

THE GREAT INTERPRETER

Michael Stokes Paulsen and Luke Paulsen argue that the Constitution as we know it was largely shaped by Abraham Lincoln.

The single most important event of constitutional interpretation in American history was the Civil War. The war was, of course, so much more than simply an act of constitutional interpretation. Fought from 1861 to 1865, it was the most devastating war in America's history, resulting in the deaths of more than 620,000 men—a death toll greater than all of America's other wars combined. The war was the nation's greatest crisis. And it marked a decisive turning point in the nation's history—perhaps the pivot point in the story of the United States as a nation.

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Yet at the heart of the Civil War, the crisis that triggered it, and the changes that it brought were enormous constitutional issues. Indeed, it is no exaggeration to say that *the Civil War was fought over the meaning of the Constitution, and over who would have the ultimate power to decide that meaning.* The Civil War decided—on the battlefields rather than in the courts—the most important constitutional questions in our nation’s history: the nature of the Union under the Constitution, the status and future of slavery, the powers of the national government versus the states, the supremacy of the Constitution, and the wartime powers of the president as commander in chief. It was the Civil War, not any subsequent judicial decision, that “overruled” the Supreme Court’s atrocious decision in *Dred Scott v. Sandford* creating a national constitutional right to own slaves.

If the Civil War is the most important event in the history of American constitutional interpretation, then President Abraham Lincoln was the Constitution’s most important interpreter—its preserver, protector, and defender. The world will little note nor long remember what most law professors and judges say about today’s constitutional issues. (And that is probably as it should be.) But it must not forget what Lincoln did, and said, in applying the Constitution. More than any Supreme Court justice, more even than any one of the framers, it is Lincoln who has shaped our understandings of the Constitution over the past one hundred fifty years.

Yet there is one great constitutional truth that Lincoln recognized but we have forgotten—ironical-ly a truth central to Lincoln’s role as the pivotal figure in American constitutional history. It is that the Constitution’s meaning cannot be left simply to the whims of the Supreme Court. Rather, faithful constitutional interpretation is the shared responsibility of *all* government officials. The duty of determining the Constitution’s meaning is not something “We the People” can resign into the hands of any one organ of national government. On this 150th anniversary of the close of the Civil War, and of Lincoln’s death, it is well to remember Lincoln’s story and its lessons for our age.

Before Lincoln and the war, the Constitution was in substantial respects proslavery. This is a matter of some embarrassment to those who revere the Constitution and the Founding Fathers who drafted it in Philadelphia in the summer of 1787. But it is also a matter of undeniable historical reality. The fugitive-slave clause obliged Northern states to return runaways. The three-fifths clause provided bonus representation

to Southern states based on their slave property, even as those states withheld all rights from slaves. For twenty years, Congress was forbidden to ban the international slave trade. And Congress appeared to lack any power to prohibit slavery in states choosing it, under generally accepted understandings of the limited scope of its enumerated legislative powers. In short, the Constitution preserved, protected, and even encouraged slavery.

Our identification of Lincoln as the “Great Emancipator” tends to erase memories of Lincoln’s pre-war positions on these points: He accepted them all. The Constitution was proslavery. And Lincoln was pro-Constitution. He tolerated the framers’ horrid compromises on slavery simply because, like them or not, there they were, plainly written in the Constitution. Lincoln was what we today might call an “originalist” or a “strict constructionist.” He believed in unwavering adherence to the text of the Constitution, as it would have been understood at the time of its adoption, even when he hated the result—a principled stand, and a surprisingly conservative one. Lincoln hated slavery, but believed the Constitution required him to tolerate it where it existed.

But where the Constitution did *not* protect slavery, Lincoln drew the line. Congress had the power to prohibit slavery in the territories and, he thought, should exercise it, thereby checking slavery’s expansion. When an activist Supreme Court—there is nothing new under the sun—invented a sweeping new “constitutional right” to own slaves in the territories in the notorious 1857 *Dred Scott* case, Senate-candidate Lincoln denounced the decision and the Supreme Court as lawless.

More than that, Lincoln insisted that this lawless judicial decision should not be regarded as binding the other branches of government, which rightfully possessed the power to resist such lawless decisions, and to do so with the powers *they* possessed under the Constitution. This was a controversial, almost radical stance, but a logically rigorous one. Lincoln maintained that the authority of the Supreme Court was limited to the particular parties and cases before the Court. He emphatically denied that a Supreme Court decision settled the meaning of the Constitution for everyone. Thus, a wrong judicial decision did not bind the other, coequal branches of government, or the people. Were it able to do so, Lincoln stated in his first inaugural, “the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.”

The Constitution, not the Supreme Court, governed the nation. A horrid judicial decision could not control the policy of the government as a whole.

These views were anathema to some. Senator Stephen Douglas, in his famous debates with Lincoln during their 1858 contest for the U.S. Senate, condemned Lincoln's position as the equivalent of hostility to the Constitution itself. But Lincoln stood firm. Though Lincoln lost the Senate race to Douglas—their rematch, this time for the presidency, would come just two years later—the debates propelled Lincoln to national prominence for his stances against slavery, against *Dred Scott*, and against the “supremacy” of a renegade Supreme Court.

Lincoln is today revered for saving the Union as much as for ending slavery. Yet it is seldom remembered that it was Lincoln's election to the presidency, coupled with his views on slavery, *Dred Scott*, and the Supreme Court, that triggered the nation's gravest constitutional crisis in the first place.

Lincoln, a western antislavery moderate, surprised more-prominent, eastern antislavery politicians by winning the Republican presidential nomination in Chicago, in 1860. Assisted by a split in the Democratic party between its Northern and Southern factions, Lincoln went on to defeat Douglas, Vice President John Breckinridge, and Senator John Bell in a wild, four-way general-election contest. Lincoln swept the northern tier of states but received almost no votes at all in the South. But the solid North was enough to enable him to win in the electoral college.

Lincoln's election triggered secession. Outraged Southerners regarded Lincoln's victory at the polls as an assault on their constitutional rights as declared by the Supreme Court in *Dred Scott*, and as an ominous threat to the institution of slavery. Months before Lincoln was sworn in, Southern states began passing resolutions declaring their secession from the Union. By the time Lincoln assumed office, seven states had left. More were soon to follow.

How should a president respond? Lincoln again took his direction from a strict reading of the Constitution's text and structure, and from an equally strict reading of his sworn constitutional duties as president. The Constitution created a “more perfect union,” and that union was designed to be perpetual. No provision existed for its dissolution. Lincoln understood the United States, under the Constitution, to be one nation, indivisible, not a confederation of independent, sovereign states. It followed, Lincoln argued in his inaugural address, that “no state, upon its own mere motion, can lawfully get out of the Union.” No state could

decide for itself, without the consent of the others, that the nation was at an end. Declarations to such effect were unconstitutional, void, and “insurrectionary.”

Lincoln therefore considered it his duty as president to preserve the Union and faithfully execute the laws throughout all the states. “*You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to ‘preserve, protect and defend’ it,” Lincoln told the South. To make concessions to slavery or secession was unthinkable. It would violate the fundamental principle of democracy that there can be no appeal “from ballots to bullets.” Election results must not be allowed to be overturned by threats of violent resistance and secession, or else free government itself would be at an end, along with the Union.

Given the chance, the Supreme Court that decided *Dred Scott* might well have sided with the South's claim to have a right to secession. The Court had a Southern majority, and Chief Justice Roger Taney, the author of *Dred Scott*, was firmly committed to state-sovereignty and proslavery positions. It would not have been at all surprising for the Court to have ruled that each state retained a sovereign right to quit the Union, and that the nation lacked any legitimate constitutional power to coerce a state to remain against its will.

But this constitutional issue was not decided in the Supreme Court. It was decided on the battlefields of the Civil War. The United States is the nation it is today because of Lincoln's unswerving constitutional commitment to maintaining the Union, his fidelity to the Constitution as he understood it and not necessarily as it was understood by others, and his willingness to fight for constitutional principle.

And the war came. The South fired first, on Fort Sumter, and Lincoln took immediate action under his constitutional powers as president and military commander in chief. It is sometimes charged that Lincoln expanded presidential war powers. It is more accurate to say that he expounded them. Lincoln was simply the first to use fully, and to explain persuasively, presidential powers that had always been present in the Constitution. Lincoln did not abuse presidential power. He used it to its full extent.

He used it boldly and decisively, as circumstances dictated: On his own authority Lincoln suspended habeas corpus to enable union troops to reach Washington and save the capital from feared invasion. Chief Justice Taney declared this unconstitutional. The president could not suspend habeas corpus; only Congress could, Taney reasoned. This was by far a

more plausible interpretation of the Constitution than Taney's *Dred Scott* opinion. Yet President Lincoln defied the Court's order—the only time a president has done this in our nation's history—arguing that the Constitution was ambiguous on the point and that circumstances necessitated his action while Congress was out of session. Lincoln's position prevailed, and Congress soon ratified all of Lincoln's actions.

Lincoln also ordered the blockade of Southern ports, again on his own military authority as commander in chief. Again, Congress backed Lincoln. This time, two years later, the Supreme Court sustained Lincoln's position in the famous *Prize Cases*, a landmark recognizing a sweeping military power of the president to respond to attacks against the United States. Congress may have the exclusive power to declare war against an enemy nation—to *initiate* a state of war. But when the United States is attacked, from without or from within, by armed forces hostile to the nation or its people, the president has full constitutional authority to meet force with force. He has power to act on his own in a state of actual war, declared or not, and to do so without waiting for Congress to “baptize it with a name.”

Lincoln also authorized military detention, without trial, for U.S. citizens who took up arms against the Union. This remains very relevant today. Under Lincoln's view secession was unlawful. The Confederate States of America did not exist as a valid legal entity. Thus Confederate soldiers were not, legally, soldiers of an enemy nation, but instead remained U.S. citizens. Nonetheless, given the reality of large-scale war, such citizens could be held as prisoners of war under military authority. War prisoners, whether Americans or not, were not entitled to civilian legal process. Enemy combatants of whatever nationality were legitimate military targets on the battlefield. And, when captured, they could legitimately be held as military prisoners.

The Supreme Court would not address these issues at length until early in the twenty-first century, in a series of cases beginning in 2004, with *Hamdi v. Rumsfeld*. But the modern Court has not done nearly as well as Lincoln. *Hamdi*, rendered by a deeply divided Court, is convoluted, vague, and unprincipled. It invents an arbitrary line between citizen-enemies and alien enemy combatants, holding that flexible and uncertain rights to a “hearing” on their combatant status must be accorded to certain classes of combatants. The result has been legally chaotic. Lincoln's stance, in contrast, was straightforward, clear, and sensible: Enemy soldiers, regardless of citizenship, are

subject to military authority, capture, detention, and punishment—period.

Still further, Lincoln authorized military-commission proceedings and punishments against citizens aiding the enemy as spies or saboteurs. Such persons were what we today would call “unlawful combatants,” subject to military punishment for violation of the traditional laws of war. No president or Congress, before or since, has gone further—with the notable exception of Franklin D. Roosevelt's shameful order imprisoning Japanese-American citizens and lawful resident aliens, not for anything they did, but on account of their ancestry and race.

In contrast to FDR, Lincoln's actions hewed closely to traditional understandings permitting the use of military authority, including trial by military commission, against those who commit war crimes against their own nation. At the time, Lincoln's authority was summarily upheld by the Supreme Court. After the war, and after Lincoln's death, a split Court struck down the use of military commissions to try civilians for treason in *Ex parte Milligan*. In historical context, the *Milligan* decision was probably directed more against President Andrew Johnson's military reconstruction policies than against anything Lincoln did, though its effect was to undermine Lincoln's views of presidential authority in the process. In the next century, however, Lincoln's views won out as the Supreme Court carefully limited *Milligan*. In *Ex parte Quirin* (1942), the Court unanimously upheld the trial by military commission and the execution of Nazi saboteurs, including at least one U.S. citizen. Lincoln's Civil War practice became the Supreme Court's interpretation as well: In times of war, the president, as military commander in chief, is authorized to convene military tribunals for the punishment of offenses against the laws of war; and that power could be applied to unlawful enemy combatants irrespective of nationality.

Once again, the modern Supreme Court has performed relatively poorly on these issues. In 2006, in *Hamdan v. Rumsfeld*, a divided Court rendered an astounding decision holding that the president's power as commander in chief did not include the use of military proceedings against even unlawful enemy *alien* combatants—al-Qaeda members who had committed war crimes, terror, and atrocities directed at civilians. Congress quickly recognized the danger presented by the *Hamdan* decision and voted overwhelmingly to give the president, by statute, every power he had claimed to possess under the Constitution. Congress's enactment in effect repudiated the Court's *Hamdan* judgment in its entirety, restoring the law to more or

less where Lincoln had placed it almost one hundred fifty years earlier. Once again, Lincoln's straightforward constitutional judgment seems sounder than modern judges' wranglings and rewritings.

In one respect, however, Lincoln went over the line—certainly so by modern standards. In September 1862, he authorized the military arrest, detention, and punishment of “aiders and abettors” of the South, including “all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States.” In the next breath, he suspended habeas corpus for all persons so held under military authority. Put bluntly, Lincoln made a military offense out of the expression of antiwar, antidraft views.

There is no getting around the fact that this violated the Constitution. It may have been true that declaring sympathy for the enemy and discouraging military service in the Union assisted the Confederacy. But the First Amendment right of freedom of speech forbids government punishment for mere expression and advocacy short of immediate inducement to violation of the law. That it took the Supreme Court another century to arrive at this conclusion (and the sad fact that freedom of speech had always been a casualty of war) does not excuse Lincoln here. Some of his generals enforced his order with great vigor and little judgment. Lincoln, great constitutional lawyer that he was, did a little better on the judgment side. But his view that “necessity” justified his actions here seems, in retrospect, wrong.

Ironically, Lincoln received far more strident criticism for a rather different military order, announced two days earlier: the Emancipation Proclamation. It is often forgotten that the Emancipation Proclamation was a military order justified by his constitutional authority as commander in chief. It declared “thenceforth and forever free” all slaves in rebel-held territory, citing the traditional understanding of the right that military authority has to seize enemy resources and matériel. He further ordered that emancipated Southern slaves “be received into the armed service of the United States,” a truly radical measure for the day and one that provoked great political opposition in parts of the North, and massacres of captured black Union troops by the armed forces of the South.

Some critics at the time charged Lincoln with violating rights of private property and of thus contradicting the Supreme Court's decision in *Dred Scott*. A few cynics chided Lincoln for proclaiming free only the slaves in Confederate-controlled states, where he did not possess effective power to make any slave

free, but not proclaiming slavery abolished in border states that were under Union control. But there was nothing cynical, symbolic, or improper in Lincoln's actions. *Constitutionally*, he lacked authority to order slaves free in states that had not entered into the Confederate insurrection. The only legitimate legal power he could exercise was what he enjoyed as commander in chief with authority over whatever enemy territory the Union armies were able to control.

Nor was this an empty gesture. As Union armies advanced, slavery contracted. Hundreds of thousands of men, women, and children were freed, and eventually 130,000 free African-American soldiers were added to Union ranks, speeding military victory and demoralizing the South. When furious Southerners declared that black Union soldiers would be summarily executed as insurrectionists, or enslaved, Lincoln issued a dramatic, terrible “Order of Retaliation”: If such was done to any Union soldier, the same would be done to a captured rebel soldier. This was perhaps the most stunning exercise of the powers Lincoln held as commander in chief. He never acted on this order, thankfully. Had he done so, it would be regarded today as a war crime under principles of international law. Lincoln saw it as an appropriate proclamation in defense of the lives of black Union soldiers, even as he recognized the futility and impracticality of actually carrying through on the threat. But Lincoln's administration did suspend prisoner exchanges when the South refused to exchange black soldiers. It was an important act of keeping faith with the promises both of emancipation and of equal protection for all Union soldiers, irrespective of race. It came at a cost, but Lincoln was the first president fully to embrace the principle that black lives matter, equally with white.

The Emancipation Proclamation was “warranted by the Constitution, upon military necessity” only. Lincoln never believed he could order slaves freed just because of his moral revulsion to slavery.

Rather, again invoking his oath, duty, and the necessity of circumstances, he argued that the Constitution imposed on him “the duty of preserving, by every indispensable means, that government—that nation—of which the Constitution was the organic law.” Writing later in the war, he articulated a compelling if somewhat dangerous general principle: “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it.”

Lincoln's Emancipation Proclamation (along with the subsequent enactment of the Thirteenth Amendment abolishing slavery throughout the nation) overturned *Dred Scott* and thus clearly contradicted the supposition that the Supreme Court is the final interpreter of the Constitution. When the Court betrays the Constitution, it is the duty and power of the president, and the people, to find a way to overrule the Court and restore the Constitution's proper meaning. The Civil War was fought over the meaning and future of the Constitution. The final word on slavery and secession did not come from the Supreme Court's decision in *Dred Scott v. Sandford*. It came from the "case" of *Grant v. Lee*.

Lincoln's constitutional legacy is remarkable. *On slavery:* The Emancipation Proclamation, the Union's military victory, and the enactment of the Thirteenth Amendment abolished slavery throughout the nation. What had been unimaginable in 1860, even to Lincoln, had become real within the space of five years. Lincoln's constitutional rigor—slavery must be tolerated in states where it exists and fugitives must be returned, but slavery need not and must not be extended to new territories or infringe on the rights of free states—led to his election, the crisis of secession, and civil war. But ultimately, it also led to the blotting out of the Constitution's original sin, and it did so through the unexpected routes of military emancipation and constitutional amendment.

On the Union: The United States is the nation it is today because of Lincoln's unwavering commitment to the Constitution as governing a single, permanent nation and forbidding secession. Lincoln's vision of Union is so thoroughly accepted today that we forget how hotly disputed it was for the first seventy years of our nation's history. The result was hardly inevitable. Lincoln's vision and resolve saved the nation. Lincoln's nationalist views have shaped every issue of federalism and sovereignty for the past one hundred fifty years. Compared with the constitutional issues over which the Civil War was fought, today's disputes over federal-versus-state power are minor-league ball played out on a field framed by Lincoln's prevailing constitutional vision of the United States as one nation, indivisible.

On the president's constitutional duty: Lincoln understood his oath to impose an absolute personal moral and legal duty not to cave in to wrong, destructive views of the Constitution. He fought on the campaign trail for his understanding of Union and of the authority of the national government to limit the spread of slavery. Once in office, he understood

his oath to impose on him an irreducible moral and legal duty of faithful execution of the laws, throughout the Union. It was a duty he could not abandon for any reason.

When that sense of duty ultimately led to a cataclysmic civil war, Lincoln as commander in chief understood his constitutional duty to be to *win* that war through all necessary means. His exercise of the full powers of the wartime presidency transformed the office for all who followed, and set the terms of debates that continue today. With the possible exceptions of Theodore Roosevelt and Franklin D. Roosevelt, no president has taken a more aggressive stance than Lincoln did, or defended it more cogently. Lincoln is therefore today not only the model of a president committed to faithful execution of the laws and of his constitutional duties, but also the model for those who today embrace a strong view of the president's power that he holds as commander in chief in time of war.

Each of these triumphs of Lincoln's constitutional vision flows ultimately from another and still more fundamental Lincolnian insight. It is today controversial but, we submit, correct: *The Supreme Court's decisions are not supreme over the Constitution itself, and therefore cannot bind other responsible actors in the exercise of their independent constitutional responsibilities.*

None of what Lincoln achieved—the eventual abolition of slavery, the preservation of the Union—would have happened had Lincoln not thought himself constitutionally authorized to resist the Supreme Court's decision in *Dred Scott*; constitutionally obligated, by his oath, to resist secession; and constitutionally empowered, as commander in chief, to fight the enemy with the full powers at his disposal, which included military force, blockade, suspension of habeas corpus, arrest and detention, seizure of enemy property, and emancipation of Southern slaves.

Put bluntly: Lincoln understood the Constitution to mean something other than what the Supreme Court said it meant in *Dred Scott*. That decision's discovery of a supposed constitutional right to hold other human beings as property could not control the policy of the national government. During the war, Lincoln defied a Court order he thought interfered with the exercise of lawful presidential power to act in a military crisis to preserve the nation: Chief Justice Taney could not command the commander in chief. No president has taken a stronger stance on the president's independent duty faithfully to interpret the Constitution and to act in accordance with

that understanding—even if that sometimes means defying the Supreme Court when its decisions violate the Constitution, which the president has sworn to “preserve, protect, and defend.”

Lincoln’s views of the immorality of slavery and the perpetual union of our nation are much acclaimed. His approach to presidential wartime powers remains substantially in place. Yet, despite what should be its evident correctness as a matter of first principles, Lincoln’s rejection of the presumptive supremacy of the Supreme Court has fallen strangely out of favor. Today, the prevalent attitude is that whatever the Supreme Court says, goes. In other words, most today hold the Stephen Douglas view in which *Dred Scott* was accepted. It is a view in which, if the Court ordered it, complete national imposition of slavery would be accepted.

This presumption of judicial supremacy is not only theoretically wrong but can be practically destructive. Imagine that the Supreme Court had held in 1861—as it might have, if given the chance—that states had a right to secede and that Lincoln’s use of force was unconstitutional. If the Supreme Court had ordered Lincoln to recall the troops, vacate the White House, and move the capital north of the Mason-Dixon line, should he have complied? The logic of today’s near-reflexive judicial supremacy suggests, incredibly, that the answer is Yes.

Lincoln’s position was better. He denied the supremacy and binding character of willfully lawless Supreme Court decisions. This was more faithful to the Constitution, by far, than the Douglas position. One cannot accept judicial supremacy without accepting the duty to accept, enforce, and embrace *Dred Scott* or any other judicial atrocity the Supreme Court might inflict on the Constitution and on the nation whose Constitution it is. And one cannot accept modern notions of judicial supremacy without rejecting everything Lincoln stood for and did as president.

Lincoln’s interpretive approach was one of strict, rigorous adherence to the words of the Constitution’s text, the logic of its structure, and the intentions of its framers. He did not regard it as appropriate to ignore the Constitution, or to twist its meaning beyond recognition, in order to accomplish what he regarded as good policy or to achieve desired political or even moral goals. The Constitution protected slavery, and Lincoln considered it his duty to protect the Constitution, warts and all. Lincoln was no constitutional “activist” who felt himself empowered to write into the Constitution his personal preferences. He was, instead, what

legal scholars today would call a strict constitutional “originalist” and “formalist.” Where the Constitution supplies a rule, all branches of government are bound by that rule. Where the Constitution does not supply a rule, it admits of democratic choice of policy and a range of action for elected officials.

Thus, if we followed Lincoln today, on matters of constitutional interpretation we would be more faithful to the document, less tolerant of judicial activism, and more accepting of the role of popular constitutional self-government. We would also be decidedly intolerant of assertions of judicial supremacy over the Constitution. We would recover a healthy skepticism about judicial power. We would find the constitutional fortitude to resist indefensible judicial decisions, not least those that extend or invent constitutional legal “rights” of some persons to oppress, harm, or kill other human beings. And we would reassert one of the basic rules of the Constitution: that national social policies are properly formulated through the legislative process, not in judicial chambers.

Lincoln’s approach to interpreting the Constitution spurs us to reconsider certain aspects of today’s constitutional mythology. America is sometimes said to have a “living constitution,” with all the poetry—and imprecision—such a beautiful idea entails. Some take this notion to mean that judges are empowered to infuse old language with new meanings. After all (the myth continues), isn’t that how the Court overcame segregation in *Brown v. Board of Education*? Some proceed further and embrace judicial supremacy over all other interpretations. After all, they say, wasn’t the idea of political resistance used by opponents of the Court’s decision in *Brown* to try to thwart its magnificent vision of racial justice?

This modern view forgets, or rejects, Lincoln. And it forgets history. *Plessy v. Ferguson*, the case where the Court in 1896 embraced segregation as constitutional, was the ugly, illegitimate stepchild of *Dred Scott* in 1857. Both were instances of judicial writing into the Constitution of the perceived, newly evolved social mores of the time, done so in opposition to the document’s original meaning. *Brown*, in overruling *Plessy*, required no judicial activism at all, unless one means by that term the rejection of the Court’s own past errors. *Brown* was, rather, an act of *restoration*. The political resistance to *Brown* was based on the South’s clinging to the Court’s decision in *Plessy*, just as secession was predicated on the South’s clinging to the Court’s decision in *Dred Scott*. In each instance, the side of injustice resisted the Constitution’s original meaning in favor

of tenacious adherence to the products of anticonstitutional judicial activism.

Lincoln, in contrast, viewed judicial activism as illegitimate, judicial precedent as problematic, and judicial supremacy as despotic. America's living constitution, for Lincoln, meant the right of the people to govern themselves—not the right of judges to govern the people. "A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people," he said in his first inaugural. "Whoever rejects it, does, of necessity, fly to anarchy or to despotism." He then proceeded to identify judicial supremacy—the policy of government being "irrevocably fixed by decisions of the Supreme Court"—with such despotism.

Lincoln thus would have viewed *Brown v. Board of Education* not as a justification for judicial lawmaking but as a repudiation of such lawmaking. *Brown* corrected the unjustified judicial activism of *Plessy*. From his stance toward *Dred Scott*, one can speculate that Lincoln likely would have championed popular resistance to *Plessy*, in order to overturn it as a precedent. And from his stance toward attempted secession, one can speculate that Lincoln likely would have viewed resistance to *Brown* as resistance by a region of the country to the *actual meaning* of the Constitution, and therefore as an occasion for executive intervention to preserve, protect, and defend that Constitution against unjustified state resistance—which is what President Eisenhower did.

The civil rights movement of the 1960s called the nation's attention to racism's betrayal of our

constitutional principles, much as Lincoln pricked the nation's conscience a century earlier by emphasizing slavery's betrayal of the principles of the Declaration of Independence. In both cases, the remedy lay with acts of popular democratic self-government. The civil rights movement was fueled as much by the Court's deference to democratic decision-making as it was by *Brown*. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were democratically enacted laws that the Court *upheld*, ruling that they were within Congress's broad legislative prerogatives. A century earlier, it had been transformative constitutional amendments adopted by the people that repudiated slavery and *Dred Scott*. When the Court takes on itself the task of engineering social policy, rather than faithful constitutional interpretation, it tends to do both tasks badly—witness both *Dred Scott* and *Plessy*. When the Court allows space for democratic constitutional choice, it respects the Constitution's role and respects the people whose Constitution it is.

Ten score and six years after Lincoln's birth, and one hundred fifty years after his death and the close of the Civil War, the transformative events of 1860–65 continue to shape our understanding of the Constitution. Lincoln was the nation's greatest commander in chief in a great war fought over the most important questions of constitutional meaning. And his vision won. As a result, the Constitution as we know it today is, in most respects, Lincoln's Constitution.

And where it isn't, it probably should be. ■