

To Schmooze Participants: This short piece is taken from a review of the three important books considered below. This review is part of my current exploration of the historiography of slavery and the Constitution in Civil War legal history.

Getting Right Without Lincoln

Daniel W. Hamilton*

Considering:

Brian McGinty, *Lincoln and the Court* (Harvard University Press, 2008)

Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War*

Lea VanderVelde, *Mrs. Dred Scott: A Life on Slavery's Frontier*

More than sixty years ago, David Donald wrote his landmark essay “Getting Right With Lincoln.”¹ Donald wrote mostly about politicians’ use of Abraham Lincoln since his assassination, and in particular how Lincoln was transformed from a deeply divisive symbol, into, by the end of World War II, “everybody’s grandfather” or a “nonpartisan, nonsectional hero.” “It thus became increasingly necessary to seek Lincoln’s imagined blessing for a given political position or candidate or party, and by the middle of the 20th century, “no reputable political organization could omit a reference to the Great Emancipator, nor could the disreputable ones.” What Donald brought to light most vividly was the blatantly opportunistic use of Lincoln in political discourse. Yet in the end, Donald is careful not to mock or condemn this practice outright, which remains a staple of our politics. The symbolism of Lincoln remains potent and

*Professor of Law and History, University of Illinois College of Law and Co-Director of the Illinois Legal History Program.

¹ David Donald, “Getting Right With Lincoln,” *Harper’s Magazine*, 202 9 April, 1951, 74-80; later republished in *Lincoln Reconsidered: Essays on the Civil War Era*, 3d ed. (Vintage Books, 2001).

has a history of its own.² Donald is also careful not to try and get right, or get wrong, with Lincoln, and if anything his treatment is admiring but wary – concluding that “perhaps the secret of Lincoln’s continuing vogue is his essential ambiguity.”

What Donald brought to light most vividly was the drive to get right with Lincoln in American politics. Yet the drive to get right with Lincoln is also at the heart of most of the legal and Constitutional history of the Civil War. The academic manifestation of this drive is twofold. First, Lincoln is most often at the center of the story, making the Congress and the courts and other legal actors bit players, relevant only in so far as they interact with Lincoln. Second, Lincoln is forced, in varying degrees, into the present. This presentism takes the form of different versions of the same basic question: was Lincoln right, was he justified in doing what he did during the Civil War.³ Was he right to suspend the writ of habeas corpus? Or to declare a blockade or to call up the army or to exile political prisoners to the Confederacy? Was he right to issue the Emancipation Proclamation? These questions are central in much of the academic writing on Civil War and it is here that the popular and academic drive to get right with Lincoln merge. The popular and cultural force of Lincoln remains so strong, he remains such a talisman for our time, that even we historians cannot consign him to the past. Not only do we need him to make rulings on our actions in the present – what would Lincoln think of Guantanamo -- but we also need to make rulings on his actions as president as part of our ongoing debates on presidential power and the Constitution in wartime.

² Matthew Pinsker, “Lincoln Theme 2.0,” *Journal of American History*, 96 (September, 2009), 417-40.

³ The modern version of this kind of argumentation is best exemplified in the classic J.G. Randall, *Constitutional Problems Under Lincoln*; It remains central in leading accounts of Civil War legal history, see Michael Burlingame, *Abraham Lincoln: A Life* (Johns Hopkins University Press, 2008); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991). Add more

This is not to say that legal historians of the Civil War are predominantly presentist, or that they are only interested in whether Lincoln was right. This is to say that there is in much Civil War history a central presentist preoccupation that does not loom as large in any other era, namely, whether Lincoln's legal and constitutional actions were justified in some absolute sense. We historians do not generally ask whether Lord Grenville was right to issue the Stamp Act, or whether Jackson was right to crush the Bank of the United States or whether Wilson was right to sign the Treaty of Versailles. We do not, in other words, usually ask whether a historical actor was right or wrong by our lights. Yet we cannot resist asking this about Lincoln. I simply do not know if Lincoln was right to suspend the writ of habeas corpus and I maintain we cannot answer this question historically. We might be able to explain why he suspended the writ, or the effects of its suspension then and afterwards. We can also bring to light the competing legal arguments made at the time, and explain why some won and others lost. But we cannot survey the sources and come to a definitive ruling on the merits on these central legal questions any more than we can come to definitive understanding of the original meaning of the due process clause. We will never know if Lincoln was right or justified in his legal actions any more than we will know whether Cromwell and his supporters were right to execute Charles I.

The question then is whether we might have a legal history that of the Civil War that does not ultimately attempt to answer these kinds of questions. Can we have a legal history of the Civil War that does not revolve around Lincoln and that does not evaluate Lincoln's legal actions on the merits? More importantly perhaps, do we want one? If we lose Lincoln as the centerpiece do we lose a galvanizing figure that that has given the field coherence over decades? If we resist making rulings on Lincoln's legal actions, and not providing answers to questions that people want answered by historians, do we risk obscurity and familiar charges of relativism?

Is it worth the price? These three books offer different takes on this question. It should be noted that all three are first-rate and important scholarship. All should be read and assigned and all make a significant contribution to the field. Yet all three point to different directions we might take within the field of Civil War legal history.

Brian McGinty's *Lincoln and the Court* is the most traditional of the three.⁴ It is traditional in the best sense in that it is a descriptive history that adds enormously to our knowledge. We have long needed a book that takes account of the Supreme Court during the Civil War and that puts the court into political and cultural context. Too often the Court is either largely ignored, surfacing briefly in the Prize Cases, and existing primarily as a kind of abstraction, a bloodless or marginalized institution issuing legal opinions that are parsed with little regard for context or attention to the people on the Court itself. McGinty has brought the Court to life and put it back into the frame as a crucial actor during the War. Indeed the most innovative part of the book is to put the Court in active juxtaposition to Lincoln, existing not as a foil for the president's ambitions, but in its own right.

The book is most traditional in a problematic sense its final chapter, entitled "The Legacy." In it, McGinty seeks out lessons we might draw in the present from his history of Lincoln and the Supreme Court. This concern for lessons is a red flag for Lincoln and Civil War presentism, and it is an odd ending for such a rich work of history. McGinty asks how the Constitution fared during the Civil War and takes up criticism of Lincoln on three fronts, "actions he took . . . relying merely on his authority as commander in chief," actions he took "that infringed on civil liberties of Americans in the loyal states" and lastly, "war measures that he adopted against the South." 302 Here, on all three fronts, Lincoln's actions are presented by

⁴ Brian McGinty, *Lincoln and the Court*

McGinty as legally and constitutionally sound. On calling up the army, Lincoln had clear textual support. On the blockade of the South, ultimate ratification by the Congress and the Supreme Court removed “any constitutional objection to the president’s actions.” 304 On the suspension of habeas corpus, Congressional approval of Lincoln’s actions meant that “Taney’s condemnation of the suspension had effectively been nullified.” Moreover, the modern Supreme Court’s rulings on habeas, in *Hamdi v. Rumsfeld* and other cases, can and should be distinguished from Lincoln’s actions, and do not effectively condemn Lincoln. 304-312. Finally, on Lincoln’s issuance of the emancipation proclamation based solely on his wartime authority, McGinty finds Lincoln’s action justified on the grounds that it “was indeed a military (and thus executive) decision as distinct from a moral one (which would have required express legislative backing.” 315

McGinty argues that his book “would be incomplete without some reflection of the broader meaning of the history .” 300. But how does this kind of legal argumentation make for a more complete history? If the goal of the book was to argue how we ought to interpret the Constitution, then making rulings on Lincoln’s actions might well be illustrative, but then we would be explicit in our turn to history to make present legal and constitutional arguments. McGinty’s legal arguments invite counter-arguments, but this temptation itself reveals the mostly fruitless nature of this kind of historical debate. Legal arguments produce counter arguments, and back and forth it goes with no winner because there can be no winner in a ruling on the past. What if we walk away with a much richer understanding of the relationship of President and Supreme Court in the Civil War and nothing else? This is enough for almost any other era, but here McGinty might be correct at least descriptively when he says that for a Civil War legal history this is “incomplete.” Readers are accustomed to a ruling on Lincoln, and

McGinty provides one. Without the final chapter we are left without a legal reckoning and to my mind it is a better history book without one.

This is not to say that historians need to put on a white coat and simply make scientific judgments about the weight of the facts. Of course our values infuse our writing of history we only care about history in large part because of its meaning in the present. We always and at all times bring our values into our work, yet these values are best left at the service of the history we tell. We may present the Declaration of Independence as radical and egalitarian or as conservative and hierarchical or somewhere in between. The sources are open to either interpretation. We do not, however, ask historians of the era to come to a definitive conclusion as to whether Jefferson was right to assert the Revolution was justified by international and natural law at the time and so justifies revolution today. This is mostly distinct from McGinty's final chapter where we see a series of rulings on particular legal controversies from the 19th century that provides lessons for the present. . McGinty is by no means alone, and this move is almost customary in Civil War legal history. To be sure, this makes the work more timely and immediate and allows historians to take part in a decades-long conversation assessing Lincoln's wartime actions. Yet to go into the Civil War looking to answer our modern questions is, to my mind, to distort the inquiry and is in the end too high a price to pay. To be sure, McGinty does this at the end of an excellent book, by which point we have learned a great deal we did not know.

If the last chapter of *Lincoln and the Court* was cut, I would, however, only be postponing the problem. When he spoke about his book I feel sure McGinty, would be asked, as we are all asked, "but was Lincoln right or wrong?" The answer I am calling for - "I do not know" - distances the past from the present in a way we almost cannot stand when it comes to

the Civil War. It is here that the academic quality of academic writing, for good and for ill, might most contrast with the dominant narrative of the Civil War. It is an open question for the field: is the history sufficient and can it stand alone, with values embedded in the story we tell, and not the definitive legal answers we provide? The books by Stephen Neff and Lea VanderVelde show us how we might maintain a connection to the Civil War while still consigning it to a distant past.

Neff's book should be the starting point for those interested in the legal issues surrounding the war. Just as McGinty's book filled a gap, so Neff's book provides the first comparative and comprehensive account of the great legal issues in the Union and the Confederacy. We see the arguments for and against secession, the competition between the executive and the legislature at the ⁵outbreak of war, and in particular Taney's battles with Lincoln over habeas and conscription, as well as struggles over property confiscation and emancipation. These are well done and informative, yet what seems to truly drive the narrative is Neff's concern and attention to international law. He is concerned with the justification and categorization of war. In particular Neff is concerned with an issue that dominated the Union and the Confederacy alike: what is the distinction between insurrection and war and what legal consequences flow from that distinction? ¹⁵ What is striking is that Neff does not seek to provide an answer – they remain open questions throughout the book. This is not to say that legal actors in the Union and the Confederacy did not reach legal and constitutional conclusions. But we in the present remain open to arguments from all sides and remain rooted in uncertainty and argumentation. Was secession legal? Was the confiscation of enemy property constitutional? Was the blockade within presidential power? All of these questions rested on the

⁵ William R Robinson, Jr., *Justice in Gray: A History of the Judicial System of the Confederate States* (Harvard University Press, 1941).

status of the Union and the Confederacy during the Civil War which was contested during the Civil War and for decades afterwards.

Yet as Neff correctly is at pains to point out, the fact that there were winners and losers in the Civil War of course colors the way we understand the legal questions we pose about the war. It is not enough to say that these questions about the nature of the Civil War cannot be definitively answered. Even as we reconstruct the arguments made on both sides, we must recall at all times this was not a debating society but a contest over power during war. If today we cannot make a ruling, say, on the ultimate legality of secession (cite Stamp), it is folly to reconstruct the legal arguments made during the War without attention to who won and who lost the argument and why. At points it is surely a case of might making right, or a legal argument settled at the point of a gun. Whatever the legality of secession, it was surely settled as a practical matter at Appomattox. But that is only the ending. It is the contingent and uncertain path to that point that is historically compelling. If our task is to definitively determine the legality of secession, then once that is done we know who is right and who is wrong and how the Civil War ought to turn out. If by contrast we do not ourselves settle the question, then we see this argument played out over years of warfare, and we see the relative power of these ideas inside northern and southern society. It surely matters that the legality of secession was ultimately rejected, and this is in no small part a story of the relative power of competing ideologies inside societies at war.

I do wish that Neff, in *Justice in Blue and Gray*, had delved more deeply into the gray. The book does not systematically examine the legal questions facing the Confederacy in particular, making reference to William Robinson's *Justice in Gray*, a book that by now is almost seventy years old and yet remains the standard account. To minimize the Confederacy in

a legal history of the Civil War runs the risk of turning into a kind of winner's history. We know today that the Confederacy legally vanished, but the participants in the conflict did not know the outcome. Legal actions on both sides were taken in direct response to the other side and including analysis of the Union and the Confederacy is an essential part of the story if the goal of the book is, to provide what is asserted in its subtitle: a legal history of the Civil War. To be sure, Neff's book is much more comparative than most, and he is careful not to implicitly adopt Lincoln's position, which has largely become the conventional story, that the legal institutions of the Confederacy, its courts, its Department of Justice, its Constitution and statutes were never real in a meaningful sense because the rebellion was manifestly illegitimate.

Lea VanderVelde's book is the most innovative of the three. Not only does this book not revolve around Lincoln and resist making judgments on his legal actions, but Lincoln and other elite legal actors are little seen. We have a genuine "bottom up" legal history of the Civil War. This is hardly ever done and Mrs. Dred Scott takes its place alongside Amy Dru Stanley's *From Bondage to Contract* as a new way of considering the legal history of the Civil War, and like that book *Mrs. Dred Scott* is a genuinely pathbreaking work. VanderVelde introduces us to a figure we have long seen but never studied, Harriett Scott. Scott was, we learn, a driving force behind the *Dred Scott* case⁶ and a central figure in one of the most important court decisions in American history. Yet we did not have, until now, any real idea who she was or her motivations and extraordinary tenacity in pursuit of her freedom and her family's freedom. The book is both terrifically researched and also an unabashedly a heroic narrative. Following VanderVelde's lead, we see for the first time those that had been made invisible and recognize their achievement for the first time. At points the book moves from the heroic to the romantic, but at all points the

⁶ *Dred Scott v. Sanford* (1857)

history is bracing and new, demonstrating extraordinary archival work making a persuasive argument for the importance of studying the life of Harriet Scott for what her life reveals a great case and also about slavery and the law more broadly.

One serious limitation in studying Harriett Scott is that so little is known about her and so little was left by her, even the nearly twenty years Scott lived as a free woman after the case was decided. VanderVelde strives mightily to overcome this limitation and for the most part succeeds drawing on the diary of one of her owners, Lawrence Taliaferro, and vivid depictions of the places and times she lived. There are stretches where Harriett Scott recedes and we are instead forced to speculate about her life and motivations in the decades before and after the Supreme Court ruled. Yet the book is important not only for what it reveals about Harriett Scott, but also for its methodological innovation for the legal history of the Civil War era. If the current dominant model is to put Lincoln at the center, both in his time and ours, *Mrs. Dred Scott* represents a bold and creative challenge to that model, one that puts new legal actors on center stage and taking the relentless focus off of Washington, and once the War breaks out, the battlefield.

In the end we are left with two Harriett Scotts. The first is the real person we did not know until now. The second Harriett Scott is something of a blank slate, a vessel for our questions about the meaning of slavery and emancipation. In this way Harriett Scott might be in practice a sort of replacement for the usual treatment of Abraham Lincoln. If our first imperative was to get right with Lincoln, using Lincoln as a kind of vessel, capable of carrying our vision of what the Civil War meant and standing in for our present policy goals, we may now have a new imperative of getting right without Lincoln. Harriett Scott is a more elusive figure than Lincoln of course, but both are enigmatic and capable of carrying multiple meanings. Neither is of

course an empty vessel, and neither the dominant obsession with Lincoln in the scholarship nor VanderVelde's book should be seen as simply manipulating these figures to take a particular shape. Still, Harriett Scott is, as Donald described Lincoln, a figure of "essential ambiguity," open to multiple interpretations and historical treatments. Harriett Scott is like Lincoln a way to consider the legal significance of the war, and to make arguments about what we should study. She is emblematic of other forgotten figures, an implicit call to study the era of the Civil War from the ground up, to leave Washington and the battlefield and to see how the law, and in particular how the law of slavery, operated inside the lives of particular women and men.

In the *Dred Scott* case in particular we see in high relief the different models of Civil War legal history in practice, and what we lose and gain in each.⁷ McGinty does an excellent job of depicting the vivid personalities and the high stakes surrounding the case. And while he carefully presents the legal arguments made by the justices, the chapter ends with Lincoln's reasoned, and implicitly correct, reaction to the case. Lincoln disputes Taney point by point and we are effectively given a choice of interpretations, culminating in Lincoln's speech in Copper Union roundly rejecting the reasoning of Taney's opinion. 58-62. Lincoln wins the argument and so effectively delivers to the reader a ruling on the case. McGinty's approach allows us to engage in argument on the merits of the Dred Scott case. Where was Taney right, where was Taney wrong? This approach helps keep the case relevant to modern readers and offers a, in regular condemnations of Taney, a cautionary tale. Yet to my mind the price of relevance is steep, at least in a history book. To be sure I am not calling for neutrality on the Dred Scott case – for who could be neutral in the face of Taney's racism. We might condemn Dred Scott without

⁷ The Dred Scott case has become something of a touchstone for question of the methodology of Civil War legal history. Mark Graber in his *Dred Scott and the Problem of Constitutional Evil* examines Taney's motivation and the role Dred Scott played in constitutional adjudication in its time and in subsequent decades.

relitigating the case in order to decide who should have won, without trying to demonstrate whether Lincoln or Taney was right on the merits.

In *Mrs. Dred Scott* the doctrine of Taney's opinion is not, for the most part, parsed to evaluate its legal soundness. It is instead contrasted with the lived experience of the Scotts on the frontier. Taney's opinion is fact-checked not cite-checked, and found wanting primarily in its ignorance of reality of life as it was lived by Harriet and Dred Scott. The frame of reference is not an assessment of the legal doctrine of the case, but what the case meant to the Scotts whether Taney and the Supreme Court were writing an opinion that took the realities of race and marriage and slavery into account. The case is studied for what it meant to Harriett Scott, which is to say both for the person Harriett Scott and also the emblematic Harriett Scott, or all those enslaved men and women who were intimately affected by the ruling.

What is most appealing about VanderVelde's treatment of the Dred Scott opinion is that it is fully historical, or grounded in sources that demonstrate the claims. It starts a new conversation about the Dred Scott case that is new and rich. The cost of this new approach is that it is difficult to put it in dialogue with the more traditional approach, and so we risk isolating Civil War legal history both from what a popular audience seems to want of it, discussion and debate of Lincoln's actions, and also perhaps isolating the new social legal history from doctrinal legal history, a trend that has hit other fields but is only now reaching the Civil War. It may be that this amounts to something of an unavoidable choice in writing the legal history of the Civil War. McGinty, Ness and VanderVelde offer three mostly separate paths, and these books are exemplars of these different choices.