

Fall 2000

Abraham Lincoln and the American Regime: Explorations

George Anastaplo

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Recommended Citation

George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 Val. U. L. Rev. 39 (2000).
Available at: <https://scholar.valpo.edu/vulr/vol35/iss1/2>

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ABRAHAM LINCOLN AND THE AMERICAN REGIME: EXPLORATIONS

George Anastaplo*

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INTRODUCTION

The American Regime is grounded in the Declaration of Independence, a constitutional document which has as a prominent, and quite influential, feature its "created equal" language. It is that exalted language which provides the point of departure in Part I of this Collection.

The "equality" principle took on a peculiar form in the insistence upon the equality and hence virtual autonomy of all the States in the American Union. This contributed to the coming of the Civil War.¹ Questions can be raised, of course, as to whether the States (however equal to one another) can properly be regarded as ever have existed outside of the Union.²

Political people, if they are to remain vital, have to be nourished by a generally accepted morality. The rightness of wielding power is itself a major source of power over the long run.³ The morality of a healthy community is refined and reinforced by the arts.⁴

We can see in Abraham Lincoln both the moralist and the artist at work—and this most graphically in his speeches. Two of his most influential speeches—one advancing his campaign for the Republican Party Presidential nomination in 1860, the other virtually closing his Presidency in 1865—are discussed in this Collection.⁵

¹ See GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY 177, 185 (1999) [hereinafter ANASTAPLO, LINCOLN]. See also GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 171 (1971) [hereinafter ANASTAPLO, CONSTITUTIONALIST].

² See GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 125 (1995) [hereinafter ANASTAPLO, AMENDMENTS]. See also GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 149 (1989) [hereinafter ANASTAPLO, CONSTITUTION].

³ See, e.g., GEORGE ANASTAPLO, THE AMERICAN MORALIST: ON LAW ETHICS, AND GOVERNMENT 161 (1992) [hereinafter ANASTAPLO, AMERICAN MORALIST]. See also GEORGE ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM, AND THE COMMON GOOD 46, 74 (1975) [hereinafter ANASTAPLO, HUMAN BEING].

⁴ See, on how the arts can be understood, GEORGE ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE (1983) [hereinafter ANASTAPLO, ARTIST]; GEORGE ANASTAPLO, THE THINKER AS ARTIST: FROM HOMER TO PLATO & ARISTOTLE (1997) [hereinafter ANASTAPLO, THINKER].

⁵ See Parts V and VII of this Collection.

The background to Lincoln's political life, including his career as a lawyer, is also touched upon in this Collection.⁶ The craft of the gifted lawyer is evident in virtually every public paper issued by President Lincoln.

Lincoln, during a visit to Independence Hall in Philadelphia on February 22, 1861, testified to the importance for him of the Declaration of Independence. (This was on his way to Washington for his Inauguration shortly thereafter.) He said on that occasion:

[A]ll the political sentiments I entertain have been drawn, so far as I have been able to draw them, from the sentiments which originated, and were given to the world from this hall in which we stand. I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.⁷

The materials brought together in this Collection are bracketed by the two talks given by me, on January 17, 2000, at the Valparaiso University School of Law. One of these talks will serve as the first Part in this Collection; the other talk will serve as the final Appendix to this Collection.

I. OUR DISPUTED "CREATED EQUAL" HERITAGE⁸

[The signers of the Declaration of Independence] were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance, but they knew its limits. They believed in order, but not in the order of tyranny. With them, nothing was "settled" that was not right. With them, justice, liberty, and humanity were "final," not slavery and oppression.

-Frederick Douglass⁹

⁶ See Parts III, IV, and V of this Collection.

⁷ See ABRAHAM LINCOLN, 4 COLLECTED WORKS 246 (Roy P. Basler ed., Rutgers Univ. Press 1953), vol. IV, p. 240.

⁸ A talk given in a Martin Luther King, Jr. Birthday Program, Valparaiso University School of Law, Valparaiso, Indiana, January 17, 2000. For another talk given on that occasion, see Appendix C of this Collection.

i.

The "created equal" language enshrined in the Declaration of Independence, and made so much of by Abraham Lincoln, was repudiated most blatantly in the 1850's, Lincoln charged, not by any politician from a Southern slaveholding State but rather by a Senator from the State of Indiana. We have, in the surviving talks of Lincoln, several references by him to this Senator's characterization of the "created equal" language as "a self-evident lie."¹⁰

The Senator thus called to account by Abraham Lincoln was John Pettit of Lafayette, Indiana, a Democratic politician who does not otherwise figure much in the political history of the United States, however important he may once have been both in Indiana and in Kansas. This man—an Easterner in origin who settled in the Midwest (in what had been the Northwest Territory)—was in critical respects a less polished version of his party leader, Stephen A. Douglas, a Senator from the neighboring State of Illinois.¹¹ Even scholars and others who are very much devoted to Abraham Lincoln are not apt to know much more about John Pettit than what Lincoln says about him.

I draw upon three sketches of this challenging Indiana politician, beginning with this account from a book about the Indiana judicial system:

Judge John Pettit was born in Sacketts Harbor, New York on June 24, 1807. In his early life, he studied law with a prominent judge in Waterloo, New York and also taught school for a year at Troy, New York. In May, 1831, he moved to Lafayette [Indiana], studied law, and in 1833 was admitted to the bar. Delving into politics immediately, he was elected to the Indiana House of Representatives in the same year. In 1839, President Martin Van Buren appointed him United States District Attorney. He served in that capacity until 1843. In the

⁹ Frederick Douglass, *Fourth of July Oration, Rochester New York, July 5, 1852* in WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS 30 (Herbert J. Storing ed., 1970).

¹⁰ See *infra* text accompanying notes 15, 22, 23, 24, 25.

¹¹ On Senator Douglas, see Paul Finkelman, *Stephan A. Douglas (1813-1861)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 578 (Leonard W. Levy et. al. eds. 1986). See also HARRY A. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES* (1959). ANASTAPLO, *LINCOLN*, *supra* note 1, at 157.

fall of 1843, Pettit was elected to Congress. He served three consecutive terms until 1849. As chairman of the Judiciary Committee in the [Indiana] Constitutional Convention of 1850, he was instrumental in shaping the course the judiciary of this state would take in the next century. He was the strongest advocate in the convention of popular election of Supreme Court judges by statewide vote.

In January 1853, his reputation and powerful political influence gained for him election to the U.S. Senate to serve the unexpired term of Senator James Whitcomb. The state legislature did not return him to the Senate in 1855. Pettit thereupon moved back to Lafayette and was elected Circuit Judge. In 1859, President Buchanan appointed him Chief Justice of the Kansas Territory. He served until Kansas became a state and then returned to Lafayette. In addition to engaging in the practice of law, he was city attorney for four years in the 1860's. He thereafter was elected mayor and served from 1867 to 1871. In the fall of 1870, he received the nomination for the [Indiana] Supreme Court. As 1870 was a Democratic year in Indiana, Pettit again became a Judge, this time on the Indiana Supreme Court. He is the only man to have served on both the highest court of the state of Indiana and that of another state or territory. After one term on the Court, Judge Pettit retired to his Lafayette home. He died barely six months later, on June 17, 1877.¹²

The account of John Pettit in another sourcebook, opens with this information:

John Pettit was born on a farm near Sacketts Harbor, New York, June 24, 1807. His parents intended him for the ministry, but he developed no inclination for the profession. When his tutor pressed him to study theology, he quit school, and studied law with Judge Potter at Waterloo, New York. In 1830 he started west,

¹² DONALD O. DEWEY, *HOOSIER JUSTICE* 175 (1966).

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but stopped at Troy, New York, and taught school for a term.¹³

An account of the Supreme Court of Indiana includes this assessment of Justice Pettit:

Pettit was a man of pronounced character. His opinions are characterized by the forcible language used in them. . . . His opinions are not noted for their learning or even accuracy of expression, but for the good common-sense often displayed in them.¹⁴

ii.

Lincoln, too, had reservations about Pettit's "accuracy of expression," but also about his "good common-sense." The first reference we have by Lincoln to Pettit is during an 1854 exchange with Senator Douglas in Peoria, four years before the celebrated Lincoln-Douglas Debates.¹⁵ Lincoln discussed on that occasion the repeal of the Missouri Compromise, which had once limited the territories of the United States open to slavery.¹⁶ He discussed, that is, the Nebraska Bill of 1854 promoted by Senator Douglas, which left to the determination of local settlers the status of slavery in any particular part of the territories.¹⁷

The Pettit reference is anticipated in these comments by Lincoln on the implications of the Declaration of Independence:

Judge Douglas frequently, with bitter irony and sarcasm, paraphrases our argument [the argument of the Republican Party] by saying "The white people of Nebraska are good enough to govern themselves, *but they are not good enough to govern a few miserable negroes!!*"

¹³ 1 COURTS AND LAWYERS OF INDIANA 257 (Leander J. Monk ct. al. eds. 1916).

¹⁴ W.W. Thornton, *The Supreme Court of Indiana*, 4 THE GREEN BAG 263 (1892).

¹⁵ 2 LINCOLN, *supra* note 7, at 247 (October 16, 1854).

¹⁶ See William W. Wiecek, *Missouri Compromise*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Leonard W. Levy, et al. eds. 1986), for a discussion of the Missouri Compromise of 1820.

¹⁷ See William W. Wiecek, *Kansas-Nebraska Act*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1095 (Leonard W. Levy et al., eds. 1986) for a discussion of the Nebraska Bill. See also Finkelman, *supra* note 11, at 378; Wiecek, *supra* note 16, at 1269. See also *infra* text accompanying note 248.

Well I doubt not that the people of Nebraska are, and will continue to be as good as the average of people elsewhere. I do not say the contrary. What I do say is, that no man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism. Our Declaration of Independence says: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED."

I have quoted so much at this time merely to show that according to our ancient faith, the just powers of government are derived from the consent of the governed. Now the relation of masters and slaves is, *PRO TANTO*, a total violation of this principle. The master not only governs the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself. Allow ALL the governed an equal voice in the government, and that, and that only is self-government.¹⁸

Lincoln then adds immediately an observation which, we will see, responds in effect to an argument that had been made by Pettit:

Let it not be said I am contending for the establishment of political and social equality between the whites and blacks. I have already said the contrary. I am not combating the argument of *NECESSITY*, arising from the fact that the blacks are already amongst us, but I am combating what is set up as *MORAL* argument for allowing them to be taken where they have never yet been—arguing against the *EXTENSION* of a bad thing, which where it already exists, we must of necessity, manage as we best can.¹⁹

¹⁸ 2 LINCOLN, *supra* note 7, at 266.

¹⁹ *Id.*

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Further on in this 1854 Peoria speech, Lincoln says more in defense of "our ancient faith," which Senator Douglas claimed he respected:

I particularly object to the NEW position which the avowed principle of this Nebraska law gives to slavery in the body politic. I object to it because it assumes that there CAN be MORAL RIGHT in the enslaving of one man by another. I object to it as a dangerous dalliance for a [free] people—a sad evidence that, feeling prosperity we forget right—that liberty, as a principle, we have ceased to revere. I object to it because the fathers of the republic eschewed, and rejected it. The argument of "Necessity" was the only argument they ever admitted in favor of slavery; and so far, and so far only as it carried them, did they ever go. They found the institution among us, which they could not help; and they cast blame upon the British King for having permitted its introduction. BEFORE the constitution, they prohibited its introduction into the north-western Territory—the only country we owned, then free from it. AT the framing and adoption of the constitution, they forebore to so much as mention the word "slave" or "slavery" in the whole instrument. . . . The earliest Congress, under the constitution, took the same view of slavery. They hedged and hemmed it in to the narrowest limits of necessity.²⁰

What the earliest national legislatures did is then described by Lincoln:

In 1794, they prohibited an out-going slave-trade—that is, the taking of slaves FROM the United States to sell.

In 1798, they prohibited the bringing of slaves from Africa INTO the Mississippi Territory—this territory then comprising what are now the States of Mississippi and Alabama. This was TEN YEARS before they had the authority to do the same thing as to the States existing at the adoption of the constitution.

²⁰ *Id.* at 274. Lincoln, in his Cooper Institute Address of 1860, challenged Douglas's understanding of the original understanding of constitutional principles. See *infra* Part V of this Collection.

In 1800 they prohibited AMERICAN CITIZENS from trading in slaves between foreign countries—as, for instance, from Africa to Brazil.

In 1803 they passed a law in aid of one or two State laws, in restraint of the internal slave trade.

In 1807, in apparent hot haste, they passed the law, nearly a year in advance, to take effect the first day of 1808—the very first day the constitution would permit—prohibiting the African slave trade by heavy pecuniary and corporal penalties.

In 1820 [which was also the year of the enactment of the Missouri Compromise], finding these [1807] provisions ineffectual, they declared the trade piracy, and annexed to it, the extreme penalty of death. While all this was passing in the general government, five or six of the original slave States had adopted systems of gradual emancipation; and by which the institution was rapidly becoming extinct within these limits.

Thus we see, the plain unmistakable spirit of that age, towards slavery, was hostility to the PRINCIPLE, and toleration, ONLY BY NECESSITY.²¹

We are now ready for the introduction of John Pettit into the Lincoln corpus; an introduction which includes some of the fiercest language found anywhere in that corpus. I repeat the concluding sentence of the previous passage, before going on with new material:

Thus we see, the plain unmistakable spirit of that age, towards slavery, was hostility to the PRINCIPLE, and toleration, ONLY BY NECESSITY.

But NOW it is to be transformed into a “sacred right.” [The] Nebraska [Bill] brings it forth, places it on the high road to extension and perpetuity; and, with a pat on its back, says to it, “Go, and God speed you.” Henceforth it is to be the chief jewel of the nation—the very figure-head of the ship of State. Little by little, but steadily as man’s

²¹ 2 LINCOLN, *supra* note 7, at 274-75.

march to the grave, we have been giving up the OLD for the NEW faith. Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for SOME men to enslave OTHERS is a "sacred right of self-government." These principles can not stand together. They are as opposite as God and mammon; and whoever holds to the one, must despise the other. *When Pettit, in connection with his support [February 20, 1854] of the Nebraska bill, called the Declaration of Independence "a self-evident lie" he only did what consistency and candor require all other Nebraska men to do. Of the forty odd Nebraska Senators who sat present and heard him, no one rebuked him. Nor am I apprized that any Nebraska newspaper, or any Nebraska orator, in the whole nation, has ever yet rebuked him. If this had been said among Marion's men, Southerners though they were, what would have become of the man who said it? If this had been said to the men who captured André, the man who said it, would probably have been hung sooner than André was. If it had been said in old Independence Hall, seventy-eight years ago, the very door-keeper would have throttled the man, and thrust him into the street.*

Let no one be deceived. The spirit of seventy-six and the spirit of Nebraska, are utter antagonisms; and the former is being rapidly displaced by the latter.²²

Two weeks later, in a speech at Chicago, Lincoln returns to Senator Pettit, who is referred to as a "beast," evidently by the reporter who wrote this newspaper account:

In reference to a certain beast who inhabits a neighboring State, the [Democratic Party] of which State sends him to the Senate, of course, Mr. L. said "there was oné man in Congress, John Pettit, who had no difficulty in seeing that our Declaration of Independence was a 'self-evident lie.' More than this, he had no hesitation in saying so in a public debate in Washington. The Declaration of Independence was a 'self-evident lie.'

²² *Id.* at 275 (emphasis added).

What would have happened if he had said it in old Independence Hall? The door-keeper would have taken him by the throat and stopped his rascally breath awhile, and then have hurled him into the street."²³

Four years later Pettit again appears in the Lincoln corpus, this time in notes evidently prepared by Lincoln for speeches to be made in the course of the 1858 contest with Douglas for a Senate seat:

But there is a larger issue than the mere question of whether the spread of negro slavery shall or shall not be prohibited by Congress. . . . In support of the Nebraska bill, on its first discussion in the Senate, Senator Pettit of Indiana declared the equality of men, as asserted in our Declaration of Independence, to be a "self-evident lie." In his numerous speeches now being made in Illinois, Senator Douglas regularly argues against the doctrine of the equality of men; and while he does not draw the conclusion that the superiors ought to enslave the inferiors, he evidently wishes his hearers to draw that conclusion. He shirks the responsibility of pulling the house down, but he digs under it that it may fall of its own weight. Now, it is impossible to not see that [various] newspapers and senators are laboring at a common object, and in so doing are truly representing the controlling sentiment of their party.

It is equally impossible to not see that that common object is to survent, in the public mind, and in practical administration, our one and only standard of free government, that "all men are created equal," and to substitute for it some different standard. What that substitute is to be is not difficult to perceive. It is to deny the equality of men, and to assert the natural, moral, and religious right of one class to enslave another.²⁴

Lincoln's final reference to Pettit's comments on the Declaration of Independence may be found in the last of the series of debates with Douglas in 1858. These remarks occur at Alton, Illinois:

²³ *Id.* at 283-84 (October 27, 1854).

²⁴ 3 LINCOLN, *supra* note 7, at 205.

At Galesburg the other day, I said in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term "all men." I re-assert it to-day. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term "all men" in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, *denied the truth of it*. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouths of some Southern men for a period of years, ending at last in that shameful though rather forcible declaration of Pettit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect "a self-evident lie," rather than a self-evident truth. But I say, with a perfect knowledge of all this hawking at the Declaration without directly attacking it, that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it and then asserting it did not include the negro. [Cheers.] I believe the first man who ever said it was Chief Justice Taney in the Dred Scott case [of 1857], and the next to him was our friend Stephen A. Douglas. [Cheers and laughter.] And now it has become the catch-word of the entire [Democratic] party. I would like to call upon his friends everywhere to consider how they have come in so short a time to view this matter in a way so entirely different from their former belief? to ask whether they are not being borne along by an irresistible current—whether, they know not? [Great applause.]²⁵

²⁵ 3 LINCOLN, *supra* note 7, at 301-02 (October 15, 1858).

I will say something further on about the *Dred Scott Case*. But first, we must look at precisely what Senator Pettit did say in 1854 about the "created equal" language of the Declaration of Independence and what we, in turn, should think about what he said.

iii.

The earliest Senate speech by Pettit which touches upon the "created equal" language that I have found was on February 20, 1854, in the course of the extended debate about the Kansas-Nebraska Bill. (Pettit had entered the Senate in January 1853.) This fateful reassessment of the Declaration of Independence comes almost as an aside, beginning in this fashion:

Now, sir *en passant*, one little reflection as to ultra, extreme Abolitionism. I hope there is not much of it here. It is alleged that all men are created equal, and the Declaration of Independence is referred to, to sustain that position. However unpopular, or however displeasing it may be to the mass of my fellow-citizens, I am constrained to dissent from any such position or dogma. It is not true in fact; it is not true in law; it is not true physically, mentally, or morally that all men are created equal. I will not play upon the term of the creation of men or babies. I will not say that men are not created. But, sir, is it a fact? If Mr. Jefferson had said, in his Declaration of Independence, that all men constituting portions of the body-politic ought to be equal, ought to have equal political rights there would have been something like propriety and wisdom in it. But however egotistical or absurd it may appear in me to venture to contradict or dispute the language of the Declaration of Independence, I proceed to do it fearlessly. I cannot, in the first place, believe that Mr. Jefferson ever intended to give the meaning or force which is attempted now to be applied to this language when he said: "We hold these truths to be self-evident, that all men are created equal."²⁶

²⁶ CONG. GLOBE, 33d Cong., 1st Sess. App. 214 (February 20, 1854). See *infra* text accompanying note 36.

If Pettit had stopped here, his speech would have been passed by without much comments elsewhere. But he continues:

I hold it to be a self-evident lie. There is no such thing. Sir, tell me that the imbecile, the deformed, the weak, the blurred intellect in man, is my equal, physically, mentally, or morally, and you tell me a lie. Tell me, sir, that the slave in the South, who is born a slave, and with but little over one half the volume of brain that attaches to the northern European race, is his equal, and you tell me what is physically a falsehood. There is no truth in it at all. But much more. Come from the slave region, and go to the free North; go, if you will, to the States of Indiana, Ohio, New York, or any other free State, and show me that the negro race, or the negro man, is upon an equality with the white man, and you show me what does not exist. Sir, it is not true that even all persons of the same race are created equal. But Mr. Jefferson puts no limit upon it. He does not say they have equal political rights, or ought to have. If he had said that, there might have been truth in it; but when he says they are all created equal, he says that for which he cannot find an honest indorser in the world. Sir, you tell me that the native African, upon his burning sands, and in his native wilderness is my equal, and I hesitate not to hoot at the idea. Tell me that the serf of the Autocrat of Russia, kneeling at his feet, and willing to lick his spittle, is my equal, and I scorn the assertion. He is not my equal. There is no truth in the declaration.²⁷

In this passage, which disparages Russians along with Africans, Pettit notices the effects of both heredity and environment (or the social order) in shaping the varying capacities of human beings. Much of this could probably be accepted today, except to the extent that he argues that there are significant mental differences by nature among the races of humankind. If he had used only the statement with which the passage just quoted ends—"There is no truth in the declaration"—politicians such as Lincoln probably would never have singled out Pettit. But it is the opening statement of the passage just quoted that proved provocative, inappropriate for a man of "good common-sense" to utter in public. By

²⁷ *Id.*

this statement, "I hold it to be a self-evident lie," Pettit insists upon directly impeaching the Declaration's famous words, "We hold these truths to be self-evident . . ." There may even be something perverse about such boldness in these circumstances.²⁸

Pettit then becomes somewhat more restrained as he acknowledges those who are superior to *him*, political giants such as Daniel Webster and Henry Clay:

Men are not equal mentally, we all admit. Who are the equals of the mighty fallen, who recently had seats on this floor? Who are the equals of Webster and Clay? The clarion voice of the one, and the thunder tones of the other, at different times, made the welkin ring, and turned the whole blue arch of heaven into one great bell, which toned to liberty as though stricken by the hand of God. Are you the equals of those men? There is no color of truth in it. It is false, physically, mentally, and morally; false in word, and false in form. Neither do I believe that Jefferson intended that such construction would be given to the language. Equal in what? He does not say. Does he mean that all men are socially equal?²⁹

This passage is followed immediately by Pettit's own claim of superiority over a class of men, a claim which he believes supports his assessment of what he takes to be a misreading, by abolitionists and others, of Jefferson's language:

Now, I will demonstrate to you that there is no such thing as social equality. Men may be made politically equal. It is possible that their political rights may be placed upon a par, but social and mental equality the God of heaven alone controls. Men are not alike in their mental organization, or in their social feelings.

Are you the equal of the man who daily and nightly wallows in the gutter, and vomits upon all, and nauseates all who come into his presence? Are you his equal? If you are, you are not mine. If he is your equal,

²⁸ See, e.g., ANASTAPLO, CONSTITUTIONALIST, *supra* note 1, at 252-53.

²⁹ CONG. GLOBE, 33d Cong., 1st Sess. App. 214 (February 20, 1854).

you invite him to your table, and your parlor, and make him the associate and companion of your wife and daughters. Have all men that equality? They have not with me, if they have with you. No, sir; I deny that any social equality can exist between persons of opposite social habits. You may, *per* force of human laws, make political equality; but *per* force of no human law can you make social equality. Men must have tendencies, aptitudes, tastes, education, and affinities alike, before they can have this social equality.³⁰

Thereupon Pettit again notices both those superior to him and those clearly inferior to him (with many more of the latter, it seems):

Why, sir, there is one class of men who would readily say that I was not on an equality with them. The learned divine, who prates all the time about catechisms and creeds—about which I know nothing—would say at once there was no social equality between us, and I should be as ready to admit it as he would. Again, there are other classes with which I am not willing to admit a social equality. This language of Mr. Jefferson goes to one as well as to the other. It includes physical, mental, moral, social, or political equality. “All men are created equal.” I say that in no one instance is there any color of truth in it. There is neither mental, moral, physical, social, or political equality to be found among us. It does not exist. Now some fellow will say that “Pettit is a bold man, he cannot be popular at home, he is certainly no Democrat, because he says we are not all equal.” I will say to him,, “go roll with the fellow in the gutter, if you are his equal.” But I speak what is true. I speak what is the judgment of all men, if they dare say it, that neither morally, mentally, socially, physically, nor politically, does equality exist in any country on the earth. It cannot exist in the nature of things. God himself has not created them equal. It is not, therefore, a truism, as Jefferson put it forth, but is false in form, and false in fact.³¹

³⁰ *Id.*

³¹ *Id.*

The boldness, or imprudence, of Pettit may be seen in his inability to let well enough alone, noting socially-evident differences that Jefferson would certainly have noticed. For he next says, as we have just seen, "It is not, therefore, a truism, as Jefferson put it forth, but is false in form, and false in fact."³² Perhaps it is such lack of restraint that helps account for the relatively short tours of duty that Pettit had in the many important positions to which his obvious talents raised him.

Be that as it may, Pettit concludes this commentary on the Declaration of Independence with a reminder of the inequalities that God Himself provided for, as recorded in the Hebrew Bible:

Sir, I will not trouble nor detain you with the inequalities which the Almighty created especially under his own theocracy. The only government, except this—I always except this, *for this is another Government which he has taken under his special care*—but in olden times he made exceptions himself as to political rights, as well as moral, physical, and mental rights. He created a priesthood. He created kings, and set them up over the people, with different political rights and powers. I speak what is his recorded and plainly-written will, when I say there is no such thing as equality among us.³³

Four months later, on June 26, 1854, John Pettit returned to his critique of the Declaration of Independence. This was during a debate on a fugitive-slave bill under consideration by Congress. He had been implicitly criticized by Charles Sumner of Massachusetts because of his utterance (evidently in the preceding February) that "the Declaration of Independence is 'a self-evident lie.'³⁴ Pettit, after having condemned Sumner for refusing to say that he would return a fugitive slave to his master, reaffirms the controversial statement he had made:

Mr. President, let me for a moment turn you to that clause of the Declaration of Independence to which reference is made. What is it? "We hold these truths to be self-evident, that all men are created equal"—not born equal, as many say and as many state it in the

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ CONG. GLOBE. 33d Cong., 1st Sess. 1515 (June 26, 1854). On Senator Sumner, see Paul Finkelman, *Charles Sumner (1811-1864)*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1808* (Leonard W. Levy et al. eds., 1986).

newspapers—"that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." In a speech which I made here some time ago, upon the Nebraska Bill, I said that the construction put upon this clause of the Declaration of Independence by the Abolitionists of the country, made it a self-evident lie instead of a self-evident truth. From that position I do not withdraw, but I boldly assert it again.³⁵

Thus, Pettit insists that he stands by what he said before.

He then puts the best face that he can upon what he had said four months before, no doubt having had time to think about how it could be put without being too offensive:

Sir, Mr. Jefferson, in penning that instrument, was not talking about individuals; he was not talking of the Senator or his progenitors from Massachusetts; he was not talking about the white or the black race, the Caucasian or the African race; but he was talking about aggregated, congregated bodies, collections, and associations of men. He had reference to collections of men when they had become sufficiently numerous to form independent States. Then it was, according to his ideas, that they, as collections and associations of men, had equal political rights with all other similar associations or collections of men. In no other light did Jefferson ever dream that he was speaking in that portion of the Declaration.³⁶

But this, too, could not be left as it stands, for Pettit went on in his response to Sumner to make comparisons between slaveholders and their slaves as part of his further condemnation of the Declaration of Independence as "a self-evident lie":

Will you say to me that Mr. Jefferson, himself a slaveholder, the descendant of a European, would stultify himself by saying that his African negro slave, who was born his slave, created his slave, begotten his

³⁵ CONG. GLOBE. 33d Cong., 1st Sess. 1518 (June 26, 1854).

³⁶ *Id.* See *supra* text accompanying note 26.

slave, who was his slave during the whole course of gestation, was created his, Jefferson's, equal? He never dreamed of such a thing.

Sir, the Senator named an African who was among the first that was slain in the contest for freedom in the streets of Boston. I will not pretend to say whether that African was the superior of the Senator from Massachusetts, or the Senator his superior; but they were not, in my judgment, equals in life or equals in death. They were not harmonious and beautiful in life, nor will they be equally beautiful in death.

Now, sir, to give this clause of the Declaration of Independence any other construction than that which I have given it, is an evident, a self-evident, a palpable lie. What is the language? That "all men are created equal." Are they created equally tall, equally broad, equally long, equally short? Are they created politically equal? Are they created physically equal? Are they created mentally equal? Are they created morally equal? I say, in no one of these several instances are all men created equal. You cannot go beyond the moment when they first respire their native air. At that time you see presented to you the imbecile in mind, weak in body, dwarf in size; while, beside him, the same day's birth, you see power, greatness, strength, wisdom, and beauty. In no one instance, therefore, is there perfect equality among men, if you regard them as individuals. As nations, as collections of men, they have a right to perfect equality as to the formation of their government, and the rights and domestic duties that shall be established among them.³⁷

Thereafter Pettit intensified his attack upon the abolitionist Sumner as a Senator who did not respect his oath of office. Daniel Webster is returned to in the course of this excoriation of Sumner: "If the Almighty even intended to create the Senator the equal with the mighty

³⁷ *Id.*

and lamented Webster, I must be allowed to say that He made a gross blunder and a most egregious mistake."³⁸

iv.

It is evident that Pettit, however much he allows himself to be provoked by Sumner, does seek harmony between the North and South. This is critical to the general approach to national politics of the Democratic Party. Such harmony depends, at least in part, upon what the South as well as the North may do with respect to the Territories, fugitive slaves, and the countrywide slave trade. An effort is thus made, especially with the Territories-policy promulgated by the Nebraska Bill, to remove slavery from the national agenda. Pettit is like his leader, Stephen A. Douglas, in this respect.³⁹

It is certainly true, as Pettit argues, that there are many ways in which human beings are different and "unequal." Pettit catalogues various of these ways. Each of the talents and characteristics noticed by Pettit can be important in some situations.⁴⁰ That differences here can matter is recognized by Lincoln as well, as may be seen in his tacit approval of such statements about the Declaration of Independence as this quoted by him from Henry Clay, a slaveholder in Kentucky:

It is a general declaration in the act announcing to the world the independence of the thirteen American colonies, that all men are created equal. Now, as an abstract principle, *there is no doubt of the truth of that declaration; and it is desirable in the original construction of society, and in organized societies, to keep it in view as a great fundamental principle.* But, then, I apprehend that in no society that ever did exist, or ever shall be formed, was or can the equality asserted among the members of the human race be practically enforced and carried out. There are portions, large portions, women, minors, insane, culprits, transient sojourners, that will always

³⁸ *Id.* On Senator Webster, see Maurice G. Baxter, *Daniel Webster (1782-1852)*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2042-43 (Leonard W. Levy et al. eds., 1986).

³⁹ See *supra* note 11.

⁴⁰ See GEORGE ANASTAPLO, CAMPUS HATE SPEECH CODES, NATURAL RIGHT, AND TWENTIETH CENTURY ATROCITIES 16 (1999) (hereinafter ANASTAPLO, CAMPUS).

probably remain subject to the government of another portion of the community.⁴¹

The Lincoln response to the Pettit position can be seen, in a particularly dramatic form, in this response by him to Douglas in the course of their 1858 debates:

[A]nything that argues me into [Judge Douglas's] idea of perfect social and political equality with the negro, is but a specious and fantastic arrangement of words, by which a man can prove a horse chestnut to be a chestnut horse. [Laughter.] I will say here, while upon this subject, that 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, and I have no inclination to do so. I have no purpose to introduce political and social equality between the white and the black races. There is a physical difference between the two, which in my judgment will probably forever forbid their living together upon the footing of perfect equality, and inasmuch as it becomes a necessity that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong, having the superior position. I have never said anything to the contrary, but I hold that notwithstanding all this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness. [Loud cheers.] I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.* [Great applause.]⁴²

⁴¹ 3 LINCOLN, *supra* note 7, at 303. (emphasis in original).

⁴² *Id.* at 16 (emphasis in original) (August 21, 1858). See also ANASTAPLO, LINCOLN, *supra* note 1, at 167-68.

This kind of formulation reminds us of the respect for simple justice that is implicit in, and usually served by, the "created equal" language in the Declaration of Independence.

v.

John Pettit runs the risk of trivializing what the Declaration of Independence was believed, from its inception, to stand for. His position, as we have seen, seems to come down primarily to the argument that all states or political bodies are equal. It is this, he suggests, that Jefferson meant by his statement that "all Men are created equal," and *that is not a lie*. What *is* a lie, he argues, is any reading (to which abolitionists are prone) that goes beyond this recognition of the equality of political bodies in some respects.

But, surely, the Declaration of Independence was not needed to affirm or establish such recognition of political bodies, for that had long been a tenet of international law or the law of nations. Unless Jefferson and his disciples, if not indeed the American people at large, were woefully deluded, something more than this had been meant in the Declaration, something which has ever since stirred people around the world and across the centuries.

Pettit's catalogue of differences among human beings is instructive. It would be, as I have indicated, rash to deny the significance of those differences in many circumstances. But it is obvious that the differences that Pettit insists upon are those found in *human beings*: human beings are evidently enough alike, or equal, to permit them to be considered together, even if only with a view to dividing them up for various purposes. What is it that permits us to identify these living beings as *human*? It is this characteristic, whether or not ultimately significant in the cosmic scheme of things, which has long been regarded as creating problems for the perpetuation of race-based chattel slavery. Indeed, the passion that Pettit devoted to the demolition, or trivialization, of the "created equal" language testifies to his awareness of how potent it was for the cause of abolitionism.

Henry Clay had found in the Declaration of Independence the statement of "a great fundamental principle."⁴³ Such a principle is evidently drawn upon in this 1857 statement by Lincoln:

⁴³ 3 LINCOLN, *supra* note 7, at 303.

I think the authors of that notable instrument intended to include all men, but they did not mean to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit.⁴⁴

That fundamental principle, it would seem, requires every human being to be accorded certain “rights” even by those who might be entitled, for one reason or another, to try to enslave him. For example, the champions of slavery were apprehensive about efforts to include in any fugitive-slave bill a provision that would entitle someone claimed as a fugitive slave to have the benefit of long-recognized due-process safeguards. This entitlement was resisted by the Democrats during the 1854 fugitive-slave-bill debate: it was recognized, that is, that allowing alleged fugitive slaves due process rights would make the recovery of fugitive slaves much more difficult than it already was—and without a ready means of recovering fugitive slaves, the institution of slavery would become even more vulnerable than it already was.

vi.

Another, far less controversial, way of stating John Pettit’s position, aligning him with Southern Democrats, was to regard the Constitution as paramount, not the Declaration of Independence, however the terms of the Declaration might be defined. In fact, it was a constitutional provision, the Fugitive Slave Clause in Article IV of the Constitution, which led to a bitter attack by Pettit on Charles Sumner as a Senator who was willing to disregard the solemn oath he had taken to support the Constitution.⁴⁵

⁴⁴ 2 LINCOLN, *supra* note 7, at 405-06. (emphasis in original).

⁴⁵ See *supra* notes 34-35 and accompanying text.

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This insistence upon the primacy of the Constitution may be seen today in the general approach of legal scholars to these matters. The Declaration of Independence, it is routinely said by scholars and jurists, has no legal authority—even though it has been included, in the United States Statutes at Large, from the beginning, as one of the organic laws of the United States.⁴⁶ Another advantage of the insistence upon the primacy of the Constitution was that it supported the Southern argument that the United States was a compact, established in 1789, not a nation identified in 1776.⁴⁷

The Southern insistence upon constitutional processes and constitutional fidelity proved, however, somewhat troublesome for the Secessionist movement of 1860-1861. By that time, the Declaration of Independence began to look more attractive to Southerners, as may be seen in how it was drawn upon in the South Carolina secessionist ordinance of December 1860. But when it was drawn upon by rebellious Southern States, they removed the “created equal” language, testifying that this language did not easily lend itself to a movement which served, and depended as much as Secessionism did, upon, the protection of slavery.⁴⁸ Was not such removal of the “created equal” language a tacit repudiation of the Pettit interpretation of that language?

vii.

There are indications here and there that John Pettit himself was both personally and politically dubious about slavery. He can be understood to have tried to make the best of a situation that was dangerous for the Union.⁴⁹ He, like Stephen Douglas, *was* a Union man. Something of a justification for slavery may be seen in the insistence that enslavement by Europeans had been good for Africans, however

⁴⁶ See Richard H. Cox, *Introduction to FOUR PILLARS OF CONSTITUTIONALISM: THE ORGANIC LAWS OF THE UNITED STATES* (1998). See also George Anastaplo, *In re Antonin Scalia*, 28 PERSP. IN POL. SCI. 22 (1999).

⁴⁷ For a discussion of the response to the Southern position in the Gettysburg Address, see ANASTAPLO, LINCOLN, *supra* note 1, at 235.

⁴⁸ See, e.g. ANASTAPLO, AMENDMENTS, *supra* note 2, at 125.

⁴⁹ On Harry V. Jaffa's “case” for Senator Douglas in this respect, see generally JAFFA, *supra* note 11.

harmful that institution had been for the white masters.⁵⁰ In this way he accepted only half of Calhoun's "positive good" argument.⁵¹

In the short term, Pettit could make the argument that slavery had been left by the Framers of the Constitution as an institution to be regulated by the States, not by the General Government. However much the General Government could and did act, after 1808, against the international slave trade, it was not empowered to deal with slavery within the States of the Union.

In the long term, however, Pettit saw the Southern Slave States as assuming a permanent minority position within the Union. The admission of California as a free State foreshadowed what was to happen with several other States.⁵² In fact, one can even read what he says about these matters as quietly advising Northern abolitionists that they would eventually get what they wanted if Southerners could be lulled for another decade or two into remaining within the Union—for, by that time, the power of the mostly-free Union would be too much for would-be Southern Secessionists to resist.

This was, in effect, the Douglas approach to these matters. Would it have succeeded in eventually ridding the country of slavery without the ravages of war? Or would slaveholders have succeeded in extending their territories, perhaps even into Cuba and Latin America, thereby making slavery ever more difficult to get rid of? Lincoln himself several times warned, in 1858 and 1859, that the policies of the Democrats could lead, with the help of the Taney Supreme Court, to making it difficult, if not impossible, to keep slavery out of any State in the Union, not just out of the territories of the United States.⁵³

Another way of assessing the Douglas approach is to ask whether it depended too much upon chance for it to succeed. Such an approach would not be prudent to rely upon, especially if the failure to

⁵⁰ See, e.g., DREW G. FAUST, ED., *THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860*, 235 (1981). Compare *infra* note 67.

⁵¹ See, e.g., 2 GEORGE ANASTAPLO, ED., *LIBERTY, EQUALITY, & MODERN CONSTITUTIONALISM: A SOURCE BOOK* 213-14, 221-23, 252-66 (1999) (hereinafter ANASTAPLO, LIBERTY).

⁵² California was admitted to the Union as a State in 1850.

⁵³ See, e.g., 3 LINCOLN, *supra* note 7 at 80-81 (August 31, 1858). See also "Illinois is No Longer a Free State," CHI. TRIB., March 27, 1998, § 1, at 21 (reprinting a *Chicago Tribune* editorial from March 16, 1857).

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resist the spread of slavery helped undermine the fundamental principles of the regime.⁵⁴

viii.

There was, it should be noticed if only in passing, what now seems a curious distribution of arguments during the 1854 debates in the Senate on the Nebraska bill and the fugitive-slave bill. The Southerners and their Northern supporters argued for a national power to legislate with respect to slavery both in the Territories (by decreeing that they should be opened to slavery, as a local option) and in the States (by providing means to Southerners for recovering fugitive slaves in the Free States).

The anti-slavery Northerners, on the other hand, argued for States' Rights, insisting both that the States need not cooperate in returning fugitive slaves and that they could even establish procedures to make sure that no free African was ever sent South as a recaptured slave.

Three years later, in *Dred Scott*, the United States Supreme Court threw these alignments into disarray by ruling, in effect, that the Missouri Compromise had been unconstitutional and that slaveholders could take their slaves freely into the Territories of the United States. Nothing that the Congress tried to do, the Court said could interfere with the right of citizens to move into the Territories with their property, including slaves. The Northwest Ordinance was, in effect, dismissed as having no current application, even as a precedent for the exercise of Congressional power with respect to slavery in the Territories.⁵⁵

One can wonder how John Pettit responded to this development. After all, he had made it quite clear in 1854 that the kind of controversy addressed three years later in *Dred Scott* should be decided (both by a United States Court and by tribunals such as the Missouri Supreme Court) in favor of emancipation of any slave taken (as *Dred Scott* and his wife had been taken) into any State that had once been part of the

⁵⁴ See ANASTAPLO, LINCOLN, *supra* note 1, at 18.

⁵⁵ For a discussion of the Missouri Compromise, see Wiecek, *supra* note 16. For a discussion of the *Dred Scott* case, see Don E. Fehrenbacher, *Dred Scott v. Sandford*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 584 (Leonard W. Levy et al. eds. 1986); See also ANASTAPLO, LINCOLN, *supra* note 1, at 363.

territory governed by the anti-slavery provision of the Northwest Ordinance.⁵⁶

ix.

This query bears also upon a minor mystery in the Lincoln correspondence file. There is in that file a cordial letter by Lincoln to John Pettit who was by then, September 14, 1860, Chief Justice of the Supreme Court of the Territory of Kansas.⁵⁷ It seems from that letter that Pettit had given to Lincoln, who was then the Republican candidate for President, some welcomed assurances about his prospects in New York. There is not evident here any of the fierceness with which Lincoln had condemned Pettit's "self-evident lie" language.

Had Lincoln recognized where Pettit "was coming from," appreciating what Pettit had tried to do (however mistakenly) to reduce sectional conflict? Or had Pettit been "turned off" either by *Dred Scott* or by Secessionist sentiment, or by both? More information is called for here. Not irrelevant is the inscription on Stephen A. Douglas's sarcophagus in Chicago, the sarcophagus of a man who is said to have hastened his death in 1861 by working strenuously to head off the Secessionist efforts of his fellow Democrats. That inscription reads, "Tell my children to obey the laws and uphold the Constitution."⁵⁸

We can see, from John Pettit's furious attack upon Charles Sumner's refusal to return fugitive slaves as well as from Pettit's racial prejudices, why President Lincoln had to invoke and solidify the Save the Union movement before he could strike a blow directly against slavery (as he did with the Emancipation Proclamation of 1862-1863). He can even be understood to agree with Pettit that to preserve the Union would, in itself, doom slavery. Thus, in his policy at the outset of his Presidency, Abraham Lincoln too made more of the Constitution than of the Declaration of Independence. But by the time of the Gettysburg Address in November of 1863, the Declaration of Independence could become much more important; this may be seen in the particular

⁵⁶ For a discussion of the Northwest Ordinance, see Leonard W. Levy, *Northwest Ordinance*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1328 (Leonard W. Levy et al. eds., 1986); see also ANASTAPLO, LINCOLN, *supra* note 1, at 39, 69.

⁵⁷ See 4 LINCOLN, *supra* note 7, at 115.

⁵⁸ CHI. TRIB. MAG., January 16, 2000, at 6.

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emphasis placed by Lincoln at Gettysburg upon an elevated understanding of the "created equal" language.⁵⁹

II. THE DECLARATION OF INDEPENDENCE REVISITED⁶⁰

[T]he 19th of April [1775] arrived--the day that dawned with a crackle of musketry about Lexington, and that closed with an exhausted British column crawling back into Boston, the country for miles around pouring troops toward the city, and the couriers already started for the neighboring Provinces. . . . Lexington was fought on Wednesday. On Thursday morning Major Israel Putnam, ploughing his farm at Pomfret, Connecticut, caught the irregular beat of a drum coming down the road, and heard a horseman, his bridle wet with foam, shout the news across the furrows. Putnam unharnessed, paused a moment at his house, and was off for Boston. . . . On Sunday the news was known in New York. In little more than a fortnight every American, to the backwoods of North Carolina and Georgia, had heard the alarm.

Allan Nevins,⁶¹

i.

We have heard much recently about the Genetic Code that has been deciphered, at least in part, by the multi-billion-dollar Genome Project.⁶² Among the things we have heard about is the significance of the ultimate origins and of the constituent elements of all living things.

The larger living things--such as elephants and whales and dinosaurs, as well as human beings--develop from their tiniest embryonic parts. The line that that individual development is likely to take is sketched out from the very beginning. Both one's natural liabilities and one's natural advantages may be anticipated from the first moment of one's existence.⁶³ It remains to be seen, of course, what will

⁵⁹ By that time, we have noticed, Lincoln had also issued the Emancipation Proclamation. On that Proclamation and the Gettysburg Address, see ANASTAPLO, LINCOLN, *supra* note 1, at 197-227, 229-41. On the Declaration of Independence, see *id.* at 11- 38. See also *supra* Part II.

⁶⁰ A talk at a University of Chicago Basic Program of Liberal Education for Adults Alumni Reunion, Loretta Hanson Residence, Geneva, Illinois, July 3, 2000.

⁶¹ ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789* 74 (1924).

⁶² See, e.g., Scott Fornek, *Experts Crack Genetic Code*, CHICAGO SUN TIMES, June 27, 2000, at 1.

⁶³ See, e.g., *The Person in Abortion Cases and in a Slavery System*, in George Anastaplo, *John Quincy Adams Revisited*, 25 OKLA. CITY U. L. REV. 119, 178 (2000) (hereinafter Anastaplo, *John Quincy Adams*).

be done, both for good and for ill, with the information thus made available to researchers.

A Genome Project, of sorts, can be also instructive in thinking about the American regime. Thinking about the regime, especially when the Fourth of July rolls around, is itself a feature of this way of life. The American regime, grounded as it is in thought, does invite periodic reexamination. Among the constitutive elements of this way of life are the desire for self-rule, the centrality of liberty, and the dedication to equality. Each of these elements can have defective mutations. Self-rule, exemplified in the insistence that there should be no taxation without representation, can become self-absorption and selfishness. Liberty, exemplified in a rule of law which insists that one really does what one wants only when one does what one should, can become licentiousness and anarchy. Equality, exemplified in at least the insistence that all are entitled to equal access to liberty, can become envy and a repudiation of all standards.⁶⁴

Since this is an occasion for celebration, the darker side of American origins need not be dwelt upon here.

ii.

The origins of the American regime are most authoritatively presented in the Declaration of Independence. But it can be useful to look, however briefly, at the origins of our origins.

One clue is provided by a resolution considered in the Continental Congress on March 23, 1776, which authorized American ships to capture British merchant ships in retaliation for what was being done by the British to American commerce. This resolution opens with the observation,

Whereas the petitions of the United Colonies to the King, for the redress of great and manifest grievances, have not only been rejected, but [have been] treated with scorn and contempt, and the opposition to designs evidently formed to reduce them to a state of servile subjection, and their necessary defense against hostile forces actually employed to subdue them, [have been] declared rebellion; And whereas an unjust war hath

⁶⁴ See, e.g., 1 ANASTAPLO, LIBERTY, *supra* note 51, at xi.

been commenced against them [which includes] not only urging savages to invade the country, but instigating negroes to murder their masters . . . ⁶⁵

Nothing is said in this document of March 1776 of independence; rather, much is made of the right of Americans to take measures to protect themselves and to recover what has been taken from them. Particularly to be resisted is the attempt by the British to deprive Americans of "the liberty they have a right to by the laws of nature and the English constitution."⁶⁶ An even more vivid (and, we might say, more "personal") attack on the British, evidently offered to the Congress for use here, has been found in the Benjamin Franklin Papers in the Library of Congress:

Whereas the british Nation, through great Corruption of Manners, and extream Dissipation and Profusion both private and publick, have found all honest Resources insufficient to supply their excessive Luxury and Prodigality, and thereby have been driven to the practice of every Injustice which Avarice could dictate or rapacity execute, and whereas, not satisfied with the immense plunder of the East, obtained by sacrificing Millions of the human Species, they have lately turned their Eyes to the West, and grudging us the peaceable enjoyment of the Fruits of our hard Labour and virtuous Industry, have for Years past been endeavouring to extort the same from us under Colour of Laws regulating trade; and have thereby actually succeeded in draining us of large sums to our great Loss and detriment, and whereas impatient to seize the whole they have at length proceeded to open Robbery, declaring by a solemn Act of Parliament that all our Estates are theirs and all our Property found upon the Sea divisible among such of their armed plunderers as shall take the same; and have even dared in the same Act to declare that all the Spoilings, Thefts, burnings of Houses and Towns, and murders of innocent People perpetrated by their wicked and inhuman Corsairs on

⁶⁵ 4 JOURNALS OF CONTINENTAL CONGRESS: 1774-1789 229 (Worthington Chauncey Ford ed., 1906) [Hereinafter JOURNALS].

⁶⁶ *Id.* at 230.

our Coasts, previous to any War declared against us were just Actions, and shall be so deemed, contrary to several of the Commandments of God, which by this Act they presume to repeal, and to all the Principles of Right and all the Ideas of Justice entertained heretofore by every other Nation Savage as well as Civilized thereby manifesting themselves to be *hostes humani generis*: And whereas it is not possible for the People of America to subsist under such continual Ravages without making some Reprisals; therefore, *Resolved*,... ⁶⁷

Here, too, the emphasis is still placed on *reprisals*.

But a May 15, 1776, resolution by a revolutionary convention in Virginia posed a new challenge to the Continental Congress, which had (in the March 23rd resolutions from which I have just quoted) accepted language that would be drawn on for the Declaration of Independence. The unanimous Virginia resolution instructed thus the Virginia delegates in the Continental Congress:

That the Delegates appointed to represent this Colony in General Congress be instructed to propose to that respectable body to declare the United Colonies free and independent States, absolved from all allegiance to, or dependence upon, the Crown or Parliament of Great Britain; and that they give the assent of this Colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming foreign alliances, and a Confederation of the Colonies, at such time and in the manner as to them shall seem best: *Provided*, That the power of forming Government and the regulations of internal concerns of each Colony, be left to the respective Colonial Legislatures.⁶⁸

⁶⁷ *Id.* at 230-31. Is it not implied here that there are natural rights which human beings everywhere are entitled to? These include "Millions" in the East and "Savage as well as Civilized" nations. Compare, e.g., *supra* text accompanying note 50.

⁶⁸ EDMUND CODY BURNETT, *THE CONTINENTAL CONGRESS 168* (1941). Notice the reliance here upon Congress's judgment in determining what is to be "thought proper and necessary." The Necessary and Proper Clause in Article I of Section 8 of the Constitution is anticipated by such sentiments.

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That was May 15, 1776. Less than a month later, on June 7, 1776, a decisive break with Great Britain is proposed by resolutions placed before Congress:

Resolved, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.⁶⁹

This was on a Friday. Some discussion of these resolutions was had on Saturday. It is then recorded, for Monday, June 10, 1776,

Resolved, That the consideration of the first resolution be postponed to this day, three weeks [July 1], and in the mean while, that no time be lost, in case the Congress agree thereto, that a committee be appointed to prepare a declaration to the effect of the said first resolution, which is in these words: "That these United Colonies are, and of right ought to be, free and independent states [etc. etc.]"⁷⁰

The journal for the following day, Tuesday, June 11, 1776, records actions by the Congress on the three revolutionary proposals of those weeks:

Resolved, That the committee, to prepare the declaration, consist of five members;

The members chosen, Mr. [Thomas] Jefferson, Mr. [John] Adams, Mr. [Benjamin] Franklin, Mr. [Roger] Sherman, and Mr. [Robert] R. Livingston.

⁶⁹ 5 JOURNALS, *supra* note 65, at 425. These resolutions are said to be in the writing of Richard Henry Lee, a Virginian.

⁷⁰ *Id.* at 428-29.

Resolved, That a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies.

Resolved, That a committee be appointed to prepare a plan of treaties to be proposed to foreign powers.⁷¹

Consideration of the critical independence resolution was postponed not only to permit time to prepare a proper declaration but also, and perhaps even more important in the circumstances, to allow delegates to secure the consent of those Colonies which had not yet authorized their delegates to vote for independence. No doubt, considerable discussion off the floor of Congress was engaged in throughout June 1776 in developing these momentous measures.

iii.

Even more, of course, had been going on before May–June 1776. There had been by then a dozen years of grievances, some of which are noted in the materials I have already quoted. Thus, there had been issued on October 14, 1774, “The Declaration and Resolves by the First Continental Congress.”⁷² The principal complaint throughout this period seems to have been, in the words of the Congress’s Declaratory Act of 1776, that the British Parliament claimed “a power of right, to bind the people of American by statute in all cases whatsoever.”⁷³

Critical fighting began with the April 1775 engagement at Lexington, which was followed in June by Congress’s appointment of George Washington as Commander-in-Chief of American forces. This was followed, on July 6, 1775, by Congress’s issuance of “The Declaration of the Causes and Necessity of Taking Up Arms.”⁷⁴ In 1774, the Colonists were prepared to oppose only by “peaceable measures” the various “grievous acts and measures” to which they had been subjected. In 1775, after once again stating their grievances, having considered themselves “bound by obligations of respect to the rest of the world to make know the justice of their causes,” they announced that they must take up arms “for the preservation of their liberties.” At the same time, they assured their supporters in Great Britain, “We mean not to dissolve

⁷¹ *Id.* at 431.

⁷² See ANASTAPLO, AMENDMENTS, *supra* note 2, at 271.

⁷³ See ANASTAPLO, LINCOLN, *supra* note 2, at 14.

⁷⁴ See *id.*

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that union which has so long and so happily subsisted between us."⁷⁵ But, as John Marshall observed decades later, in his biography of George Washington, victory alone, in their armed struggle with Great Britain, could restore to them the rights they had had--"and victory would give them independence" as well.⁷⁶ And so, he adds, "The hazard was the same; and since the risk of every thing was unavoidable, the most valuable object ought, in common justice, and common prudence, to be the reward of success."⁷⁷

In short, the measures needed to protect themselves were also the measures that would win them independence. Besides (as we have also seen), continued intimate relations with Great Britain seemed to threaten the purity of American political principles. Thus, John Marshall reports, "The alacrity . . . with which the English nation entered into [the present war] was ascribed to a secret and dangerous influence, which was, with rapid progress, undermining the liberties and the morals of the Mother Country; and which, it was feared, would cross the Atlantic, and infect the principles of the colonists likewise, should the ancient connexion be restored."⁷⁸

This was the "high road" to independence, with an emphasis placed upon preserving the moral superiority of the Colonists. But Marshall notices the "low road" as well, when he says:

It was also urged, with great effect, that the possibility of obtaining foreign aid would be much increased by holding out the dismemberment of the British empire, to the rivals of that nation, as an inducement to engage in the contest.⁷⁹

He adds,

American Independence became [in June 1776] the general theme of conversation; and more and more the general wish. The measures of Congress took their complexion from the temper of the people. Their proceedings against the disaffected became more and more vigorous; their language respecting the British

⁷⁵ See *id.* at 14-15.

⁷⁶ See JOHN MARSHALL, 2 THE LIFE OF GEORGE WASHINGTON 147 (1925).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 148.

government was less the language of subjects, and better calculated to turn the public attention towards Congress and the provincial assemblies, as the sole and ultimate rulers of the country.⁸⁰

And so the Declaration of Independence was issued.

iv.

Vital to this decade-long development had been the superintending role of the Continental Congress, however imperfectly formed and however limited in its self-awareness. It had been Congress' activities which had made the fighting more than mere sporadic acts of violence and which had permitted the Colonists to regard their act of defiance as more than crimes.

Authoritative statements had been issued by Congress, as well as by provincial assemblies, at every stage of these proceedings. Guidance had been provided by Congress, along with troops and material. Indeed, one can see in the 1776 *Journals of the Continental Congress* how much that body *was* concerned not only with general statements and direction but also (and much more) with detailed supervision of the hostilities in which the Colonists were engaged. Congress ran the war in considerable detail, including its allocation of sums of money large and small.

Consider, for example, the account provided in the *Journals* of matters both petty and grand addressed by the Congress on the eve of its fateful promulgation of the Declaration of Independence. Here are the complete *Journal* entries for Wednesday, July 3, 1776:

A letter from the convention of New Jersey, dated 2 July; and a letter from the commissioners of Indian affairs in the southern department, dated Augusta, 21 May, together with an account of their expenses, and the minutes of their conference with the Indians in that department, were laid before Congress, and read:

Resolved, That the account of the commissioners be referred to the Board of treasury.

⁸⁰ *Id.* The "disaffected" were the Loyalists, who suffered at the hands of the Rebels (who considered themselves Patriots).

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The Congress took into consideration the letter from the convention of New Jersey; Whereupon,

Resolved, That the committee of safety of Pennsylvania be requested to send as many of the troops of their colony as they can spare, to Monmouth county, in New Jersey, to the assistance of the inhabitants of that colony, and to be subject to the orders of the commander in chief; the said troops to be allowed the same pay and rations as the troops in the service of the continent, from the time of their march until they return:

Resolved, That a circular letter be written to the committees of the several counties in Pennsylvania, where troops are raised, or raising, to form the flying camp, requesting them to send the troops by batallions, or detachments of batallions, or companies, as fast as raised, to the city of Philadelphia, except those raised in the counties of Bucks, Berks, and Northampton, which are to be directed to repair, as aforesaid, to New Brunswick, in New Jersey:

Resolved, That a copy of the foregoing resolutions be sent to General Washington, and that he be directed to appoint a proper officer to the command of the flying camp, and also direct proper persons to supply the men with rations.

Resolved, That the Marine Committee be empowered to contract with shipwrights, to go to Lake Champlain, on the following terms:

To allow each man at the rate of 34 dollars and two-thirds per month; one month's pay to be advanced, upon their giving security, if required:

Each man to be allowed one ration and a half, and one half pint of rum, a day:

Their tools and arms to be valued:

Two-thirds of their wages to be paid; monthly, to whomever they shall leave the power of receiving it:

Their pay to commence from the day they sign articles, and continue until they are discharged, with an allowance of one day's pay for every twenty miles, between the place where discharged, and their respective homes.

Resolved, That Dr. [Benjamin] Franklin and Mr. [James] Wilson, two of the commissioners for Indian affairs in the middle department, be authorized to discharge the bills drawn by Mr. Morgan on the commissioners of that department.

Agreeable to the order of the day, the Congress resolved itself into a committee of the whole, to take into their farther consideration, the Declaration; and, after some time, the president resumed the chair, and Mr. [Benjamin] Harrison reported, that the committee, not having finished, desired leave to sit again.

Resolved, That this Congress will, to morrow, resolve itself into a committee of the whole, to take into their farther consideration, the Declaration.

Adjourned to 9 o'Clock to Morrow.⁸¹

I do not mean to suggest that all of these items of business took the same time or were considered of equal importance—but they do indicate the scope of Congressional oversight. No doubt much of the talk among the delegates that day was in anticipation of what was likely to happen the following day when they would proceed “to take into their farther consideration, the Declaration.”⁸²

v.

It is obvious that, from early on, the Continental Congress, of delegates from the thirteen Colonies, was quite adept in parliamentary procedures and legislative know-how. The delegates' considerable experience in colonial governmental bodies, either as participants or as careful observers, is evident from the beginning of the Congress. In

⁸¹ 5 JOURNALS, *supra* note 65, at 507-09.

⁸² *Id.* at 508.

addition, these men were well-versed in parliamentary history and in constitutional law.⁸³

The emphasis is placed by them, and by their constituents across the Continent, upon the *preservation* of "American liberty," or of "the liberties of the Americans," protecting themselves thereby against "invasion." This liberty goes back for centuries. Not only can the Glorious Revolution of 1688 be invoked, but so can the Magna Carta of 1215. Thus, it was not only in their language that these people remained English.⁸⁴

It is quite evident, as one watches this *continental* legislature at work, that no guidance, permission, or control is needed by them from elsewhere. They are obviously very much on their own. One also gets the impression that much the same can be said, within the sphere of their influence, about the colonial bodies scattered across the country. In these circumstances, therefore, one can venture the opinion that calling the document issued on July 4, 1776, a Declaration of Independence may be something of a misnomer. It is really a Recognition of Independence, inviting the world to acknowledge what in fact had happened to those Colonists three thousand miles from Britain who had been obliged, for some time, to manage most of their affairs pretty much on their own.

It is understandable, therefore, that Thomas Jefferson could record, as the stance of those arguing for independence in the Summer of 1776, "The question was not whether, by a declaration of independence, we should make ourselves what we are not; but whether we should declare a fact which already exists."⁸⁵ And John Adams, perhaps the most determined leader of the movement in Congress for independence, could comment on the sweetness of ruling oneself.⁸⁶

vi.

⁸³ See George Anastaplo, *On Robert's Rules of Order*, 1996 THE GREAT IDEAS TODAY 232, 248-50 (1996).

⁸⁴ See, e.g. ANASTAPLO, AMENDMENTS, *supra* note 2, at 244, 263. It can be considered providential that, during the weeks leading up to the preparation of this talk, a nest of robins on our front porch (in Chicago), for which we provided a convenient shelf, has permitted us to watch, close up, the emergence of four small all consuming *heads*, which somehow turn into able bodied birds in a fortnight or so, birds that are able to leave and to fend for themselves. This can be said to be what happened more or less naturally to the British Colonists in North America. It can also be considered providential that these birds left this nest on the Fourth of July, never (it seems) to return.

⁸⁵ BURNETT, *supra* note 68, at 175.

⁸⁶ See *Id.* at 103.

It is evident, therefore, that these North Americans had been governing themselves effectively for most of the Eighteenth Century. Perhaps they did need help from the British in fending off the French during the French and Indian Wars, wars which were part of the constant struggle during that period between France and Great Britain. Even men who were not eager for independence could recognize that "no power in Europe was strong enough to subdue a country three thousand miles off."⁸⁷

If technology had permitted the instant communication and the rapid transportation to which we are accustomed, the British might have been able to hold these thirteen colonies longer. On the other hand, such technology might have meant, by the end of the Nineteenth Century, that the inhabitants of the British Isles would have become restive as members of an Empire that had come to be dominated more and more by the much larger and much wealthier dynamic American Colonies. It might then have become a question, in the Twentieth Century, whether the British Islanders would be permitted to go their own way.⁸⁸

This kind of speculation is useful only as a suggestion about how much American Independence was already in the works in the late Eighteenth Century, no matter what was done by the Colonists; however important it came to be what the doctrines and terms of that independence were.⁸⁹ Not only was *de facto* independence to be recognized by Congress and its constituents, but also the primacy of the legislature in American constitutional law and practice.⁹⁰

It is evident, that is, that the American legislatures were really in control, both in the national assembly and in the provinces. The same can be said of Great Britain by this time, with Parliament very much in charge. Formal executive power in North America was, for the most part, lodged in royal governors or other officials controlled by the British. A repudiation of British rule, therefore, included in effect an

⁸⁷ NEVINS, *supra* note 61 at 89. But it was argued by Americans that the British had plundered (and ruled?) their dominions in the East. See *supra* note 67, and accompanying text.

⁸⁸ Even now, the British, like the French, can worry about American "cultural imperialism." Consider, also, Calvin Sims, *Japan, Feasting on Whale, Sniffs At "Culinary Imperialism" of U.S.*, N.Y. TIMES, August 10, 2000, at A1.

⁸⁹ Was one result of the American movement a reform by the British in how they handled thereafter their far less developed Canadian provinces? For a discussion on Canada and Quebec separatism, see ANASTAPLO, HUMAN BEING, *supra* note 3, at 139-50.

⁹⁰ On the primacy of the legislature, see ANASTAPLO, CONSTITUTION, *supra* note 2, at 32, 74. See also *infra* note 91.

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insistence upon legislative supremacy, that supremacy which may be seen as well in the Constitution of 1787.⁹¹ The legislatures they deferred to were those in which Americans could be properly represented, *not* the British Parliament.

The Congress, during the week following its issuance of the Declaration of Independence, occupied itself considerably with what can be called legislative constitutionalism. It considered, on July 10, a draft of the rules governing the conduct of the Congress.⁹² Thereafter, it began considering what we now know as the Articles of Confederation, a constitutional document which would be largely a recognition and refinement of the rules and practices of the Congress as it had conducted itself for several years.⁹³

vii.

The immediate concern of the Congress was to make good, on the battlefield, its Declaration of Independence, despite whatever the English might attempt to do. This was not the time, therefore, to rock the Ship of State by questioning the domestic arrangements pursuant to which Congress was organized. It was appropriate that John Dickinson, a much respected conservative who had held out to the end against the issuance of the Declaration of Independence, was as relied upon as he evidently was to help shape the Articles of Confederation.⁹⁴ This reliance would provide assurances that no substantial change would be made, at least while the war was going on, in the way that the Continental Congress had been operating.

Fundamental questions were raised at this time, but they were not insisted upon. One critical question that would have to be faced before a truly permanent constitution could be developed for the United States concerned the practice theretofore of allowing each Colony an equal vote in the Congress, no matter how small its population and resources. And yet, it was obvious that not all of the Colonies, or new States, would be able to contribute equal measures of blood and treasure to the common cause if the formidable struggle with Great Britain was to be properly advanced.

⁹¹ See *id.* at 28, 89, 109.

⁹² See JOURNALS, *supra* note 65, at 532-33.

⁹³ On the Articles of Confederation, see ANASTAPLO, CONSTITUTION, *supra* note 2, at 245-55, 331.

⁹⁴ For a discussion of Dickinson, see Dennis J. Mahoney, *John Dickinson (1732-1808)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 561 (1986).

The key issues here were recognized during the Summer of 1776 as the Articles of Confederation were developed. But it also seems to have been generally understood that no substantial reforms could be expected, so long as there did remain a war to be fought. One can see here how flaws in the origins of things can generate serious problems in the mature organism. One can also see how, in some circumstances, inelegant accommodations have to be made to the flawed institution which has been inherited.

The principal accommodation eventually seen here is, as we know, the allotment of equal votes for each State in the Senate provided for by the Constitution of 1787. This accommodation has become substantially less troublesome than it was at its outset for the largest States because of what the emergence of national political parties has done, in effect, to the equality of the States in the Senate.⁹⁵

viii.

This States' Rights issue is, in effect, an argument about the meaning of equality, an argument which Americans continually reexamine.

That argument may also be seen in the other major issue touched upon during the deliberations in the Congress about the Articles of Confederation. That was the issue of slavery, at least as it bore upon how States were to be assessed for taxes. Should slaves be counted as human beings inhabiting a State or as property owned in a State?⁹⁶

The propriety of slavery itself was touched upon here as well as the cruelty of the international slave trade.⁹⁷ But, as we know, this issue too had to be set aside temporarily. Only after the very existence and security of the United States could be considered permanent would patriotic passion be diverted both into the Abolitionist movement against slavery and into the Southern movement for States' Rights.

⁹⁵ It has become more important what a Senator's political party is than what his State is.

⁹⁶ See ANASTAPLO, THE AMENDMENTS, *supra*, note 2, at 179-80; ANASTAPLO, CONSTITUTION, *supra* note 2, at 29-30. This was also to become a question when the basis for membership in the House of Representatives came to be addressed in 1787 by the Constitutional Convention.

⁹⁷ It was known that South Carolina and Georgia intended to continue importing slaves from Africa.

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We can see how these issues come down to our day, especially in the form of race-relations controversies, which include questions as to which governments should deal with the passions and problems these matters invoke. We can also see, as we anticipated, that flaws in the origins of an organism can become acute in its maturity, political as well as physiological.⁹⁸

Be all this as it may, the primary concern during the Summer of 1776 *was* to recognize what had come to exist—whether Independence or Congressional protocol. No new course, along a radically different bearing, could be ventured until the War could be survived and a stable peace could be achieved.⁹⁹

ix.

However much the Declaration of Independence was a recognition, and hence a ratification, of what developed in North America before July 1776, there *was* something critically different about it—and that was its emphasis upon a declaration of *principles*.¹⁰⁰

It is that set of principles, authoritatively recognized, which have proved vital to *efforts*, since 1776 and down to our day, to purge the American regime of its inherited flaws. The principles themselves are not original; they were not invented here, but rather re-discovered and refined here. Or, it can be said, they have been dramatized and legitimated by the Declaration of Independence, providing respectable authority (apparently grounded in nature) by which dedicated citizens, generation after generation, might properly challenge the established ways of the community.¹⁰¹

⁹⁸ Thus, for example, the American Colonists' insistence, "No taxation without representation," contributed to the unfortunate reliance upon "requisitions" to the States as the principal source of revenue for the national government under the Articles of Confederation.

⁹⁹ Notes on the debates which I have drawn upon here may be found in the records of the 1776 debates in Congress left by John Adams and Thomas Jefferson. See 6 JOURNALS, *supra* note 65, at 1069-1106.

¹⁰⁰ There is *something* of this in the most important English documents of 1688-1689. Is it distinctively English to build upon the old in this way? For a tribute to English ways, see ANASTAPLO, LINCOLN, *supra* note 1, at 37.

¹⁰¹ See, e.g., ANASTAPLO, LINCOLN, *supra* note 1, at 19. On the human soul, nature, and the moral virtues, see GEORGE ANASTAPLO, BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT (forthcoming 2001), App. B (hereinafter ANASTAPLO, BUT NOT PHILOSOPHY).

What is truly original about the American regime, perhaps, is that a people had provided for itself, so early and so well, an authoritative guide, for centuries to come, to good government and civic virtue. This does seem worthy of repeated celebration and hence renewal.

III. A MURDER TRIAL IN SPRINGFIELD¹⁰²

Some circumstantial evidence is very strong, as when you find a trout in the milk.

Henry Thoreau¹⁰³

i.

Abraham Lincoln, who was then thirty-seven years old, evidently prepared for publication in 1846 a newspaper account of an inquiry into a Springfield, Illinois "murder" which had been conducted five years earlier. The editor in Quincy, Illinois who introduced this account, "handed [him] for publication by a member of the Bar," said of the inquiry that "the whole affair is of so extraordinary a character as to entitle it to publication, and commend it to the attention of those at present engaged in discussing reforms in criminal jurisprudence, and the abolition of capital punishment." The author of this newspaper account does not himself pass explicit judgment either upon the criminal jurisprudence of his day or upon the issue of capital punishment.¹⁰⁴ Scholars are confident that the anonymous author of the newspaper account was Lincoln.¹⁰⁵

This 1846 account provides us an introduction to this episode. We, unlike the newspaper readers of that day, also have available (and will look at later) a letter written in June 1841, by Lincoln to a friend of his about the same episode as it then seemed to him, immediately after the "murder" excitement had ended.¹⁰⁶ The 1846 account begins,

In the year 1841, there resided, at different points in the State of Illinois, three brothers by the name of Traylor.

¹⁰² A talk given to a Faculty Workshop, Loyola University of Chicago School of Law, Chicago, Illinois, April 18, 2000.

¹⁰³ HENRY THOREAU, JOURNAL (November 11, 1850). This observation by Thoreau was endorsed by Sherlock Holmes.

¹⁰⁴ 1 LINCOLN, *supra* note 7, at 371-76.

¹⁰⁵ *Id.* at 371 n.1.

¹⁰⁶ *Id.* at 254.

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Their Christian names were William, Henry and Archibald. Archibald resided at Springfield, then as now the Seat of Government of the State. He was a sober, retiring and industrious man, of about thirty years of age; a carpenter by trade, and a bachelor, boarding with his partner in business—a Mr. Myers. Henry, a year or two older, was a man of like retiring and industrious habits; had a family and resided with it on a farm at Clary's Grove, about twenty miles distant from Springfield in a North-westerly direction. William, still older, and with similar habits, resided on a farm in Warren county, distant from Springfield something more than a hundred miles in the same North-westerly direction. He was a widower, with several children. In the neighborhood of William's residence, there was, and had been for several years, a man by the name of Fisher, who was somewhat above the age of fifty; had no family, and no settled home; but who boarded and lodged a while here, and a while there, with the persons for whom he did little jobs of work. His habits were remarkably economical, so that an impression got about that he had accumulated a considerable amount of money.¹⁰⁷

The principal characters having thus been introduced, the account continues:

In the latter part of May in the year mentioned, William formed the purpose of visiting his brothers at Clary's Grove, and Springfield; and Fisher, at the time having his temporary residence at his house, resolved to accompany him. They set out together in a buggy with a single horse. On Sunday Evening they reached Henry's residence, and staid over night. On Monday Morning, being the first Monday of June, they started on to Springfield, Henry accompanying them on horse back. They reached town about noon, met Archibald, went with him to his boarding house, and there took up their lodgings for the time they should remain. After dinner, the three Trailors and Fisher left the boarding house in

¹⁰⁷ *Id.* at 371-72.

company, for the avowed purpose of spending the evening together in looking about the town. At supper, the Trailors had all returned, but Fisher was missing, and some inquiry was made about him. After supper, the Trailors went out professedly in search of him. One by one they returned, the last coming in after late tea time, and each stating that he had been unable to discover any thing of Fisher. The next day, both before and after breakfast, they went professedly in search again, and returned at noon, still unsuccessful. Dinner again being had, William and Henry expressed a determination to give up the search and start for their homes. This was remonstrated against by some of the boarders about the house, on the ground that Fisher was somewhere in the vicinity, and would be left without any conveyance, as he and William had come in the same buggy. The remonstrance was disregarded, and they departed for their homes respectively. Up to this time, the knowledge of Fisher's mysterious disappearance, had spread very little beyond the few boarders at Myers', and excited no considerable interest. After the lapse of three or four days, Henry returned to Springfield, for the ostensible purpose of making further search for Fisher. Procuring some of the boarders, he, together with them and Archibald, spent another day ineffectual search, when it was again abandoned, and he returned home. No general interest was yet excited.¹⁰⁸

But then, little of interest had seemed to happen thus far. That was soon to change, with the 1846 account continuing further:

On the Friday, week after Fisher's disappearance, the Postmaster at Springfield received a letter from the Postmaster nearest William's residence in Warren county, stating that William had returned home without Fisher, and was saying, rather boastfully, that Fisher was dead, and had willed him his money, and that he had got about fifteen hundred dollars by it. The letter further stated that William's story and conduct seemed strange; and desired the Postmaster at Springfield to

¹⁰⁸ *Id.* at 372.

ascertain and write what was the truth in the matter. The Postmaster at Springfield made the letter public, and at once, excitement became universal and intense.¹⁰⁹

Once the good people of Springfield, which was then a town of about thirty-five hundred souls, and already the State capital, had been alerted by the Warren County Postmaster (a hundred or so miles away), they began what was indeed an intense hunt for Fisher's corpse. Meanwhile, the Attorney General of the State of Illinois, in collaboration with the Mayor of Springfield, succeeded in eliciting from Henry Traylor the admission that his brothers had killed Fisher and then had done away with his body, perhaps in a mill pond not far from where (he said) he had seen them carrying a body out of his sight into a thicket. Here is how Henry Traylor was moved to cooperate as he did with the authorities:

The Mayor and Attorney Gen'l took charge of him, and set their wits to work to elicit a discovery from him. He denied, and denied, and persisted in denying. They still plied him in every conceivable way, till Wednesday, when, protesting his own innocence, he stated that his brothers, William and Archibald had murdered Fisher; that they had killed him, without his (Henry's) knowledge at the time, and made a temporary concealment of his body; that immediately preceding his and William's departure from Springfield for home, on Tuesday, the day after Fisher's disappearance, William and Archibald communicated the fact to him, and engaged his assistance in making a permanent concealment of the body. . .¹¹⁰

Archibald and William Traylor were under arrest on suspicion of murder and their preliminary hearing was moving along steadily, with Henry Traylor the principal (and evidently a quite effective witness) for the State. Lincoln and two other lawyers had been engaged by, it seems, William Traylor, the brother who lived in Warren County.¹¹¹ It appeared more and more likely that at least two of the Trailors would soon be hung, by vigilantes if not by the State. But the excitement was brought to a most unexpected, if not even disappointing, end when there appeared

¹⁰⁹ *Id.* at 372-73.

¹¹⁰ 1 LINCOLN, *supra* note 7, at 373.

¹¹¹ *Id.* at 256.

in Springfield, first, news of the supposed victim's continued existence and, then, the "victim" himself.

It is, no doubt, a rather bizarre episode, one which can readily be categorized as weird. So weird is it that it is hard, if not impossible, to make sense of it all. No matter what suppositions one makes, one is likely to be left with a mystery or two to contend with. Lincoln seems to have entertained his friends and his colleagues at the bar with this tale, so much as to move the Quincy editor to urge him to write it up for publication.¹¹²

ii.

There are, of course, several dubious features about the conduct described here. To begin with, there was a remarkably frantic community-wide response stirred up by few, if any, suspicious signs. What made the response here particularly curious are the respectability of the suspects and the somewhat notorious unpredictability of the supposed victim, who was "subject to temporary derangement of mind."¹¹³ But for the distant Postmaster's letter, the Trailors' conduct in Springfield with respect to Fisher would not have aroused much notice, especially since they had seemed to make repeated efforts to locate their missing companion in Springfield.

There was quite limited, if any, evidence as to a murder, or even as to any death. And yet two or three murderers were suspected before either a corpse or any witness to a crime had been found. This was even before the Attorney General and the Mayor went to work, evidently with some persistence, on Henry Traylor. Henry Traylor, living in a town twenty miles away, was evidently close enough for them to have ready (and evidently uninhibited) access to him. Had he been a Springfield neighbor, they might have been reluctant to treat him the same way.

Did these officials force a confession out of Henry Traylor? Did he come to feel, with their help, that he was at risk—and that his brothers (who do not seem to have had as young children as he did) should be left to take their chances?¹¹⁴ What, if anything, had his brothers said to

¹¹² The Quincy account was reprinted, a week later, in a Springfield newspaper. *See id.* at 371 n.1.

¹¹³ *Id.* at 376. *See also id.* at 257.

¹¹⁴ One can be reminded here of the fatal testimony of David Greenglass, against his sister and brother-in-law, in the Julius and Ether Rosenberg espionage case. For a discussion of

Henry Traylor about what they had done to Fisher—and why might they have said whatever he recalled in the dangerous way that he did?

Among the mysteries left by the 1846 account of this episode is the lack of any “follow-up” actions that one might expect, either by the Trailors eventually explaining themselves or by the authorities in dealing thereafter with what had happened.

iii.

There are several troublesome features here, aside from a display of how little evidence sufficed for the official actions that were taken. There is, most obviously, the problem of the feverish conduct of the good people of Springfield, even though Archibald Traylor had lived among them theretofore in a peaceable manner.

The people—hundreds of them, we are told—simply went on a tear, and this on the basis of fairly flimsy suspicions, supplied by a distant Postmaster whom few if any of them may have known. They probably knew nothing, for instance, about the prejudices and limitations of their informant, about his prior dealings (if any) with the Trailors, and about his personal interest in all this. For all they know, their distant informant was no more moderate than they were.

Still, it is instructive to see how seriously law and order (in one sense) was taken in the old Northwest Territory. (Illinois had been a state since 1818.) People evidently felt quite threatened, as well as decidedly stimulated, by the alleged misconduct. The volatile character of American life, at least the life of that period and place, is indicated as well as the importance of a vigorous maintenance of law and order.

iv.

Even more troubling than anything noticed thus far by me is the fact that no one seems to have called attention to himself by attempting to impede, if only by questioning, what was being done by his fellow citizens *en masse*. Thus, no one is reported (in the 1846 newspaper account) to have urged moderation (especially since the Trailors were obviously not going anywhere), while “hundreds” were caught up in the frantic search and by the prospect of a hanging-party. Exceptions of sorts were the three lawyers, who were evidently engaged for the

the *Rosenberg* case, see George Anastaplo, *On Trial: Explorations*, 22 LOY. U. CHI. L.J. 765, 996 (1991) (hereinafter *Anastaplo, On Trial*).

hearing, as well as the man who did not fancy having his mill-pond wrecked in the course of the people's search for Fisher's body.¹¹⁵

Our own law students, while discussing this matter with me, have not been at all surprised that no one spoke out against the rather wild response to the distant Postmaster's "evidence." It seems to me curious, if not ominous, that this kind of silence is not remarked upon, or even noticed, by students of law. It should be remembered here, as indicative of the mood of the town, that one of the brothers was reported to have been glad to have found safety in a jail.

Did, we must wonder, anyone know better? Or were they all swept away, at least among the public at large? It should at once be added that the Anglo-American community had long had, in the annals of the law, warnings against such misinterpretations of evidence as may be seen here. Consider, for example, this passage from Coke's Institutes:

In the county of Warwick there were two brethren, the one having issue a daughter, and being seized of lands in fee devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age: her uncle for some offence correcting her, she was heard to say, Oh good uncle kill me not. After which time the child after much inquiry, could not be heard of: whereupon the uncle being suspected of the murder of her, the rather for that he was her next heir, was upon examination committed to the gaol for suspicion of murder, and was admonished by the justices of assise to find out the child, and thereupon bailed him until the next assises. Against which time for that he could not find her, and fearing what would fall out against him, took another child as like unto her both in person and years as he could find, and appareled her like unto the true child, and brought her to the next assises, but upon view and examination, she was found not to be the true child; and upon these presumptions he was indicted and found guilty, had judgment, and was hanged. But the truth of the case was, that the child being beaten over night, the next

¹¹⁵ See 1 LINCOLN, *supra* note 7, at 258.

morning when she should go to school, ran away into the next county; and being well educated was received and entertained of a stranger; and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proven to be the true child. Which case we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption: and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did.¹¹⁶

Perhaps it did not serve Lincoln's purposes to show what follow-up there was to all this. Even so, he *was* prepared to leave us with a rather bleak portrait of his fellow-townsmen, however comical this account, and even more so his 1841 account, could be.¹¹⁷

For one thing, there is no indication of any soul-searching afterwards in Springfield, especially when it is recalled how close people had come to hanging two men for a murder that no one had committed. Nor is there any indication of who was to pay for the rebuilding of the dam damaged in the search for Fisher's body.

Even more significant for the legal scholar is the absence of any suggestion of one or more legal actions one might expect in the wake of this episode. Should, for example, Henry Trailor have been tried for perjury—or even, depending upon what relations had been theretofore among the brothers, for attempted murder? Or was it that he had gotten Fisher's money with them—if Fisher ever had any money—and did not want to share it? Certainly, we must wonder what he had really heard and seen with respect to Fisher. It is not impossible here that Archibald and William Trailor had pretended to far more mischief than had occurred, if only to impress a gullible (if not even mentally incompetent) brother and otherwise amuse themselves as they traveled together.

Should, for another example, the Attorney General and the Major have been tried for coercing destructive testimony that could not

¹¹⁶ EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 72 (1747). This passage was called to my attention by Frank M. Covey, Jr., a Loyola School of Law colleague.

¹¹⁷ See 1 LINCOLN, *supra* note 7, at 254-58.

have been true? Were there any political repercussions for these vigorous public servants who had done so much with so little? And what about the Warren County Postmaster—was he responsible enough to keep on the public payroll?

Or, if Henry Traylor was indeed believable as far as he went, should there have been an indictment of his brothers for attempted murder? On the other hand, if the brothers had indeed made an attempt upon Fisher, should they not have been eager to negotiate with the authorities after Fisher showed up, for they could not have known what Fisher might remember, eventually if not immediately, about any attack by them upon him?

Was there ever any significant money involved here (fifteen hundred dollars is rumored¹¹⁸)? If so, who got it—and if the Trailors, why do we not hear of any lawsuit by Fisher to recover whatever may have been taken from him?

I do not venture to do much more than merely notice the romantic angle, developed by a scholar or two almost a century later, which has been offered to help explain some of the brothers' puzzling conduct, if any explanation at all is really needed.¹¹⁹ There is no follow-up at all along this line either in the accounts left us by Lincoln.

Nor does Lincoln say anything about the only law-related follow-up about which I have heard, his going to court to collect from William Traylor's estate his fee for having represented him in the Fisher matter.¹²⁰

vi.

One can well wonder what Lincoln's principal purpose was in making available in 1846 the account of the Fisher fiasco. Should he not be assumed to have noticed whatever problems and issues we might find in examining this episode?

¹¹⁸ See *id.* at 372.

¹¹⁹ The thwarted elopement of a young woman, whose reputation had to be protected, has been suggested. Compare *id.* at 376-77 n.3. See also *id.* for the suggestion that Fischer may even have gone into the thicket fearing an impending attack.

¹²⁰ See *infra* note 125 and accompanying text.

Certainly, there are lessons here with respect both to criminal-law procedures and to capital punishment.¹²¹ It does seem that people were eager to believe what they wanted to believe, no matter how outlandish in the circumstances, which may testify to how boring life could be in more or less rural American in the 1840s. This is not unrelated to the excitement that could be generated nationwide by revival meetings, by abolitionist crusades, and by political campaigns.¹²²

Lincoln's acute political sense is revealed upon comparing the two accounts of the Fisher matter that are attributed to him. He is, in his 1841 letter to his friend, far less restrained in describing his fellow townsmen.¹²³ Particularly revealing is his willingness in 1846 to suppress the wonderful vignette with which he ended his 1841 account, describing the reactions in the courtroom to the account by the Warren County doctor who reported that Fisher was still alive:

When the doctor's story was first made public, it was amusing to scan and contemplate the countenances, and hear the remarks of those who had been actively engaged in the search for the dead body. Some looked quizzical, some melancholy, and some furiously angry. Porter, who had been very active, swore he always knew the man was not dead, and that *he* had not stirred an inch to hunt for him; Langford, who had taken the lead in cutting down Hickoxes mill dam, and wanted to hang Hickox for objecting, looked most awfully wo-begone; he seemed the "*wictim of hunrequited haffection*" as represented in the comic almanic we used to laugh over; and Hart, the little drayman that hauled Molly home once, said it was too *damned* bad, to have so much trouble, and no hanging after all.¹²⁴

We can see here those affinities between Abraham Lincoln and Mark Twain which reflect the remarkable, if not even uncanny, ability they both had to understand the American people and thereafter to speak to and for them in the most effective way. Exhibitions of that ability reminds us of how much such gifted men, who validate each

¹²¹ See *supra* note 104 and accompanying text.

¹²² It should be remembered, for example, that the audiences in each of the seven encounters during the Lincoln-Douglas debates in 1858 could expect three hours of speeches by the principal speakers.

¹²³ See 1 LINCOLN, *supra* note 7, at 254-58.

¹²⁴ *Id.* at 257-58.

other to a considerable extent, are somehow shaped by the people they minister to.

We can also see, here as elsewhere, how difficult it can be for the rest of us to be as reliable as such men in the stories they weave. Lincoln himself has the Warren County doctor, and thereafter Fisher himself, come on their own to Springfield on behalf of William Traylor. He also has this Traylor die within less than a year after the Fisher matter. Mythic elements are added to Lincoln's account of this episode by Carl Sandburg:

More than four years had gone by since William Traylor was in jail in Springfield, charged with murder, and men around the public square were growling about "the rope" for Traylor. Then Lincoln had helped turn up, alive and healthy, the man who was supposed to have been killed, having stood by his client during false accusations and threats of lynching. And the years passed and Traylor couldn't or wouldn't pay the fee of his lawyer and best friend in the hours a noose was knotted for his neck. And Traylor died a peaceable, homelike death--without having paid his lawyer, his valued counsel. And Lincoln sued the estate of William Traylor, and collected \$100.00.¹²⁵

vii.

I return, however briefly, to what may have been Lincoln's principal purpose in making available the account he did in 1846. I suspect that he may have been returning with an example quite close to home, to the powerful argument that he had made, less than a decade earlier, in his Springfield Lyceum Speech.¹²⁶

He had, in that 1838 speech, described the atrocities that had been perpetrated elsewhere by people who had been unduly passionate in the cause of justice and retribution. We can see in those dubious

¹²⁵ CARL SANDBURG, *1 ABRAHAM LINCOLN: THE PRAIRIE YEARS* 293 (1926). Nothing is said in Lincoln's accounts of his having "helped turn up, alive, and healthy, the man who was supposed to have been killed." Nor is anything said about difficulties in collecting his fee.

¹²⁶ 1 LINCOLN, *The Perpetuation of Our Political Institutions*, in *COLLECTED WORKS*, *supra* note 7, at 108-16.

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passions, in the North as well as in the South, the emotional materials that fueled the sustained bloodletting of the Civil War.¹²⁷

Among the lessons taught by Abraham Lincoln, in reminding his fellow citizens in Illinois of how even they could be infected by the righteous lawlessness of the day is that such aberrations leave people far more dependent upon chance than a self-governing community should dare or want to be.

IV. ABRAHAM LINCOLN AND THE PURSUIT OF HAPPINESS¹²⁸

A peasant must stand a long time on a hillside with his mouth open before a roast duck flies in.

*A Chinese Proverb*¹²⁹

i.

We are reminded, by the Declaration of Independence, "that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness."¹³⁰ We are further reminded by the Declaration that "to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."¹³¹

"Life, Liberty, and the Pursuit of Happiness" is very much an American reformulation of that English trinity of rights, "Life, Liberty, and Property." That more traditional form may be seen in authors such as John Locke and in constitutional documents such as the Fifth and Fourteenth Amendments to the Constitution of the United States. Locke

¹²⁷ Abraham Lincoln, we are told by Lord Charnwood, regarded "lawlessness and slavery as twin evils." See ANASTAPLO, LINCOLN, *supra* note 1, at 229.

¹²⁸ A talk given at the Lenoir-Rhyne College Hickory Humanities Forum (Wildacres Resort, Little Switzerland, North Carolina, April 27, 2000).

¹²⁹ PAUL THEROUX, RIDING THE IRON ROOSTER xi (1998).

¹³⁰ For the text of the Declaration of Independence, see ANASTAPLO, CONSTITUTION, *supra* note 2, at 239. For a discussion of that text, see ANASTAPLO, LINCOLN, *supra* note 1, at 11, 38. See also *supra* note 59.

¹³¹ In *Marbury v. Madison*, 5 U.S. 136, 176 (1803), Chief Justice John Marshall wrote, "[T]hat the people have an original right to establish for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected."

also spoke of the *pursuit* of happiness, but not with the emphasis upon it seen in the Declaration of Independence.¹³²

An emphasis upon *pursuit* looks to desire and change, if not also to acquisitiveness, and hence perhaps to the importance of opportunities, of ambition, and of novelty in the satisfaction of appetites. This emphasis can make more of the *game*, and of constantly raising the stakes, than it makes of any permanent objective. Americans can speak of the satisfaction of the hunt itself, even more than of any primary concern with the quarry hunted. Thus, avid fisherman among us can routinely return to the water the fish that they are eager to haul in.¹³³ The corruption of this approach to happiness may be seen quite vividly in Mozart's *Don Giovanni*: the pursuit can possess one's soul, not any satisfaction or fulfillment.¹³⁴

A commonsensical American approach to this matter may be seen in an observation by Benjamin Franklin, that although the Constitution may guarantee one the right to pursue happiness, one must still catch it for oneself.¹³⁵

ii.

It should be useful to consider what Abraham Lincoln, the greatest champion thus far of the Declaration of Independence, has had to say about "the Pursuit of Happiness."¹³⁶

Two approaches to happiness are evident in his work: the political and the personal. We are all familiar with Lincoln's political approach to happiness, which included a sometimes desperate concern that the mistaken policies with respect to the extension and hence likely perpetuation of slavery in the United States would subvert the teachings

¹³² See, e.g., ROBERT A. GOLDWIN, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 476, 483-85, 510 (Leo Strauss & Joseph Cropsey eds. 3d ed.1987).

¹³³ See, e.g., Abraham Lincoln, On the Perpetuation of Our Political Institutions, Springfield Lyceum Speech (1837). For references to discussions of this speech, see ANASTAPLO, LINCOLN, *supra* note 1, at 366.

¹³⁴ So much may the soul be possessed that the pursuit of beauty can turn ugly. See, e.g., ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 440 n.198, 448-49 n.218 (on *Là ci darem la mano*), 264-65 n.263.

¹³⁵ The Declaration of Independence does recognize the desire to maintain one's happiness once one has attained it. Property can be seen as useful means for generating happiness, if not even as congealed happiness, so to speak. But property must be alienable if one is to have full use of it, while life and liberty may not be alienated, even though they may sometimes have to be put at risk if not even sacrificed along with one's property.

¹³⁶ See 4 LINCOLN, *supra* note 7, at 240 (for Abraham Lincoln at Independence Hall).

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and conditions necessary for the enduring happiness of the American people. Setbacks such as the *Dred Scott* decision, in 1857,¹³⁷ could be distressing for him, casting a pall over the equanimity of a country sensitive to the promise of its founding principles.

It is the less familiar personal approach by Lincoln to happiness which we can usefully examine on this occasion. How *does* one regulate one's life? People, he argued again and again, have more control of their happiness than they may appreciate. One's happiness, especially if one is a citizen in a free country, depends in large part upon one's self-knowledge and self-control.¹³⁸

Two quotations attributed to Lincoln suggest what this personal approach to happiness requires. The first, found in advice given to a friend, incorporates elements that many of you have no doubt adopted for yourselves:

Do not worry; eat three square meals a day; say your prayers; be courteous to your creditors; keep your digestion good; exercise; go slow and easy.¹³⁹

He then adds, aware that individual circumstances may require individual treatment, "Maybe there are other things your special case requires to make you happy, but my friend, these I reckon will give you a good lift."¹⁴⁰

Our second quotation from Lincoln is particularly challenging, especially as it comes from a man who had, through much of his life, suffered what appear to have been bouts of depression: "People are just about as happy as they make up their minds to be."¹⁴¹

iii.

¹³⁷ See *supra* note 55.

¹³⁸ Is not happiness likely to be more "personal" for Americans than it is for Europeans, who are still more inclined than we are to look to the familial and the communal for their satisfaction?

¹³⁹ *Id.* On Lincoln and health, see LINCOLN, *supra* note 7, Index Volume, at 148.

¹⁴⁰ That one's happiness may indeed depend, in part, upon one's circumstances seems to be recognized here.

¹⁴¹ This is not unrelated to another intriguing observation by Lincoln, that a man by the time he reaches the age of forty is responsible for his face.

Lincoln's personal approach to happiness is suggested, however fleetingly and perhaps ambiguously, by something that happened during a political visit to Kansas in December 1859.¹⁴² This was a few months before he succeeded in securing the by-then quite-valueable Republican nomination for the Presidency.

Lincoln stayed, in Leavenworth, in the home of Mark W. and Louisiana Hanks Delahay. She was a distant cousin on his mother's side; he was a lawyer who had been a political crony of Lincoln's in Illinois.¹⁴³ Lincoln evidently believed that Delahay, who was in his early forties in 1859, could be useful for him in Kansas and thereafter at the Republican Convention in Chicago.

When Lincoln left the Delahay home to return to Springfield, he signed the Autograph Album of Mary Delahay, who seems to have been the oldest daughter (if not the oldest child) in the family. Her age is hard to come by—one archivist in Kansas with whom I have spoken observed that she evidently did not record her age in any of the many papers in their Delahay collection. Another librarian has estimated 1844 as the year of her birth, making her about fifteen at the time of Lincoln's visit.¹⁴⁴

iv.

The Albums of that day, kept by both boys and girls, seem to have been similar to the high school and college Yearbooks that we have. There is, we sometimes sense, magic in a name: names can help tie things down.¹⁴⁵

Certainly, Mary would have wanted a distinguished visitor to sign her Album. One consequence of her enterprise was that the Delahay family had bestowed upon it an inscription that would prove to be quite a legacy.

Here is the text that Lincoln left behind in Kansas, along with the memory of the speeches he made there to his enthusiastic anti-slavery supporters:

¹⁴² See 3 LINCOLN, *supra* note 7, at 495-504.

¹⁴³ Delahay was born in 1817, he died in 1879.

¹⁴⁴ A Kansas archive photograph shows her dressed, as a very young lady, for a reception at the White House after Lincoln's Inauguration in March 1861.

¹⁴⁵ See ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 357-63. See also *infra* text corresponding to note 215.

Dear Mary

December 7, 1859

With pleasure I write my name in your Album. Ere long some younger man will be more happy to confer *his* name upon *you*.

Dont allow it, Mary, until fully assured that he is worthy of the happiness. Dec. 7--1859

Your friend,

A. Lincoln¹⁴⁶

v.

The inscription for Mary Delahay reflects Abraham Lincoln's inclination to be somewhat thoughtful or deliberative, no matter how prosaic the occasion may be.¹⁴⁷ It evidently pleased him to make use of his powers thus--it pleased him to say something fitting *and* intriguing.¹⁴⁸ There may be something distinctively American in the effort thus to elevate the prosaic.

Elevation may take the form of wryness, as in this note to F. A. Wood, Esq. (of June 1, 1860):

Dear Sir

Yours of May 24th. is received. You say you are not a Lincoln man; "but still would like to have Mr. L's autograph."

Well, here it is. Yours with respect

A. Lincoln.¹⁴⁹

¹⁴⁶ 3 LINCOLN, *supra* note 7, at 504.

¹⁴⁷ Even his resort to comedy could be most instructive. See, e.g., ANASTAPLO, LINCOLN, *supra* note 1, at 226-27, 322-23.

¹⁴⁸ Thus, one can see him "practicing" for the Gettysburg Address in some of his spontaneous responses to serenades at the White House. See, e.g., *id.*, at 26. See also *supra* notes 47, 59.

¹⁴⁹ 4 LINCOLN, *supra* note 7, at 68.

Lincoln's response (of May 17, 1862) to another request for an autograph, to be supplied to the daughter of a man with political influence (he had been appointed, by Lincoln, the Minister to Austria), provides a fitting introduction to our discussion of the Mary Delahay inscription:

Miss Mary Motley—

A friend of yours (a young gentleman of course) tells me you do me the honor of requesting my autograph. I could scarcely refuse any young lady—certainly not the daughter of your distinguished father.

Yours truly

A. Lincoln¹⁵⁰

Another young man is anticipated in Mary Delahay's inscription: he will be asking her to make him happy by marrying him.

Lincoln indicates, in the Delahay inscription, that *happiness* is related to *pleasure*: he takes "pleasure" in writing his name for her, while someone else will be even "more happy" in giving her *his* name. There is an echo here of an observation that had been made by John Locke:

Happiness then in its full extent is the utmost Pleasure we are capable of, and Misery the utmost Pain: And the lowest degree of what can be called *Happiness*, is so much ease from all Pain, and so much present Pleasure, as without which any one cannot be content.¹⁵¹

Thus, it can be said, *happiness* is a continuum along which ordinary pleasure is an instructive beginning. Happiness, it has also been said, should depend in large part upon satisfaction with a life well-lived.¹⁵² It should depend upon activities grounded in virtue. For Lincoln himself, as is evident in such early speculations as his 1838 Perpetuation Speech (at age 29),¹⁵³ happiness is derived from being

¹⁵⁰ 5 LINCOLN, *supra* note 7, at 220-21.

¹⁵¹ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, Book II, Chapter 21.

¹⁵² See, e.g., ARISTOTLE, NICOMACHEAN ETHICS, Book I. See also *supra* notes 101 and 109.

¹⁵³ See ANASTAPLO, LINCOLN, *supra* note 1, at 366 (for references to discussions of the Lyceum Speech, "The Perpetuation of Our Political Institutions").

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recognized as special: he thirsted for distinction (even in the way he provided an autograph). Happiness thus derived was to be found more in public life than in private.

Indeed, one can wonder how happy Lincoln ever was in his private relations. A sober psychiatrist of experience I know tells me that the statement he provided Mary Delahay is *not* the statement of a happy man: he detects a paternal, even poignant, tone in that inscription.¹⁵⁴ Is one *not* apt to be happy if one makes much of happiness? Does Lincoln speak here not so much as a *happy* man but rather as a *married* man?¹⁵⁵

vi.

Be all this as it may, Mary Delahay is advised that she should be careful in how she dispenses happiness. Especially should this be so whenever names, and hence families, are rearranged, for this is what marriage can mean.

Does not Lincoln invoke too high a standard here? "Fully assured" (which sounds like a property title search if not like an Euclidian demonstration) demands much more confidence than such standards as "beyond a reasonable doubt."

Lincoln, in the way he guides Mary Delahay, tends to confirm what can be seen again and again in his bachelor days, a most apprehensive, if not even "pathological," response to the prospect of marriage. It is said that Lincoln himself came to speak of his abrupt breaking off of an engagement as "the fatal first of January 1841"¹⁵⁶ One friend is reported to have said that "Lincoln went crazy as a loon" on that occasion, with suicide feared by some of his friends.¹⁵⁷ Whatever the truth of all this, it does seem that there are troubling features to Lincoln's responses to sexuality, especially in his early manhood.¹⁵⁸

However that may have been, Lincoln does anticipate that a younger man will seek his happiness by marrying Mary Delahay. We can gather from Lincoln's inscription that this man will be more moved

¹⁵⁴ The psychiatrist drawn upon here is Gunther Rice of Chicago, a student in the Basic Program of Liberal Education for Adults, The University of Chicago.

¹⁵⁵ For the entrapment of Benedict, the "married man," see WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 2, sc. 3.

¹⁵⁶ He was thirty-two years old.

¹⁵⁷ See WILLIAM E. BARTON, *THE WOMEN LINCOLN LOVED* 240-41 (1927).

¹⁵⁸ See, e.g., Douglas L. Wilson, *Keeping Lincoln's Secrets*, *ATLANTIC MONTHLY*, May 2000, at 78. See also *infra* note 163.

by prospects of pleasure than she in turn should be. Is a critical difference between male and female suggested here?

The young man will be in pursuit of a pleasure-oriented happiness. What should *she* be after? Happiness, also, it *can* be said, but a happiness which is grounded more in duty (or virtue) than in pleasure.¹⁵⁹ Another way of putting this inquiry is to ask, What should be the status here of *love*?

It can sound odd to us to ask, "Whom should one love?" It may sound less odd if it is suggested that whether one will be happy with one's beloved depends, at least in part, upon the caliber of one's beloved.

Mary Delahay, it seems to be suggested, is of a high caliber. Lincoln's implicit flattery here may even have a flirtatious element: she is regarded, in the inscription, as attractive enough to be able to choose among the suitors she will surely have.

vii.

Why does Lincoln permit himself to seem as concerned about this girl as this inscription indicates? She *is* a distant relative and he has just been a guest in her family home.

There may also have been something special about her—or about her circumstances—which made her particularly attractive (and worth paying attention to) or particularly vulnerable. Is there a clue here in the second use of "Mary" in the inscription (as if he is trying to get close to her—"hitting on her," students may say)?¹⁶⁰

Certainly, the name "Mary" was of peculiar significance to Lincoln in the realm of marriage. He had proposed to one Mary before he got another one to marry him. The first, Mary Owens, is quoted as having explained her rejection of him thus: he was "deficient in those little links which make up the chain of a woman's happiness."¹⁶¹

The second, Mary Todd, evidently was of a more ambitious type, coming from a Lexington family with aristocratic tendencies. Her

¹⁵⁹ On Aristotle, the moral virtues, and happiness, see *supra* note 152. See also ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 318-19.

¹⁶⁰ It should be noted that Lincoln and his wife did not have any daughters.

¹⁶¹ On Mary Owens and Abraham Lincoln, see 1 LINCOLN, *supra* note 7, at 54-55, 78-79, 94-95, 117-19.

character was such as to make plausible the stories we hear that she believed, early in their acquaintance, that Lincoln had the makings of a future President.¹⁶² The union of Abraham Lincoln and Mary Todd is not generally believed to have been a happy marriage, as marriages are usually judged. But it was obviously, in critical respects, a remarkably successful marriage, for it seems to have helped each of them get what was most wanted by each.

What about Mary Delahay? Had Lincoln, during his stay in her house, seen a particular suitor calling on her? If so, he is hardly recommending *that* young man. Or was the problem with a much older man, her father? He, although useful to Lincoln politically, was rather questionable in character.

The father is generally regarded by historians to have been somewhat disreputable, not least because of his difficulties in managing both his money and his liquor. One historian has recently grouped him with other "slightly damaged characters," in an account of how Lincoln came to nominate Senator Simon Cameron of Pennsylvania for his Cabinet (he later was to nominate Mark Delahay as a District Court judge in Kansas):

Despite Cameron's malodorous reputation, he appeared to be an amiable, if somewhat reserved, gentleman . . . [He was a] self-made man like Lincoln . . . That his reputation was not spotless was not altogether a negative; Lincoln always had a fondness for slightly damaged characters, like Mark Delahay, [Ward Hill] Lamon, and [William H.] Herndon. The two very practical politicians [Lincoln and Cameron] hit it off at once and the next day, as Cameron was preparing to go home [from Springfield, Illinois], Lincoln sent him a brief note promising that he would nominate him for either Secretary of the Treasury or Secretary of War.¹⁶³

However useful Mark Delahay might have been for Lincoln's political career, he was evidently questionable as a model to his daughter for a

¹⁶² It seems that Stephen A. Douglas may also have courted Mary Todd.

¹⁶³ DAVID HERBERT, LINCOLN 260 (1995). For Lincoln's second thoughts about this appointment, see *id.* at 260-61. One can be reminded of his panic after having proposed to Mary Todd. Was it because of questionable episodes in his own life, of which he was inclined to make too much, that Lincoln could be drawn to questionable characters on occasion? See *supra* note 158.

husband. In his inscription, Lincoln could even be advising Mary Delahay not to make the same mistake her mother (Louisiana Hanks) had made in choosing *her* husband.

Lincoln made another remark about marriage during his December, 1859, Kansas visit, a remark of a political character. It was in response to the potentially damaging charge that his anti-slavery position opened the door to much-dreaded racial amalgamation.¹⁶⁴ Lincoln attempted to defuse this issue with this statement: "Because he did not wish to hold a negro woman as a slave it did not follow that he wanted her for a wife."¹⁶⁵

These, then, have been some speculations inspired by the Lincoln inscription in Mary Delahay's Album. We are severely limited in what can be said here by the paucity of the relevant data that happens to be available. Suggestive of how chance can affect what we notice and what we can make of it are the place and date of this inscription: the place is Leavenworth, the date is December 7. How much are *we* influenced, unconsciously, in considering what Lincoln may have thought of marriage, by data that remind us of surprise attacks and imprisonment?¹⁶⁶

viii.

The data that do happen to be available also limit what can be said now about Mary Delahay's career. What influence *did* Abraham Lincoln have on her?

We can learn that the Delahay family became noteworthy because of its association with Lincoln. Thus, there are Delahay family materials collected both in Springfield, Illinois, and in archives in Leavenworth and Topeka, Kansas.

As for Mary Delahay, she had the misfortune of seeing her father suffer public disgrace. He has come to be regarded as one of Lincoln's worst appointments.¹⁶⁷ He was born in Maryland in 1817, had practiced law in Mobile, Alabama, and in Illinois, before going to Kansas in 1855

¹⁶⁴ Such concerns were expressed during the Lincoln-Douglas Debates of 1858. See ANASTAPLO, LINCOLN, *supra* note 1, at 157.

¹⁶⁵ 3 LINCOLN, *supra* note 7, at 504.

¹⁶⁶ The Pearl Harbor attack of December 7, 1941, and the Leavenworth Federal Prison are alluded to here.

¹⁶⁷ See CARL SANDBURG, 3 ABRAHAM LINCOLN, THE WAR YEARS 450-51 (1939).

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where he served as an outspoken abolitionist editor.¹⁶⁸ He died in 1879, not long after he resigned his District Court judgeship (for which he had been nominated by Lincoln in 1863) to avoid impeachment.¹⁶⁹

How happy, then, was Mary Delahay's life? She did have the satisfaction of collecting and depositing various family papers in archives. But she evidently never had the satisfaction available in a marriage.¹⁷⁰ She lived into her late eighties, dying in 1931 in San Antonio, Texas, where she and her brother had gone to live.¹⁷¹

Had she been influenced by Lincoln in her evident decision never to marry? Or was it that Lincoln, in his instinctive shrewdness, saw in the girl someone who would not be inclined (or able?) to marry--and thus left her with an inscription which could reassure her in the course she may have been naturally inclined, if not even bound, to follow?

ix.

Abraham Lincoln, it seems safe to say, was eminently successful in his principal marriage, that which he entered into with the American Regime.¹⁷²

He could have derived considerable satisfaction upon looking back, as in his Second Inaugural Address, on what had happened to the country under his stewardship.¹⁷³ The best hope of an enduring happiness, it can be said, comes from knowing that one is doing, one's duty.

The vital element of *knowing* should be recognized. One can be encouraged by Lincoln's example to make use of whatever occasions offer themselves as opportunities both to do well and to understand what has happened. Critical to Lincoln's political teaching is the insistence that the people of the United States can and should realize the

¹⁶⁸ *Id.* at 451. Thus the "marriage" between Abraham Lincoln and Mark Delahay may not have been a "happy" one, but it may still have been quite productive politically.

¹⁶⁹ Among his offenses were drunkenness on the bench.

¹⁷⁰ A Kansas archivist has told me that all of the correspondence between Mary Delahay and the archivists has her addressed at "Miss Delahay."

¹⁷¹ Had the brother ever married? Had she found him, after all, the best man available to her as a companion?

¹⁷² Some of Lincoln's younger staff, in the White House, could refer to him, among themselves, as the "tycoon."

¹⁷³ See *infra* Part VII.

best in themselves, which includes allowing to each human being a fair chance to do and to be what he or she is capable of.

However well one conducts oneself, it should be added, it is even better when one *understands* what should be done, by others as well as by oneself. Such understanding can be accompanied by its peculiar pleasure, a pleasure keyed to the distinctively human desire *and* ability to learn and to know.¹⁷⁴

Lincoln himself may have been too ambitious, and hence too occupied with politics, to be drawn to the contemplative life. But this need not have kept him from sampling now and then the pleasure that can come from attempting to make sense of the things one happens to notice.¹⁷⁵ Sometimes the tiniest clues can be the most revealing.

Certainly, one can derive considerable pleasure, and contribute to the promotion of a general happiness, by employing both an attention to detail and a disciplined imagination in the investigation of matters both low and high.¹⁷⁶

¹⁷⁴ President Clinton is said to have expressed the opinion that his Vice-President would have been happier in academia than in politics. See Maureen Dowd, *The Popular Pariah*, NEW YORK TIMES, October 19, 2000, at A31.

¹⁷⁵ For example, Lincoln's study of Euclid during his single term in Congress must have provided him considerable pleasure along with instruction in what it means "to know." See ANASTAPLO, LINCOLN, *supra* note 1, at 143, 172, 252; *infra* text corresponding to note 187.

¹⁷⁶ My introduction to this talk, when it was given on April 27, 2000, included the following report:

I met on the Lenoir-Rhyne Campus this morning a young woman who asked me what I was doing there. Our conversation went like this:

I'm here to help lead the seminars for the Hickory Humanities Forum up at Wildacres.

What is the subject of the meeting?

Happiness

Are you happy?

Why do you want to know?

I wouldn't want to try to learn to be happy from someone who is not happy himself.

Why is that? Would you refuse to be treated by a doctor who is ill?

If he can't keep himself healthy, why should I trust him to take care of me?

I'll have to think about what you are saying.

I concluded our exchange thus even though I could have tried to use the argument first made, so far as we know, some twenty five hundred years ago—the argument, in Plato's *Republic*, that it is food if one's doctor has experienced

V. THE COOPER INSTITUTE ADDRESS¹⁷⁷

[T]he poet's function is to describe, not the thing that has happened, but a kind of thing that might happen, i.e. what is possible as being probable or necessary. The distinction between historian and poet is not in the one writing prose and the other verse--you might put the work of Herodotus into verse, and it would still be a species of history; it consists really in this, that the one describes the thing that has been, and the other a kind of thing that might be. Hence poetry is something more philosophic and of graver import than history, since its statements are of the nature of universals, whereas those of history are singulars. By a universal statement I mean one as to what such or such a kind of man will probably or necessarily say or do--which is the aim of poetry, though it affixes proper names to the characters; by a singular statement I mean one as to what, say, Alcibiades did or had done to him.

-- Aristotle¹⁷⁸

i.

Abraham Lincoln, in the course of his successful efforts to secure the Republican Party nomination for the Presidency in 1860, made a major speech on February 27 at the Cooper Institute in New York City.¹⁷⁹ That speech, a distinguished political scientist of our day has suggested,

considerable illness himself. On that same occasion, however, it was also argued that the judge, unlike the doctor, should *not* have experienced personally the defect that he deals with, *injustice*. I did not proceed further with my young woman because I recognized that no matter what I said, the question would remain whether an inquiry into *happiness* is more like an inquiry into *justice* than it is like an inquiry into *health*. This, I figured, is a critical question that we here in the Forum would try to work through this weekend. Besides, I knew that the formidable John Fogarty was coming very soon to pick us up for the trip up here--and it would not have been either just or healthy to make him wait, to say nothing of the unhappiness it would cost him if he could not readily find us.

Thereafter I gave the talk which now serves as Part IV of this Collection.

¹⁷⁷ A talk given at the Annual Convention of the Illinois Political Science Association, Roosevelt University, October 23, 1999.

¹⁷⁸ ARISTOTLE, POETICS 1451a36-b22. (Ingram Bywater trans., 1984).

¹⁷⁹ See 3 LINCOLN, *supra* note 7, at 522. See also ANASTAPLO, LINCOLN, *supra* note 1, at 265, 302-03, 309-10, 314.

is "the most extraordinary campaign speech ever uttered in America."¹⁸⁰ A contemporary of Lincoln's said that this was "the address which was to make him President."¹⁸¹ The speech was delivered to what has been called the best audience in New York City since the days of Daniel Webster and Henry Clay.¹⁸²

Our political scientist has described the Cooper Institute address in this useful way:

[I]t joins a deeply learned inquiry into the early political history of the Republic to rhetorically eloquent appeals to the reason, good sense, sense of justice, patriotism, and magnanimity of his fellow citizens, south and north. As the tensions mount between North and South, Lincoln seeks to prevent a rupture of cataclysmic proportions and yet to insist upon maintaining the integrity of the central idea of the nation.

The question Lincoln addresses is this: "Does the proper division of local from federal authority, or anything in the Constitution, forbid *our Federal Government* to control as to slavery in *our Federal Territories*." He divides the speech into two parts. In the first part, he establishes, through meticulous historical analysis, that a majority of "the fathers" of the Republic who acted on the question voted in favor of such authority on a number of occasions. In the second part, he speaks, by turn, to "southerners" and "Republicans."¹⁸³

The second part of the address, which draws upon and develops sentiments and arguments that Lincoln had been expressing for several years, is not our primary concern on this occasion. Rather, we take our point of departure from the first part of the address, that part developed for his Eastern audiences and to which those audiences evidently responded with enthusiasm.

¹⁸⁰ COX, *FOUR PILLARS OF CONSTITUTIONALISM*, *supra* note 46, at 49. Compare the way that Harry Jaffa has spoken of Lincoln's 1858 "House Divided" speech. See ANASTAPLO, *LINCOLN*, *supra* note 1, at 149.

¹⁸¹ See CHARLES C. NOTT, ED., *THE COOPER INSTITUTE ADDRESS (1860)* (issued by the Young Men's Republican Union); 3 *LINCOLN*, *supra* note 7, at 522 n.1. See also *infra* notes 190 and 201 and accompanying text.

¹⁸² See JOHN G. NICOLAY AND JOHN HAY, *2 ABRAHAM LINCOLN: A HISTORY* 217 (1886).

¹⁸³ COX, *FOUR PILLARS OF CONSTITUTIONALISM*, *supra* note 46, at 49. See also *infra* note 200.

The first part of the Cooper Institute address is described in this way by our political scientist:

Lincoln's rhetorical strategy in his historical analysis is to focus on legislative actions of "the fathers," thirty-nine in number, who signed the original Constitution in 1787. . . . He follows their official actions from the period of the nation under the Articles of Confederation all the way through the period of the nation under the Articles of Confederation all the way through the period of the passage of the Missouri Compromise of 1820. Lincoln's masterly summary of the historical record . . . treats the Articles of Confederation, the Northwest Ordinance of 1787, and the Constitution as a series of inextricably connected measures bearing on the contested question of the authority of Congress to "control as to slavery in the territories."¹⁸⁴

A critical distinction is then made between what was done by Lincoln in the Cooper Institute address and what had been done earlier by him, including during 1858 Lincoln-Douglas Debates:

He does not explicitly refer to the Declaration of Independence in this historical analysis because his focus is on *legislative* actions taken by various of "the fathers" *after* the establishment of the independence of the American nation. But undergirding Lincoln's whole argument clearly is the position [he had taken in response to the 1857] *Dred Scott* decision, asserting the continued "vitality" and "practical value" of the Declaration's ringing affirmation of the "self-evident truth" that "all men are created equal." It is the rock-bottom principle of the nation and underlies the stance taken by twenty-one of "the fathers" who, at various times between 1784 and 1820, voted to control slavery in the territories.¹⁸⁵

This trip to the East was critical to Lincoln's career. One earlier trip to the East had been to serve his single term in the House of Representatives (in 1847 to 1849). Lincoln distinguished himself in that

¹⁸⁴ COX, FOUR PILLARS OF CONSTITUTIONALISM, *supra* note 46, at 49-50.

¹⁸⁵ *Id.* at 50.

term by his public opposition to the Mexican War.¹⁸⁶ It was also during that term that he studied Euclid and got to know and respect Congressman Alexander H. Stephens, of Georgia, who was eventually to serve as Vice-President of the Confederate States of America.¹⁸⁷

Lincoln's trip to the East in February 1860 featured the address he gave at the Cooper Institute in New York City. (It had been originally scheduled for a Brooklyn site.) On the same trip he gave several talks in New England, drawing repeatedly upon what he had said in New York.¹⁸⁸

His next trip east was as President-Elect, leaving Springfield on February 11, 1861, in order to be inaugurated on March 4, 1861.¹⁸⁹

ii.

The Cooper Institute address, which is said to have cost Lincoln much more effort to prepare than any other talk he made theretofore, and which was his only speech printed in a handsome edition during his lifetime, is addressed to "fellow citizens of New York." The special edition, issued by a New York Republican organization, was for the 1860 Presidential campaign.¹⁹⁰

Lincoln's principal objective in the address was to show himself to be a credible candidate for the Presidency. He had been noticed nationwide for his ability, in the Illinois Senate race in 1858, to stand up to Stephen A. Douglas, the most prominent Democrat in the country.¹⁹¹ Although Douglas had retained his Senate seat, Lincoln had out-pollled him in the popular vote which elected the members of the Illinois State Legislature who in turn selected the Senator.¹⁹² Douglas was expected to be the most formidable opponent that the Republican Party would face in the 1860 Presidential contest--and it was obvious that Lincoln had been more than a match for Douglas in 1858.

¹⁸⁶ See e.g., 1 LINCOLN, *supra* note 7, at 416-519, 2 LINCOLN, at 1-37.

¹⁸⁷ For a discussion on Alexander Stephens, see ANASTAPLO, LINCOLN, *supra* note 1, at 308-09. On the study of Euclid, see *supra* note 175.

¹⁸⁸ See 3 LINCOLN, *supra* note 7, at 550-54.

¹⁸⁹ See 4 LINCOLN, *supra* note 7, at 190-91.

¹⁹⁰ See *supra* note 181.

¹⁹¹ For a discussion of the Lincoln-Douglas Debates of 1858, see *supra* note 164.

¹⁹² This occasional disparity between the popular votes and electoral votes in Senate races was similar to what can still happen in Presidential elections. For a discussion of the merits of the Electoral College, see ANASTAPLO, CONSTITUTION, *supra* note 2, at 99-106. See also *infra* text accompanying note 252.

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To make himself credible in the East, Lincoln had to reassure the somewhat conservative Republican leaders out there that he was more than an exciting and effective Western "stump-speaker." One can even suspect that he helped the tough, ambitious and eminently successful men of the East to recognize in Abraham Lincoln someone who was ambitious, competent, self-restrained and hence "safe."¹⁹³ The Cooper Institute address was a great success, arousing an enthusiastic response among its distinguished audience and leading four New York City newspapers to publish it in its entirety the next day.¹⁹⁴

How did Lincoln do it? Evidently by providing, in the first part—the distinctive part—of his address something that was tailored to the circumstances in which he found himself as the second- or third-choice, if not the first-choice, of Republicans everywhere. Those circumstances included the vulnerability of the recognized front-runner for the Republican Party nomination, Senator (and former Governor) William Seward of New York. Seward was thought by some to be too radical, especially because of his talk about a "higher law than the Constitution" and about "an irrepressible conflict."¹⁹⁵

Republicans wanted to win in 1860, and Seward's sometimes impulsive talk was regarded as asking for trouble. Besides, many leading Republicans believed that a non-Easterner would be needed at the top of the ticket, since the Northeast was likely to go Republican anyway.

In Lincoln's effort to assure his New York audience of his reliability he provided both a negative and a positive side to his Cooper Institute argument. In effect, he separated himself from Seward, without mentioning him, by clearly disavowing both the radical John Brown and the abusive anti-slavery polemicist Hinton Rowan Helper.¹⁹⁶ Lincoln

¹⁹³ See ANASTAPLO, LINCOLN, *supra* note 1, at 297-98 n. 275 (discussing Lincoln's constant ambition). The preface to the facsimile edition of the Cooper Institute Address recognizes Lincoln's ambition and self-appraisal.

¹⁹⁴ Nott, *supra* note 181.

¹⁹⁵ On William Seward, see *William Stewart*, in *DICTIONARY OF AMERICAN BIOGRAPHY* 615-21 (Dumas Malone, ed., 1935). Seward's "higher law than the Constitution" observation was in 1850; his "irrepressible conflict" observation was in 1858. *Id.* at 617. Lincoln himself had, in effect, said the same sort of things, but perhaps more guardedly.

¹⁹⁶ On John Brown, see *John Brown*, in *2 DICTIONARY OF AMERICAN BIOGRAPHY* 318 (Allen Johnson & Dumas Malone eds., 1960). On Hinton Rowan Helper, see *Hinton Rowan Helper*, in *4 DICTIONARY OF AMERICAN BIOGRAPHY* 517-18 (Allen Johnson & Dumas Malone eds., 1960) (hereinafter *Helper*). *Helper's* influential book, *The Impending Crisis of the South* was first published in 1857. See *infra* note 213. See also *infra* text accompanying note 265.

displayed himself as opposed both to Southern expansionism (with its callousness toward slavery) and to Brownian fundamentalism (with its eagerness for violent change and its disregard for prudential considerations). This was the negative side of his argument, which was deliberately overshadowed on this occasion by the positive side with which he opened his address.

That positive side, which is critically unlike anything Lincoln had said before, drew at length upon his extensive research into the constitutional and legislative history of the United States. Perhaps Jonathon Elliot's six volumes of records from the Founding Period were his primary sources.¹⁹⁷

The important underlying issue, as we have noticed, was whether the Government of the United States had the power to regulate slavery in the Territories of the United States. This issue had been vital to the *Dred Scott* controversy.¹⁹⁸ Lincoln takes as his challenge a statement by Senator Douglas, made in Columbus, Ohio, in the Fall of 1859: "Our fathers, when they framed the Government under which we live, understood this question just as well, and even better, than we do now."¹⁹⁹ Lincoln considers himself entitled, therefore, to address the question, "What was the understanding those fathers had of the question" posed by Douglas, a question which Lincoln frames thus: "Does the proper division of local from federal authority, or anything in the Constitution, forbid *our Federal Government* to control as to slavery in *our Federal Territories*?"²⁰⁰

Lincoln attempts to show how the fathers understood this question by inventorying the votes of those fathers (beginning with the thirty-nine signers of the Constitution in 1787) who had participated in framing federal legislation regulating slavery in the territories. Perhaps as important as the results of this inventory were other consequences: Lincoln once again displayed himself as able to "handle" Douglas; also, he allowed his audience to see how industrious and sober he could be in investigating constitutional/legislative matters; and, perhaps most important on this occasion, he revealed himself as quite respectful of the country's history, especially the history of the original States in the

¹⁹⁷ See WILLIAM H. HERNDON & JESSE W. WEIK, *HERNDON'S LIFE OF LINCOLN* 368 (Fine Editions Press 1949) (1889).

¹⁹⁸ For references to discussions of the *Dred Scott* case, see ANASTAPLO, *LINCOLN*, *supra* note 1, at 363. See also *supra* text accompanying note 185 and *infra* text accompanying note 208.

¹⁹⁹ See 3 *LINCOLN*, *supra* note 7, at 522. See also *id.* at 322, 325.

²⁰⁰ See *supra* note 183 and accompanying text (emphasis in original source).

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Union. This latter revelation must have been flattering to Easterners, coming as it did from a leading figure of "the West" where the East could often be regarded as old-fashioned and not really "the future" of the country. I suspect that this determined deference to history was the decisive element contributing to the reception given to this address in the East, a reception evidently far warmer there than what was accorded to it in the West.

iii.

Lincoln organized historical data in a fashion which (it can be said) took advantage of his grounding in Euclid. That organization reflected his awareness, a somewhat self-conscious awareness, of what is needed for a proper argument. And it is obvious, in the elaborate notes prepared by a New York City Republican organization to accompany the formal publication of this address, that Lincoln's historical research and analyses impressed potential supporters in the East.²⁰¹

But there are problems with the novel (or historically-oriented) parts of this address, which may help account for the kind of reception it has and has not had. A lot of research is evident, but it is rather flimsy in critical respects. It can be rather technical, "lawyerly," and even mechanical, serving much more to reassure people who are already sympathetic and who want professional or respectable arguments to justify their inclinations, serving more to do that than to persuade those who are truly undecided.

The difficulties with the chain of reasoning here begin with the identification of the thirty-nine signers of the Constitution as its drafters and hence as among "the fathers." However, these signers did not sign as drafters, but rather as witnesses that this document was indeed the work of the Convention. This may seem too technical a point to dwell upon, but it does help us notice that almost two dozen of the delegates who contributed to the drafting of the Constitution either were absent at the end of the convention or were present but did not want to sign as witnesses, lest it be thought by the unwary that they accepted all of what had been done by the Convention.²⁰²

Lincoln, in collecting the twenty-one out of thirty-nine whom he takes to have been supporters of federal legislation with respect to

²⁰¹ See, *supra* note 181. On Euclid, see *supra* note 175.

²⁰² See ANASTAPLO, CONSTITUTION, *supra* note 2, at 219.

slavery in the federal territories, makes dubious assumptions about the significance of the silence of those who did not register any protest or vote against measures passed without recorded opposition. Most, if not all, of us have been in situations when it seemed it would serve no useful purpose to express opposition to something that was bound to be accepted no matter what one said or did.

Be that as it may, to proclaim the "declared" twenty-one as a majority of the thirty-nine is not to turn up with much of a majority. Lincoln does notice that many, if not most, of the undeclared were also known to be dubious about slavery. Would it have helped to have emphasized, more than he did, that of those whom he considered to have shown themselves as having taken a position on the question of the federal slavery power in the territories, some ninety percent recognized such a power?

Similar reservations can be developed about Lincoln's arguments assessing the votes of those additional "fathers" who had contributed to framing the then-present Constitution by drafting the Bill of Rights in the First Congress. But we need not notice more than we have already the problems with this approach, for that is enough to suggest to us a more important question: Was Lincoln himself aware of the limits of this address? And, if so, did this reflect his awareness both of the limits of his audience and of what they wanted and needed to hear? In short, how perceptive was Lincoln about the difficulties implicit in the approach to historical research and interpretation to which he had devoted several months of hard work?

A far sounder approach to the question addressed might have been to determine the understanding of the fathers with respect to the now-disputed territorial question by looking not at their sometimes obscure votes, but rather at what they said about slavery and, in some ways more critical, what they did about it *as a community*. Critical here, of course, is the slavery prohibition at the end of the Northwest Ordinance, especially since that prohibition was first imposed by the Confederation Congress in 1787 and reaffirmed by the First Congress in 1789.²⁰³ No doubt Lincoln appreciated the merits of this approach, for he had used it repeatedly in earlier speeches.²⁰⁴ Did he believe, however, that he now needed something that was both novel and indicative of

²⁰³ See *id.* at 264-65.

²⁰⁴ For a discussion of Lincoln and the Northwest Ordinance, see ANASTAPLO, LINCOLN, *supra* note 1, at 39, 367.

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disciplined thinking, thereby making himself more interesting and apparently more trustworthy? Even so, he does rely somewhat, even here, upon the opinions expressed by George Washington and Thomas Jefferson about slavery and its regulation.

In pursuing this approach, there could be the use of the other legislation noticed by Lincoln, but without making as much as he did of the particular "fathers" involved. Rather, the emphasis could have been on "the people" who really authorized such legislation. But would this have seemed to Lincoln's audience too "populist" an approach, whereas the repeated deference shown by him in this address to "the fathers" testifies to a respect for the ancestral, with Easterners providing almost all of those ancestors?

iv.

Once Lincoln, with the aid of his service as a historian, establishes himself at the Cooper Institute as solid and safe, he can return to the highmindedness which had been inspiring his public life for a decade. His audience can now "relax" and permit itself to be stirred, without being disturbed, by a probing of the moral issues at the heart of the their current slavery controversy.

The latter half of the Cooper Institute address shows Lincoln insisting that there are moral judgments to be made here, that there are fundamental questions about right and wrong. To be resisted, he can now venture to teach (as he had been teaching out West for a decade)—to be resisted is the South's insistence that *we* should say that *they* are right about slavery.²⁰⁵ There are indications, here as elsewhere, that Lincoln understands that however damaged the South's moral sense may have become because of its "obligation" to defend slavery, the Southern effort to induce the North to recognize the rightness of slavery may itself reflect a natural desire both to do and to seem good.²⁰⁶ Lincoln seems to have believed that this residual openness to goodness could be appealed to not by attacking slaveholders personally but by elevating the Union, even as slavery is recognized as an infliction inherited by the South, if not even by the entire country.²⁰⁷

²⁰⁵ See 3 LINCOLN, *supra* note 7, at 547-48.

²⁰⁶ On nature and the good, see GEORGE ANASTAPLO, BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT, Appendix B (forthcoming).

²⁰⁷ On the development of this argument in the Second Inaugural Address, see *infra* Part VII.

Critical to the Lincoln position is the attempt to make the good *seem* as well as *be* expedient, and hence politically viable--or, at least, to keep the good from being regarded as obviously inexpedient. It is important here that George Washington and others were known to have hoped to see the country rid of slavery.

However expedient it is for Lincoln to recognize the opinions of "the fathers," he senses that a sound political order must be able, *if need be*, to look beyond the ancestral to the good. Thus, he can notice, however guardedly, that we need not be bound on all occasions by what the fathers did and said. Does he suspect, at times, that the fathers could have usefully done and said more than they did about the institution of slavery to which they accommodated themselves in 1787 and thereafter?

v.

Even a mechanical approach to "our fathers" teaches the lesson that the political man should be respectful of the Constitution, that his oath of office and constitutional duties require such deference. This deference may be assumed, in Lincoln's polling of the fathers, by the inferences he draws from their silence.

The way that Lincoln proceeds also teaches that the political man can see what the Constitution requires--what it permits and what it forbids, in the light of which can be developed what is needful in one's circumstances. It is evident from what Lincoln says that the Congress is considered competent, as well as obliged, to pass on constitutional issues. Thus, it is not only the Supreme Court that is critical here. By this time, February, 1860, the Supreme Court had done far less constitutional interpretation and application than the Congress had been routinely obliged to do.

One major experiment by the Supreme Court in slavery-related interpretation had been what it did in the *Dred Scott* case in 1857, and that had been unfortunate.²⁰⁸ Among the Court's defects in that adjudication had been its silly use of the Due Process Clause in the Fifth Amendment. It is somewhat ironic, if not even shameless, that so much was made by the Court of protecting the liberty of slaveholders, considering what those men routinely did, generation after generation,

²⁰⁸ See *supra* note 198.

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to the lifelong liberty of innocent people.²⁰⁹ The Congress, in its efforts to keep slavery out of the Territories of the United States, had been more highminded than the Court. The peculiar distortions by the *Dred Scott* Court included its attempts to explain away the Northwest Ordinance, which had exhibited both the Continental Congress and the First Congress as clearly forbidding the introduction of slavery into all of the territories then controlled by the United States.²¹⁰

vi.

Lincoln does not consider it useful, in his Cooper Institute address, to spell out the powers that Congress might have, in 1860, to deal with slavery in the United States. It suffices to challenge, as he had been doing (most notably in his 1858 debates with Douglas), the *Dred Scott* ruling of the Supreme Court. Lincoln had to be careful not to make so much of the powers of Congress with respect to slavery in the Territories that apprehensive slaveholders might wonder what the Republican Party would try to do to slavery everywhere in the country if that party ever gained control of the Presidency and Congress.

Particularly threatening must have been what might be done to slavery interests, by Northerners in control of the National Government, through the use of the Commerce Power. That that power could be used to regulate the shipment of slaves (as part of "Commerce among the several States") is tacitly recognized in the provision in Article I, Section 9 suspending until 1808 the use of any Congressional power to interfere with the importation of slaves into the United States.²¹¹ Lincoln had refused, in the course of the Lincoln-Douglas Debates, to say whether the Commerce Power could be used to forbid "interstate" traffic in slaves.²¹² There would be time enough to speak to that issue, he must have believed, when the Republican Party had prevailed. In the meantime, it would only disturb the tranquility of apprehensive citizens, in the North as well as in the South, to suggest that something might someday be

²⁰⁹ For a discussion on the deep abhorrence of slavery natural to the Old South, see ANASTAPLO, LINCOLN, *supra* note 1, at 358-59; *infra* text corresponding to Appendix B, note B-31.

²¹⁰ Even the "three fifths of all other Persons" provision in Article I, Section 2 of the Constitution recognized the humanity of the slaves being held in the United States. After all, Southerners were always quite willing to convert that provision into "five fifths of all other Persons." See U.S. CONST. Art. I, § 2.

²¹¹ See ANASTAPLO, CONSTITUTION, *supra* note 2, at 64-65.

²¹² Douglas had put this question to Lincoln. On the Lincoln-Douglas debates, see *supra* note 164.

done by the National Government about slavery even in those States where it had been long established.²¹³

In the long run, the critical issues here would be political, not constitutional. Prudence and expediency would ultimately be decisive, not constitutional speculations. In the short run, therefore, it would be prudent to show oneself as sound and restrained, however disingenuous Lincoln may have seemed to some whenever he insisted that Republicans did not intend to disturb slavery where it was.

vii.

The South could sense, of course, where Lincoln's principles and policies, and those of the Republican Party generally, led. In fact, it was just a matter of time before the Republicans, and not just Lincoln, would exhibit in deeds their fundamental resolve against slavery.

That is, the South knew what it was doing, but only up to a point. Otherwise, it could not have persisted in so flawed a position toward slavery as it did in the middle of the Nineteenth Century, a position that their ancestors in the Eighteenth Century did not anticipate and that their descendants in the Twentieth Century could not defend, except perhaps in the form of the content-neutral defense of "States' Rights."

Lincoln, at the end of his Cooper Institute address, speaks of the *Nation* and the *National Territories*.²¹⁴ We can see in this speech an artful use of "history," suggesting thereby that the Republican Party truly stood for the long term policies toward slavery that had been sanctified by "our fathers," in the South as well as in the North. These had been the fathers who had insisted again and again upon "a perpetual Union" and "a more perfect Union," and who had so watched their language that they had several times deferred to slavery in the Constitution of 1787 without endorsing it by even so much as naming it.²¹⁵ Abraham Lincoln himself exhibits such watchfulness in his history-minded Cooper

²¹³ Hinton Rowan Helper, in his widely circulated published attacks on slavery, had made much of the Tax Power of Congress as a means of dealing with the problem. On Helper, see *supra* note 196. We have seen, in the Twentieth Century, considerable use of the Tax Power in support of general policies.

²¹⁴ See 3 LINCOLN, *supra* note 7, at 550.

²¹⁵ The Articles of Confederation spoke of "a perpetual Union" and the Constitution of 1787 spoke of "a more perfect Union." See ANASTAPLO, CONSTITUTION, *supra* note 2, at 245, 253, 266. On names, see *supra* text corresponding to note 145. See also *infra* note 275.

Institute address, in which he can adroitly put distance between himself and the more aggressive abolitionists of his day without disavowing the ultimate objective, inherited from "our fathers," of freeing all Americans, including inevitably beleaguered slaveholders, from the shackles of slavery.

VI. A Political Autobiography²¹⁶

*Suppose in truth
He did not ask for truth!—I must admit,
Suspicion that he used the truth as trap
Would be too small by far.—Too small? —What is
Too small for one so great?*

—Nathan the Wise²¹⁷

i.

My book, *Abraham Lincoln: A Constitutional Biography*²¹⁸—a title prompted by my publisher—is perhaps best understood with the working title I myself used as I prepared it: *Thoughts on Abraham Lincoln*.²¹⁹ This working title reflects what I tried to do in the book, a book which was guided somewhat by the way Lincoln himself worked, as may be seen in the opening lines of my book:

Abraham Lincoln recognized that he was "very little inclined on any occasion to say anything unless [he] hope[d] to produce some good by it." Much that we have from the mature Lincoln, therefore, was carefully prepared for specific occasions, usually of a political character. Is not this the trait of a remarkably practical man?

I attempt to follow in Lincoln's tracks to this extent: all of the discussions collected here . . . were prepared by me for specific occasions between 1961 and 1998. In

²¹⁶ A talk given at the Seminary Cooperative Bookstore, Chicago, Illinois, February, 20, 2000. This meeting followed upon the publication of my book, *ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY*, *supra* note 1.

²¹⁷ GOTTHOLD EPHRAIM LESSING, *NATHAN THE WISE* 74 (act. 3 sc. 6 lines 11-15) (1955).

²¹⁸ See *supra* note 1.

²¹⁹ This echoes the title of a book by one of my teachers, LEO STRAUSS, *THOUGHTS ON MACHIAVELLI* (1958). On Leo Strauss, see LEO STRAUSS, *THE STRAUSSIANS, AND THE AMERICAN REGIME* (Kenneth L. Deutsch and John A. Murley, eds., 1999).

them I address issues in American history, political philosophy, and constitutional law to which I have returned again and again. These issues are illuminated by, and in turn illuminate, observations about current affairs.²²⁰

I continue, in my introduction to the book, to describe its contents in this way:

The opening portion of this Collection (Chapter 1-7) suggests the constitutional, political, and social background out of which Lincoln emerged. The career of Lincoln, up to his Presidency, is sketched in the central portion of this Collection (Chapters 8-11). The concluding portion (Chapters 12-17) examines Lincoln as President working for the most part from his major addresses, messages, and proclamations. I have, during three decades of preparing materials for various occasions, worked with a view to this Collection in which aspects of Lincoln's constitutional biography would be surveyed and assessed. The detailed commentaries provided by me on the Emancipation Proclamation and the Gettysburg Address indicate how carefully all of Lincoln's mature works should be read. These commentaries are anticipated by the discussions [in the opening chapters] in this book of the Declaration of Independence, [the Northwest Ordinance, and the Constitutional Convention of 1787].²²¹

I should add that there is, in the vast Lincoln literature, relatively little careful reading of his principal texts, just as there is in the considerable body of constitutional law materials relatively little commentary on the text of the Constitution itself, something which I have provided in my two volumes of commentary on the Constitution and its Amendments.²²² Only by working through such texts, and thinking about them, may one begin to grasp the political sense as well as the principles and intelligence which are drawn upon.²²³

²²⁰ ANASTAPLO, LINCOLN, *supra* note 1, at 1.

²²¹ *Id.* at 2.

²²² See *supra* note 2.

²²³ See, e.g., George Anastaplo, *How to Read the Constitution of the United States*, 17 LOY. U. LAW JOURNAL 1 (1985).

It would not serve any serious purpose for me simply to quote further from my book on this occasion, or to paraphrase here what I have probably said much better there. Rather, it should say something useful about my book, and about how I work and think about my subject, if I should offer something now about my next Lincoln book, which has the working title, *Further Thoughts on Abraham Lincoln*, a book which should include some materials I had to leave out of the current book.²²⁴

I continue to be interested primarily in what Lincoln said, and why and how he said it, rather than in what most historians are usually interested in. The thinking of a truly thoughtful man is apt to be more solid than what historians are apt to talk about. Intelligence is more evident in sound thinking, while chance is much more a factor in what we know as the "stuff" of history. Chance may dominate the "stuff" of history—both what happens and what is discovered about what has happened. Of course, one has to have some reliable awareness of circumstances in order to appreciate the "why and how" of what is *said* by a thoughtful person—but, often, the text one studies (if it is of a high order) can provide one considerable guidance as to what its circumstances were. I find, as I work further with Lincoln and his thoughts, that there *are* details about the relevant history that I have not gotten quite right—but I have not yet happened upon anything that requires a fundamental revision of what I have said thus far.

ii.

Since this is Lincoln's birthday, we can consider this gathering a birthday party. The party to be held here next Monday, in connection with a Valentine's Day discussion of love and courtship, will (I am told) include chocolates. It is appropriate, then, that we too serve something on this occasion—and what is better for that purpose than copies of an autobiographical sketch prepared by Lincoln, evidently in early June 1860, which begins, "Abraham Lincoln was born Feb. 12, 1809, then in Hardin, now in the more recently formed county of Larue, Kentucky."²²⁵ This sketch was prepared a few weeks after he had been selected as the

²²⁴ Indeed, my talk on this occasion could serve as the prologue for the sequel referred to here. I added the advice for the students present at this talk, that one should, when invited to speak anywhere, always attempt to develop something somewhat new for the occasion. This permits one to build up a reservoir of materials to be drawn on thereafter, perhaps even years later. See *infra* note 233.

²²⁵ 4 LINCOLN, *supra*, note 7, at 60.

Republican Party Presidential candidate for the November 1860 election.²²⁶

It was a time when no public addresses were made by the Republican candidate once nominated. It is even reported that Lincoln had been advised "that his positions were well known when he was nominated, and that he must not now embarrass the canvass by undertaking to shift or modify them."²²⁷ It was also a time when it was expected that the Republican Party nominee was likely to win the election, particularly since the Democratic Party (which Stephen A. Douglas had hoped to lead in 1860) would have its Northern and Southern wings nominate different candidates.²²⁸

This autobiographical sketch is a minor text by Lincoln, a text which is inherently partial or fragmented inasmuch as it is designed to supply gaps in the information and materials that John Logan Scripps, a Chicago editor, would use in preparing a campaign biography of Lincoln which would receive wide circulation. Even so, it can be instructive to notice what Lincoln chose to use and how he put it in providing background and personal details for his friendly biographer.²²⁹

It is evident from Scripps's thirty-two page campaign biography that he drew on much more than what Lincoln provides him in this autobiographical sketch.²³⁰ Scripps had available not only copies of speeches that had been published, but also the benefit of at least one visit with Lincoln, evidently in Springfield. He had other sources, of course, as well as his own experience to draw upon, as may be seen in his comments about the young Lincoln's reading:

Abraham's first book after Dilworth's Spelling-Book, was . . . the Bible. Next to that came Aesop's Fables, which he read with great zest, and so often as to commit the whole to memory. After that he obtained a copy of Pilgrim's Progress—a book which, perhaps, has

²²⁶ See *id.* at 51, 60 n. 1.

²²⁷ *Id.* at 60 (quoting "Form Reply to Requests for Political Opinions").

²²⁸ See *supra* Part V.

²²⁹ See 4 LINCOLN, *supra* note 7, at 60 n.1. Scripps was later appointed Postmaster of Chicago by President Lincoln. He worked in 1860 for the *Chicago Press and Tribune*. The Lincoln Sketch was also used by Horace Greeley in New York for a tract he issued in support of the Lincoln Candidacy.

²³⁰ JOHN LOCKE SCRIPPS, LIFE OF ABRAHAM LINCOLN (1968). The conclusion of this Scripps biography is appended to this talk in *infra* text corresponding to note 293.

quicken as many dormant intellects and started into vigorous growth the religious element of many natures, as any other in the English language.²³¹

I interrupt Scripps to observe here that there must be few journalists or politicians today who can talk thus about a book such as *The Pilgrim's Progress*, as well as about other of the books that Scripps mentions.²³² I continue:

Then came the life of Franklin, Weems' Washington, and Riley's Narrative of the Brig Commerce. . . . These books constituted the boy's library. When he was fourteen or fifteen years of age, he learned that. . . a distant neighbor had in his house Ramsey's Life of Washington—a book which he was told gave a fuller and better account of Washington and the Revolution than the [Weems] volume which he had read with so much pleasure. He at once borrowed the book, and devoured its contents.²³³

The reader is thereafter told by Scripps:

[He was then] fortunate enough to get possession of a copy of Plutarch's Lives. What fields of thought its perusal opened up to the stripling, what hopes were excited in his youthful breast, what worthy models of probity, of justice, of honor, and of devotion to great principles he resolved to pattern after, can be readily imagined by those who are familiar with his subsequent career, and who have themselves lingered over the same charmed pages.²³⁴

²³¹ SCRIPPS, LIFE OF ABRAHAM LINCOLN, *supra* note 231, at 35.

²³² For a discussion of THE PILGRIM'S PROGRESS, see ANASTAPLO, THE ARTIST AS THINKER, *supra* note 4, at 76 et seq. For a discussion of the Bible, see George Anastaplo, *Law and Literature in the Bible: Explorations*, 23 OKLA. CITY. L. REV. 515 (1998) (hereinafter Anastaplo, *The Bible*).

²³³ SCRIPPS, LIFE OF LINCOLN, *supra* note 230, at 35-36. On George Washington, see George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRAN. L.J. Parts 5 and 6 (forthcoming 2000-2001) (hereinafter Anastaplo, *The Rule of Rules*). On the materials used in "Explorations" collections, see *id.*, Appendix; also, *supra* note 224.

²³⁴ SCRIPPS, LIFE OF LINCOLN, *supra* note 230, at 36-37. For a discussion of Plutarch, see George Anastaplo, *Law Education, and Legal Education: Explorations*, 37 BRAN. L.J. 585, at 724, 734 (1998-99). See also George Anastaplo, *Lessons for the Student of Law: The Oklahoma Lectures*, 20 OKLA. CITY U. L. REV. 19, 44 (1995).

We can see here, the risks run by the historian. Scripps, in his July 17, 1860 letter sent to Lincoln with a copy of the Campaign Biography he had just issued, includes this apology:

I believe the biography contains nothing that I was not fully authorized [by Lincoln?] to put into it. In speaking of the books you read in early life, I took the liberty of adding Plutarch's Lives. I take it for granted that you have read that book. If you have not, then you must read it at once to make my statement good.²³⁵

Scripps returned to the Plutarch problem in a letter to William Herndon, Lincoln's former law partner, on June 24, 1865, three months after the Lincoln assassination. His observations there include indications of what could be taken for granted even in frontier settlements almost two centuries ago:

When the pamphlet was printed, I sent a few copies to Mr. Lincoln, and in an accompanying note, I said to him, I was in doubt only as to one statement I had made—and that was as to whether or not he had read "Plutarch's Lives." I had trusted somewhat to my memory on the subject of his early reading; and while I was not certain he had enumerated this book among those he had read in his boyhood, yet as I had grown up in about such a settlement of people as he had in Indiana, and as I had read Plutarch in my boyhood, I presumed he had had access to it also. If I was mistaken in this supposition, I said to him, it was my wish that he should at once get a copy, and read it, *that I might be able to testify as to the perfect accuracy of the entire sketch.* Mr. Lincoln did not reply to my note, but I heard of his frequent humorous allusions to it.²³⁶

A historian informs us that "on April 17, 1862, one of the books borrowed by the Executive Mansion [from the Library of Congress] was *Plutarch's Lives.*"²³⁷

²³⁵ SCRIPPS, LIFE OF LINCOLN, *supra* note 230, at 12.

²³⁶ *Id.* at 14.

²³⁷ *Id.* at 37 n. 21.

iii.

I will say more further on about how Scripps used the Lincoln autobiographical sketch.²³⁸ But, first, here is how Lincoln's 1860 sketch was subdivided by an editor upon its being reprinted in 1913 (I have added the numbering):

1. Ancestry (pp. 124-25)
2. Homes in Kentucky and Indiana (pp. 125-27)
3. Schooling (p. 127)
4. A Trip to New Orleans (pp. 127-28)
5. Removal to Illinois (pp. 128-29)
6. A Clerk in a Store and Mill (pp. 129-30)
7. Enlists as a Soldier (pp. 130-31)
8. Keeps a Store (pp. 131-32)
9. Elected to the State Legislature (pp. 132-34)²³⁹
10. Elected to Congress (pp. 134-35)
11. His Votes in Congress Explained (pp. 135-36)
12. Law, Practice, Speeches, and Debates (pp. 136-37)²⁴⁰

We have noticed, that the Lincoln sketch begins with the observation, "Abraham Lincoln was born Feb. 12, 1809 etc." Lincoln, after this opening use of his full name, uses merely "A." (for Abraham) (along with "he", "the subject of this sketch", and "the present subject") to refer to himself. Then, about two-thirds of the way through the sketch, he switches to "Mr. L." (for Mr. Lincoln, which is kept to the end, along with "he").²⁴¹

Whether details matter in reading such a sketch can be debated, however much details do matter in reading the great statements intended by Lincoln for general circulation.²⁴² But we should at least notice that Lincoln switches to "Mr. L." just after he recalls his 1837 slavery-related protest in the Illinois General Assembly.²⁴³ It is at this point of his career that two significant events occur: his nomination by his party, still a minority party, for the position of Speaker in the Illinois

²³⁸ Two earlier autobiographical sketches had been prepared by Lincoln: a brief note for a Congressional Directory, and an 1850 first-person account for another biographer.

²³⁹ This includes the Dan Stone-Abraham Lincoln Protest of March 3, 1837. See 1 LINCOLN, *supra* note 7, at 74. See also *infra* note 268.

²⁴⁰ LIBRARY OF LITTLE MASTERPIECES (George Iles, ed.1913) (hereinafter LIBRARY).

²⁴¹ See 4 LINCOLN, *supra* note 7, at 65.

²⁴² See, e.g., ANASTAPLO, LINCOLN, *supra* note 1, at 197.

²⁴³ See 4 LINCOLN, *supra* note 7, at 65.

House of Representatives, and his marriage to Mary Todd of Lexington, Kentucky.²⁴⁴

Thus, the author's becoming "Mr. Lincoln" can be said to have begun with his bid for the Speakership and confirmed by his marriage. We may well wonder whether Lincoln himself was conscious of the circumstances of this shift in the way that he identifies himself.

Another detail—a rather odd detail—can usefully be noticed here before we touch upon the serious issues dealt with in Lincoln's sketch. This is his account of an episode in which he was involved while working on a boat owned by Denton Offutt that was being taken to New Orleans:

It was in connection with this boat that occurred the ludicrous incident of sewing up the hogs eyes. Offutt bought thirty odd large fat live hogs, but found difficulty in driving them from where [he] purchased them to the boat, and thereupon conceived the whim that he could sew up their eyes and drive them where he pleased. No sooner thought of than decided, he put his hands, including A. at the job, which they completed—all but the driving. In their blind condition they could not be driven out of the lot or field they were in. This expedient failing, they were tied and hauled on carts to the boat. It was near the Sangamon River, within what is now Menard county.²⁴⁵

It seems that John Nicolay, Lincoln's secretary that summer in Springfield, may have excluded this passage from the copy he made of the Lincoln autobiographical sketch that he sent to Scripps on Lincoln's behalf. In any event, Scripps did not use this incident. And, we have been told, this passage was also omitted from the Nicolay and Hay collection of the works of Abraham Lincoln years later, an omission evidently directed by Lincoln's son, Robert Todd Lincoln.²⁴⁶

It is not hard for us to understand why John Nicolay and Robert Todd Lincoln decided that this episode need not be widely circulated. The responses of those looking out for Lincoln's interest in this way can

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 63-65.

²⁴⁶ SCRIPPS, LIFE OF LINCOLN, *supra* note 230, at 63 n. 6.

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make us wonder, even more than we otherwise might, why Lincoln included this incident in the sketch he prepared for his campaign biographer.

Perhaps his opening reference to it as "the ludicrous incident of sewing up the hogs eyes" suggests that the incident had already become widely known. If so, Lincoln might have wanted to show that this foolishness had been his employer's idea, not his. Or was this incident supposed to remind people of Lincoln's considerable reputation as a frontier humorist? Or did he believe that the "human" touch should be put in here and there, lest people tire of the high-mindedness that had come to be expected in his speeches?²⁴⁷

There is also the possibility, of course, that Lincoln was suggesting that just as blinded hogs cannot be properly led, neither can deluded people.

iv.

We can now move from the trivial and the ludicrous to something much more sobering—an awareness of how much the most portentous events, events which can be of the utmost importance for a human being or for a country, may be grounded in chance.

Two such chance events are provided for us to notice in the Lincoln autobiographical sketch. For an assessment of Lincoln's career, it is critical to notice *when* they happened. The first depends upon Lincoln's few months of service in the Black Hawk War of 1832; the second depends upon the repeal of the Missouri Compromise.²⁴⁸

First, we have the Black Hawk war. Lincoln had, in July 1831, "stopped indefinitely, and, for the first time, as it were, by himself, at New-Salem, [Illinois]. . . . Here he rapidly made acquaintances and friends."²⁴⁹ Unfortunately, his employer's business was failing, jeopardizing the young Lincoln's ability to remain in New Salem. It was then that the Black Hawk War of 1832 broke out:

A[braham] joined a voluntary company, and to his own surprize, was elected captain of it. He says he has not since had any success in life which gave him so much

²⁴⁷ Compare, in Plutarch's *Lives*, the ostracism of "Asistides the Just."

²⁴⁸ See *supra* text accompanying notes 16-17, *infra* text accompanying note 256-257.

²⁴⁹ 4 LINCOLN, *supra* note 7, at 64.

satisfaction. He went the campaign, served near three months, met the ordinary hardships of such an expedition, but was in no battle. He now owns in Iowa, the land upon which his own warrants for this service, were located.²⁵⁰

I find it most remarkable that Lincoln could say, a quarter century later, that he had not had, since his surprise election as captain of a volunteer company, "any success in life which gave him so much satisfaction." This is said by a man who had since then served several terms in the State Legislature and a term in Congress, who was believed by many to have bested the formidable Stephen A. Douglas in nationally-publicized debates, and who was now the candidate for President with the best prospects of winning.²⁵¹

His electoral success with the company of volunteers, made up for the most part, of people he had become acquainted with during his first year in New Salem, evidently taught the young Lincoln that he was capable of earning the respect and securing the support of others. And thus Lincoln's political career begins, which he then describes:

Returning from the [Black Hawk] campaign, and encouraged by his great popularity among his immediate neighbors, he, the same year, ran for the [State] Legislature and was beaten—his own precinct, however casting it's votes 277 for and 7, against him. And this too while he was an avowed [Henry] Clay man, and the precinct the autumn afterwards, giving a majority of 115 to Genl. [Andrew] Jackson over Mr. Clay. This was the only time A[braham] was ever beaten on a direct vote of the people. He was now without means and out of business, but was anxious to remain with his friends who had treated him with so much generosity, especially as he had nothing elsewhere to go to.²⁵²

²⁵⁰ *Id.*

²⁵¹ Lincoln also records his satisfaction in his autobiographical sketch of the year before. One can wonder what Mrs. Lincoln thought of her husband's assessment of what had given him the most "satisfaction."

²⁵² 4 LINCOLN, *supra* note 7, at 64-65. On the vote of the 1858 Senate race, see *supra* note 192 and accompanying text.

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Lincoln continues to hold to his bosom, so to speak, the 277 votes from his precinct, confirming thereby the revelation implicit in his surprise election as Captain of Volunteers.²⁵³

Had the Black Hawk War not come when it did, there is "no telling" where Lincoln would have ended up or what he would have done. We can see here both the role of chance and the limits of history, for there can be "no telling" what might have happened if this or that had been even slightly different. Since Lincoln "had nothing elsewhere to go to," he worked at several jobs to keep "body and soul together" until he could capitalize upon his popularity among his generous neighbors. Lincoln's account records the launching thereafter of his professional career:

The election of 1834 came, and he was then elected to the Legislature by the highest vote cast for any candidate. Major John T. Stuart, then in full practice of the law, was also elected. During the canvass, in a private conversation he encouraged A[braham] to study law. After the election he borrowed books of Stuart, took them home with him, and went at it in good earnest. He studied with nobody. He still mixed in the surveying to pay board and clothing bills. When the Legislature met, the law books were dropped, but were taken up again at the end of the session. He was re-elected in 1836, 1838, and 1840. In the autumn of 1836 he obtained a law license, and on April 15, 1837 removed to Springfield, and commenced the practice, his old friend, Stuart taking him into partnership.²⁵⁴

It was clear by now that the twenty-eight-year-old Lincoln would be able to make something of himself. On January 27, 1838, he delivered his first memorable address, the Springfield Lyceum Speech on the perpetuation of our political institutions.²⁵⁵

That Lincoln was able to make the decisive contribution he did to the perpetuation of those institutions depends upon the second chance

²⁵³ I am reminded of Richard J. Daley's license plates, which recorded the number of votes that he received in Chicago upon his first election as Mayor. Mrs. Daley, I have heard, had the address of their house on *her* license plates.

²⁵⁴ 4 LINCOLN, *supra* note 7, at 65. See also *infra* note C-2 and accompanying text.

²⁵⁵ See 1 LINCOLN, *supra* note 7, at 108. See also *supra* note 126 and accompanying text; *supra* note 153.

event to which I have referred: the repeal of the Missouri Compromise, especially the timing of that repeal. This is the way Lincoln put it:

In 1854, his profession [as a lawyer] had almost superseded the thought of politics in his mind, when the repeal of the Missouri Compromise aroused him as he had never been before.²⁵⁶

Lincoln does not need to say more than this in his autobiographical sketch: Scripps could be counted on to develop, which he did at length, what that repeal meant to the country (with its critical shift in the status of slavery), to Stephen Douglas who helped engineer the repeal, and to the political fortunes of Lincoln.²⁵⁷ The *Dred Scott* decision three years later confirmed for Lincoln and those of like mind what the status of slavery was to be if the Republican Party did not soon take charge of the national government.²⁵⁸

If all this had happened a decade earlier, Lincoln probably would not have yet been in the position to respond as he did; if it had happened a decade later, he probably would have been too long out of politics, if not also too old, to develop the campaign for the Presidency between 1854 and 1860.²⁵⁹

I have said that such dependence upon chance for the most important things that happen to us can be sobering, especially when one notices in one's own life how much the most important things, for good and for ill, have depended upon chance. One can even wonder what there is to be said about fate in these matters.²⁶⁰ This bears upon the fascination for us, over millennia, of the Oedipus story.²⁶¹

v.

We can now return to the autobiographical sketch of June 1860, noticing that relatively little has to be said there, for Scripp's use, about slavery. The significance of the reference to the repeal of the Missouri

²⁵⁶ 4 LINCOLN, *supra* note 7, at 67. See *supra* notes 16, 17, and 55.

²⁵⁷ See *supra* notes 11, 14, 49, and 164.

²⁵⁸ See *supra* note 55.

²⁵⁹ Timing, in these matters, can be decisive. It has long seemed to me that if the South had attempted to secede twenty years earlier, it probably would have succeeded; if it had attempted to secede twenty years later, it probably would have been fairly easily subdued.

²⁶⁰ See, e.g., George Anastaplo, *What is Still Wrong with George Anastaplo? A Sequel to 366 U.S. 82* (1961), 35 DEPAUL L. REV. 551 (1986).

²⁶¹ See, e.g., Anastaplo, *On Trial*, *supra* note 114, at 830.

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Compromise is amply developed in much of the material otherwise available to Lincoln's biographer.

Here, as elsewhere, mere references in the Lincoln sketch suffice which can be dealt with by Scripps in a reliably partisan manner. Thus, the concluding paragraph of the sketch is intended to counter the charge being made by Democrats that Lincoln had, in his criticism of the *Dred Scott* decision, reneged on an 1856 promise to abide by what the Supreme Court said about the status of slavery in the Territories of the United States.²⁶²

There is also a comment in passing that the Lincoln family left Kentucky in 1816 "partly on account of slavery."²⁶³ Scripps makes considerable use of what may be implied here, indicating again and again that one of the massive evils of slavery is that it degrades the labor of the enterprising poor, especially the Europeans who had been swelling the ranks and increasing the power of the Free States even since the turn of the century.²⁶⁴ This argument could be accompanied by the insistence that slavery was impoverishing the South.²⁶⁵

We can see, in how Lincoln sketches out the slavery issues in his memorandum for Scripps, how carefully a Northern politician had to move in order to remain viable as a *national* candidate. Both Stephen Douglas's "don't care" policy with respect to the Territories and the abolitionists' war on slavery wherever it was (dramatized by John Brown's raid the year before) had to be repudiated by Lincoln.²⁶⁶ He must have thought that his safest and most responsible course was to reaffirm the position taken by him and another member of the Illinois General Assembly in 1837 in a "protest" which he incorporated in the sketch prepared for Scripps.²⁶⁷ The 1837 statement is clear about the "injustice and bad policy" of slavery.²⁶⁸ Thus I observe, in my *Abraham Lincoln* book:

[C]ritical to Lincoln's approach to slavery, anticipated in [the] 1837 Protest, is the opinion that the spread both of

²⁶² See 4 LINCOLN, *supra* note 7, at 67.

²⁶³ *Id.* at 61.

²⁶⁴ See e.g., 8 LINCOLN, *supra* note 7, at 150-51.

²⁶⁵ This was argued without considerable publicity by Hinton Rowan Helper. See *supra* note 196.

²⁶⁶ See *supra* text accompanying note 196.

²⁶⁷ See 4 LINCOLN, *supra* note 7, at 65.

²⁶⁸ See 1 LINCOLN, *supra* note 7, at 74. See also ANASTAPLO, LINCOLN, *supra* note 1, at 128-29.

abolition doctrines and of slavery should be firmly discouraged if the Union was to continue, thereby permitting the United States to be someday the true land of liberty envisaged by its founders. Lincoln shows us, here and elsewhere, what the principled man of law is both limited by and capable of.²⁶⁹

Lincoln, by reaffirming in 1860 his 1837 statement, which he might have been primarily responsible for drafting, attempts to reassure "law and order" men, in both the North and South, that he is a moderate on the slavery issue, content to be guided by a policy he had announced a quarter of a century before.

Very little is said in the 1860 autobiographical sketch about the evils of slavery. Lincoln obviously did not want to rock the Ship of State when the South was threatening Secession in the event of a Republican victory in the impending Presidential election. Indeed, one might even wonder whether Lincoln intended to signal to the South that he appreciated the problems they confronted in dealing with the huge population of those of African descent that they were obliged to deal with. Such signaling may be seen in the details he provides about family connections with the South over several generations.²⁷⁰

Similar signaling may be seen in the curious account of an encounter on the river, an encounter which Scripps makes use of:

When he was nineteen, still residing in Indiana, he made his first trip upon a flat-boat to New-Orleans. He was a hired hand merely; and he and a son of the owner [Allen Gentry, son of James Gentry], without other assistance, made the trip. The nature of part of the cargo-load, as it was called--made it necessary for them to linger and trade along the Sugar coast--and one night they were attacked by seven negroes with intent to kill and rob them. They were hurt some in the melee, but succeeded in driving the negroes from the boat, and then "cut cable" "weighed anchor" and left.²⁷¹

²⁶⁹ See ANASTAPLO, LINCOLN, *supra* note 1, at 130.

²⁷⁰ See 4 LINCOLN, *supra* note 7, at 60-62.

²⁷¹ *Id.* at 62. On the Gentry Family in Indiana, see ANASTAPLO, LINCOLN, *supra* note 1, at 139-45.

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This kind of account might have been intended to assure "law and order" men everywhere that Lincoln would not be dangerously sentimental in his treatment of race relations.²⁷²

How did Lincoln "really" feel about people of African descent? Certainly, he became more sensitive over the years in how he talked about them. And he did manage to establish a remarkable relation with Frederick Douglass, who came to speak of Lincoln in the warmest terms.²⁷³ One can be reminded here of President Lyndon Johnson who, however dubious his way of talking could be in these matters, did guide the epoch-making civil rights bills through Congress in 1964 and who nominated for the Supreme Court someone he wanted to be, in appearance, unmistakably African in his origins.²⁷⁴

Perhaps the most telling evidence of Lincoln's deep-rooted opposition to slavery is provided by the South. The pro-slavery leaders in the Slave States were convinced, no matter how Lincoln temporized and attempted to reassure them, that his election meant the beginning of the end of slavery in the United States. In this, at least, those often sadly misguided leaders were correct.²⁷⁵

vi.

Perhaps the ultimate threat to slavery evident in Lincoln's autobiographical sketch of 1860 is the ample testimony it provides of the economic and social opportunities promoted by the American dedication to equality. This sketch suggests what someone of talent and energy can make of his life if he should insist upon applying himself. This can mean, among other things, a high rate of mobility as one adjusts to changing circumstances.²⁷⁶

The history of the extended Lincoln family was connected, one way or another, with one-fifth of the States in the Union at that time.

²⁷² Perhaps this is suggested also in the report that his grandfather had been killed by Indiana and that he himself had volunteered for the Black Hawk War. See 4 LINCOLN, 4, *supra* note 7, at 61-64.

²⁷³ For a discussion of Abraham Lincoln and Frederick Douglass, see ANASTAPLO, LINCOLN, *supra* note 1, at 363. See also *infra* Section III of Appendix B.

²⁷⁴ See, e.g., W.W. Rostow, *Lyndon Johnson*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1022 (Leonard W. Levy et al. eds., 1986).

²⁷⁵ Compare LERONE BENNET JR., FORCED INTO GLORY: ABRAHAM LINCOLN'S WHITE DREAM (2000). See *supra* text corresponding to note 215, *infra* text corresponding to note 311. See also *infra* note B-15.

²⁷⁶ See 4 LINCOLN, *supra* note 7, at 62-65.

Lincoln himself experimented with a dozen or more callings before settling into politics and law. This experimentation allows Lincoln to be regarded as the principle-of-equality personified. *Liberty* may also be seen in his mobility, but, in his time, people may have depended more upon *equality* to make the most of their lives. Besides, it should be remembered, Southern slave-holders sometimes made as much of liberty as did Northern abolitionists.²⁷⁷ The *liberty* of John Locke, it can be said, needed to be tempered, or humanized, by the *equality* of Jean-Jacques Rousseau.²⁷⁸

Lincoln himself was proud of his humble origins--or rather, he was proud of his rise from humble origins. His obvious accomplishments mean even more because he made so much with the very little he had been provided in worldly privileges. Any popular resentment of his having risen above the many was likely to be tempered by his repeated acknowledgment of those who helped him in his career. The gratitude he exhibited toward those who advanced his interests probably contributed to the enthusiastic support he received from loyal well-wishers again and again, not least during the maneuverings that led to his being nominated for President in Chicago in May 1860.²⁷⁹

No doubt, too much can be made today of Lincoln's career, especially when systemic distortions seem to keep hardworking and talented people from enjoying a decent life. This kind of optimism can even be characterized, as James Agee did in 1939, as "abelincolnism."²⁸⁰ Even so, there is still enough openness in the American system to permit the most exalted successes to be built upon the most humble origins, as may be seen in the careers of at least a half dozen Presidents in the Twentieth Century.²⁸¹

Even so, the account Lincoln provides of his own career suggests that economic resources may not be the most critical factor in developing

²⁷⁷ See *supra* note 209.

²⁷⁸ On Locke, see GOLDWIN, *supra* note 132, at 476. On Rousseau, see HISTORY OF POLITICAL PHILOSOPHY 559 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

²⁷⁹ See *supra* note 226. See also *supra* Part IV.

²⁸⁰ See JAMES AGEЕ, THREE TENANT-FAMILIES: LET US NOW PRAISE FAMOUS MEN 7 (1939).

²⁸¹ For an example of the sanctification of mobility in the United States, see WALL STREET JOURNAL Feb. 2, 2000, at B17.

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a proper educational, as well as social, system. This bears upon how we may approach our own problems today.²⁸²

Vital to a proper use of one's talents is the availability of challenges which permit one to develop a justified self-confidence. It must have been most reassuring for Abraham Lincoln that he knew that he had been able, for a generation, to contend successfully with Stephen Douglas, who was obviously one of "the great men" of the country. He had, again and again, taken the measure of that man--and they both knew it.²⁸³

vii.

In the final analysis, Lincoln was more politic than Douglas; he was able to unify his party behind him for the 1860 Presidential campaign, while Douglas was not able to do with *his* party. Lincoln's political astuteness may be seen not only in how he presented his origins and career, but also in how he avoided various pitfalls.

Thus, Lincoln is careful to explain what he did and did not do and say with respect to the Mexican War: he insists that he always supported the soldiers and their families, even as he opposed that war as unconstitutionally and unjustly begun by the Polk Administration.²⁸⁴ He places the emphasis upon the Polk Administration's desire to "divert public attention from the surrender of 'Fifty-four, forty, or fight' to Great Britain, on the Oregon boundary question."²⁸⁵ He says nothing about any desire among some Southerners to acquire new territories for the expansion of slavery.²⁸⁶ Here, as elsewhere in his sketch, Lincoln seems not to want to emphasize, any more than he already has, the differences between his party and the South with respect to the slavery issue.

²⁸² See, e.g., George Anastaplo, *Samplings*, 27 POL. SCI. REVIEWER 346, 349 (1998). See also Anastaplo, *Bible*, *supra* note 232 at 753-57.

²⁸³ See *supra* Part V.

²⁸⁴ See 4 LINCOLN, *supra* note 7, at 66. There are interesting problems here for anyone assessing the actions of Lincoln's own administration, especially during the first year of the Civil War.

²⁸⁵ See *id.* One can be reminded of the conclusion of Shakespeare's *Henry IV* plays. See Anastaplo, *Law & Literature and Shakespeare: Explorations*, OKLAHOMA CITY U. L. REV., Part 10 (forthcoming).

²⁸⁶ Scripps makes more of this in his campaign biography. However, it should be remembered that Southerners such as Alexander H. Stephens sided with Lincoln on this issue in Congress. See, e.g., ANASTAPLO, LINCOLN, *supra* note 7, at 308-09 n. 386. See also *infra* note 342.

After all, the immediate problem he can anticipate facing as President is not what to do about slavery but rather what to do in order to keep the South from trying to secede, however troublesome such questions as what to say and to do about the enforcement of fugitive-slave laws and about any exercises by slaves of the right of revolution may be.²⁸⁷ Lincoln would say much more about preserving the Union in his First Inaugural Address in March of the following year than he said in this June 1860 autobiographical sketch. He probably considered it prudent, during the presidential campaign, not to dramatize the possibility of disunion following upon a Republican victory.²⁸⁸ By Inauguration Day, however, a half-dozen Southern States had announced they had seceded—and so the issue had to be addressed squarely.²⁸⁹

Among the items provided by Lincoln which Scripps did not draw upon in his campaign biography was, along with the “ludicrous incident” with the hogs, the observation, “The family were originally quakers, though in later times they have fallen away from the peculiar habits of that people.”²⁹⁰ Was it Quakerism with its pacifism, the abandonment of that ancient faith, or both, which Scripps thought it best not to say anything about? The same considerations may bear upon Scripps’s omission of the episode revealing Lincoln’s revulsion upon his killing a wild turkey.²⁹¹ Someone vigorous and steady had to be presented for the Presidency in what threatened to be quite troubling times. Perhaps between the lines of the Lincoln account could be read assurances that he had been astute and ambitious enough to advance himself even as he served others in the rough-and ready arena of American politics.

One of the most remarkable accomplishments of Abraham Lincoln was that he retained the appearance of having the common touch even as he battled his way (both in politics and in war) to the top. It does seem to require a most uncommon skill to be able to do this over decades. His success is reflected in how both he and George Washington could be spoken of by a perceptive editor introducing, in 1913, the autobiographical sketch that we have been reviewing on this occasion:

²⁸⁷ See, e.g., Anastaplo, *John Quincy Adams*, *supra* note 63, at 146-50.

²⁸⁸ See, e.g., ANASTAPLO, LINCOLN, *supra* note 1, at 177.

²⁸⁹ See *id.* at 177, 185. See also Part 7.

²⁹⁰ 4 LINCOLN, *supra* note 7, at 60-61.

²⁹¹ See *id.* at 62.

While Washington stands highest in the veneration of the American people, Lincoln is first in their affections. Washington, indeed, was as much the last and best of our kings as the first of our presidents. His elevation of mind, his dignity, and reserve, keep him far above the plane of a comrade. But Lincoln was one of ourselves: he was always ready to chat with a neighbour about constitutional reform, and then press on to the attractions of a county fair, or tell a mirthful story. He was one of the plain people: he heartily liked them, they returned the feeling with usury.²⁹²

Addendum

Conclusion of the Scripps Biography²⁹³

The man whose history we have thus briefly traced now stands before the country the chosen candidate of the Republican party for President of the United States. Commencing life under circumstances the most discouraging, we have seen him courageously and manfully battling his way upward from one position of honor and responsibility to another, until he now stands in an attitude to place his foot upon the very topmost round of honorable fame. He presents in his own person the best living illustration of the true dignity of labor, and of the genius of our free American institutions, having been elevated through their instrumentality from poverty and obscurity to his present distinguished position.

Perhaps no more appropriate conclusion can be given to this sketch of Mr. Lincoln's life, than the following, relative to his personal appearance, habits, taste, &c., which is copied from the *Chicago Press and Tribune*, and for the correctness of which, in every particular, we can fully vouch:

²⁹² See LIBRARY, *supra* note 240, at 123.

²⁹³ SCRIPPS, LIFE OF LINCOLN, *supra* note 230, at 163-66. The sketch from the *Chicago Press and Tribune*, of May 23, 1860, which makes up most of this Conclusion, is believed also to have been written by Scripps himself. See *id.*, at 163 n.1. The introductory paragraph of the *Press and Tribune* sketch read, "Ten thousand inquiries will be made as to the looks, the habits, taxes and other characteristics of Honest Old Abe. We anticipate a few of them." *Id.* Other omissions from the *Press and Tribune* sketch are included by me in brackets with appropriate adjustments in punctuation. *Id.*

"Mr. Lincoln stands six feet four inches high in his stockings. His frame is not muscular, but gaunt and wiry; [his arms are long, but not unreasonably so for a person of his height; his lower limbs are not disproportioned to his body.] In walking, his gait, though firm, is never brisk. He steps slowly and deliberately, almost always with his head inclined forward, and his hands clasped behind his back. [In matters of dress he is by no means precise. Always clean, he is never fashionable; he is careless but not slovenly." In manner, he is remarkably cordial, and at the same time simple. His politeness is always sincere, but never elaborate and oppressive. A warm shake of the hand and a warmer smile of recognition are his methods of greeting his friends. At rest, his features, though they are those of a man of mark, are not such as belong to a handsome man; but when his fine, dark-grey eyes are lighted up by any emotion, and his features begin their play, he would be chosen from among a crowd as one who had in him not only the kindly sentiments which women love, but the heavier metal of which full-grown men and Presidents are made. His hair is black, and though thin, is wiry. His head sits well on his shoulders, but beyond that it defies description. It nearer resembles that of Clay than Webster's, but is unlike either. It is very large, and phrenologically well proportioned, betokening power in all its developments. A slightly Roman nose, a wide-cut mouth, and a dark complexion, with the appearance of having being weather-beaten, complete the description.

"In his personal habits, Mr. Lincoln is as simple as a child. He loves a good dinner, and eats with the appetite which goes with a great brain, but his food is plain and nutritious. He never drinks intoxicating liquors of any sort, [not even a glass of wine.] He is not addicted to tobacco in any of its shapes. He was never accused of a licentious act in his life. He never uses profane language. [A friend says that once, when in a towering rage in consequence of the efforts of certain parties to perpetrate a fraud on the State, he was heard to say, "They shan't do it, d--n 'em!" but beyond an expression of that kind, his bitterest feelings never carry

him.] He never gambles; [we doubt if he ever indulges in any game of chance.] He is particularly cautious about incurring pecuniary obligations for any purpose whatever; and, in debt, he is never content until the score is discharged. We presume he owes no man a dollar. He never speculates. The rage for the sudden acquisition of wealth never took hold of him. His gains from his profession have been moderate, but sufficient for his purposes. While others have dreamed of gold, he has been in pursuit of knowledge. In all his dealings, he has the reputation of being generous but exact, and, above all, religiously honest. He would be a bold man who would say that Abraham Lincoln ever wronged a man out of a cent, or ever spent a dollar that he had not honestly earned. His struggles in early life have made him careful of money, but his generosity with his own is proverbial. He is a regular attendant upon religious worship, and, though not a communicant, is a pewholder and liberal supporter of the Presbyterian Church in Springfield, to which Mrs. Lincoln belongs. He is a scrupulous teller of the truth—too exact in his notions to suit the atmosphere of Washington, as it now is. His enemies may say that he tells Black Republican lies; but no man ever charged that, in a professional capacity, or as a citizen dealing with his neighbors, he would depart from the Scriptural command. At home, he lives like a gentlemen of modest means and simple tastes. A good-sized house of wood, simply but tastefully furnished, surrounded by trees and flowers, is his own: there he lives, at peace with himself, the idol of his family, and for his honesty, ability, and patriotism, the admiration of his countrymen.

“If Mr. Lincoln is elected President, he will carry but little that is ornamental to the White House. The country must accept his sincerity, his ability, and his honesty, in the mould in which they are cast. He will not be able to make so polite a bow as Franklin Pierce, but he will not commence anew the agitation of the slavery question by recommending to Congress any Kansas-Nebraska Bills. He may not preside at the Presidential dinners with the ease and grace which distinguished the ‘venerable public functionary,’ Mr.

Buchanan; but he will not create the necessity for a Covode Committee and the disgraceful revelations of Cornelius Wendell. He will take to the Presidential Chair just the qualities which the country now demands to save it from impending destruction—ability that no man can question, firmness that nothing can overbear, honesty that never has been impeached, and patriotism that never despairs.”

VII. The Second Inaugural Address²⁹⁴

The rarer action is in virtue than in vengeance

*Prospero*²⁹⁵

i.

Perhaps the most obvious collaboration between religion and the law among us is the use made of oaths in inauguration ceremonies, in courts of law, and in other such transactions. Religion-related controversies in the law (with an insistence upon the separation of church and state) are many, illustrated by the litigation we have seen about monogamy, flag salutes, governmental aid to church-sponsored schools, prayers in public schools, abortion, gambling, and the medical treatment of children.²⁹⁶

Even more serious are the uses of religion which help shape the political life, and hence the laws, of the country. Routine political discourse often draws upon religious teachings and language, more in some times or places than in others, and tailored to the inclinations of particular audiences. The speaker's explicitness in these matters may be very much affected, as it should be, by the circumstances.

The development of religious sentiments in political discourse in this country has been particularly distinguished in the speeches of Abraham Lincoln, speeches which can conjure up the spirit of John

²⁹⁴ A talk given at the Fall Roundtable Meeting, Seventh Circuit, American Bar Association—Law Students Division, Chicago, Illinois, September 16, 2000.

²⁹⁵ WILLIAM SHAKESPEARE, *THE TEMPEST*, Act 5 sc. 1 lines 27-28. On *The Tempest*, See ANASTAPLO, *AMERICAN MORALIST*, *supra* note 3, at 179.

²⁹⁶ See, e.g., George Anastaplo, *Church and State: Explorations*, 19 *LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL* 61 (1987). See also ANASTAPLO, *AMENDMENTS*, *supra* note 2, at 47.

Bunyan's *The Pilgrim's Progress*, a book which is rarely read these days.²⁹⁷ I have had occasion to suggest:

Lincoln never lost sight of the reliance that government places upon the religious sentiment of its people. Even more vital—and this is seen in several of his proclamations as well as in the Gettysburg Address and the Second Inaugural Address—religious passions may be needed to provide the transcendent supports that the essentially temporal and temporary political enterprise seems to require. This is especially so in a continent-wide popular government, where glory cannot be depended upon either to sustain or to restrain mass action and where political tradition may be sapped by egalitarian doctrines.

The excellent man must guide and shape. He is among the relatively few who can give an enduring grace and meaning to the deeds and even the aspirations of human beings. Lincoln did so by taking the materials at hand and devoting them to a restatement, and hence a refounding, of the American creed. Perhaps because of its aristocratic accents and its historical associations, he seems to have seen the Declaration of Independence as somewhat compromised in his time. Its doctrines, especially what he regarded as its most immediately vital doctrine with respect to equality, had to be adapted to his circumstances and then reinforced by the use of the religious fervor and imagery that the authors of the Declaration had not seen it as possible or fit or necessary to use.

The Declaration of Independence does invoke divinity—but it is not simply the God of Israel or the God of the Christians. Instead . . . there is to be found in the Declaration the molding of God to political institutions; the divine order of the universe conforms to the Trinitarian separation of powers of eighteenth-century American political thought. Lincoln, on the other hand, recruited the God of the Bible for a great struggle. This is reflected in the Gettysburg Address even in his

²⁹⁷ See *supra* notes 231-237 and accompanying text.

"under God" underpinning to the final resolve, the great oath that the embattled American people is, in effect, to take. In his thought, in fact, the political history of the nation is seen as somehow conforming to, if not duplicating and perhaps even replacing, the spiritual or divine history of the world.

One can wonder about the circumstances that permitted and entitled Lincoln to employ the imagery and draw upon the passions that he did. A century earlier such an endeavor might have been regarded by some as blasphemous and by others as sentimental and irrelevant; a century after him, it would have been dismissed as either affected or anachronistic. The religious devotion of his people, while still strong, was already weakening: not too strong to resent an exploitation of religious sentiment for political purposes; not too weak to make such a dedication of religious sentiment ineffective. In any event, the passions aroused by a terrible fratricidal struggle proved to be such as to permit, perhaps even to compel, the public identification of the entire experience with the Passion.²⁹⁸

To this can be added these comments, first made by me in the 1970s:

One must wonder what it is that the contemporary statesman has to draw upon comparable to the materials Lincoln had at hand in the Declaration of Independence, Shakespeare, and the Bible. Do we have (of these) primarily the Declaration, and a somewhat neglected Declaration at that, to serve as a popular underpinning of our venerable Constitution? Lincoln, on the other hand, could still depend upon a substantial uniformity in the literary tastes and in the orthodox religious sentiments of his community—tastes and sentiments (imbedded in his language, as they still are in some degree in ours) which the respectable literature and the influential intellectuals of his day did not openly challenge. . . .

²⁹⁸ ANASTAPLO, LINCOLN, *supra* note 1, at 240-41.

We may detect these basic problems in our current church-and-state concerns. Are we most explicitly concerned *today* about “the separation of church and state” because it is an epoch when the blending of these two by the creative statesman is much more difficult than it has ever been among us? The particular legislative measures and judicial decisions that have aroused controversy among us in recent decades may relate merely to essentially desperate skirmishes in a battle already over. One faction . . . has a victory that it may not yet know it has won; the other has suffered a defeat that it may be futilely trying to reverse. The victor overestimates the strength of political institutions; the vanquished underestimates the relentless skepticism of modern relativism. . . .

The problem of “church and state” may have become so acute because we are at last in an era when the relation between the “state” and the “church” is coming to reflect more than formal or legal separation. What had once been taken for granted—a seemingly inexhaustible quarry of religious sentiment independent of government control or concern—has had to be abandoned. The attempt to encourage by law what had once been produced by the community at large raises far-reaching issues of public policy and constitutional law. . . .

No doubt, the Gettysburg Address will continue to move men so long as the English language is read. But one must wonder whether the Address can continue to have its intended effect now that its theological foundations have been worn away. Even so, is not the Gettysburg Address likely to remain more captivating to moderns than Lincoln’s Second Inaugural Address, in that it is less explicitly theological and more obviously political than [the inaugural address?]²⁹⁹

²⁹⁹ *Id.* at 349-50 n.494.

It is understandable, therefore, that Frederick Douglass could say of Lincoln's Second Inaugural, "The address sounded more like a sermon than like a state paper."³⁰⁰

ii.

Certainly, the most memorable passages of the Second Inaugural Address, found in its second half, do sound like a sermon. The opening paragraphs of the address are much more political. The opening words³⁰¹ anticipate, ever so quietly, the religious sentiments found in the second half.

Lincoln sets the scene at the outset: four years of devastating war have been endured.³⁰² There is no need to explain, unlike at the 1861 Inauguration, what the policy of the Administration would be.³⁰³ The critical fact in the previous Inauguration had been the prospect of war. The policies of the contending parties on that occasion are now described by Lincoln. There was then great uncertainty and foreboding, with the Administration determined to do what it could to avert war and, failing that, to fight the war so as to restore the constitutional relations among the States.

In 1861, Lincoln had been inclined to make much more of the cause of Union, far less of the status of slavery.³⁰⁴ But now that the war is nearly over, he can point to slavery as the root cause of the war:

³⁰⁰ Frederick Douglass, *Narrative of the Life and Times of Frederick Douglass*, in FREDERICK DOUGLASS, *AUTOBIOGRAPHIES* 801 (Henry Louis Gates, ed. 1994).

³⁰¹ "At this second appearing" 8 LINCOLN, *supra* note 7, at 332.

³⁰² The losses during the war have been summed up thus:

In the proportion of casualties to participants the Civil War was the costliest U.S. war, with casualties totaling between 33% and 40% of the combined Union and Confederate forces. Union dead, 339,528 (including 110,070 killed in battle or died from wounds); wounded, 275,175, Confederate dead, 258,000 (94,000 in battle or from wounds); wounded, 100,000 minimum.

Richard B. Morris, ed., *ENCYCLOPEDIA OF AMERICAN HISTORY* (1961), p. 245. Compare *Casualties in Principal Wars of the U.S.*, *WORLD ALMANAC* (1995), p. 163.

³⁰³ That policy was further developed, after hostilities began, in Lincoln's July 4, 1861 speech to the Special Session of Congress. See ANASTAPLO, LINCOLN, *supra* note 1, at 177, 185.

³⁰⁴ See, e.g., *id.* at 183.

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One eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the Southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it.³⁰⁵

The reference to "colored slaves" reminds us of the special character of American slavery. It was race-based, unlike pre-modern (or ancient) slavery which tended to exploit prisoners of war. Race-based slavery took for granted that an enslaved family would continue thus in perpetuity, generation after generation.³⁰⁶

Historians since the Civil War have disagreed as to what that great struggle was "really" about, with economic, social, psychic, class, geographic, and other differences between North and South made much of. But here, in 1865, Lincoln testified, "All knew that this interest [slavery] was, somehow, the cause of the war."³⁰⁷ His use of the term "somehow" acknowledges, in effect, the sorts of things that the historians talk about. Still, differences with respect to slavery are identified by him as fundamental—and, after all, he *was* there.

Lincoln describes conflict narrowly, even technically: Southerners wanted to extend slavery; "the government claimed no right to do more than to restrict the territorial enlargement of it."³⁰⁸ It had been the dispute about permitting slavery in the Territories that had stirred American national politics for decades, as may be seen in the Missouri Compromise of 1820, the "Popular Sovereignty" and Kansas-Nebraska bill struggles of the 1850s, and the Lincoln-Douglas Debates of 1858.³⁰⁹ Even the United States Supreme Court had gotten into the controversy, hoping to settle it (and even to quiet thereby anti-slavery

³⁰⁵ 8 LINCOLN, *supra* note 7, at 332.

³⁰⁶ This may be compared to Biblical slavery, which was quite varied in its sources and usually much more restrained in its executions than Southern slavery could ever be. See *infra* text accompanying note 325.

³⁰⁷ 8 LINCOLN, *supra* note 7, at 332.

³⁰⁸ *Id.*

³⁰⁹ See *supra* notes 11, 14, 49, 164. See also *supra* text accompanying notes 256-257.

agitation) by issuing what turned out to be its explosive 1857 decision in the *Dred Scott* case.³¹⁰

The Administration's determination "to do no more than to restrict" the territorial enlargement of slavery was far more threatening to the South than Lincoln acknowledges here. The defenders of slavery believed, with Lincoln, that the confinement of slavery to where it was—a confinement that Lincoln's Republican Party insisted was within the constitutional powers of the national government to require—would eventually mean the end of slavery all over the United States, especially as the confined South lost its remaining power to protect slavery in the Senate. No matter what reassurances Lincoln gave, his election to the Presidency was regarded by the South as a threat to the immunity that slavery had enjoyed for some fourscore years from regulation by the national government. And so the dreadful attempt at Secession came.³¹¹

iii.

Once Lincoln had described the past, especially how things stood four years earlier, he could turn to what happened when the war came. Particularly significant is the fact that the magnitude of the war had been far greater than anyone had expected. Nor had it been expected that "the *cause* of the conflict might cease with, or even before, the conflict itself should cease."³¹² At the time of Lincoln's Second Inauguration, the war was continuing, although it was obviously winding down, but slavery itself had already been dealt a mortal blow. The Emancipation Proclamation, which took effect on January 1, 1863, had effectively liberated (*since then*) a large number of slaves, thereby imperiling the entire system of slavery.³¹³ In addition, by March 1865, the Thirteenth Amendment, totally abolishing slavery, had been proposed by the Congress to the States and was well on its way to ratification.³¹⁴

"Each looked for an easier triumph, and a result less fundamental and astounding," Lincoln observed—and, as if to suggest how astounding events had been, and perhaps why, he notices that both

³¹⁰ See *supra* note 55. See also *supra* text accompanying note 258.

³¹¹ See *supra* text corresponding to note 275. See also *infra* note B-15. On the Confederate Constitution of 1861, see ANASTAPLO, AMENDMENTS, *supra* note 2, at 125.

³¹² 8 LINCOLN, *supra* note 7, at 333.

³¹³ On the Emancipation Proclamation, see ANASTAPLO, LINCOLN, *supra* note 1, at 197.

³¹⁴ On the Thirteenth Amendment, see *id.* at 363. See also ANASTAPLO, AMENDMENTS, *supra* note 2, at 168.

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parties to this conflict "read the same Bible, and pray to the same God . . ." ³¹⁵ Lincoln adds, "The prayers of both could not be answered; that of neither has been answered fully." ³¹⁶ Before the Address ends, the President voices a prayer of his own: "Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away." ³¹⁷ Is prayer, we can wonder, a particularly fervent form of hoping?

Be that as it may, *this* prayer is answered, so far as it is concerned with the fighting itself. But it has taken a very long time, far more than a century, for the scourge of that war to pass away, if it *has* done so. ³¹⁸

iv.

One reason the scourge was as dreadful as it was is that the similarities between the parties, including in their religious sentiments, meant that each side would know and could deal with the other's strengths and weaknesses. In addition, a blow against the other was, in effect, also a blow against oneself. ³¹⁹

Lincoln had observed, "The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself . . ." ³²⁰ This is consistent with the character of a republican regime, one in which the people govern themselves far more than in any other regime. In order truly to govern themselves, the people have to know what is going on. But this also means that the scourge of war will have its full effect because a country's losses are known at once and fully. ³²¹

When similarities are as extensive as they were among Americans North and South, it can mean that differences are developed at a deeper level and hence more intensely, than they might otherwise be. At that deeper level were divergences as to the meaning of *liberty*.

³¹⁵ 8 LINCOLN, *supra* note 7, at 333.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See, e.g., George Anastaplo, *The O.J. Simpson Case Revisited*, 28 LOY. UNIV. CHI. L.J. 461, 489, 498 (1997). See generally George Anastaplo, "Racism," *Political Correctness, and Constitutional Law: A Law School Case Study*, 42 S. D. L. REV. 108 (1997).

³¹⁹ See ANASTAPLO, AMENDMENTS, *supra* note 2, at 1.

³²⁰ 8 LINCOLN, *supra* note 7, at 332. President Lyndon Johnson said much the same during the Vietnam War. See ANASTAPLO, MORALIST, *supra* note 3, at 228-29.

³²¹ The republican character of their regime is testified to by the reliance upon national elections both in 1862 and in 1864—that is, even in the middle of a great war. Compare the British practice of suspending general elections during a great war.

Each party, it should be remembered, said—and evidently believed—that *it* stood for liberty.³²²

Even the masters of slaves regarded themselves as champions of liberty, that liberty which is at the very foundation of Anglo-American constitutionalism. The liberty *they* stood for was that of being able to conduct their own affairs, and to retain the property that they had “gained by honest toil” (as one stirring song of the Civil War put it).³²³ Lincoln himself had questioned this kind of argument with his rebuke, “It may seem strange that any men should dare ask a just God’s assistance in wringing their bread from the sweat of other men’s faces . . .”³²⁴ The Southern response to this rebuke would have once drawn upon supposed natural differences between races as well as upon the Biblical toleration of slavery.³²⁵

The liberty to make such a response reminds us of the serious abuses which are risked when liberty *is* relied upon, as it has to be relied upon among us.

v.

Literally central to the Second Inaugural Address are the words, “Each looked for an easier triumph, and a result less fundamental and astounding.”³²⁶ That is, at the heart of Lincoln’s remarks is a recognition of the intermittent ignorance of the American people, something which is particularly challenging for any people that is determined to govern itself.

Lincoln was always conscious of the length of this address. A few weeks earlier he had spoken of it as about six hundred words in length. By the time he delivered it, it was seven hundred words.³²⁷ It can safely be assumed, therefore, that Lincoln was aware of what this address literally turned on: a confession of ignorance about very important, if not the most important, matters.³²⁸

³²² See, e.g., ANASTAPLO, LINCOLN, *supra* note 1, at 358-59. See also Appendix B.

³²³ See *infra* Section VI of Appendix B.

³²⁴ 8 LINCOLN, *supra* note 7, at 333.

³²⁵ See, e.g., ANASTAPLO, LIBERTY, *supra* note 51, at 221, 252. See also *supra* note 306.

³²⁶ 8 LINCOLN, *supra* note 7, at 333.

³²⁷ 703 words, it seems, depending on how one counts.

³²⁸ The central *sentences*, as distinguished from either words or lines, are the two sentences about slavery being somehow the cause of the war. Lincoln’s insistence upon precision may be seen in changes he made in the manuscript up to very end. with “Southern half”

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Does ignorance, especially about profoundly important things, promote piety and reliance upon divine providence? Certainly, fear and awe and a sense of mystery can do so. But, it can be argued, piety (if it does not degenerate into sentimentality) can promote understanding, permitting one to make sense of, or to see the sense in, the whole in a way that one would not otherwise be likely to do.³²⁹ An overarching order is thereby affirmed, which can, among other things, inspire religious respect for the law.

However ignorant Lincoln, along with others, had been in March 1861 about what would happen to the Union, he can speak with considerable confidence in 1865 about the working of divine providence in the affairs of the nation.³³⁰ God's providence is inferred from what has happened. Among the things that have happened is that both the profits derived over the centuries from slavery (in the North as well as in the South) and the blood shed by the slaves have been forcibly purged from the system. The offense of slavery was thus matched by the woe visited upon the offenders.³³¹

vi.

Lincoln reinforces what he says about the workings of divine providence by asking whether there can be discerned in what he has described "any departure from those divine attributes which the believers in a Living God always ascribe to Him."³³² However much of a reinforcement this question may be, it also seems to suggest a subtle distancing of himself from what is generally believed.

Certainly, Lincoln does not suggest that he has any special revelation to draw upon here. Rather, as I have indicated, he infers the divine purpose from what has happened for four years. Perhaps this kind of thinking helped him preserve his mental balance during an

becoming "Southern part" and "four thousand years" becoming "three thousand years." See *id.* at 333 n.2, n.3. In addition, the "world" became "all nations" at the very end of the Address. See *id.* at 333 n.4.

³²⁹ Compare Deuteronomy 4:6.

³³⁰ On Lincoln's Infidelity Handbill (1846), see ANASTAPLO, LINCOLN, *supra* note 1, at 66, 239, 245, 248, 301, 350-51. See also *infra* note 333.

³³¹ How do these calculations and assessments bear upon the claims made today for reparations to be paid to the descendants of slaves in the United States?

³³² 8 LINCOLN, *supra* note 7, at 333.

awful war, a war for which he himself could be considered, in part, personally responsible.³³³

We will probably never know for sure what Lincoln – or, for that matter, any notable prophet – really believed about divine providence.³³⁴ At the very least, it can be said, Lincoln used the language of providence as a way of talking about what he had discovered for himself upon contemplating the war, slavery, and the American regime. In reasoning about the natural order, could he not have seen what we can see about the likely consequences of the kind of slavery found in the South and acquiesced in (if not even depended upon) by the North?

Political discourse among the more prominent Founders in the 1770s and 1780s had not relied, as much as President Lincoln did, upon Biblical language and Christian theology. But, it can be said, circumstances were quite different in the 1860s, especially when the country was being shaken to its foundations in a way that it had not been shaken during the Revolutionary War and in the decades immediately thereafter.

A nationwide audience, unlike what might be expected from the audiences for earlier peacetime speeches in Illinois, is not likely to grasp properly the moral reasoning and the political judgments upon which the President relied. These require far more extensive arguments than are likely to be submitted to during so bloody a war. It may be reasonable in some circumstances, therefore, not to rely too much upon reasoning and the reasonable in guiding and reassuring fellow citizens who may not have the time, the capacity or the inclination to submit to the discipline needed for thinking things through properly. In such

³³³ This related, perhaps, to Lincoln's periodic melancholia, which may reflect intense yearnings that did not seem capable of fulfillment. Consider also the determinism referred to in his handbill in response to charges of infidelity. See *supra* note 330. Consider as well these observations by a contemporary psychiatrist:

It is amazing that with all his handicaps and disappointments, with his insecurity and feelings of inferiority, and with his bad marriage, family deaths, and subsequent severe depression, Abraham Lincoln became such a great man and such a great political leader. What would he have accomplished if he had not suffered so much? We can not answer this. Perhaps his afflictions themselves gave rise to the forces that counterbalanced them, to create what [L.P.] Clark called the political idealist. "The . . . blend" he suggested, "is as rare as perfect blade of Damascus steel."

ROY GRINKER SR., *HISTORICAL PERSPECTIVES ON DEPRESSION: DEPRESSION AND ABRAHAM LINCOLN* 11 (1979).

³³⁴ On prophecy, see Anastaplo, *Law, supra* note 232, at 521-30. See also *infra* note A-12.

circumstances, a kind of prophecy might prudently be substituted for political discourse.

vii.

Many, if not even most, readers of the Second Inaugural Address can accept the proposition that there is something deeply providential in how the war obliged Americans to pay, in treasure and in blood, for what had been exacted from slaves for more than two centuries.³³⁵ But Lincoln may hint at more than has been generally noticed.

His language may even be taken to suggest that it was also part of God's purpose that there should be such a war, with the offenses of slavery (for which both North and South were responsible, in different ways and in varying degrees) being themselves imposed upon Americans by God.³³⁶ After all, things could have been otherwise if, for example, the cotton gin had been invented decades later, or if electricity and modern power had been developed much earlier than they were.

A deep mystery is suggested here: Why was there American slavery at all, in the scale and with the consequences there have been? The English, for example, were not put through such a slavery-related trial as Americans endured, however much their slave traders may have contributed to what happened in North America. The War of Independence had been the somewhat natural culmination of the progress toward liberty and self-government long evident among the English-speaking peoples. The Civil War, on the other hand, can be understood as having been necessary to take this "project" even further, permitting a Union to be baptized, if not also purified, by blood and fire, thereby forging, or at least solidly confirming, a *nation* which could be truly special among the peoples of the earth, a nation which could become distinctive in combining traditional liberty with radical equality, both of which could be better grasped once the beguiling alternative of institutionalized slavery had been widely exploited and then decisively repudiated.

One major consequence of the Civil War is evident in what Lincoln does in the Second Inaugural Address, as he had done elsewhere: he uses *Union* and *Nation* interchangeably, the former being a

³³⁵ See *supra* notes 330-331 and accompanying text.

³³⁶ Compare Thomas Jefferson's attempt to hold the King of Great Britain responsible for American slavery. See ANASTAPLO, LINCOLN, *supra* note 1, at 272-73 n.44.

term which depends upon constitutional arrangements, the latter being a term which suggests natural affinities, but affinities which are grounded as well in the principles recognized in the Declaration of Independence.

Could these Civil War results have been gotten any other way? Do not the people of this country sense the specialness of the Civil War, providing as it does the defining, or critically redefining, moment of the grand American development? Furthermore, did Lincoln himself even come to believe that it was providential that the United States both had offended and had been redeemed the way it had? Is this implicit in his supposition "that American Slavery is one of those offences which, in the providence of God, must needs come"?³³⁷

viii.

This is a proposition that could not be more than hinted at—but it does seem consistent with the evident Lincolnian belief that an omnipotent divinity ordains the doings of mankind. An enduing, even ennobling, benefit for the United States can thus be suggested.

But what about the history and fate of the slaves who would have had to be used in such a divine plan? That is not Lincoln's primary concern on this occasion. But if his understanding of divine providence is applied to the Africans caught up in "the American project," must it then be argued that those people and their descendants had needed the soul-searing experiences to which they were subjected for centuries?³³⁸

Had this been somehow necessary and thus good for them? Or does the failure to account for *their* role in the Divine Plan suggest once again how much the Whites, North as well as South, failed to see these slaves as truly human? Perhaps how Lincoln would have spoken of and to those people depended upon another occasion, an occasion that would be more propitious if the contending parties in the Civil War could be reconciled.

Perhaps, also, the slaves once freed could begin to develop among themselves, especially as they came to compare their conditions with those in Africa, the providential character of the travails to which they had been subjected by outsiders who had not really been at all concerned with their interests. Something of the distinctive

³³⁷ 8 LINCOLN, *supra* note 7, at 333.

³³⁸ See George Anastaplo, *An Introduction to "Ancient" African Thought*, in 1995 THE GREAT IDEAS OF TODAY 146 (1995). See also *supra* note 101.

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opportunities available to Africans in North America seems to be argued for in the early works of W.E.B. DuBois, opportunities which would both permit and oblige people of African descent to contribute to the salvation of the human race worldwide.³³⁹

ix.

Be this as it may, Lincoln himself recognizes that "bind[ing] up the nation's wounds" is essential if "a just, and a lasting peace" is to be permanently established between former enemies.³⁴⁰ The Constitution, properly amended, would not only have to be reimposed nationwide, but it would also need to be truly accepted by the defeated insurgents if the nation was to be healthy.³⁴¹

Such acceptance would be more likely if the *victors* could also be properly chastened—and this Lincoln undertakes to do with his sermon about divine providence and about the relentless, fated purging of offences by both North and South. Of course, this would not be an assessment that many in the North, who had endured so much to save the Union, would readily accept or long be chastened by. But Lincoln's healing use of religion, in the cause of promoting a compassionate law-abidingness, would help convert him into the martyred leader of the better elements in the vanquished South, those people who could regard themselves as truly the victors over those temporary wielders of power in the North who were unable to recognize the wisdom of what Lincoln had preached in his Second Inaugural Address.³⁴²

CONCLUSION

We can be reminded, in thinking about Abraham Lincoln, of what Leo Strauss said about the "self-evident" truths passage in the Declaration of Independence:

The passage has frequently been quoted, but, by its weight and its elevation, it is made immune to the

³³⁹ See George Anastaplo, *Rome, Piety, and Law: Explorations*, 39 LOY. L. REV. 2, 113-21 (1993). See also *infra* Section XI of Appendix B.

³⁴⁰ See 8 LINCOLN, *supra* note 7, at 333.

³⁴¹ There should be no talk now of rebels or traitors or of slaves. See *infra* Section V of Appendix B.

³⁴² Alexander H. Stephens, for one, was confident that Southern leaders would not find a victorious Lincoln to be vindictive. See *supra* note 286.

degrading effects of the excessive familiarity which breeds contempt and of misuse which breeds disgust.³⁴³

Certainly, we can return to Lincoln, as to the Declaration, again and again in our effort to come to know ourselves better—and to conduct ourselves as we should both as human beings and as citizens.

APPENDICES

APPENDIX A. THE BANK BILL CONTROVERSY OF 1791:

A PRECURSOR TO THE SECESSIONIST CRISIS OF THE 1860'S^{A-1}

The national banking system is proving to be acceptable to capitalists and to the people. On the twenty-fifth of November five hundred and eighty-four national banks had been organized, a considerable number of which were conversions from State banks. Changes from State systems to the national system are rapidly taking place, and it is hoped that, very soon, there will be in the United States, no banks of issue not authorized by Congress, and no bank-note circulation not secured by the government. That the government and the people will derive great benefit from this change in the banking systems of the country can hardly be questioned. The national system will create a reliable and permanent influence in support of the national credit, and protect the people against losses in the use of paper money. Whether or not any further legislation is advisable for the suppression of state bank issues, it will be for Congress to determine. It seems quite clear that the treasury cannot be satisfactorily conducted

³⁴³ LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 1 (1953). Even so, it should be remembered, the regime of the Declaration of Independence is higher than even Lincoln himself. See, e.g., ANASTAPLO, *ABRAHAM LINCOLN*, *supra* note 1, at 344 n.492.

The three Appendices which follow discuss (A) the Bank Bill controversy of 1791, which anticipates issues that led to the Civil War, (B) the songs of the Civil War, which illuminate the passions as well as the principles of that great war, and (C) a contemporary race-related controversy which helps us review (for Lincoln's own State) what the "created equal" language might properly mean to members of the Illinois bar, if not also to the community at large.

^{A-1} A paper prepared for a panel on Abraham Lincoln, sponsored by the Claremont Institute for the Study of Statesmanship at the Annual Convention of the American Political Science Association Washington, D.C., September 2, 2000. The other participants in this panel included Harry V. Jaffa.

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unless the government can exercise a restraining power over the bank-note circulation of the country.

Abraham Lincoln (1864)^{A-2}

i.

I have been encouraged by the chairman of this panel to spell out my differences with Harry V. Jaffa, something which I have tried to do from time to time. I cannot properly do so, however, without once again recognizing Professor Jaffa's profound influence upon Lincoln studies during the past half-century.

The distinguished American historian, Don Fehrenbacher, delivered at Oxford in 1968 a lecture entitled, "The Changing Image of Lincoln in American Historiography."^{A-3} He reported that, in the 1920s and 1930s,

Lincoln studies were [affected] by 'revisionism'. . . [T]he revisionists seemed to share the sympathies of the Southern vindicators, but their outlook was essentially national rather than sectional. . . . [T]hey denied the sufficiency of the slavery controversy as a cause for civil war; [but] they found no other compelling reason why the conflict should have been irrepressible. The Civil War, according to the revisionists, was a tragic mistake, produced by the unnecessary agitation of an 'artificial' issue--that is, whether slavery should be nominally permitted in the Western territories [of the United States], where conditions were generally inimical to its establishment. Unsuccessful advocates of compromise, like Stephen A. Douglas and John J. Crittenden, were obviously the heroes of this interpretation. Responsibility for the 'needless war' rested with blundering politicians and with extremists in both

^{A-2} 8 LINCOLN, *supra* note 7, at 143-44 (December 6, 1864). This was President Lincoln's last Annual Message to Congress. I do not mean to suggest that the system described by Lincoln is the same as that proposed by Hamilton in 1791. See *infra* note A-15. But what Lincoln refers to here does assume a broad power in Congress to deal with national financial affairs and countrywide economic conditions. See also *infra* note A-59.

^{A-3} DON FEHRENBACHER, AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD, ON MAY 21, 1968 (1968).

sections who inflamed public feeling to a point beyond rational control. But in thus distributing blame, the revisionists were not entirely evenhanded. They tended to be more emphatic in their condemnation of Northern abolitionists and radical republicans.^{A-4}

Further on Professor Fehrenbacher reports:

Within Lincoln literature, the most ambitious assault upon revisionism came from a political scientist, Harry V. Jaffa. His *Crisis of the House Divided* (1959) keenly analyzed and compared the political ideas of Douglas and Lincoln, to the latter's advantage. Among other things, Jaffa rejected the view that slavery had reached its natural limits by 1860 and would have fared no better under a policy of popular sovereignty [advocated by Douglas] than under [a policy] of legal restriction [advocated by Lincoln].^{A-5}

I myself have endorsed such recognition of Harry Jaffa from time to time, most recently in the following appraisal that I submitted for the dust jacket of his book, *A New Birth of Freedom*:^{A-6}

On exhibit in this book is a powerful intellect which has been trained by the classicism of Leo Strauss and inspired by the patriotism of Winston S. Churchill. Among the prominent Americans who are brilliantly illuminated here as they have rarely been are Thomas Jefferson, John C. Calhoun, Jefferson Davis, and of course Abraham Lincoln.^{A-7}

We can now turn, however briefly, to some of our differences, which come to view upon noticing the kind of things he has said recently about my observations concerning the Declaration of Independence, judicial review, and the Emancipation Proclamation. The underlying

^{A-4} *Id.* at 16.

^{A-5} *Id.* at 19. The author adds, "My own book, *Prelude to Greatness* (1962) was likewise anti-revisionist in its generally favorable treatment of Lincoln's rise to political power."

^{A-6} HARRY V. JAFFA, *A BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* (2000).

^{A-7} Earlier appraisals by me of Harry Jaffa's work may be found in, among other places, ANASTAPLO, *HUMAN BEING*, *supra* note 3, at 61; ANASTAPLO, *LINCOLN*, *supra* note 1, at 365. See also *infra* note A-70 and accompanying text.

differences here have something to do with how the citizen should read a text.^{A-8}

ii.

Mr. Jaffa, in Chapter 2 of his *A New Birth of Freedom*, reports this about the Declaration of Independence:

The "laws of nature and of nature's God" refers to the legislative function, the "supreme judge of the world" to the judicial function, and the "protection of Divine Providence" to the executive function. The first scholar to observe this "separation of powers" within the government of the universe was George Anastaplo, in [a 1965 law review article].^{A-9}

Mr. Jaffa, in the text to which this note is keyed, makes the following quite perceptive use of my observation from the Sixties:

The Declaration of Independence, equally with [Dante's] *On Monarchy*, assumes that the divine government of the universe supplies the paradigm for the right government of man by man. According to the Declaration, the divine government embodies distinct and distinguishable legislative, judicial, and executive functions, and the American people identified their understanding of human constitutionalism with what they believed was the constitution of the universe.^{A-10}

He immediately follows with this suggestion:

As we have already noted, however, [the American people] took their bearings from the *difference* between man and God. The government of the universe might be monarchical, and the one God might properly exercise all three functions, because God and God alone is possessed of "infinite wisdom, infinite goodness and rectitude."

^{A-8} See, e.g., Anastaplo, *How to Read the Constitution of the United States*, *supra* note 223.

^{A-9} JAFFA, *A NEW BIRTH OF FREEDOM*, *supra* note A-6, at 512 n.114. A fourth term, "the Creator" follows immediately in the Declaration upon the "laws of Nature and of Nature's God" and should probably be considered linked to that opening reference to the Divine. See *infra* note A-13 and accompanying text.

^{A-10} JAFFA, *A NEW BIRTH OF FREEDOM*, *supra* note A-6, at 146.

But the American people, while proclaiming "In God We Trust," considered it impious to think that such confidence might be placed in humans. . . . They refused, therefore . . . to be subject to any other king than God.^{A-11}

It is in Mr. Jaffa's creative interpretation of the evidence—an interpretation which can be called metaphysical, if not theological—that one can begin to appreciate differences between him and most of the rest of us. There is, in his approach to these matters, the spirit of the prophet, someone to whom gifted disciples can be naturally drawn.^{A-12}

iii.

I presume to be somewhat more prosaic here by drawing upon comments made by me, first in 1961, about the "theology" of the Declaration (these comments are used in the 1965 article Mr. Jaffa drew upon):

The first reference to God, and perhaps the second as well, regarded God, as *legislator*: it is He Who orders things, ordaining what is to be. He first comes to sight as the lawgiver or lawmaker. (Just as in the Constitution, so in the Declaration, the legislative aspect of government is primary, both in the order of enumeration and in importance.) Next, God is seen as *judge*. Finally, He is revealed as *executive*, One Who extends protection, enforcing the laws that have been laid down (with a suggestion as well of the dispensing power of the executive).

Thus, the authors of the Declaration of Independence created even the Government of the World in the image of their political institutions. We should further note that the first two references to divinity were inspired by Jefferson: God is seen and known as reflected in Nature, as something that can be grasped by man's reason without the aid of revelation. The third and fourth references, on the other hand, which were added on the floor of the Congress to the Jeffersonian draft, come

^{A-11} *Id.* at 146.

^{A-12} On prophecy and political science, see LEO STRAUSS, *JEWISH PHILOSOPHY AND THE CRISIS OF MODERNITY: ESSAYS AND LECTURES IN MODERN JEWISH THOUGHT* 418-26, 469 (Kenneth Hart Greed, ed., 1997). See also *supra* note 334.

closer to the God of the Bible, the God of revealed religion. In fact, one must observe that the Congress in its pious contributions may have been more "realistic" politically than the free-thinking Jefferson.^{A-13}

I particularly want to emphasize here the difference between what Jefferson supplied in drawing upon the Divine and what the Congress supplied. (It should also be noticed that even what Jefferson originally fashioned had probably been with a view to what Congress wanted or, at least, would accept.) The distinction I am noticing here, between what "the free-thinking Jefferson" supplied and what "the Congress in its pious contributions" added, anticipates what I say further on in these remarks about the limitations of Jefferson as a political man, whatever his "metaphysical" gifts may have been.^{A-14}

Those limitations are quite striking during the 1791 controversy about the "constitutionality" of the Bank Bill championed by Alexander Hamilton, then Secretary of the Treasury.^{A-15} It is in the course of his

^{A-13} See ANASTAPLO, LINCOLN, *supra* note 1, at 25.

^{A-14} On Thomas Jefferson, see ANASTAPLO, AMERICAN MORALIST, *supra* note 3, at 103; ANASTAPLO, AMENDMENTS, *supra* note 2, at 107. See also *infra* notes A-46, A-69.

^{A-15} Bank of the United States Act, 1 Stat. 191 (1791). The following encyclopedia entry describes the controversy related to this act:

The first Bank of the United States (1791-1811) was chartered by Congress on a plan admitted by Secretary of the Treasury Alexander Hamilton as part of his financial system. Modeled on the century-old Bank of England, the national bank harnessed private interest and profit for public purposes. It received an exclusive twenty-year charter. It was capitalized at \$10,000,000, of which the government subscribed one-fifth and private investors the remainder, one fourth in specie and three-fourths in government stock. Located in Philadelphia and authorized to establish branches, it was to be the financial arm of government (a ready lender, a keeper and transferer of funds); through its powers to mount a large paper circulation and advance commercial credit, the bank would also augment the active capital of the country and stimulate enterprise. James Madison had opposed the bank bill in Congress entirely on constitutional grounds. His arguments, turning on the absence of congressional power and invasion on the reserved rights of the states, were repeated in opinions submitted to President George Washington by Attorney General Edmund Randolph and Secretary of State Thomas Jefferson. They were answered, convincingly in Washington's mind, by Hamilton's argument on the doctrine of implied powers.

Merrill D. Peterson, *Bank of the United States Acts*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 98-99 (1986). See Stephen B. Presser, *Marbury, McCulloch, Gore and Bush*, 33 JOHN MARSHALL L. REV. 1157, 1158 (2000). See also *supra* note A-2.

account of that controversy that Mr. Jaffa makes another comment about my work which exposes another difference between us.

iv.

Mr. Jaffa's account of the Bank Bill controversy is part of his magisterial review of the political and constitutional history of the United States, a review that no other scholar today about whom I happen to know would either venture in the detail or carry off with the power that he does. Particularly illuminating for us here is what Mr. Jaffa says about the constitutional debate on the Bank Bill between Thomas Jefferson and Alexander Hamilton.

I begin to notice our differences *here* by suggesting that we should be reminded, by the Jaffa account, that the principal constitutional debates in this country once took place among politicians, not before or among judges. The forum in which Hamilton (as Secretary of the Treasury) and Jefferson (as Secretary of State) were debating was provided by the President who had asked them (as well as his Attorney General^{A-16}) for their opinions about the constitutionality of the Bank Bill just enacted by Congress. The Hamilton-Jefferson debate followed similar, much more public, debates that had recently been concluded in the House of Representatives.^{A-17}

I argued, in my Commentary on the Constitution of 1787 (published in 1989), that the principal authoritative interpretation of the Constitution was once done by the Congress and the President, not by the Courts.^{A-18} In that venue, I have also argued, *constitutionality and political wisdom (or expediency) can be properly combined.*^{A-19} In addition, all prospective legislation can be thus examined from the outset, not only the legislation that happens eventually to be challenged in court. Among the healthier aspects of this approach is that it may tend to dampen down litigiousness.

^{A-16} On Attorney General Randolph, see Dennis J. Mahoney, *Edmund Randolph (1753-1813)*, in 3 *ENCYCLOPEDIA OF AMERICAN CONSTITUTION* 1510 (1986).

^{A-17} The Senate of the United States conducted its business behind closed doors at that time.

^{A-18} See, e.g., ANASTAPLO, *CONSTITUTION*, *supra* note 2, at 322 n.106.

^{A-19} See, e.g., *id.* at 142-43.

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I am grateful to Mr. Jaffa for having provided me the incentive to examine the 1791 Bank Bill.^{A-20} This examination was spurred by Mr. Jaffa's suggestions about judicial review.

v.

It is in his account of the Bank Bill controversy that Mr. Jaffa corrects what I have said about constitutional law. This is how he begins:

George Anastaplo, in *The Constitution of 1787: A Commentary* (Baltimore: Johns Hopkins University Press, 1989), p. 207, writes: "The 'in pursuance' language . . . looks more to the source of formal adequacy of a purported law of the United States than to its 'constitutionality.' This language is more likely to mean 'following upon' or 'made after this Constitution is adopted' than it is to mean 'in conformity to the Constitution' in the sense used today to denote 'constitutionality.'" On its face, this is eminently plausible.^{A-21}

Mr. Jaffa, when he recognized my observation as "eminently plausible," should have quit while we were both still ahead. However, he continued (in a paragraph which can be conveniently divided into four more parts (as I do here) for purposes of analysis, following upon the first part already quoted):

[2] But when Hamilton and Jefferson squared off in 1791 on the question of the bank, they were already using the idea of "constitutionality" (and hence "in pursuance") in the present-day sense. [3] Our view of "in pursuance" was of course introduced into constitutional jurisprudence by Chief Justice John Marshall in *Marbury v. Madison* [1803]. [4] But Marshall was anticipated, in principle, by Justice Samuel Chase, in *Calder v. Bull*: "An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on

^{A-20} Compare *id.* at 202.

^{A-21} JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 492-93 n. 55. See ANASTAPLO, CONSTITUTION, *supra* note 2, at 201 (not 207). The phrase "source of formal adequacy" should be "source and formal adequacy." *Id.*

express compact, and on republican principles, must be determined by the nature of the power on which it is founded" (3 U.S. 386 [1798]). [5] Chase was a signer of the Declaration of Independence, and "the great first principles of the social compact" refers unquestionably to the principles of the Declaration. Interpreting the "pursuance" clause to refer to constitutionality seems reasonable if one understands the principles of the Declaration to be the principles of the Constitution. In doing so, one must of course distinguish those parts of the Constitution that follow from its principles and those that are compromises dictated by "necessity."^{A-22}

The passage taken by Mr. Jaffa from my Commentary was developed as part of an effort to show that judicial review of Acts of Congress was neither desired nor provided for by the Framers of the Constitution.^{A-23} Mr. Jaffa, insofar as he differs from me here, seems (in his constitutional history) to make a case for judicial review of Acts of Congress. Otherwise, there is no need for him to correct me as he does. I will consider, in reverse order, the five parts of the paragraph I have just quoted.

The fifth part of the Jaffa passage, drawing on Samuel Chase as a signer of the Declaration of Independence, does not illuminate what the "in pursuance" language (found in the Supremacy Clause, in Article VI of the Constitution) means. Certainly, it does not require that the "pursuance" language be taken "to refer to constitutionality." The problem with the Jaffa interpretation is found more in what he says earlier in this paragraph, where he begs one question after another.

It is in the immediately preceding part, the fourth, that Justice Chase is introduced, speaking in (the always puzzling case of) *Calder v. Bull*:

An ACT of the Legislature (for I cannot call it a *law*) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on

^{A-22} JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 493 n. 55.

^{A-23} On judicial review see ANASTAPLO, CONSTITUTION, *supra* note 2, at 335.

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republican principles, must be determined by the nature of the power on which it is founded.^{A-24}

Where does this kind of talk leave us when considering the question of the authority for judicial review? It is one thing to say that some legislative actions "cannot be considered a rightful exercise of legislative authority;" it is quite another to assume that the courts are authorized to set aside such actions.^{A-25} Justice Iredell, in his opinion in *Calder*, takes issue with Justice Chase; however, Justice Iredell is prepared to see judicial review exercised in extreme cases, but *not* (as Justice Chase seems to do) to vindicate natural justice:

If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (*possessed of an equal right of opinion*) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.^{A-26}

In the third part of the Jaffa paragraph we are reviewing, it is said, in part, "Our view of 'in pursuance' was of course introduced into constitutional jurisprudence by Chief Justice John Marshall in *Marbury v.*

^{A-24} *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (italics omitted). I have used this passage as found in the United States Reports.

^{A-25} President Andrew Jackson even went so far as to proclaim, "The opinion of the judges [in a National Bank case] has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Peterson, *Banks of the United States Acts*, *supra* note A-15, at 99. Compare *infra* note A-31.

^{A-26} *Calder v. Bull*, 3 U.S. (3 Dall.) at 399 (emphasis added). Justice Iredell continues thus:

There are then but two lights, in which the subject can be viewed. 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

Id.

Madison.^{A-27} I do not believe that Justice Chase ever used the “in pursuance” language in *Calder*. Chief Justice Marshall (in *Marbury*) uses it only in the concluding paragraphs of his opinion, where he says:

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other department, are bound by that instrument.^{A-28}

One is tempted to discern the Chief Justice’s use of “in pursuance” a subtle joke, especially if one assumes that he must have known what any careful reading of the Constitution reveals, that the Supremacy Clause (in Article VI of the Constitution) from which this language is taken has nothing to do with judicial review of Acts of Congress. Rather, it is concerned primarily with insuring that State court judges follow acts of Congress made “in pursuance” of the Constitution (as well as other expressions of the national authority, such as treaties entered into by the United States and, of course, the Constitution itself).^{A-29} It is hardly likely that State court judges being thus restricted are equipped or authorized or expected to pass judgment on the “constitutionality” of Acts of Congress.^{A-30}

The Chief Justice, when he resorts in closing, to the “in pursuance” language, tacitly acknowledges that there is no other language in the Constitution which either authorizes or depends upon

^{A-27} JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 493 n.55.

^{A-28} *Marbury v. Madison*, 1 U.S. (5 Cranch) 137, 179 (1803) (emphasis in original).

^{A-29} The relevant passage in Article VI of the Constitution reads,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See ANASTAPLO, CONSTITUTION, *supra* note 2, at 277.

^{A-30} *Id.* at 199-202.

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judicial review of Acts of Congress.^{A-31} Indeed, the Chief Justice must have also known what we know, that the prevailing opinion about these matters at the time of the drafting of the Constitution was that quoted by Justice Iredell in *Calder v. Bull* from Blackstone:

[T]here is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no.^{A-32}

It is not surprising, considering how flimsy the authority was for what a perhaps desperate Chief Justice did in *Marbury* in resorting to judicial review,^{A-33} that no other Act of Congress is said to have been declared unconstitutional by the Supreme Court until 1857^{A-34}--and that, too, was done at the instigation of a Chief Justice who was truly desperate (as well as woefully misguided in his reading of the Constitution).^{A-35}

It should also be added that the Supremacy Clause (along with the rest of the Constitution) contemplates and provides not only for judicial review of *State* acts, but also for executive review and, even more, for legislative review of State acts.^{A-36} Article I, Section 10 indicates some of the limitations on the States that the General Government is expected to insist upon. Such national review of State acts, for their expediency as well as for their constitutionality, was considered essential if the contemplated overall system was to work properly.^{A-37}

^{A-31} A carefully limited "executive review" of Acts of Congress is provided for in the recognition of the veto power of the President. *Id.* at 339 (collecting citations to discussions of the use of the "veto power").

^{A-32} *Calder v. Bull*, 3 U.S. (3 Dall) 399 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 91).

^{A-33} On the desperation at times of the Chief Justice, see WILLIAM W. CROSSKEY, 2 POLITICS AND THE CONSTITUTION (1953). Compare Presser, *supra* note A-15, at 1158 ("This [*Marbury v. Madison*] is not constitutional law-making; at best it's prudence, at worst cowardice.").

^{A-34} See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

^{A-35} On the somewhat pathetic folly of *Dred Scott*, see ANASTAPLO, LINCOLN, *supra* note 1, at 363.

^{A-36} Unfortunately, respectable legal scholars sometimes seem not to appreciate the proper subordination of State legislation to review for its constitutionality, by the National Government, including by the Courts of the United States. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999).

^{A-37} Also critical here is the Republican Form of Government Guarantee in Article IV of the Constitution. See ANASTAPLO, CONSTITUTION, *supra* note 2, at 337.

We can now assess what is said by Mr. Jaffa in the second part of the paragraph we are examining:

But when Hamilton and Jefferson squared off in 1791 on the question of the bank, they were already using the idea of "constitutionality" (and hence "in pursuance") in the present-day sense.^{A-38}

Particularly troublesome here is the parenthetical comment, "and hence 'in pursuance'." Rarely, if ever, is the "in pursuance," term used either by Hamilton and Jefferson in their debate or in the Congressional debates of this issue that I have examined. Of course, "constitutional" is used again and again, but not with the approach evident in the Supremacy Clause, where so much is made of disciplining State judges.

In fact, so little is judicial review anticipated, in the course of the Bank Bill debate, that neither Jefferson nor Hamilton speculates about what judges might say about the proposed statute. Even in the Congressional debate, very little is made of the possibility of any judge reviewing an Act of Congress, and when this is mentioned, it tends to be brushed aside.^{A-39} It is emphatically clear throughout—both in the Congressional debates and in the intraCabinet debate—that the important constitutionality issues under consideration are not to be decided by the courts at any stage. The silence here is rather telling, pointing up how much of a departure from general expectations (whether or not salutary) was engineered (if only for the moment) by the Chief Justice in *Marbury* in 1803.^{A-40}

We need to say a little more now about the first part of the Jaffa paragraph under review. It is quite clear, in the context from which my language is taken by Mr. Jaffa, that I never denied either that the Framers had the term "constitutional" in their lexicon or that the term meant for them "in conformity to the Constitution." I hope it is also clear now, if it was not earlier, that this sense of "constitutional" is not likely to be what is drawn upon in the Supremacy Clause. In any event, an informed reading of the Supremacy Clause does not support the argument for

^{A-38} JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 493 n.55.

^{A-39} *Marbury v. Madison*, it should be remembered, was still more than a decade away. See *supra* note A-28.

^{A-40} See *supra* text corresponding to note A-34.

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judicial review of Acts of Congress, an argument for which there is (I repeat) no explicit support anywhere in the Constitution of 1787.^{A-41}

vi.

Thus it should be recognized, “constitutionality” was indeed an issue in the Hamilton-Jefferson debate and in the earlier debates on the Bank Bill. But it should also be recognized—and here we return to Jefferson’s limitations—that Hamilton clearly had much the better in that debate. One can wonder whether Jefferson himself recognized this. He may well have, considering both his native intelligence and his professional training.

It is not only Jefferson who can be faulted, but also his allies in Congress, not least his longtime satellite, James Madison.^{A-42} The superiority exhibited by Hamilton was anticipated in the arguments by his allies in Congress.^{A-43}

It is obvious that both “political” and “constitutional” factors influenced most, if not all, of the participants in the Bank Bill debates. This is testified to by how the voting in the House of Representatives divided almost entirely along sectional lines, with virtually all of the Southern members opposing, at least at the final stage, the incorporation of a national bank. There are indications in the House debates, and even more indications elsewhere, that Southerners were concerned primarily about where the permanent national capital would be located. It seems to have been feared by them that if a powerful national bank were allowed to take root in Philadelphia, it could undermine the influence, if not the very placement, of the national capital on the Potomac.^{A-44}

We can see here, once more, how difficult it is to separate political concerns from constitutional concerns—and why it is not

^{A-41} A quite different question, which I do not address here, is what we might prudently do with judicial review of Acts of Congress once it has been established and widely accepted. Even so, a proper reading of what the Constitution does provide should help us understand how that instrument is put together and how it should be thought about.

^{A-42} Another ally of sorts was Edmund Randolph, the Attorney General. But he was always unreliable, so much so as to be rather silly at times, as could be seen in how he sometimes conducted himself in the Constitutional Convention and thereafter in Washington’s cabinet. See *supra* note A-16.

^{A-43} These included Fisher Ames, Elbridge Gerry, and John Laurance.

^{A-44} See, e.g., CROSSKEY, 1 POLITICS AND THE CONSTITUTION, *supra* note A-33, at 194-95. Is it revealing that Mr. Jaffa evidently makes no use of Mr. Crosskey in his latest treatise? On the Potomac issue see *infra* note A-70.

prudent to expect most judges to keep such concerns separate. If they *are* hard, if not impossible in practice, to keep political and constitutional concerns separate, do we want unelected judges routinely passing on political issues in the guise of constitutional determinations, especially when our elections tend to moderate political excesses (at least in politicians)?

Be all this as it may, there is still the question of how good the arguments of Jefferson and his allies were.^{A-45} We can be reminded by this 1791 exercise of how doctrinaire, and hence unreliable, Jefferson could be, along with his brilliance and his political magic.^{A-46}

Jefferson's constitutional arguments here, as elsewhere, can be rather sophistical.^{A-47} One suspects that Washington sensed how unreliable Jefferson could be in these matters—and so he relied more on Hamilton, who was somewhat more straightforward, or at least predictable, in his ambitions.^{A-48}

Sophistry may also be seen in how Madison used similar arguments. (Madison could be more blatant here than Jefferson, as a member of the Cabinet, could afford to be.) Mr. Jaffa notices that Madison eventually came to support a national bank during his own Presidential administration.^{A-49} Madison's efforts in 1816 to distinguish that later situation from the one which he had encountered in the First Congress in 1791 are interesting exercises in "rationalization."^{A-50} This kind of shift on Madison's part had been seen already, but in the opposite direction. When Madison argued in 1791 (during the Bank Bill controversy) against a broad reading of the Constitution, he was challenged by his alert opponents in Congress to explain his arguments

^{A-45} Some of these arguments were later dealt with, along the lines suggested by Hamilton, in Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

^{A-46} This recalls what I have said earlier in this paper about Jefferson and the Declaration of Independence. It also recalls what I have said elsewhere about Jefferson and Plato's *Republic*. See ANASTAPLO, AMENDMENTS, *supra* note 2, at 107.

^{A-47} Mr. Jaffa uses the term "Talmudic" to characterize the debate. See JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 32.

^{A-48} Did we see something similar to the "Jefferson" approach in the career of William Jefferson Clinton?

^{A-49} See JAFFA, A NEW BIRTH OF FREEDOM, *supra* note A-6, at 33.

^{A-50} See *id.* See also Peterson, *supra* note A-15, at 98. Mr. Crosskey, of course, had a less charitable assessment of Madison. See, e.g., *infra* note A-51.

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earlier in the same First Congress in favor of an expansive interpretation of the Constitution when addressing other issues.^{A-51}

These shifts anticipate the irrationality that was later to characterize the dominant Southern response to vital national issues, especially whenever slavery was implicated. Certainly, Hamilton's arguments about the implied powers of the General Government^{A-52} drew upon a "theory" of the Constitution which would permit Congress to deal with slavery in due time. Hamilton was, in this respect, a precursor of Abraham Lincoln and *his* allies. Chief Justice Taney, in his *Dred Scott* opinion, attempted in effect to resurrect the "theory" of the Constitution fashioned by Jefferson and Madison in the last stages of the 1791 Bank Bill controversy.^{A-53} In doing so, however, Taney had to repudiate the great contribution to American freedom and an enduring constitutionalism that Jefferson himself had made in championing the Northwest Ordinance in the 1780s.^{A-54}

vii.

Lincoln was aware of problems with the judicial-review claims, if not usurpations, of the judges. We should not be surprised that he could figure out what *we* can about these matters.

He, like us, could see what the judges did in *Dred Scott*, when they tried, by judicial fiat, to settle a grave political crisis.^{A-55} It was soon evident that their efforts only made matters worse, especially when they presumed to question the constitutionality of the Missouri Compromise and, in effect, of the Northwest Ordinance, both of which prohibited slavery in specified territories of the United States.^{A-56}

The Congress, in Taney's time, was more sensible—just as was, a generation later, the post-Civil War Congress which had fashioned the legislation invalidated by the Supreme Court in the *Civil Rights Cases*.^{A-57} The Court is to be commended for what it did in *Brown v. Board of*

^{A-51} See, e.g., CROSSKEY, *supra* note A-33, at 195. See also *infra* note A-70.

^{A-52} See, e.g., LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95 (Clair Clarke & D.A. Hall eds., 1832).

^{A-53} See *supra* notes A-34, A-35.

^{A-54} On Jefferson and the Northwest Ordinance, see ANASTAPLO, LINCOLN, *supra* note 1, at 40. See also *supra* note 56.

^{A-55} Lincoln addressed this attempt by the judges throughout the Lincoln-Douglas Debates of 1858. See, e.g., *supra* notes 55, A-35.

^{A-56} On the Missouri Compromise, see *supra* note 16.

^{A-57} *The Civil Rights Cases*, 109 U.S. 3 (1883).

Education, in 1954,^{A-58} but the principal legislation dealt with on that occasion was *State* legislation, and in that case the Court was making proper uses of its powers under the Supremacy Clause.^{A-59}

Lincoln had to be careful in how he spoke about the Supreme Court's *Dred Scott* decision. Much of his own political appeal depended upon his decades-long identification with the cause of law-abidingness, as may be seen in Lincoln's Lyceum Speech masterfully examined by Mr. Jaffa in his *Crisis* book).^{A-60} Most people tended to be deferential toward judges—this is played upon by Lincoln, with his continual reference to Douglas as “Judge Douglas,” because of his earlier judicial service. Lincoln did not believe it prudent to undermine such deference, even in a good cause.

Lincoln had learned, across two decades, how careful one has to be in resisting a determined public opinion. This had been one of the lessons he learned from his opposition (in his one term in Congress) to the Mexican War, an opposition which led to his patriotism being questioned from time to time, as in the last of the Lincoln-Douglas Debates.^{A-61} How much more relaxed we can be about patriotism these days is suggested by the fact that a more or less conservative national party can nominate for President and Vice President two candidates who are known to have supported American involvement in the Vietnam War even while they, as young men, made determined (and successful) efforts to avoid having to serve in a war that they were quite willing to see less privileged young men drafted for. Their nominations are especially curious when supported by those patriots who are concerned these days not only about citizen-character but also about the

^{A-58} 347 U.S. 483 (1954).

^{A-59} If the United States Supreme Court had done what it should have done in response to Congressional legislation in the *Civil Rights Cases* (*supra* note A-57) and in related cases in the late Nineteenth Century, *Brown* (*supra* note A-58) might never have been needed. In any event, it is well to be reminded that whenever Congress and the Supreme Court have differed with respect to great national issues, the Congress has usually been right. This may be seen not only with respect to *Dred Scott* issues (*supra* notes A-35) and the *Civil Rights Cases*, but also with respect to the early New Deal economic-regulations cases. Recent cases, such as *Lopez v. United States*, 514 U.S. 549 (1995), remind us that Congress is apt to be more “realistic” than the Supreme Court in recognizing that national problems tend to require national solutions which only Congress is equipped to try to provide. It should also be noticed that our national legislature and courts may have, with respect to *State* legislation, some of the powers exercised by Parliament and the Privy Council with respect to Colonial legislation in North America before 1776.

^{A-60} For the Lyceum Speech, see 1 LINCOLN, *supra* note 7, at 108. See also HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 236 (1959); *supra* note 153.

^{A-61} See 3 LINCOLN, *supra* note 7, at 319.

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inadequacy of the most powerful military establishment in the history of the world.^{A-62} But there are other subjects about which politicians know that they have to be careful today if they expect success on the national level: the “counterproductive” futility of our drug laws, the follies of our Mexican border interdictions, and the extent of our abortion epidemic are all subjects treated with the greatest care, if they are not altogether avoided, by the ambitious candidate.^{A-63} And, it was not too long ago that national politicians were obliged to endorse, or at least to acquiesce in, all kinds of Cold War delusions, including delusions about the power of the Soviet Union, something that should easily have been questioned by anyone who visited Russia in those days.^{A-64}

The subjects about which Lincoln had to be careful in the 1850s, in addition to the subject of how courts should be regarded, were abolitionism, the capacities and future status in the United States of people of African descent, fugitive-slave laws, and such exploits as that by John Brown and his band.^{A-65} That is, the national politician had to accommodate himself somewhat to the continued existence of slavery in at least a dozen States—either that or risk the crippling charge that he was promoting sectional discord, if not even provoking a civil war.

Even so, Lincoln did make it clear, as when he talked about *Dred Scott*, that there was a proper, but decisively limited, place for judges in the American constitutional system. He did not venture to question the institution of judicial review of Acts of Congress—but he did, as President (in the course of considering a nominee for the Supreme Court), express the hope that “the new Chief Justice would recognize that ‘the function of courts is to decide *cases*—not *principles*.’”^{A-66}

^{A-62} See Anastaplo, Letter to the Editor, CHICAGO SUN-TIMES, November 1, 2000, at 50. (Captions for letters to editors are usually provided by editors, not by the letter-writers.) American military power is the most powerful in the history of the world when compared to the power of other nations today. *Id.* Critics in the “national conservative party” have long disparaged the young Bill Clinton as a “draft dodger” — but, it should be remembered, he was clearly opposed to the Vietnam War and evidently did not want *anyone* drafted to serve there.

^{A-63} See, e.g., George Anastaplo, *Governmental Drug-Testing and the Sense of Community*, 11 NOVA L. REV. 295 (1987); Robyn Blumner, Editorial, *McCaffrey's Full of Pointless Pride*, CHICAGO SUN-TIMES, Nov. 20, 2000, at 33.

^{A-64} See, e.g., ANASTAPLO, HUMAN BEING, *supra* note 3, at 226-28 n.4. See also ANASTAPLO, AMERICAN MORALIST, *supra* note 3, at 225.

^{A-65} See, e.g., *supra* note 196 and accompanying text.

^{A-66} See DAVID H. DONALD, LINCOLN 551 (1995). This bears on the jurisprudential problems posed by *Eric R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See also *infra* note A-67.

viii.

To "decide cases" does require, of course, a proper grasp of "principles," those well-established principles which should be looked to in deciding the particular case at hand. The skills of the lawyer are very much to be relied upon here.^{A-67}

Those lawyerly skills, as well as the skills of the statesman, are evident in the Emancipation Proclamation (of 1862-1863). It is in response to my commentary on the Emancipation Proclamation that Mr. Jaffa has penned the third passage that suggests differences between us. His response to that commentary is most generous, so much so that it is drawn upon by the publisher for the dust jacket of my *Abraham Lincoln* book, where the would-be reader is informed,

The finest scholarly writings on Lincoln's words that I know. My feeling is that Anastaplo must have sat at Lincoln's elbow as he composed the Proclamation of September 1862 and discussed it with him, paragraph by paragraph. As a proof of the possibility that one can understand a great writer as he understood himself, it is the definitive refutation of historicism.^{A-68}

I do not wish to quarrel with what is said here by Mr. Jaffa—I can safely leave that to others—, but I do presume to suggest that the kind of careful reading of documents that he commends in my commentary on the Emancipation Proclamation is very much needed as well for an adequate commentary on the Constitution.

ix.

I have argued here as elsewhere that there are problems with how even the most learned scholars and judges read the Constitution. We have seen, in what I have said about the Supremacy Clause, how difficult it is to be precise enough with constitutional language.

There are two extremes to be avoided: the "practical" (which makes too much of *election returns* at the expense of *constitutional*

^{A-67} Lawyers and judges work together, in the common-law tradition, to refine such principles. On the common law, see ANASTAPLO, CONSTITUTION, *supra* note 2, at 332. On the distortions of "the Erie doctrine," see *id.* at 128-37, 320 n.95.

^{A-68} See John A. Murley, *In re George Anastaplo*, in LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME 159, 188 n.44 (Kenneth L. Deutsch and John A. Murley, eds., 1999).

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principles) and the “metaphysical” (which makes too much of *truth* at the expense of *prudence*). The latter approach is, I suspect, better suited to probing the thought and passions of a John Calhoun than it is the thought and aspirations of an Abraham Lincoln. It is an approach which Chief Justice Marshall warned against when he disparaged “refined and metaphysical reasoning.”^{A-69}

It is anything but “refined and metaphysical reasoning,” however, to recognize once again, in closing, a scholar who has had so profound an influence upon Lincoln studies as Harry Jaffa has had during the past half-century. I draw here upon a passage in my *Abraham Lincoln* book:

Lest it seem that there are fundamental differences between Professor Jaffa and me—something that would indeed be a sign of presumptuousness on the part of someone who has learned as much as I have from him—permit me to observe again that our differences (such as they are) can be considered differences merely with respect to emphasis. I would prefer to see more made of the American regime, and less of Abraham Lincoln, than he does. But in order to know our own regime better, we should appreciate fully the kind of men and women it can and does produce as needs arise and as opportunities present themselves.

We are helped toward that appreciation, which serves to help us know ourselves better and hence to do and be better, by what Harry Jaffa has done, for decades now, in putting Abraham Lincoln, a genuine American republican, on display before the spiritually impoverished country we are in danger of becoming. Consider, for example, what is said [by Harry Jaffa in his “House Divided” talk] about the most memorable of the Lincoln speeches:

The utterances that have come down to
us, graven in bronze and in stone, like

^{A-69} *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 222 (1824) (concluding paragraph). Mr. Jaffa’s partisans can take comfort from the fact that I have reservations as well about Abraham Lincoln, in part because he is not philosophical enough. See ANASTAPLO, *LINCOLN*, *supra* note 1, at 347-48 n.492. See also *supra* note A-14 and accompanying text.

the Gettysburg Address and the Second Inaugural, are profound meditations on human experience. In the midst of the horrors of destruction and death, and amid the turmoil of the passions of war, they are designed to reconcile us to our fate by discerning the hand of God in events that might otherwise seem merely chaotic. Although these speeches arise out of particular events at particular times, they draw back the curtain of eternity and allow us, as time-bound mortals, to glimpse a divine purpose within a sorrow-filled present, and tell us how our lives, however brief, can nonetheless serve as a deathless end.

Any commentator who thus plumbs the depths of Abraham Lincoln's words generously shares with others the beauties of his own soul, thereby enriching the souls of his fellow students for decades to come.^{A-70}

^{A-70} See ANASTAPLO, LINCOLN, *supra* note 1, at 155-56. On the significance of the Potomac issue during the Bank Bill controversy in 1791, consider the following passage from a review of Joseph J. Ellis's *Founding Brothers* (2000):

Among the first questions facing the republic were the twin matters of where to locate the new seat of federal authority and whether to accept Hamilton's fiscal program, designed to create a single debt policy for all thirteen states. The new government, Mr. Ellis writes, was in a condition of "total paralysis" over these debates.

Sixteen different sites were proposed for the new capital, including Carlisle, Germantown and Trenton. Meanwhile, Virginia deeply opposed Hamilton's financial scheme, which Southerners saw as a covert bid for the federal government to assume authority over the economies of all states, everything they had fought against in the revolution. Mr. Ellis colorfully details the maneuvers behind Jefferson's famous dinner party that brokered the compromise: Madison, the Virginian, agreed to allow the new fiscal program to pass in return for moving the new capital to the "Patowmac" (which the Philadelphia press blasted as a "rocky wilderness" inhabited by "wild beasts").

APPENDIX B. SONGS OF THE CIVIL WAR^{b-1}

FELLOW CITIZENS: *I am very greatly rejoiced to find that an occasion [the collapse of the Confederacy] has occurred so pleasurable that the people cannot restrain themselves. [Cheers.] I suppose that arrangements are being made for some sort of a formal demonstration, this, or perhaps, tomorrow night. [Cries of 'We can't wait.' 'We want it now.' &c.] If there should be such a demonstration, I, of course, will be called upon to respond, and I shall have nothing to say if you dribble it all out of me before. [Laughter and applause.] I see you have a band of music with you. [Voices, 'We have two or three.'] I propose closing up this interview by the band performing a particular tune which I will name. Before this is done, however, I wish to mention one or two little circumstances connected with it. I have always thought 'Dixie' one of the best tunes I have ever heard. Our adversaries over the way attempted to appropriate it, but I insisted yesterday that we fairly captured it. [Applause.] I presented the question to the Attorney General, and he gave it as his legal opinion that it is our lawful prize. [Laughter and applause.] I now request the band to favor me with its performance.*

Abraham Lincoln^{B-2}

i.

"More than any other war in the world's history," it has been said, the Civil War "was a singing and musical war."^{B-3} It has also been said that "often the men in [one army] could hear the sound of the [enemy's] bands playing above the din of battle . . ."^{B-4} Even more significant than the tunes of those bands were the words of the songs, North and South, songs which testify to how deeply-rooted the great

Jay Winik, *Wise Men Can Disagree, Sometimes Ferociously*, WALL ST. J., Oct. 23, 2000, at A34. See also *supra* A-51 and accompanying text.

^{B-2} Abraham Lincoln, Response to a Serenade, April 10, 1865. See 8 LINCOLN, *supra* note 7, at 393.

^{B-3} Record Jacket, THE SOUND OF THE CONFEDERACY (Whitehall Records).

^{B-4} *Id.*

issues of the struggle were in the passions, as well as in the principles, of the American people.^{B-5}

Perhaps the most influential “song” leading up to the Civil War was Harriet Beecher Stowe’s 1851-1852 novel, *Uncle Tom’s Cabin*, arousing as it did anti-slavery sentiment in the North. President Lincoln “is alleged to have referred to its author as the ‘little lady’ who caused the Civil War.”^{B-6}

Still another influential “song”—but one of which we evidently have no reliable record – is the spectacular “rebel yell.” Here is a brief account of it:

First heard at 1st Bull Run [in July 1861], it was one of the most effective Confederate weapons. Described as a high-pitched shout and supposed by some to be a variation of the Southern fox hunters’ cry, it invariably produced an eerie feeling within the enemy lines, although there is no record that the Yankees ever turned tail upon hearing it.^{B-7}

Other songs could also be stirring, most notably *Dixie*, *The Battle Hymn of the Republic*, and *Maryland! My Maryland!*^{B-8} The first became, in effect, the Southern anthem; the second, the Northern anthem, and the third, appropriating the tune of *Tannenbaum*, a reminder of the critical struggle for the loyalty of the Middle States (such as Delaware, Kentucky, Missouri, and of course Maryland).^{B-9} It is with the words of the songs, North and South, not the tunes, that we are primarily concerned on this occasion, words which can illuminate and perhaps refine what we may otherwise know about the Civil War.

Among the many things we do know about that war is that it can engage us all retroactively, just as it can offer a pattern for understanding what happens elsewhere, either far away or long ago. Thus, we who are children of early Twentieth Century immigrants can find ourselves responding as partisans to that war, as if our families had been here for centuries. Thus, also, someone such as my wife, very much

^{B-5} See Anastaplo, 2 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 42. Ten of the best-known Civil War songs are included in this collection. See *id.* at 90-98.

^{B-6} THE CIVIL WAR DICTIONARY 856-57 (Mark Mayo Boatner III ed., 1959).

^{B-7} *Id.* at 683.

^{B-8} See 2 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 92, 94, 95.

^{B-9} See THE CIVIL WAR DICTIONARY, *supra* note B-5, at 74.

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a Southerner in her antecedents, "naturally" assumed while she was growing up that ancient Athens, an enterprising and constantly changing city, which she properly identified with the American North, had prevailed (as the Yankees had done) in the Fifth Century B.C. Peloponnesian War, over Sparta, a city which she identified (because of its considerable dependence upon slavery and its conservative aristocracy) with the South.⁸⁻¹⁰

ii.

The words of the songs of the Civil War include recollections of spectacular deeds by two J.B.s, or John B's. Their deeds can be usefully understood to have bracketed the Civil War. I refer, of course, to John Brown and to John Wilkes Booth. In both cases, these men were immediately disowned by respectable and influential people who were believed to be somewhat sympathetic to their respective causes.

The career of John Brown is summed up in this fashion in *The Civil War Dictionary*:

Brown, John. Fanatic Abolitionist. 1800-59 [Born in Conn[ecticut]. His incendiary actions on the eve of the Civil War led to his death. He kept a station of the Underground Railroad in Richmond (Ohio), but in 1855, when his sons went to Kansas to help win the state for the anti-slave forces, he followed with a large supply of weapons to aid in the struggle. He became a surveyor and militia captain at Osawatomie, and the success of the pro-slave raid on Lawrence in 1856 roused him to a fury. Asserting that he was an instrument of God, he, four of his sons, and two other men deliberately murdered five pro-slavery men on the banks of the Pottawatamie. Gathering a group of men, he led many attacks in the guerrilla warfare of the border and became nationally known in the abolitionist press. Late in 1857 he began to lay his plans for a massed invasion of the South to free the slaves. [On October 16,] 1859 he seized the US Armory at Harpers Ferry with a band of 21 men, captured the inhabitants, and took possession of the town. Local militia blocked his escape, and the next

⁸⁻¹⁰ On Thucydides' account of that War, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 253.

morning a company of US Marines commanded by Robert E. Lee assaulted the group, killed 10 of the men, and captured Brown. He was convicted of treason and on 2 Dec. '59 was hanged at Charlestown. Regarded by Northern sympathizers as a martyr, he became the hero of a marching song, "John Brown's Body." See "Battle Hymn of the Republic."^{B-11}

However obliged Northern political leaders had been to disavow John Brown, there was evident, in the sympathy he aroused and in the music he inspired as a martyred saint, that deep-rooted antipathy to slavery which always separated the North from the South.^{B-12} All other differences between North and South—whether the issue of tariffs, of States' Rights, or of the "original intent" of the Constitution—were secondary when compared to the issue of slavery. Critical to the more extreme element in the opposition to slavery was its belief that it was "an instrument of God."^{B-13}

iii.

Among the respectable Northerners who immediately disowned John Brown's Harpers Ferry raid was Abraham Lincoln. He, as a politician with serious political ambitions in late 1859, could not seem to be encouraging the John Browns of the world, however much he shared their detestation of slavery.^{B-14}

^{B-11} THE CIVIL WAR DICTIONARY, *supra* note B-5, at 91.

^{B-12} This is described in Lincoln's Second Inaugural Address. See Part VII of this Collection.

^{B-13} THE CIVIL WAR DICTIONARY, *supra* note B-5, at 91.

^{B-14} Lincoln's politic responses to events such as John Brown's Raid have inspired such criticism as the following:

... Lincoln, who loathed abolitionists and who said John Brown was insane (CW 3:503), found himself in the front ranks of a procession made up of heaven-stormers and men singing songs about John Brown Lincoln's failure to respond to the defining moral crisis of his age foreshadowed one of the most agonizing questions of the modern world: What is the duty of an oppressor or a member of an oppressing group when his group is responsible for a situation of total oppression? What should an oppressor or a person identified with the oppressing group do in a situation of collective evil sanctioned by the violence of the state? Since there is no possibility of acting morally short of a destruction of the situation which makes him or her illegitimately privileged, no matter what he or she does, where should the oppressor or the person identified with the oppressing group stand? Should he or she, abandoning all others, stand with the oppressed, as Wendell Phillips and John Brown did, or should he or

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Thus, Lincoln knew at the outset of his Administration in 1861 that he could enlist far more citizens in the cause of preserving the Union—the cause of law-and-order in support of the venerable Union and its constitutional processes—than he could enlist in the cause of destroying slavery. Consider how Frederick Douglass, the eloquent former slave, described this Lincolnian awareness in his 1876 oration in memory of the fallen President:

I have said that President Lincoln was a white man, and shared the prejudices common to his countrymen towards the colored race. Looking back to his times and to the condition of his country, we are compelled to admit that this unfriendly feeling on his part may be safely set down as one element of his wonderful success in organizing the loyal American people for the tremendous conflict before them, and bringing them safely through that conflict. His great mission was to accomplish two things: first, to save his country from dismemberment and ruin; and, second, to free his country from the great crime of slavery. To do one or the other, or both, he must have the earnest sympathy and the powerful co-operation of his loyal fellow-countrymen. Without this primary and essential condition to success his efforts must have been in vain and utterly fruitless. *Had he put the abolition of slavery before the salvation of the Union, he would have inevitably driven from him a powerful class of the American people and rendered resistance to rebellion impossible.* Viewed from the genuine abolition ground, Mr. Lincoln seemed tardy, cold, dull, and indifferent; but measuring him by the sentiment of his country, a sentiment he was bound as a statesman to consult, he was swift, zealous, radical, and determined.^{B-15}

she stand with his group, whatever the evil? Abraham Lincoln said slavery was evil, perhaps the greatest of all evils. Yet he consciously and deliberately chose whiteness, slavery, man-hunting, and evil. What does that tell us about his morals and, ours?

Lenore Bennett Jr., FORCED INTO GLORY: ABRAHAM LINCOLN'S WHITE DREAM 58-59, 282 (2000). See also *id.* at 253, 367. See also *supra* text corresponding to notes 275 and 311. On "utopianism," see *infra* note C-40.

^{B-15} WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS 52-53 (Herbert J. Storing ed., 1970) (emphasis added).

Frederick Douglass himself, however much he admired John Brown and his cause, refused to join his attack on Harper's Ferry in 1859. He recognized, as did Lincoln, that such recourse to violence could undermine that respect for "law and order" upon which support for the Constitution and hence a restrained South depended. In addition, it was far from clear that any slaves would immediately benefit, however powerful the memory of John Brown would eventually become, as testified to by several songs of the Civil War.

iv.

When the Civil War began, I have noticed, the Lincoln Administration presented its efforts as primarily a Save the Union campaign, as efforts to vindicate constitutional process.^{B-16} The Administration had to be careful lest it appear to be primarily an abolitionist project, one that would seem to invite and legitimate Southern resistance to national authority in the name of the constitutional prerogatives of the South.

The Save the Union emphasis of the Administration dominates Northern war music, with its insistence upon *the Union* and *the Flag*. In fact, there was a considerable Battle of the Flags running through the songs of both the North and the South.^{B-17}

An emphasis is placed in Northern songs, as in Northern political rhetoric, upon Southerners as rebellious, even as treasonous. In a few instances, Southerners condemned Northerners as traitors, as may be seen in the useful 1960 collection, *Songs of the Civil War*.^{B-18}

But the large majority of treason charges were hurled against Southerners.^{B-19} After all, it was easier to suggest a *prima facie* case of

^{B-16} This may be seen in Lincoln's First Inaugural Address and in his Message to Congress of July 4, 1861. See ANASTAPLO, LINCOLN, *supra* note 1, at 177, 185.

^{B-17} For a fitting epilogue to the Battle of the Flags, see *infra* text accompanying note 58.

^{B-18} See SONGS OF THE CIVIL WAR (Irwin Silber ed. 1960).

^{B-19} So much was this so that Southerners could, in the course of defending themselves in a song, put "traitors" in quotation marks. Southerners could also say, in self-defense,

Rebel is a sacred name;
 Traitor, too, is glorious;
 By such names our fathers fought—
 By them were victorious.

Washington a rebel was,
 Jefferson a traitor,
 But their treason won success,

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treason against those seeking to break up the Union than against those seeking to keep the Union together. Even so, Lincoln had to be careful lest he be condemned as a usurper (and hence treasonous) in the war measures he directed against slavery.^{B-20}

v.

It was understandable that Southerners made much of the causes that impelled them toward a separation. They insisted, again and again, that their rights were threatened, that the Northern States were failing to live up to the constitutional and political arrangements considered necessary by the South for a healthy federal association. Those arrangements, rarely spelled out in songs, centered upon the assurances that Southerners required for at least the preservation, if not even for the expansion, of their slavery institutions.^{B-21}

Northerners argued—as may be seen in Lincoln's First Inaugural Address—that Southerners had not been deprived of any essential rights. Such a deprivation *might* have justified their resort to the right of revolution.^{B-22} Lincoln urged again and again, in the first half of 1861, that good will and deliberation could provide Southerners all the assurances that they needed and to which they were entitled.^{B-23}

In Southerners' songs there are repeated acknowledgments that they are indeed rebels. They were proud to see themselves acting as their patriotic forebearers had acted in 1776. Our ancestors were rebels and so are we, they sang—and, like them, we are rebels in a good cause.^{B-24}

Southerners called for rebellion because the North had broken faith. In fact, a favorite term for depicting the North is *tyrant*. Thus, in *Maryland! My Maryland!*—a song which opens with the stirring words,

And made their glory greater.

Id. at 49.

^{B-20} For a discussion of the issues considered in the drafting and issuance of the Emancipation Proclamation see ANASTAPLO, LINCOLN, *supra* note 1, at 197-227.

^{B-21} For samples of arguments *for* slavery, see 1 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 221; 2 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 54, 58.

^{B-22} For a discussion of the right of revolution and the Civil War see ANASTAPLO, LINCOLN, *supra* note 1, at 11-27, 177-183.

^{B-23} See *supra* note B-16.

^{B-24} Thus, one song is titled, *Oh, I'm a Good Old Rebel*. See SONGS OF THE CIVIL WAR, *supra* note B-18, at 356. Another was *The Rebel Soldier*. See *id.* at 215.

"The despot's heel is on thy shore"—the State is called upon to "burst the tyrant's chain," with a reminder of "the proud refrain," "*Sic semper [tyrannis]*" an ominous phrase to which we will return.^{B-25}

Occasionally, there is an indication in a Northern song that slavery itself may be tyrannical, but that never seems to suggest itself to Southerners.^{B-26}

vi.

Just as the North had to go easy on the term *abolition*, the South had to go easy on the term *slavery*. The closest that Southerners came to an explicit affirmation of slavery, at least among their better known songs, is *The Bonnie Blue Flag*, which opens with the declaration,

We are a band of brothers
And native to the soil,
Fighting for the property
We gained by honest toil . . .^{B-27}

The euphemism seen in this reference to slavery can remind us of the euphemisms employed in the references to slavery in the Constitution of 1787.^{B-28}

Euphemisms were resorted to in songs because, it seems, there *was* an awareness among Southerners that there was indeed a problem with slavery, with one race clearly *using* another race, relentlessly and indefinitely. One Southern song, which did not catch on, has an elderly slave testify that she has her liberty, not because of any Northern proclamation but rather because of her Christian faith.^{B-29}

Another attempt to get around whatever slavery-related "guilt" that decent Southerners might have had was the "positive good"

^{B-25} See *infra* text accompanying note B-55.

^{B-26} For a discussion of Patrick Henry, slavery and liberty, see *infra* text accompanying note B-35.

^{B-27} See 2 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 90; SONGS OF THE CIVIL WAR, *supra* note B-18, at 65-66.

^{B-28} The Confederate Constitution of 1861, on the other hand, spoke explicitly of slavery in firmly establishing that institution within its constitutional system. See ANASTAPLO, AMENDMENTS, *supra* note 2, at 125-34, 344-61.

^{B-29} There is about this argument something of Socrates, or at least of Diogenes? For a benevolent view of relations between masters and slaves, see Anastaplo, *Slavery and the Constitution: Explorations*, 20 TEXAS TECH L. REV. 677, 681-90 (1989).

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argument developed a generation before. Whatever force there may have seemed to be in the argument for slavery so long as the Africans appeared foreign and uncivilized, it became much harder to justify slavery once the slaves became Americanized, which included becoming Christianized.^{B-30} And so, it became easier for Southerners, in their songs, not to make much of slavery—but rather to make much more of unwarranted Northern interference in how Southerners preferred to live.^{B-31}

vii.

Both sides, as reflected in their songs, are very much in agreement about the goodness of liberty or freedom. However, it is primarily the liberty of whites that is being celebrated thus, not that of the slaves. This is true almost as much in the Northern songs as in the Southern songs.^{B-32}

Both sides condemn infidelity and treachery. Liberty, for the North, includes respect for the results of free elections. Liberty, for the South, includes resistance to coercion, which is reinforced by Southerners' fear of the long-term effects of a Republican Party ascendancy. Lincoln was moved to observe, late in the War, that the country needed a good definition of the word *liberty*, so different were the working definitions of the North and the South.^{B-33}

The liberty being championed both by the North and by the South could be seen everywhere as standing in opposition to slavery. This is evident in what Patrick Henry said in the second most famous speech in the nation's history.^{B-34} In fact, it is with a comment on Patrick

^{B-30} For a discussion of slavery and the proper Christian response, see John Wesley, *Thoughts Upon Slavery*, in 1 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at 252.

^{B-31} Adam Smith would have agreed with the Southerners' use of "honest toil," or at least of "toil," but not in the sense of the *Bonnie Blue Flag* song. That is, he did argue, in his *The Wealth of Nations* that to rely upon slavery for common labor was not an efficient use of resources.

^{B-32} John Donne observed that "No man is an *Island*, entire of it self." In recent centuries, it can also be said, no race is an *Island* of itself either.

^{B-33} See 7 LINCOLN, *supra* note 7, at 301-02; 1 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM, *supra* note 51, at xi. Lincoln thought that other terms were also in need of disciplined examination, which he offered in his major 1861 addresses. See *supra* note B-16.

^{B-34} The most famous speech in the nation's history sees the nation as having been "conceived in liberty," but a liberty which is challenged, if not even enriched, by the dedication to equality.

Henry's speech that I conclude the final note in my *Abraham Lincoln* book:

Be all this as it may, we should not leave the Civil War-centered dialogue on statesmanship and the pursuit of a proper happiness offered by this Collection without reminding ourselves once again of that gallant love of liberty and that deep abhorrence of slavery natural to the Old South. These noble responses are evident in a passage from Patrick Henry's most celebrated speech, a passage which anticipates the solid Union that would be required for the people of this Country to be able truly to govern themselves. The passage is taken from this 1775 speech before a meeting of the Second Revolutionary Convention of Virginia: "There is a just God who presides over the destinies of nations, and who will raise up friends to fight our battles for us. The battle, sir, is not to the strong alone, it is to the vigilant, the active, the brave. Besides, sir, we have no election. If we were base enough to desire it, it is now too late to retire from the contest. There is no retreat but in submission and slavery! Our chains are forged. Their clanking may be heard on the plains of Boston! . . . The war is actually begun! The next gale that sweeps from the north will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God!-I know not what course others may take; but as for me, give me liberty, or give me death!"^{B-35}

³⁵

I wonder in passing whether the American insistence upon liberty, and perhaps also upon equality, is somehow related to one of the odd features of the Civil War songs, both North and South. While much is made in these songs, sometimes quite sentimentally, of wives, husbands, lovers, children, siblings and, of course, mothers, rarely is anything said about the fathers of those in the military, whatever may be

^{B-35} ANASTAPLO, LINCOLN, *supra* note 1, at 358-59. See WILLIAM WORT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 115-25, (3d ed., 1818).

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said about their patriotic ancestors.^{B-36} Does American mobility, and the liberty and equality implicit in such mobility, encourage, if it does not require, emancipating oneself from paternal rule?

viii.

This silence with respect to fathers is one of the features common to both Northern and Southern songs. There are many others, with often the same catch-phrases being used.

It is not surprising that the songs are often interchangeable. Sometimes it is even hard to tell whose song it is. Or it can be a song which begins in one part of the country and is then picked up, perhaps with adaptations, in the other part.

We are reminded here, as elsewhere, of the considerable common heritage of Northerners and Southerners. Did this commonalty contribute to making the war as ferocious as it was? Certainly, there are few exhibitions, in songs, of pity for both sides.^{B-37}

A common heritage is evident in how the Constitution of 1787 could readily be adapted to their own use by the framers of the Confederate Constitution of 1861.^{B-38} Indicative of another kind of adaptation is the change of the name of Washington College to Washington and Lee College after the defeated general served as its president.^{B-39}

ix.

But however common the heritage, we can become aware of further significant differences between the songs South and North, differences that may be slavery-related.

^{B-36} One could expect to hear much more about fathers from, say, Homeric, Roman, or Shakespearean characters. A major exception to this silence is what is said about "Father Abraham," as in the Northern song, *We Are Coming, Father Abr'am*. See SONGS OF THE CIVIL WAR, *supra* note B-18, at 104-07. Compare ANASTAPLO, LINCOLN, *supra* note 1, at 329.

^{B-37} Compare what is done by Lincoln in his great "songs," the Gettysburg Address and the Second Inaugural Address. See ANASTAPLO, LINCOLN, *supra* note 1, at 229, 243; Part 7 of this Collection.

^{B-38} See ANASTAPLO, AMENDMENTS, *supra* note 3, at 125.

^{B-39} It is indicative of how times have indeed changed that a young African-American scholar, a popular member of the Washington and Lee University faculty, can thank that institution for its help in getting his book published. See LUCAS E. MOREL, LINCOLN'S SACRED EFFORT: DEFINING RELIGION'S ROLE IN AMERICAN SELF-GOVERNMENT ix (2000).

Chivalry is stressed more in the South. 'It is a term which is several times used in Southern songs; I recall no instance of its use in any of the more prominent Northern songs. It is chivalry which leads to, among other things, an emphasis in the South upon honor. It can also lead to the ordinary soldier's complaint that all their glory is monopolized by the officers.'^{B-40} An amiable feature of Southern chivalry is the rhapsodic way that General Lee could write about his horse:

If I were an artist like you, I would draw a true picture of Traveller, representing his fine proportions, muscular figure, deep chest, short back, strong haunches, flat legs, small head, broad forehead, delicate ears, quick eye, small feet and black mane and tail. Such a picture would inspire a poet, whose genius could then depict his worth and describe his endurance of toil, hunger,

^{B-40} One can compare the speeches made by President Lincoln to the regiments that came to serenade him, speeches stressing again and again the opportunities available to all under the Constitution. Thus, he said to an Ohio regime on August 22, 1864:

I almost always feel inclined, when I happen to say anything to soldiers, to impress upon them in a few brief remarks the importance of success in this contest. It is not merely for to-day, but for all time to come that we should perpetuate for our children's children this great and free government, which we have enjoyed all our lives. I beg you to remember this, not merely for my sake, but for yours. I happen temporarily to occupy this big White House. I am a living witness that any one of your children may look to come here as my father's child has. It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise and intelligence; that you may all have equal privileges in the race of life, with all its desirable human aspirations.

⁷ Lincoln, *supra* note 7, at 512. Lincoln had, after making similar remarks to another Ohio regiment (on August 18, 1864), cautioned against what we call "utopianism":

There is involved in this struggle the question whether your children and my children shall enjoy the privileges we have enjoyed. I say this in order to impress upon you, if you are not already so impressed, that no small matter should divert us from our great purpose. There may be some irregularities in the practical application of our system. It is fair that each man shall pay taxes in exact proportion of his property; but if we should wait before collecting a tax to adjust the taxes upon each man in exact proportion with every other man, we should never collect any tax at all. There may be mistakes made sometimes; things may be done wrong while the officers of the Government do all they can to prevent mistakes. But I beg of you, as citizens of this great Republic, not to let your minds be carried off from the great works we have before us. This struggle is too large for you to be diverted from it by any small matter.

Id. at 505. See *infra* note B-46. Compare *supra* note B-14.

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thirst, heat and cold, and the dangers and suffering through which he has passed. He could dilate upon his sagacity and affection, and his invariable response to every wish of his rider. . . .^{B-41}

Related to the elevation of chivalry, and hence of manners and gentility in the South, is the depreciation of manual labor. Ordinary working men, those men who have left their ploughs and workshops to save their country, seem to have a higher status in the Northern songs. The lower status of labor in the South may have been due in large part to the existence there of slavery: that is, it was easy to believe there that manual work was something that was fit only for slaves to perform. It is the Southern disdain for manual labor, by the way, that may have contributed to the significant tendency of immigrants (from abroad as well as from the Eastern States) to go into what we now know as the Midwest rather than into the South.^{B-42} Working men and women were reluctant to go into a part of the country where they were likely to be regarded, by those in control, as not much better socially than slaves. And this immigration contributed, in turn, to the growing political power of the North, compared to the South, that steadily growing power which frightened the South into its attempted Secession.

Not only did class differences matter more in the South, but Southerners tended to see Northerners as naturally more interested than Southerners were in money-making, and hence more eager to sell each other out for gain. At the same time, Southerners could see Yankees as more puritanical and bigoted, with someone such as John Brown representing the "pure" and hence awful condition toward which Northerners tended.^{B-43} Southerners could also come to appreciate, as may be seen by implication in the song *Goobor Peas*, that the North was better equipped materially to conduct a long war.^{B-44}

The class differences that Southerners insisted upon may perhaps be summed up in this stanza from their song, *I Can Whip the Scoundrel*:

Jeff Davis was a gentleman;

^{B-41} THE CIVIL WAR DICTIONARY, *supra* note B-5, at 847.

^{B-42} Lincoln, in his last Annual Message to Congress (December 6, 1864), reported that steady immigration had maintained the population of the Union despite the heavy casualties suffered during the war.

^{B-43} The scandal of General Ben Butler's "Woman Order" reinforced Southern impressions of Yankee coarseness. See THE CIVIL WAR DICTIONARY, *supra* note B-5, at 945.

^{B-44} See SONGS OF THE CIVIL WAR, *supra* note 18, at 168.

Abe Lincoln was a fool.
 Jeff Davis rode a dapple gray,
 And Lincoln rode a mule.^{B-45}

Davis was born in Kentucky, the year before Lincoln was. But his family advantages were considerably greater, permitting him to attend Transylvania University before receiving an appointment to West Point.^{B-46} His circumstances were even such that he could elope with Zachary Taylor's daughter, after which he resigned his Army commission and settled down in Mississippi as a planter. Davis, as President of the Confederacy, "took over more of the powers and became dictatorial and autocratic, a trend that ran counter to the states-rights philosophy of the seceding states."^{B-47} Davis's ostensibly aristocratic ways are believed to have made the Southern war effort less effective than it might otherwise have been.^{B-48}

x.

The bigotry that Southerners saw in the North was probably related to the deeper religious fervor evident in Northern songs. Much more in made in the North of the Lord and of Christ, with *The Battle Hymn of the Republic* as perhaps the prime example.^{B-49}

Thus, it seems, the North was more inclined to look to something grand, if not even transcendental, emerging from their sacrifices. Northerners believed they were fulfilling thereby the promise and expectations of the Founding Period. The South, on the other hand,

^{B-45} *Id.* at 225.

^{B-46} The constant rearrangement, in the United States, of family advantages is suggested by the fact that a son of the plebeian Abraham Lincoln (Robert Todd Lincoln, who later became a Chicago lawyer), attended Harvard College.

^{B-47} THE CIVIL WAR DICTIONARY, *supra* note B-5, at 225-26.

^{B-48} Still, Jefferson Davis can be regarded as "ambivalent" in various ways:

He believed that blacks were inferior to whites, that congressional prohibition of the African slave trade was unconstitutional, and that the federal government should not interfere with slavery. Yet his plantation [in Mississippi] was a model, surpassed only by his brother's for treating blacks with compassion and for giving them a great deal of self-government. He opposed reopening the slave trade on moral grounds and in 1865 advocated emancipation to save the Confederacy.

Paul Finkleman, *Jefferson Davis (1808-1889)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 541 (Leonard W. Levy, et. al eds. 1986).

^{B-49} Compare the pious note inserted by the Confederates in the Preamble to their Constitution of 1861. See ANASTAPLO, AMENDMENTS, *supra* note 2, at 130-31, 344-45.

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tended to look to preserve what they had, if not even to return to a simpler and less threatening age. This aim was consistent with its glorification of chivalry and honor.

The principal risk run by the South, in their effort to halt, if not even to reverse, the disquieting developments of half a century, developments that had begun to be addressed in the Missouri Compromise of 1820, was that of relying ultimately upon the spirit of *negativity*.^{B-50} It is this spirit, in the form of the supposed right to secede whenever the results of constitutional processes are not to any State's liking, which President Lincoln condemned as the spirit of anarchy.^{B-51}

xi.

I have suggested that the religious passion of the North is testified to by the resurrection of John Brown during the Civil War, with the martyred enemy of slavery becoming a Christ-like figure. This may be related to that Puritanism of the North which Southerners found so unsettling.

It is evident from Southern songs, as from the Southern way of life generally, that Southerners could neither live with slavery nor live without it. It is curious that *Dixie*, their most popular Civil War song, depends, at least in its original form, upon somewhat critical comments about plantation life by a slave.^{B-52}

It seems appropriate that the *Marching Song of the First Arkansas Colored Regiment* should make as much as it did of *John Brown's Body*, not only for its tune but also for its chorus. It is striking, and so American, to see how much is made in that song of the fact that these emancipated slaves were "fighting for the law."^{B-53} It is law that they look to when it is reported in the song,

They said, "Now colored brethren, you shall be forever free,
From the first of January, eighteen hundred sixty-three."
We heard it in the river going rushing to the sea,

^{B-50} On negativity and Mephistopheles in Marlowe's *Doctor Faustus* and in Goethe's *Faust*, see Anastaplo, *Law & Literature and the Moderns: Explorations*, NORTHERN ILL. U. L. REV. (forthcoming). See also ANASTAPLO, *AMERICAN MORALIST*, *supra* note 3, at 125.

^{B-51} Was this spirit a perversion of the position taken in the Virginia and Kentucky Resolutions of 1798? On those Resolutions, see 2 *LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM*, *supra* note 51, at 30.

^{B-52} See *id.* 94-95. See also *supra* B-2 and accompanying text.

^{B-53} See *id.* at 97.

As it went sounding on.

Father Abraham has spoken and the message has been sent,
The prison doors he opened, and out the prisoners went
To join the sable army of the "African descent,"
As we go marching on.^{B-54}

xii.

We can now return, in coming to the end of the Civil War, to the other John B. introduced at the outset of these remarks, John Wilkes Booth. His notorious career is summed up in this fashion in *The Civil War Dictionary*:

Booth, John Wilkes. Actor and Lincoln's assassin. 1838-65. After success in Shakespearean roles in 1859, he joined the Virginia militia regiment that assisted in the capture and execution of John Brown that same year. For six months he planned with several others to abduct Lincoln to Richmond at the outbreak of war, but this plot failed when the President did not appear where the conspirators lay in wait. On 14 Apr. '65 he learned that the President would attend the performance that evening of *Our American Cousin* starring Laura Keane at Ford's Theater. After arranging plans with his co-plotters that afternoon, he leaped into Lincoln's box shortly after 10 P.M., shot the President, and jumped on the stage shouting, "*Sic semper tyrannis!* The South is avenged!" His spur caught in the folds of the American flag draped over the box, and he fell, breaking his leg. He escaped backstage to a waiting horse and was not found until 26 Apr., in a barn near Bowling Green (Va.). The barn was set on fire, and Booth was shot to death as he made his escape. Although the original plot had called for killing several high Union officials, all escaped harm except Seward, who was severely stabbed. Booth was the brother of Edwin Booth, the great

^{B-54} *Id.* at 97-98.

Shakespearean actor, and son of Junius Brutus Booth,
the English tragedian.^{B-55}

The negativity to which I have referred may be seen here: decisive action is directed at destruction, not at building up, with little thought evident about what should come next and how.

The theatricality dramatized here—not only in the site of the assassination but even more in how it was done, with the invocation of the ancient *Sic semper tyrannis*—seems somehow a grotesque parody of Southern chivalry, with the victim struck down without warning from behind.^{B-56} Booth came from a family of actors, but he evidently had not learned (as perhaps his father and brother had), that it is a rare actor who does not need firm control by a competent director.^{B-57}

The irrationality of the Southern position during the Civil War, an irrationality promoted by the “impossible” situation in which a dependence upon slavery placed Southerners, is carried to an extreme in the way that John Wilkes Booth assumed his role on this occasion. It is somehow appropriate that Booth should have been literally and fatally tripped up, in his folly, by an American flag.^{B-58}

xiii.

Both the South and the North “lived” in the past, but in different ways. The South looked more to settled relations and to perhaps outmoded roles, with a kind of ancestor-worship. The North looked more to authoritative documents, such as the Declaration of Independence and the Constitution, to which was added in 1862-1863 the Emancipation Proclamation. However venerable such documents are, their authority rests ultimately not upon their age but upon the soundness of the principles they embody. This dependence upon sound principles makes for a vitality that the Southern regime could not have, however noble and self-sacrificing its best people were.

^{B-55} THE CIVIL WAR DICTIONARY, *supra* note B-5, at 73.

^{B-56} One can be reminded of what had been done, the decade before (in 1856) on the floor of the Senate, to Charles Sumner of Massachusetts by a South Carolinian. *See id.* at 818.

^{B-57} Consider the challenging implications, for the son, of the “Junius Brutus” in his father’s name, the great Roman who not only led the expulsion of the kings but who also executed his “counterrevolutionary” sons. On Junius Brutus, *see* ANASTAPLO, THE THINKER AS ARTIST, *supra* note 4, at 361.

^{B-58} One unfortunate influence on John Wilkes Booth may have been the name of the volatile John Wilkes that he carried. *See* ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 1, at 514 n.45, *See also id.* at 524 n.71, 537 n.100.

The passions which led the Civil War are anticipated in a poem written a generation earlier. A hymnal handbook provides this information for us:

The American poet, James Russell Lowell [of Massachusetts], in December [1854], wrote a poem, "The Present Crisis," against the war with Mexico, in which he argued that annexation to the United States of any considerable portion of Mexico would add to the American territory in which slavery was permitted. . . . From this poem a cento was taken which forms our own stirring hymn of social justice, "Once to every man and nation."^{B-59}

The opening stanza of what *is* a stirring, and still popular, hymn is adapted from the fifth stanza of Lowell's eighteen-stanza poem, *The Present Crisis*. That stanza of the hymn reads:

Once to every man and nation
Comes the moment to decide,
In the strife of truth with falsehood,
For the good or evil side;
Some great cause, God's new messiah,
Offering each the bloom or blight,
And the choice goes by for ever
'Twi'xt that darkness and that light.^{B-60}

It may be generally true that "Once to every man . . . Comes the moment to decide . . ." We can hope, however, that this is not true of "every . . . nation," for this might mean that true greatness is possible only for one of a nation's many generations across the centuries.^{B-61} But

^{B-59} Glenn N. Schram, *My American Heritage*, MODERN AGE, Spring 1999, at 179, 181 (quoting from HYMNAL HANDBOOK FOR STANDARD HYMNS AND GOSPEL SONGS 83 (Homer A. Rodeheaver, ed. 1931)).

^{B-60} SERVICE BOOK AND HYMNAL 547 (1958). Authorized by the Lutheran Churches cooperating in The Commission on the Liturgy and Hymnal. The Lowell original, *The Present Crisis*, has a line, after "bloom or blight," which is dropped from the hymn prepared by Thomas John Williams (1869-1944): "Parts the goats upon the left hand, and the sheep upon the right." See THE POETICAL WORKS OF JAMES RUSSELL LOWELL 67 (1978).

^{B-61} On Lincoln's Perpetuation Speech, see 1 LINCOLN, *supra* note 7, at 108. See also *supra* note A-60. Winston Churchill did speak, in the darkest days of the Second World War, of an

if what the poet says is true, it can mean that this nation has already had its greatest moment. Perhaps people sense that this is so, as reflected by our enduring interest in the Civil War.^{B-62}

Whatever the ultimate meaning and stature of slavery and hence of the Civil War among us, there is an oracular pronouncement in the ninth stanza of Lowell's *The Present Crisis* which Northerners and Southerners alike can take to heart, "They enslave their children's children who make compromise with sin."^{B-63}

impending "finest hour" for the British which would be remembered for one thousand years.

^{B-62} A proper assessment of the response by James Russell Lowell to the Mexican War can be complicated. It should be remembered, for example, that Alexander H. Stephens, the Vice-President of the Confederacy (who is himself remembered in a couple of Civil War songs), was, like Abraham Lincoln, opposed to the Mexican War. He had also opposed Secession. On Stephens, see ANASTAPLO, LINCOLN, *supra* note 1, at 121, 185, 266, 304, 308-10, 341.

^{B-63} THE POETICAL WORKS OF JAMES RUSSELL LOWELL, *supra* note B-60, at 67. Even so, counsels of moderation suggesting salutary compromises can, once passions have been aroused, seem foolish, if not even sinful or unpatriotic. Consider, for example, my letter to the editor of November 10, 2000:

It is possible that our Presidential contest will remain "undecided" for weeks to come, partly because of uncertainties in Florida.

If (a big "if") a prolongation of this standoff threatens to damage the country and to subvert the authority of the next Administration, would it not be prudent for the two major candidates to announce an immediate recourse by them to the drawing of lots to settle this matter? The Electoral College votes could thereafter be easily adjusted by their supporters accordingly.

Would not this be a statesmanlike resolution of this "crisis" by both candidates, dramatizing their character and fitness and making more likely an era of national good will thereafter?

This approach would best be taken before the official recount, including the absentee ballots, is announced in Florida, thereby making less likely the risk of having it appear that the "loser" won. It is fortunate that the major candidates have roughly the same amount of popular support nationwide, making it much easier for the country to accept this kind of self-denying compromise.

These candidates have long been extolled as pious patriots. Would not a voluntary recourse by them to the drawing of lots in these extraordinary circumstances, for which there are American legal as well as Biblical precedents, testify both to their faith in Providence and

APPENDIX C. "POWER," "RESPONSIBILITY," AND THE AMERICAN BAR ^{C-1}

I am from home too much of my time, for a young man to read the law with me advantageously. If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already. It is but a small matter whether you read with any body or not. I did not read with anyone. Get the books, and read and study them till, you understand them in their principal features; and that is the main thing. It is of no consequence to be in a large town while you are reading. I read at New-Salem, which never had three hundred people living in it. The books and your capacity for understanding them, are just the same in all places.

Abraham Lincoln^{C-2}

i.

The Matthew Hale bar admission controversy seemed fairly simple and straightforward when it first came to public view in 1998. It seemed, initially, to be an old-fashioned freedom of speech problem involving "hate speech." In these and like matters, the *controversial* should be distinguished from the *offensive*.^{C-3} The controversial should be protected as much as possible, at least so long as the words used are not "so closely brigaded with illegal action as to be an inseparable part of

to their dedication to the common good? Certainly, this kind of resolution would be salutary as a reminder that what always unites us is much greater than what may chance to divide us from time to time.

This letter was submitted three days after a Presidential election which became remarkably unseemly, if not even permanently divisive, as efforts were made to determine who had "really" won. This letter was published in the CHI. DAILY L. BULLETIN, Nov. 13, 2000, at 2, in the HICKORY DAILY REC. (North Carolina), Nov. 15, 2000, at 10A; U. OF CHI. MAROON, November 17, 2000, at 7; in a slightly abridged form in the CHI. TRIB., Nov. 15, 2000, § 1, at 20, and in an enigmatically abridged form in the CHI. SUN-TIMES, Nov. 20, 2000, at 32. No member of a law school faculty with whom I discussed the letter's proposal on November 21, 2000, was prepared to "vote" for it. The longer the November-December standoff continued and the uglier the struggle became, however, the better the counsel of simply drawing lots seemed—at least to me! It can sometimes take time for a sensible position to be acknowledged properly. See, e.g., CHI. TRIB., Nov. 26, 2000, § 1, at 1 (upper left-hand corner): "Finally, everyone has come around to his way of thinking," but only after a half-century, of course.

^{C-1} A talk given in the Martin Luther King, Jr. Birthday Program, Valparaiso University Law School, Valparaiso, Indiana, January 17, 2000.

^{C-2} 2 LINCOLN, *supra* note 7, at 327 (a letter to Isham Reavis, November 5, 1855). See also the text at *supra* note 254.

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it."^{C-4} The offensive should be, and indeed *is* routinely, regulated in the interest of that decorum which makes productive debate possible.^{C-5}

My original expectation, upon studying Mr. Hale's matter, was that he would be admitted to the Illinois bar by the State Supreme Court, however distasteful the Justices found his racist fulminations. This admission seemed to be suggested, if not even required, by the constitutional doctrines that now seem to govern these matters. Certainly, no lawyer who may be found to share the Hale racist doctrines is likely to be disbarred at this time. I also expected, from the outset, that Mr. Hale's highly-publicized opinions would severely jeopardize his effectiveness as a lawyer.^{C-6}

Mr. Hale is already enough of a "lawyer" to know the limits of the territory that he can range across without getting too close to the edge. Thus, he is careful to insist that he does not advocate any law-breaking: the racist programs he advocates are, he further insists, to be carried out by changes in legislation and the Constitution. The question remains, of course, whether this is mere window-dressing behind which highly questionable, if not even illegal, programs are concealed.

Those who have answered this question against him, including the character committee which recommended against his admission to the Illinois bar, have had their position made much easier to maintain by the murderous shooting rampage, in Illinois and Indiana, conducted by one of Mr. Hale's more intimate disciples last Fourth of July weekend.^{C-7} The principal issue then became far less a "constitutional question" and much more "a question of fact"—the question being what Mr. Hale should have anticipated and done with respect to his murderous associate. It is not likely that the judicial authorities, in Springfield, Illinois, or in Washington, D.C., will do anything to reverse any finding by Illinois authorities that Mr. Hale is somewhat responsible for what

^{C-3} See GEORGE ANASTAPLO, *CAMPUS HATE SPEECH CODES, NATURAL RIGHT, AND TWENTIETH CENTURY ATROCITIES* 21 (1999) (hereinafter ANASTAPLO, *CAMPUS HATE SPEECH CODES*).

^{C-4} See ANASTAPLO, *CONSTITUTIONALIST*, *supra* note 1, at 520.

^{C-5} See generally ANASTAPLO, *CAMPUS HATE SPEECH CODES*, *supra* note C-3, at 37. See also George Anastaplo, *Censorship*, in *ENCYCLOPEDIA BRITANNICA* (15th ed.).

^{C-6} See George Anastaplo, *Lawyers, Principles, and Contemporary Challenges: Explorations*, 19 N. ILL. U. L. REV. 353, 355 (1999) (hereinafter Anastaplo, *Lawyers*).

^{C-7} See, e.g., Douglas Holt, *State Panel Says Hale 'Tacitly Endorsed' Hate Spree*, CHI. TRIB., Oct. 31, 1999, at 2; Rick Hepp, *Shooting Victim Sues White Supremacist*, CHI. TRIB., Apr. 4, 2000, at 1; Matt O'Connor, *Minister Shot in Spree Sues Church Leader*, CHI. TRIB., Apr. 5, 2000, at 4.

happened over that fateful Fourth of July weekend.^{C-8} If Mr. Hale some day begins to talk and act differently from how he has talked and acted for some time now, the authorities may come to believe that they are finally dealing with an applicant significantly different from the applicant they have rejected thus far.

As matters now stand, Mr. Hale continues to disturb conscientious people with ordinary sensibilities. He obviously lives in an awful world, not having been properly disciplined in his formative years. Thus, he metes out to himself his own punishment.^{C-9} Also in need of better training are those among the "targets" of his racist talk who allow themselves to be unduly affected by what he says, however apprehensive they may be entitled to be lest some would-be disciples of his explode into deadly outrages. But the Hale matter, as a bar admission case, is not very important in itself.^{C-10}

ii.

The Matthew Hale matter *is* important, however, for what it reminds us about the prevailing sense of right and wrong all around us and about both the level of confidence and the authority of the community in promoting what is right and in suppressing, or at least discouraging, what is wrong. It is remarkable how demoralized the community at large has become with respect to recognizing and insisting upon its prerogatives here. Indeed, it can be said, the one thing that people such as Matthew Hale—whether racists, survivalists, millenarians, or the like—may have right is their conviction that the community as such should do something constructive about the good and the bad, however misguided they themselves may be about what is truly good and what is truly bad as well as about what is indeed constructive.

Some distinctively modern difficulties have emerged here, aggravating the general problems that have followed for a couple of centuries now from the enthronement of "individualism" in the Western

^{C-8} See *In re Matter of Matthew F. Hale*, 723 N.E.2d 206 (Ill. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 2716 (2000). See also Editorial, *Targeting Hateful Conspiracies*, CHI. TRIB., Mar. 19, 2001, sec. 1, p. 16; Ray Long, *Supremacist group argues law is vague*, CHI. TRIB., Mar. 22, 2001, sec. 1, p. 3.

^{C-9} On the natural reward for virtue and the natural punishment for vice, see ANASTAPLO, *CAMPUS HATE SPEECH CODES*, *supra* note C-3, at 127, 147. See also ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 182, 303, 312, 318. See also *supra* note 260.

^{C-10} See *supra* note C-6. It should be emphasized that there is not, at this time, much practical concern about whether either applicant for admission to the bar or members of the bar are racists.

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world and the attacks (even by our so-called conservatives) upon the authority of government.^{C-11} These difficulties, which are keyed to technological innovations, have contributed to the opening of an ever-widening gap between "power" and "responsibility." This gap is reflected in what we have recently accepted, even embraced, in the means of communication and in what we have endured in the means of destruction.

These developments have included, among other things, the proliferation (worldwide) of the Internet and (in the United States) of firearms. The Internet permits ready access to an unprecedented amount of information. Unfortunately, much of that information is unreliable—or, at least, the recipient cannot readily determine its reliability, since there often is no recognizable editor or publisher to vouch for what is being transmitted. One consequence of this information-anarchy has been the reinforcement of paranoid tendencies, since one can easily find others of like mind (or of like un-mind) to support one's fears and fantasies.^{C-12} Thus, one's primary "community" becomes not those all around one, among whom one is obliged to be careful in what one says and appears to be, but rather those few here and there (who can add up to reassuring totals "worldwide") who reinforce one's apprehensions and delusions.^{C-13}

We hear talk these days about "cyber-communities." But these associations are hardly communities which are commensurate with our healthier appetites and our natural capacities. There may be very little that is common in the "communities" relied upon even by people in the same households, to say nothing of neighbors, as each "associates" with a selected (and often chance-driven) combination of "correspondents," arrangements which are subject to constant revision and hence instability. Symptomatic of the problem of community here is the ever-growing so-called e-commerce which is largely immune from local sales taxes—and yet the people involved still live in places where they depend upon public services that are in large part supported by sales taxes.

^{C-11} See e.g., George Anastaplo, *We Owe A Lot to the Community*, Letter to the Editor, CHICAGO TRIBUNE, October 20, 2000, sec. 1, p. 24.

^{C-12} On paranoia, see LEO PAUL S. DE ALVAREX, ED., ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM 147-48 n. 33 (1976).

^{C-13} We have had this sort of thing anticipated for us in recent decades by the bizarre stories featured in supermarket tabloids week after week, stories for which there seems to be a steady audience.

I notice in passing that I argued, several decades ago, for the abolition of broadcast television in the United States, arguing that it was having a corrupting effect among us.^{C-14} Now we have hundreds, if not even thousands upon thousands, of Internet "broadcasters" who are even more pervasive and less accountable than television broadcasters have been.^{C-15}

Comparable suggestions can be made about the gap between "power" and "responsibility" when one surveys the proliferation of firearms in this country. Ever more destructive equipment is openly being made available to ever more undisciplined people. Guns are the most obvious means here, but poison gas and other innovations can be expected. The weaponry produced and circulated among us can result in such unnatural distortions as permitting weaklings and cowards to visit considerable devastation upon the unsuspecting, as was dramatized in the Columbine High massacre last year.^{C-16} A truly self-governing community would supervise much more than we are inclined to do both the "power" distributed among us and the "responsibility" assigned by us for what people are moved to say and do. There is, in our refusal "on principle" to face up to the facts that are readily apparent here as elsewhere, a perverse piety.

iii.

The 1799 Virginia General Assembly Minority Report (of 1799) on the Alien and Sedition Acts, prepared perhaps by John Marshall (in what would today be generally considered a dubious cause), includes old-fashioned sentiments which can continue to challenge us. Particularly instructive here is the repudiation, two centuries ago, of a supposed "inability of our nation to preserve its own peace, and to protect themselves from the attempts of wicked citizens, who, incapable of quiet themselves, are incessantly employed in devising means to disturb the public repose."^{C-17}

^{C-14} See e.g., ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 3, at 245.

^{C-15} The suggestions I made on this occasion in Valparaiso about the gap between "power" and "responsibility" in the realm of communications have been made by someone whose brother served for years as a popular radio broadcaster in Northern Indiana.

^{C-16} See Anastaplo, *Lawyers, First Principles, and Contemporary Challenges*, *supra* note C-6, at 514.

^{C-17} See ANASTAPLO, *2 LIBERTY, EQUALITY & MODERN CONSTITUTIONALISM*, *supra* note 51, at 32. Thucydides reports that the Athenians could be spoken of similarly in other cities in Greece. On Thucydides, see ANASTAPLO, *THE THINKER AS ARTIST*, *supra* note 4, at 253.

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There *are*, we continue to observe, restless souls very much in need of restraint—for their own good as well as for the good of the community. When the sense of community is vital this restlessness is likely to be curbed substantially by public opinion. When it is not, then even men and women in high office are less likely to be shamed into stepping down when their disgraceful misconduct is exposed.

Related to, and reinforcing, this development is the cheapening of talk among us, something that is evident in and reinforced by the advertising to which we are constantly subjected. People have become accustomed to saying as well as to hearing all kinds of absurd things without feeling uncomfortable. This is still another way of noticing the gap between “power” and “responsibility” in our lives both public and private, a widening gap which makes serious education as well as genuine self-government difficult. We should be grateful to Matthew Hale who, in his obvious exploitation of the sensationalism that the mass media is addicted to, can help us identify, diagnose, and perhaps treat (or at least soundly repudiate) the false prophets of our time.