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## Lincoln's Deadly Hermeneutics<sup>1</sup>

**Abstract:** My aim here is to extend and further explore the deeper meaning of a phrase I coined some years ago: “deadly hermeneutics” (Ball, 1987):<sup>2</sup> roughly, the idea that hermeneutics – the art of textual interpretation – can be, and often is, a deadly business, inasmuch as peoples’ lives, liberties and well-being hang in the balance. I plan to proceed as follows. By way of introduction and illustration I first consider very briefly three modern examples of deadly hermeneutics. I then go on to provide a brief account of the hermeneutical-political situation in which Abraham Lincoln found himself in the 1850s in the run-up to the Civil War and subsequently during the war itself. This requires that I sketch an overview of the Southern case for secession and, more particularly, their interpretation of the Declaration of Independence and the Constitution to legitimize that radical move. I then attempt to show how Lincoln invoked and used a counter-interpretation of the Declaration in his speeches on the Kansas-Nebraska Act (1854), the Dred Scott decision (1857), and his debates with Senator Stephen A. Douglas (1858). I next look at President Lincoln’s interpretation of the Constitution in the Emancipation Proclamation (1863), his suspension of Habeas Corpus and, finally, his finest, briefest – and at the time highly controversial – Gettysburg Address.

**Keywords:** hermeneutics, interpretation, Abraham Lincoln, Emancipation Proclamation

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<sup>1</sup> An early version of this essay was presented at the conference “The Politics of Interpretation,” organized by Jens Olesen in Oxford in 2011, and a revised version presented to the Institute of Historical Research at the University of London in 2013, with Professor Quentin Skinner in the chair. I thank Dr. Olesen for inviting me to the first, to Professor Skinner for inviting and graciously introducing me at the second. A third and slightly revised version was delivered as the 2014 Charles S. Hyneman Lecture at Indiana University. I thank my hosts and members of the audiences on these occasions for stimulating comments and criticisms. I also thank my colleagues Jeffrie G. Murphy and Jennet Kirkpatrick for their encouraging and helpful comments.

<sup>2</sup> I am of course well aware that hermeneutics is not a univocal term; but for my purposes here I do not need a more nuanced or fine-grained conception than I use here.

It is a truism that political actors interpret texts to legitimate and justify their actions and policies. By way of example, consider first how radical Islamists' interpretation of the Qur'an lends legitimacy (in their eyes, at least) to a particular interpretation of the meaning of the concepts of jihad ("struggle") and takfir (the punishment of apostates) which translates rather quickly into a strategy of terrorism and mass murder. What critics view as rank rationalization radical Islamists view as moral justification. Closer to home, radical anti-abortionists cite scripture by way of justifying their bombing of clinics and the killing of abortion providers. Or, if these two examples of deadly hermeneutics seem to be too theological and insufficiently "political," consider Stalin's situation in the mid-1930s.

In the course of consolidating his power, Stalin purged potential rivals who were put on trial on trumped-up charges and summarily shot. His fear of and animus toward Trotsky, Bukharin and other political opponents was perhaps understandable; but the execution of others appears, initially at least, to be puzzling, if not inexplicable. Consider the case of David Riazanov, the mild-mannered and deeply learned founder of The Marx-Engels Institute and editor of the *MEGA* (*Marx-Engels Gesamtausgabe*, or collected works). Stalin ordered Riazanov shot and publication of the *MEGA* stopped, and also saw to it that several works by Lenin were omitted from the latter's *Collected Works* (Medvedev, 1972, chap. 14). At the same time Stalin published his first foray into Marxian theory, *Dialectical and Historical Materialism* (1938) which reappeared the following year as a chapter in his potted and partisan history of the Russian Revolution and the Communist Party, the *History of the CPSU (B)*, in 1939.<sup>3</sup> All of these events are interconnected. *Pace* Deutscher and others, it was not mere image polishing or ideological window-dressing that explains his actions (Deutscher, 1960, pp. 381–382). Stalin, who had initially been educated for the priesthood in a Russian Orthodox seminary – not for nothing did Lenin nickname him "the priest" – knew that control over the meaning and interpretation of key texts was itself an important source of political power, authority, and legitimacy. Scholars and theorists who knew much more about Marx and Marxian theory than Stalin did therefore had to be silenced or even eliminated if Stalin's interpretations were to be accepted as authoritative. Hence his – quite literally – deadly hermeneutics.

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<sup>3</sup> Stalin's *History* was a thinly veiled attempt to refute his arch-enemy Trotsky's interpretation of actions and events in his *History of the Russian Revolution* (1930).

## II

The abrupt transition from Stalin to Lincoln is not quite as strange as it might first appear. Bound by his oath of office to uphold the Constitution, Lincoln lacked the power that Stalin had and exercised so ruthlessly. But he knew what Stalin and all or most major political figures know: that having one's interpretations of key texts accepted as authoritative is an important and perhaps indeed indispensable source of power – and political legitimacy. As early as 1838 Lincoln – like Machiavelli, Rousseau and other republican thinkers he had probably never read – advocated a “political religion” as a kind of civic cement to bind citizens to their nation and generations to each other (Lincoln, 1989a, p. 32).<sup>4</sup> As with any religion, a political or civil religion must have one or more sacred texts that must be read closely and interpreted carefully and perhaps creatively. For Lincoln the two major texts were the Declaration of Independence and the Constitution. Of the two, the Declaration was in his view the more basic or fundamental, not only because it was written earlier, but because, Lincoln believed, it made the United States a nation. The Constitution was secondary inasmuch as it promulgated the basic law by which that nation was to organize and govern itself. Moreover, Lincoln used the Declaration as an interpretive lens through which to read, to criticize – and finally to amend – the Constitution.

This was no idle intellectual exercise. The 1850s saw constitutional crises of unprecedented scope and severity. Many Southerners spoke openly of secession. In their view secession was tantamount to another American Revolution and could be justified by invoking both the Declaration of Independence and the Constitution. For them, the operative part of the Declaration was

(...) whenever any Form of Government becomes destructive of these ends [for which government is instituted], it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness (...).

If Northern abolitionists and the newly formed Republican Party had their way, white Southerners claimed, slavery would be abolished, their lives endangered, their safety and happiness imperiled, and poverty would replace prosperity. If secession was the only way to stave this off, then so be it. According to the Declaration – as they interpreted it, with secession as a stand-in for revolution – they clearly had this right.<sup>5</sup>

<sup>4</sup> I have used Fehrenbacher's edition because it includes all the works I need to refer to and it is superior to the less ably edited 8-volume *Collected Works of Abraham Lincoln* (Basler, 1953).

<sup>5</sup> My greatly abbreviated summary of the secessionist and pro-slavery arguments and interpretations of the Declaration and the Constitution is drawn from Thomas R. Dew,

But what of the Constitution? It says nothing at all about secession. And that, Southern apologists argued, is precisely the point: if the law is silent about action *x*, then *x* is legally permissible. As Hobbes famously said about “the liberty of subjects”: “Lyberties (...) depend on the silence of the law. In cases where the Sovereign has prescribed no rule, there the Subject hath the liberty to do, or forbear, according to his own discretion.” (Hobbes, 1991, Bk. II, chap. 21, p. 152). Since the Constitution says nothing about secession, then surely secession is constitutionally permissible. And when the Constitution does speak, it speaks in favor of the South and slavery. The Constitution clearly condones the institution of slavery, to which it refers three times (though without using the words slave or slavery). For purposes of apportioning representatives in the House, each slave is to count for 3/5 of a person but is to be without the rights of a citizen (Art. I, sec. 2). The Constitution explicitly states that escaped slaves must by law be returned to their masters (Art. IV, sec. 2). It also gives Congress the power to outlaw (after 1808) the importation of slaves – but not the institution of slavery itself (Art. I, sec. 9).<sup>6</sup> And, not least, the concluding clause of the Fifth Amendment – the so-called “takings clause” – stipulates that “private property [shall not] be taken for public use, without just compensation.” It would therefore be unconstitutional to abolish slavery without the federal government (i) bearing the burden of specifying precisely the “public use” to which former slaves would then be put and (ii) compensating slave-owners for the loss of their (human) property. Hence the Constitution, according to the Southern reading, is a pro-slavery document.

Many Northerners regarded this interpretation of the Constitution as unassailable. Even prominent abolitionists such as William Lloyd Garrison and Wendell Phillips agreed that the Constitution was a pro-slavery compact. It was, Garrison said, “a Covenant with Death, an Agreement with Hell,” and to underscore his point he publicly burned a copy in 1844 (Garrison, 1973, p. 303). For Garrison and the abolitionists, the Declaration and the Constitution were dueling documents, the first standing for human liberty and dignity, and the second for slavery and humiliation.

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Chancellor Harper, and other Southern advocates of slavery and secession, along with Southern states' subsequent declarations of secession. See, among other works, Elliott (1860). See, further, the immediate post-secessionist arguments advanced in various Southern states' declarations of secession, and most particularly the earliest – that of South Carolina, which became a model or template for those that followed – The South Carolina Declaration of Causes of Secession of December 24, 1860, in Commager, 1963, pp. 372–374.

<sup>6</sup> Interestingly, the Constitution of the Confederate States of America (1861) outlawed the importation of slaves. This is hardly surprising, since that prohibition would increase the value of slaves already residing (and reproducing) in the CSA. See further DeRosa (1991).

## III

Here then was the hermeneutical situation in which Lincoln found himself in the 1850s. The Declaration's "self-evident" truth that "all men are created equal" was dismissed by many, both South and North, as either a "self-evident lie" (as Senator John Pettit of Indiana asserted), or as applying solely to "all white men" (Senator Stephen A. Douglas of Illinois, amongst many others), or as simply a "glittering generality" (Senator Rufus Choate of Massachusetts) that played no part in the Declaration's avowed purpose in declaring American independence from Great Britain (John C. Calhoun). Southern apologists for slavery alternately said that the Declaration – inasmuch as it defended a right of revolution (which in their view was exactly equivalent to secession) – was a vital and living document or, when it suited them, as dead as the proverbial door-nail. And in their view no part of the Declaration was deader than "All men are created equal." As for the Constitution, it was simply pro-slavery, for the reasons to which I have already alluded.

Lincoln's task was both hermeneutical and political. He had to dispute and refute the then-influential interpretations I've just recounted, and do so in a way that would be widely regarded as being demonstrably correct and therefore, almost by definition, persuasive. In the political climate of the 1850s this would, he knew, be an uphill struggle – a struggle, above all, to save the Union.

Different as they were, Southern secessionists and radical abolitionists agreed about one thing: Neither regarded the preservation of the Union as being of paramount importance. Preserving the institution of slavery was the primary aim of the former, and abolishing slavery the principal goal of the latter. Many abolitionists believed that the Union established by the Constitution was rotten to the core; if ending slavery meant disunion and civil war, then so be it. Southern secessionists argued that the Union created by the Constitution was an arrangement of convenience; if any state or states were inconvenienced, then they could by right leave the Union at will. The Constitution's silence secured them that right.

Lincoln strove to save the Union and to make good on the Declaration's affirmation that all men are created equal. To many contemporaries this dual aspiration was simply a rank contradiction. You can have one or the other, but not both. Just as sailing against the wind requires tacking, so going into the political headwind required that Lincoln pursue a radical agenda while presenting himself as a conservative who sought only to preserve the Union. "What is conservatism?" he asks. "Is it not adherence to the old and tried, against the new and untried?" (Lincoln, 1989b, p. 122). On Lincoln's telling, he was the true conservative, and secessionists and abolitionists alike were radicals who would forget – or radically reinterpret – the Declaration and the Constitution, and rend the Union asunder. What follows is a somewhat simplified account and analysis of

Lincoln's hermeneutical-political strategy, focusing in particular on his interpretation of the Declaration of Independence.

## IV

Lincoln's stature as a political thinker and his contribution to political thought remains a matter of scholarly controversy. He is certainly no Aristotle or Hobbes or Montesquieu or, for that matter, Thomas Jefferson.<sup>7</sup> But he is closer to Jefferson than one might imagine. For Lincoln is arguably the closest and most careful – and perhaps most creative – reader that Jefferson has ever had. And he interpreted Jefferson's intentions in drafting the Declaration of Independence to counter the interpretations advanced by others who would reduce the Declaration to a mere *pièce d'occasion*. Perhaps the most important and influential among the latter was Senator John C. Calhoun of South Carolina.

Calhoun contended that the Declaration had the one-off practical purpose of declaring the American colonies' independence from Great Britain. Once its work was done it had no further or deeper purpose. Against abolitionists who quoted the memorable opening paragraphs, and particularly the phrase "all men are created equal," Calhoun countered that "It was inserted into our Declaration of Independence without any necessity. It made no necessary part of our justification in separating from the parent country, and declaring ourselves independent." (1992, p. 566).

Why then, Lincoln asks, were those paragraphs and that passage "inserted" by Jefferson and not removed (as were other passages of Jefferson's draft) by the Congress? In answering, Lincoln constructed a wholly original and innovative interpretation of the Declaration's meaning. On Lincoln's reading the Declaration had a dual purpose. The first and most obvious was to declare the American colonies' independence from Great Britain. The second and less obvious – though no less important – purpose of the Declaration was to issue a warning and a challenge to future generations of Americans. "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use." (Lincoln, 1989l, pp. 398–399). This was a theme to which Lincoln returned repeatedly. "The principles of Jefferson," Lincoln wrote, "are the definitions and axioms of free society (...). All honor to Jefferson – to the man who, in the concrete pressure of a struggle for national independence (...) had the coolness, fo-

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<sup>7</sup> Several modern scholars have however attempted to recruit Lincoln into the ranks of political philosophers. See, inter alia, Harry V. Jaffa (1982); Garry Wills (1992, chap. 4); Allen C. Guelzo (2009); Ronald C. White (2002); and – most recently and extensively – John Burt (2013) and George Kateb (2015).

recast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and to embalm it there, that to-day and in coming days, it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression.” (Lincoln, 1989o, p. 19). And in a speech delivered at Independence Hall on the eve of his first inauguration Lincoln said:

I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence. (...) I have often inquired of myself, what great principle or idea it was that kept this Confederacy [i.e., the United States] so long together. It was not the mere matter of the separation of the colonies from the mother land; but something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time. It was that which gave promise that in due time the weights would be lifted from the shoulders of all men, and that all should have an equal chance. This is the sentiment embodied in that Declaration of Independence. (Lincoln, 1989k, p. 213)

Lincoln insisted time and again that the Declaration’s “all men are created equal” did indeed apply to *all* men (and women) of all races. His opponents, North and South, contended that this famous phrase refers to all white men. In the North, during the 1858 Lincoln-Douglas debates, Senator Douglas reiterated this point at every opportunity. And in the South Confederate Vice-President Alexander Stephens not only repudiated Lincoln’s reading of the Declaration but added that “Our new [Confederate] government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery (...) is his natural and normal condition. This, our new government, is the first in the history of the world based upon this great physical, philosophical, and moral truth.” (Stephens, 2007, pp. 1090–1093).

Stephens, Calhoun, and others embraced slavery as a “positive good”; Lincoln believed it a great evil that could be tolerated only if doing so would preserve the Union intact. It was the extension of that institution into the western territories that was intolerable. That, however, is what was afoot in 1854.

The 1854 Kansas-Nebraska Act, sponsored by Senator Stephen A. Douglas of Illinois, repealed the Missouri Compromise of 1820, which forbade the extension of the institution of slavery into the territories acquired through the Louisiana Purchase of 1803, north of parallel 36° 30’. Incorporated into the Act was Douglas’s doctrine of “popular sovereignty,” according to which white male residents in the territories would decide democratically whether their territory would enter the Union as a free or a slave state. Douglas himself professed to be indifferent as to whether any territory would be admitted into the Union as a free or a slave state. To this Lincoln thundered,



This declared indifference, but as I must think, covert *real* zeal for the spread of slavery, I can not but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world – enables the enemies of free institutions, with plausibility, to taunt us as hypocrites – causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty – criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest. (Lincoln, 1989m, p. 315)

With the passage of the Kansas-Nebraska Act,

Our republican robe is soiled, and trailed in the dust. Let us repurify it. Let us turn and wash it white, in the spirit, if not the blood, of the Revolution. (...) Let us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it. (...) If we do this, we shall not only have saved the Union; but we shall have saved it, as to make, and keep it, forever worthy of the saving. (Lincoln, 1989m, pp. 339–340)

Whilst the Kansas-Nebraska Act was a political disaster, it was in Lincoln's view a disaster with the legislative remedy of repeal. And if the growing ranks of Republicans had their way, it would be. But then, three years after passage of the Kansas-Nebraska Act, came the even more disastrous Dred Scott decision.

A slave whose master had taken him to the free state of Illinois and the Wisconsin Territory, Dred Scott argued that he was legally free since slavery was not legal in any free state or territory. When his case finally reached the Supreme Court, a majority (seven of nine Justices) ruled that Scott was not and could not be a citizen; therefore he had no legal "standing" to bring a case; but, clearly contradicting itself, the Court took the case anyway, ruling against Scott. That long and legally tortuous majority opinion, written by Chief Justice Roger B. Taney, is succinctly summarized by Lincoln:

The Constitution of the United States forbids Congress to deprive a man of his property, without due process of law; the right of property in slaves is distinctly and expressly affirmed in that Constitution; therefore, if Congress shall undertake to say that a man's slave is no longer his slave, when he crosses a certain line into a territory, that is depriving him of his property without due process of law, and is unconstitutional. (Lincoln, 1989j, p. 52)

But the loss was not Scott's alone. The Dred Scott Decision was radical and far-reaching. Indeed, it went much further than the Kansas-Nebraska Act, in that it declared the Missouri Compromise to have been unconstitutional and said that slavery could not be excluded anywhere, including already-existing free states and future states to be carved out of the western territories. Congress, the



Court said, had no authority to outlaw slavery anywhere in the United States.<sup>8</sup> In deciding the case the majority felt it necessary to take into account the Declaration of Independence, and in particular the passage which states that “all men are created equal.” “The general words [‘all men are created equal’] would seem to embrace the whole human family,” Taney wrote. “But it is too clear for dispute that the enslaved African race were not intended to be included [in the Declaration of Independence].” The Court also declared that even free Negroes and mulattos were not intended to be included in the Declaration. The author and signers of “that memorable instrument” believed that blacks are “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.” (Commager, 1963, p. 342). Blacks, the Court concluded, never were, are not now, and never can be citizens of the United States.

The Dred Scott decision seemed to deal a death-blow against the Republican Party’s aim of stopping slavery’s spread. Alarmed at the new prospect of slavery’s seemingly inevitable westward extension, Lincoln once again weighed in with a measured but blistering attack on that decision and on Douglas, who had defended it. Lincoln’s critique was at heart a hermeneutical one about the proper way of interpreting the Declaration’s meaning. Taney’s (and Douglas’s) assertion – and it is merely that – that the Declaration of Independence’s promise of equality applies only to whites, not to blacks, says Lincoln, is both erroneous and absurd on its face. Their denial is nothing less than a blatant and willful distortion of the plain words of the Declaration 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.” The words “all men” mean “all men.” Lincoln excoriates Douglas and Taney

for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that noble instrument intended to include all men, but they did not intend 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 in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant. (Lincoln, 1989, p. 398)

Clearly the institution of slavery is incompatible with the Declaration, inasmuch as slavery denies the rights to liberty and the pursuit of happiness, and all too often the right to life itself. Once regarded almost as secular scripture, the Declaration is now demeaned and defamed: “to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and

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<sup>8</sup> On that decision’s doleful impact, see Fehrenbacher (1978).

hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it." (Lincoln, 1989l, p. 396).

To illuminate and illustrate his point, Lincoln quotes Douglas's statement that in declaring all men equal Jefferson and the Congress were referring to "the white race alone" and more specifically still to "British subjects on this continent being equal to British subjects born and residing in Great Britain." "My good friends," Lincoln retorts, "read that carefully over some leisure hour, and ponder well upon it – see what a mere wreck – mangled ruin – it makes of our once glorious Declaration. (...) I had thought the Declaration promised something better than the condition of British subjects; but no, it only meant that we should be equal to them in their own oppressed and unequal condition." (Lincoln, 1989l, pp. 399–400). To read the Declaration as Douglas and Taney did, reduces it to inanity and absurdity.

But, Douglas countered, to interpret the Declaration as Lincoln and the Republicans did, would not only eventually destroy the institution of slavery but would allow blacks to associate with whites on equal terms. The utterly unacceptable result will be that blacks will "amalgamate" (i.e., intermarry) with whites. Lincoln's reply was at once principled, humorous, and acerbic. Douglas and other Democrats are "especially horrified at the thought of the mixing blood by the white and black races: agreed for once – a thousand times agreed. There are white men enough to marry all the white women, and black men enough to marry all the black women; and so let them be married." (Lincoln, 1989l, p. 400). He forthrightly rejected "that counterfeit logic which concludes that, because I do not want a black woman for a slave I must necessarily want her for a wife. I need not have her for either, I can just leave her alone." And then, anticipating an argument he would use against Douglas a year later, Lincoln added: "In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of anyone else, she is my equal, and the equal of all others." (Lincoln, 1989l, pp. 397–398). As for the black man, in the wake of the Dred Scott decision,

All the powers of the earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in a prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him (...) bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places (...). (Lincoln, 1989l, pp. 396–397)

American slavery, it seemed, was here to stay.

## V

A year after the Dred Scott decision Lincoln debated Douglas in the U.S. senatorial election in Illinois. The seven Lincoln-Douglas debates were to a remarkable degree hermeneutical contests over the meaning of the Missouri Compromise, its repeal by the Kansas-Nebraska Act, the effective repeal of both by the Supreme Court in its Dred Scott decision – and, not least, the meaning of the Declaration of Independence itself.

Reiterating his defense of the Dred Scott decision, Douglas denied that the Declaration of Independence referred to “all men” regardless of race. He repeated his and Chief Justice Taney’s claim that in writing “all men are created equal,” Jefferson meant all white men. To argue otherwise, as Lincoln had, is a “monstrous heresy.” Douglas asserted that “The signers of the Declaration of Independence never dreamed of the negro when they were writing that document. They referred to white men, to men of European birth and European descent, when they declared the equality of all men. (...) [T]his government was made by our fathers on the white basis. It was made by white men for the benefit of white men and their posterity forever (...)” (Lincoln, 1989c, pp. 697–698).

When campaigning in the negrophobic southern part of the state, Lincoln was not above defending himself in terms that were racist, or close to it: “I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races. I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people.” (Lincoln, 1989g, p. 636). Even so, Lincoln argued for a rough kind of racial equality, even as he appeared to equivocate. He assuaged his negrophobic audience by speaking in favor of racial segregation and black inferiority even as he argued for the natural rights of *all* races:

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 had 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 [Senator] 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 leave of anybody else, which his own hand earns, he is my equal and the equal of [Senator] Douglas, and the equal of every living man. [Great applause.] (Lincoln, 1989f, p. 512)

The apparent pander in the first sentence serves a prelude to a ringing reaffirmation (begun midway through the second sentence) of the natural rights of all human beings, regardless of race. In the quicksand that was Illinois politics, this was a daring statement of moral principle, drawn from the Declaration of Independence as interpreted by Lincoln.

## VI

When he became president in 1861 Lincoln relied less on the Declaration as he interpreted it and more on the Constitution he had taken an oath to uphold. In his First Inaugural Address President Lincoln countered the constitutional argument made by Southern secessionists. That argument, which I recounted earlier, was that secession is constitutionally permissible because the Constitution says nothing about – and still less against – it. Just as he had given pride of place to the opening words of the Declaration, Lincoln now focused on the Preamble to the Constitution, which was written and ratified “to form a more perfect Union (...).” Lincoln reasoned that the Union could not be perfected by dismembering it (Lincoln, 1989e, p. 218). But southern secessionists were not dissuaded. And the war came.

Once the war was underway Lincoln was determined to see it through – and to see its meaning made clear by being couched in the language of the Declaration of Independence.

Two of President Lincoln’s wartime measures were immediately and immensely controversial. The first was his Emancipation Proclamation, the second his suspension of Habeas Corpus. Lincoln’s hermeneutical strategy was to justify both by interpreting – in a breathtakingly broad way – the vaguely defined powers given by the Constitution to a president in wartime or other times of national emergency. So broadly and liberally did Lincoln interpret the Constitution that some legal scholars have averred that he virtually created his own Constitution – “Lincoln’s Constitution.”<sup>9</sup>

Here is what the Constitution says about the president’s powers as commander-in-chief: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the Actual Service of the United States” (Art. I, sec. 2). That is all. It says nothing about the extent of, or limitations upon, a president’s wartime powers. Lincoln held that his power to emancipate Southern slaves – in apparent violation of the “takings” clause of the Fifth Amendment – and to suspend habeas

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<sup>9</sup> Daniel A. Farber (2003) contends that Lincoln’s actions, although controversial at the time, nevertheless pass constitutional muster by today’s standards.

corpus were implied: if doing these things aided the Union war effort, then he as commander-in-chief has the authority to do them. President Lincoln pushed the doctrine of "implied powers" (derived from the Necessary and Proper Clause in Art. I, sec. 8) up to and perhaps beyond its breaking point.

When President Lincoln issued the Emancipation Proclamation on January 1, 1863 it was greeted with cheers from Frederick Douglass and other abolitionists, and with jeers from Democrats and Southern sympathizers. Contrary to a popular and persistent misunderstanding, the Proclamation did not free all American slaves with a single stroke of the president's pen. It aimed to free only those slaves residing in the Confederacy; it did not touch slavery in the slaveholding but non-rebellious border states (Maryland, Delaware, Kentucky, Missouri and West Virginia). The Proclamation was made as a matter of "military necessity," and publicly justified on those grounds alone. Lincoln reasoned, rightly, that the labor of southern slaves was propping up and prolonging the Confederate war effort. If he could induce many of those slaves to escape in hope of finding freedom, he could cripple the South's ability to fight. In his capacity as commander-in-chief Lincoln issued the Proclamation as a businesslike executive order. Richard Hofstadter is correct, if rather unfair, in complaining that "The Emancipation Proclamation had all the moral grandeur of a bill of lading." (Hofstadter, 1973, p. 159). The low-key lawyerly prose of the Proclamation was intentional. Lincoln sought to free slaves in the rebellious Confederacy without alarming slave owners and sympathizers in the loyal border states.

But there was another, now often overlooked but then-controversial, clause of the Final Emancipation Proclamation. Escaped male slaves, it said, were eligible to enlist as Union soldiers and sailors: "such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations and other places (...)" (Lincoln, 1989d, p. 425). This provision of the Proclamation greatly upset and offended many in the border states and displeased Democrats in the North. In Illinois Peace Democrats drafted resolutions opposing the Emancipation Proclamation, and especially its provision for arming freed blacks. What would come next? they asked. Black emancipation? Enfranchisement? Equality with whites? Intermarriage? The very thought was anathema to them and to many in Illinois and across the North. Union soldiers, they said, had not enlisted to free the slaves but to save the Union; if the aim is now to free the slaves, northern soldiers would and should lay down their arms and cease to fight.<sup>10</sup>

As though the Emancipation Proclamation were not controversial enough, two days after issuing its preliminary version Lincoln made public his Proclamation Suspending Habeas Corpus (Lincoln, 1989i, p. 371). Once again, Lincoln's

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<sup>10</sup> Although doubtless true of some Union soldiers, it was by no means true of all, as Chandra Manning shows in *What This Cruel War was Over: Soldiers, Slavery, and the Civil War* (2007).

justification turned on his interpretation of the Constitution. He invoked “military necessity” and his constitutional powers as commander-in-chief. Confederate sympathizers in the North and the border states had cut telegraph wires, torn up sections of railroad tracks along which Union troops and supplies were transported, and stirred up anti-war and anti-black feelings (indeed the two were seen by some as interchangeable) among northern laborers. Under Lincoln’s suspension of habeas corpus such fifth columnists could be (and indeed were) arrested and imprisoned without trial. When Chief Justice Taney and other critics complained that Lincoln’s suspension was unconstitutional, Lincoln quoted the words of the Constitution back at them. “Ours is a clear case of rebellion – (...) in fact, a clear, flagrant, and gigantic case of rebellion; and the provision of the Constitution [Art. I, sec. 9] that ‘the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it,’ is *the* provision which specially applies to our present case.” (Lincoln, 1989n, p. 457).

But the central constitutional question was concerned with who had the authority to suspend habeas corpus. Since the provision quoted by Lincoln is in Article I – which enumerates the powers of Congress – it appears that Lincoln did indeed overstep his constitutional authority and usurp a power that properly belonged to Congress. This seems a clear-cut case of constitutional misinterpretation – or perhaps creative interpretation – on Lincoln’s part. And when Chief Justice Taney issued a court order to block Lincoln’s suspension of habeas corpus, he simply ignored it.

## VII

A turning-point in the war came with the Battle of Gettysburg when Union forces began to turn the tide against the Confederacy. Because losses on both sides were especially horrific, it was decided to turn the battlefield into a national cemetery. Lincoln was invited to the dedication ceremony to – as the invitation said – “make a few appropriate remarks.” Those few remarks became The Gettysburg Address. In his best and briefest address Lincoln effectively recast the meaning of the Civil War. And he did so by reframing the larger meaning of the war in the words and principles of the Declaration of Independence, as he interpreted it.

“Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal.” That opening sentence alone was controversial because, among other things, Lincoln radically reinterprets both the date and the meaning of the American Founding. If you do the math (four-score and seven = 87; 1863 minus 87 = 1776), Lincoln dates the American founding back to 1776

and the Declaration of Independence, and not to 1788 and the ratification of the Constitution. The Declaration says that all men are created equal, with certain inalienable rights, including the rights to life, liberty and the pursuit of happiness; the Constitution denies what the Declaration declares and affirms, and condones the institution of slavery (which as I noted earlier is mentioned three times in the Constitution, without actually using the words slave or slavery). In so doing Lincoln seems to sign on, implicitly, to the abolitionist view (voiced by William Lloyd Garrison and Frederick Douglass, among others) that the Declaration, not the Constitution, is the first and truer charter of American liberty, and the Constitution – unless amended to accord with the Declaration by abolishing slavery – is forever freighted and stained with the blood of slaves.

Lincoln then goes on to reframe and reinterpret the reasons for which the Civil War was still being fought. As a matter of historical fact – attested to by Lincoln's pre-war speeches, along with letters written and speeches delivered early in the war – the war was waged originally to keep the Union intact, and nothing more. But as a matter of moral meaning the Civil War was recast by Lincoln as a conflict of an altogether different sort – as a struggle to deliver on the promise of the “real” founding of 1776, which was stated in the form of a “proposition” that all men are created equal. In one brief speech Lincoln reframes the Framing, refounds the Founding, and radically recasts the meaning of the murderous and fratricidal Civil War – no mean feat, surely.

Garry Wills exaggerates only slightly when he says that in delivering the Gettysburg Address Lincoln

performed one of the most daring acts of open-air sleight-of-hand ever witnessed by the unsuspecting. Everyone in that vast throng of thousands was having his or her intellectual pocket picked. The crowd departed with a new thing in its ideological luggage, that new constitution Lincoln had substituted for the one they brought there with them. They walked off, from those curving graves on the hillside, under a changed sky, into a different America. Lincoln had revolutionized the Revolution, giving [Americans] a new past to live with that would change their future indefinitely. (Wills, 1992, p. 38)

At least some of Lincoln's contemporaries noticed what he had done, and cried the deed. Democratic editorial writers all across the country said that Lincoln had traduced and misinterpreted the constitution he had sworn to uphold and in so doing had dishonored his office and demeaned the dead. The Constitution, they noted, says nothing at all about equality *and* it condones slavery. As one Democratic newspaper editorialized, “It was to uphold this constitution, and the Union created by it, that our officers and soldiers gave their lives at Gettysburg. How dare he, then, standing on their graves, misstate the cause for which they died, and libel the statesmen who founded the government? They were men possessing too much self-respect to declare that negroes were their equals, or



were entitled to equal privileges.” (“The President at Gettysburg”, 1863, quoted in Wills, *Lincoln at Gettysburg*, pp. 38–39).

Thus the speech that every American schoolchild now recites almost as if it were scripture was quite controversial in its day. It was controversial precisely because Lincoln had at last laid all his cards on the table by publicly interpreting the Constitution and the Founding through the lens of the Declaration of Independence’s “all men are created equal.” And it was Lincoln’s Declaration-based interpretation that was incorporated into the Constitution in the so-called “Reconstruction amendments.” Lincoln worked diligently for but did not live to witness the ratification of the Thirteenth Amendment (1865), which abolished slavery; the Fourteenth (1866), which declared former slaves and their offspring to be full citizens entitled to “the equal protection of the laws”; and the Fifteenth (1869), which gave male citizens of African descent the right to vote.

The Civil War and the Reconstruction that followed amounted to nothing less than a second American Revolution.<sup>11</sup>

## VIII

Lincoln believed with every fiber of his being that in opposing the prefatory principle inscribed in the Declaration of Independence, Senator Douglas, the Taney Court (in the Dred Scott decision), and finally the Confederacy were not only on the wrong side of morality, but on the wrong side of history as well. The opponents of slavery will be remembered and its defenders forgotten. Every schoolboy, Lincoln wrote, knows that William Wilberforce and Granville Sharp helped to end the English slave trade; but who, he asked, “can now name a single man who labored to retard [that cause]?” Although its opponents “blazed, like tallow-candles for a century, at last they flickered in the socket, died out, stank in the dark for a brief season, and were remembered no more, even by the smell.” (Lincoln, 1989h, p. 438).

Lincoln, by contrast, is remembered. Throughout his life he thirsted not only for office but for fame. Fame, in the classical republican sense, is as close as humans can come to achieving immortality. Fame belongs to those who speak great words and perform great deeds. And no deed is greater than that of founding a free and long-lived republic.<sup>12</sup> But what of one who re-founds a foundering and divided republic, by preserving it intact while making it more truly free by emancipating its slaves and thereby redeeming the promise of its founding principle

<sup>11</sup> See James M. McPherson (1991).

<sup>12</sup> See, inter alia, Francis Bacon’s ranking of famous men: “In the first place are (...) founders of states and commonwealths.” (1957, p. 137). Or Alexander Hamilton’s observation that “the love of fame [is] the ruling passion of the noblest minds” (Hamilton, 2003, p. 353).

that all men are created equal? Therein lies Lincoln's achievement and his unique claim to fame. And he could hardly have achieved lasting fame, had he not so brilliantly and skillfully practiced his own version of deadly hermeneutics.

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