<sup>68</sup> It should occasion no surprise to learn that Congress refused to seat representatives from Louisiana elected under Lincoln’s policy, and it similarly refused to count the electoral votes from Louisiana, Arkansas, and Tennessee in the vital election of 1864.<sup>69</sup> As James McPherson writes, “Congress tried to regain the initiative on reconstruction” from a President they did not trust to impose truly just terms on the defeated Confederacy.<sup>70</sup> It manifested this desire by passing, on July 2, 1864, just in time for Independence Day celebrations two days later, the Wade-Davis bill that was considerably less generous. For example, instead of the anodyne pledge of loyalty to the Union of the voters, it limited the

63. Fred Barnes, *Meet Mario the Moderate*, THE NEW REPUBLIC, Apr. 8, 1985, at 18.

64. ERIC FONER, *NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY* 55 (1983). Additionally, the John Henderson of Missouri, a supporter of the Thirteenth Amendment committed as well to maintaining, as much as possible, the traditional prerogatives of state government, commented that “[w]e give [the freedman] no right except his freedom, and leave the rest to the States.” FONER, *FIERY TRIAL*, *supra* note 35, at 293.

65. FONER, *FIERY TRIAL*, *supra* note 35, at 199.

66. *Id.* at 321.

67. *Id.*

68. See JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 406 (1982).

69. *Id.*

70. *Id.* at 407.

franchise to those who could swear an “ironclad oath” that they had never supported rebellion in the first place. Moreover, “it enacted specific legal safeguards of the freedmen’s liberty, which were to be enforced by federal courts.”<sup>71</sup> Finally, because at least fifty percent of the population had to be prepared to swear to the ironclad oath, the supporters of Wade-Davis were confident that it would be a while before self-government would really return to the defeated states.<sup>72</sup> What was Lincoln’s response? It was a pocket veto, which elicited in turn what McPherson describes as “a blistering manifesto” by Wade and Davis condemning what they termed the “studied outrage on the legislative authority of the people.”<sup>73</sup> All of this was a harbinger of the conflicts between Congress and the White House that would define the period of Reconstruction, regardless of who occupied the presidential office.

As Foner notes—and Masur would surely agree—the status of Lincoln’s “last speech” is “factually accurate,” but the term suggests a “finality scarcely anticipated when it was delivered.”<sup>74</sup> It is, so to speak, as if John Kennedy’s final speech in November 1963 was accorded the same symbolic weight as, say, Washington’s “Farewell Address.”<sup>75</sup> There are many, no doubt, who almost casually join John Burt in pointing to the Second Inaugural, delivered on March 4, 1865, as “Lincoln’s final position,” offering ample evidence of “an ethical generosity . . . that arises from a mature sense of the moral complexity experienced by all fallen and finite beings.”<sup>76</sup> But that speech was far more impressive for the somber sense of sin overhanging the American project, for which the 750,000 war dead is blood atonement, than for what we might today call policy proposals. Could, for example, one be equally “charitable” toward both newly freed slaves—especially those who had fought to save the Union (and procure their own freedom)—and defeated proponents not only of secession but also of the slave system that accounted for secession? Concrete decisions—set out in the prose of legislative proposals—were now necessary; recourse to presumptively unifying rhetoric, however grand and eloquent, would be no substitute for specific policies that would inevitably create winners and losers. And the rancor and disappointment of the losers would outweigh the gratitude of the winners, who would, after all, believe themselves deserving of any benefits received and thus needing no display of unseemly thanks to what was, after all, their due.

As already suggested, the key question, only barely answered by the Thirteenth Amendment, was what beyond the formal end of chattel slavery would be attained by the blood sacrifice of war. Would that be enough in effect to purify the country of the sins of slavery as evoked in the Second Inaugural? Or would it be necessary to go well beyond that beginning and move toward the elimination root and branch of the former Southern white leadership, beginning with the executions of the traitors Jefferson Davis and Robert

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71. *Id.*

72. *Id.*

73. MCPHERSON, *supra* note 68, at 407-08.

74. FONER, *FIERY TRIAL*, *supra* note 35, at 331.

75. See John F. Kennedy, *Remarks at the Dedication of the Aerospace Medical Health Center*, JOHN F. KENNEDY LIBRARY & MUSEUM (Nov. 21, 1963), [http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/San-Antonio-TX\\_19631121.aspx](http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/San-Antonio-TX_19631121.aspx).

76. JOHN BURT, *LINCOLN’S TRAGIC PRAGMATISM: LINCOLN, DOUGLAS, AND MORAL CONFLICT* 25 (2013).



E. Lee, to name only the two most prominent candidates for treason trials? And, as already hinted, one might well choose to redistribute the ill-gotten property of Confederate sympathizers to the hundreds of thousands of victims of their oppression.

Julian, of course, was a partisan of regime change. Was Lincoln? Who knew? *That*, I believe, is Masur's central point. What was most distinctive about his political career was his professed opposition to slavery, and his unrelenting opposition to extension of slavery into the territories, which he viewed as a key step in what might well be a century-long process of eliminating slavery as part of American life.<sup>77</sup> But he had never exhibited much sympathy with Abolitionists, given the threats they posed to constitutional stability (not to mention their disrespect for the constitutional arrangements agreed to in 1787). But now slavery had been eliminated, at least formally, throughout the country; this was the meaning, of course, of the Thirteenth Amendment. Was *that* the true culmination of the War and of the Lincoln presidency—as is implicitly suggested by Steven Spielberg's movie *Lincoln*, which details the political mechanisms by which the Amendment was proposed by Congress before concluding with the martyred President and the words of the Second Inaugural? In any event, this helps to illustrate the near-irrelevance of the question whether Lincoln “die[d] an abolitionist.”<sup>78</sup> Abolitionism *had* become the law of the land with the ratification of the Thirteenth Amendment, which Lincoln clearly and unequivocally supported. The central question, as already suggested, was what besides the Thirteenth Amendment would Lincoln have imposed on a recalcitrant white South?

#### IV. “PERNICIOUS ABSTRACTIONS” AND “METAPHYSICAL” ARGUMENTS

To what extent did the Constitution structure any answers that one might give to the dilemmas posed by Reconstruction? The Supreme Court would speak in 1869 of “an indestructible Union . . . of indestructible States.”<sup>79</sup> What precisely did this mean, especially, one might add, in the immediate aftermath of Appomattox? In some profound sense, had secession been at least successful enough to warrant the status, for the defeated states, as “conquered provinces,” to be ruled by Congress in basically whatever manner that body wished and whose readmission to the Union required adherence to conditions set out by Congress?<sup>80</sup> Just as important, as a practical matter, is what the role of the President would be in this process of “reconstruction” and “restoration.” He was, after all, Commander in Chief. But, as a formal matter what might be termed the “battlefield war” had concluded. Was he also commander of whatever ensuing peace process would follow, or did his role return to being the faithful executor of such laws as Congress saw fit to pass?

In answering this question, one might note an unfortunate, perhaps even lunatic, feature of the 1787 Constitution (that would in fact not be rectified until the Twentieth Amendment in 1933). Following Lincoln's re-inauguration on March 4, 1865, Congress

77. See FONER, NOTHING BUT FREEDOM, *supra* note 64.

78. See Manisha Sinha, *Did He Die an Abolitionist?: The Evolution of Abraham Lincoln's Antislavery*, 4 AMER. POL. THOUGHT 439 (2015).

79. *Texas v. White*, 74 U.S. 700, 725 (1868).

80. Consider in this context the repeated refusal to admit Utah to the Union until 1896, until its state constitution firmly and unequivocally outlawed polygamy, which had been denounced as a “twin relic of barbarism,” along with slavery, by the 1856 Republican Platform.

was not due to reassemble until December 1865, just as was the case in 1861, when Lincoln was originally inaugurated. He had notably refused in 1861 to call Congress back into session until July 4, thus giving him four full months of relatively unimpeded power both in the run-up to Fort Sumter and then for three months afterward, during which time he instituted blockades and unilaterally suspended habeas corpus.<sup>81</sup> He has been described by Clinton Rossiter, among others, as a “constitutional dictator.”<sup>82</sup> Lincoln (like his successor Andrew Johnson) might well have been tempted to take advantage of Congress’s similar absence in 1865 and attempt to take charge of whatever “reconstruction” would turn out to mean, especially if he feared, rightly, that Radical Republicans might have less charitable impulses than he himself with regard to the fate of the defeated enemies.

For anyone interested in constitutional theory, the key chapter of Masur’s book is titled, perhaps paradoxically, “A Pernicious Abstraction.”<sup>83</sup> In its own way, it raises the deepest questions about the nature of the constitutionalist enterprise when faced with what might be termed the actual demands of governing in the face of dire challenges.<sup>84</sup> Masur well captures Lincoln’s addressing, or perhaps, more accurately, attempting to dance around—the issue of the constitutional status of the now former Confederate States of America. Someone interested in constitutional theory might well wonder where they were, ontologically. Were they *within* or instead in some important sense *outside* of the United States, perhaps “conquered territories”? If the latter, then what “rights,” if any, did they, or their inhabitants, possess, on what legal basis?<sup>85</sup> Lincoln had had some opportunity to consider such questions with regard to states that had been defeated prior to Appomattox, including Arkansas and Louisiana.<sup>86</sup> How were their governments to be organized before being fully welcomed back into the Union?

Among the most important questions was the suffrage, including not only the right of newly freed slaves, especially those who had served in Union armies, to vote, but also regarding the exclusion of many white Confederate sympathizers from the ballot. (What, after all, did “government by the people,” as so memorably invoked by Lincoln at Gettysburg, really mean? Who *are* the people who count as part of the relevant *demos*?).<sup>87</sup> The concrete answer was that Lincoln seemed more than willing to accept governments led by

81. Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in PRESIDENTIAL POWER STORIES 101 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

82. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948). Rossiter is not the only person with this perception. Carl Schmitt called Lincoln the “perfect example” of a “commissarial dictatorship,” that is a dictatorship for the purpose of saving the existing constitutional order, as distinguished from the “sovereign dictatorship” that fundamentally transforms the order. See GIORGIO AGAMBEN, STATE OF EXCEPTION 20 (2005).

83. MASUR, *supra* note 11, at ch. 3.

84. See THE FEDERALIST NOS. 40, 41 (James Madison) and the essay thereon in SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY 149-54 (2015).

85. Ironically or not, *Dred Scott* could be read for the proposition that inhabitants of territories did indeed retain significant constitutional rights, a conclusion rejected in the later decisions collectively known as *The Insular Cases* (1901). See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901). An important legal artifact of those cases was the conclusion that Puerto Rico was an “unincorporated” territory, by definition *not* simply in a holding state prior to statehood. That argument would be impossible to make, presumably, with regard to Virginia, Texas, or Mississippi.

86. See MASUR, *supra* note 11, at 92-115.

87. See Sanford Levinson, “Who Counts?” “Sez Who?”, 58 ST. LOUIS U.L.J. 937 (2014).

whites who, while willing to renounce slavery, had little use for black participation in government. As Masur crisply writes, “The new [Arkansas] constitution did not provide for universal black suffrage, but authorized the state legislature to give voting rights to blacks who were literate, owned property, or fought for the Union—authority the legislature was unlikely to exercise.”<sup>88</sup> Arkansas, obviously, was quite different from the “bitter-end” states that had to be crushed by Sherman and Grant before surrender, and, of course, in some states the fight continued through what we might today label an “insurgency” led by the Ku Klux Klan.

So what did Lincoln himself say to the expectant audience on April 11th? The answer will surely frustrate anyone looking for clarity on such weighty matters:

I have *purposely* forborne any public expression upon it. As appears to me that question [the theoretical status of the defeated Confederacy] has not been, nor yet is, a practically material one, and that any discussion of it, while it thus remains practically immaterial, could have no effect other than the mischievous one of dividing our friends. As yet, whatever it may hereafter become, that question is bad, as the basis of a controversy, and good for nothing at all—a merely pernicious abstraction.<sup>89</sup>

Is it too much to say that this brief paragraph captures, in a quite different setting, the Lincolnian fear of “divided houses,” which, he had said throughout his career, could not stand?<sup>90</sup> “Friends” should unite, not divide, and, apparently, a focus on “pernicious abstraction[s]”<sup>91</sup> would be far more divisive than truly helpful. But this is just to say that constitutional argumentation, at least under certain circumstances, is “pernicious” rather than genuinely illuminating, a proposition that, if true, should certainly concern those who devote their lives to the study of “the law.”

One of the astonishing things about Lincoln’s statement is that one might well view the legal argument for the War, as articulated in Lincoln’s First Inaugural, as resting on sheer abstraction, pernicious or otherwise. “We find the proposition that in legal contemplation the Union is perpetual.”<sup>92</sup> Whatever his undoubted hatred of slavery, the arguments offered in 1861 had almost literally nothing to do with the evil of that practice; indeed, Lincoln endorsed the so-called “Corwin Amendment,” which would have guaranteed in perpetuity the legitimacy of slavery in those states that already recognized the practice. He rested his decision to go to war with the abstract duty to maintain the Union, scarcely a

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88. MASUR, *supra* note 11, at 102 (citing Abraham Lincoln, President of the United States, Last Speech (Apr. 11, 1865)).

89. *Id.* at 70.

90. See *Mark* 3:25. Interestingly enough, Foner notes that Lincoln’s original use of the “divided house” maxim was quite early in his career, when he was basically cautioning his fellow Whigs about the importance of party unity. See also FONER, *FIERY TRIAL*, *supra* note 35, at 100-01. Quite obviously, it developed much more bite when used to refer to the division in the United States between pro- and anti-slavery forces. But it stands as an ever useful appeal to any persons with whom one shares an association, whether in a chess club, a political party, or a nation, to forego division and make compromises in the name of preserving unity.

91. Abraham Lincoln, President of the United States, Last Speech (Apr. 11, 1865).

92. Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861).

self-evident proposition from the perspective of devotees of the “state compact” theory associated with the Kentucky and Virginia Resolutions of 1798 and then developed further by John C. Calhoun during the Nullification Crisis of 1828 and afterward.<sup>93</sup> But now, in 1865, it was presumably ill-advised to take a stand on what I sometimes call the “metaphysics of Union” and the concomitant status of the defeated Confederacy.

Nor was Lincoln alone in his apparent disdain for such arguments. Downs effectively quotes Massachusetts Senator Charles Sumner, at least following the ratification of the Thirteenth Amendment, dismissing as “metaphysical” and “only worthy of schoolmen” arguments about the legal status of the states.<sup>94</sup> There were practical decisions to be made, and it was not clear that lawyers were really of much help in making them. Indeed, the most fundamental question raised by all three of these truly important books may well be the potential irrelevance of traditional “lawyerly” arguments or more general invocations of “the rule of law” in considering the questions posed first by slavery and then by the response to the war that, among other things, presumably ended slavery. The formal termination of chattel slavery left completely open the practical mechanisms by which the oppressive domination constitutive of slavery would in fact be brought to an end and the status of genuinely “freed men and women” established in its place.

#### V. “WAR,” “PEACE,” AND RECONSTRUCTION

Not the least remarkable feature of Downs’s book, *After Appomattox*, is its partial rehabilitation of Andrew Johnson. Downs is no “neo-revisionist” who wants to overturn the anti-Johnsonian writings of the past half-century and return to the historical portraits of the early twentieth century that painted Johnson as the heroic defender of the Constitution against Radical Republican excesses. Downs warmly supports Reconstruction and the reader may well believe that Downs wishes that Reconstruction had lasted longer and was more successful in bringing about true regime change. Nor does Downs refrain from elaborating Johnson’s callous racism, almost unthinkable with regard to the Lincoln of 1865 who had called Frederick Douglass his “friend.”

But it is essential to realize not only that we have no solid evidence that Lincoln would have been considerably tougher in his treatment of the defeated South than Johnson desired to be; it is also necessary to realize that Johnson was a warm supporter of the Thirteenth Amendment and—crucial to Downs’s entire argument—was more than willing to affirm that the surrender at Appomattox may only have ended the most obvious phase of the war. In no legal sense did it establish a “peace” that would, for example, simply allow the defeated Southern entities—my own preferred term given that we really don’t know what it means to refer to them as “states,” “territories,” “conquered provinces,” etc.—to resume their full membership in the Union and, all importantly, regain full rights of representation in both the House and the Senate. We remained “at war” at least with regard to the ability of the national government to exercise whatever “war powers” were conferred by the Constitution—and perhaps, as Downs suggests more than once, more

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93. For an overview, see Sanford Levinson, “Perpetual Union,” “Free Love,” and Secession: On the Limits to the “Consent of the Governed” 39 TULSA L. REV. 457 (2004).

94. DOWNS, *supra* note 5, at 66.

besides.<sup>95</sup>

As a practical matter, Richard Henry Dana, who in June 1865, made a notable speech at Faneuil Hall in Boston arguing that the South remained in “the grasp of war,” might certainly feel vindicated, whether or not his theory became officially endorsed. “Let the states make their own constitutions,” Dana had said, “but the constitutions must be satisfactory to the Republic, and . . . by a power which I think is beyond question, the Republic holds them in the grasp of war until they have made such constitutions.”<sup>96</sup> It should not escape notice that this is exactly the authority that Congress claims with regard to territories seeking admission into the Union, as against states within the Union that might wish to rewrite their existing constitutions. To be sure, proponents could refer to the Republican Form of Government Clause of Article IV, but, to say the least, it had certainly not been taken seriously before as a means of disciplining slavery or the racism that helped to constitute it. Can one really believe that Radical Republicans would have behaved differently were their no such clause in the 1787 Constitution?

Johnson was certainly non-radical inasmuch as he was glad to welcome the former secessionist states back to the Union with open arms once they agreed to repudiate both secession and chattel slavery. He was, among other things, quite promiscuous in his use of the presidential pardon powers that the Constitution, for better or worse, assigns to the President’s presumptively unimpeded discretion.<sup>97</sup> But Downs makes the all-important point that the Thirteenth Amendment had not yet been ratified when Lincoln was assassinated, and this fact meant that among the very first questions facing Andrew Johnson and other leaders was deciding what the denominator would be with regard to the number of states three-quarters of which had to ratify the proposed amendment (which, of course, was proposed only because the elected representatives and senators were excluded from Congress in December 1865).<sup>98</sup> Would it be only the twenty-five “loyal states” (which included the four slave states of Delaware, Maryland, Kentucky, and Maryland), or would it be the full complement of states that included the eleven would-be members of the Confederate States of America? The answer was the latter. If thirty-six states comprised the denominator, then that meant that twenty-seven must vote to ratify the Amendment; this required several of the former Confederate states to agree to ratify, in addition to every one of the loyal states. Such ratifications were procured, but only by what Downs terms “extra-constitutional powers,” or, even if one disagrees with his use of the adjective, by the full exercise of “war powers” that rested on the conclusion that the “restored” states did not in fact possess the autonomy genuinely to reject the Amendment. “Therefore, [Johnson] warned them—as he would not have warned a normal state—that they must ratify the amendment or risk not being seated by Congress.” Upon South Carolina’s os-

95. See generally DOWNS, *supra* note 5.

96. See ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 100 n.11 (1960).

97. See U.S. CONST., art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment”).

98. DOWNS, *supra* note 5, at 82-83 (“While some Republicans wished to count only loyal states, Johnson wanted the ex-Confederate states counted, too, in order to help establish their legitimacy”). See also BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* 113-14 (1998).

tensibly “restored” government resisting, “Johnson wailed, ‘I trust in God that the restoration of the Union will not be defeated and all that has so far been well done thrown away?’”<sup>99</sup> South Carolina in fact did choose to acquiesce, as did Alabama, North Carolina, and Georgia:

Johnson had secured [these] crucial votes by using threats of continuing war powers. Other important votes came from the loyal, but in many ways, fictional governments of Arkansas, Virginia, and Louisiana, where tiny administrations relied heavily upon the army, and generals intervened in the amendment fight. On paper, the states had consented, but only if one overlooked the role of war powers in forcing them to. . . . Again and again, Johnson had demonstrated that he had, as the *New York Times* put it, the right and the duty to “impose conditions upon the states.”<sup>100</sup>

To put it in a nutshell, transformational constitutional change grew out of the barrel of the military’s guns. But the formal ratification of the Thirteenth Amendment, even if had occurred by December 6, 1865, was scarcely sufficient.

Why not? And why were the guns necessary—and proper? The answers to both questions are simple: Lee may have surrendered at Appomattox, but this in no way is evidence that the Southern whites who went to war to preserve slavery were in fact prepared to accept the new socio-political order in which their former chattels were now truly—and not merely formally—free, perhaps with land of their own and, even more importantly and ominously, perhaps with the right to vote. Southern whites in effect exemplified *The Federalist’s* repeated warnings about putting too much faith in “parchment barriers,”<sup>101</sup> whether the Emancipation Proclamation or the Thirteenth Amendment. The importance of the Thirteenth Amendment would—or would not—be realized only if the entire force of the national government were brought to bear against those who resisted it. As Downs puts it, “Emancipation was not a moment of lifting the hands of the government but of extending the federal government into areas it had previously not regulated.”<sup>102</sup> And that extension would involve not only, say, the enhanced jurisdiction of federal courts that would come along in 1871, but also the continuing use of military power.

Downs well sets out the fact that an “insurgency” rapidly developed in the defeated Confederacy—as would later be the case in Iraq—and it required full use of the American military if it were to be defeated. The very use of the subjunctive, of course, raises the most important question about Reconstruction, which is the extent to which it was truly successful or not in bringing about the kinds of regime change to which radicals, in particular, aspired. But it is crystal clear that there was a direct correlation between the willingness to use military force after Appomattox and *any* change, predicated on the continued existence of (enough) war to justify exercise of “war powers” by the U.S. military.

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99. *Id.* at 83 (internal quotation marks omitted).

100. *Id.*

101. See, e.g., THE FEDERALIST NO. 48 (James Madison).

102. DOWNS, *supra* note 5, at 53.

And Andrew Johnson, at least early in his administration, was fully aware of this and willing to reject, for example, the arguments, paradoxically, put forth by William T. Sherman, that the ravages of war, which included, of course, his march through Georgia and South Carolina, had been followed, almost immediately, by the halcyon days of “peace” that invalidated the use of the military’s now negated “war powers.”<sup>103</sup>

As Downs convincingly demonstrates, the most crucial single decision of the entire period between Appomattox and 1871, when everyone agreed that, as formal matter, the war had ended and the Union had been fully restored (with representation for all of the formerly excluded states), occurred during the congressional session that began in December 1865. “If Congress seated representatives from the rebel states, the war would be over,” as both a political and a legal matter.<sup>104</sup> Moreover, it would mean that the one and only constitutional transformation would in fact be the Thirteenth Amendment, for the Southern representatives and senators surely would have been able to forestall the proposal of the Fourteenth Amendment, given the Constitution’s requirement of two-third’s approval by each House of Congress. Therefore:

[Congress] refused “to set any reliable peace terms for the South. They simply continued the war until they could build a firm foundation for the future. . . . [T]he decision not to end the war would be Congress’s crucial act, the basis for the eventual ratification of the Fourteenth and Fifteenth constitutional amendments, and the bridge to the enfranchisement of freedpeople in the South.”<sup>105</sup>

To be sure, these decisions were constitutionally freighted; Democrats, some “moderate” Republicans, and, most certainly, Andrew Johnson objected to many of these exercises of congressional power. What was key, though, was the recognition that the future of the Union was still very much at stake, Appomattox or no Appomattox. “What is this Government worth,” asked Senator Jacob Howard, “what is your Constitution worth, what are your laws worth, if bands may wander about by day or night . . . to rob and plunder and murder?”<sup>106</sup> Downs describes Republicans who “[a]ngrily . . . dismissed constitutional qualms as technicalities raised by ‘exceedingly legal gentlemen.’” Instead, the emphasis should be placed on the overriding “law of self-preservation.” As another Republican put it, the “military was created for just such occasions and no other. . . . Let us meet the emergency of the hour like men.”<sup>107</sup>

Consider in this context what is surely the most chilling passage in all of *The Federalist*:

103. *Id.* at 15-19 (Sherman’s position, if accepted, “would have eliminated Reconstruction and contrained emancipation in ways that far exceeded the effects of Jim Crow”).

104. *Id.* at 113.

105. *Id.*; see also *id.* at 134 (“Prolonging wartime, they kept hold of the extraconstitutional authority they needed to protect freedpeople”).

106. *Id.* at 227-28.

107. *Id.* at 228.

The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and *by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.*<sup>108</sup>

This occurs in *Federalist 41*; but just prior to it, Publius has gone out of his way to defend the irregularities of the Philadelphia Convention on the grounds that they were necessary to respond adequately to the “exigencies” facing the delegates, the most important one of which was the sheer inadequacy—Publius in *Federalist 15* would call it “imbecility”—of the present government. Publius adverted back to the heroes of the American Revolution and praised them for having “no little ill-timed scruples, no zeal for adhering to ordinary forms.”<sup>109</sup>

One aspect of the epic struggle over Reconstruction, of course, was the allocation of power to President and Congress. Johnson, like Lincoln before him, behaved exactly as James Madison might have predicted, eager to maximize his own institutional power and to limit that of Congress.<sup>110</sup> That fight would eventuate in Johnson’s impeachment. But the other aspect, quite obviously, was over the scope of national power. Did Congress have all but unlimited “war powers,” or did the Constitution establish checks on both alike? And, of course, how would one know and which, if any institution, was empowered to declare such limits. Here is where the Supreme Court enters the conversation. Downs notes the potential importance of *Ex parte Milligan*,<sup>111</sup> in which the Court eloquently denounced the recourse to military commissions if civilian courts were available. What was potentially at issue, though, was the ability of the military in fact to suppress the insurgency, since the “restored” governments—and, recall, this is *prior* to congressionally imposed “military Reconstruction”—would almost certainly be unwilling or unable to protect vulnerable newly freed people against the re-imposition of near-slavery.

It is easy enough to view Andrew Johnson as a disastrous president. But this does not entail that Abraham Lincoln would necessarily have been a much better one, at least if the basis of assessment is the actual treatment of the freed people, backed by the continued use of military force, and the measures taken to bring about what we call the Reconstruction Amendments. One might hope that Lincoln would have been far less tolerant of the “Black Codes” that the unreconstructed legislatures were passing in an effort to preserve as much of the old order as conceivably possible in the absence of formal chattel slavery. But he was scarcely opposed to systems of labor that would have, at least in Lincoln’s eyes, helped to tutor the newly freed former slaves in the discipline of wage labor.<sup>112</sup> One might well believe that he would have supported the Civil Rights Bill of 1866, based on the Thirteenth Amendment, instead of vetoing it, like Johnson, and would have appointed

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108. THE FEDERALIST NO. 41 (James Madison) (emphasis added).

109. See LEVINSON, *supra* note 84, at 150.

110. See THE FEDERALIST NO. 51 (James Madison).

111. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

112. FONER, *FIERY TRIAL*, *supra* note 35, at 116.



more sympathetic officials than did Johnson to administer, say, the Freedman's Bureau. And we know that Lincoln flirted with the idea of granting the franchise to those former slaves who had fought for the Union, but they would not have been enough to guarantee the maintenance of a Republican form of government in the defeated South. As a practical matter, that would also have required the continued hegemony of the Republican Party in both the defeated states and the national institutions in Washington, lest the latter loosen the strictures of reconstructive regime change and allow (as of course happened) the return to power of the traditional white elites in the Democratic Party.

None of what we know about Lincoln necessarily adds up to his allying with Julian and other Radicals. Would Lincoln have agreed with the substantive programs linked with Military Reconstruction. Just as important, perhaps, is the question of whether he would have acknowledged that Congress in effect trumped the President in determining such policies, including the enfranchisement of *all* former (male) slaves prior to the Fifteenth Amendment (which itself would never have entered the Constitution without the regime changes sparked by Military Reconstruction). We know what Andrew Johnson did, and it is altogether easy (and correct) to condemn many of his actions. An important contribution of Downs's book, though, is to note that our condemnation cannot possibly be total, given Johnson's own willingness to recognize that "peace" had not returned and recourse to "war powers" continued to be necessary. We simply don't know what Lincoln would have done, and whether the country would have been or worse off as a result.

What makes Downs essential reading for anyone interested either in legal history or contemporary constitutional theory is his repeated insistence that the recourse to "war powers" cannot easily be defended in terms of orthodox constitutional theory. In this, he is similar to Bruce Ackerman, whose work he unfortunately ignores,<sup>113</sup> perhaps because Ackerman is a self-conscious constitutional theorist, very much concerned with "abstractions" pernicious or otherwise, while Downs is more wedded to the limits of disciplinary history. But, as with Ackerman's, Downs's book will undoubtedly repay repeated readings. I can think of few books better to assign for a seminar on the constitutional history of Reconstruction or, perhaps, a quite different seminar on what is necessary if an ostensibly winning military power wishes in fact to impose genuine regime change on the losers.

## VI. CODA

I have discovered that contemporary law students betray considerable ambivalence about Lincoln, reflecting, though with far less sophistication, Kateb's own. And, I should emphasize, this refers not only to my students at the University of Texas Law School. Readers who know little about Texas beyond the identity of some of those elected to public office in recent years may suspect that Texans would be predisposed to be doubtful of either the Savior of Union or the Great Emancipator. But consider the similar, if not even stronger, presence of this ambivalence during two semesters, over a period of five years, when I had the honor and pleasure of teaching introductory constitutional law to first-year

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113. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63, 69 (Sanford Levinson ed., 1995) (emphasizing the importance of playing "fast and loose with the existing rules" at times of "unconventional adaptation" of the Constitution to new situations). Ackerman spells out his argument at length in *2 WE THE PEOPLE: TRANSFORMATION* (1991).

students at the Yale Law School in 2006 and 2011. Why would *they* be ambivalent?

As students of literary canons know, the arrival of a new entrant into the canon inevitably causes re-evaluation of what came before. To put it bluntly, the presidency of George W. Bush—and, in many disconcerting ways, of his successor Barack Obama as well—has made the questions asked by Downs, Masur, and Kateb with reference to Lincoln and then Reconstruction, ever more pressing. Downs, for example, quite self-consciously concludes his volume by adverting to Afghanistan and Iraq with regard to the ability of armies to engage in “nation-building” or, as in Reconstruction, genuine “regime change.”<sup>114</sup> And it is worth noting that policies in those two countries have basically been set by Presidents Bush and Obama, with minimal collaboration with Congress (save for financing the armed forces). Many of us have asked how much these presidents truly know what they are doing, in any systematic sense. One might concede that Bush was well-motivated, in many ways, and committed, under the influence of Paul Wolfowitz and others, to bring about some kind of “democracy” to the Middle East. But so what? How much trust should we place in their judgments, which may appear, because they are in fact are, confusing and contradictory rather than the product of fundamental rank-ordered commitments based on well-founded knowledge of the totality of the situation?

A “progression” from Lincoln to presidents like Theodore Roosevelt and Woodrow Wilson and then to FDR was one thing for students of American constitutional development through the time that I entered graduate school in 1962, though there were certainly revisionist historians who were willing to challenge aspects of the thinking of all of these presumptively “great” presidents.<sup>115</sup> But even by the time I entered the Stanford Law School in 1970, Richard Nixon was president, and one had to realize that Nixon—and, after him, Ronald Reagan, Bill Clinton, George W. Bush, and now Barack Obama—could also invoke Lincoln for their own purposes. How do we create a coherent narrative of executive power—and a concomitant willingness, perhaps, to play fast and loose with standard-form constitutional constraints when thought necessary to preserve vital American interests? Ideally, we would say that there is simply no basis for comparison and maintain an unequivocal (and perhaps unexamined) veneration for Lincoln as the keystone of our civil religion. But maybe it is time to take off the rose-colored glasses and to join the authors of these three exceptional books in grappling with a man who *was* perhaps our greatest president, but who also left us with a decidedly ambiguous legacy that we must continue to address a full 150 years after his death, unfortunate or otherwise, at the hands

114. DOWNS, *supra* note 5, at 250–52.

115. Need one really add that in 2016, the subject of Wilson’s undoubted racism is roiling Princeton University, which named its School of International and Public Affairs after Wilson, who was president of the University before becoming first Governor of New Jersey and then President of the United States. *See, e.g.*, Jennifer Schuessler, *Woodrow Wilson’s Legacy Gets Complicated*, N.Y. TIMES, Nov. 29, 2015, [http://www.nytimes.com/2015/11/30/arts/woodrow-wilsons-legacy-gets-complicated.html?\\_r=0](http://www.nytimes.com/2015/11/30/arts/woodrow-wilsons-legacy-gets-complicated.html?_r=0). *See also* Editorial, *The Case Against Woodrow Wilson*, N.Y. TIMES, Nov. 25, 2015, <http://www.nytimes.com/2015/11/25/opinion/the-case-against-woodrow-wilson-at-princeton.html>. One might usefully compare the current perception of Wilson and his legacy with that of an earlier generation of Princetonians. *See, e.g.*, PRINCETON SOUNDS PRAISES OF WILSON; Dr. Van Dyke, at Fund Meeting, Calls Him University’s Most Illustrious Son. 100,000 HAVE CONTRIBUTED Every State in Union and a Dozen Foreign Countries Represented—Average \$5, N.Y. TIMES, Feb. 21, 1922, <http://query.nytimes.com/gst/abstract.html?res=9405EFD81239E133A25752C2A9649C946395D6CF>. Historians, especially, remind us, for good and for ill, of the truth of the Latin proverb, *Sic temper gloria mundi*.

of John Wilkes Booth. And we are left with the most basic question of his entire career, and perhaps of American constitutionalism itself: do we wish that he had been more scrupulous in living up to the demands of “fidelity” to the sometimes difficult restraints imposed by the Constitution, or do we hope instead that, had he lived longer and completed his second term, he would, perhaps like the Framers in Philadelphia, have known when laws, including the Constitution, were indeed made to be broken in the name of the substantive commitments to a “new birth of freedom” so eloquently set out at Gettysburg?