

Revisiting *Dred Scott*: Prudence, Providence, and the Limits of Constitutional Statesmanship

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Abstract: After the *Dred Scott* decision in 1857, Abraham Lincoln embarked on a public campaign to prevent the expansion of slavery in the federal territories. Lincoln's opposition to *Dred Scott* was, however, bound up with a certain theoretical orientation that is often rejected in the general milieu of modern constitutional theory. Within the context of two recent revisionist accounts of slavery and American constitutionalism, I argue that our retrospective evaluations of the sixteenth president's statesmanship must enter into a deeper engagement with Lincoln's attachment to natural law and his theological interpretation of the Civil War.

Keywords: Lincoln, providence, statesmanship, slavery, *Dred Scott*

When the Supreme Court rendered its decision in *Dred Scott v. Sandford* (1857), the case was immediately met with public criticism by antislavery and free soil activists opposed to the expansion of slavery in the federal territories. According to the opinion written by Chief Justice Roger Taney, African slaves and their descendents were not, and could never become, citizens of the United States. Additionally, the Constitution, according to Taney's interpretation, protected the right of citizens to own and traffic in slaves in the federal territories.¹ Giving voice to a political movement formed in opposition to the Court's ruling, Abraham Lincoln imme-

diately declared Taney's opinion to be "erroneous."² In later elaborations on the error of the decision, the Illinois Republican particularly emphasized the moral dimensions of American constitutionalism, which, he maintained, were rooted in the self-evident truths appealed to in the Declaration of Independence. That "all men are created equal and endowed by their Creator with certain unalienable rights" was, according to Lincoln, "a lofty, and wise, and noble understanding of the justice of the Creator to His creatures." This foundational understanding, in turn, influenced Lincoln's interpretation of the Constitution, which, he argued, contained provisions designed to "gradually remove the disease [of slavery] by cutting off its source."³

The degree to which modern constitutional theory is uncomfortable with the political theology and constitutional teleology of the antislavery constitutional tradition is evidenced by recent works challenging the received wisdom that Lincoln exercised great constitutional statesmanship in his efforts to oppose the *Dred Scott* decision. Mark Brandon and Mark Graber, in particular, have each offered iconoclastic treatments of Lincoln that display a certain reticence about heaping praise upon Lincoln's antislavery constitutionalism.⁴ Brandon, for his part, provides a typology for constitutional failure that jettisons reliance on any transcendent or normatively justifying principles external to a written constitution. Graber, in a different vein, urges us to rethink the tradeoffs, relative to the institution of slavery, between constitutional peace and constitutional evil. Each work employs a neo-Hobbesian framework that implicates broad questions regarding Lincoln's statesmanship in terms of his public criticism of the *Dred Scott* decision and his moral engagement with the tragedy of the Civil War.

In assessing these two aspects of Lincoln's statesmanship, I suggest in this essay that we ought to take Lincoln's deep

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attachment to natural law, as well as his interpretation of the war in providential terms, far more seriously than we are inclined to in our retrospective evaluations. What emerges then is not a picture of an individual willing to recklessly gamble away peace but a statesman operating within the confines of human knowledge and trusting, ultimately, that human events are purposeful and that the universe in which they occur is providentially ordered. If Lincoln's interpretation of the thing at stake in *Dred Scott* was correct, moreover, then a failure of members of the other branches of government to challenge the constitutional principles of the Court's decision would have amounted to an acquiescence in the destruction of republican government at the hands of the judiciary. But Lincoln's interpretation of the political crisis that erupted after the *Dred Scott* decision was bound up with a certain theoretical orientation that is often rejected in the general milieu of modern constitutional theory, and this rejection makes a reconsideration of Lincoln in light of contemporary challenges to the standard Lincoln hagiography particularly important. In the following sections of this essay, I offer a brief review of Lincoln's public response to *Dred Scott* during the political aftermath of that decision before turning to a discussion of the challenges to Lincoln's statesmanship posed by Brandon and Graber. In conclusion, I consider Lincoln's providential interpretation of the Civil War, and I suggest that a full critique of Lincoln's statesmanship requires an engagement with this neglected aspect of his thought.

THE AFTERMATH OF *DRED SCOTT*

After the *Dred Scott* decision was handed down, the Court's opinion found vocal support from the executive and legislative branches of government. Two days before Chief Justice Taney read his opinion from the bench, President Buchanan asserted in his inaugural address that the territorial question regarding slavery was a "judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled." Moreover, Buchanan proclaimed that to the Court's "decision, in common with all good citizens, I shall cheerfully submit, whatever this may be. . . ."⁵ Illinois Senator Stephen Douglas likewise praised the Court's decision and insisted that the Supreme Court was the final and authoritative interpreter of the meaning of the Constitution. Yet Douglas's past insistence on the principle of popular sovereignty for territorial legislatures was difficult to square with the Court's declaration in *Dred Scott* that (a) Congress had no power to limit slavery in the territories and (b) Congress could not delegate to territorial legislatures power that it did not possess. Douglas had seemingly developed an opinion about the constitutional legitimacy of the Kansas–Nebraska Act (1854), which granted territorial legislatures the right to decide whether to allow or prohibit slavery, that was independent of (and contrary to) the Supreme Court's opinion. Nonetheless, Douglas went out of his way to reconcile the principle of popular sovereignty in the territories with a firm insistence on the doctrine of judicial supremacy.⁶

Lincoln, as well, had to square his previous political teachings with his public reaction to the Court's decision. A younger Lincoln had taught that respect for law—even bad law—was the central doctrine in American civil religion. In his famous Lyceum Speech in 1838, Lincoln declared, "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others." But, Lincoln went on,

... When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws, nor that grievances may not arise, for the redress of which, no legal provisions have been made.—I mean to say no such thing. But I do mean to say, that, although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed.⁷

While nothing in Lincoln's previous teaching was necessarily inconsistent with his opposition to *Dred Scott*, the ruling did provide the impetus for Lincoln to articulate (and perhaps develop) a nuanced understanding of the appropriate role of judicial authority in upholding the rule of law. If a strict observance of law was the central doctrine in America's civil religion—and if the Taney Court was wrong in its *Dred Scott* ruling—then the Court could not play the role of the magisterium in American political life.

Upon the question of judicial authority, moreover, Lincoln had to defend himself against the charge of waging "warfare upon the Supreme Court of the United States" and uttering a proposition that carried "with it the demoralization and degradation destructive of the judicial department of the federal government."⁸ During the celebrated political debates between Lincoln and Douglas in the summer of 1858, Douglas's criticism of Lincoln on this point was particularly pointed.⁹ In a rhetorical flourish that was reminiscent of Lincoln's warning in the "Lyceum Address," Douglas asked, "When we refuse to abide by judicial decisions what protection is there left for life and property? To whom shall you appeal? To mob law, to partisan caucuses, to town meetings, to revolution?"¹⁰ Douglas thus thrust upon Lincoln the burden of providing a coherent theory of judicial authority that respected the rule of law while denying the concept of judicial supremacy. Additionally, Douglas charged Lincoln with attempting to usher in the very thing many of the nineteenth century opponents of the Constitution had feared would be the tendency of the federal government. Lincoln's fundamental principle, Douglas asserted, was "for consolidation, for uniformity in our local institutions, for blotting out state rights and state sovereignty, and consolidating all the power in the federal government, for converting these thirty-two sovereign states into one empire, and making uniformity throughout the length and breadth of the land."¹¹ From Lincoln's perspective, however, the *Dred Scott* decision portended a different kind of consolidation—a consolidation of pro-slavery principles and the nationalization of slavery throughout the Union. Viewed in this light, Lincoln attempted to refute Douglas's charge by drawing out the logic of the principles posited by the Court, principles Lincoln pledged

to disregard as “rules of political action for the people and all the departments of the government.”¹²

LINCOLN THE STATESMAN

A pivotal moment in Lincoln’s public campaign against the *Dred Scott* decision had occurred at the 1858 Illinois State Republican Convention, where Lincoln led off his address to the delegates with the following observation: “If we could first know *where* we are, and *whither* we are tending, we could then better judge *what* to do, and *how* to do it.”¹³ He had just been unanimously selected as the Republican candidate to challenge Douglas for the Illinois Senate seat, and the *Dred Scott* decision weighed heavily on his mind. The promised end to the slavery agitation had not been effected by the Kansas–Nebraska Act (1854), and, in fact, Lincoln argued, the slavery agitation “*will* not cease, until a *crisis* shall have been reached, and passed.” Quoting from the Gospels, Lincoln famously exhorted, “a house divided against itself cannot stand.”¹⁴ The Union would cease to be divided over the slavery question by becoming entirely slave or entirely free, and the engine in the machinery tending toward the resolution of that crisis in favor of slavery, Lincoln thought, had been provided by Taney’s opinion in *Dred Scott*.

“The several points of the *Dred Scott* decision,” Lincoln asserted, “. . . constitute the piece of machinery, in its *present* state of advancement.”¹⁵ According to the logic of the decision, “what *Dred Scott*’s master might lawfully do with *Dred Scott*, in the free state of Illinois, every other master may lawfully do with any other *one*, or one *thousand* slaves, in Illinois, or in any other free state.”¹⁶ The principle announced by the Court, in other words, tended toward the resolution of the slavery question through the nationalization of slavery *via* the judiciary. Given the acquiescence of the current president and Congress in the Supreme Court’s decision, and their declared commitment to the supremacy of the Court’s interpretation of the Constitution, it would only take “another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits” for this nationalization to be complete. Whether or not it was the result of “preconcert,” the alliance between Senator Douglas, President Buchanan, and Chief Justice Taney, Lincoln declared, was the “present political dynasty” that “shall be met and overthrown.”¹⁷

Lincoln’s call for the overthrow of the “present political dynasty” and his opposition to the *Dred Scott* decision did not constitute a call for force or violence, however. Rather, they constituted a call for the development of independent perspectives on constitutional meaning by the legislative and executive branches, and part of Lincoln’s work in the Republican Party was to encourage candidates for office who would act on political principles that were formed independent of the Court’s tutelage. Regarding legitimate judicial authority, Lincoln maintained that Supreme Court decisions were authoritative and final for the parties involved in the suit. Whomever the Court declared to be a slave, Lincoln assured, would not through private force or mob rule be declared free. But the principles of the Court’s decision would not become binding and authoritative as “political rules” for the

coordinate branches of government. “If I were in Congress,” Lincoln explained, “and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should.”¹⁸

It is not enough to presume that Lincoln’s departmentalist view of constitutional interpretation and his opposition to *Dred Scott* were based simply on an exegesis of the constitutional text. Lincoln’s articulation of the constitutional wrong of the *Dred Scott* decision cannot be understood apart from his view that the Constitution was informed by moral principles, grounded in human nature, which provided the logical basis for republican government. Lincoln maintained that these principles were corroborated by the opening lines of the Declaration of Independence, and he managed to get a lot of mileage out of those “Jeffersonian axioms” during his debates with Douglas. Nevertheless, Lincoln’s argument was not historicist, and it would be wrong to assume that the egalitarian principles he trumpeted were relevant only *because* they were acknowledged in the Declaration or *because* the Declaration somehow was bound up with the Constitution.

The reason Lincoln declared that a slave was not among that species of property “held rightfully” under Taney’s reading of the Fifth Amendment was based on his consideration of the nature of the thing in question. The spirit that says to another man, “You work and toil and earn bread, and I’ll eat it,” Lincoln argued, is based upon a tyrannical principle “[n]o matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race.”¹⁹ While Lincoln declared—in opposition to Taney’s originalist proslavery argument—that the Founders of the American regime intended to place slavery on a course toward ultimate extinction and that the Constitution neither distinctly nor expressly affirmed the right to hold property in men, the “real issue in this controversy,” he maintained, “—the one pressing upon every mind—is the sentiment on the part of one class that does look upon [slavery] *as a wrong*, and another class that *does not* look upon it as a wrong.”²⁰ And according to Lincoln, the wrongness of the *Dred Scott* majority opinion inhered not in its substantive interpretation of the Fifth Amendment but rather in its failure to extend the substantive protections of the Fifth Amendment to all men residing in the federal territories. But the answer to the constitutional question of whether or not the protections of the Fifth Amendment ought to be extended to any particular man depended on the answer to the antecedent question of whether that man is a man who is in full possession of those natural rights that are afforded by nature to humanity as such. Lincoln’s answer was that there was no relevant difference between men of any color that would constitute the possession of different natural rights.

In order to consistently support the principles posited by Taney in *Dred Scott*, one had either to deny the humanity of Africans or deny the moral relevance of human status to the constitutional rules governing property in the federal territories. For Lincoln, both of those denials were false. Equally—and perhaps more—problematic, according to Lincoln, however, was the possibility that such a sweeping

denial of natural rights for one class of people would destroy the logical foundation of the rights of the oppressing class. Lincoln expounded his argument in the following syllogism:

If A. can prove, however conclusively, that he may, of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A.?— You say A. is white and B. is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own. You do not mean color exactly?—You mean the whites are *intellectually* the superior of blacks, and, therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own. But, say you, it is a question of *interest*; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.²¹

The true basis of one's own freedom, Lincoln suggested, was a recognition that the *rightful* claim to freedom is not something won by convention or superior strength, and this recognition carried with it the concomitant denial that the freedom of another might *rightfully* be taken merely on the basis of convention or strength. The primary evil of the *Dred Scott* decision was its denial of this fundamental truth. Lincoln foresaw what he thought would have been the devastating effect of this principle being adopted by the legislative and executive branches, and he combated the Court's rhetoric in an attempt to prevent this principle from capturing the imagination of the public mind.

THE CONSTITUTION IN THE PUBLIC MIND

One of the chief criticisms originally leveled at the proposed Constitution by Anti-Federalists was that national judges, through the influence of their opinions, would be able to “mould the government, into almost any shape they please.”²² Lincoln, in defense of the Constitution, was nonetheless similarly concerned with the potential for a judicial decision to shape the public mind and mold government policy on the issue of slavery. Taney's *Dred Scott* opinion would, Lincoln feared, “gain upon the public mind sufficiently to give promise” to another judicial decision drawing out its logical implications, which would extend and protect slavery in each state of the Union.

In his critique of the *Dred Scott* opinion, Lincoln endeavored not just to represent politically those citizens who carried antislavery sentiments but also to educate the citizens about constitutional realities and to help form and develop those very sentiments. In his judgment of “what to do and how to do it,” Lincoln surveyed the political landscape and he offered a solution within the confines of real constitutional limitations, having a “due regard for [slavery's] actual existence . . . and the difficulties of getting rid of it in any satisfactory way, and to all the constitutional obligations which have been thrown about it; but, nevertheless, desir[ing] a policy that looks to the prevention of it as a wrong, and looks hopefully to the time when as a wrong it may come to an end.”²³ Lincoln's preferred constitutional policy, moreover, was predicated on his understanding that “there is no just rule other than that of moral and abstract right.”²⁴ The

reason Lincoln so emphasized the Declaration of Independence was because he saw that, to be consistent, the defenders of slavery had to reject the self-evident truths spoken of in the Declaration and instead insist “that there is no right principle of action but *self-interest*.”²⁵ Once the repudiation of the principles of the Declaration had been complete, there would be no firm basis upon which republican government could rest.

Lincoln's solution to the problem posed by a wayward judiciary was not, as it was in the tradition of the Anti-Federalists, to declare the legislature superior to the Court, however. Rather, Lincoln explicitly acknowledged the power of judicial review of legislative enactments, as this was “a duty from which [judges] may not shrink.” Still, Lincoln's views on judicial authority became more nuanced through his political duel with Stephen Douglas over the territorial question, and in his First Inaugural Address, with the impending sectional crisis on his mind, Lincoln went on to lay out the danger of political acquiescence in the principles of the *Dred Scott* decision:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit; as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. . . . At the same time, a candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.²⁶

The departmentalist view of constitutional interpretation that Lincoln articulated offered a separation of powers solution to the problem brought on by the potential for judicial pronouncements on the meaning of the Constitution to move the government in untoward directions. Yet, Lincoln's solution was not merely procedural, for it required the work of statesmen, who would identify the tendency of constitutional politics, measure that tendency against “moral and abstract right,” and then propose “what to do and how to do it” within the exigencies of the contemporary political and constitutional landscape.

CONTEMPORARY CHALLENGES TO LINCOLN'S STATESMANSHIP

From a certain vantage point, however, Lincoln misapprehended entirely the project of modern constitutionalism. The challenge of “twentieth-century Hobbesians” to the old paradigm of natural law constitutionalism, Mark Brandon asserts, is “that a constitution is largely incapable of making a world that is distinguishable from the imperatives of economics, morality, culture, or politics.”²⁷ The problem confronted by constitutionalism is therefore how to “constrain and direct political power” in light of the inability of written words to assume meaning independent of other existential realities. In dealing with this problem, Brandon suggests,

modern constitutional theory has rejected, *a priori*, the notion of a “metaphysical higher law,” because invocation of such a higher law is riddled with practical difficulties, including the difficulty of engendering a consensus regarding (a) where such a law originates, (b) what makes it binding, (c) how its principles are to be discerned, and (d) how compliance is to be enforced.²⁸

Hobbes, of course—like latter day Hobbesians—was critical of the classical and scholastic natural lawyers for their ineptness at providing any quantifiable methodology for arriving at the content of the laws of nature. “For the most part,” Hobbes asserted, “such writers as have occasion to affirm, that anything is against the law of nature, do allege no more than this, that it is against the consent of all nations, or the wisest and most civilized nations.” The precepts of the laws of nature, Hobbes asserted in contrast, could be no more than “those which declare unto us the ways of peace, where the same may be obtained, and of defence where it may not.”²⁹ In this, Hobbes’s natural law theory was founded on the most universal or shared human passion, which, he maintained, was the fear of violent death. The old moral codes, however, were problematic for Hobbes’s theory, because traditional notions of duty and obligation were precisely what led men to willingly endure violence and even martyrdom for a good ostensibly higher than peace. Hobbes therefore attempted to reduce this threat (i.e., the threat of violence embraced for the sake of some contested notion of a higher good) by diminishing the force and sway of traditional moral doctrines associated with classical and scholastic natural law theories.³⁰

Remnants of this Hobbesian framework are evident in Mark Graber’s approach to modern constitutionalism as well. Deriving lessons from the constitutional problems posed by the institution of slavery in the nineteenth century, Graber suggests that constitutions should not be viewed as reflections or manifestations of transcendent realities but rather as “vehicles for preserving the peace among persons who have very different visions of the good society, a robust democracy, and the rule of law.”³¹ In light of the problem of political and moral pluralism, in other words, the purpose of modern constitutionalism is to mediate controversies that arise between citizens with competing political aspirations. “The constitutional task,” Graber asserts, “is better described as finding settlements that everyone perceives as ‘not bad enough’ to justify secession and civil war than as making the Constitution ‘the best it can be’ from some contestable normative perspective.”³²

In the American context, the failure of the original constitutional design consisted in its inefficiency at sustaining a national political community among people with deep and pervasive disagreements about the morality of slavery. Modern constitutional theory, Graber likewise maintains, vainly attempts to adjudicate constitutional disputes, and it employs some favored constitutional methodology to ascertain which party is right. Yet, past accommodations with evil provide resources for reasonable legal arguments to be made in favor of perceived injustices. Constitutions, therefore, can only “successfully settle political conflicts in the long run by creating a constitutional politics that consistently resolves contested

questions of constitutional law in ways that most crucial political actors find acceptable.”³³

Problems of constitutional evil are thus not simply about whether persons should respect explicit constitutional provisions that accommodate practices they believe to be unjust. Rather, Graber argues,

Political orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted. The price of constitutional cooperation and union is a willingness to abide by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences in the present.³⁴

Dred Scott emerges, in this context, as a centrist decision; a decision, in other words, that was at least as legitimate an interpretation of American constitutionalism as any other. After the American bisectional consensus broke down, moreover, the only remaining political branch that was controlled by a Southern majority was the Supreme Court, and “In *Dred Scott*,” Graber argues, “the Supreme Court fostered sectional moderation by replacing the original Constitution’s failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in the free and slave states.”³⁵ Under these conditions, he maintains, slavery could only be eradicated by civil war—“not by judicial decree or the election of an anti-slavery coalition.”³⁶ Graber’s challenge, then, is this: Modern partisans of the antislavery cause ought to consider, with all of the benefits of hindsight, “whether antislavery Northerners should have provided more accommodations for slavery than were constitutionally strictly necessary or risked the enormous destruction of life and property that preceded Lincoln’s ‘new birth of freedom.’”³⁷

In Brandon’s similarly iconoclastic treatment of slavery and American constitutionalism, he suggests an alternative theory of constitutionalism that emphasizes the procedural and historically contingent character of the constitutional enterprise. On Brandon’s account, the “new” constitutionalism ushered in by the 1787 Constitution jettisoned nature as a source of constitutionally relevant norms. Rather than being an attempt to secure rights that have a trans-historical basis, the new constitutionalism is defined as a certain type of activity—“an experiment in a particular mode of establishing, directing, and limiting political power”—that is historically contingent.³⁸ Accordingly, constitutional failure with respect to slavery is not understood in terms of a denial of natural human rights but rather as a failure to abide by the historically contingent standards of modern constitutionalism, which require that individuals be able to “construct their political identities” with reference to the regime’s fundamental law. “Notice that this claim,” Brandon points out,

does not rest on the notion that the Constitution violated the principle of ‘human dignity.’ It may well have done so, but within the assumptions of the new constitutionalism, invoking a standard of human dignity is problematic, not least because of its metaphysical roots. Human dignity evokes natural law and natural rights, which are off limits in the new constitutionalism.³⁹

Yet on a different account—commonly associated with Lincoln, but having deep roots in the American political tradition—the failure of the antebellum constitutional order was understood precisely in terms of natural law and natural rights. It is not surprising, then, that antislavery constitutionalists in the nineteenth century such as John Quincy Adams quite consciously rejected the general premises of Hobbes’s political science. Hobbes’s doctrine, Adams asserted, was “utterly incompatible with any theory of human rights, and especially with the rights which the Declaration of Independence proclaims as self-evident truths.”⁴⁰ In the founding generation, as well, Alexander Hamilton offered his own conventionalist interpretation of Hobbes’s theory: “Moral obligation according to him, is derived from the introduction of civil society; and there is no virtue, but what is purely artificial, the mere contrivance of politicians, for the maintenance of social intercourse.”⁴¹ The ultimate reason for Hobbes’s rejection of the classical natural law paradigm, Hamilton conjectured, moreover, was because Hobbes “disbelieved the existence of an intelligent superintending principle, who is the governor, and will be the final judge of the universe.”⁴²

The ultimate grounding principle for the laws of nature was for Hamilton, as it was in the Declaration, a providential God who was at once a lawgiver and a judge for mankind. The challenge of neo-Hobbesians, I take it, is directed precisely at this foundational understanding, based, in part, on a perceived tendency for such a doctrine to engender political violence. Inasmuch as Lincoln constantly appealed back to the Declaration to provide an ultimate foundation for the American regime, and an ultimate justification for prosecuting the Civil War, Lincoln’s statesmanship has therefore also been the subject of revised interpretations in light of conventionalist or antifoundationalist constitutional theories that privilege peace over contested notions of the good.⁴³ In this vein, Brandon questions whether the cost in blood of the Civil War could possibly justify the end of preserving Union (even if Lincoln was correct in maintaining that secession was itself unconstitutional), and Graber, within his discussion of constitutional evil, asserts forcefully: “*Dred Scott* was wrong and Lincoln right only if John Brown was correct when he insisted that slavery was sufficiently evil to warrant political actions that ‘purge[d] this land in blood.’”⁴⁴ The historical causality of the Civil War is, of course, convoluted and deeply contested, and it would be anachronistic to assume that Lincoln, or any other participant, could have anticipated the level of devastation the war would bring. Still, as the war progressed Lincoln did wrestle with these questions, and, as he did, he emphasized the practical limits of prudential statesmanship while his rhetoric became increasingly deferential to the mysterious workings of divine providence.

PRUDENCE, PROVIDENCE, AND THE LIMITS OF STATESMANSHIP

The Civil War historian and Lincoln scholar Allen Guelzo notes that “Prudence was, for Lincoln, a means for balancing respect for a divine purpose in human affairs with the candid recognition that it was surpassingly difficult to know what

purposes God might have.”⁴⁵ To broach the issue of Lincoln’s providentialism in connection with his constitutional statesmanship is, of course, to foray into the perennially contested issue of Lincoln’s theology. Given the pervasiveness of theological language and biblical imagery in Lincoln’s political rhetoric, however, questions concerning the content and political implications of his theology cannot be avoided. As William Wolf argued, after his own study of the sixteenth president’s political speeches and writings,

Lincoln’s religion cannot be hermetically sealed off from his social, economic, and political attitudes. His political action, as revealed by his own words, was ultimately the social expression of an understanding of God and of man that demanded responsible activity.⁴⁶

Lincoln’s politics, committed to certain ideals yet flexible in application, navigated between the Scylla of moral relativism and the Charybdis of unfettered moral idealism through the prudent application of moral principles to particular political circumstances. Nonetheless, in the application of principle to political reality, Lincoln’s ultimate goal, as he increasingly declared, was to be the humble instrument of divine purposes.

Because of the prevalence of theological concepts in Lincoln’s political rhetoric, contemporary observers often regard him, understandably, as “either ‘the mere politician’ or ‘the pious man’ of Washington’s Farewell Address,” while others contend that he “transcends the mere politician and the pious man in a statecraft that is both politic and pious.”⁴⁷ Reinhold Niebuhr offered a variation of the latter interpretation in his classic essay in *The Christian Century*. “Analysis of Abraham Lincoln’s religion,” Niebuhr wrote,

... in the context of the prevailing religion of his time and place and in the light of the polemical use of the slavery issue, which corrupted religious life in the days before and during the Civil War, must lead to the conclusion that Lincoln’s religious convictions were superior in depth and purity to those held by the religious as well as by the political leaders of his day.⁴⁸

In this vein, Niebuhr maintained that “Lincoln’s religious faith was informed primarily by a sense of providence. . . [and that] the chief evidence of the purity and profundity of Lincoln’s sense of providence [was] the fact that he was able to resist the natural temptation to. . . identify providence with the cause to which he was committed.”⁴⁹

Men did not agree in Lincoln’s day, as they do not in our own, and any association of one’s preferred policy with the good and right was often met with a disparate contention and the association with the good and right of a diametrically opposed policy. Such a problem was amplified in antebellum America by the millennialist tendency of each side to associate their own political agenda with the will of God. In the face of intractable disagreements, then, the problem of constitutional evil emerged in an especially cogent way on the eve of civil war. Quoting Sanford Levinson’s *Constitutional Faith*, Graber describes the universal condition of large, diverse polities as one in which “‘one person’s notion of justice is often perceived as manifest injustice by someone else.’”⁵⁰ Lincoln, indeed, recognized this when he wrote to Alexander Stephens, “You think slavery is right and should

be extended; while we think slavery is wrong and ought to be restricted. That I suppose is the rub.”⁵¹

In a speech in 1860, Lincoln disavowed “those sophistical . . . contrivances such as groping for some middle ground between the right and the wrong”⁵² with regard to slavery expansion. Yet, while in office, Lincoln repeatedly demonstrated a willingness to concede ground on important matters of government policy in order to keep the union of states intact. In a famous letter to the influential antislavery editor of the *New York Tribune*, Lincoln declared that, given his options, he would be content to “save the Union without freeing any slave.”⁵³ In his First Inaugural Address, Lincoln had, in fact, made it clear that he had no legal authority and “no purpose, directly, or indirectly, to interfere with the institution of slavery in the States where it exists,” and, in a gesture to the seceded states, Lincoln later supported a proposed constitutional amendment that prohibited any future change to the Constitution that would “authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.”⁵⁴

Lincoln’s ultimate willingness to accept war rather than compromise the principle of non-expansion of slavery in the territories, however, also reflected his recognition that there were limits to what might be achieved through statesmanship, and in recognizing these limits, Lincoln sought to absolve himself of responsibility for the conflict. “In your hands,” Lincoln told his southern brethren, “. . . and not in mine, is the momentous issue of civil war.”⁵⁵ As the war progressed, moreover, Lincoln increasingly framed the contest in terms of providential history. Finally, in his Second Inaugural Address, Lincoln reflected:

The Almighty has His own purposes. ‘Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!’ If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—ferently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said ‘the judgments of the Lord, are true and righteous altogether.’⁵⁶

However, as Nicholas Parrillo notes, “we should be careful not to spotlight the Second Inaugural too much, for it was merely one expression of religious ideas that had been an integral part of Lincoln’s leadership throughout the war.”⁵⁷

Indeed, even before the conflict, Lincoln had constructed an overarching narrative of the American Founding that was imbued with theological ideas. Of those lines in the Declaration of Independence proclaiming that “all men are created equal” and “endowed by their Creator with certain inalienable rights,” Lincoln asserted that this was the Founders’

. . . majestic interpretation of the economy of the Universe. . . In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows.⁵⁸

By wedding the self-evident truths in the Declaration to a providentially ordered universe and by making natural rights derivative from the image of God in man, the very logic of American constitutionalism was given a theological meaning.

Lincoln’s arguments indicated, as David Trueblood notes, that “the Declaration of Independence ma[de] sense in a theological context, but fail[ed] to make sense in any other.”⁵⁹ For the statesman, that theological context was, admittedly, paradoxical, and there was a constant tension between divine providence and human action, moral knowledge and moral responsibility. “The will of God prevails,” Lincoln later reflected in his private journal.

In great contests each party claims to act in accordance with the will of God. Both *may* be, and one *must* be wrong . . . In the present civil war it is quite possible that God’s purpose is something different from the purpose of either party—and yet the human instrumentalities, working just as they do, are of the best adaptation to affect His purpose. I am almost ready to say this is probably true—that God wills this contest, and wills that it shall not end yet. By his mere quiet power, on the minds of the now contestants, He could have either saved or destroyed the Union without a human contest. Yet the contest began. And having begun He could give the final victory to either side any day. Yet the contest proceeds.⁶⁰

In his reflections on providence, Lincoln constantly qualified his remarks with a certain humility that evidenced the internal dynamic at work in “an anguished participant searching for ultimate meaning.”⁶¹ By grappling with these foundational questions, Lincoln ultimately came to view the tragic conflict within the context of a universe that made sense of theological concepts such as collective guilt and collective punishment as well as a divine justice, which, however indiscernible in its particularities, did guide human events. The sins of the fathers truly were visited upon the third and fourth generations.

After the *Dred Scott* decision in 1857 and continuing throughout the Civil War, Lincoln interpreted his own public actions as actions that were motivated by principle and guided by prudence while nevertheless being limited by purposes beyond his control. Revisiting *Dred Scott* and Lincoln’s subsequent statesmanship, within the terms of constitutional debate in the nineteenth century, requires that we at least wrestle with Lincoln’s theological interpretation of the conflict. In his discussion of constitutional justice and constitutional peace, Graber identifies today’s John Bell voters—voters, that is, who are always willing to compromise with evil in order to procure peace—as those who maintain that “peace . . . is intrinsically more just than war.”⁶² In his discussion of today’s Lincoln voters, however, Graber does not consider, as a serious possibility, Lincoln’s own view that war could be an instrument of providential justice transcending the purposes and intentions of individual participants. In his account of constitutional failure, Brandon relatedly discounts the idea that the antebellum constitutional order rested “on a *priori*

assumptions about the character, worth, or rights of human beings.”⁶³ Lincoln, however, did conceive of constitutional failure and the impetus of the Civil War precisely in these metaphysical and theological terms.

As we continue to search for lessons in the experience of the Civil War, revisionist accounts of Lincoln’s statesmanship often lament his inability to maintain peace and ensure or prolong constitutional success in a divided society. But in discarding or tabling the enduring questions of justice and human rights, and the concomitant and unavoidable theological questions underpinning such notions, we often do not adequately consider Lincoln’s own interpretation of the conflict. Perhaps it is an implicit premise in modern scholarship that Lincoln could not have meant what he said in this respect or that what he said has been deemed irrelevant by the progression of the social sciences. That premise, however, needs to be made explicit and argued for before the old constitutionalism, which was conceived of in terms of a providential order and judged by its compatibility with the dignity of human nature, is jettisoned in our modern analysis of the lingering problems of constitutional evil and constitutional failure. For we must first grapple with those nineteenth-century arguments concerning natural rights, man’s place in the divinely constituted cosmos, and the tragic and uncertain price of maintaining free government amid the contingencies of political life before we are adequately able to consider whether there really are political goods higher than peace and whether, after the avenues of prudent statesmanship have been exhausted, some principles are worth dying for. The challenges to Lincoln posed by Brandon and Graber have refreshingly, though perhaps unintentionally, put such enduring questions back on the table by reminding us both of the importance and limits of constitutional statesmanship.

NOTES

1. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Dred Scott was a slave who sued for his own freedom after traveling with his master to Illinois and to the free territories north of Missouri. On the preliminary question of jurisdiction, the Court asserted that Dred Scott was not a citizen capable of bringing suit in federal courts. Beyond the citizenship question, the Court also argued that the Missouri Compromise was an unconstitutional piece of congressional legislation. See *ibid.*, 452 (Taney, J.): “Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.” Even though the Missouri Compromise had effectively been overturned by the Kansas–Nebraska Act of 1854, Taney considered the constitutionality of the federal restriction on slavery in order to refute the argument, made by Scott’s lawyers, that Scott became free as he entered the federal territories north of Missouri (where slavery had been prohibited by federal law).

2. Abraham Lincoln, “Speech on the Springfield, Illinois” (June 26, 1857) in ed. Roy P. Basler, *Collected Works of Abraham Lincoln* (Brunswick, NJ: Rutgers University Press, 1953), 2: 401.

3. Abraham Lincoln, “Speech at Lewistown, Illinois” (August 17, 1858) in ed. Basler, *Collected Works*, 2: 546.

4. Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton, NJ: Princeton University Press, 1998); Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006).

5. James Buchanan, “Inaugural Address” (March 4, 1857) in Jonathan French, ed., *The True Republican: Containing the Inaugural Addresses. . .*

of All the Presidents of the United States from 1789 to 1857 (Philadelphia: J.B. & Smith Company, 1857), 292.

6. Douglas was the author of the Kansas–Nebraska Act, and he presented his mature argument on the reconcilability of the ruling in *Dred Scott* with the Act’s principle of popular sovereignty in an article printed by *Harper’s* magazine in 1859. See “The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories.” *Harper’s Magazine* (September 1859): 519–537. Reprinted in Harry Jaffa and Robert Johannsen, eds., *In the Name of the People* (Columbus, OH: The Ohio State University Press, 1959). Douglas’s argument rested on an analytic distinction between powers that Congress could exercise but not confer, on the one hand, and powers that Congress could confer and not exercise, on the other. The enumerated powers in Article I were powers that Congress could exercise but not confer. The power to craft a policy for the domestic institutions of a territory was a power that Congress could confer but not exercise. As such, Douglas argued, regulations affecting slavery—as a domestic institution—were within the authority conferred on the territorial legislatures by Congress in the Kansas–Nebraska Act (1854) and such regulations were not inconsistent with the *Dred Scott* decision, even though Congress could not directly exercise this power under the Court’s ruling. Even if this distinction is granted, however, it still is difficult to square Douglas’s position with the Court’s insistence that Congress “can confer no power on any local Government, established by its authority, to violate the provisions of the Constitution” and that “the right to property in a slave is distinctly and expressly affirmed in the Constitution” (see *Dred Scott* at 451).

7. Lincoln, “The Perpetuation of Our Political Institutions: Address Before the Young Men’s Lyceum of Springfield, Illinois” (January 27, 1838) in ed. Basler, *Collected Works*, 1: 108–15.

8. “Douglas at Springfield” (July 17, 1858) in ed. Paul M. Angle, *The Complete Lincoln–Douglas Debates* (Chicago: University of Chicago Press, 1991), 57–8.

9. See, generally, ed. Paul M. Angle, *The Complete Lincoln–Douglas Debates* (Chicago: University of Chicago Press, 1991).

10. “Douglas at Springfield” (July 17, 1858) in ed. Angle, *The Complete Lincoln–Douglas Debates*, 58.

11. *Ibid.*, 55.

12. “Lincoln at Springfield” (July 17, 1858) in ed. Angle, *The Complete Lincoln–Douglas Debates*, 78.

13. “Lincoln at Springfield” (June 16, 1858), in ed. Angle, *The Complete Lincoln–Douglas Debates*, 1.

14. *Ibid.*, 2.

15. *Ibid.*, 4. The antecedent states of this machinery, according to Lincoln, were (1) the repeal of the Missouri Compromise by the Kansas–Nebraska act; (2) the exclusion from the Kansas–Nebraska act of the amendment proposed on the floor by Samuel Chase to expressly declare that slavery could in fact be prohibited by territorial legislatures; (3) the declaration of the author of the Kansas–Nebraska act on the floor of the Senate that whether or not slavery could be prohibited by territorial legislatures was ‘a question for the Supreme Court’; and (4) the endorsement by President Buchanan of the Supreme Court’s forthcoming decision in *Dred Scott*. See *ibid.*, 2–4.

16. *Ibid.*, 5.

17. *Ibid.*, 7.

18. “Lincoln at Chicago” (July 10, 1858) in ed. Angle, *The Complete Lincoln–Douglas Debates*, 36. We also know from the very first days of the Lincoln Administration that he had to decide whether or not he, as President, would obey the principles of *Dred Scott* in his actions as an executive officer. In separate instances, one free black man was denied a passport to study in France, and another free black man was denied a patent for his invention. Both of these denials were premised on the ground that African slaves and their descendants could not be citizens of the United States per the ruling in *Dred Scott*. Lincoln’s Attorney General, Edward Bates, disputed the legitimacy of the Court’s ruling by declaring that free blacks born in the United States were citizens of the United States and were thus entitled to the benefits of national citizenship. Accordingly, the Administration issued both the passport and the patent. Moving beyond these specific instances within the executive branch, the Republic Congress also passed legislation banning slavery in the territories while extending that prohibition to all territories that might be added in the future. As James Randall notes, “Congress passed and Lincoln signed a bill, which, by ruling law according to the Supreme Court interpretation was unconstitutional.” See James Randall, *The Civil War and Reconstruction* (Boston: D.C. Heath & Company, 1937), 136.

19. “Alton: Lincoln’s Reply” (October 15, 1858) in ed. Angle, *The Complete Lincoln–Douglas Debates*, 393.

20. *Ibid.*, 390.

21. *Abraham Lincoln: A Documentary Portrait Through His Speeches and Writings*, ed. Don Fehrenbacher (Stanford, CA: Stanford University Press, 1977), 70.

22. Brutus, "Letter XI" (31 January 1788) in ed. Herbert J. Storing, *The Anti-Federalist* (Chicago: University of Chicago Press, 1985) 167.
23. "Galesburg: Lincoln's Reply" (October 7, 1858) in ed. Angle, *The Complete Lincoln-Douglas Debates*, 304.
24. *Ibid.*, 300.
25. "Ottawa: Lincoln's Reply" (August 21, 1858) in ed. Angle, *The Complete Lincoln-Douglas Debates*, 116.
26. Abraham Lincoln, "First Inaugural Address" (March 4, 1861) in ed. Basler, *Collected Works*, 4: 268.
27. Brandon, *Free in the World*, 7.
28. *Ibid.*, 9.
29. Thomas Hobbes, *The Elements of Law Natural and Politic*, ed. J. C. A. Gaskin (Oxford: Oxford University Press, 1994), 81. See also Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Oxford: Cambridge University Press, 1996), chapters 13–5, pp. 86–100.
30. My interpretation of Hobbes here assumes that the Hobbesian laws of nature are, as Norberto Bobbio suggests, "not laws, but mere theorems" which lead men to covenant themselves to a sovereign lawgiver. "All that Hobbes manages to squeeze out of the traditional doctrine of natural law is thus an argument in favor of the state, and of our absolute obligation to obey positive law." Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. Daniela Gobetti (Chicago: University of Chicago Press, 1993), 145; 148. See also Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, [1950] 1963), 166–202. For a rival interpretation of Hobbes's natural law theory as a deontic divine command theory, see A. P. Martinich, *The Two Gods of Leviathan* (New York: Cambridge University Press, 2003), 100–34.
31. Graber, *Dred Scott and the Problem of Constitutional Evil*, 253.
32. *Ibid.*, 2.
33. *Ibid.*, 3.
34. *Ibid.*, 3.
35. *Ibid.*, 13.
36. *Ibid.*, 4.
37. *Ibid.*, 4.
38. Mark E. Brandon, "Constitutionalism and Constitutional Failure," in eds. Sotirios A. Barber and Robert P. George, *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001), 304.
39. *Ibid.*, 306.
40. John Quincy Adams, *Argument of John Quincy Adams, Before the Supreme Court of the United States, in the Case of the United States, Appellants, vs. Cinque, and others, Africans, Captured in the Schooner Amistad*. . . (New York: S.W. Benedict, 1841), 89. See also John Quincy Adams, *The Social Compact Exemplified in the Constitution of the Commonwealth of Massachusetts*. . . (Providence: Knowles and Vose, 1842), 24. Hobbes's theory, Adams asserted, "severs the Gordian knot with the sword, extinguishes all the rights of man, and makes force the corner stone of all human government. It is the only theory upon which slavery can be justified as conformable to the law of nature."
41. Alexander Hamilton, "The Federal Farmer Refuted," in *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge, 12 vols. (New York: G.P. Putnam's Sons, 1904), 1: 61–2. For an insightful essay on Hamilton's views of slavery, see Michael D. Chan, "Alexander Hamilton on Slavery," *Review of Politics*, vol. 66 (2004), 207–31.
42. Ed. Lodge, *The Works of Alexander Hamilton*, 1: 62.
43. For a fuller sketch of Brandon means by "new" and "old" constitutionalism, see Brandon, *Free in the World*, 3–33.
44. Graber, *Dred Scott and the Problem of Constitutional Evil*, 8.
45. Allen Guelzo, "The Prudence of Abraham Lincoln," *First Things*, January 2006, 13.
46. William J. Wolf, *The Almost Chosen People: The Religion of Abraham Lincoln*, 2nd ed. (New York: Doubleday & Company, [1959] 1963), 91.
47. Lucas Morel, *Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government* (Lanham, MD: Lexington Books, 2000), 9. For utilitarian accounts of Lincoln's religious rhetoric, see, for example, Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*, 2nd ed. (Chicago: University of Chicago Press, 1982); Harry V. Jaffa, *A New Birth of Freedom* (Lanham, MD: Rowman & Littlefield, 2000); Michael Zuckert, "Lincoln and the Problem of Civil Religion" in eds. John A. Murley, et al., *Law and Philosophy: The Practice of Theory: Essays in Honor of George Anastaplo*, vol. 2 (Athens: Ohio University Press, 1992), 720–43. For more pious accounts (that also recognize the utility of religion), see, for example, Allen Guelzo, *Abraham Lincoln: Redeemer President* (Grand Rapids, MI: William B. Eerdmans, 1999); Joseph R. Fornieri, *Abraham Lincoln's Political Faith* (DeKalb: Northern Illinois University Press, 2003); Mark Noll, *The Civil War as a Theological Crisis* (Chapel Hill: The University of North Carolina Press, 2006).
48. Reinhold Niebuhr, "The Religion of Abraham Lincoln," *The Christian Century* (10 February 1965), 172.
49. *Ibid.*, 172–3.
50. Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1989), 72. Quoted in Graber, *Dred Scott and the Problem of Constitutional Evil*, 8.
51. Lincoln, "Letter to Alexander H. Stephens" (December 22, 1860) in ed. Basler, *Collected Works*, 4: 160.
52. Lincoln, "Speech at New Haven, Connecticut" (March 6, 1860) in ed. Basler, *Collected Works* 4: 29. See also "Speech at Hartford, Connecticut" (March 2, 1860) in ed. Basler, *Collected Works* 4: 8, 13, on the impossibility of achieving a "middle ground" between slavery extension and slavery restriction.
53. Lincoln, "Letter to Horace Greeley" (August 22, 1862) in ed. Basler, *Collected Works*, 5:389.
54. "Joint Resolution to Amend the Constitution" (March 2, 1861), *U.S. Statutes at Large*, 36th Congress, 2nd Session, 251.
55. Lincoln, "First Inaugural Address" (March 4, 1861) in ed. Basler, *Collected Works*, 4: 268.
56. Lincoln, "Second Inaugural Address" (March 4, 1865) in ed. Basler, *Collected Works*, 8: 333.
57. Nicholas Parrillo, "Lincoln's Calvinist Transformation," *Civil War History*, Vol. XLVI, No. 3 (2000), 253.
58. Abraham Lincoln, "Speech at Lewistown, Illinois" (17 August 1858) in ed. Basler, *Collected Works*, 2: 546.
59. David Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish* (New York: Harper & Row, 1973), 69.
60. Lincoln, "Meditation on Divine Will" (September 2, 1862) in ed. Basler, *Collected Works*, 5: 403–4.
61. Fornieri, *Abraham Lincoln's Political Faith*, 40.
62. Graber, *Dred Scott and the Problem of Constitutional Evil*, 253.
63. Brandon, "Constitutional Failure," in *Constitutional Politics*, 306.

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