LINCOLN'S LESSONS

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Abraham Lincoln's first Message to Congress is his most underappreciated address. Other speeches mattered more in terms of persuading, inspiring, or shaping the course of events. But few explain so clearly and so thoroughly Lincoln's conception of the commonwealth: its legal structure, its place in history, and its distributions and concentrations of power.

At more than 6,000 words, his message was long. It reads like a cross between an academic lecture, an appellate brief, and a religious sermon. And its topics are among those that remain the most divisive and consequential facing our commonwealth today: federalism; race; liberty versus security; executive power; American exceptionalism; and the style of a commonwealth's leader.

In this Article, we use Abraham Lincoln's message, delivered on July 4, 1861, to explore what Kentucky's most famous son thought America meant and should mean with regard to many of his era's most vital issues, as important now as they were then.

I. INTRODUCTION

Who are we? What do we value? When values clash, who decides which prevail? And what do we want from the deciders? These were the expansive questions on the mind of Abraham Lincoln when he authored a message to Congress on July 4, 1861, just three months into our commonwealth's most perilous period.[1] He did not pretend to exhaustively answer each question. Nor do we.

On the surface, Lincoln answered these questions by arguing that we are a single union, not fifty sovereign states; that we must value security before civil liberties; that the President's powers are vast; and that leadership

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[1] President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (transcript available at Internet Archive, https://archive.org/details/lincolnsfirstmes00unit). In keeping with the practice of the era—stretching from Jefferson's administration through Harding's—Lincoln did not appear before Congress. He instead sent a written message.

requires listening. He said that the "States have their status in the Union, and they have no other legal status";[2] that it is better to break one law than to let "the government itself to go to pieces lest that one be violated";[3] and that presidential orders need not be "strictly legal" when supported by "a popular demand and a public necessity."[4] And while forcefully arguing for broad presidential powers and against federalism and habeas corpus, he failed to argue—forcefully or otherwise—against slavery, believing that his audience was not ready to fight a war for emancipation.

But beneath the surface, Lincoln's approach to federalism, civil liberties, presidential power, and leadership are more nuanced. Yes, as a general matter, secession is illegal, but not when the anti-slavery West Virginia seceded from the pro-slavery Virginia. Yes, during an existential emergency, we must value security over liberty, but perhaps the balance shifts when the battle ends. Yes, the President has the power to raise armies and suspend habeas corpus when Congress is absent, but perhaps not when Congress returns, or at least not if Congress repudiates it. And yes, a leader cannot get too far out in front of public opinion, but the best leaders stay just enough ahead of it that they can shape it over time.

Our goals for this Article are modest. We do not pretend to fully explore Lincoln's notion of the commonwealth, or ours. Instead, we want to explore what Lincoln had to say about four specific topics that are important to the commonwealth: the balance required by federalism; the balance between security and liberties; the balance between presidential and congressional power; and the balance for statesmen between listening and leading.

To the extent Lincoln's answers to these questions have a common principle, it is his belief that a commonwealth must balance the need for vision with the need for expediency; the need for principle with the need for pragmatism; the need to dream with the need to survive. His yin-and-yang insight was neither novel nor profound, and we do not agree with every balance he struck—nor do we, for that matter, always agree with each other. But the way Lincoln wrestled with that balance is instructive to a society that still struggles with each of these timeless questions.

II. WHO ARE WE?

When Congress convened in 1861, four months after Lincoln's inauguration and three months after the first shots on Sumter, the President

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[2] *Id.* at 10.
[3] *Id.* at 7.
[4] *Id.*

had some explaining to do. He had exponentially multiplied the size of the Army.[5] He had blockaded Southern ports.[6] He had suspended habeas corpus.[7] He had ordered what would become the Army of the Potomac to move on what would become the Army of Northern Virginia, in what would become the first of two major battles by a creek called Bull Run, and one of ten thousand battles in a war that would make casualties of one of every five Americans eligible to serve.[8] Lincoln had, in short, done more in four months without Congress than any President before had done even with Congress.

As if these practical considerations did not matter enough, they raised abstract questions about the meaning of the nation's revolution, the nature of federalism, and America's place in history. Lincoln believed that persuading Congress and Congress's constituents to see these questions from his perspective would decide, as much or more than any battlefield maneuver, whether the country's promise of freedom could be kept, and how far, to how many, that freedom would reach. These questions had already divided the Union. Lincoln needed to make sure they did not divide what was left of it.

A. One or Fifty?

One of us is an avid fan of *Lawrence of Arabia*, and thinks often of a line near the end of act one.[9] Lawrence is clothed in Arab garb and covered in dirt and sand.[10] He has just walked across the Sinai Peninsula.[11] From across the Suez Canal, a British soldier spots Lawrence and calls out across the distance, loudly and slowly, "Who . . . Are . . . You?"[12] He repeats it.[13] And Lawrence stares blankly, not just because he is too tired to speak, but because for Lawrence the simple question's answer is not simple.[14] Indeed, when the credits roll two hours later, the answer to the question remains unclear.

As a nation—as a commonwealth of fifty states, praying to different gods, tracing our roots to different shores, speaking in dozens of different languages, living in locales as varied as Davenport and Las Vegas, as Lancaster and Los Angeles—we have been asking the same question for

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[5] *See infra* notes 126–28 and accompanying text.

[6] *See infra* note 129 and accompanying text.

[7] *See infra* notes 78–81 and accompanying text.

[8] *Civil War Casualties*, AM. BATTLEFIELD TR., https://www.battlefields.org/learn/articles/civil-war-casualties (last visited Oct. 20, 2018).

[9] LAWRENCE OF ARABIA (Columbia Pictures 1962).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

more than two centuries: Who are we? In a land as diverse as ours with a history as divisive as ours—we have rioted, we have killed, over taxes and race; over religious and regional attachments; over tariffs (tariffs!) in 1832 and again in 1999—how do Americans identify ourselves? How do we make of our story a usable past?

The conflicting answers to this ultimate question lead to wildly different smaller questions that are themselves hardly insignificant. Assume the states can ban sports betting: Can Congress require them to?[15] Assume the states can run background checks on gun buyers: Can Congress make them?[16] Assume the states can set speed limits: Can Congress punish them for setting them too high?[17]

These questions affect more than gamblers who want to quickly buy a gun and drive faster than 55 mph. Their implications extend into our history's most profound political fights about federal power. Assume the states can force individuals to purchase health insurance: Can Congress?[18] Assume the states can criminalize marijuana: Can Congress?[19] Assume the states can require overtime pay and prohibit child labor: Can Congress?[20] Assume the states can outlaw segregated hotels and lunch counters: Can Congress?[21]

We do not need to emphasize the practical importance of these questions, but if you will indulge us: Imagine an African-American traveling through Mississippi. Can he find a hotel that will take him? If he is in a traffic accident, can he afford the hospital bill? Speaking of costs, can he afford the

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[15] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

[16] *See* Printz v. United States, 521 U.S. 898 (1997).

[17] *See* South Dakota v. Dole, 483 U.S. 203 (1987).

[18] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[19] *See* Gonzales v. Raich, 545 U.S. 1 (2005). Just this year, California joined the growing list of states that have legalized the recreational use of marijuana. Erin Barry, *Legalized Marijuana Movement Grows, But Federal Resistance Is Holding the Sector Back: Arcview CEO*, CNBC (Apr. 15, 2018), https://www.cnbc.com/2018/04/15/legalized-pot-movement-grows-but-federal-resistance-holds-it-back.html. Along with California, "8 other states and Washington DC have laws that fully legalize recreational marijuana, [and] 29 states have broadly legalized medical pot." *Id.* However, the federal government stands opposed to those states, and still considers marijuana an illegal Schedule 1 drug with "no medical benefit and a high potential for abuse." *Id.* Former Speaker of the House John Boehner has adopted a federalist position on the issue. "My position is the states, under the 10th Amendment, have the right to create laws for their own citizens. Let the people in these states decide what . . . they want to do." *Id.* While it is still unclear what action, if any, the sitting government will take, some things that it cannot do include using the Spending Clause to coerce states into abandoning legalization. *See Sebelius*, 567 U.S. 519. Further, the federal government cannot commandeer local authorities and force them to enforce federal regulations. *See Printz*, 521 U.S. 898.

[20] *See* United States v. Darby, 312 U.S. 100 (1941).

[21] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); *See* Katzenbach v. McClung, 379 U.S. 294 (1964).

hotel room in the first place? What about the cost of his car? Or gas? Or even a bus ticket?

There was a time of course, within the memories of our parents, when the answer to each of these questions was, for most African-Americans and for many other Americans, no. Hotels were segregated. Health insurance was unaffordable. So was a car. But today, for many millions more than before, the answers are yes, due in part to acts of Congress like the Fair Labor Standards Act (FLSA), the Civil Rights Act, and the Affordable Care Act—laws that have not solved the problems they addressed (laws alone rarely do), but that have begun at least to address them, after bitter debates over the nature of federalism. Those debates have in some instances been largely settled (the FLSA and the Civil Rights Act) and in other instances, among those who see an ominous change in the relation between the central government and the citizen, they still rage (the Affordable Care Act).

We want to be clear: Although we are grateful for the FLSA and the Civil Rights Act, we are also grateful for federalism. They are not mutually exclusive. To value federalism—to embrace laboratories of democracy, local preferences in local matters, proximity and familiarity between the governed and the governors, and easier opportunities for civic participation—is not to reject a national role for national issues, like (in the case of the FLSA) protecting the engine of economic growth that is our nation's middle class, and (in the case of the Civil Rights Act) eradicating de jure apartheid. As Justice Kennedy wrote in 1995: "Federalism was our Nation's own discovery. The founders split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[22] He added:

> The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.[23]

"Genius" or not—and we think it is—the founders' federalism is at the heart of the difficulty in answering the question "Who are we?" Before the Civil War, at a time when people were more likely to say "The United States *are* . . . " than "The United States *is* . . . " the compact theory was fashionable

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[22] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[23] *Id.* at 838–39.

in some quarters. Which quarters, because to be human is to be sometimes a hypocrite, varied by region depending on the issue. When the War of 1812 was unpopular in New England, the theory found favor there.[24] When Lincoln's Republican platform was unpopular in the (white parts of the) South, the theory found followers there.[25]

Under the theory, "the Union was an aggregation of sovereign states formed by a mutual compact; the central government had no independent sources of power, but was solely a creation of the states. The states had both the right of nullification . . . and that of secession . . . ."[26] One proponent of the compact theory was John Calhoun, who like each of us to a degree, consciously or unconsciously, cherry-picked history for a usable past and built a narrative around it. Under his compact theory, "American history . . . was a story of continuous secessions: The thirteen States seceded from the British Empire and then entered into the Confederation; unsatisfied with the Confederacy, nine States seceded from the Confederation and established a new Union by the Constitution."[27] In this narrative, "[t]he Articles of Confederation and the Constitution . . . were both *compacts* among independent sovereigns."[28]

Jefferson Davis, President of the Confederate States of America, looked to the compact theory in his message to the Provisional Congress of the Confederacy on April 29, 1861, a mere two months before Lincoln's special session message. Davis "reasserted the idea that the Constitution of 1789 was 'a *compact between* independent [s]tates,'" a proposition which he found reinforced in the Ninth and Tenth Amendments, "which 'plac[ed] beyond any pretense of doubt the reservation by the [s]tates of all their sovereign rights and powers not expressly delegated to the United States by the Constitution.'"[29]

Alexander Stephens, Vice President of the Confederate States of America, also subscribed to the compact theory. To justify secession, Stephens also looked to the law of nations, which "declared that 'each [s]tate was, in the last resort, the sole judge' of what acts were consistent with those sovereign rights."[30] Stephens "maintain[ed] that it was 'the inherent right of

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[24] Han Liu, *Three Arguments of "Right to Secession" in the Civil War: International Perspectives*, 41 HASTINGS INT'L. & COMP. L. REV. 53, 66–67 (2018).

[25] *Id.* at 76.

[26] *Id.*

[27] *Id.* at 77.

[28] *Id.*

[29] G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 481 (2011).

[30] *Id.*

Nations' to 'disregard the obligations of Compacts of all sorts' when 'there has been a breach of the Compact by the other party or parties.'"[31] In the Confederate view, "Northern states, by refusing to comply with their obligation to return fugitive slaves, had breached the compact with the South, justifying secession."[32] And for a compact theorist like Stephens, "[f]orce may perpetuate a Union. That depends upon the contingencies of war. But such a Union would not be the Union of the Constitution. It would be nothing short of a Consolidated Despotism."[33]

Had Stephens been right, federalism cases would not divide the Supreme Court and drive debates in Congress, for the same reason that if first base were three feet from home plate, there would be no close calls at first. But let us be clear: Stephens was wrong. So were Davis and Calhoun. And perhaps none explained why with a more eloquent narrative of our past than Abraham Lincoln.

Lincoln believed that the states were products of the Union and subservient to it. As Lincoln explained in his July 4th message, "[t]he original [states] passed into the Union even *before* they cast off their British colonial dependence; and the new ones came into the Union directly from a condition of dependence, excepting Texas. And even Texas, in its temporary independence, was never designated a State."[34] As Lincoln further explained, "the 'United Colonies' were declared to be 'free and independent States'; but even then the object plainly was not to declare their independence of *one another* or of the *Union*, but directly the contrary, as their mutual pledge and their mutual action . . . show."[35]

Further, Lincoln held an extreme position on the idea of state sovereignty: that it did not exist. In his message, Lincoln asked Congress "[w]hat is 'sovereignty' in the political sense of the term? Would it be far wrong to define it 'a political community without a political superior'?"[36] His questions, however, were rhetorical. He explained that:

> [N]o one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; . . . The States have their status in the Union, and they have no other legal status. If they break

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[31] *Id.*

[32] *Id.*

[33] Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2056 (2005).

[34] Lincoln, *supra* note 1, at 10 (emphasis added).

[35] *Id.* (emphasis added).

[36] *Id.*

> from this, they can only do so against law and by revolution.[37]

According to Lincoln, "[t]he Union, and not themselves separately, procured their independence and liberty . . . . The Union is older than any of the States, and, in fact, it created them as States."[38]

A hallmark of Lincoln's view on federalism was his selection of specific terminology. Early in his message, he makes his views clear by referring to the Confederacy as "the seceded States, so called . . . ."[39] To Lincoln, the terminology was important, and it encapsulated his point of view. As he explained to Congress, "[i]t might seem, at first thought, to be of little difference whether the present movement at the South be called 'secession' or 'rebellion.' The movers, however, well understand the difference."[40] In Lincoln's view, secession was illegal, and he took the opportunity in his message to paint the Confederates as law-breakers, rather than freedom fighters seeking independence as the American colonies had been. According to Lincoln, the Confederates "knew they could never raise their treason to any respectable magnitude by any name which implies *violation* of law."[41]

He also painted the architects of secession as tricksters. He told Congress, "[t]hey knew their people possessed as much of moral sense, . . . devotion to law and order, and . . . pride in and reverence for the history and government of their common country as any other civilized and patriotic people."[42] As such, "they commenced by an insidious debauching of the public mind. They invented an ingenious sophism which, if conceded, was followed by perfectly logical steps, . . . to the complete destruction of the Union."[43] According to Lincoln:

> [T]hey have been drugging the public mind of their section for more than thirty years, and until at length they have brought many good men to a willingness to take up arms against the government the day *after* some assemblage of men have enacted the farcical pretense of taking their State out of the Union, who could have been brought to no such thing the day *before*.[44]

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 5.
[40] *Id.* at 9.
[41] *Id.* (emphasis added).
[42] *Id.*
[43] *Id.*
[44] *Id.* (emphasis added).

The "sophism" that Lincoln rails against is "that any State of the Union may *consistently* with the National Constitution, and therefore *lawfully* and *peacefully*, withdraw from the Union without the consent of the Union or of any other State."[45] Clearly, Lincoln disagreed. Aside from consistently referring to this notion as a "sophism," he also made clear, in relation to his first previous point about the difference between secession and rebellion, that he viewed the Confederacy as the latter.[46] As he stated to Congress, the Southern theory of secession merely "sugar-coated" what was, according to Lincoln, a rebellion.[47]

In his message, Lincoln explained that "[t]he sophism derives much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a *State*—to each State of our Federal Union."[48] Lincoln, however, did not believe this to be true. "Our States have neither more nor less power than that reserved to them in the Union by the Constitution—no one of them ever having been a State out of the Union."[49]

While Lincoln's message on federalism was clear, his subsequent actions reflected a more nuanced approach to federalism and secession that embraced pragmatism when necessary. And so the Confederacy was not a nation, he said, *except* when it was legally convenient to label their pirates "privateers."[50] Likewise, secession was illegal, he said, *except* when the anti-slavery, pro-union West Virginia seceded from pro-slavery, anti-union Virginia.[51]

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[45] *Id.* (emphasis added).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 9–10 (emphasis added).

[49] *Id.* at 10.

[50] Lincoln told Congress, in his message, that "the insurrectionists announced their purpose to enter upon the practice of privateering." *Id.* at 7. "The term 'privateer' refers both to privately owned ships that fought on behalf of a government and to people who operated those ships. If a man wanted to fight as a privateer on behalf of a government, he would have to . . . obtain a commission, sometimes called a 'letter of marque,' from a duly authorized government officer." David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS L. J. 145, 151–52 (2008). Therefore, Lincoln recognized that a Confederate government existed to empower these Southern privateers.

[51] When Virginia voted to secede, twenty-six delegates, located in the northwestern part of the state, opposed the secession resolution. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 298 (2002). Eventually, the "pro-Union counties declared themselves to be the 'proper authorities' of Virginia." *Id.* at 299. Congress seated legislators from this "new" government, and Lincoln recognized it as the legitimate government of the state. *Id.* at 300. Soon, however, the new state government formed a convention to become a new state, and voters in the northwestern counties ratified a new state constitution. *Id.* at 300–01. Because the Constitution states that "no new State shall be formed or erected within the jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress," *Id.* at 301 (quoting U.S. CONST.

Some might see spin in the July 4th message's rewriting of history, or hypocrisy in Lincoln's subsequent actions. But we see a genius for balancing the nation's principles with the nation's survival—for seeing complementary polarities where others might only have seen competing ones. After all, if you are willing to repudiate a right like habeas corpus in order to secure all other rights (more on that later), you are probably also willing—consciously or subconsciously—to spin a little history. And thank goodness—you do not win a presidential election and a civil war by being a martyr (although after the war was won, Booth made him that too).

But even if Lincoln was right that the compact theorists were wrong (and he was), was he right about why? We are not sure. His version of history goes so far in the opposite direction that it risks throwing the federalist baby out with the compact theorist bathwater. We have no easy answer for America when asked what Lawrence was asked at the Suez. We see no faithful reading of history or the Constitution that denies state sovereignty—or federal sovereignty. Instead we see a yin and a yang, and we suspect the best answer to whether we are one or fifty is that we are both—a reality embraced by the totality of Lincoln's words and actions, if not by either alone. We (desperately) needed the Civil Rights Act of 1964. And we needed the Supreme Court to invalidate Congress's commandeering of the New Jersey state legislature in 2018. And constitutional tug of war over the individual mandate matters in some ways more than the outcome. It is dangerous for the state-federal pendulum to swing too far. But it is necessary for it to swing.

B. Special or Not?

To Lincoln, the Civil War was much more than an American war. If Wilson would later fight "to make the world safe for democracy,"[52] Lincoln fought to make democracy safe for the world. And although he would find more elevated and eloquent words two years later at a cemetery in Gettysburg, even in this early chapter of the war, he saw the American Civil War as one that embraced "more than the fate of these United States. It represents . . . the question whether a constitutional republic or democracy—a government of the people by the same people—can or cannot maintain its

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art. IV, sec. 3, cl. 1), the "restored legislature" of Virginia stepped in and consented to the formation of the new state. *Id.* Thus, West Virginia effectively seceded from Virginia and Lincoln, opponent of secession, signed the West Virginia statehood bill after Congress passed it. *Id.*

[52] President Woodrow Wilson, Joint Address to Congress Leading to a Declaration of War Against Germany (Apr. 2, 1917) (transcript available at the National Archives, https://www.archives.gov/historical-docs/todays-doc/?dod-date=402).

territorial integrity against its own domestic foes."[53] He informed Congress that it "presents the question whether discontented individuals, too few in number to control administration according to organic law . . . can always, upon . . . any . . . pretenses, or arbitrarily without any pretense, break up their government, and thus practically put an end to free government upon the earth."[54] To Lincoln, the struggle to maintain the Union would set a dangerous precedent if he should fail. Defeat for his free government would "practically put an end to free government upon the earth."[55]

One wonders whether Lincoln's vision of American exceptionalism was as controversial in its time as it is today. After all, when Reagan spoke of a "shining city on a hill,"[56] a fair fraction of the country rolled its eyes (although a larger fraction of forty-nine states cast their ballots his way). Generations before Reagan, when Franklin Roosevelt told Americans they had "a rendezvous with destiny," he said it to a nation wedded to isolationism.[57] And a generation after Reagan, from President Obama's so-called apology tour to President Trump's MAGA hats, Americans who believe their country to be great remain divided over whether it was once greater. And whether it is the greatest. And whether it should be.

Time and again, right or wrong, Americans have invoked the notion that we must be an example to the world. In World War I, should we defend democracies around the globe? The world depends on it! When trading with dictatorships, should our foreign policy prioritize human rights? The world needs our leadership! To improve our moral authority during the Cold War, should we end Jim Crow segregation? The world is watching!

To Lincoln, the American experiment meant as much to the world as it did to America, and that insight—or, to skeptics of American exceptionalism, that delusion—was the answer to the ultimate of all wartime questions: Why do we fight? Lincoln said we must fight, we must win, not because *an* experiment in self-government depends on it, but because *the* experiment in self-government depends on it—not just America's experiment, but mankind's experiment.[58] "Our popular Government has often been called an experiment. Two points in it our people have already settled—the successful

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[53] Lincoln, *supra* note 1, at 4–5.

[54] *Id.* at 5.

[55] *Id.*

[56] *See* President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989) (transcript available at The Ronald Reagan Presidential Foundation & Institute, https://www.reaganfoundation.org/media/128652/farewell.pdf).

[57] *See* President Franklin Delano Roosevelt, Acceptance of Nomination for Second Term (June 27, 1936) (transcript available at Teaching American History, teachingamericanhistory.org/library/document/acceptance-of-nomination-for-second-term/).

[58] Lincoln, *supra* note 1, at 14.

establishing and the successful *administering* of it. One still remains—its successful *maintenance* against a formidable internal attempt to overthrow it."[59] And then, in our favorite line of Lincoln's entire message, he explained—more like a political scientist than a politician—

> It is now for them to demonstrate to the world that those who can fairly carry an election can also suppress a rebellion; that ballots are the rightful and peaceful successors of bullets; and that when ballots have fairly and constitutionally decided, there can be no successful appeal back to bullets; . . . [only to] ballots themselves at succeeding elections.[60]

This, Lincoln said, "will be a great lesson of peace: teaching men that what they cannot take by an election, neither can they take it by war; . . . ."[61]

III. WHAT VALUES MATTER MOST

It tells us little about our commonwealth to list our values. It tells us much more when we rank them, and by the time of Lincoln's July 4th message to Congress, events had already required him to rank values in a way that many in his own region, and his own party, severely questioned. While Congress was away, the President had suspended habeas corpus[62]—an ancient right that allows a prisoner to challenge the legality of his detention.[63] And the President had raised an army without congressional authorization.[64] And he had blockaded Southern ports.[65]

Why, many asked, had Lincoln prioritized public safety over individual rights? After all, Benjamin Franklin once said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[66] This was Lincoln's first, best, and perhaps if he failed, last opportunity to explain why he believed Franklin—or at least why the popular misunderstanding of Franklin's quote—was wrong.[67]

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[59] *Id.* (emphasis added).

[60] *Id.*

[61] *Id.*

[62] *See infra* notes 78–81 and accompanying text.

[63] *See infra* notes 68–72 and accompanying text.

[64] *See infra* notes 126–28 and accompanying text.

[65] *See infra* note 129 and accompanying text.

[66] *Ben Franklin's Famous 'Liberty, Safety' Quote Lost Its Context in 21st Century*, NPR (Mar. 2, 2015, 4:15 PM), https://www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century.

[67] *Id.* "It is a quotation that defends the authority of a legislature to govern in the interests of collective security. It means, in context, not quite the opposite of what it's almost always quoted as saying but much closer to the opposite than to the thing that people think it means." *Id.*

And yet here again, we are not convinced that Lincoln actually valued security more than liberty. Rather, when the two were in conflict, Lincoln's prioritization of one over the other depended on a host of considerations, which he expected could and would change over time. Natural law, constitutional text, history, and tradition all mattered, but so did the distance between Washington, D.C. and the nearest Confederate Army. The Lincoln of July 4, 1861, is a Lincoln who embraced the competing and complementary polarities of American values, rejected none of them, and put time-and-space limits on any ranking of values when they were unavoidably in conflict.

In an era when we have seen presidents of both parties endorse the PATRIOT Act, drone strikes on American citizens abroad, and collection of metadata by the National Security Agency, the question of when to prioritize safety over liberty matters more than ever. And because the Supreme Court has held none of those government actions unconstitutional, the best check on excesses is often us—and what values we as a commonwealth choose to prioritize. Lincoln does not tell us what to do on those matters. But the values he weighed—perhaps with wisdom, and perhaps at times in error—are the values we weigh today. And though we may do so with better judgment than Lincoln did, we ought not exercise that judgment until we have considered the many competing interests that mattered to him, and that should matter to us.

A. Habeas Corpus

The writ of habeas corpus grew out of English common law.[68] Originally, the writ evolved from the power of the English King himself.[69] "It is the prerogative of the King to deliver all prisoners upon habeas corpus or to be satisfied that there [is] just cause for their imprisonment. It is the right of the subject to be so delivered and it is the right of the court to deliver them . . . ."[70] The writ was utilized, even by common folk, to protect themselves against overreach and abuse from "those whose authority threatened them most: not the Privy Council, but the justices of the peace and statutory commissioners who lived in their own communities."[71] It provided a means for "the correction of errors of officers, judicial and extra-

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[68] Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575, 594 (2008).

[69] *Id.*

[70] *Id.* (quoting William Williams, Address Before Justices of the Kings Bench (1677)).

[71] *Id.* at 608.

judicial, whenever they wrongly detained one of the king's subjects."[72] As America grew out of English colonies, the founders gathered "against the backdrop of an English history of habeas corpus . . . ."[73] As such, the writ made its way into American legal history and tradition as well.[74] "[T]he legal framework established by the Suspension Clause and the Judiciary Act of 1789 . . . gave the federal courts jurisdiction to entertain writs of habeas corpus . . . ."[75] The Constitution's Suspension Clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[76]

Abraham Lincoln was the first American president to suspend the writ of habeas corpus.[77] His first suspension of the writ came on April 27, 1861, and was designed to protect Washington, D.C. and a military reinforcement route that could be used to supply the capital with troops.[78] His second suspension occurred in May of 1861, when he suspended the writ in Florida.[79] Lincoln enacted another suspension in Florida the next month, this time relating to a specific person: Major William Henry Chase.[80] In July of 1861, the same month as his message to Congress, Lincoln produced another suspension order, this time covering a military line spanning from New York to Washington, D.C.[81] Months later, in October, Lincoln would expand the military line and, thus, the suspension area, to Bangor, Maine.[82] Finally, more than a year after the July 1861 message to Congress, in September of 1862, Lincoln suspended habeas nationwide "in certain kinds of cases"[83] to enforce a provision of the Militia Act of July 17, 1862 that allowed "the secretary of war to draft for nine months the militiamen of states that failed to upgrade their militias."[84]

In July 1861, Lincoln informed Congress that he had authorized "the Commanding General in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus, or, in other words, to arrest and

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[72] *Id.* at 609.

[73] *Id.* at 670.

[74] *Id.*

[75] *Id.* at 671.

[76] U.S. CONST. art. I, § 9, cl. 2.

[77] Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575, 578 (2010).

[78] *See* Eli Palomares, Note, *Illegal Confinement: Presidential Authority to Suspend the Privilege of the Writ of Habeas Corpus During Times of Emergency*, 12 S. CAL. INTERDIS. L. J. 101, 112–13 (2002).

[79] *Id.* at 119.

[80] *Id.* at 120.

[81] *Id.*

[82] *Id.* at 121.

[83] Mark E. Neely, Jr., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 52 (1992).

[84] *Id.*

detain without resort to the ordinary processes and forms of law such individuals as he might deem dangerous to the public safety."[85] Lincoln recognized that his decision was controversial, stating that "the attention of the country has been called to the proposition that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them."[86] Less than a century earlier, Parliament suspended the writ in the colonies during the American Revolution, an act that led George Washington to write "that 'arbitrary imprisonment has received the sanction of British laws by the suspension of the Habeas Corpus Act.'"[87] But, Lincoln was not facing a situation that any president, before or since, has faced. "The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States."[88]

Lincoln provided two justifications for his suspension of the writ. First, he argued that it was necessary and, interestingly, attacked the utility of the writ itself:

> Must [the laws] be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that, practically, it relieves more of the guilty than of the innocent, should to a very limited extent be violated?[89]

The President further clarified his point, asking "are all the laws *but one* to go unexecuted, and the government itself to go to pieces lest that one be violated?"[90]

Second, Lincoln argued that his actions were consistent with the Suspension Clause,[91] which contains the Constitution's reference to the writ. He argued the clause provides "that such privilege may be suspended when, in cases of rebellion or invasion, the public safety *does* require it. It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ . . . ."[92] Lincoln rejected the view that the power to suspend habeas is granted solely to

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[85] Lincoln, *supra* note 1, at 7.

[86] *Id.*

[87] *See* Halliday & White, *supra* note 68, at 649 (quoting The Continental Journal and Weekly Advertiser, Mar. 5, 1778, at 3).

[88] Lincoln, *supra* note 1, at 7.

[89] *Id.*

[90] *Id.* (emphasis added).

[91] U.S. CONST. art. I, § 9, cl. 2.

[92] Lincoln, *supra* note 1, at 8 (emphasis added).

Congress, even though the Suspension Clause appears in Article One of the Constitution.[93] Lincoln said:

> [T]he Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together . . . ."[94]

President Lincoln's decisions to suspend habeas were not without detractors. One notable opponent was Chief Justice Taney. John Merryman, a Maryland state legislator, was arrested by Union soldiers and accused of being a part of a secessionist group that destroyed railroad bridges and telegraph lines.[95] Merryman petitioned for a writ of habeas corpus directly to Chief Justice Taney who, in turn, "issued a writ to General George Cadwalader, . . . to appear before him and to bring Merryman with him."[96] The general instead sent an aide to inform the Chief Justice that he and Merryman would not appear.[97] Taney issued an order of contempt against the general, but the U.S. Marshal carrying the order "was denied entry at the gate of the fort."[98]

Still, Taney issued an opinion on the case, and quickly made known his disagreement with Lincoln's suspension policy.[99] "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, . . . that the privilege of the writ could not be suspended, except by act of congress."[100] Taney based his decision on the Suspension Clause's inclusion in Article One.[101] "This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department."[102] Article Two, which addresses the executive branch, is silent on habeas.[103] "And if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in

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[93] *Id.*

[94] *Id.*

[95] John Yoo, *Lincoln and Habeas: Of Merryman, Milligan, and McCardle*, 12 CHAP. L. REV. 505, 512–13 (2009).

[96] *Id.* at 513.

[97] *Id.* at 514.

[98] *Id.*

[99] *See* Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861).

[100] *Id.* at 148.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 149.

it that can furnish the slightest ground to justify the exercise of the power."[104] Despite Taney's opinion, "[t]he administration continued the system of military detentions."[105]

Chief Justice Taney was not the only member of the judicial branch to weigh in on Lincoln's suspension of habeas and military tribunals. Clement Vallandigham was a former representative and, "at the time of his arrest, a candidate for the Democratic nomination for Governor" of Ohio.[106] The former congressman was arrested and tried by the Union army for making speeches that "stir[red] up men against the prosecution of the war . . . ."[107] Vallandigham petitioned the Supreme Court for habeas corpus, but the Court declined to grant certiorari to review a conviction and imprisonment by a military commission.[108] The Court found that military commissions are not "in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789."[109] The Supreme Court found that its authority to grant habeas was "appellative," and the commission had a "special authority" that the Court could not examine.[110] As a result, the Court held that "there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus* . . . or the writ of certiorari to revise the proceedings of a military commission."[111]

The Court, however, quickly changed its course after *Vallandigham.* Lambdin Milligan, an Indiana lawyer and failed politician, entered into a conspiracy with others to plan attacks on the Union, but never carried them out.[112] Instead, Milligan and some co-conspirators were caught by Union officers and sentenced to death by a military commission.[113] Milligan filed a habeas petition and, nearly a year after Lincoln's death, the case was argued before the Supreme Court.[114] The Court ordered the release of Milligan, and held:

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[104] *Id.*

[105] Yoo, *supra* note 95, at 518.

[106] Abraham Lincoln, *The Case of Vallandigham.; Reply of President Lincoln to the Ohio Committee. Washington, D.C., June 29, 1863.*, N. Y. TIMES (July 7, 1863), https://www.nytimes.com/1863/07/07/archives/the-case-of-vallandigham-reply-of-president-lincoln-to-the-ohio.html.

[107] *Id.*

[108] Ex parte Vallandigham, 68 U.S. 243 (1864).

[109] *Id.* at 251.

[110] *Id.* at 253.

[111] *Id.*

[112] Yoo, *supra* note 95, at 522.

[113] *Id.* at 522–23.

[114] *Id.* at 524–25.

> [T]ribunals had no jurisdiction over a citizen who was not a resident of one of the rebellious states, not a prisoner of war, and not in the armed forces of the Confederacy or the Union. The law of war . . . held no sway over 'citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.'[115]

The Court found that the Constitution "does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by use of direct words to have accomplished it."[116]

The D.C. Circuit also attempted to address habeas during the Civil War but, like Chief Justice Taney, it was unsuccessful. Unlike Taney, however, the Lincoln Administration did not simply ignore the court's opinions. Judge William Merrick held that "habeas corpus could issue against the Army to secure the release of minors who enlisted without their parents' consent."[117] When he tried again in a similar case two weeks later, Lincoln "ordered the Army not to comply with the judicial process. He further ordered the Comptroller General not to pay the salaries of the three judges, and he sent an armed sentry to stand guard outside Judge Merrick's house."[118] While Judge Merrick believed that he was under house arrest, his colleagues ordered the Provost Marshal of D.C. "to show cause why he should not be held in contempt for these actions against Judge Merrick."[119] Lincoln again responded, sending "Army officials to the court to announce that he had suspended the writ of habeas corpus in the District of Columbia. The court questioned whether Lincoln had the authority . . . but they concluded in the face of military authority there was nothing more that they could do . . . ."[120] Even though the court considered the case closed, Lincoln and the Republican Congress "abolished the court and terminated the judgeships, creating in the place of the abolished court a new court called the Supreme Court of the District of Columbia."[121]

Lincoln seemed to expect a response from the Legislative Branch as well.[122] "Whether there shall be any legislation upon the subject, and if any,

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[115] *Id.* at 525–26 (quoting Ex parte Milligan, 71 U.S. 2, 121 (1866)).

[116] Ex parte Milligan, 71 U.S. 2, 126 (1866).

[117] Chief Justice John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 382 (2006).

[118] *Id.*

[119] *Id.* at 382–83.

[120] *Id.* at 383.

[121] *Id.*

[122] Lincoln, *supra* note 1, at 8.

what, is submitted entirely to the better judgment of Congress."[123] Congress did respond, albeit two years later, by enacting the Habeas Corpus Act of 1863.[124] "Lincoln's unilateral orders were still in effect . . . and even those congressmen protective of legislative power . . . were careful to avoid the appearance of reprimanding Lincoln while . . . at war. The statute was therefore deliberately drafted so that it could be read either as authorizing Lincoln to act or approving what he had already done."[125]

B. Other Measures "Whether Strictly Legal or Not"

The unilateral suspension of habeas corpus was not Lincoln's only executive action in defense of security and at the expense of civil liberties. By July 1861, Lincoln had vastly and unilaterally expanded the size of the federal military forces, beginning with a call for 75,000 militia,[126] and soon following with a call "for volunteers to serve three years, unless sooner discharged, and also for large additions to the Regular Army and Navy."[127] Congress had appropriated money for the support of none of these troops, nor had it allocated funds for the secret expenditures Lincoln made to private parties to raise troops.[128] And then, again without congressional authorization, Lincoln instituted a naval blockade of Southern ports.[129]

Lincoln looked to his own understanding of the Constitution to formulate his view of presidential power. "Lincoln defended his actions by arguing that the Commander in Chief Clause, when read in conjunction with the Take Care Clause, conveyed upon him the 'war power,' which empowered him to take the sweeping actions that he did."[130] In his message, Lincoln called upon this special power, informing Congress that "no choice was left but to call out the war power of the government; and so to resist the force employed for its destruction, by force for its preservation."[131]

Nevertheless, even Lincoln himself seemed to view his newfound power as a necessary but last resort. He stated, in his message, that "[i]t was with the deepest regret that the executive found the duty of employing the war

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[123] *Id.*

[124] Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 263 (2014).

[125] *Id.* at 263–64.

[126] Lincoln, *supra* note 1, at 6.

[127] *Id.*

[128] *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--A Constitutional History*, 121 HARV. L. REV. 941, 997–1003 (2008).

[129] *Id.* at 997–98.

[130] Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 725 (2003) (quoting Lincoln, *supra* note 1, at 15).

[131] Lincoln, *supra* note 1, at 5.

power in defense of the government forced upon him. He could but perform this duty or surrender the existence of the government."[132] He told Congress that "[t]hese measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand and a public necessity; trusting then, as now, that Congress would readily ratify them."[133]

Here again, we see that Lincoln's assertion of executive power was more nuanced than it appears on first impression. Lincoln is not asserting what we now call a *Youngstown* category three power—the power to override an existing congressional regulation.[134] In fact, Lincoln likely called Congress back into session in July 1861 precisely so that it could decide whether to ratify his unilateral actions. And he may have waited *until* July—eighty days after his inauguration—in part "because that was the earliest period by which, under its laws, the border state about which he cared most—Kentucky—could select a new slate of members to sit in the Congress that Lincoln hoped would ratify all he had done."[135] According to Judge David Barron, "in that period of time, Lincoln is monitoring very closely the coming elections in Kentucky, to make sure that he gets a slate that's going to be on board for his program."[136] By July, Lincoln "had good reason to believe Congress would ratify most of his decisions. And one month later, Congress did just that, as to virtually all of Lincoln's unilateral conduct *other than* the suspension of the habeas writ, which it did not address until 1863 . . . ."[137]

We do not necessarily agree with all of Lincoln's executive actions. But Lincoln's assertion of unilateral powers, balanced by his invitation for Congress to ratify his conduct, shows a leader able to walk and chew gum. He did not lose sight of the forest (the Constitution; civil liberties; Congress's role) even when a couple trees were on fire (which necessitates emergency, unilateral measures, and the suspension of important civil liberties like habeas corpus).

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[132] *Id.* at 15.

[133] *Id.* at 7.

[134] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[135] David J. Barron, *When Congress and the Commander in Chief Clash Over War*, MARQ. LAWYER, Fall 2018, at 9, 14.

[136] *Id.*

[137] Barron & Lederman, *supra* note 128, at 1003 (emphasis added).

IV. LEADING AND LISTENING

There is a great scene in *The West Wing* about a lame-duck Congress.[138] A congressional ally of the President has lost his re-election bid, and he views his defeat as a sort of anti-mandate: rather than voting with the President whose treaty he supports but his constituents rejected, he abstains.[139] "I'm a Senator for another ten weeks," he tells Toby, "and I'm going to choose to respect these people and what they want."[140] Toby later quotes Edmond Burke: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."[141]

What do we want of the men and women we elect? For them to listen? Or for them to lead? If we were subjects under an absolute monarchy, or nearly any one of world history's governments that preceded our own, we would not expect our leaders to do a lot of listening. But if we were a pure democracy, a nation whose government was designed to always and everywhere represent the exact will of the people, we would not have a Senate. Or an Electoral College. Or a Bill of Rights.

On this question of whether rulers should listen or lead, Lincoln's answer was . . . "Yes." He listened and he led. He carefully avoided putting himself too far ahead of public opinion. But he made sure to stay a step ahead of it. On the greatest issue of his age, he pulled his electorate along with a bold incrementalism, which would seem like a contradiction in terms if Lincoln's career was not a model of making it work—making democracy work, not always steadily and not always slowly, but usually both, and always in the direction he desired, on a journey that began for him with an opposition to slavery's expansion, and ended with its abolition.

In his 1861 message to Congress, Lincoln made hardly a mention of race or slavery. Instead, he simply made a passing reference to "the States commonly called slave States," of which none but "Delaware, gave a regiment through regular State organization" when the Union militias were called upon.[142] There was little in his words to indicate that he would one day be remembered as the Great Emancipator. To the contrary, he seemed more worried about the effect of secession on creditors than slaves.[143] Lincoln stated that "[t]he nation purchased with money the countries out of

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[138] *The West Wing: The Lame Duck Congress* (NBC television broadcast Nov. 8, 2000).
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] Lincoln, *supra* note 1, at 5.
[143] *Id.*

which several of these States were formed."[144] Specifically, he mentioned "very large sums . . . to relieve Florida of the aboriginal tribes" and that "part of the present national debt was contracted to pay the old debts of Texas."[145] He asked Congress, "Is it just that they shall go off without leave and without refunding? . . . Is this quite just to creditors?"[146]

But do not be fooled. Lincoln knew his audience. The majority of Northerners were not ready to fight a civil war for black slaves. And as Lincoln had done in the years before his election, and as he would do for the four years and one month of his presidency, Lincoln picked his battles, varied his rhetoric, and adapted his policies in the service of one who abhorred the institution of slavery, but who was relying on a less enlightened electorate as his only instrument in dismantling that institution.

Lincoln's hatred of slavery sprung from his belief "that no man is good enough to govern another man, *without that other's consent.*"[147] He called this "the leading principle . . . of American republicanism."[148] In his debates against Stephen Douglas, he said, "Our Declaration of Independence says: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed . . . with certain inalienable rights,'" and to protect those rights, governments are created which only derive their power "from the consent of the governed."[149] Slavery, to Lincoln, was an affront to the primary concept that the country was founded upon: liberty. He opposed the Nebraska Bill "because it assumes that there can be moral right in the enslaving of one man by another. I object to it as a dangerous dalliance for a free people–a sad evidence that, feeling prosperity, we forget right–that liberty, as a principle, we have ceased to revere."[150]

Lincoln echoed these sentiments privately as well. In an 1855 letter to a friend, Lincoln complained that "[o]ur progress in degeneracy appears to me to be pretty rapid."[151] He continued to write that "[a]s a nation, we began by declaring that '*all men are created equal.*' We now practically read it '*all men are created equal except negroes.*' When the Know-Nothings . . . get control, it will read 'all men are created equal except negroes, *and foreigners,*

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[144] *Id.*

[145] *Id.* at 11.

[146] *Id.*

[147] George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 VAL. U. L. REV. 39, 44 (2000).

[148] *Id.* at 45.

[149] *Id.*

[150] *Id.* at 46.

[151] Brian Dirck, *Lincoln's Kentucky Childhood and Race*, 106 REGISTER OF THE KY. HIST. SOCIETY 307, 308 (2008).

and catholics.'"[152] Lincoln summed up his personal feelings on the matter with a bit of sarcasm. "When it comes to this I should prefer emigrating to some country where they make no pretense of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy."[153]

Lincoln opposed slavery for other reasons as well. One of his chief reasons relates to economic freedom and the idea of a natural law. Lincoln wrote "that 'all *feel* and *understand*' the most fundamental aspect of the relation of a slave to his or her master: '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.'"[154] Lincoln felt that it was only natural that a person keeps the fruits of his labor. As he explained, "this is 'so plain, that the most dumb and stupid slave that ever toiled for a master, does constantly *know* that he is wronged.'"[155] But to Lincoln, slavery was not only harmful to slaves. Regarding slavery, Lincoln said in an 1854 speech:

> [L]et us beware, lest we 'cancel and tear to pieces' even the white man's charter of freedom. Slavery hurts the Negro most certainly, he is saying, but it hurts the white man, too, by trampling all over the implicit premise of the Declaration and the Constitution, that of equal economic opportunity.[156]

Before we explore how Lincoln listened to his electorate and led them over time on the issue of slavery, let us be clear about what Lincoln did *not* do. He did not single-handedly free the slaves: at the top of the list of people most responsible for emancipation were the emancipated—when the Civil War ended with black soldiers constituting one out of every four ranks of the Union Army's lines,[157] it was pretty clear that white Americans, including Lincoln, were not the only, or even the primary, reason Jefferson Davis was not still in Richmond's Confederate White House.

And let us also be clear about Lincoln's views on race: They stunk. True, they were not as bad as Davis's. Or Lee's. Or most white Southerners'. Or a lot of white Northerners'. But in his first debate with Stephen Douglas,

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[152] *Id.*

[153] *Id.*

[154] LINCOLN ON RACE & SLAVERY xxx (Robert Louis Gates, Jr. & Donald Yacovone eds., 2009).

[155] *Id.*

[156] *Id.*

[157] *Civil War Facts*, NAT'L PARK SERV., https://www.nps.gov/civilwar/facts.htm (last visited Oct. 20, 2018). "By the end of the war, almost 200,000 black soldiers and sailors" joined the ranks of the Union armed forces. *The Emancipation Proclamation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation (last visited June 10, 2018).

Lincoln stated, "There are physical differences between the two [races], which . . . will probably forever forbid their living together . . . [in] perfect equality, and . . . [if] there must be a difference, I . . . am in favor of the race to which I belong, having the superior position."[158]

So if Lincoln did not believe in equality, what did he believe in? Our theory—and we think the evidence is strong but not decisive—is that he believed slavery should be abolished as soon as possible. And our theory is that he pursued that policy throughout his career not by consistently proposing abolition—which would have guaranteed he would remain a Springfield lawyer—but by pulling the public in that direction. Lincoln calculated, we hypothesize, that he could use the public as his instrument if he stayed one incremental step ahead of public opinion, persuaded them to take that step, and then another, and then another.

Consider the timeline of his positions on slavery. In 1858, he proposed a halt to slavery's expansion; his Illinois electorate was not with him, and so Douglas beat him in the Senate race.[159] Then, in 1860, he made the same proposal to the nation; but the electorate again was not with him, and so he lost 60% of the popular vote (although winning a majority of the Electoral College).[160] Then, in July 1862, he proposed the Emancipation Proclamation to his Cabinet, which would promise freedom only to slaves in territories occupied by Confederate authorities;[161] and yet again the Northern public was not ready for it, as evidenced by Seward's suggestion that Lincoln better wait until a Union military victory, lest the public view the proclamation as an act of desperation.[162] By July 1864, it appeared Lincoln was still ahead of the public opinion curve, since he was expected to lose the presidential election to a pro-slavery Democrat (George McClellan),[163] an outcome that only changed later, after Sherman turned the tide of the war by taking Atlanta.

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[158] John Sexton, *On Lincoln's "Pragmatism,"* 2 AM. POL. THOUGHT 89, 95 (2013).

[159] *Id.* at 105.

[160] Anastaplo, *supra* note 147, at 39.

[161] "The proclamation declared that 'all persons held as slaves' within the rebellious states 'are, and henceforth shall be free.'" *The Emancipation Proclamation*, *supra* note 157. In other words, "[i]t applied only to states that had seceded from the United States, leaving slavery untouched in the loyal border states. It also expressly exempted parts of the Confederacy . . . that had already come under Northern control." *Id.*

[162] In the midst of this political chess match, Lincoln floated, with what level of sincerity remains unclear, proposals to colonize emancipated slaves overseas. He asked Congress for money to relocate freed slaves in his first annual message to Congress, supported diplomatic recognition of Liberia and Haiti, and in 1862, even sought to meet with a delegation of five black men to discuss their eventual leadership of a colonization plan in South America. LINCOLN ON RACE & SLAVERY, *supra* note 154, at xxxiii–iv.

[163] *See* Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J.L. & PUB. POL'Y 59, 64 (2017).

Only after Atlanta did Lincoln endorse the Thirteenth Amendment, which still only barely passed the House of Representatives in January of 1865, months after Lincoln's endorsement and on the eve of what, by 1865, appeared a near-certain Union victory in the war.[164] The likelihood that he was still an incremental step ahead of public opinion is suggested by his efforts to pressure the House into passing the amendment.[165] After his reelection, "Lincoln declared that the 'voice of the people' had been heard and called on the House to vote again on the amendment. Lincoln threw his support to the endeavor, intervening more directly in the legislative process than at any other point in his presidency."[166] He put pressure on representatives from border states and "authorized [the] Speaker of the House . . . to announce that if the amendment failed again, the President would call a special session of the next Congress in March, as soon as the current one expired."[167]

At each step, Lincoln was ahead of public opinion. And at each step, he was using all his powers, from the bully pulpit to the battlefield, to pull the public along at a pace that was far from fast, but that may well have been as fast as was politically possible. To be sure, this was not as fast as it *should* have been. But in a democracy where leaders who do not listen often do not have the political capital to lead at all, this may well have been as fast as it *could* have been. And even if it was not, our point is that Lincoln likely believed it was—and answered the question of whether to listen or lead by doing quite a bit of both. In a commonwealth that is neither a dictatorship (thank goodness) nor a pure democracy, that may be exactly what those we elect should do—depending on the time, the topic, and the temperature of we the people. Leadership requires a statesman who can lead and listen at the same time—who sees those two endeavors as complementary more than competing.

V. FINAL THOUGHTS

To understate the obvious, we feel comfortable saying Lincoln got more than a few things right. For example, as a general matter, secession was unlawful. And his blockade was not. And there are limits to a politician's political capital.

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[164] *See id.* at 66–67.
[165] *See id.* at 66.
[166] *Id.*
[167] *Id.*

We are also comfortable saying that Lincoln occasionally erred. We are not sure the President can suspend habeas corpus, at least not while Congress is in session. We are not convinced Lincoln's founding-era narrative is fool-proof. And we of course disagree with his belief that any race is superior to any other.

But as for the precise definitions of federal power, or the perfect balancing of liberty and security, or the fine line between representing the led and leading the represented, we do not claim to have the answers, and we do not think Lincoln did either.

What we do believe is that an inquiry into these questions could start at a worse place than Lincoln's first Message to Congress. The arguments he made deserve careful consideration, not because they are perfect but because they inform; not because they persuade, but because they illuminate a journey of discovery each American must travel with his or her own compass. The progress of our commonwealth does not depend on perfect answers. It requires only that with humility and good faith, with one eye on yesterday's tutors and the other on tomorrow's possibilities, every citizen continues asking the questions that demanded the attention of history's wisest President: our Commonwealth's favorite son, who put pen to paper and explained as best he could—when many wondered who we could be, what we should value, and why we must fight—a little bit about the nature of Abraham Lincoln's commonwealth.