

## Review – The Broken Constitution

Written by R. Owen Williams

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R. OWEN WILLIAMS, AUG 9 2022

### ***The Broken Constitution: Lincoln, Slavery, and the Refounding of America***

**By Noah Feldman**

**Macmillan Publishers, 2021**

We can only imagine how hard it is to be president of the United States. As Noah Feldman makes clear in *The Broken Constitution*, the Civil War made the job virtually impossible: only a person of extraordinary ability, willing to pursue extraordinary means, could get it done. Abraham Lincoln was that person, though determining what he actually got done (and how) requires close attention.

Historians generally agree that Lincoln's primary objective as president was to hold the Union together; emancipation of America's four million African slaves was initially secondary. In a letter of August 22, 1862 to Horace Greeley, Lincoln wrote, "If I could save the Union without freeing any slave I would do it...What I do about slavery and the colored race, I do because I believe it helps to save this Union." Later emancipation became an important goal as it became more evident that it was not only the right thing to do, but it would also help Lincoln achieve his goal of preserving the Union.

The title of Feldman's cogent and compelling read tells an engrossing story about the United States Constitution, Abraham Lincoln, and slavery, in that order of significance. His thesis is perhaps best summed up thusly: "Emancipation was the radically transformative act that ended the compromise Constitution once and for all, and cleared the way for the moral constitution to follow" (p.316).

The book is structured chronologically (before, during, and after the Civil War) to demonstrate Lincoln's philosophical evolution and how it altered America's foundational document: the Compromise Constitution (chapter one); the Breaking Constitution (chapters two through four); and the Broken Constitution (chapter five). When considered more closely, this story contains several moving parts that defy deft distillation: by seceding, the southern states effectively "broke" the Constitution as it existed from 1789 to 1861; Lincoln's various wartime measures, particularly the suspension of habeas corpus and the expansion of executive power, along with his evolving views on slavery and constitutionalism, solidified a thorough break from the nation's slaveholding past; all of which generated our now morally superior (and more idealistic) United States Constitution.

The keyword in all of this is "evolution." Circumstances pressured Lincoln to evolve, to alter his constitutional thinking in a way that "ultimately broke his idea of the Constitution as a kind of law based on cold reason", and turned his mind instead to a "political theology of the nation" where the "basis was no longer 'unimpassioned reason' but moral truth." (p.317). Lincoln and the Constitution evolved, first one and then the other.

There is much here to respect, to learn from, and to enjoy. But it is important to note two things. First, Feldman rather oddly claims, "Rupture in our constitution and national fabric remains paradoxically the untold story of the Civil War — the topic almost no one has wanted to touch in the vast historiography of the war and of Lincoln's role in it" (p.12). Actually, much of the ground Feldman covers has been well-tilled before. More than a few works have focused on how Lincoln and the Civil War altered the United States Constitution. In this century alone, George Fletcher's *Our Secret Constitution: How Lincoln Redefined American Democracy* (2001) addressed the constitutional "rupture"

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brought on by “redemptive war,” identical words and images employed by Feldman. In *Lincoln’s Constitution* (2003), Daniel Farber made the case that “Lincoln’s use of executive authority was extraordinary in its breadth” and his “actions (contrary to common belief) were generally in line with our current view of executive authority.” Brian Dirck’s *Lincoln and the Constitution* (2012) addressed the ways in which Lincoln’s constitutionalism changed over time to a more progressive emphasis on federal power. More recently, James Oakes, in *The Crooked Path to Abolition: Abraham Lincoln and the Antislavery Constitution* (2021), examines all the same issues, though he characterizes Lincoln and the Constitution very differently from the way Feldman does.

And that brings us to the second thing to note about Feldman’s thesis: he has taken on a significant, though diminishing, battery of Lincoln apologists and historians determined to defend our national exceptionalism story. Disagreement still persists as to the character of the United States Constitution regarding slavery. Was it proslavery, was it compromised (like someone who has been exposed to disease), or was it antislavery? Just look at the recent exchange in the *New York Review of Books* between Feldman and James Oakes to witness this ongoing debate.

When Feldman observed, “We think we understand the prewar Constitution, because the Constitution remains for us a living document,” (p.37) he was more than rejecting the constitutional theory of “originalism.” He was setting up his larger argument that at the core of the Constitution “lay a central compromise: the compromise over slavery” as seen in three specific clauses — the “three-fifths” clause, the clause prohibiting a ban against the slave trade before 1808, and the “fugitive-slave” clause. (For a far more comprehensive examination of the proslavery clauses of Constitution, see Paul Finkelman’s *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (2014) or *Slavery’s Constitution: From Revolution to Ratification* (2010) by David Waldstreicher.)

Feldman asserts that Lincoln’s views on slavery evolved to become increasingly abolitionist, just as his views on the Constitution evolved to become increasingly authoritarian, thus leading him to take four unconstitutional actions — coercive rejection of secession; suspension of habeas corpus; use of military tribunals to silence political opposition; and emancipation — to which Feldman devotes three chapters without ever directly claiming that Lincoln behaved “unconstitutionally.” Instead, he soft-pedals with language such as, “Lincoln was asserting a new constitutional structure,” (p.168) or “the president almost certainly lacked the constitutional authority” (p.187). While Feldman contends that secession essentially broke the Constitution, he insists that Lincoln sealed the deal through those evidently unconstitutional acts.

Oakes, by contrast, does not believe Lincoln operated unconstitutionally, and sees emancipation less as a Lincolnian lightning bolt and more as the “climax in a series of increasingly radical attacks on slavery.” From the start of the Civil War, Oakes writes, congressional legislation and federal policy worked against southern slaveholders. Oakes also tips his hat to the “escaping slaves whose swelling numbers forced the radicalization of federal antislavery policy.” What’s more, Oakes sees emancipation as justified under two principles of the Constitution: first, the seceding states forfeited their right to any constitutional protection of their property in slaves; and, second, the “war powers” clause of the document gave Congress the power to emancipate slaves in the event of invasion or insurrection. According to Oakes, Lincoln operated within the document’s antislavery construct, not against it; he was using rather than breaking the Constitution.

Viewed from the vantage point of twenty-first century presidential elections and the victories handed to George W. Bush in 2000 and Donald J. Trump in 2016 by the Electoral College — the very same vehicle that enabled slaveholders to dominate the antebellum American political landscape — it is almost impossible to characterize the original U.S. Constitution as anti-slavery (or, for that matter, pro-democracy). Throw in the “three-fifths” clause — which counted three-fifths of all southern slaves for the purposes of congressional representation (and, more sinisterly, generating a greater number of southern electors) — it is hard to argue with Feldman’s perception of the founding document as compromised, at the very minimum.

It is also hard to argue with Oakes’s respect for the antislavery thinking that existed throughout the antebellum era, yet it must be conceded that, functionally (though perhaps not intentionally), the Constitution so favored slavery and slaveholders as to render antislavery constitutionalism moot. Oakes is a gifted historian, no doubt, but when it comes to Lincoln and the Constitution, he seems too forgiving and idealistic.

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Feldman is right to underscore Lincoln's evolving constitutionalism. In his First Inaugural Address, the incoming president specifically swore his fidelity to all elements of the Constitution, including those that assured the sanctity of slavery. However much Lincoln might have hated slavery, it appears undeniable that Lincoln was transformed — by war, by the radicals in his party, by the bravery of both escaped slaves and Black soldiers — in a way that encouraged and enabled him to tack in a new direction on the Constitution. By the time of his Gettysburg Address, a more seasoned and war-weary president called for “a new birth of freedom,” which, in the wise words of George Fletcher, formed the preamble to a new Constitution.

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### **About the author:**

R. Owen Williams, past president of the Associated Colleges of the South, previously served as president of Transylvania University. He edited *The Encyclopedia of Antislavery and Abolition* (Greenwood Press), was an articles editor for the *Yale Journal of Law and the Humanities*, and has published in several books, magazines, journals, and encyclopedias. Williams served as Vice President of the New Haven Reparations Coalition and is currently vice-chair of the Board of Governors at Gratz College, the oldest Jewish college in America.