THE DAVID C. BAUM MEMORIAL LECTURE: WAS THE EMANCIPATION PROCLAMATION CONSTITUTIONAL? DO WE/SHOULD WE CARE WHAT THE ANSWER IS?†

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On the first day of the new year of 1863, President Abraham Lincoln issued the Emancipation Proclamation—signifying the dawn of a new era in the bitterly divided United States of America. Surely, few would question the monumental significance of this historic event. Few would dare debate the "rightness" of Lincoln's action. However, Professor Sanford Levinson, in his David C. Baum Memorial Lecture, asks: was the Proclamation constitutional? In this provocative piece, Professor Levinson explores Lincoln's, and his contemporaries', intellectual and political struggles with the constitutional parameters of the office of president and the lawful scope of the Proclamation. Professor Levinson then proceeds to set forth an assessment of the constitutionality of Lincoln's action. Ultimately, according to Professor Levinson, the question becomes: do we care whether the Emancipation Proclamation, and other landmark acts, events, and decisions, are constitutional? He argues that society evaluates constitutional decisions with a focus on whether it agrees with or substantively "likes" the outcome, i.e., nonlegal grounds, rather than on the decision's fidelity to the Constitution. Professor Levinson concludes by discussing Bush v. Gore *and the lessons it, and the Emancipation Proclamation, teach about constitutional development, "rough justice," and most importantly, constitutional fidelity.*

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I. INTRODUCTION

It should go without saying that I am highly honored to lend my name to the distinguished series of David C. Baum lecturers on civil liberties and civil rights. I should also emphasize my special pleasure in following such close friends as Akhil Reed Amar and Randall Kennedy to this podium. Among the many things that Professor Amar and I have in common is a fascination with Illinois's Abraham Lincoln.[1] With Professor Kennedy, I share a deep interest, if that is not too mild a term, in the tangled history of race in the American constitutional order.[2] It was, therefore, overdetermined that I decided, almost immediately upon accepting the invitation to be with you today, to address a topic that has long interested me: Exactly what is to be learned from the Lincoln presidency about constitutional norms and the notion of constitutional fidelity?

No president has been more important, and only Lyndon B. Johnson could challenge Lincoln at all, in using the full powers of his office to enhance what we today call "civil rights."[3] Yet, as I have written elsewhere,[4] Lincoln's career presents the most complex paradoxes for anyone interested in American constitutional development and, especially, in the notion of constitutional fidelity. This paradox is unforgettably manifested in what I regard as one of the most amazing sentences in the entire history of *United States Reports*. It occurs in Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[5] This case, often simply called the "*Steel Seizure Case*," concerned President Truman's ordering the takeover by the national government—acting through the Secretary of Commerce, John Sawyer—of the steel industry as an alternative to accepting a strike that would very likely have shut down the industry and, as a result, threatened the supply of vital war materiel to American and United Nations forces then fighting in Korea.[6] The Supreme Court, by a six-to-three vote, held that the seizure was unconstitutional because the President could only "enforce" the law, and

1. Akhil Reed Amar, *Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109.

2. Randall L. Kennedy, *"Nigger!" As a Problem in the Law*, 2001 U. ILL. L. REV. 935.

3. I put it this way because members of Lincoln's own generation drew a sharp distinction between "civil rights" and "political rights," as, indeed, is illustrated in the debates in Congress about the meaning of the proposed Fourteenth Amendment. Many of its proponents went out of their way to assure skeptics that it would apply only to "civil rights" and, therefore, not at all to such political rights as voting or jury service. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 246–48 (4th ed. 2000); *see also* Minor v. Happersett, 88 U.S. 162 (1874). That distinction is happily lost to us, partly as the result of such cases as *Strauder v. West Virginia*, 100 U.S. 303 (1879), which without ado treated the exclusion of African Americans from jury service, a quintessential political right, as covered by the Fourteenth Amendment. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (arguing that *Strauder* would have been better decided as a Fifteenth Amendment case).

4. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 139–42 (1988).

5. 343 U.S. 579 (1952).

6. *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

no statute passed by Congress had given him the authority to seize the mills.[7] The majority, in effect, disregarded the potential cost of disallowing the seizure as perceived by the commander-in-chief, who emphasized the risks presented to the lives of American personnel and their allies in Korea.

Although Justice Frankfurter purported to agree with Justice Black's remarkably short and formalistic majority opinion, he offered an extensive concurring opinion based on close consideration of the prior practices of presidents, not to mention his showing, as well, that Congress had quite explicitly opted *not* to pass legislation that would have granted the president the authority claimed by Truman.[8] Still, the implication was that Truman's act would have been perfectly acceptable, even in the absence of specific authorization, if there were indeed sufficient precedent for it. Not surprisingly, several of Lincoln's acts had been suggested as precedents, leading to Frankfurter's remarkable sentence: "It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War."[9] As many times as I have read this opinion, it still almost takes my breath away that the acts of America's most admired president during the most important single episode in our national history can be so utterly dismissed as "irrelevant" to the constitutional analyst, especially one so attuned to precedent-based analysis as Frankfurter was.

Why was Frankfurter so concerned with "neutralizing" Lincoln? The problem is obvious: If Lincoln's actions are indeed relevant, then one is forced to wrestle with the implications of his actions as setting important precedents for future presidents. Assistant Attorney General Baldridge had defended Truman's seizure before the district court by arguing that "[t]he executive, particularly in times of national emergency, can meet whatever situation endangers the national safety of the country."[10] As we shall see presently, he was making precisely the argument that was used to defend such Lincolnian acts as the Emancipation Proclamation.

Not surprisingly, the dissenters in *Youngstown Steel* found Lincoln to be far more relevant. Indeed, they note that "[t]he most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the States, but wholly without statutory authority."[11] If the Emancipation Proclamation is accepted as relevant to considering President Truman's far more modest (and altogether temporary) seizure of the steel mills, then, concomi-

7. *Youngstown*, 343 U.S. at 589.
8. *Id.* at 599 (Frankfurter, J., concurring).
9. *Id.* at 611.
10. BREST ET AL., *supra* note 3, at 707.
11. *Youngstown*, 343 U.S. at 685 (Vinson, C.J., dissenting).

tantly, the decision of the majority that Truman was without authority casts into doubt the constitutional legitimacy of the Proclamation.

So perhaps I should have titled my lecture "Is It Irrelevant Whether the Emancipation Proclamation Was Constitutional?" The (majority of the) Supreme Court apparently thought that the answer was yes. Should we accept that answer?

That question I can answer with ease: I believe that it is highly relevant how we think of the Proclamation. I do not share Justice Frankfurter's complacent confidence that we should simply cabin off the events of the Lincoln presidency from our more general analysis of constitutional law and, just as importantly, constitutional development.[12]

In any event, to the extent that we refuse to confront the lessons of the Lincoln presidency, two things are true. First, as already suggested, it is almost certainly evidence of abysmal ignorance about important aspects of our national history. Second, and perhaps of greater importance, as a result of that ignorance we become far more likely to misunderstand even contemporary realities of how our constitutional system operates in practice, in contrast with the idealized, altogether misleading, notions taught not only in seventh-grade civics texts but also, less forgivably, in too many of our law schools.

Most of this lecture will be devoted to the Proclamation and why it is possible to question its constitutional legitimacy. But I will in fact move, toward the end of my remarks, to much more contemporary examples, including the case of *Bush v. Gore*.[13] The reason is that I think the most basic question hovering over our system of constitutional democracy is if we really care whether any particular action (e.g., the Proclamation, the bombing of Serbia, or the Supreme Court's decision in the 2000 Presidential election case) is constitutionally legitimate. Do we ultimately base our evaluations of such actions—and many more besides—on what are, at bottom, nonlegal grounds? And, if so, is there anything necessarily wrong with doing that?

II. ABRAHAM LINCOLN AND CONSTITUTIONAL FIDELITY

Let us turn, then, to the Proclamation itself and the debate about its constitutionality. Although Abraham Lincoln is one of the leading figures in our American civil religion—surely the Lincoln Memorial is the leading temple of our national religion—what remains unclear is precisely what he teaches us about constitutional faith. Many examples could be given, all of them discussed in what remains the leading book,

12. Indeed, I am not even sure that we *can* cabin them off, at least once we become aware of them. It may be like the fabled assignment to stand for five minutes in a corner *without* thinking of a purple cow.

13. 531 U.S. 98 (2000).

Constitutional Problems Under Lincoln,[14] written by a great University of Illinois historian, James G. Randall. But I want to concentrate on the act that led Lincoln to be titled by many the "Great Emancipator," the Emancipation Proclamation of January 1, 1863.

As every historian has recognized, the Proclamation is a most peculiar document. It declares slaves to be free in territories of the secessionist states that were not yet under federal control; it left untouched the status of slaves not only in the four slave states that had remained within the Union—Maryland, Delaware, Kentucky, and Missouri—but also even those parts of the ostensibly secessionist states that had been brought under Union control. Thus, though most of Louisiana was covered, the City of New Orleans was exempted from the Proclamation; the same was true with regard to the state of Virginia and such specific cities, successfully recaptured by the United States, as Norfolk and Portsmouth.[15] As the London *Spectator* put it with justified acerbity, the fundamental principle underlying the Proclamation appeared to be "not that a human being cannot justly own another, but that he cannot own him unless he is loyal to the United States."[16]

There are two principal explanations for Lincoln's exempting the Unionist states from the Proclamation. One is absolutely obvious: He desperately needed them to remain within the Union, and that required full recognition of the rights of loyal slaveholders. It may help us to understand why, as Randall informs us, "loyal slave owners within such Union States as Kentucky and Missouri were permitted to recover their [fugitive] slaves until late in the war, when the fugitive slave acts were" finally repealed on June 28, 1864.[17] After all, the slave owners in these states had to be appeased, lest they throw their support to the Confederacy, and these slave owners expected that their fugitives would continue to be subject to forced return. Don Fehrenbacher, in his magisterial—and sadly posthumous—book that is tellingly titled *The Slaveholding Republic*,[18] notes that "[a]ntislavery efforts to remove these eyesores"[19] of the Fugitive Slave Acts of 1793 and 1850 had been "blocked by border-state congressmen and northern Democrats with the help of conservative Republicans."[20] Not until February 1863, for example, was a bill to repeal the 1850 Act reported out of committee, though initially introduced

14. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed. 1964).

15. See the full text of the Proclamation in JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 96–98 (1963).

16. JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 298 (1982).

17. RANDALL, *supra* note 14, at 357.

18. DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001).

19. *Id.* at 250.

20. *Id.*

in December 1861, and even then it was "reported unfavorably by the chairman, a New Jersey Republican."[21]

Consider that the Supreme Court, in *Prigg v. Pennsylvania*,[22] said that the right to recapture fugitive slaves was guaranteed by the Constitution itself.[23] Even in April 1864, when the Senate was considering a bill to repeal the laws, it accepted an amendment that left the 1793 Act in force. As Fehrenbacher writes, "Eleven Republicans voted for the amendment, apparently agreeing with its author, John Sherman of Ohio, that certain southerners were still *entitled* to at least minimal protection of a right guaranteed by the Constitution."[24] This suggests a second explanation for the particular form that Lincoln's Proclamation took and its exemption of federally occupied lands as well as the Unionist slave states. Perhaps we should think in terms not only of political prudence, but also of what leading lawyers, including Lincoln, believed to be the commands of the Constitution itself. This allows us to explain the exemption of New Orleans or Norfolk in a way that looking simply to raw political considerations does not.

So we should take seriously the possibility that the limited reach of the Proclamation is explained—and is that the same thing as justified?—by the fact that Lincoln believed that he was simply being faithful to his constitutional oath of office, which, presumably, compels scrupulous fidelity to constitutional norms. At the very least, this "generous" interpretation of Lincoln's act requires us to grapple with the awful description of the Constitution offered by William Lloyd Garrison—that it was a "Covenant with Death and Agreement with Hell."[25] If, as Garrison suggested, and many other decisions of the Supreme Court such as *Prigg* and, even more notably, *Dred Scott*, confirmed,[26] the Constitution did include what Justice Story in *Prigg* termed the "fundamental"[27] recognition of the rights of slave owners, then one has to accept the possibility that Lincoln indeed was forced, by respect for his oath of office, to limit the reach of emancipation. He was, from this perspective, as "great an emancipator" as the Constitution allowed him to be, which, in fact, was not much, at least as a legal proposition. The irony, of course, is that praising Lincoln as a dedicated constitutionalist requires affirming the basic validity of the Garrisonian vision. If one, on the other hand, rejects that vision and offers a more generous depiction of the Constitution, it is harder to accept the second, Constitution-oriented, explanation (or de-

21. *Id.*

22. 41 U.S. (16 Pet.) 539 (1842).

23. *Id.* at 625.

24. FEHRENBACHER, *supra* note 18, at 250 (emphasis added). The amendment proved unavailing, though, and Radical Republicans were able to muster support for the bill repealing both of the Acts.

25. PHILLIP S. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 3 (1975).

26. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); *Prigg*, 41 U.S. at 539.

27. *Prigg*, 41 U.S. at 611.

fense) of Lincoln's limited reach. Instead, one might have to view the entire Proclamation entirely within the structure of *realpolitik*, which may have much to be said for it but has precious little to do with standard-form constitutional analysis and rigorous constitutional fidelity.

As we decide which explanation to accept, it is worth noting that Lincoln was scarcely a constitutional radical,[28] even if it is true that he consistently opposed slavery on moral grounds throughout his career. Perhaps the best example of his nonradicalism was a remarkable argument he made in the Lincoln-Douglas debate with regard to the Constitution and fugitive slave laws.[29] Thus, after quoting the text of Article IV, clause 2, Lincoln states that it

> is powerless without specific legislation to enforce it. Now on what ground would a member of Congress who is opposed to slavery in the abstract [as Lincoln was] vote for a fugitive law, as I would deem it my duty to do so? Because there is a Constitutional right which needs legislation to enforce it. And although it is distasteful to me, I have sworn to support the Constitution, and having so sworn I cannot conceive that I do support it if I withheld from that right any necessary legislation to make it practical.[30]

That is, Lincoln not only concedes Congress's power to pass such laws—itself a controversial proposition given the total lack of any such enumerated power in Article I, Section 8 of the Constitution—but he also appears to impose on members of Congress a constitutional duty to support them, whatever one's private views as to the evil of slavery.

Similarly, if Lincoln built his entire political career around the proposition that Congress had the power to ban slavery in the territories, he was careful to proclaim that he recognized fully the constitutional duty to protect the institution in the states where it already existed. As he put it in his first inaugural address, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so . . . ."[31] Indeed, he reiterated his endorsement of the 1860 Republican platform, which spoke of "the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively."[32] If that were not sufficient re-

28. Compare him with, say, Lysander Spooner. *See* Randy Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997); Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, *reprinted in* BREST ET AL., *supra* note 3, at 207–11. *See generally* WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM 276–77 (1977) (stating that Lincoln was not pushing for drastic measures regarding slavery).

29. *See* Lincoln-Douglas Debates, *in* SPEECHES AND WRITINGS 1832–1858, at 620, 813 (Don E. Fehrenbacher ed., 1989).

30. *Id*. at 620 (Debate of September 15, 1858).

31. Abraham Lincoln, 1st Inaugural Address, *in* SPEECHES AND WRITINGS 1859–1865, at 215, 215 (Don E. Fehrenbacher ed., 1989).

32. BREST ET AL., *supra* note 3, at 226.

assurance of the slave states, he explicitly supported the so-called Corwin Amendment that had received the support of what was by then an overwhelmingly Northern Congress.[33] That Amendment would in effect have guaranteed in perpetuity the maintenance of slavery in the states where it then existed by forbidding any future amendment "to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[34]

It is worth noting the emphasis on *congressional* power in the Corwin Amendment, for no one, at least as of 1861, was so bold to suggest that slavery could be threatened by unilateral presidential action. Two constitutional arguments are involved. One of them involves the power of the national government. The other is a classic separation-of-powers controversy. Even if the national government is deemed to have certain powers, the president still needs congressional authorization for his actions. This, after all, is the heart of *Youngstown Steel*, which would have been an absolutely easy case had Congress authorized the seizure in advance.

In any event, Lincoln *did* act, both to resist Southern secession and then later to issue the Emancipation Proclamation. Realizing that he had some duty to offer a legal justification, Lincoln cited "the power in me invested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States,"[35] and he described the Proclamation "as a fit and necessary war measure for suppressing said rebellion."[36] So, "by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free."[37] Finally, after noting that his act is "sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity,"[38] he "invoke[d] the considerate judgment of mankind, and the gracious favor of Almighty God."[39]

Lincoln did not write in a void. Indeed, he himself had earlier been very critical of capacious theories of war powers to liberate slaves. Consider, for example, a private letter written by Lincoln in September 1861, addressed to Illinois Senator Orville H. Browning, an objector to Lincoln's almost instant revocation of an order written by General John C. Fremont (Lincoln's predecessor as the Republican candidate for president in 1856) that had freed slaves belonging to Missouri rebels. Again,

33. *See* MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 136–38 (1998).

34. *Id*. at 137.

35. Abraham Lincoln, The Emancipation Proclamation, *in* FRANKLIN, *supra* note 15, at 96, 96.

36. *Id.* at 97.

37. *Id.*

38. *Id.*

39. *Id.*

one can easily offer a completely political explanation for the revocation. But Lincoln proclaimed he was primarily motivated by constitutional concerns:

> [Fremont's] proclamation . . . is simply "dictatorship." It assumes that the general may do *anything* he pleases—confiscate the lands and free the slaves of *loyal* people, as well as of disloyal ones.[40] And going the whole figure I have no doubt would be more popular with some thoughtless people . . . . But I cannot assume this reckless position . . . . You speak of it as being the only means of *saving* the government. On the contrary it is itself the surrender of the government. Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws,—wherein a General, *or a President*, may make permanent rules of property by proclamation?
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> I do not say Congress might not with propriety pass a law, on the point. . . . What I object to, is, that *I as President*, shall expressly or impliedly seize and exercise the permanent legislative functions of the government.[41]

One should note the denial by Lincoln that the President can act without congressional authorization even as he acknowledges the possibility that Congress in fact had the power to legislate with regard to slavery. In form, then, this is a classic separation-of-powers argument.

By the following May, Lincoln's views had modified somewhat. General David Hunter had issued a somewhat similar proclamation with regard to federally controlled areas in South Carolina, Georgia, and Florida, and, once again, Lincoln revoked it. This time, however, he objected only that it went beyond Hunter's powers. Lincoln wrote:

> I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the Slaves of any state or states, free, and whether at any time, in any case, it shall have become a necessity indispensable to the maintenance of the government, to exercise such supposed power, are questions which, under my responsibility, I reserve to myself . . . .[42]

Lincoln seems to be rejecting the separation of powers argument made earlier. Now he in effect is appointing himself the judge in his own case, "reserv[ing] to [him]self"[43] the most basic decision as to the extent of his powers as President of the United States. This is no mere academic point since Lincoln was already at war with the Chief Justice of the United States, Roger Brooke Taney, over the reach of presidential

40. Though note that Fremont seemed to limit his order to the slaves of rebels and not, therefore, of those who had remained loyal to the Union.

41. Letter from Abraham Lincoln to Orville H. Browning (Sept. 22, 1861), *in* SPEECHES AND WRITINGS 1859–1865, *supra* note 31, at 268–69 (emphasis added).

42. "Proclamation [of May 19, 1862] Revoking General Hunter's Emancipation Order," *in id*. at 318–19.

43. *Id.* at 319.

power. Taney had held that Lincoln's unilateral suspension of habeas corpus was without constitutional warrant; to be sure, Congress could suspend the power, but the very placement of such authority in Article I, Section 9 implied that the President had no such independent authority to do so.[44] Lincoln's response was basically to ignore Taney's strictures.

But Lincoln, and his supporters, also had to contend with former Supreme Court Justice Benjamin R. Curtis of Massachusetts, who had dissented in *Dred Scott* and thus established a certain measure of anti-slavery bona fides. Curtis had issued a pamphlet on "Executive Power"[45] following Lincoln's September 22, 1862, announcement that he intended to issue the Proclamation should the rebellious states not cease their campaign. In that pamphlet, Curtis castigated the theory of executive war power that Lincoln used to justify the potential act of emancipation. Emphasizing that the Proclamation reached *every* slave (and slave owner) within the affected states, Curtis noted that:

> [i]t is not, therefore, as a punishment of guilty persons that the commander-in-chief decrees the freedom of slaves. It is upon the slaves of loyal persons, or of those who, from their tender years, or other disability, cannot be either disloyal or otherwise, that the proclamation is to operate, if at all; and it is to operate to set them free, in spite of the valid laws of their States.[46]

In addition, Curtis emphasized that Lincoln's own theory of the war refused to recognize the legitimacy of secession, which meant, as a logical matter, that the states within the so-called Confederacy remained a part of the United States, with its citizens continuing to possess whatever constitutional rights attached to that status. Moreover, of course, Lincoln had consistently emphasized that he did not wish to disturb the traditional prerogatives of those states, which included the right to recognize the institution of slavery. Thus, said Curtis:

> It has never been doubted that the power to abolish slavery within the States was not delegated to the United States by the Constitution, but was reserved to the States. If the President, as commander-in-chief of the army and navy in time or war, may, by an executive decree, exercise this power to abolish slavery in the States,

because of his belief that it will be conducive to overcoming "the enemy, what other power, reserved to the States or to the people, may not be exercised by the President, for the same reason . . . ?"[47] Sounding the note that would be trumpeted in *Youngstown Steel*, Curtis wrote that "all the

44. *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

45. EXECUTIVE POWER, *reprinted in* 1 UNION PAMPHLETS OF THE CIVIL WAR 1861–1865, at 450 (Frank Freidel ed., 1967) [hereinafter 1 UNION PAMPHLETS]. Excerpts can also be found in BREST ET AL., *supra* note 3, at 226–28. Curtis would end up as Andrew Johnson's leading counsel in his impeachment trial before the Senate in 1868. *See* 1 UNION PAMPHLETS, *supra*, at 450.

46. BREST ET AL., *supra* note 3, at 227.

47. *Id.*

powers of the President are executive merely. He cannot make a law . . . ."[48]

With regard to the topic (and title) of my remarks today, though, the most powerful paragraph is one responding to what Curtis described as "[a] leading and influential newspaper"[49] that had supported Lincoln's announcement of his intentions and had written: "The Democrats talk about 'unconstitutional acts.' Nobody pretends this act is constitutional, and nobody cares whether it is or not."[50] Curtis then writes:

> Among all the causes of alarm which now distress the public mind, there are few more terrible . . . than the tendency to lawlessness which is manifesting itself in so many directions. No stronger evidence of this could be afforded, than the open declaration of a respectable and widely circulated journal, 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 . . . ; that our public affairs have become so desperate, and our ability to retrieve them by the use of honest means is so distrusted, and our willingness to use other means so undoubted, that our great public servants may themselves break the fundamental laws of the country, and become usurpers of vast powers not intrusted to them, in violation of their solemn oaths of office; and "nobody cares."[51]

Lincoln never offered a genuine response to Curtis or other critics; though, needless to say, others did. Thus, New Yorker Charles P. Kirkland quickly drafted and published an open letter, dated November 28, 1862, to former Justice Curtis.[52] He easily found Lincoln's proposed act to be within the internationally recognized laws of war by "depriv[ing] the rebels of their means of sustaining the rebellions" by being able to count on the labor of their slaves.[53]

A similar defense was offered by another New York lawyer, Grosvenor P. Lowrey.[54] What is most interesting about Lowrey's defense was his adoption of what is, at bottom, an extraconstitutional argument:

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48. 1 UNION PAMPHLETS, *supra* note 45, at 465. Although the *New York Times* supported the Proclamation, it would have preferred that it had been presented as a straightforward military order. "We think," it went on, "every dispassionate person must feel some doubt whether the Supreme Court will decide that the President has power to *repeal State laws on the subject of slavery*, or to continue those laws in force according to his judgment of the military necessities of the moment." N.Y. TIMES, Jan. 6, 1863, *quoted in* 5 CARL BRENT SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 937 (Paul A. Freund ed., 1974).

49. 1 UNION PAMPHLETS, *supra* note 45, at 470.

50. *Id*.

51. *Id*. at 470–71.

52. Charles P. Kirkland, *A Letter to the Hon. Benjamin R. Curtis*, *in* REVIEW OF HIS RECENTLY PUBLISHED PAMPHLET ON THE 'EMANCIPATION PROCLAMATION' OF THE PRESIDENT (Latimer Bros. & Seymour Law Stationers, 1862) [hereinafter REVIEW], *as cited in* Sanford Levinson, *Abraham Lincoln, Benjamin Curtis & The Importance of Constitutional Fidelity*, 4 GREEN BAG (2d Series) 419, 425 n.12 (2001).

53. REVIEW, *supra* note 52, at 10.

54. *See* GROSVENOR P. LOWREY, THE COMMANDER-IN-CHIEF; A DEFENCE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION; AND AN ANSWER TO EX-JUDGE CURTIS'

> [W]here the Constitution itself is the subject of consideration, and the question is, shall it exist or cease, and the President finds his powers, as its military champion, challenged, the mind looks instinctively through the Constitution to that broader charter upon which it rests. And this it does, not for the purpose of finding a "higher law" which shall contradict or thwart the Constitution (dangerous fallacy), but a higher law which shall sustain and be in agreement with it.[55]

So, Lowrey concluded, "First: Abraham Lincoln, as Commander-in-chief in time of war, embodies all the executive war powers of the nation. Second: These powers are extra-constitutional, having their origin in the nature of things . . . ."[56] Especially interesting is Lowrey's insistence, *pace* Curtis, that Lincoln did not in fact abolish the institution of slavery. "The military power, acting through emancipation, does not pretend to destroy the legal right to own slaves, and is not, therefore, obnoxious to the charge of annulling or repealing state laws."[57]

The most widely discussed defense of Lincoln's powers appears to have been offered by William Whiting, the Solicitor of the War Department, in a book on presidential war powers that went through no fewer than forty-three editions in eight years.[58] He devoted a full chapter to explaining why the President, as commander-in-chief, possessed the power "to emancipate the slaves of any belligerent section of the country, if such a measure becomes necessary to save the government from destruction . . . ."[59] An important part of Whiting's argument was drawn from international law concerning the rights of belligerent parties. Indeed, Whiting argued:

> It is *only* the law of nations that can decide this question, because *the constitution*, having given authority to government to make war, *has placed no limit whatever to the war powers*. There is, therefore,

PAMPHLET, ENTITLED "EXECUTIVE POWER" 474 (2d ed. 1863), *in* 1 UNION PAMPHLETS, *supra* note 45, at 474. Though this new edition was published in 1863, an earlier edition had been published in 1862.

55. *Id*. at 480–81.

56. *Id*. at 499.

57. *Id*. Note the implication that it would in fact have violated the Constitution for Lincoln to have mandated the abolition of the legal institution of slavery per se.

58. WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES, at ix (Da Cupo Press 1972) (1871). Whiting had been named Special Counselor of the War Department in November 1862 before being promoted to the office of Solicitor upon the creation of that office in February 1863.

59. *Id*. at 66. Whiting made full use of early arguments that had been made by John Quincy Adams while a member of Congress following his presidency. As David Donald writes:

> "[B]y the laws of war," [Adams] reminded his listeners, "an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them." In case of "actual war, whether servile, civil, or foreign," he grimly told Congress, the South's "municipal institutions" would be entirely subject to these laws of war, which permitted the confiscation of enemy property, including slaves.

David Herbert Donald, *Whig in the White House*, *in* LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 133, 145 (3d ed. 2001). Whiting quotes extensively from Adams. WHITING, *supra* note 58, at 77–82.

> no legal control over the war powers except the law of nations, and
> no moral control except the usage of modern civilized belligerents.[60]

Thus, once the President decides that a measure is "necessary and proper," so to speak, to achieve victory, he can order it, period.

Not surprisingly, such an extravagant theory of presidential power drew criticism. Philip Paludan, writing of Harvard law professor Joel Parker, describes Whiting as having made "the sort of argument that Parker despised. It expanded power, diminished liberty, and glorified both actions as justified by the Constitution."[61] Parker took particular exception to Whiting's assertions that, in effect, the Constitution had become silent and that international law controlled. Instead, Parker argued, the conflict was an insurrection and *not* an international conflict, which meant that the Constitution continued to have basic application. "Otherwise," as Paludan summarizes Parker's argument, "the whole legal foundation for the war against secession vanished."[62]

In our own era of at least quasi-imperial presidencies, where presidents regularly claim the power to engage in foreign hostilities without congressional authorization—think, for example, of the Gulf War, the invasion of Panama, and the bombing of Serbia, all within the last fifteen years—and inherent authority to limit liberty in the name of "national security" considerations,[63] we should take quite seriously the charges lev-

60. WHITING, *supra* note 58, at 68–69 (emphasis added).

61. PALUDAN, *supra* note 25, at 146.

62. *Id*. at 148.

63. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981). The Court pronounced it as "'obvious and unarguable' that no governmental interest is more compelling that the security of the Nation." *Id.* If one takes this seriously, then, given the very structure of "compelling interest" logic, which arises precisely in order to limit what appear otherwise categorical prohibitions, there are *no* rights protected against infringement by national government. There remains the question of *who* within the national government can infringe otherwise protected rights. *See, e.g.*, United States v. New York Times Co., 403 U.S. 713 (1971) (Pentagon Papers Case). The majority that voted against enjoining publication of top-secret documents by the *New York Times* split with regard to whether the defect in the United States's case was simply that Congress had failed to authorize the President to seek such injunctions, *id.* at 732–33 (White, J., concurring), as against the proposition enunciated by Justices Black, Douglas, and Brennan that any such authorization would itself have been unconstitutional. *Id.* at 714–15 (Black, J., concurring); *id*. at 720 (Douglas, J., concurring); *id*. at 725 (Brennan, J., concurring).

One might as well reconsider in this context the Court's oft-criticized opinion in *Korematsu v. United States*, 323 U.S. 214 (1944), which tested the legitimacy of presidential order 9066 that first imposed a curfew on all persons of Japanese descent living on the West Coast and ultimately served as the basis of their forced relocation in what Justice Roberts described as "concentration camps." *Id.* at 226. Indeed, Richard Posner offers a defense of *Korematsu* in his book: *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts*. He writes:

> What *Korematsu* and the Emancipation Proclamation [which I strongly approve of] have in common, and what distinguishes them from the steel seizure case, is, nothing more or less, it seems to me than, the difference in menace between the Civil War and World War II, on the one hand, and the Korean War, on the other. The scope of the President's constitutional power as the commander in chief of the armed forces of the United States is relative to the threat facing the nation. In January 1863, before the Union victory in the Battle of Gettysburg and the surrender of Vicksburg to Grant, the threat was very great. And so was Japan's threat to the nation perceived to be (though in hindsight the perception was exaggerated) in March 1942, when the exclusion order at issue in *Korematsu* was issued. For Lincoln to have refrained from issuing the Emancipation Proclamation because of a belief that it was unconstitutional would have given real meaning to the idea that the Constitution is a suicide pact.

eled against Lincoln and his supporters. Taken to an extreme, the views expressed by Whiting, Lowrey, and Kirkland seem to license presidential dictatorship during time of war. If one is going to be subjected to dictatorship, then surely Abraham Lincoln is far preferable to most candidates for the job. This does nothing to contradict the point that these views present a reading of the presidential prerogative wholly at odds with the far more restricted reading adopted by the Court in *Youngstown Steel.*

We seem, then, to have the following options with regard to assessing the constitutionality of the Emancipation Proclamation:

(1) It was constitutional, but only because it was in fact so limited in its reach. Had Lincoln been more ambitious and ordered emancipation in any territories controlled by the Union army, let alone any of the non-seceding slave states, or, perhaps, had he ordered emancipation earlier in his term of office, when Generals Fremont and Hunter were engaging in their own efforts, he would have violated his oath of office and, perhaps, merited impeachment rather than a Memorial.

(2) It was constitutional, because he indeed had basically unlimited power to do whatever he deemed instrumentally effective in waging a successful war to save the Union. Had he determined that nationwide emancipation would be efficacious to the goal, then he could have issued a far more sweeping Proclamation. After all, as Whiting noted, "the United States have in former times sanctioned the liberation of slaves even of loyal citizens, by military commanders, in time of war, without compensation . . . ."[64] Indeed, had he determined that simply confiscating slave owner land and redistributing it to slaves who had, say, joined the Union forces, that would have been perfectly proper as well. This means, that the limited reach of the Proclamation that *was* issued is a

RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 171–72 (2001). Posner's relative dismissal of the Korean War is, in important ways, similar to the stance adopted in the majority opinions and concurrences in the *Steel Seizure Case*. See, however, the opening pages of the dissent written by Chief Justice Fred Vinson, which basically takes the stance that the War is the opening battle of World War III in which nothing less than the ultimate survival of freedom is at stake. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 668–69 (1952) (Vinson, C.J., dissenting). If one adopted that perception of what was at stake, it is not at all clear that Posner's argument would not counsel accepting the legitimacy of Truman's action.

With regard to Lincoln's unilateral suspension of habeas corpus, Posner writes as follows:

> Lincoln's defying of Taney over habeas corpus was different. The constitutional text can't be stretched to authorize the President to suspend habeas corpus; only Congress can. It was an unconstitutional act validated by a higher source of justice, namely survival. The governing maxim is *inter armes leges silent*.

E-mail from Richard Posner, Judge, U.S. Court of Appeals for the Seventh Circuit, to Sanford Levinson, W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School (Mar. 26, 2001) (on file with *University of Illinois Law Review*). I am grateful to Judge Posner for his permission to quote his comments. The foregoing footnote was written well before the events of September 11, 2001. It should be obvious that the arguments raised both in the text and in the footnote about the extent of war powers—and, indeed, whether law genuinely speaks during time of war—is more important than ever, especially because September 11 represents the first time since the events of 1861–1865 that the mainland United States has been the object of direct military attack.

64. WHITING, *supra* note 58, at 82.

sign not of constitutional fidelity, but, rather, of political will. Perhaps an equal way of putting this is to say that this notion completely collapses the notion of "law" into that of "prudence."

(3) It was, alas, unconstitutional; though, at the end of the day, "no harm, no foul," because of the proposal by Congress, ratified by the States in 1865, to abolish slavery in the Thirteenth Amendment. As important, under this analysis, is Section Four of the Fourteenth Amendment, added to the Constitution in 1868, which explicitly states that "neither the United States nor any state shall assume or pay . . . any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."[65] In the absence of such language, a careful lawyer imbued with respect for the Takings Clause of the Fifth Amendment might suggest that the United States would indeed have a duty to compensate at least some slave owners for the loss of their property, such as those who had remained loyal to the Union even while living in Confederate states. Indeed, whether for reasons of politics or constitutional fidelity, Lincoln had coupled proposals for emancipation and compensation until the Proclamation itself.[66] Invocation of the Fourteenth Amendment raises other questions altogether relevant to our inquiry this afternoon, which is whether the process by which it was added to the Constitution was in fact constitutionally legitimate,[67] and, of course, whether we care in the least how we answer this question. And so, as Kurt Vonnegut might put it, "it goes."[68]

III. DO WE CARE?

One reason I have chosen the Emancipation Proclamation as my topic is the cognitive dissonance produced by an assertion that one of the truly great acts in our history, whatever its limits, might have violated what we like to believe is a Constitution that is admirable and, indeed, worthy of what James Madison termed our "veneration."[69] I could have chosen other examples raising some of the same problems, including, for example, the constitutionality of the Louisiana Purchase (which Presi-

65. U.S. CONST. amend. XIV, § 4.

66. *See, e.g.*, Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *in* SPEECHES AND WRITINGS, *supra* note 31, at 412–14; Abraham Lincoln, Appeal to Border-State Representatives for Compensated Emancipation (July 12, 1862), *in id.* at 340–42; Abraham Lincoln, Message to Congress (Mar. 6, 1862), *in id.* at 307; Abraham Lincoln, Message to the Senate and House of Representatives concerning a bill to provide slave states with compensation for end of slavery (Feb. 5, 1865), *in id.* at 671. As this last example indicates, the Emancipation Proclamation in no way entailed shelving the analytically separable issue of compensation.

67. Professor Ackerman presents powerful—I believe persuasive—arguments as to why the Fourteenth Amendment ought not be described as an Article V amendment to the Constitution, however much its supporters tried to shoehorn it within the confines of that Article. Bruce Ackerman, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 2279 (1999).

68. KURT VONNEGUT, JR., SLAUGHTERHOUSE-FIVE OR THE CHILDRENS CRUSADE 185 (1969).

69. *See* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443, 2452 (1990).

dent Thomas Jefferson believed was unconstitutional) or the admission of Texas to the Union under the Admissions Clause of the Constitution after a treaty between the United States and the Republic of Texas failed ratification in the Senate. All of these are monumentally important acts in the history of the Republic that can legitimately be said to be in violation of our ostensibly fundamental law.

One response to all of these examples, though, might well be a yawn and agreement with the newspaper critically quoted by Curtis. That is, who cares? Why should we spend any time discussing such issues? Isn't this the kind of thing that justifies the pejorative use of the term "academic," as in "this is merely an academic question"? I have earlier offered one kind of answer to this question, which involves an appeal to the notion of precedent and doctrinal integrity. That is, the successful assertions of presidential and congressional power in all of these episodes (none of them, it should be emphasized, explicitly ratified by timely judicial review) has implications for the powers that can today be claimed by these institutions. But this assumes that we really care about doctrine and consistency, the classic values of "the rule of law." An alternative hypothesis is captured in what law professor R. B. Bernstein aptly labels some "blunt" remarks directed to his colleagues who accuse the Supreme Court in *Bush v. Gore* of traducing the rule of law: "People don't give a . . . []damn about arguments that only a constitutional theorist could love. They regard such matters as hypertechnical, pedantic, and elitist (in the sense that you have to have heavy-duty graduate or legal training to understand, let alone agree with, those arguments and claims)."[70]

Thus, I think that the likely response of many of you—"Who cares?"—reflects an important intellectual reality with regard to assessment of political actions: When all is said and done, we place far greater emphasis on whether we substantively like the outcomes, than on their legal pedigree. Consider, in this context, the view of Lincoln put forth by the noted New York diarist George Templeton Strong that "[r]espect for written law and constitutions may be excessive and no less deadly than hypertrophy of the heart . . . . [Thus, should] learned counsel prove by word-splitting that [Lincoln] saved [the Union] unconstitutionally, I shall honor his memory even more reverently than I do now."[71] To what degree do *we*, this very day, honor Lincoln as a "great constitutionalist" in the sense of *preserving* the antebellum Constitution? If we do honor him as a constitutionalist, is it not with regard to his being what Garry Wills[72] and George Fletcher[73] both deem the preeminent Founder of the Ameri-

70. Posting of R.B. Bernstein to "Law Professors for the Rule of Law," LawProfsROL@listbot.com (Mar. 20, 2001) (on file with *University of Illinois Law Review*).

71. As quoted in Levinson, *supra* note 4, at 142.

72. *See generally* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

73. *See generally* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001).

can Republic as we know it today? And this founding involved massive repudiation not only of antebellum values but, just as importantly, the antebellum Constitution and its replacement by decidedly different, far more egalitarian, values and the supplementation of the 1787 text by the new, liberatory texts of the so-called Reconstruction Amendments. If we applaud Lincoln, it is, I believe, because we applaud his values and his political vision, not because we venerate him for any particular devotion to the idea of fidelity to law as a primary norm.

I asked, in a book review that I wrote some quarter-century ago, "Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)."[74] If we countenance the possibility that the answer is yes, as I think we must, then it suggests that "fidelity to law," at least in the sense that that term is used in most law schools, is far less important than either fidelity to overarching values or simply knowing which way the train of history is moving and taking care to hop on, lest one remain mired in a soon-to-be-discredited past. As Lincoln himself put it to officials embarking on the reorganization of a conquered Louisiana: "Follow forms of law as far as convenient,"[75] with the negative pregnant, of course, that one should discard the forms when the costs of compliance are simply too high. And if this is true with regard to political leaders like presidents or members of Congress, it is probably true, as well, for courts and judges. What dictates popular acceptance (or rejection) of judicial decisions has almost nothing to do with their conformity to ostensible norms of legal reasoning.[76]

Dred Scott,[77] for example, is a despised decision not because Roger Brooke Taney violated any deep norms of legal reasoning—indeed, I am quite willing to defend the decision as "rightly decided" under perfectly acceptable legal norms[78]—but, rather, because we are rightly repulsed by the disdain for human freedom (except for the freedom of American citi-

74. Sanford V. Levinson, *Fidelity to Law and the Assessment of Political Activity (Or, Can a War Criminal Be a Great Man?)*, 27 STAN. L. REV. 1185 (1975) (book review).

75. David Herbert Donald, *Reverence for the Laws: Abraham Lincoln and the Founding Fathers*, *in* LINCOLN RECONSIDERED, *supra* note 59, at 148, 154.

76. For a similar argument, to which I am much indebted, see Barry Friedman, The Origins of the Countermajoritarian Difficulty (Oct. 3, 2001) (unpublished manuscript, on file with *University of Illinois Law Review*). *See also* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 260 (1991) (political science literature). As my colleague H.W. Perry well points out, there is no reason to believe that the public generally has the slightest idea of what the Supreme Court is actually doing. So inquiry must necessarily focus on that relatively small subset of highly visible cases that receives reasonably extensive coverage by the media. To what extent does support or opposition depend on public awareness of the actual legal arguments made by the contending parties and judges, as against knowing (or at least believing) who "won" and "lost" the case? To what extent will public opinion shift over time as a result of professorial commentary? As a practical matter, has *any* controversial case ever received such unanimous approval or condemnation that some suitable number of professors could not be found on both (or all) sides?

77. 60 U.S. (19 How.) 393 (1856).

78. Mark Graber has provided the essential scaffolding for any such argument. *See* Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997).

zens, about which Taney is quite eloquent) and his emphasis that the American Constitution was indeed exactly what Garrison suggested, a covenant with slave owners. *Brown v. Board of Education*[79] is a venerated decision, not because the opinion written by Chief Justice Warren demonstrated any great facility for legal reasoning, but, rather, because it spoke to a nascent spirit of equality that had been reinvigorated by World War II and further stimulated by the imperatives of Cold War politics.

To come to more contemporary issues, if one believed that Bill Clinton ought not to have been impeached, it was *not*, I think, because of a convincing argument that what he had done did not meet the standard of impeachability, but, rather, because of a thoroughly pragmatic judgment that, all things considered, we were better off maintaining him in office than getting rid of him.[80] At some level, his supporters (of whom I was, with some reluctance, one) should have admitted that the proper question was "Who cares?" rather than to offer professorial arguments that the Constitution itself compelled nonimpeachment and acquittal.

And so, perhaps inevitably, we come to *Bush v. Gore*,[81] a decision that I will freely say that I despise to the heart of whatever being I possess, both as a citizen and as a lawyer. I would gladly incorporate by reference the words that Harvard professor Joel Parker used with regard to William Whiting's arguments in behalf of Lincoln's exertions of presidential power: The per curiam opinion in *Bush*, as well as the concurring opinion written by Chief Justice Rehnquist, are "[a] tissue of miserable sophistry, bad law, and if possible, worse logic."[82] Brilliant analyses by such scholars as Peter Shane,[83] David Strauss,[84] Frank Michelman,[85] Richard Hasen,[86] and Richard Briffault[87] have demonstrated, I believe beyond a shadow of a doubt, that the opinions of both the Court, in its per curiam opinion, and the three-justice plurality in the opinion written by Chief Justice Rehnquist, were shoddy beyond belief, failing fundamental tests of doctrinal integrity or sensitive readings of the constitutional text. So what? Who cares?

79. 349 U.S. 294 (1955).

80. I therefore substantially agree with the analysis of Judge Posner in RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 183–84 (1999).

81. 531 U.S. 98 (2000).

82. PALUDAN, *supra* note 25, at 146.

83. Peter Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. (forthcoming 2001).

84. David A. Strauss, Bush v. Gore: *What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001).

85. Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001) [hereinafter Michelman, *Suspicion*].

86. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. (forthcoming 2001).

87. Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. (forthcoming 2001).

I believe that it is telling that the most persuasive defense of the decision, in my opinion, is that offered by Judge Posner.[88] Posner, certainly the most interesting, and I believe among the very most able, judges of our time, is notable not only for his status as a founder of law-and-economics, but also, and perhaps of equal significance, for his ruthless attacks on conventional legal analysis. No other federal judge, for example, would have had the courage to have entitled one of his major works, nonironically, *Overcoming Law*.[89] As I have argued elsewhere, there is more than a touch of the adherent of Critical Legal Studies in Posner, even if his politics are, of course, at the other end of the spectrum from most "crits."[90]

In fact, Posner has some kind words to say about the concurring opinion by Chief Justice Rehnquist, though he grants that he does not find "compelling"[91] the Equal Protection argument relied upon by the per curiam. I do not find Posner's attempted defense of the plurality's Article II, Section 1 argument at all "compelling," but that is really quite beside the point. For the heart of Posner's argument is really that the majority's actions constituted a kind of "rough justice."[92] In a rather remarkable paragraph, he writes:

> There is such a thing as judgment in advance of doctrine. Experienced judges may have a strong intuition about how a case should be decided yet have difficulty matching the intuition to existing doctrine. Such tensions play a creative role in legal growth and change. *Bush v. Gore* may someday be seen as such a case.[93]

For Posner, the "rough justice" is a function of three arguments: first that Bush would in fact have won the election even if the recount ordered by the Florida Supreme Court had taken place;[94] second, that the Florida Supreme Court had behaved irresponsibly (quite possibly in or-

88. *See* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1 [hereinafter Posner, *Florida 2000*]. I am grateful to Judge Posner for sending me a copy of his text. It is also part of his book, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

89. RICHARD A. POSNER, OVERCOMING LAW (1995).

90. Sanford Levinson, *Strolling Down the Path of the Law (And Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1252 (1991).

91. Posner, *Florida 2000*, *supra* note 88, at 41.

92. *Id*. at 60. "The result of the Court's intervention," Posner concludes his article, "was, therefore, at the least, rough justice; it *may have been* legal justice as well." *Id.* (emphasis added).

93. *Id*. at 23. This paragraph could well serve as the basis for an entirely separate lecture on the nature of precedential argument. Precedent-based argument is most interesting, of course, precisely when one concedes, in effect, that the prior decision was basically illegitimate with regard to what the Constitution (or any other body of relevant legal materials) "really" meant. (If it had been correct ab initio, then one would not need to defend the merits of precedent, one would simply applaud the earlier court for having gotten it right and then suggest that the present court should follow the fine example set by the earlier decision maker.) It is, of course, entirely unclear how *Bush v. Gore* will be used by courts to structure future constitutional development. For some skepticism about that prospect, see Briffault, *supra* note 87; Hasen, *supra* note 86.

94. *See* Posner, *Florida 2000*, *supra* note 88, at 59.

der to do what they thought would aid Al Gore[95]), and; finally, that the country would have paid a severe cost had the election been extended further beyond the December 12 terminus provided by the Supreme Court's decision (and the Vice President's concession).[96] Thus, he writes, "Consideration of the practicalities of continued recounting is notable by its absence from the opinions of the dissenting Justices in *Bush v. Gore*."[97] These practicalities, according to Posner, included "a real and disturbing *potential* for disorder and temporary paralysis"[98] because of delaying the choice of president until the new Congress could make the decision, should there in fact be conflicting sets of Florida electors. "Whatever Congress did would have been regarded as the product of raw politics, with no tincture of justice. The new President would have been deprived of a transition period in which to organize his Administration and would have taken office against a background of unprecedented bitterness."[99]

Surprising agreement with Posner, in a way, is provided by Harvard law professor (and noted liberal) Frank Michelman.[100] Analyzing the undoubted fact that the public, for all relevant purposes, readily accepted the legitimacy of *Bush v. Gore*, Michelman writes:

> It could be that what the country wants above all else out of the Supreme Court is assurance that someone is there to bring the country to heel or to order when chaos looms or politics threatens to get out of hand; assurance that someone is there to cut short and bring to practical resolution certain kinds of bitter and divisive social controversy that Americans just can't bring themselves to believe ordinary democratic politics can manage in a way that people will be willing peacefully to accept . . . . What Americans most deeply count on getting from the Supreme Court is less "law" than it is "order"—is less law in the sense of true rules and rulings of justice than it is finality and settlement, order pure and simple . . . .[101]

Michelman explicitly, and without irony, suggests that one function (and, on occasion, conscious purpose) of the Supreme Court, descrip-

95. *See id.* at 60.
96. *See id.* at 46.
97. *Id.*
98. *Id.*.
99. *Id.* "I put Bush v. Gore in with the Emancipation Proclamation and Korematsu," Posner writes, "not because of the scale of the looming national emergency, which was of course much less in Bush v. Gore, but because it's a case in which the text (Article II, section 1, clause 2) can be stretched, rather easily it seems to me, to enable a less ominous but still significant crisis to be averted." E-mail from Richard Posner, Judge, U.S. Court of Appeals for the Seventh Circuit, to Sanford Levinson, W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School (Mar. 26, 2001) (on file with *University of Illinois Law Review*).
100. *See* Michelman, *Suspicion*, *supra* note 85; Frank I. Michelman, *Tushnet's Realism, Tushnet's Liberalism*, 90 GEO. L.J. (forthcoming 2001) [hereinafter Michelman, *Tushnet's Realism*]; *see also* Frank I. Michelman, Machiavelli in Robes? The Court in the Election, Colin Thomas Ruagh O'Fallon Lecture, University of Oregon (Apr. 9, 2001).
101. Michelman, *Tushnet's Realism*, *supra* note 100 (manuscript at 12–13).

tively, has been to serve a Machiavellian "princely" role of making what one is tempted to describe—though only if one agrees with them—as "necessary and proper" decisions, even if they scarcely meet standard-form tests of constitutional propriety and, indeed, bring from their opponents charges that the Court has been "arrogant, rash, miscalculated, even profoundly anticonstitutional."[102] The fact that the honest analyst of the Court's role within American politics might have to recognize a Machiavellian dimension, derived in part from Michelman's own agreement that the Constitution, indeed, "is not a suicide pact,"[103] brings Michelman no pleasure. Thus, he concludes another recent essay on *Bush v. Gore* as follows:

> The justices of the Bush v. Gore majority might be imagined as Machiavelli's new prince, a ruler and savior prepared to sacrifice all to save the imperiled republic—probity, reputation, even the salvation of an honored place in history.
>
> Princes for judges. Is that what Americans want? Would that be keeping the faith? I mean these questions in earnest. The answers, alas, are not obvious.[104]

And, of course, if one can make this argument for the Supreme Court, it is even easier to make it with regard to presidents, because they, totally unlike the members of the Court, have to return to "We the People" for approbation or condemnation in general elections. Would that we had the opportunity to exercise such judgment on the members of the United States Supreme Court!

In a lecture that has raised significant questions about Lincoln's fidelity to constitutional norms, it is especially important to acknowledge that perhaps the greatest thing that Abraham Lincoln did—an act that would in and of itself justify his Memorial—was to enter without question into the election of 1864 and throw himself on the electorate's judgment. Indeed, as David Donald points out, Lincoln made no

> attempt to rush through Congress a bill admitting the new states of Colorado and Nebraska, both of which would have voted for his reelection, nor did he try to force the readmission of Louisiana, Tennessee, and other Southern states, partially reconstructed but still under military control, which would surely have added to his electoral strength.[105]

102. Michelman, *Suspicion*, *supra* note 85, at 693. These adjectives describe Michelman's (and my own) assessment of *Bush v. Gore.*

103. *Id.* This phrase, of course, comes from Justice Jackson's dissenting opinion in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) ("There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

104. Michelman, *Suspicion*, *supra* note 85, at 693–94. As Michelman has written privately, "I wish on this matter to reserve some distance between the country and me." E-mail from Frank I. Michelman, Robert Walmsley University Professor, Harvard University Law School, to Sanford Levinson, W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School (Mar. 27, 2001) (on file with *University of Illinois Law Review*).

105. Donald, *supra* note 75, at 157.

One can have no confidence that the contemporary Republican Party would have exercised similar discipline, given the arguments—which I regard as a mixture of frivolous and dangerous—made by lawyers representing Governor Bush with regard to the power of the Florida legislature in effect to seize control of the election away from the Florida electorate.

Still, let us assume that at the end of the day we do indeed care, especially with regard to truly important matters, more about "rough justice" and even Machiavellian competence than about legalistic punctiliousness. I end with one possible ramification, also appropriate for a lecture at the University of Illinois insofar as it is the home of a leading authority on legal ethics, Ronald Rotunda (who also, I believe, supported the Clinton impeachment). I refer to a recent story in the *Austin American-Statesman* concerning another "local boy made good," former Texas Supreme Court Justice Al Gonzales, who is now White House Counsel for his former boss, George W. Bush and, I think it is safe to say, sure to be on the short list of potential nominees to the Supreme Court:[106]

> Bush is one of Gonzales' life-changing people.
>
> In 1995, he went to work as chief lawyer in then-Gov. Bush's administration. He joined a team of key advisers, . . . [including] Dan Shelley, who was a legislative director and now lobbies in Austin. The team reviewed every bill Bush had to consider for veto.
>
> In those days, Shelley said, Gonzales [, a graduate of the Harvard Law School,] was an earnest, by-the-book guy without much political savvy.
>
> "Al would say, 'This piece of legislation is unconstitutional; veto it,'" Shelley said. "He was probably absolutely right. But then it would come to me, and I was the political guy. If Al had marked veto and the reason was it was unconstitutional, I would say, 'Go ahead and sign it, governor.' It's not up to us to say whether it's unconstitutional. That's for the Supreme Court to decide.
>
> "Al, I don't think, was comfortable with that at first, and that's where I think there was eventually a little political maturity."[107]

It is, I think, no small matter whether we regard the education that Gonzales received at Shelley's hands as one that contributed to his maturity, perhaps so that he, too, under appropriate circumstances, could act with Machiavellian insight. Or, rather, is further evidence of the fragile status of constitutionalism as a constitutive ideal, at least if we adopt a strongly rule-of-law definition of "constitutionalism." Is fidelity to the Constitution something we expect—assuming, of course, that we really care about it at all—only from members of the judiciary and not, say,

106. Jena Heath, *Gonzales Gains Clout, Savvy at Bush's Side*, AUSTIN AMERICAN-STATESMAN, Mar. 18, 2001, at A1.

107. *Id.*

from governors, presidents, or those who advise governors or presidents? Is the constitutionally compelled oath of office, taken by every public official, best understood as (something like) "I will do what I think best, where 'best' includes raw political considerations, leaving it up to the courts to tell me whether I can in fact do so"? And, if Posner and Michelman are correct, do we really care about it all that much even with regard to members of the judiciary, at least when adherence to the formalities of law would seemingly require the paying of very high costs?

I emphasize that I ask these questions nonrhetorically. As it happens, I disagree with Posner as to the likelihood of Bush's election had a recount been conducted, the plausibility of the plurality's legal argument, and the imminence of a genuine constitutional crisis. But what if I disagreed only with regard to elements one and two and accepted the likelihood that a measure of genuine political chaos threatened? Would I still be apoplectic about *Bush v. Gore*? I just do not know. What I do know, though, is that one gains no purchase today in pointing to the "technical" unconstitutionality of the Louisiana Purchase, the Admission of Texas, the Emancipation Proclamation, the process by which the Fourteenth Amendment was added to the Constitution, or the suspension of payment in gold by the national government in the early days of the New Deal. History has made its judgment that all of these acts have become fully accepted into the American fabric. If George W. Bush is a successful president, one suspects that the same will be true of *Bush v. Gore*, that it will become part of the "canon" of American constitutional law comparable, say, to *Baker v. Carr*,[108] a case of similarly dubious pedigree in terms of preexisting doctrine that has become a basic building-block of our contemporary constitutional structure. If, as some of us believe, he is destined to be a failure because of his unfitness for the office[109] (coupled with commitment to highly dubious policies), then *Bush v. Gore* will become a latter-day *Dred Scott*,[110] *Plessy v. Ferguson*,[111] or *Lochner v. New York*.[112] Jack Balkin and I have referred to such cases as "anti-canonical,"[113] noting that the function they serve in legal education is how courts ought *not* to act. But the important point is that it will be the consequences of the decision that will ultimately determine the final evalua-

108. 369 U.S. 186 (1962).

109. As noted earlier, these remarks were written prior to September 11, 2001. In the current atmosphere, one necessarily feels some hesitation in criticizing Mr. Bush. That being said, I find it impossible to believe that any of his pre-September 11 adherents based their support on the desirability of his being a war-time president, given his breathtaking lack of international experience or any manifestation of genuine curiosity about the world outside America. He is, though, as the saying goes, "the only President we have," and every American must wish him well, if for no other reason than that our lives may be fundamentally affected by the decisions that he will have to make.

110. 60 U.S. (19 How.) 393 (1856).

111. 163 U.S. 537 (1896).

112. 198 U.S. 45 (1905).

113. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998).

tion of *Bush v. Gore*, not what law professors will have said about it in the pages of law reviews or in public lectures.

Whether this lecture has been encouraging or depressing I leave it to you to decide. I do hope, though, that at the very least it has thrown some light on the process by which our political system, ostensibly controlled by the Constitution, actually develops. That process fits quite uneasily with the standard-model versions of constitutional development taught in our civics books and, I am afraid to say, in all too many law school classes. The challenge facing anyone who takes American constitutionalism seriously is to come to terms with the lessons taught by the Emancipation Proclamation, *Bush v. Gore*, and much else in our national history.