

## Foreword: The Lincoln-Douglas(s) Debates and the Problem of Constitutional Evil

Mark A. Graber

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Mark A. Graber, *Foreword: The Lincoln-Douglas(s) Debates and the Problem of Constitutional Evil*, 83 Md. L. Rev. 190 ()

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol83/iss1/6>

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

---

# The 2023 Maryland Constitutional Law Schmooze

## THE LINCOLN-DOUGLAS(S) DEBATES AND THE PROBLEM OF CONSTITUTIONAL EVIL

MARK A. GRABER\*

The problem of constitutional evil structured the Lincoln-Douglas(s) debates. Problems of constitutional evil occur in any moderately diverse society where people disagree strongly about justice and morality.<sup>1</sup> The price of living in such a regime is a willingness to tolerate at least some level of injustice with an understanding that future and increased injustices are probable. “Hell,” Jean-Paul Sartre reminds us, “is other people.”<sup>2</sup> The questions Abraham Lincoln and Stephen Douglas disputed in their famous debates during the Illinois Senate campaign of 1858 and those Lincoln and Frederick Douglass considered in their ongoing conversations during the Civil War concerned how much evil the American constitutional order should tolerate, for how long should such evils be tolerated, and what means were necessary and proper for eliminating constitutional evil.

Slavery was the evil whose tolerance for how long and by what means Lincoln-Douglas and Lincoln-Douglass debated. All three acknowledged the injustice and immorality of one person having property rights and total dominion over another person. Douglas declared slavery to be a “curse

---

© 2023 Mark A. Graber.

\* Thanks to Rosemary Ardman and the *Maryland Law Review* for their help with the Symposium. Thanks to Dean Renée Hutchins, Dean Peter Danchin and the Maryland Law faculty for their support of the Schmooze.

1. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 1–2 (2006).

2. JEAN-PAUL SARTRE, *NO EXIT* 45 (Stuart Gilbert trans., Vintage Int’l ed. 1989) (1945).

beyond computation.”<sup>3</sup> Lincoln condemned “the same spirit that says, ‘You work and toil and earn bread, and I’ll eat it.’”<sup>4</sup> He continued:

No 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, it is the same tyrannical principle.<sup>5</sup>

Douglass asserted that slavery was a “monstrous relation” from which “there springs an unceasing stream of most revolting cruelties.”<sup>6</sup> “The very accompaniments of the slave system,” he said, “stamp it as the offspring of hell itself.”<sup>7</sup>

Douglas, Lincoln, and Douglass outlined three different responses to the problem of constitutional evil. Douglas insisted that permanent coexistence with evil was the price of diversity. The Illinois Democrat in his first debate with Lincoln declared:

I hold that New York had as much right to abolish slavery as Virginia has to continue it, and that each and every State of this Union is a sovereign power, with the right to do as it pleases upon this question of slavery, and upon all its domestic institutions.<sup>8</sup>

Lincoln maintained that Americans should live with evil in the present while being committed to eradicate evil over time. He repeatedly insisted, “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists,”<sup>9</sup> and that his goal was to place slavery “where the public mind shall rest in the belief that it is in course of ultimate extinction.”<sup>10</sup> Douglass had no truck for any temporizing with evil. He called on Americas to emulate John Brown and do whatever was necessary to free slaves immediately. “When John Brown stretched forth his arm the sky was cleared,” he wrote, “[t]he time for compromises was gone—the armed hosts

---

3. Robert W. Johannsen, *Stephen A. Douglas and the South*, 33 J.S. HIST. 26, 32 (1967).

4. Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (Oct. 15, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 284, 315 (Roy P. Basler ed., 1953) (Mr. Lincoln’s reply).

5. *Id.*

6. Frederick Douglass, The Nature of Slavery (Dec. 1, 1850), in FREDERICK DOUGLASS: AUTOBIOGRAPHIES 419, 420 (Henry Louis Gates, Jr. ed., 1994)

7. *Id.*

8. First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 4, at 2, 11 (Mr. Douglas’s speech).

9. See, e.g., Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861) [hereinafter Lincoln, First Inaugural Address], in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 263, 263 (Roy P. Basler ed., 1953).

10. Abraham Lincoln, “A House Divided”: Speech at Springfield, Illinois (June 15, 1858) [hereinafter Lincoln, A House Divided], in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 462, 462 (Roy P. Basler ed., 1953).

of freedom stood face to face over the chasm of a broken Union—and the clash of arms was at hand.”<sup>11</sup>

Commitments to moral diversity during the mid-twentieth century clashed with commitments to racial diversity. Douglas believed the regime committed to moral diversity was as committed to a white man’s government. “I believe this government was made on the white basis,” he declared when debating Lincoln.<sup>12</sup> He went on: “[I]t was made by white men, for the benefit of white men and their posterity for ever, and I am in favour of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians and other inferior races.”<sup>13</sup> Lincoln’s call for gradually weakening moral diversity over time corresponded to his ambivalence about a racially diverse society. He responded to Douglas’s ode to white supremacy by declaring:

I agree with Judge Douglas he is not my equal—in 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 Judge Douglas, and the equal of every living man.*<sup>14</sup>

Douglass, who vigorously opposed a regime in which diverse sentiments towards slavery were tolerated, was enthusiastic about a multi-racial regime that would exhibit different forms of diversity. He favored “immediate and unconditional emancipation in all the states,” and argued for “invest[ing] the black man everywhere with the right to vote and to be voted for, and remov[ing] all discriminations against his rights on account of his color, whether as a citizen or as a soldier.”<sup>15</sup>

The 2023 Maryland Constitutionalism Schmooze explored the problems of constitutional evil raised by the Lincoln-Douglas(s) debates. The Constitutionalism Schmooze, which last took place on March 10–11, 2023, is an annual event at the University of Maryland Carey Law School that brings together a diverse range of scholars from different disciplines and different generations to talk about central questions of constitutionalism. Past Schmoozes have been devoted to such topics as “Juristocracy,”<sup>16</sup> “Executive

---

11. Frederick Douglass, John Brown: An Address (May 30, 1881), in *THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES* 258, 275 (Nicholas Buccola ed., 2016).

12. First Debate with Stephen A. Douglas at Ottawa, Illinois, *supra* note 8, at 9 (Mr. Douglas’s speech).

13. *Id.*

14. *Id.* at 16 (Mr. Lincoln’s reply).

15. Frederick Douglass, The Mission of the War: An Address (Jan. 13, 1864), in *FREDERICK DOUGLASS: SPEECHES AND WRITINGS* 529, 537 (David W. Blight ed., 2022).

16. See Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1 (2006).

Power,”<sup>17</sup> and “An Eighteenth-Century Constitution in a Twenty-First-Century World.”<sup>18</sup> This year, given the way in which polarization has structured American constitutional politics for a generation, the Schmooze topic focused on the last era of polarized politics and the political actors who most exemplified the different responses to constitutional politics in a regime riveted by powerful disagreements over the demands of justice and morality.

The essays below explore the problem of constitutional evil, the Lincoln-Douglas debates, the Lincoln-Douglass debates, and the Lincoln-Douglas-Douglass debates. Concerns range from detailing the context of those debates to outlining what those debates teach us about contemporary constitutional politics. Some authors put the problem of constitutional evil at the heart of their contribution. That problem provides the background for other contributions but is no more missing than the specter of slavery was missing from any antebellum constitutional debate. No contribution seeks to escape, none could escape, and no contemporary American can escape, some version of the problem of constitutional evil that Americans confronted during the mid-nineteenth century. When faced with neighbors who insist on policies we know to be evil, whether those practices be bans on reproductive choice or abortion on demand, race-based admissions policies or policies that ignore the history of white supremacy in the United States, each paper in different ways asks whether we should emulate Stephen Douglas by living with the evil, emulate Abraham Lincoln and risk war by ameliorating the evil, or emulate Frederick Douglass by demanding the evil be eradicated at all costs.

## I. THE PROBLEM OF CONSTITUTIONAL EVIL

The problem of constitutional evil haunted constitutional politics on the eve of the Civil War and haunts constitutional politics today. Constitutional actors throughout history have striven to make the Constitution “the best it can be.”<sup>19</sup> Ronald Dworkin and his followers are explicit in their call for a “fusion of constitutional law and moral theory.”<sup>20</sup> Originalists on the Supreme Court profess indifference to justice even as their historical investigations support their partisan predilections to the same degree as those who openly champion a jurisprudence of values.<sup>21</sup> The problem with the

---

17. See Mark A. Graber, *Foreword: Executive Power: From the Constitutional Periphery to the Constitutional Core*, 73 MD. L. REV. 1 (2013).

18. See Mark A. Graber, *Foreword: Making Sense of an Eighteenth-Century Constitution in a Twenty-First-Century World*, 67 MD. L. REV. 1 (2007).

19. RONALD DWORKIN, *LAW’S EMPIRE* 62 (1986).

20. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977).

21. See Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 70 (Earl M. Maltz ed., 2003).

project of constitution-perfecting is that “the others also exist.”<sup>22</sup> Constitutionalism more often than not entails “rotten compromises”<sup>23</sup> that sacrifice fundamental rights, typically of parties not at the bargaining table, so that others may enjoy the benefit of union.

Darrell A.H. Miller offers a powerful meditation on the constitutional evil that was slavery, an evil he notes that was “named” in the Constitution “only to be banished.”<sup>24</sup> His paper does not offer a legal analysis of the Thirteenth Amendment, but a framework for thinking about how through “Confession, Contrition, and Penance,”<sup>25</sup> Americans might achieve “Reconciliation”<sup>26</sup> and “Redemption.”<sup>27</sup> Confession requires “knowledge and apprehension of the nature of the sin.”<sup>28</sup> Slavery was not the metaphorical excess of much American political thought. Slavery was “the lash, the shackle, the ‘can to can’t.’”<sup>29</sup> Contrition requires a comprehensive understanding of how slavery warped the American soul. “We must recognize,” Miller insists, “all the ways in which we as a People have transgressed through the sin of slavery.”<sup>30</sup> Penance entails an ongoing commitment to eradicating every surviving trace of slavery, the slave system, and the slave power. Miller concludes, “the values of the Reconstruction Amendments have no sunset provision, no expiration date.”<sup>31</sup> Atoning for the sin of slavery is an American project baked into the post-Civil War Constitution that should structure American constitutionalism as long as the Reconstruction Amendments remind Americans that they have been charged with constitutional evil and found guilty.

## II. THE LINCOLN-DOUGLAS DEBATES

The essays on the Lincoln-Douglas debates play variations on the theme of “the past is a foreign country.”<sup>32</sup> William Blake and Rachel Shelden emphasize important differences between the constitutional politics that structured the Lincoln-Douglas debates and contemporary constitutional politics. Blake highlights the sophistication of nineteenth-century political

---

22. This may be a paraphrase. The source is SIMONE DE BEAUVOIR, *THE BLOOD OF OTHERS* (1945).

23. AVISHAI MARGALIT, *ON COMPROMISE AND ROTTEN COMPROMISES* (2010).

24. Darrell A.H. Miller, *A Meditation on the Thirteenth Amendment and Constitutional Redemption*, 83 MD. L. REV. 331, 331 (2023).

25. *Id.* at 334.

26. *Id.*

27. *Id.* at 332, 338.

28. *Id.* at 337.

29. *Id.* at 338.

30. *Id.* at 340.

31. *Id.* at 345.

32. L. P. HARTLEY, *THE GO-BETWEEN 17* (N.Y. Rev. of Books 2002) (1953).

argumentation when compared to the dummed down rhetoric of the present.<sup>33</sup> Shelden discusses the far more porous boundary between law and politics in the nineteenth century that featured overt judicial-political alliances that would violate twenty-first-century legal norms.<sup>34</sup> Jeffrey Hoagland and Vinay Harpalani's analysis of originalist arguments and contested notions of racial equality in past and present debates draws more direct lessons from history for contemporary politics.<sup>35</sup> Rogers Smith acknowledges that both Lincoln and Douglas were persons of their time.<sup>36</sup> Nevertheless, he points out that thinking about the rightful heirs of Lincoln and Douglas is an important twenty-first-century political project given "that it is often effective for political actors and movements to link their preferred positions to those that are prestigious in their nation's past, while tagging their opponents with disgraced viewpoints."<sup>37</sup>

Blake points to the political environment of the 1850s that enabled Lincoln and Douglas to present fairly sophisticated analyses of the problem of constitutional evil to a mass audience. That "[i]n the mid-nineteenth century, constitutional politics was public spectacle," Blake points out, explains why at a time when "[l]evels of formal education . . . were likely much lower" than at present, "neither Douglas nor Lincoln dumbed themselves down to keep the audience entertained."<sup>38</sup> Lincoln and Douglas made detailed constitutional arguments to an audience that had constitutional authority. Their debates were an exercise in constitutional politics analogous to Supreme Court arguments aimed only at nine Justices. Blake notes that "one key feature of nineteenth-century civic life" was that "the right to vote and petition were vehicles through which citizens could hold leaders accountable for actions they considered to be unconstitutional."<sup>39</sup> Contemporary presidents exhibit nowhere near the rhetorical skills Lincoln and Douglas demonstrated in their debates partly because they have hired professional speech writers, partly because they consider politics to be about material goods, and partly because constitutional analysis has become the domain of lawyers and courts. These rhetorical practices enfeeble the

---

33. William D. Blake, "Our Constitution . . . Should Be Read by Intelligent and Patriotic Men": A Statistical Analysis of Constitutional Rhetoric, 83 MD. L. REV. 314 (2023).

34. Rachel A. Shelden, "I Shall Not Forget or Entirely Forsake Politics on the Bench": Abraham Lincoln, Dred Scott, and the Political Culture of the Judiciary in the 1850s, 83 MD. L. REV. 217 (2023).

35. Jeffrey D. Hoagland & Vinay Harpalani, *Original Intent, Racial Equality, and the Conundrums of "Colorblindness"*, 83 MD. L. REV. 231 (2023).

36. Rogers M. Smith, *Who Are the True Heirs of Lincoln and Douglas?*, 83 MD. L. REV. 204 (2023).

37. *Id.* at 205.

38. Blake, *supra* note 33, at 315–16.

39. *Id.* at 318.

constitutional populace. Blake observes that the “audience at the Lincoln-Douglas debates engaged with the Constitution through their senses of touch, sight, and hearing in ways that would flummox the modern political consultant (and the modern political scientist).”<sup>40</sup> He urges a return to the constitutional rhetoric of the past as the best means for restoring the sense that “‘we the people’ have a role to play in constitutional politics.”<sup>41</sup>

Shelden points to those features of the political environment that normalized partisan alliances between politicians and the judiciary. When Lincoln claimed in his debates with Douglas that a conspiracy existed between members of the Democratic party on and off the court,<sup>42</sup> he was attacking the pro-slavery commitments of the Democratic Party rather than criticizing Chief Justice Roger Taney’s legal ethics. Politicians and justices during the mid-nineteenth century frequently worked together for partisan ends. Shelden discusses how “judges were key players in nineteenth-century politics: they served as partisan presidential electors, advised political candidates (or were candidates themselves), and collaborated on legislation.”<sup>43</sup> The ubiquity of judicial intervention in the political arena explains why in 1858, “there was nothing new or particularly shocking about the idea of Justices participating in pro-slavery politics.”<sup>44</sup> Lincoln alleged a conspiracy between Douglas, Taney, and others to link Douglas to Taney’s pro-slavery constitutionalism, not to accuse either of injudicious conduct. Shelden declares, “[t]he Illinois Republican was hoping to tie his Democratic rival to the stink of Taney’s politics.”<sup>45</sup> Taney and Douglas were complicit in constitutional evil, not partners in a crime against the nineteenth-century equivalent of the Code of Professional Responsibility. As Lincoln declared in the fifth debate with Douglas:

[T]he *Dred Scott* decision . . . never would have been made in its present form if the party that made it had not been sustained previously by the elections. . . . [T]he new *Dred Scott* decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections.<sup>46</sup>

---

40. *Id.* at 330.

41. *Id.* For an elaboration of this argument, see ELVIN LIM, *THE ANTI-INTELLECTUAL PRESIDENCY: THE DECLINE OF PRESIDENTIAL RHETORIC FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2012).

42. Lincoln, *A House Divided*, *supra* note 10, at 466–67.

43. Shelden, *supra* note 34, at 219.

44. *Id.*

45. *Id.* at 228.

46. Fifth Debate with Stephen A. Douglas at Galesburg, Illinois (Oct. 7, 1858), *in* 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 4, at 208, 232 (Mr. Lincoln’s reply).



Hoagland and Harpalani connect the past and present when analyzing the sources Douglas, Lincoln, and contemporaries use to discuss and justify constitutional evil. The subject line has changed from the merits of slavery to the merits of colorblind constitutionalism, but the modes of argument have remained constant. Hoagland and Harpalani maintain that the Lincoln-Douglas debates are “uniquely American” in their “concern for honoring original intent, the powers of the federal government and the states . . . , and the ideals of social and racial equality in our multicultural democracy.”<sup>47</sup> One “uniquely American” feature of the Lincoln-Douglas debate is each participant pointed to the constitutional text and history as offering legal rather than moral solutions to the problem of constitutional evil of their times. Hoagland and Harpalani observe that “both Lincoln and Douglas would allow slavery to continue or end, against their own personal views, based on which authority controlled.”<sup>48</sup> Lincoln, in particular, swallowed his anti-slavery convictions when insisting that the Constitution compelled good men to return persons escaping slavery to their masters in obedience to Supreme Court decisions, at least with respect to the parties in particular cases.<sup>49</sup> Constitutional positivism remains central to resolving the problem of constitutional evil presented by the history of white supremacy in the United States. “[T]he rhetorical power of appealing to original meaning has not only proven incredibly persuasive through movements like originalism,” Hoagland and Harpalani note in their discussion of *Students for Fair Admissions v. President & Fellows of Harvard College*,<sup>50</sup> “but has become unavoidable in debates over equal protection.”<sup>51</sup>

Smith makes different connections between past and present debates over constitutional evils when he assesses who has a claim to be Lincoln’s constitutional descendant and who in contemporary politics must acknowledge Douglas as their most cherished ancestor. His essay asks “what, if any, positions in our current polarized politics can plausibly claim to be the heirs of the rival positions that Lincoln and Douglas took in those debates?”<sup>52</sup> Smith acknowledges that contemporary progressives reject natural law and champion other practices that are or seem inconsistent with the understanding of the Declaration of Independence that guided Lincoln’s thinking. “[I]n many contemporary conservative eyes,” Smith asserts, “progressives past and present have, like Douglas, been predominantly relativistic, anti-

---

47. See Hoagland & Harpalani, *supra* note 35, at 244.

48. *Id.* at 234.

49. *Id.*; see also Lincoln, First Inaugural Address, *supra* note 9, at 268–69 (noting that Supreme Court decisions “must be binding . . . upon the parties to a suit” and that the “fugitive slave clause” is “well enforced”).

50. 143 S. Ct. 2141 (2023).

51. Hoagland & Harpalani, *supra* note 35, at 240.

52. Smith, *supra* note 36, at 204.

universal natural rights, . . . believers in democratic majoritarianism,” and, in different ways, “are racist and imperialist themselves.”<sup>53</sup> Progressives nevertheless share the Lincolnian commitment to expanding the beneficiaries of the Declaration of Independence. Smith points out that Lincoln and contemporary progressives agree that the American “project” is “necessarily open-ended, because the full ‘possibilities of human freedom are not known,’ and ‘new agendas of freedom’ could ‘emerge’ that might well go far beyond what earlier generations imagined.”<sup>54</sup> Smith reads the post-Civil War Amendments as amplifying the dimensions of Lincoln’s thought most aligned with contemporary progressivism. Both “Lincoln and the progressives,” he concludes, “read the Constitution as increasingly embodying a project of achieving more inclusive, egalitarian, and beneficial enjoyment of rights for all.”<sup>55</sup>

### III. THE LINCOLN-DOUGLASS DEBATES

The essays on the Lincoln-Douglass debates compare Lincoln’s temporizing on various problems of constitutional evil with Douglass’s willingness to endorse direct violent solutions. Julie Novkov examines how Douglass pushed Lincoln with increasing success to make use of African American soldiers and treat Black military service as a pathway to full Black citizenship.<sup>56</sup> Robinson Woodward-Burns details how “Lincoln and Douglass differed on their obligations to do constitutional evil under the 1850 Fugitive Slave Act,”<sup>57</sup> with Lincoln asserting a constitutional obligation to do evil and Douglass insisting on a moral obligation to do justice. Jack Balkin and Sanford Levinson take a more comprehensive look at Lincoln’s willingness to work within the constitutional processes to realize in the long run constitutional commitments to eradicating slavery and Douglass’s insistence that extra-constitutional violence was a justifiable means for eliminating the constitutional scourge of human bondage.<sup>58</sup>

Novkov documents the debate between Abraham Lincoln and Frederick Douglass over “Black military service and its meaning.”<sup>59</sup> Douglass insisted that Black military service both entailed and demonstrated African-American

---

53. *Id.* at 210.

54. *Id.* at 212 (quoting MICHAEL P. ZUCKERT, *A NATION SO CONCEIVED: ABRAHAM LINCOLN AND THE PARADOX OF DEMOCRATIC SOVEREIGNTY* 36 (2023)).

55. *Id.* at 215.

56. Julie Novkov, *What to the Nation Is the American Soldier? Shifting Conceptions of Service, Rights, and Belonging in the Civil War*, 83 MD. L. REV. 294 (2023).

57. Robinson Woodward-Burns, *Lincoln, Douglass, Fugitive Slave Law, and Constitutional Evil*, 83 MD. L. REV. 281, 293 (2023).

58. Jack M. Balkin & Sanford Levinson, *Frederick Douglass as Constitutionalist*, 83 MD. L. REV. 260 (2023).

59. Novkov, *supra* note 56, at 296.

fitness for freedom and full citizenship. Novkov points out that immediately after fighting began “Douglass made demands for immediate emancipation that linked emancipation to Black enlistment.”<sup>60</sup> Lincoln during the Civil War temporized over Black military service, as he had temporized over slavery before the Civil War. He “initially prioritized holding onto the states that had not yet seceded,”<sup>61</sup> which meant the Union army would be as white as the Confederate fighting machine. As military hostilities dragged on, Lincoln moved towards Douglass. Novkov details how the sixteenth president became more committed to Black military service as both an expression of a national commitment to emancipation and as a pathway for American citizenship. Lincoln eventually reached the conclusion that “freed persons were citizens, and Black servicemembers were entitled to equality.”<sup>62</sup> Together, Lincoln and Douglass helped fashion the contemporary polity in which military service is a vehicle for civic advancement. Novkov observes how “war-making can raise questions of incorporation for marginalized groups that may have broader implications for the meanings and rewards attached to military service.”<sup>63</sup> Nevertheless, the gap between Lincoln and Douglass persisted. Lincoln’s last speech endorsed voting rights only for “the very intelligent,” and “those who serve our cause as soldiers.”<sup>64</sup> This speech provides evidence for Novkov’s conclusion that “Lincoln never completely endorsed Black civic incorporation, but he ultimately supported Black citizenship.”<sup>65</sup>

Woodward-Burns considers the debate between Abraham Lincoln and Frederick Douglass over the Fugitive Slave Acts of 1791 and 1850. His paper explores how the Fugitive Slave Acts implicated two different dimensions of the problem of constitutional evil. Both the 1791 and 1850 measures raised issues about the obligation to obey an immoral provision of the Constitution and the obligation to obey immoral laws that were not compelled by the immoral provision of the Constitution. As Woodward-Burns notes, “[t]he Fugitive Slave Clause did not expressly empower federal, state, or private agents to recapture fugitive slaves.”<sup>66</sup> Obedience, if compelled, was compelled by the obligation to interpret an evil constitutional provision in light of that provision’s evil constitutional purpose. Douglass in the name of natural right rejected any duty to obey either the Fugitive Slave Clause or the constitutionally contested fugitive slave laws Congress passed when

---

60. *Id.* at 297.

61. *Id.* at 305.

62. *Id.* at 309.

63. *Id.* at 313.

64. *Id.* at 313 (quoting Abraham Lincoln, Last Public Address (Apr. 11, 1865), in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 399, 403 (Roy P. Basler ed., 1953)).

65. *Id.*

66. Woodward-Burns, *supra* note 57, at 191.

implementing the Clause. This natural right “authorized violent resistance.”<sup>67</sup> “By killing slavecatchers,” Woodward-Burns points out, Douglass thought “the 1850 Fugitive Slave Act might be voided, bringing positive law in closer conformity to natural law.”<sup>68</sup> Lincoln from early in his political career scorned claims that natural law trumped positive law.<sup>69</sup> Woodward-Burns details how the Illinois Republican’s commitment to positive law explains why “Lincoln held that he and other lawmakers were oath-bound to support the [Fugitive Slave] Clause and consequently the 1793 and 1850 Acts,”<sup>70</sup> while acknowledging those acts might not have been constitutionally necessary.<sup>71</sup> Lincoln refrained from returning fugitive slaves, Woodward-Burns points out, only during the Civil War, when he could constitutionally justify abandoning rendition under the war power and pragmatism no longer warranted returning human beings to bondage.<sup>72</sup>

Balkin and Levinson examine the debate between Lincoln and Douglass over violent responses to the problem of constitutional evil. They identify Lincoln as a “Humean” constitutionalist “willing to make compromises, even deeply regrettable ones, in order to preserve the rule of law, mutual cooperation, and social peace.”<sup>73</sup> Lincoln, the Humean constitutionalist, insisted on enforcing the Fugitive Slave Acts, would not ban slavery in existing states, and initially fought the Civil War only to preserve the Union.<sup>74</sup> Balkin and Levinson identify Douglass as a “Lockean” constitutionalist who regarded “[b]reaches of civil peace and even insurrection . . . necessary to preserve republican values,” most notably the republican commitment the “natural rights.”<sup>75</sup> Douglass, the Lockean constitutionalist, urged the murder of federal agents assisting the rendition of fugitive slaves and provided financial support to John Brown.<sup>76</sup> Balkin and Levinson observe that Douglass’s willingness to endorse violent solutions to the problem of constitutional evil might render him ineligible for the bar under such decisions as *In re Anastaplo*.<sup>77</sup> Douglass certainly would have been disqualified from holding federal office under Section Three of the

---

67. *Id.* at 286.

68. *Id.* at 287.

69. See Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 108 (Roy P. Basler ed., 1953).

70. Woodward-Burns, *supra* note 57, at 291.

71. *Id.* at 228.

72. *Id.* at 291.

73. Balkin & Levinson, *supra* note 58, at 263.

74. See Lincoln, First Inaugural Address, *supra* note 9, at 263, 269 (discussing slavery in the states and fugitive slaves); Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (Roy P. Basler ed., 1953).

75. Balkin & Levinson, *supra* note 58, at 263.

76. *Id.* at 268–70–11.

77. 366 U.S. 82 (1961).

Fourteenth Amendment for engaging in insurrection had he been a past or present officeholder.<sup>78</sup> Balkin and Levinson conclude by asking how acknowledging Douglass's penchant for violence should influence American regard for others who were violent for just causes. They observe how Douglass's place in the contemporary American pantheon raises questions about including those who were on the frontlines of antislavery violence before the Civil War. "[T]he more we remember about the real Frederick Douglass," Balkin and Levinson write, "the more complicated it becomes to honor Douglass and reject Brown."<sup>79</sup>

#### IV. THE LINCOLN-DOUGLAS-DOUGLASS DEBATES

The Lincoln-Douglas-Douglass debates raise fundamental questions about Abraham Lincoln and middle ground approaches to the problem of constitutional evil that are satisfied with efforts to ameliorate injustice over time. From some perspectives, when Lincoln, Douglas and Douglass are placed on a continuum, Lincoln looks more like Douglas than Douglass. Henry Chambers, Jr., details how neither Lincoln nor Douglas was prepared to live in the multiracial society that was at the heart of the constitutional vision that animated Douglass.<sup>80</sup> From other perspectives, Lincoln looks more like Douglass than Douglas. Lincoln during the last years of his life largely reconciled with Douglass on matters of Black military service and the antislavery goals of the Civil War. A gap between them remained, but the gulf between Lincoln and white supremacist Democrats seemed greater by April 1865 than the divide between Lincoln and abolitionists. That Lincoln more closely resembled Douglas on race and slavery before the Civil War and more closely resembled Douglass on race and slavery by the end of the Civil War suggests the virtues of thinking about the Douglas-Douglass debates, cutting out the middleman.<sup>81</sup>

Chambers points to affinities between Douglas and Lincoln on the salience of race in constitutional politics when considering the perspectives the Lincoln-Douglas(s) debates offer for contemporary debates over

---

78. The Republicans who drafted Section Three of the Fourteenth Amendment believed persons who provide financial support to insurrectionists are insurrectionists. See Mark A. Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, LAWFARE (Sept. 26, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021>.

79. Balkin & Levinson, *supra* note 58, at 279.

80. Henry L. Chambers, Jr., *Douglass, Lincoln, and Douglas Before Dred Scott: A Few Thoughts on Freedom, Equality, and Affirmative Action*, 83 MD. L. REV. 245 (2023).

81. On this point, see Mark A. Graber, *John Brown, Abraham Lincoln, Dred Scott and the Problem of Constitutional Evil*, in *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW* (David Thomas Konig, Paul Finkelman & Christopher Alan Bracey eds., 2010).

affirmative action. Douglas, Chambers recognizes, believed the “rights of slaves or the rights of free Black Americans” were “subject to negotiation, diminution, or augmentation depending on circumstances.”<sup>82</sup> Chambers reminds us that “Lincoln’s colonization suggestion may have stemmed from a belief that free Blacks and Whites could not live together peaceably.”<sup>83</sup> Douglass would have none of this. Chambers explains that his “Constitution, buttressed by the Declaration of Independence, creates a single class of free citizens, with no distinction among free people.”<sup>84</sup> Constitutional authorities interpreted the post-Civil War Amendments in the spirit of Lincoln-Douglass, rather than adhering to Douglass’s commitment to racial equality in all civic dimensions. “Consistent with Abraham Lincoln’s refusal to endorse full equality between the races and Stephen Douglas’s general unwillingness to guarantee rights to Black people,” Chambers declares, the Reconstruction Constitution provided “an impoverished set of rights” that “would not ensure equality across races.”<sup>85</sup> The result is a contemporary regime in which lives of all citizens and their perspectives remind strongly influenced by their race. The Supreme Court majority may imagine that race is not a relevant proxy for diversity, but as Chambers observes, “the American tradition of sorting people by race has created a society in which the different life experiences people of different races typically possess are relevant in an education setting.”<sup>86</sup>

During the Civil War, Lincoln increasingly more resembled Douglass than Douglas. Lincoln would not let the South go in peace or make additional concessions to preserve the peace. He was unwilling to endorse additional compromise to preserve the Union<sup>87</sup> other than a codification of the federal consensus that Lincoln already thought was good law.<sup>88</sup> Lincoln was more hesitant than Douglass and many Republicans to declare abolition a war aim, but the Emancipation Proclamation made clear that the Civil War had become a war to end slavery. Lincoln’s hesitancy was partly tactical. He declared that he hoped God was on his side, but he really needed Kentucky.<sup>89</sup> Arguably, Lincoln was a more masterful version of Frederick Douglass and John Brown. All three sought an end to slavery as soon as possible. Only Lincoln was aware of the strategic maneuvers necessary to achieve that goal.

---

82. Chambers, *supra* note 80, at 248.

83. *Id.* at 251.

84. *Id.* at 254.

85. *Id.* at 255.

86. *Id.* at 259.

87. See Letter from Abraham Lincoln to Lyman Trumbull (Dec. 10, 1860), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 9, at 149, 149–50 (“Let there be no compromise on the question of *extending* slavery.”).

88. Lincoln, First Inaugural Address, *supra* note 9, at 163.

89. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 284 (1988).

Lincoln's contribution to the happy ending promised by the Thirteenth Amendment may bias contemporary analysis towards his moderate solution to the problem of constitutional evil. The Civil War worked as what Frederick Douglass insisted was a war against slavery, even though Lincoln's war against slavery was arguably initiated only with the issuance of the Emancipation Proclamation.<sup>90</sup> Lincoln on this logic without firing the first shots<sup>91</sup> successfully provoked Confederate actions that built up the support for emancipation, Black military service, and Black citizenship in the North and border states sufficient for adopting those measures without fear of an immediate electoral backlash, although one occurred shortly after the Civil War.<sup>92</sup> Lincoln's success was nevertheless contingent. The Civil War might have turned out differently had a Confederate general at Antietam not accidentally left military plans for the Union Army to find.<sup>93</sup> Cooler southern heads might have forestalled secession. Had that been the case, by Lincoln's calculation, Black chattel slavery would have still existed in the United States when the more senior members of the Schmooze were born.<sup>94</sup> Would Americans living in such a regime celebrate Lincoln as the great emancipator, honor Stephen Douglas for recognizing that slavery was the price for peaceful Union, or rue that their ancestors in 1860 did not heed John Brown and Frederick Douglass's calls for a more violent response to constitutional evil?

---

90. Abraham Lincoln, *Emancipation Proclamation* (Jan. 1, 1863), reprinted in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 28, 28–29 (Roy P. Basler ed., 1953).

91. See generally KENNETH M. STAMPP, *And the War Came: The North and the Secession Crisis, 1860-1861* (1950).

92. See Michael Les Benedict, *The Rout of Radicalism: Republicans and the Elections of 1867*, 18 CIV. WAR HIST. 334 (1972).

93. See MCPHERSON, *supra* note 89, at 537.

94. Fourth Debate with Stephen A. Douglas at Charleston, Illinois (Sept. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 4, at 145, 182 (Mr. Lincoln's rejoinder) (claiming to doubt whether under Republican party policies, "ultimate extinction would occur in less than a hundred years at the least").