



## *Lincoln and American Values Symposium*

### **Lincoln and the Constitution**

**September 20, 2008**

Lincoln regarded the Declaration of Independence and the Constitution as living in a dynamic harmony with each other. This panel examined how Lincoln set a pattern that continues to be debated to this day, as the Constitution and the Declaration are often seen to be in conflict with each other. Moderated by **Harold Holzer**, panelists include **Frank J. Williams**, co-author of *The Emancipation Proclamation: Three Views*; **Michael Vorenberg**, associate professor at Brown University and author of *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*; and **Brian Dirck**, associate professor of history at Anderson University, and author of *Lincoln the Lawyer*.

**HAROLD HOLZER:** I'm not waiting to milk the applause, but my instructions are to invite our first group of panelists to join me onstage. And I will introduce them in a moment. Well, we're together, of course.

We're launching the first of today's 3 sessions on Lincoln and the founding documents, documents that animated his evolving political philosophy, buttressed him in his decision to end slavery, and governed his leadership of the nation and the war that he waged to save it. It's a big topic—probably "topics" is the better word-- but we have the time, we have this inspiring setting in which to consider them, and we have a gifted panel to explore them productively. Let me begin by introducing the panelists, after which, if you're not gonna be too intolerant of me, I'm actually gonna make a few opening comments about the panel, and then our plan is to spend 10 minutes each or so with opening comments from our panelists on a specific aspect of the topic that we discussed in advance so we wouldn't repeat each other too much.

Then, hopefully, we'll have 15 minutes or 20 minutes for the panelists to respond to whatever points they wish to address to their colleagues or are inspired or outraged by their colleagues and feel they must comment on. And then we've allocated a good 30



minutes at the close of the session for your comments and questions, questions to the panel, and you will see that there are microphones that'll be staffed by Archives folks, and we'll do that on signal.

In the end, my mandate is to satisfy your hunger for knowledge just as your other hunger kicks in. So we will break precisely at 11:30 for our lunch. And if I may, gentlemen, I'll give you each a sort of a gesture or a signal or a nudge when you're close to your 10-minute limit for the opening.

Now, before I have to signal myself, let me introduce the panel. In the order in which they will speak, I start with a fine scholar who serves as associate professor of history at Anderson University in Indiana. He's the author of the 2001 book "Lincoln and Davis: Imagining America;" the very fine 2007 study "Lincoln the Lawyer;" an editor of another 2007 book, "Lincoln Emancipated: The President and the Politics of Race," which included his own essay "Abraham Lincoln, Emancipation, and the Supreme Court." He will talk this morning about Lincoln's view of constitutional law. Ladies and gentlemen, Brian Dirck.

[Applause]

Second, a man whose credits could easily and deservedly consume the rest of our session. In a nutshell, he's founding chairman of the Lincoln Forum; a member of the Lincoln Bicentennial Commission; president of the Ulysses S. Grant Association; collector and bibliographer; author of "Judging Lincoln;" co-author of a dozen more books, including "The Emancipation Proclamation: 3 Views;" and in his spare time, he is Chief Justice of the Supreme Court of Rhode Island--my good friend Frank Williams.

[Applause]

The Chief will address Lincoln and the rule of law in war.

And third, a historian who also contributed to Brian Dirck's volume on "Lincoln Emancipated" with "Slavery Reparations in Theory and Practice: Lincoln's Approach" and is best known deservedly for writing the definitive book on the 13<sup>th</sup> Amendment, "Final Freedom: The Civil War, the Abolition of Slavery, and the 13<sup>th</sup> Amendment;" associate professor of history at Brown University Michael Vorenberg.

[Applause]

And he will address his specialty, of course, how Lincoln changed the Constitution to end slavery. So we have a judge, we have specialists on the law and the Constitution—really a perfect trio for this discussion. In a way, the scholarly jury is still out, or to be more accurate, has renewed its deliberations on which of the founding documents was more



important to Lincoln, the Declaration of Independence or the Constitution. For a generation and more, the historical consensus had tilted to the Declaration. Lincoln himself had called it "a landmark," "a sacred instrument," and "a mortal emblem of humanity worth "revering, the great modern expression of natural law "that gave every being, the slave included, the right to the fruit of his own labor." Standing at the place where the Declaration was adopted, Independence Hall, Lincoln declared less than two weeks before his inauguration, "I never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence." But in that same talk, Lincoln emphasized what he called "the other document." That day, he admitted he was hearing what he called "the "breathings rising within the consecrated walls wherein "the Constitution of the United States was originally framed and adopted."

And no wonder. The Constitution was under attack. It meant, as he understood it in those final hours before swearing his oath, guaranteeing the right of the people to select their leaders and live by the results, and holding equally sacred the bonds that held the Union together. "Think of, if you can," he challenged the secessionists, "of a single instance in which "a plainly written provision of the Constitution has ever been denied." He reminded the South as he took that oath that he would have a solemn oath registered in heaven to preserve, protect, and defend the country, that the states could not divorce like a husband and wife, that the country must swear their support to the whole Constitution. "Without the Constitution," he scribbled a few weeks earlier, "we would not have achieved great prosperity."

Well, in recent years, scholars like Phillip Shaw Paludan have reoriented the discussion back toward equilibrium, I think, a discussion of the Constitution as another of Lincoln's sacred documents. "The assertion of the principle of liberty to all," Lincoln wrote in notes for a speech that he never gave before he assumed president, "the assertion of that principle was an apple of gold. The Constitution was the picture of silver "subsequently framed around it. The picture was made not to conceal or destroy the apple, but to adorn and preserve it. So let us act," he wrote, "that neither picture nor apple shall ever be blurred or bruised or broken."

Words from scripture, perhaps not the easiest metaphor to advance, and maybe that's why he never spoke them publicly; and worse, for him--at least more awkwardly--inspired by a letter he had received from, of all people, Alexander H. Stephens, who later went on to become Vice President of the Confederacy; but a measure of Lincoln's devotion to the archives of both freedom and union. "It is said the devil takes care of his own," Lincoln once said. "Much more should a good spirit, the spirit "of the Constitution, take care of its own. I think it cannot do less and live." And in the end, Lincoln himself died for this principle.

That's my opening, but, Brian, I'd love to hear your take on how Lincoln might have developed this philosophy or your view of whether you see it the same way or differently.



**BRIAN DIRCK:** Well, thank you, first of all, sir. I hope everybody can hear me. Yeah.

I think whenever we start thinking about Lincoln and the Declaration and the Constitution, if you look at the collected works of Abraham Lincoln, I think you just almost automatically go to that document that you mentioned with his metaphor of the apple of gold and the frame of silver. And I was thinking about that when I was preparing what I wanted to say today, and I know as a college professor, I'm supposed to pretend I know everything. None of my students are here.

So they won't know any better, I hope, you know. So I'm not really going to propose profound answers. I just--I've got a few questions I just want to sort of throw out there and see what you guys think about this, because I was going over the documents in the Declaration and the Constitution and noticing some interesting things. I mean, we all know that Abraham Lincoln posited his version of natural law in the Declaration of Independence, that this was where he located his sense of moral imperative, for example, to combat slavery. Lincoln was a lawyer—we all know this--a very practical man. He was never comfortable with vague assertions of a higher law that transcended the Constitution.

I think that bothered him as being maddeningly vague. There was a point in which he explicitly writes that he does not support William Seward's doctrine of a higher law than the Constitution. I think it worried him because, I believe, he worried that such assertions with no practical grounding could be a recipe for anarchy. I mean, you can make an argument that anything is higher law, and the rule of law then becomes subsumed under that.

So I think Lincoln, especially in the 1840s and the 1850s in particular, was looking for a place--sort of a moral talisman or a moral bellwether, if you will, something that he could invoke and say, "Yes, "this, this is the highest moral principle from which we can attack slavery," which Lincoln saw as the negation of all that was right.

He says this. He says, "If slavery is not wrong, then nothing is wrong." It is the closest thing to a moral absolute that you will find in Lincoln's writings, that the essence of slavery is the essence of evil to him, and he needed to find a place to locate that. And if you look at his speeches and his papers in the 1850s, it is the Declaration of Independence time and time again.

Now, this wasn't exactly an original idea with Abraham Lincoln. Those who have studied the ideology of the Republican Party find that there were other anti-slavery people who were doing much the same thing, but I don't think with Lincoln's fervor and as repetitive as he did. And he repeatedly in his speeches says, "The Declaration is," as he says once, "our sheet anchor" of American republicanism. It is the principle that we base everything upon." And at the same time, the Constitution, if you look at his writings from the 1850s—



he reveres it, of course. He's a lawyer. But there are times when he finds that the Constitution imposes restraints on what he can do in the name of supporting anti-slavery.

For example, in a letter that he wrote to his best friend, Joshua Speed, Kentucky slaveholder, 1855--they were growing rather distant by this point. They'd been very close friends when Speed lived in Springfield, but Speed had since relocated to Kentucky. Joshua Speed was also a Kentucky slaveholder, and he was a supporter of Southern rights, and he had written Lincoln a letter during these very overheated political times in the 1850s, and basically he said--I don't think we have the letter, but I think we know what he said from Lincoln's letter. He basically said, "In defending our rights as "Southern slaveholders, we would as soon see the Union broken up." And Lincoln replies to him, and he says, quote, "I acknowledge your rights and my obligations under "the Constitution in regard to your slaves. "I confess I hate to see the poor creatures hunted down "and caught and carried back to their stripes and unrewarded toils, but I bite my lip and keep quiet."

And I think this is an expression, I think, of where Lincoln saw the relation between the apple and the frame in the 1850s. Yes, he reveres both, but I think at times he saw the Constitution, the frame, as forcing him to bite his lip because he understood that the Constitution imposed a duty upon him to recognize certain things that he found morally repugnant during the 1850s.

But here's the interesting thing: I was talking to Michael about this beforehand. If you go back and you look at the collected works of Abraham Lincoln, which is now online in a keyword-searchable database, thank God. I wish they had been available when I did my dissertation 10 years ago. Life would have been a lot easier, let me tell you. One of the nice things about this new technology is that you can now go into the collected works and do a keyword search as to what he's saying. If you count the number of times he looked to the Declaration of Independence, he mentions the Declaration--these numbers aren't exact, but it's like--I think he mentions the Declaration 75 times in various speeches during the 1850s.

And then, from 1861 until 1865, he mentions the Declaration maybe a dozen times, maybe 15 at the most. So the question I want to pose today see what we can do with this, is why is it--here is this man in the 1850s who says that this is his sheet anchor of republicanism, this is his apple of gold. You know, he stands in front of Philadelphia's Independence Hall on the eve of war and says, "This is the place where all my political feelings arise." And yet once the war begins, I think it's fair to say the Declaration fades to the background. Now, it's not absent entirely. It is of course present as an underlying theme in the Gettysburg Address. If you've read Garry Wills' book on this, he sees the Declaration and the Gettysburg Address as being intimately linked, and that's true, but still it's interesting that he has stopped using that moral talisman to say, "This is my moral principle." And instead, he's talking a great deal more about the Union. And what I find



interesting, and I've got a theory about that. I'm not sure if this is true or not, but I'll try it and see what you guys think, OK? I think during the war, Lincoln's thought underwent an evolution and a shift. And I believe if you look at his writings, I think he had come to believe that the Union and the Constitution and the laws had intrinsic moral worth unto themselves and were worth defending and that they were almost equal with the apple of gold, if not equal, because, I think, he was dismayed by the ease with which Southerners could co-opt the Declaration of Independence.

If you look at the literature from the Confederacy during the secession crisis, Confederates are repeatedly invoking the Declaration of Independence as their primary justification for breaking the Union up. They say, "Here's Jefferson asserting the right "of self-government. We're using the same thing." I think Lincoln had to sort of find a new--a new place to posit the moral imperative of the war, and I think he found the Declaration to be inadequate for that reason. And I think he was uncomfortable still with telling people in the Union, "Well, I want you to "go fight and die for something vague like "the higher law that we don't really know what it is, but we think it's important." And I think he was uncomfortable with invoking God, because, as we all know, Lincoln was not an overly religious person before the war, and even during the war, he was always extremely reluctant to tell people that he knew what God thought, you know? He was always very humble that way, and I think if you look at the evolution of his thought--we must when we understand Lincoln--we must understand that his thinking evolves, it doesn't stay static.

We have a tendency to want to make it one thing of all time. And I think during the war, he stops talking about the Declaration because, I think, he finds that he believes that the Union--that is to say, the Union and the Constitution and the legal system that the Union embodies--if it is properly administered and it is fairly understood--as it was not, in his opinion, in places like Kansas before the war--but if the Union is preserved, the Union by itself is naturally anti-slavery because the Union embodies values of democracy and self-government. And I think he believes that if we preserve the Union-- even if they had preserved the Union with Southerners still in the Union, or if they had been enticed to come back-- if he had preserved the Union, fairly administered, it would have eventually led to emancipation sooner or later because the nature of the Union and the nature of the Constitution is to create a democratic conversation that he sees entirely inimicable to slavery.

I think this is the real reading of the Horace Greeley letter in the summer of 1862. Most people want to look at that letter, if you know which one I'm talking about, in which he says to Greeley, "My paramount object is to save the Union and not to free the slaves. If I could save the Union and free all of the slaves, I would do that, or none of the slaves or some and not others, I would do that." You guys know that letter, right?

A lot of people who don't like Lincoln look at that letter and they say, "Well, what he's basically saying "is that the Union is more important than emancipation." But I think we're



misunderstanding Lincoln here. What I think we're seeing instead is that Lincoln believes that in preserving the Union, he will still get emancipation, it will just be later rather than sooner, because I believe that what Lincoln has come to think during the war is that the Union and the Constitution are essentially a working out of a conversation about freedom and a conversation about equality that the framers intended would eventually eradicate slavery sooner or later. So that in the end, what he's really saying to Greeley is, "I would sacrifice emancipating the slaves now to preserve a Union that I know will emancipate the slaves later." And I believe that's the proper reading of this. So I think if you follow Lincoln's thinking, I think before the war, he has the apple of gold and the frame of silver in the two things, and the silver frame is subordinate because it makes him bite his lip. But I think during the war, he tends to sort of fuse the two things together, and he sees the Constitution and the Union all together as something that has intrinsic moral worth and something that he can ask men to die for 600,000 times over.

[Laughter]

**HOLZER:** Is that...Yeah, that's great. I mean, I look forward to discussing what you said, but...It's a perfect lead-in to Frank Williams because Lincoln began his administration, as Brian pointed out, citing the country, and then stretched the Constitution to save the country. And, Frank, why don't you take us on a survey of that journey?

**FRANK WILLIAMS:** Well, let me start with a view of Lincoln as president, a very personal view. And I like to place it with his leadership, first of all, what I call the loneliness of command, where this president and commander-in-chief is faced with the difficulties of civil war, which is probably the very worst situation that a nation or a country can find itself. And he's a basically conservative person, a Whig. Mike may talk about that, about Whigs weren't great on constitutional amendments. And we have the firing on Fort Sumter, and whether Lincoln provoked it or not is a topic for another symposium. And he's—Congress isn't in session. And the U.S. Army and Navy are of diminutive size--17,000, plus or minus. And what's the commander-in-chief to do who's taken this oath that Harold indicated--preserve, protect, and defend—which is prescribed in the Constitution itself, the only place where such an oath is taken. And he does certain things that Lincoln, the former lawyer--still the lawyer in the White House--would find appalling if he was still in private practice. He expands the size of the Army and Navy. He appropriates monies for the purchase of arms and munitions. He declares a blockade, even though for a long time it's a paper blockade, which is in international law really an act of war. And he does something else that you would be appalled if it were done today. He suspends, or authorizes General Winfield Scott to suspend the precious writ of habeas corpus on the rail line between Washington and Philadelphia. Of course, he's fearful of the capital, this city, being cut off from the North.

You know what habeas corpus is, don't you? I mean, we take it for granted. When I was a trial judge, the best job I ever had, every day I'd sign a petition for habeas corpus, which



was an order to the warden at our state prison to bring in certain named prisoners the next day to have their detention checked. And Lincoln authorizes the suspension of this rather--rather arbitrarily, even though he knew the importance of it, of the writ of habeas corpus. And the Constitution does permit suspension, in Article 1, Section 9, in cases of rebellion or when the public safety require it.

Well, immediately, Lincoln gets in trouble with Chief Justice Taney, who's riding circuit in Baltimore because the military authorities arrest one John Merryman for enlisting troops not for the Union Army, but for the Confederate Army, and he's put away in Fort McHenry in Baltimore Harbor. And Taney, who visits with Merryman's lawyers, signs a writ of habeas corpus to bring Merryman before him to check his detention. And the fort's commander, George Cadwalader, refuses to honor the writ. And Taney is outraged and issues a body attachment for the fort's commander, and of course the U.S. marshal cannot get in to serve it. And he then sits down and writes this opinion, and this is a chambers opinion. This is not from the full Supreme Court, because Taney is riding circuit now, as all the justices did then. And in "Ex parte Merryman," he chastises President Lincoln, who he never liked anyway, and says that only Congress has the authority to suspend the writ of habeas corpus. The one thing that Taney fails to recognize is that the country is at war. Congress is not in session. Congress comes into special session July 4, an appropriate day in our history. And Lincoln, not having responded to Taney, which was politically wise, does something that a very astute politician and leader--remember the loneliness of command. He sends a message to the Congress explaining what he did and why he did it, and he does something that--that many presidents should have learned from him. He puts all of this in the hands of Congress, and he asks them to ratify it, which they did, even by implication, his unilateral suspension, or authorization for the suspension of habeas corpus. And he gives one line of rationale, which he uses in one form or another throughout the war. "Are all the laws but one, habeas corpus, be violated and the country itself go to pieces lest that law be violated?" And he does it in letter after letter that he intends to be made public to justify his actions that he can do certain things in wartime as president and commander-in-chief that he could not do in peacetime. And I think that's not only the loneliness of command, but a reflection of the kind of leader he was.

Well, we talk about the laws. Harold asked about the laws and the Constitution. Lincoln defined the war power, because there is no definition of the powers of a president in wartime. So he was plowing new ground here. And a great Lincoln biographer, Randall, said that there's no way of knowing what limit that Lincoln would use in defining what the war power should be for the presidency. It's whatever Lincoln thought it could be to win the war and then eventually enforce emancipation. Don Fehrenbacher, who's a great scholar of slavery and Lincoln in the Civil War and very much supportive of Abraham Lincoln, once said that Lincoln set this precedent for the war power that was not good to look back upon in later presidencies because there would be later administrations that would abuse this definition that evolved during the Lincoln administration.



Well, Lincoln didn't act alone. We just talked about Congress ratifying his acts. What about the Supreme Court? You know we have a federalist system, supposedly three co-equal branches of government that matriculate, sometimes overlap, check each other. And fortunately, Lincoln had the votes in the Supreme Court, too, which in the Prize Cases also—also validated Lincoln's actions as the chief magistrate. Some things would change after the Civil War.

There would be a famous case--it's even being used now, cited now in our current Supreme Court relating to the detainees at Guantanamo and elsewhere--"Ex parte Milligan," in which a majority of the Court said, "Look. Congress has the power only to suspend the writ, and you cannot have these military tribunals or martial law when the civilian courts, the ones that we're all used to, are in operation." And this is a case coming out of Indiana, Lambdin P. Milligan, and the courts, the U.S. District Courts, were operating there.

So Lincoln was slapped down, but note the timing. It's after the war. So let me close by saying this and hopefully encourage questions from you. Our friend Mark Neely, who writes this great book "Fate of Liberty: Abraham Lincoln and Civil Liberties in Wartime," 1991, Oxford University Press--it's still in print—very prescient, Mark is. And he talks about civil liberties in wartime. The clearest lesson is that there is no clear lesson.

[Laughter]

No neat precedents, no ground rules, no map. War and its effect on civil liberties remain a frightening unknown.

**HOLZER:** You raised an interesting point at the beginning of your discussion that leads us to Michael, and that is that Lincoln was a member of the Whig Party before he was president. He was a member of the Whig Party longer than he was a Republican, and as such, you noted, frequently expressed an aversion to tinkering and to constitutional amendments. And yet he brought about in many ways the most nation-altering constitutional amendment in history. So, Michael, why don't you take it from there?

**MICHAEL VORENBERG:** Thank you. Thank you all for coming. I will speak a bit about the 13th Amendment, the one that abolished slavery. I wrote a book about that. But I actually don't--I have other things to say first. Let me begin with the Constitution and the Declaration that are in this hall of ours because I think that's appropriate, where we are right now.

The Constitution that sits in this hall and that is reproduced in American history textbooks, is a document that is preserved because of this honoring of that original moment, and it's preserved in an interesting way so that when you read it--and I almost always have my students read it for one class or another-- it includes clauses, well, that my students then



have questions about. For example, "What is this thing about these people in service counting as 3/5 for purposes of representation? What is this business about fugitives?" And "I don't understand this slave trade thing." These are all in the original Constitution, and you can go and see these clauses there now. They've all been—those particular 3 clauses, just to give the most famous examples of the ways in which slavery was written into the original Constitution—they've all been superseded one way or another, most importantly by the 13th Amendment, which was ratified in 1865, so that the 3/5 rule, the fugitive slave cause, the slave trade—and by the way, while we're talking about bicentennials, let's remember that this is the bicentennial year of the abolition of the transatlantic slave trade, or the international slave trade, I should say. All of these things, although they have been superseded, remain in the text.

Now, consider the contrast, for example, with a country that would then erase these clauses, redraft a constitution, or just rewrite it, keeping all clauses but those and saying, "Well, they no longer apply, so we need not reproduce them in our children's textbooks." This is—it's not hard to imagine such a country. In your lifetimes, you've seen these countries... [Laughter] where constitutions and textbooks have been rewritten or presented as original when they're not really. But what I find to be a very redeeming quality of this country is that this is not done to the original document. And I mention this because in that act, or lack of act of rewriting or erasing an original clause, you have the two contesting impulses, I think, in the way we relate as Americans to the Constitution, the first being this sense of the original text as sacred. And I realize that that's a religious term, sacred, but it has a larger meaning. Lincoln used it often, and not always to invoke God. That is that the text itself, the original words, have a great value and need to be preserved and paid attention to.

But the second impulse, which can run against that first, against an originalist sort of impulse, is an organic impulse, or what we might think of as organicism—this notion that the Constitution grows. It evolves. We like to think it evolves toward something better that is perfectable, and I think it usually does. But it changes. These two impulses, then, run at each other headlong and continue to stymie ordinary Americans who look at the Constitution as well as law professors in our greatest law schools.

For Lincoln, he was just like any other American in this way. He was beholden to the original text of the Constitution but not so beholden that he couldn't see organic growth. As a Whig--Whigs are defined primarily in this way: They hate Andrew Jackson. [Laughter]

I could go on and on about various other ideological and intellectual issues, but to be a Whig in the 1830s and then beyond was to think about what Andrew Jackson was and to despise him.



Why? Well, for various reasons, but one of the things that Jackson stood for, which I think is also redeeming, was the notion--not that he actually acted on what he said, but the notion that the people control and that he was an agent of the people and that the people themselves are the greatest force.

Now, Lincoln, of course, corresponds to this, too. But what this meant in terms of the Constitution was that Jacksonians regularly changed constitutions, usually state constitutions. So when there was a problem, a social reform that needed doing, what a Jacksonian would typically do would be to call for a constitutional convention at the state level, a change in the state constitution, to rewrite things because, they said, the original Constitution as it was must be preserved, and when you follow the letter of the law, and when it needs changing, the people themselves intervene to amend. And therefore, it's often the Jacksonians who are associated with formal change, formal amendment to the Constitution, and the Whigs who are more often associated with growth through interpretation-- that is, judges, we usually think of, or legislatures interpreting a clause in a certain way that moves us forward and evolves this way.

I mention this quite a bit in my book because when you get to the Civil War, it's one of the reasons why Lincoln is not an early advocate of an amendment abolishing slavery. He comes to support the 13th Amendment, to be sure, but the way in which he would do this primarily is through, of course, a wartime act in the Emancipation Proclamation, but then he would have states figure out how to do this on their own, and finally he would rely on judges. He gets to appoint a number of Supreme Court justices, including a new chief justice in 1864 in Salmon Chase, and Chase would do quite a bit to reinterpret the Constitution against slavery.

So therefore, just to finish up on this note, and then I'll come back to one other thing, when the Dred Scott decision is issued in 1857 and Lincoln has a real problem with the Dred Scott decision, which says a number of things, which I won't go into detail here--in our culture today and certainly in a Jacksonian mentality, if the Supreme Court issues an opinion that you don't like, you start thinking about issuing some kind of constitutional amendment or supporting it, even if it has no hope of passing, but at least a support amendment that will control the Supreme Court. But that's not what Lincoln said when he denounced the Taney court that issued the Dred Scott decision. What he said is that he didn't accept the decision as correct, but he must accept it in law, and that what he expected was over time there would be new justices who would interpret the Constitution correctly. So that's where he goes with this, is that an organic growth through judicial interpretation, judicial intervention, and legislative intervention so the people, through legislative intervention, are involved.

So that's an interesting element of Lincoln. I want to say one last thing which is somewhat



on a different note, and it relates to the Declaration of Independence. And I was saying this to Brian before. I think that when you ask people today, "How does the Constitution affect your life? What do you think about when you think about the Constitution?"

I think most people today tend to think about this in terms of rights. That is, they actually tend to think more about the Bill of Rights, which comes after the Constitution, ratified in 1791, than the original document itself, without necessarily knowing what those Bill of Rights say, but having a sense that...[Laughter] that they do relate to their individual rights. And so the idiom that has come into our culture--right?

If you feel yourself wronged in some way--someone took the parking space that you had picked as yours--what do you say? You say, "My God, that's unconstitutional." Well, what does that--because why do you say such a thing? Well, because this notion of a fundamental right that's yours and they've just done a fundamental wrong, we somehow have come to associate with the Constitution, which is OK, but that tends to focus mostly on the Bill of Rights. And by the way of the Bill of Rights is the greatest manifestation of the Declaration of Independence there is in the Constitution. That is, the Declaration is of mostly, of course, a list of grievances against the king and Parliament, which is implied what we will be protected by later, and that's what comes into the Bill of Rights. Lincoln actually has very little to say about the Bill of Rights, which is interesting, except for one, and that's the Fifth Amendment.

Now, the Fifth Amendment, which is so often invoked about the right against self-incrimination, has a number of pieces. It's all about due process and judicial process generally. But it has that piece that says it's about takings. "The government shall take no property without just compensation."

So this piece Lincoln was very interested in as he approached emancipation because when he began to see that emancipation was coming with the Civil War, he was determined to abide by the Fifth Amendment and that the property taken from slave owners would be compensated for.

Congress passes a bill in April of 1862, and Lincoln signs it that emancipates the slaves of Washington, D.C., about 3,000 people. And that bill provides also for compensation to the loyal slave owners. And you can go into the National Archives, a couple floors above, and you can find the boxes of manumission slips where--receipts, receipts where the government paid money according to a certain schedule for the slaves that were being lost by these people.

In other words, slavery was definitely on the outs, it was pretty clear, but here was a way that the government could, well, let's just call it a bailout if you will...[Laughter] that could bail out some of the slave owners. And in February of 1865--'65, right--Lincoln's already been re-elected. He'll take the inaugural in March next month. He comes to his cabinet



with a proposal, his last attempt. He wants the proposal to be sent to Congress that will pass legislation for \$5 million--I can't remember; something vast--that will be used to pay slave owners loyal to the Union, slave owners who have lost their slaves. And the cabinet says no, and then Lincoln says, "I can see you're all against me," and that's it. And by the way, Maryland, which has abolished slavery in October of '65, a lot of those slave owners still were looking for their compensation. Still are, I suppose. And kept on appealing to Lincoln and saying, "Where's our money?" Something happened. Lincoln was absolutely abiding by the Fifth Amendment and this notion of compensation, but he gave up that. And what happens next? On March 4, a month after this conversation with his cabinet, he delivers the second inaugural, the greatest speech ever given by a president, in my estimation. It really is. And compensation appears in that document but in a completely different way, in which he talks about this war as possible payment, if you will, by God for the injustice done to slaves, not just by slave owners, but by Northern whites and Southern alike and that this judgment against Americans is the price now paid. It is a completely different notion of compensation that he had come to, a notion rooted in, of course, the Bible and the Old Testament specifically and away from the Constitution. It's a fascinating transformation and shows Lincoln is a very moral actor, as well, of course, as a Constitutional interpreter.

**HOLZER:** Thank you. Well, we have a lot to talk about. I think the themes--and I invite you to begin heading to the microphones if you have questions, and I hope you will. I mean, I think the strongest central theme that's emerged is this notion of Lincoln evolving. There's evolution and there's exigency. There is philosophy and heart-rending change, morality, and there is also political expediency. And I think one can point to several examples. I was amused by Michael's reference to the origin of the Whig party being rooted exclusively in anti-Jackson, but when Lincoln is concerned that there is not enough resistance to secession, there's not enough outrage at the treatment of Federal troops being harassed in Maryland on the way to Washington, he says, "There's no Jackson in that" and he puts--he either puts or keeps; we don't exactly know--a painting of Andrew Jackson in his office, and it remains there. It's in the background, interestingly, I think muddied out in the final version of Francis Carpenter's painting in the Capitol, "The First Reading of the Emancipation." All of these discussions with the Cabinet, all these decisions, Lincoln's signature on the Emancipation are made beneath a painting of Andrew Jackson, the man whose philosophy inspired him into the Whig party.

Similarly, on the Greeley letter, one can make an argument, as Brian did, that it reflects his beginning to embrace the Union almost as containing a sacredness that approaches the founding documents, and we do have evidence from his contemporaries that he believed that the Union had a position in his philosophy that elevated it almost to the sublime, I think that's the word that was used. On the other hand, keep in mind that--it's useful to keep in mind that that letter was written after he had drafted the Emancipation Proclamation and tabled it in anticipation of a Union victory that might encourage its public release and that he might very well have been using a master public relations strategist,



Horace Greeley, to outmaneuver him and to couch the Proclamation as a war measure meant only to preserve the Union and not, as he told *The New York Times*, coming out of the bosom of philanthropy, one of my favorite Lincolnian expressions that we can only guess that he really said.

So I'm waiting for questioners. Oh, good, we have one. You can direct the question to any of us or all of us, but please go ahead.

**MAN:** Thank you. Let's see, I have a comment and a question. General comment, I think what's going to happen today started off wonderfully, and I think it's gonna continue that throughout the day, but I wonder a little bit if there might have been a fourth panel discussing something about Lincoln's thought in relation to the events of the last week. [Laughter] Because I think there is a lot in his works. I won't get into that.

**HOLZER:** Happily, Michael has alluded to it in just the right way. Go ahead with your question.

**MAN:** The question is, and I'm not sure whether it belongs at this panel or the third one as commander in chief, but I wonder what each of the three of you would think, do you think Lincoln in the 1850s had thought about and pondered the question that civil war was not the worst thing that could happen to the country.

**HOLZER:** Frank, would you like to start? We could run it down this way.

**WILLIAMS:** Well, I would say we can only speculate, but I think right until the inauguration Lincoln was hoping that civil war would be avoided. I think he feared it in view of the "house divided" that he spoke about when he accepted the Republican nomination for the U.S. senatorship in Illinois. I'm not sure he would have come to that conclusion to level the playing field, I think is what you're thinking.

**MAN:** I'm not going to try to turn this into a dialog.

**HOLZER:** Let everybody answer. Because we can't do dialogues because we have a lot of questions. Brian?

**DIRCK:** I think the question--and the question you always need to ask of Lincoln is when in Lincoln's thought are we asking the question? I think in the 1850s, as far as I can tell, he believed what he said when he thought there was a pro-slavery conspiracy to make slavery national, and I suspect then he would have said that that would have been possibly worse than the Civil War, to have a country united under a banner of human bondage in every corner of the Union.



During the war, I imagine he didn't see things that were much worse, but then I think alluding to Michael's point, towards the end there, maybe he saw it as a sort of just retribution in the end in some sort of cataclysmic way. I almost see the second inaugural as him sort of making an uneasy peace with Civil War in a moral sense. The "OK, this is horrible, but I kind of understand why it would have happened on a godly level."

**VORENBURG:** I think that you ask in an interesting way could there be something worse than a civil war from Lincoln's view, and I think the answer is yes, and that would be a revolution. And this gets complicated because, of course, the Civil War has been called the Second American Revolution by James McPherson and others. Let me go back to the Declaration of Independence, and I'll answer that but also ask a question for Brian and others.

The Declaration of Independence, well, I'm gonna say it has three major elements that are relevant here. One is it has this notion of equality: all men, it says equal before the law. And one of Lincoln's great moves here, of course, is to bring that back to the Constitution. He does this at Gettysburg and elsewhere. That's an old trick by Whig lawyers. It predates the Constitution--excuse me, it predates the Civil War. The second thing is that there is rights, which I mentioned before, that list of grievances that then we can talk about rights. But there's this other thing, which is a right, too, but it's foundational to the Declaration, and that is the right of revolution. The right of revolution. The whole foundation on which the American Revolution rests is a theory, a political theory that goes way back to the right of revolution. Lincoln had to confront this conundrum that the Declaration endorses the right of revolution, but he had to say that right cannot be invoked now, that this is not a revolution. This is a rebellion, an insurrection, the words he uses. So the greater danger was that people would use the Declaration to say that this was a revolution and a legitimate revolution.

And I should say after Lincoln, historians have wrestled with this, too, that is, how do we say that what Lincoln did was correct when in fact the Declaration endorses the right of revolution, which would suggest that what the secessionists did was correct. They, of course, rooted their actions in the Declaration. It's a problem.

And just to give you an example, Harry Jaffa, who's a wonderful political scientist who's written huge books on this subject, tries to weave this ground by saying, "Well, the right of revolution is a genuine right, but it must be acted on with prudence." He uses this word "prudence," right? Well, what does that mean? Who's to say what is and is not prudent? Lincoln saw what the secessionists were doing certainly as imprudent, but of course, they did not, the secessionists. So it's an issue.

**HOLZER:** Just very quickly, the archivist mentioned the speech in Congress, the right to rise up, and where he evolves from that, I think, is basically to say, yes, the people have



the right to rise up and change governments every four years. And even if you get 39% of the vote, if you win, you win, and they can have a better man next time. He says it all along the inaugural journey. The people have a right to change governments, and you may find a better man. Find one, but not until 1864. Let's go to this side.

**MAN:** A reference was made to the property clause of the Fifth Amendment, but it wasn't quoted completely. It reads, "nor shall private property be taken for public use without compensation." And public use, well, I'm not for no emancipation, but public use is not discussed by anybody here, and I wonder what you'd say about that.

**WILLIAMS:** Well, I think the point, and then Michael can defend himself, but the point here is the emphasis in Lincoln's generation--we still have it here--on property rights. And the slaves were property, the value of each slave written next to his and her name in the tax assessor's books. And when we talk this afternoon on emancipation, I might briefly mention the confiscation acts that no one can understand anyway before emancipation came and actually did nothing to manumit the slaves, but it was a legal process where you'd go into U.S. district court. It never really emancipated anyone. Even Lincoln knew that, but these acts were adopted by Congress with not the full acquiescence of the president, although he allowed the Second Confiscation Act to become law because of his concern over property rights, and that's why even in 1862, after the preliminary Emancipation Proclamation was signed by Lincoln on September 22, in his December message to Congress, with final emancipation on January 1 yet to come, he's offering this compensation to those states that had stayed in the Union. Big emphasis on property rights. It's hard for us to conceive that today, but very big.

**DIRCK:** That's a great point, and remember, it's not just his emphasis. It is the Supreme Court's emphasis. And one thing we need to remember is that as he is drafting the Emancipation Proclamation, Roger Taney is still the Chief Justice of the Supreme Court as well as most of the judges in the majority opinion of *Dred Scott v. Sandford*. And one of the conclusions I've made in my essay in "Lincoln Emancipated" is he has to think in the back of his head, "I've got to write the Emancipation Proclamation in such a way that it is unlikely it will ever end up in a lawsuit because if it ever is--"I think it's a pre-forgone conclusion Taney would have struck it down. So he needed to write in such a way that it would not violate the Fifth Amendment, which I think is the reason why he limits the scope of the proclamation.

**HOLZER:** And astonishingly, things have--perhaps replacing southern justices with other southern justices, even though he knows it would doom any such appeal. So, Michael, have you thought of a defense of your truncated Fifth Amendment?

**VORENBERG:** No. I mean, the public issue is crucial. From today's perspective, of course, what does public use mean? Public/private divide seems to be obliterated now. We see this with the Fannie Mae Freddie Mac issue, right? I mean, that is, are these



private or are they public? And we'll hear more about this in the future, I'm sure. In war time, that line always gets fuzzy. So for Lincoln, you can say, well, wait a minute. Emancipating slaves, what does that have to do with public use? Well, it has everything to do with public use because the slaves, if you don't emancipate them, are and were being used by the Confederacy against the Union.

So if you emancipate them, it's a public use in terms of you are keeping your public, the Union, safe from agents who can be used against you. That's one way of framing it, and that's exactly how the Confiscation Acts are framed, the first one especially. You have to emancipate them so that these people aren't used against you. Lincoln didn't get bogged down in the public use thing, and we've seen many people not get bogged down in this. I mean, the Connecticut case three years ago, right, where eminent domain is used to turn over--what is the name of the case, Frank? Key. Theo, thank you.

**WILLIAMS:** To Pfizer chemical.

**VORENBERG:** Right. And turns it over to a private developer, or owner, for public use because it was seen that that would be a better use of the property than keeping it as it was. Well, that's public use. So this public use thing is a fuzzy term. I don't mean to endorse this at all, but Lincoln is along--he's in good--well, he's in company when he uses public use loosely in this way.

**HOLZER:** Sir?

**MAN:** Yes, I understand that in the 1860s Lincoln went to some effort to assure the South that he was not intending to move against slavery. The abolitionists were, of course, upset by this, but it seems that those people who later after his--immediately after his election called for secession were not prepared to believe it. And so it began to happen almost immediately even before he had been brought into office. And following up on Michael's term of a conundrum here, is there anything in the Lincoln record: letters, conversations, or anything that would indicate that he would do other than support the holding of the Union together?

Did he ever entertain, was he having arguments with himself about "Well, maybe we ought to let them go," and particularly since it spread over a number of states over a period of time. Initially started off with a couple of the states, then gradually up to Virginia and all. Was there any time between November and April in Fort Sumter that seemed to be a possibility for saying, "OK, I don't like it, but it's got to happen"?

**HOLZER:** I guess I'll start because of--

**WILLIAMS:** Your book.



**HOLZER:** Right. The one that I failed to produce for this event. But that's OK. I think--you're right about the reassurances that begin early, even at Cooper Union, "I have no intention of interfering with your slaves. If opposition and revolution occurs, it's your fault, not our fault because we're not threatening you." But the very notion of Lincoln saying that he was putting slavery in the course of ultimate extinction was enough apparently to threaten the slave power.

I always think that Lincoln's continuing assurances of non-interference were aimed not at the deep South states that began leaving in December, as you noted, but the upper South states, which he continued to believe he could hold in the Union. And my answer, Virginia, for example, which he really believed could be persuaded to stay, but in all of the literature, I don't see any moment--I mean, I see moments where Lincoln wavers on emancipation, late moments where Lincoln wavers on emancipation. Or at least talks about waving on emancipation, but I don't see any moment where he believes that there could be two countries and that they could be recognized and that one could discuss them or believe that there isn't--I mean as late as 1863, the famous example with General Meade, who says, "We've driven the Confederates after Gettysburg back into their territory." Lincoln famously explodes and says, "It's all our territory. It's all the United States." Doesn't he get it even now? Anybody else want to talk about it?

**DIRCK:** Well, in fact, doesn't he say in his first inaugural address that he thought that the geography, the very layout of the country made separation impossible. He felt that it was just a physical impossibility to separate the country in that way, although he does also say, doesn't he, that if they had called a convention of all of the states, North and South together, and then decided to break the Union up, that would have been the people coming back together in the capacity to decide to remake the pact that they had made in 1787 so that maybe, maybe that would be a way to do it, but even then, I don't think--

**HOLZER:** Of course, they do bring representatives together to see if they can create this strange compromise that would perhaps lure states back into the Union, but Lincoln does whatever he can to sabotage that in a very clever way. Yes, sir?

**MAN:** It's often pointed out that as a congressman, Lincoln opposed the war against Mexico. I think he said, "Mexico will poison us," but I've never seen any indication that as president he contemplated returning the Mexican session. I've read that, in fact, the admission of Nevada was hustled through in case he needed their electoral votes in '64. How did Lincoln reconcile this in his mind if indeed he addressed it?

**HOLZER:** He voted for the Wilmot Proviso 17 or 18 times, so he felt he was sanctified, but that's a glib answer. Does anybody want to? Obviously he never talked about giving back the Mexican session.



**WILLIAMS:** He also needed the silver in Nevada, too. The war was costing a million a day and just translate that into today's dollars and maybe it'll help bail out somebody else.

**DIRCK:** I think the only time he ever addressed the Mexican War issue after the war was, I believe, in the autobiography he wrote for John Scripps in which he said something to the effect of, "And, oh, by the way, I always voted for supplies and money for the Army," because that really stung him. There were Democrats in Illinois who claimed that he had actually voted for no supplies for the troops, and he was still mad about that 12 years later. But I don't know that he ever came back to that issue that I know of. Do you, Michael, or Frank?

**VORENBURG:** No, I don't. I mean, who's ever heard of a candidate who opposed a war and then came around and supported it?

[Laughter]

The--the--but I don't want to--that just reduces Lincoln to a political animal. And I guess--I do want to be careful when I make this sort of off-the-cuff remark not to reduce him to that. Because, actually, I think when he--why did he oppose the Mexican War? Was it because he was an anti-imperialist? Well, maybe a little, but that's not the major reason. In fact, what you quote, "poisonous," right?

The problem he had, of course, is expansion of slavery. He wasn't thinking about Mexican autonomy and self-government. As much as he was a champion of self-government, I don't think that's what was on his mind when he opposed it. What he has on mind, like all anti-expansionist Whigs, Henry Clay included, was--and Henry Clay probably foremost of all--was the danger of opening up new land to slavery. And that's what he has in mind. And so he's actually being completely consistent, because he can then say, "I opposed the expansion of slavery then, I now oppose a Southern group that would expand slavery still today into new areas."

**WOMAN:** First a comment, then a question. Just as a high school history teacher, I can't tell you enough how invaluable these symposiums are. So I really appreciate that you're all here today. And speaking to Justice Williams, my students—we get into a lot of discussion about the expansion of presidential powers during Lincoln's term in office. And, you know, students are very concrete and they just want a concrete answer. And I think your quote from Mark Neely will be very helpful in framing that discussion for my students in the loneliness of power, and so I appreciated that. I've been reading Farber's book on "Lincoln's Constitution," and I'm struggling with something in how to present it to my students. There's a part where he talks about the South's Constitutional theory, was that, "The ultimate authority over Constitutional issues did not reside in Supreme Court or in the process for Constitutional Amendments, but in the sovereign people in each state."



And he goes in very thorough detail into the competing arguments of what is sovereignty, and it's really just a discussion of the theories. How do you recommend that I present--

[Laughter]

I know: tall order. But how do you recommend I present this in a palatable way to 11th-grade American students?

**HOLZER:** Michael?

[Laughter]

**WOMAN:** Sorry.

**WILLIAMS:** That's what judges do, you know.

[Laughter]

**VORENBURG:** Come on, someone has to start here. Yes, we have a long history of Frank delegating to me, right?

[Laughter]

No, the--I--well, there are a number of historians, scholars, ordinary people who articulate--and I would, I think, agree with this--that the most important words of the Constitution are the first three: "We, the people." And they are important, both because of the signal--this was a really remarkable notion, that the sovereignty will lie in the people themselves. That was a remarkable Republican moment. Uh, Republican: that is, Republicanism of the Revolution. The Republican party had not yet been formed. The question, then, to put to 11th graders or to fifth graders or to ourselves is, who is "the people"? Are they the people assembled in the state? Are they the people in the country? Are they the people who can vote? Are they the people who can't vote, including--included with the people who can vote? There is no easy answer to that, and it's a wonderful topic of discussion, and it's open-ended. So, as with any teacher, right, you want to find the right questions to get students to think about this, and I think the Constitution itself provides it right there.

**HOLZER:** Frank, do you want to answer?

**WILLIAMS:** Well, and I think, too, it ties into this theory of revolution. And as, I think, Michael and Brian alluded to, that right of revolution sort of faded as the War took hold. And he clearly indicates in the first inaugural unequivocally, which is supposed to be a document of conciliation, of mediation with the South. But he unequivocally says you don't have the right to leave without the consent of the other states. Correct me if I'm wrong: I'm not even sure the right of revolution appears in the first inaugural, does it? No. It's out.



And that's this--you know, that's what, you know, Michael is saying about "We, the people," and who are they. And Lincoln is now saying that you just can't--you know, he begins to hedge his bets on the right to revolution. Not just by removing it from the inaugural, but he puts it in the context it's got to be for acceptable, moral reasons: I'm paraphrasing. And the reasons they're giving to leave, the 7 states, let's say, were not acceptable.

**HOLZER:** And part of it is what Jim McPherson has talked about: the battle for the definition of liberty. Is liberty the ability to remove oneself from a allegedly constricting Union at will or at whim? Or is it an expression of a preference for a leader every 4 years, and after which one must live by the results? My comment is I'm so proud as a New Yorker that there are such wonderful, committed high school teachers who want to get their students in line with history, so thank you for what you do. Yeah, do you want to say something?

[Applause]

**DIRCK:** Also, it's important to keep in mind, as well. Remember, Abraham Lincoln never saw the movement for secession as, in any sense, democratic or fair. He always believed that secession was foisted upon the majority of the Southern people who he thought never supported it by a few leaders. So I think his answer would also be, how do you know that this movement toward revolution represents the will of the Southern people? Because, I mean, he's got a point. The South never held a referendum on secession. It was the legislatures and these hastily called conventions that pulled them out.

**HOLZER:** But, you know, again, exigency trumps philosophy because Lincoln was such a believer in the convention system. He always talked about the convention system. And yet when one border state has a referendum and secession is rejected, he, of course, is for the referendum system. So--yes?

**MAN:** I had a question, and this following up listening to Dr. Vorenberg and Dr. Dirck. You referred to the conundrum for Lincoln about the right to revolution, and not coincidentally, all four of you just talked about this in the last 3 minutes. Dr. Dirck talked about the famous statement, "If slavery's not wrong, nothing is wrong." And then Dr. Holzer referred to exigency and trumping. Is the answer, and maybe this is too lofty, that the right to revolution is trumped by an absolute wrong?

**HOLZER:** Well, I'm not suggesting that Lincoln advanced slavery as the absolute wrong that trumps other things. I think he was using Union and the bond and the law at that moment as the exigent reason. But does anyone else want to comment? I mean, he's not prepared to have his presidency or the Union live or die on the abolition of slavery at that moment because that's a political battle he can't win. And that's, you know, as destructive



to the Union and to the future of the country as what Frank talked about enforcing no law but one.

**DIRCK:** Well, yeah, and there's also the difference between what he privately believed and what he thought he could do as president. He even says this--I forget which letter, but he says something to the effect of, "I always believed that slavery was an absolute moral evil." Nobody can gainsay that, but he said, "I always thought there was a difference between what I personally believed and what I could actually do as a president, and that I didn't have--" I think he says, "I didn't have the luxury of acting upon my private beliefs because the presidency constrains me from only doing those things which were legal in the Constitution that were possible to do."

**HOLZER:** And, in fact, in the Greeley letter that you cited, he ends with the line, "Everything above should be taken along with my personal belief that all men everywhere should be free." Yeah, yeah. Oh, go ahead, Mike. I'm sorry.

**VORENBURG:** Oh, no, no.

**HOLZER:** Please. No, I was going to go to the next question, but, please.

**VORENBURG:** Well, the right of revolution isn't just a right that says, "I don't like what's going on, "therefore I will revolt." It's founded on this theory that's been articulated here already that you have the right when the consent of the governed is no longer expressed by the people who govern. And Lincoln said, therefore, the right can't be invoked because the consent has been expressed in the election. And as Brian says, that those who are promoting secession do not represent the majority. They are a small minority, and so he says that the right doesn't exist.

But this is a very difficult ground. Because how--how do you know that the people in power do or do not express the desires of the governed? Or the not governed: the people? The people, right? So that means nonvoters, as well. I mention that because—and this probably will not be the only time I mention this--that we also are poised, in addition to the Lincoln Bicentennial, it's the 150th anniversary next year of the raid on Harpers Ferry. And what John Brown said when--and others who invoke slave insurrection--they invoke the right of revolution, and they invoke the Declaration of Independence as their document, and that is terribly important. I mean, who's to say that that argument is not legitimate? That is, that those are also people, and their consent is not included in the will of the governors, if you will. And so it's an interesting conundrum, to use that word again, this right of revolution. Who gets to determine whether or not that consent is manifested by the people in charge?

**HOLZER:** Yes, sir?



**MAN:** When I hear the discussion regarding compensation for slave owners, I think back to the clause in the Constitution that talks about three-fifths. And I never understood where that came from, and I never heard it mentioned even in the Civil War. Is there ever any reference to the relationship of--other than just property?

**VOREBERG:** Well, it comes from a clause in the Constitution. It was created—you can stop me if I'm not answering your question. But it's created essentially at the time of the Constitution to make sure that in the House of Representatives, the Southern states, the slave states, will--well, they were all slave states. But that the Southern states in particular, where the dominant of slaves were—the dominant population of slaves were, would have an equal representation in the House. So that fraction,  $3/5$ , is the fraction that will produce the political--equality in political representation that's desired. Well, that's 1787, then ratified 1789. What people don't expect and what happens is that over the next 70 years, the slave population in this country, and especially in the South, exclusively in the South, explodes in a way that went beyond any slave society ever before or after. That is, that the rate of growth just became not just self-reproducing, but self-growing, and it was done without transporting slaves. What this then did was to create a greater representation among Southern states, which now is exclusively where the slaves were by the 1820s, thirties, give them a greater representation than the founders had envisioned when they put that clause in. Is it invoked? All the time. As part of--in the Republican rhetoric, the Republican party, as part of the slave-power conspiracy, that they use this thing and other things to make sure that they keep a stranglehold on the government. So Lincoln mentions this and other things all the time. I don't know if that answers your question.

**MAN:** Kind of. But what I was trying to get at was that they could have just given more representatives to the South and just said for a state, you get 3 senators. But instead, it seems by saying that you have  $3/5$  of the slave, you're implying that they're  $3/5$  human.

**WILLIAMS:** Well, that was the Great Compromise in Philadelphia to get the states to agree to--or enough of them to agree to bring it back to their states for ratification. That's why it evolved into that three-fifths. And by the way, you don't see anywhere in the Constitution of Lincoln's day--forget the 13th Amendment that came in '65--an absolute expression of a government supporting the institution of slavery. That is the clause that gives validity to the ownership of human beings in slavery: the three-fifths clause.

**HOLZER:** The irony is the insistence upon they're being counted in the census to expand Congressional representation, as opposed to the denial of human rights to the people who were being counted. And that's, of course, the essential irony that drove the Republicans crazy and made the debate so difficult.

**VOREBERG:** Because what you're getting at is exactly right: it's one of many hypocrisies.



That is, Southern, pro-slavery ideology—or pro-slavery ideology wherever it's coming from--says that these people are inhuman, and yet they're in the Constitution. You're saying, well, they are at least 3/5 human.

**HOLZER:** Right.

**WILLIAMS:** And count.

**HOLZER:** And they count. Yes, let's try to get a couple more in.

**MAN:** OK, I've heard speculation that one reason Jefferson Davis was never brought to trial was that he indeed might've made a case that secession was Constitutional.

**HOLZER:** Well, he did in his memoirs.

**MAN:** Well, he did, but--

**DIRCK:** If you want to slog through those God-awful things: I had to do a dissertation.

[Laughter]

I'm sorry.

**HOLZER:** I'm sorry.

**DIRCK:** It left scars, you know? But, no, I'm sorry. I didn't mean to interrupt you.

**HOLZER:** No, that--I'm just-- I'm not sure. I think that they were afraid of what a trial would produce in terms of his statements because he went on, you know, to write what he wanted to write. That's true. That's true. Does anybody have any views on that: a trial? I mean, think there was political utility in not having him have a stage and have a forum, but I don't think that was the only concern: that it would reopen thorny or divisive Constitutional issues that would create another crisis.

**DIRCK:** Well, and Davis wanted a trial very badly. He wanted that stage.

**HOLZER:** Yeah, well, he was his own worst enemy: he thought he was a good public speaker.

**DIRCK:** He was his own worst enemy in a lot of ways. That's true, yeah. And it's also very difficult to get a treason conviction under U.S. law anyway. I think a lot--I'm just--distant memory from writing my first book. I looked at some stuff, and I think that there is a genuine fear that he could "beat the rap." You know, because it's, if I'm not mistaken, it's



the only criminal procedure laid out in the Constitution that's very, very prescribed because the framers didn't want it used as a political tool, and it would've been a real difficult thing. There haven't even been that many treason prosecutions, period, in American history.

**HOLZER:** And I know what always happens to them at the end. I mean, look at the new Rosenberg revelations. If the witnesses live to be 92, you can hear some interesting things. Yes?

**MAN:** I believe there was reference that Lincoln said that the U.S. was the last great hope of mankind. Is the executive branch, in its conduct of foreign affairs, subject to the language of the Constitution in the Declaration?

**VORENBURG:** Frank?

[Laughter]

**WILLIAMS:** It's supposed to be.

[Laughter]

You know, all these acts that Lincoln took unilaterally without authorization of Congress--although he did go in to get them ratified. I think that's very much a part or an omission in the Constitution where the duties of Congress are more clearly spelled out in Article I than the duties of the Chief Executive in Article II. So you have that ambiguity, but you're supposed to have these checks and balances. For example, treaties are supposed to be ratified by the Senate. And we have many accords in our history that we've honored without the Senate ratifying. Some are pending. Some have been pending for decades.

**HOLZER:** You know, Lincoln once said that the Constitution was, "not altogether such as any one of its framers would have preferred, but the joint work of all," and added, "the better that it was so." I think this panel has been the better for reflecting our divergent views or sometimes our agreements, but our diversity of opinion, and I thank you all. Lincoln also said in 1854, I have a great quote to end with, "I stand by the Constitution fully, fairly, and firmly," and I thank my colleagues on the panel for doing that this morning.

Thank you.

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