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Apple of Gold in a Picture of Silver: The Constitution and Liberty

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Abstract

In the threatening winter of 1861, as the United States was being ~ inched ever- closer to the outbreak of civil war by the secession of the Southern states over the issue of black slavery, the newly elected president, Abraham Lincoln, opened up a confidential correspondence with a former Southern political colleague, Alexander Stephens of Georgia. Stephens had made headlines in November 1860, in a speech to the Georgia legislature, urging Georgia not to follow the South into secession. Lincoln sent him a friendly note, asking for a printed copy of the speech-and perhaps warming Stephens to an invitation to come into Lincoln's cabinet as a gesture of mollification toward the South. Stephens wrote back, apologizing that the speech was not yet in print (apart from the newspaper reports of it that Lincoln had read), but taking the opportunity to urge Lincoln to make some kind of conciliatory promise to the South about staying within the bounds of the Constitution, as president, and not threatening to take federal action against slavery in the South, where slavery had enjoyed a kind of constitutional immunity since the beginnings of the Republic. This, Stephens believed, would deflate the secession fire-eaters better than any cabinet offer, adding (with a phrase borrowed from the Book of Proverbs), "A word fitly spoken by you now would be like 'apple of gold in a picture of silver.'" [*excerpt*]

Keywords

Civil War, Abraham Lincoln, slavery, President, secession, Alexander Stephens, Confederacy, Constitution

Disciplines

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CHAPTER 6

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Allen C. Guelzo

I

In the threatening winter of 1861, as the United States was being inched ever-closer to the outbreak of civil war by the secession of the Southern states over the issue of black slavery, the newly elected president, Abraham Lincoln, opened up a confidential correspondence with a former Southern political colleague, Alexander Stephens of Georgia. Stephens had made headlines in November 1860, in a speech to the Georgia legislature, urging Georgia not to follow the South into secession. Lincoln sent him a friendly note, asking for a printed copy of the speech—and perhaps warming Stephens to an invitation to come into Lincoln's cabinet as a gesture of mollification toward the South. Stephens wrote back, apologizing that the speech was not yet in print (apart from the newspaper reports of it that Lincoln had read), but taking the opportunity to urge Lincoln to make some kind of conciliatory promise to the South about staying within the bounds of the Constitution, as president, and not threatening to take federal action against slavery in the South, where slavery had enjoyed a kind of constitutional immunity since the beginnings of the Republic. This, Stephens believed, would deflate the secession fire-eaters better than any

cabinet offer, adding (with a phrase borrowed from the Book of Proverbs), "A word fitly spoken by you now would be like 'apple of gold in a picture of silver.'"

Lincoln was disappointed that Stephens seemed to think that he intended some unconstitutional aggression against the South. The president-elect could not believe that conciliatory words from him about the Constitution were really necessary: "Do the people of the South really entertain fears that a Republican administration would, *directly*, or *indirectly*, interfere with their slaves, or with them, about their slaves?" The correspondence died on that point of mutual misunderstanding, and Stephens, rather than entering Lincoln's cabinet, eventually became vice-president of the new Southern Confederacy in February 1861. (And nine years later, Stephens would compare Lincoln to Caesar, the destroyer of the Roman republic, and claim that "I do not think he understood" the niceties of constitutional government "or the tendencies of his acts upon them").¹

But Stephens's anxiety about Lincoln's potential for breaking over the limits of the Constitution stayed in the forefront of Lincoln's thinking, like an irritation he could not rub out. So did the biblical image about apples of gold and pictures of silver, for in January Lincoln wrote out a brief statement on the place of the Constitution in his thinking, perhaps as part of a reply to Stephens, in which Lincoln borrowed precisely Stephens's own image about apples of gold. "Without the *Constitution* and the *Union*, we could not have attained . . . our great prosperity," Lincoln acknowledged, and therefore he had no intention of treating the Constitution lightly. But "there is something back of these, entwining more closely about the human heart," Lincoln insisted, "That something is the principle of 'Liberty to all' that is enshrined in the Declaration of Independence, that 'all men are created equal.'" This was a principle that, for Lincoln, slashed straight across the practice of slavery, and if Stephens expected him to pay attention only to the Constitution and ignore the principles that lay "back of these," he would have nothing to expect but disappointment in Lincoln. The Constitution did not exist merely for its own sake, as though it were only a set of procedural rules with no better goal than letting people do what they pleased *with* what they pleased; it was intended to serve the interests of "the principle of 'Liberty to all,'" which meant

that the Declaration was “*the word, ‘fitly spoken’* which has proved an ‘apple of gold’ to us.” The Constitution, and the federal Union the Constitution created in 1787,

are 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. The *picture* was made *for* the apple—not the apple for the picture.²

There is no doubt but that the Declaration of Independence was the central statement of Lincoln’s political idealism. “I believe that the declaration that ‘all men are created equal’ is the great fundamental principle upon which our free institutions rest,” he wrote in 1858; and two months after his correspondence with Stephens, at Philadelphia’s Independence Hall, Lincoln declared that “I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.” What he hated about the enslavement of blacks was not only its crass disregard of the natural equality of all human beings, but the way it forced “so many really good men amongst us into an open war with the . . . Declaration of Independence, and insisting that there is no right principle of action but self-interest.” And it was the Declaration’s promise of equality that Lincoln made the chapter and verse of his great call for a “new birth of freedom” in his most memorable public speech, the Gettysburg Address.³

But this was precisely what, at bottom, divided Lincoln and Alexander Stephens. For Stephens, the Declaration was a great mistake; and the Constitution was indeed a set of procedural rules, intended to teach no particular system of political morality, or any other morality for that matter. “The prevailing ideas . . . at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature,” Stephens said on March 21, 1861. “Those ideas; however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error.” And resting the Constitution on the Declaration was the equivalent of building the national house on “a sandy foundation.”⁴

And there have been, long after Stephens and even among Lincoln’s admirers, those who have wondered whether Stephens was right, or at least right in apprehending that Lincoln had taken entirely too cavalier

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an attitude toward the Constitution. According to the conservative political scientist Willmoore Kendall, Lincoln did not merely set the Declaration and the Constitution into what he imagined was a proper relationship of apples of gold and pictures of silver; he used the Declaration to demolish the Constitution in the name of his own egalitarian ideology. "What Lincoln did . . . was to falsify the facts of history, and to do so in a way that precisely *confuses* our self-understanding as a people," Kendall argued. Gottfried Dietze, a political conservative like Kendall, saw Lincoln's appeal to the Declaration as the "apple of gold" as a democratic pretense that allowed him to demote the Constitution to a mere piece of framery, so that Lincoln would be free to pursue dictatorial glory as president. Lincoln, said Dietze, was "a democratic Machiavellian whose latent desire to achieve immortality broke forth at the first opportunity offered by . . . the Civil War." Or if not glory, Lincoln used the pursuit of equality as an excuse for granting himself "unprecedented and virtually dictatorial powers as president," and so tear down the restraints of the Constitution so that he could satisfy a kind of political Oedipus complex. According to Dwight G. Anderson, Lincoln would use the appeal to equality in the Declaration in order to "put himself in Washington's place as the father of his country." For Anderson, Lincoln as president only posed as a defender and maintainer of the Union and the Constitution, while in reality "he actually was transforming it."⁵

And even among Lincoln's admirers, there is a running current of discomfort at Lincoln's apparent willingness to set the Constitution below the Declaration. The great Lincoln biographer, James G. Randall, the equally great historian James Ford Rhodes, and the path-breaking political historian William Dunning all agreed that Lincoln rode roughshod over the Constitution in pursuit of dictatorial powers, although they were quick to add that Lincoln's "wholesome regard for individual liberty" and "the legal-mindedness of the American people" kept him from turning into an outright tyrant. More recently, voices on the political left like Garry Wills, Charles L. Black, and Mark Tushnet have actually applauded Lincoln for dumping the Constitution in favor of the Declaration. According to Wills, the Gettysburg Address, by invoking the Declaration of Independence at the beginning rather than the Constitution, changed "the recalcitrant stuff of that legal compromise, bringing it to its

own indictment." At Gettysburg, Lincoln performed "one of the most daring acts of open-air slight-of-hand ever witnessed by the unsuspecting" and "changed the way people thought about the Constitution." (Willmore Kendall, in Wills's reading, was actually quite right: Wills merely chose to cheer what Kendall chose to deplore). Howard Jones echoes Wills's judgment by describing the war as "an instrument" Lincoln used "for reshaping the Union of the Constitution into the more perfect Union envisioned by signers of the Declaration of Independence." Even Phillip Paludan, who offers the most realistic and persuasive middle path between Kendall and Wills, can only insist that Lincoln was indeed a Declaration-of-Independence egalitarian, but a *process* egalitarian who believed "that equality would be realized only through the proper operation of existing institutions."⁶

What runs as a common thread through all of these comments, favorable and unfavorable alike, is the peculiar sense that, in varying degrees and for good or ill, Lincoln really does represent a sacrifice of the Constitution to the Declaration. Lincoln's own image of the "apples of gold in the picture of silver" has offered easily quotable support for that, since it suggests all too broadly that the Constitution's importance is largely that of an instrument for implementing the Declaration's ideals. As Lincoln said to a political rally in June 1858: "be ever true to Liberty, the Union, and the Constitution—true to Liberty, not selfishly, but upon principle—not for special classes of men, but for all men, true to the union and the Constitution, as the best means to advance that liberty."⁷ Did Lincoln sit at the other extreme from Alexander Stephens, and did he regard the Constitution as a wax nose, to be reshaped according to his own egalitarian idealism? If either Wills or Kendall are even close to being right, the answer would have to be *yes*, to both questions.

The difficulty with resting in this opinion is that we still live under this Constitution, and the Civil War was fought to keep it in place; and very nearly all the advances in civil equality made in this century have been based on appeals to the Constitution. Certainly, no civil rights litigation has achieved success by ignoring the Constitution and directing judges' attention to the Declaration. Casting Lincoln as both Wills and Kendall do—as a subverter of the Constitution—makes Lincoln into a sort of political monster rather than a hero. So what did Lincoln intend when he spoke of the Constitution as a "picture of silver"? And

before we confidently conclude that Lincoln had to tear down the Constitution in order to pave the way for equality, what did Lincoln mean by *equality*? For it may turn out that Lincoln was more of a constitutionalist than meets the eye, and a very different sort of egalitarian than we think.

II

It is surprising that Abraham Lincoln, a lawyer's lawyer, would find himself defining the relationship of the Declaration and the Constitution in terms of illustrations and pictures rather than a precise legal equation. But Lincoln was not the only one with that problem. This was because there was no simple consensus in the American Republic as a whole about how the Constitution was supposed to function, and nowhere was that more dramatically demonstrated than in the ferocious political contests between the Democratic party of Andrew Jackson and Stephen A. Douglas, and the Whig party of Henry Clay and Abraham Lincoln.

Born in the great political triumph of Thomas Jefferson and his followers in the presidential election of 1800, the Democratic party saw itself as the party of a virtuous countryside, a party of independent landowners who would keep liberty pure by preventing the fledgling American merchant class from concentrating too much lethal political power in its own hands. For the Democrats, the Constitution was a procedural rulebook, and for the most part, only a procedural rulebook. It prescribed only the minimum of guidelines for public life and left the balance to the self-government of American individuals. It bothered the Democrats not at all if those self-governing individuals galloped off in a hundred different cultural and moral directions. Any attempt to prescribe a common cultural standard not only stepped beyond the Constitution, but amounted to a conspiratorial concentration of power. "So long as the individual trespasses upon none of the rights of others, or throws no obstacle in the way of their free and full exercise," wrote Orestes Brownson, "government, law, public opinion even, must leave him free to take his own course."⁸

This heady brand of do-your-own-thing populism (made all the headier by the leadership, first, of Jefferson, and then of Andrew Jackson) had

two basic flaws: nations of landowners tend not to do well if they are ever sucked into war with nations of merchants; and, landowners (far from being always virtuous) can just as often be suspicious, provincial, and lecherous. The first of those flaws showed up in the War of 1812, when radical Jeffersonians led by Henry Clay brought the United States into a war in which the American Republic came within an ace of having its ill-equipped and underweight armies of farmers wiped out by the British. Clay, the sadder but wiser politician, backed away from Jefferson and began insisting that, if the United States wanted its liberty to survive, it had better investigate the acquisition of a little power—and so Clay created the Whig party to promote a national banking system to encourage commercial development (and a national tariff to protect it) and a general combination of business and government in joint effort.

This enraged Democrats. “Our plan may be stated in a phrase of the utmost brevity,” erupted Democratic journalist William Leggett, “for it consists merely in the absolute separation of government from the banking and credit system.” Clay’s so-called American System for the promotion of commerce and industry would only lay open the path to frightening accumulations of power, both inside and outside the government. Once accumulated, that economic power could then be used in political ways—to buy votes for public works projects that benefited the powerful, to finance campaigns for the imposition of evangelical Protestant morality on the working class (like the New York City religious revivals underwritten by the wealthy Whig merchants, Arthur and Lewis Tappan), and, even more threatening, to back movements for the abolition of black slavery (which the Tappans were also financing). To Democrats like Leggett, such concentrations of power, and the capacity for social mischief they created, were wildly unconstitutional. The Constitution nowhere gave any sanction to proposal for national banks, national roads, or national meddling with slavery—at least not explicitly.⁹

But *explicitly* was just Clay’s point—what the Constitution did not expressly forbid was not *unconstitutional*, and so hey-ho for the National Bank. Add to this the guidance given to American jurisprudence by Joseph Story and James Kent in favor of absolutizing contract law and inhibiting state restraints on commerce, and the breakup of state restrictions on banking and interstate business supervised by Chief Jus-

tice John Marshall and the Marshall court, and the way was open to “constitutionalizing” the entire field of domestic economic policy. Instead of the Constitution enjoying a sacred consensus above mere policy disputes, the Constitution in the early republic became the site of every one of those disputes.¹⁰

The second flaw in the Democratic reasoning—the unreliability of rural virtue—was something with which Abraham Lincoln was all too well acquainted. “I presume I am not expected to employ the time assigned me, in the mere flattery of the farmers, as a class,” Lincoln warned the Wisconsin State Agricultural Fair when he was invited to speak there in 1859. “I believe there really are more attempts at flattering them than any other; the reason of which I cannot perceive, unless it be that they can cast more votes than any other.” Born in rural Kentucky poverty to the very model of independent Democratic farmers, Lincoln disliked agricultural work and everything attached to it almost from the beginning; and as soon as he came of age in Illinois, he left the farm for the town and the city and never looked back, to become a storekeeper and then a lawyer, two professions that were the point guards for American commercial development. It was this that made Lincoln a Whig from the start and drove him into politics (even before law), and which made “the name of Henry Clay . . . an inspiration to me.” It also determined Lincoln’s view of the Constitution, and, as we shall see, gave his understanding of the Declaration an unexpectedly economic twist.¹¹

It is only if we suppose that Lincoln thought of nothing but the Declaration—only if we ignore his immersion as a highly partisan Whig in the 1830s and 1840s, along with the general propensity of all political partisans then to “constitutionalize” policy debates—that we will be surprised to find Lincoln closely preoccupied with the integrity of the Constitution far earlier than with the Declaration of Independence. For despite the suggestions of some of his critics, Lincoln in the 1840s devoted more attention to the interpretation of the Constitution, and to a far more restrained notion of the Constitutional interpretation at that, than Wills, Kendall, or Randall claimed. His earliest extended political statement, the Springfield Young Men’s Lyceum Address on “The Perpetuation of Our Political Institutions” (from January 1838), closes with a ringing denunciation of the role of “passion” in politics (and

passion was understood to be the Democratic style, as opposed to Whig “reason”) and a call for “*general intelligence, [sound] morality* and, in particular, *a reverence for the constitution and laws.*” In 1848, as a Congressman advocating Clay’s programs of tax-supported “internal Improvements,” Lincoln attacked proposals to amend the Constitution as a mistake leading to ruin:

No slight occasion should tempt us to touch it. Better not take the first step, which may lead to a habit of altering it. Better, rather, habituate ourselves to think of it, as unalterable. It can scarcely be made better than it is. New provisions, would introduce new difficulties, and thus create, and increase appetite for still further change. No sir, let it stand as it is. New hands have never touched it. The men who made it, have done their work, and have passed away. Who shall improve, on what *they* did?¹²

Of course, as a Whig, he was more inclined to grant exceptions to this stiffness in handling the Constitution when it came to the pet projects of the Whig party. Participating in his first national political campaign in 1840 as a Whig speechmaker, Lincoln attacked the Democrats’ successful dismemberment of the national banking system under Andrew Jackson and Martin Van Buren, a dissolution grounded in Jackson’s claim that the Constitution gave no express sanction to a national bank. “As a sweeping objection to a National Bank . . . it often has been urged, and doubtless will be again, that such a bank is unconstitutional,” Lincoln told a Springfield audience in December 1839. “Our opponents say, there is no *express* authority in the Constitution to establish a bank,” Lincoln observed, but as a good Whig, he replied, “The Constitution enumerates expressly several powers which Congress may exercise, superadded to which is a general authority to make ‘all laws necessary and proper,’ for carrying into effect all the powers vested by the Constitution of the Government of the United States.” A national banking system was as good a means of satisfying that need as any of the simple substitutes the Democrats were proposing; therefore, on Lincoln’s expansive logic, “is it not clearly within the constitutional power of Congress to do so?”¹³

But this only meant that he read the Constitution as a Whig might read it, not that he had no regard for it whatsoever. Far from it: his first

brief sliver of national notoriety was his attempt to force President Polk to reveal his own constitutional high-handedness in triggering the Mexican War, riding roughshod over "the provision of the Constitution giving the war-making power to Congress." In 1852, he had actually criticized the campaigners for an immediate abolition of slavery as the enemies of constitutional government. "Those who would shiver into fragments the union of these States; tear to tatters its now venerated constitution; and even burn the last copy of the Bible, rather than slavery should continue a single hour," Lincoln said in a eulogy for the recently deceased Henry Clay, "together with all their more halting sympathizers, have received and are receiving their just execration."¹⁴

But *as a Whig*, he was also inclined to read the Constitution as more than merely a procedural document, which secured liberty but refused to do more than express neutrality on what was done with that liberty. The same spirit in the Whigs that looked to create a powerful economic republic also looked to sponsor a powerful spirit of nationalism, which would triumph in the creation of a single American national identity rather than a diversity of local, regional, or state identities. "I wish to be no less than National in all the positions I may take," he wrote in 1854. What Lincoln found great in Henry Clay, as he said in 1852, was that "Whatever he did, he did for the whole country. . . . Feeling, as he did, and as the truth surely is, that the world's best hope depended on the continued Union of these States, he was ever jealous of, and watchful for, whatever might have the slightest tendency to separate them." And taken one step further, the Whigs also encouraged the creation of unified concepts of public morality, and attracted large-scale support from Protestant evangelicals who feared that the Democrats, in the name of personal liberty, had simply become the party of moral indifference to right and wrong.¹⁵

Lincoln never professed very much in the way of religion; but almost as a way of compensating for his lack of religious profile, he cultivated an unbending moral uprightness that won him the reputation, which has come down even to our times, as what his Springfield law partner William Herndon called "a safe counselor, a good lawyer, and an honest man in all the walks of life." And it was his moralism that led him into conflict, after 1854, with slavery. Lincoln's opposition to slavery always had strong moral overtones. "I

have always hated slavery," he declared in his great debates with Douglas in 1858; and in 1854, he explained, "I object to it because it assumes that there CAN be MORAL RIGHT in the enslaving of one man by another."¹⁶

Lincoln did not articulate just what constituted the basis of that moral outrage. (As Southern defenders of slavery delighted to point out, the Bible was singularly silent on condemning slavery, so it would be difficult for him to find a source for antislavery moralism there). Certainly, one part of this moral loathing for slavery was Lincoln's tendency to associate slaveholding with low-life, nouveau riche forms of loose moral living. He once told a political ally that slavery "was the most glittering ostentatious and displaying property in the world" and was "highly seductive to the thoughtless and giddy headed young men who looked upon work as vulgar and ungentlemanly." And in his 1842 Temperance Society Address in Springfield, Lincoln spoke of the "victory" of Reason arriving only "when there shall be neither a slave nor a drunkard on the earth"—implying that slavery and drunkenness were twins.¹⁷

Another, larger claim for moral indignation was that slavery violated natural law. "The ant who has toiled and dragged a crumb to his nest, will furiously defend the fruit of his labor, against whatever robber assails him," Lincoln wrote in 1854. Slavery, which robbed the slave of the fruit of *his* labor, was just as much an outrage on the part of the human laborer. This was "so plain, that the most dumb and stupid slave that ever toiled for a master, does constantly know he is wronged." And even if the Bible had nothing explicit to say against slavery, Lincoln believed that natural theology did. "I think that if anything can be proved by natural theology, it is that slavery is morally wrong."¹⁸

But above all, slavery violated the spirit of the Declaration of Independence, and it was in this context—as a contradiction of the secular morality of the Declaration of Independence—that the Declaration first begins to assume, in the 1850s, a significant place in Lincoln's rhetoric. "To us it appears natural to think that slaves are human beings; men, not property," Lincoln said in New Haven in 1860, "that some of the things, at least, stated about men in the declaration of independence apply to them as well as to us." In that case, the enslavement of blacks was a step away from the moral road of the Declaration, and a step away from liberty and toward the enslavement of everyone. "Then we

may truly despair of the universality of freedom, or the efficacy of those sacred principles enunciated by our fathers—and give in our adhesion to the perpetuation and unlimited extension of slavery.” Slavery was a moral spot on the garment of freedom as laid down in the Declaration. “Our republican robe is soiled, and trailed in the dust,” he said in 1854 in the tones of a parson demanding repentance from his flock: “Let us repurify it. Let us turn and wash it white, in the spirit, if not the blood of the Revolution. . . . Let us readopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it.” Only that will save the Republic from the embarrassment of slavery; and in that case, “we shall have so saved it, that the succeeding millions of free happy people, the world over, shall rise up, and call us blessed, to the latest generation.”¹⁹

The standard Democratic response was to point out that, morality and the Declaration notwithstanding, the Constitution sanctioned slavery, left it untouched in the States where it was legal, and maybe even untouchable everywhere else, too. As legal historian Paul Finkelman has remarked, “The word ‘slavery’ was never mentioned in the Constitution, yet its presence was felt everywhere.” The slaveholding states were granted extra representation in Congress based on a census count of three-fifths of their slave populations; recovery of slave runaways—euphemistically described as persons “held to Service or Labour”—was made a matter of interstate comity throughout the Union; the Atlantic slave trade was guaranteed existence for 20 years; and the Constitution’s prohibition on export duties gave granted unearned favors to slave-based agricultural products.²⁰

Some of the most extreme Southern Democrats argued that the Declaration not only had nothing to do with the Constitution, but it had actually been a philosophical mistake for the United States to adopt such ideas in its founding documents. Northern Democrats, like Lincoln’s great Illinois rival, Stephen A. Douglas, would not go so far as to reject the Declaration out of hand, but they would argue that the Declaration’s ideas about freedom and equality applied only to white people. “In my opinion the Signers of the Declaration of Independence had no reference whatever to the negro, when they declared all men to have been created equal,” Douglas remarked in the great debates of 1858. And this left him free to deal with the Constitution purely as a

procedural document that made no claims to any moral judgments whatsoever. It was not that Douglas actually favored slavery; it was that he believed that the rights of black people were “a question which each State in this union must decide for itself.” This was because “our government was formed on the principle of diversity in the local institutions and laws, not that of uniformity.”²¹

The response of many antislavery Whigs in the 1840s and Republicans in the 1850s was to concede this point and flee from the Constitution to the Declaration as some sort of alternative standard of government.²² And for Lincoln, too, the Declaration surfaces in the 1850s as a vital authority to appeal to when Democrats reached out to white racial prejudice as a way of silencing Northern unease with slavery. But Lincoln showed no sign that he believed the Constitution now had to be reshelved to a lower point, or that he had ever believed other than that the Constitution was a moral document, with moral implications about liberty and equality that coincided perfectly with the Declaration.

As the image of the apple of gold and the picture of silver indicates, Lincoln believed that the Declaration and the Constitution needed each other. The Declaration was a statement of foundational natural rights, and natural rights that were shared everywhere by every human being. But it was not, and could not be, a statement about civil or political rights, which were a different thing altogether. “I have said that I do not understand the Declaration to mean that all men were created equal in all respects”—the details of specific civil and political rights were up to each community to grant. And the granting of such rights was very much a power left to the states in the early nineteenth century, within the very general framework of the federal Constitution. Even up through the last weeks of his life, Lincoln was reluctant to commit the federal government to a national statement about black civil rights, because the Constitution gave the federal government no power to delimit those rights. (Not that Lincoln had no concern for black civil rights: this is why he delicately pestered reconstruction governors like Michael Hahn to enfranchise the freedmen, because civil rights like the franchise were understood, before the Reconstruction Amendments, to be the proper constitutional bailiwick of the states.) But in the basic natural rights that belonged to everyone, Lincoln believed that blacks and white alike shared a common, equal ground that

forever forbade one race from enslaving the other. "Though it does not declare that all men are equal in their attainments or social position, yet no sane man will attempt to deny that the African upon his own soil has all the natural rights that instrument vouchsafes to all mankind." And in no case was that natural equality more evident than in the case of economic rights. Every man, "in the right to put into his mouth the bread that his own hands have earned . . . is the equal of every other man, white or black."²³

This did not mean, however, that the Declaration and the Constitution were two entirely different sorts of document, the one strictly about ideas and the other strictly about technical process. A close reading of the historical context of the Constitution would demonstrate that the Constitution was animated by the same moral commitment to liberty as the Declaration. True, the Constitution gave some measure of legal sanction to slavery, but this was only because the choice in 1787 was between making those concessions and getting a national Constitution, or a descent into national anarchy and misrule; and only because the authors who made those concessions made them in the expectation that slavery would gradually die out anyway on its own. "You may examine the debates under the Constitution and in the first session of Congress and you will not find a single man saying that Slavery is a good thing," Lincoln wrote in 1859, "They all believed it was an evil."²⁴

Whatever immunities the Constitution originally conferred upon slavery, "I believe that the right of property in a slave is not distinctively and expressly affirmed in the constitution." For instance: "There was nothing said in the Constitution relative to the spread of slavery in the Territories, but the same generation of men said something about it in [the] ordinance of [17]87," the Northwest Ordinance that restricted the spread of slavery into the old Northwest Territory. What was more, "they placed a provision in the Constitution which they supposed would gradually remove the disease by cutting off its source. This was the abolition of the slave trade," once the initial 20-year sanction for it had expired:

a European, be he ever so intelligent, if not familiar with our institutions, might read the Constitution over and over again and never

learn that Slavery existed in the United States. The reason is this. The Framers of the Organic Law believed that the Constitution would *outlast* Slavery and they did not want a word there to tell future generations that Slavery had ever been legalized in America.²⁵

Lincoln did not feel any necessity for setting the Constitution and the Declaration in tension with each other because he supposed that the common intentions of their common authors on the point of equality and liberty spoke sufficiently well for themselves. And this, he explained, was why he had not stepped forward as an antislavery partisan before 1854 and the adopting of the Kansas-Nebraska bill, permitting the extension of slavery into the western territories. "I have always hated it, but I have always been quiet about it until this new era of the introduction of the Nebraska bill began. I always believed that everybody was against it, and that it was in the course of ultimate extinction. . . . The adoption of the Constitution and its attendant history led the people to believe so." The "theory of our government is Universal Freedom," Lincoln said in 1854, "'All men are created free and equal,' says the Declaration of Independence. The word 'Slavery' is not found in the Constitution."²⁶

And so he continued to believe. Unlike many fellow Republicans, Lincoln would not demand an end to the obnoxious provisions of the Fugitive Slave Law of 1850, because however much he disliked the operation of it, it was guaranteed to the South under the Constitution. As Lincoln wrote Joshua Speed in 1855, "I confess I hate to see the poor creatures hunted down, and caught, and carried back to their stripes, and unrewarded toils." But "I also acknowledge *your* rights and *my* obligations, under the constitution, in regard to your slaves," and he wanted Speed to appreciate "how much the great body of the Northern people to crucify their feelings; in order to maintain their loyalty to the constitution and the Union." Lincoln declared at the end of the Lincoln-Douglas debates, "I have neither assailed, nor wrestled with any part of the constitution. The legal right of the Southern people to reclaim their fugitives I have constantly admitted. The legal right of Congress to interfere with the institution in these states, I have constantly denied." In 1859, he actually advised Salmon Chase to restrain the Ohio state Republican committee from asking for a repeal of the Fugitive Slave Law to

be included in the 1860 Republican national campaign platform. "The U.S. Constitution declares that a fugitive slave 'shall be delivered up.'"²⁷

But to argue from that premise that the Constitution somehow gave slavery the broad right to plant itself in new areas, and sprout new dominions for itself under the shelter of Douglas's argument that the Constitution made no moral judgments about what people did in those new dominions, was actually a denial of the whole intention of the Constitution. Even when the infamous *Dred Scott* decision in 1857 seemed to suggest that the Constitution actually did protect the extension of slavery into the territories, Lincoln refused to see it as any reason to surrender confidence in the ultimate justice of the Constitution. In his mind, *Dred Scott* was not an interpretation of the Constitution, but a perversion of it.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias . . . it then might be, perhaps would be, factious, even revolutionary, to not acquiesce in it as a precedent. But when, as it is true, we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.

And yet, even at that moment, Lincoln would not call for defiance of the Court, but rather for patience in awaiting a new decision. "We do not propose that when *Dred Scott* is decided to be a slave, that we will raise a mob to make him free," Lincoln warned during the Lincoln-Douglas debates, "If . . . there be any man in the republican party who is impatient of . . . the constitutional obligations bound around it, he is misplaced, and ought to find a place somewhere else." This is not what we expect to hear from a man who sits lightly by the Constitution. But it is what we expect to hear from one who believes that the Constitution was written to pursue, more than just procedural goals, a set of moral goals.²⁸

III

For Lincoln, the place of the Declaration of Independence as an apple of gold was not intended to diminish the importance of the Constitution as

a picture of silver; nor was a description of the Constitution as a means to realizing the goals set out in the Declaration a way of writing off the Constitution. Much as he appealed to Douglas's followers in 1856 to "Throw off these things, and come to the rescue of this great principle of equality," he also added, "Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties." Nor was he exaggerating for political effect when, en route to his inauguration in 1861, he remarked, "When I shall speak authoritatively, I hope to say nothing inconsistent with the Constitution, the union, the rights of all the States, of each State, and of each section of the country." Moreover, as an "old Henry Clay Whig," he persisted in taking a minimalist view of his own powers as president under the Constitution. "My political education strongly inclines me against a very free use of any of these means, by the Executive, to control the legislation of the country. As a rule, I think it better that congress should originate, as well as perfect its measures, without external bias."²⁹

The tragedy of what happened with the secession of the Southern states and the beginning of the Civil War was that, with such views of the Constitution, Lincoln as president was actually a better safeguard for the continued existence of slavery in the South than secession. If it were a case, Lincoln explained in his First Inaugural, where a majority was forcibly depriving a minority of their constitutional rights, secession—or rather, revolution—might well be justified. "But such is not our case. All the vital rights of minorities, and of individuals, are so plainly assured to them . . . in the Constitution, that controversies never arise concerning them." Nor should they be worried that his private intentions might somehow subvert these rights. "By the frame of the government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals." Just as only Nixon could have gone to China, only Lincoln, with the moral weight of the Republican party, could have enforced national respect for the Constitutional safeguards that prevented interference with Southern slavery.³⁰

But this did not happen, and secession plunged the nation into a situation for which the Constitution granted little guidance. Just as the

Constitution granted no right to secede, it granted the president no direction about how to proceed with the seceders. His guiding star in that case, however, was not the Declaration, but again the Constitution, and his insistence that the Constitution was permanent and unbreakable. "My opinion is that no state can, in any way lawfully, get out of the Union, without the consent of the others," he told Thurlow Weed in 1860, "and that it is the duty of the President, and other government functionaries to run the machine as it is." Just as slavery was a violation of the spirit of the Declaration, secession was a violation of the whole idea of constitutional government. "A majority, held in restraint by constitutional checks, and limitations, and always changing, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people." But secession was an insult to the notion of majority rule and constitutional government, a flight "to anarchy or despotism."³¹

The constitutional uncertainties of dealing with secession led Lincoln into a series of actions in the spring of 1861 that were, by his own public admission, of debatable constitutionality in peacetime: suspending the writ of habeas corpus, authorizing the raising of a national army, spending public money to buy supplies, imposing a blockade. What Lincoln reminded his critics was that this was not peacetime, but war, and war of such a nature that no one who wrote the Constitution had ever anticipated, and war that had broken out while Congress was not only in between sessions, but which was in fact still in the midst of completing Congressional elections. (Lincoln's decision in April not to call a special session of Congress before July 4, 1861, was dictated in large measure by the fact that, under the old staggered system of congressional elections, a number of key border-state Congressional districts had not yet finished balloting for new representatives.) When the western counties of Virginia organized their own Provisional Government of Virginia, and then plunged ahead to petition for separate statehood, Lincoln was equally reluctant to sanction what amounted to a disregarding of the Constitution's prohibition on setting up new states out of old ones without the old state's approval (Article 4, section 3) and to discourage a loyalist movement which had been formed at great hazard to support Constitutional government. He was forced finally to come down on the side of the West Virginians—not, significantly, because they represented the

triumph of egalitarianism (the West Virginia state constitution actually provided for a gradual emancipation, rather than the full emancipation Lincoln had already announced as his policy for states still in rebellion), but because their movement represented the spirit of the Constitution, if not its precise specification. There is a difference, Lincoln observed, "between secession against the constitution, and secession in favor of the constitution," and there was nothing unconstitutional in taking notice of the difference. "It is said," Lincoln concluded, "the devil takes care of his own. Much more should a good spirit—the spirit of the Constitution—take care of its own. I think it can not do less, and live."³² Similarly, the exigencies of the war meant that the executive branch of the government swelled to gargantuan size under Lincoln's administration, leading Lincoln's critics to claim that Lincoln was the original author of "big government." But these charges generally miss how dramatically the federal government shrank back to its prewar proportions after 1865, and stayed that way for another half-century. Congress, fully as much as the executive branch, filled the role of "big government" during the war: each wartime Congress, the 37th and 38th, each doubled the number of bills passed by the record 27th Congress of 1841–1843.³³

It also needs remembering how comparatively limited Lincoln's early extra-Constitutional wartime gestures were. The original unilateral suspensions of the writ of habeas corpus were only operative in areas of military confrontation; the recruiting and supplying of the armies were submitted to Congress for post facto approval, and, despite the clamor of offended Democrats during the war, wartime arrests and limitations of civil liberties were extraordinarily few, especially by comparison with the Red Scares and wholesale confinement of Japanese-Americans in this century's American wars. And one good measure of Lincoln's cautious constitutionalism is the care with which he strove to justify even these measures. He was meticulous in seeking out legal opinions to support actions as commander in chief as minor as the appointment of a temperance representative as an officer or the remission of a fine imposed on a restaurant owner for selling brandy to a wounded soldier; he rigidly segregated decisions that he believed as commander in chief he needed to take to "best subdue the enemy" from meddling in "the permanent legislative functions of the government."³⁴

Like his Whig predecessors, Lincoln was troubled by any expansion of government built on nothing more than raw executive power. The adoption of measures on the sole ground that "I think the measure politically expedient, and morally right" bothered Lincoln. "Would I not thus give up all footing upon constitution or law? Would I not thus be in the boundless field of absolutism? Would it not lose us . . . the very cause we seek to advance?" And he submitted himself to the most obvious of all tests of constitutionality, the reelection campaign of 1864, which he could easily have suspended by bayonet, but which never seems even to have crossed his mind as a possibility. In fact, his only recorded discussion about a response to an unfavorable electoral verdict was the extraction of a promise from all his cabinet that they would abide by the legal results. As Don Fehrenbacher remarked, "he placed the principle of self-government above even his passion for the Union" and "affirmed his adherence to the most critical and most fragile principle in the democratic process—namely, the requirement of minority submission to majority will."³⁵

It was, in fact, a matter of frustration to the most radical members of Lincoln's own party that he seemed so unwilling to step out from behind the Constitution and deal with the Confederate states as they thought he ought. Despite the clamor of Charles Sumner, Ben Wade, and Zachariah Chandler in Congress, Lincoln never seriously entertained any notion of destroying the identity of the rebel states, and aimed at a speedy reconstruction with those state identities intact. He issued the Emancipation Proclamation only after he had satisfied his own mind that it could be applied strictly as a military measure, under his own authority as commander-in-chief in time of war, and only with strict application to those parts of the Confederacy still in actual rebellion.

Even then, his preface to the Proclamation identified its "object" as "practically restoring the constitutional relation between the United States, and each of the states . . . in which states that relation is, or may be suspended, or disturbed." (He refused, for instance, Salmon Chase's urging to extend the Proclamation to federally occupied parts of Virginia and Louisiana on the grounds that these areas were no longer under his purview as military zones, and that the Proclamation "has no constitutional or legal justification, except as a military measure.") He admitted to Alexander Stephens at the Hampton Roads Conference in February 1865,

that as the proclamation was a war measure and would have effect only from its being an exercise of the war power, as soon as the war ceased, it would be inoperative for the future. It would be held to apply only to such slaves as had come under its operation while it was in active exercise. . . . So far as he was concerned, he should leave it to the courts to decide.

He appeared, as Mark Neely has remarked, "to some antislavery advocates at the time and to many historians since to have been strangely stricken with a paralyzing constitutional scrupulousness." Conscious of his constitutional limitations as president, rather than simply attempt to enforce it by bayonet, Lincoln turned in 1864 to having emancipation, in more sweeping form, written into the Constitution as the Thirteenth Amendment. It is hardly likely that a "dictator," or an egalitarian ideologue who believed that the Declaration of Independence trumped all questions, would even have bothered.³⁶

There is no easy formula for describing the living connection between Lincoln's well-known awe for the Declaration and his restrained constitutionalism. It is doubtful whether he himself had one, at least explicitly, and his best effort at describing it was only a biblical metaphor. He had no constitutional theory as such, if only because he believed that the original intent of the founders was actually quite easy to discover in the text of the Constitution and in the writings of the founders—which, preeminently, included the Declaration of Independence. But he was convinced that such a connection existed, that as the Declaration set out a political ideal for all Americans, the Constitution remained the single greatest vehicle for realizing, implementing, and occasionally restraining that ideal.

This does not make Lincoln, by any stretch of the imagination, into either Kendall's or Wills's closet revolutionary, undermining a Constitution that he resented as an obstacle to either ambition or liberty. Gideon Welles, Lincoln's secretary of the navy and a former Democrat who was keen to scent Republican improprieties, remarked that:

Mr. Lincoln . . . though nominally a Whig in the past, had respect for the Constitution, loved the federal Union, and had a sacred regard for the rights of the States. . . . War two years after secession brought emancipation, but emancipation did not dissolve the Union, consoli-

date the Government, or clothe it with absolute power; nor did it impair the authority and rights which the States had reserved. Emancipation was a necessary, not a revolutionary measure, forced upon the Administration by the secessionists themselves, who insisted that slavery which was local and sectional should be made national.

It is one of the great oddities of modern American life that (as Michael Sandel has written) our political discourse has tended to follow not the path of Lincoln, but the path of Stephen A. Douglas, toward insisting that the Constitution provides only a procedural framework in which morally unencumbered individuals scream in protest at any attempt to "legislate morality." To the extent that Sandel is right, perhaps Abraham Lincoln is a revolutionary after all, for our times, if not for his own.³⁷