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INTRODUCTION LINCOLN'S DIVIDED HOUSE: THE CONSTITUTION AND THE UNION

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In 1858, Abraham Lincoln accepted the nomination of the Republican Party in Illinois to run for the Senate. In his acceptance speech, commonly referred to as his "House Divided" speech, Lincoln addressed the slavery issue that was dividing the country. He said:

In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed. "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved* – I do not expect the house to *fall* – but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other.¹

* Professor of History and Lincoln historian, Lincoln Memorial University. Thank you to my fellow participants in the Symposium for their comments and questions during the Lincoln Memorial University Duncan School of Law's inaugural Symposium *Navigating the Political Divide: Lessons from Lincoln*. I would also like to express my appreciation to Sydney A. Beckman, Vice President, Dean and Professor of Law, and the *Law Review* for hosting such an event.

¹ Abraham Lincoln, "A House Divided," Speech at Springfield, Illinois (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

This was certainly a radical statement in the context of the political environment that existed in the 1850s. Some Lincoln scholars have suggested that because the audience was a friendly Republican group, Lincoln wanted to see how his fellow Republicans would respond to his position on slavery and its expansion into the territories.

Lincoln's remarks were a response, at least in part, to the 1856 decision by the Supreme Court in *Dred Scott v. Sanford*, more commonly known as the *Dred Scott* case.² Chief Justice Roger Taney, in his majority opinion, went beyond the basic question for the Court and determined that Dred Scott was a slave and therefore a non-citizen, not entitled to the protection of the law.³ Slaves were property according to Taney's ruling and could be transported anywhere in the country, including the territories.⁴ Further, slaves were considered property for which their owners were entitled to the protection of the law.⁵ The Court's decision effectively negated the Missouri Compromise of 1820 and most of the provisions of the Compromise of 1850.⁶ As a result, slavery was constitutional and legal throughout the country. Lincoln disagreed with the Supreme Court ruling, but he respected the Court's authority and believed the appropriate response was to bring another case to the Supreme Court that would reverse the *Dred Scott* decision.⁷

The *Dred Scott* case was fraught with political implications dating back to 1852 when the Missouri Supreme Court first rendered its decision.⁸ President James Buchanan went so far as to pressure a Democratic Chief Justice Taney to delay issuing his opinion until after

² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

³ *Id.* at 404-05.

⁴ *Id.* at 451.

⁵ *Id.* at 451-52.

⁶ *Id.* at 452.

⁷ See ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 200 (Simon & Schuster 2004).

⁸ See *Scott v. Emerson*, 15 Mo. 576 (1852).

the 1856 election.⁹ This case and similar other cases in the Court's politicized judicial system focused national attention on the slavery issue that would ultimately divide the nation as Lincoln predicted in his "House Divided" speech.¹⁰

After securing the Republican nomination to run for the Senate, Lincoln expected to place the question of the expansion of slavery into the territories squarely in front of the people of Illinois in the forthcoming political debate with his opponent, Stephen Douglas. Lincoln had repeatedly acknowledged his hatred of the institution of slavery, but his commitment to the rule of law prevented him from any formal association with the radical abolitionist movement. Lincoln wanted to project the image of a moderate opposed to the expansion of slavery but allowing it to continue where it already existed.

The country was indeed divided, and it was slavery that called attention to the larger fundamental problems associated with democracy in a federal republic. In a federal system, the power to govern is defused and divided between local governments and the central government. Could the branches of government, as provided by the Constitution, resolve the question of slavery through compromise? Further, was it a local matter or one to be decided at the national level? Throughout the history of the Republic, numerous compromises on slavery had been suggested and tried. However, none of the compromises that were put in place completely resolved the problem.

Most Americans on both sides of the divide were indifferent or at least tolerant of slavery in the states where it existed. During the antebellum period, each state decided for itself whether slavery was legal in that particular state. But what about the territories that

⁹ See Sarah Schultz, Note, *Misconduct or Judicial Discretion: A Question of Judicial Ethics in the Connecticut Supreme Court*, 40 CONN. L. REV. 549, 567 n.130 (2007).

¹⁰ See JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 98-132 (Simon & Schuster 2006), for a detailed analysis of the *Dred Scott* case.

expected at some point to become states? Was it the responsibility of the federal government to regulate and govern the territories before they were admitted as states to the Union? If so, should the federal government allow slavery within its jurisdiction? The Supreme Court in the *Dred Scott* case effectively ruled that slavery was legal throughout the country, including the territories. The issue was vigorously debated during the campaign for the Senate between Abraham Lincoln and Stephen Douglas. Lincoln's position and that of Douglas identified the issue that defined the presidential election campaign of 1860.

The American people and their political parties struggled to identify and select candidates that represented their position. The 1860 presidential election provided an opportunity for the people to express their opinion on the slavery issue. In the northern free states, there was an enthusiastic and vocal abolitionist minority. In the slave states of the Deep South, a radical minority inflamed the passions of both the slaveholders and non-slaveholders. Both the Democratic and Republican parties were further divided into factions. The newly formed Republican Party included German immigrants, former Whig protectionists, moderates with strong nationalistic tendencies, and, of course, the abolitionists. The Democratic Party separated along geographical lines into northern and southern wings. As the election grew closer, the southern wing split into three separate factions. Eventually, the Democrats would splinter up and run three candidates for President. The Republicans managed to remain a united but sectional party with little or no support in the slave states.

This very fragile coalition of Republicans managed to elect Abraham Lincoln as President. Lincoln was the consummate politician and strongly believed in party unity. For Lincoln, it was political parties that provided opportunities for the people to voice their opinions on the great issues of the day. As President, he used political patronage and some controversial cabinet appointments to unite the Republican Party. It was Lincoln's hope, at the start of his presidency, that the people's elected officials could hold the country together.

Almost immediately after Lincoln was elected President, the southern slave states, led by South Carolina, chose to secede from the Union and create a slaveholders republic called the Confederate States of America. The secession of the southern states created the greatest constitutional crisis in American history. Southerners believed that the future of slavery and much of their cultural and economic identity was threatened by President Lincoln and the so-called "Black Republicans." It was Lincoln's election and the perceived threat he posed to slavery that provoked Southerners to withdraw from the Union. However, for Lincoln, the breakup of the Union identified a larger threat not only for Americans but for all mankind. That threat was whether a government of the people, by the people, and for the people, could endure. Secession in Lincoln's view was a clear and fundamental threat to democracy.

Paradoxically, the potential threat to democracy lies within the strength of the system. Majority control of the system is both its strength and major weakness. Democracy's strength is found in the unity of the majority. The problem for democracy develops when the majority refuses to accommodate and protect the rights of the minority. The problem is further exacerbated when the minority refuses to accept the will of the majority.

This frustrating dilemma and potential flaw continues to plague advocates for self-determination grounded in the democratic system of majority rule. The concept of tyranny by the majority is generally associated with Alexis de Tocqueville, the French political philosopher and historian of the early nineteenth century.¹¹ However, the problems associated with democratic rule were not lost on those who drafted the Constitution of the United States. In the late eighteenth century, John Adams identified the problem and pointed out several ways that the Founders of the United States sought to address and eliminate the potential breakdown of democratic rule.¹²

¹¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).

¹² See 1 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* (Philadelphia, William Cobbett 1797).

This issue was also discussed by James Madison in *The Federalist No. 10* in which Madison recognized that “the superior force of an interested and overbearing majority” might encroach on the personal liberties and freedoms of the minority.¹³ Just before the presidential election of 1860, the British political thinker John Stuart Mill argued for a limited representative government instead of pure democracy in his book, *On Liberty*.¹⁴

As John Adams pointed out during the early development, the Constitution provided a number of mechanisms to avoid the potential pitfalls of tyrannical rule by the majority; for example, constitutional limits on the branches of government such as the separation of powers, supermajority rules of the legislature, and the Bill of Rights, to name a few. All these, argued Adams and other supporters of American constitutional government, would enable the United States of America to have democracy with adequate protection for personal liberty and freedom for all citizens, including dissenting minorities.

Despite these protections, in 1860, a large and determined minority felt threatened by the majority and decided to break up the union of states. The secession crisis that confronted Lincoln was not only a threat to the country, but it signaled potentially the end of American democracy. To solve this crisis, Lincoln first needed to effectively persuade Americans that secession was a threat to democracy and, second, to convince the people that the system was sufficient to address the problem.

Abraham Lincoln certainly possessed the persuasive skills to motivate the people to save the Union and democracy without resorting to violence. No President, except possibly Thomas Jefferson, was such an acknowledged literary genius and communicator. Lincoln is arguably the finest of wordsmiths, and his words, as much as anything about him, justified Edwin Stanton’s

¹³ THE FEDERALIST NO. 10, at 77 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966).

¹⁴ See JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

comment upon Lincoln's death that "[n]ow he belongs to the ages."¹⁵ With this lamentation, Stanton made Lincoln's words an integral part of American political rhetoric for the ages. Among America's most famous speeches, Lincoln's Gettysburg Address is considered by most historians and political philosophers as the supreme statement of the meaning of American democracy and civil society. Despite the tragedy of the Civil War, Lincoln never lost faith in democracy and the American people.

From the start of his presidency, Lincoln had "a patient confidence in the ultimate justice of the people."¹⁶ With this statement, Lincoln was referring to a government by the people and was certain "that truth, and that justice, will surely prevail, by the judgment of this great tribunal, the American people."¹⁷ With these and numerous other statements, Lincoln must be assured his place as the most eloquent spokesman for American democracy.

Lincoln wanted to maintain the Union and convince the American people to support the political system and the institution provided by the Constitution, but he could not allow secession. The bitterness caused by the American Civil War with all its hatred and deprivation, while not lost on Lincoln, did not prevent him from seeking the reconciliation and unification of all Americans. It is difficult to imagine that any American would not be moved by Lincoln's words in his Second Inaugural Address when he said:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—

¹⁵ DAVID HERBERT DONALD, *LINCOLN* 599 (Simon & Schuster 1995).

¹⁶ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *COLLECTED WORKS*, *supra* note 1, at 262, 270, *quoted in* DAVID DONALD, *LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA* 142 (Alfred A. Knopf 2d ed. 1966).

¹⁷ *See id.*

to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.¹⁸

More than a century later, these words continue to illuminate our lives and our commitment to Lincoln's vision of forgiveness, reconciliation, and empathetic understanding for our fellow countrymen. Generations of Americans have accepted Lincoln's vision, and that shared commitment has sustained American democratic principles.

Ultimately, the secession of the southern slave states threatened the existence of constitutional democracy. Lincoln was correct when he predicted that a country could not endure permanently divided against itself. Despite the efforts of members of Congress and leading politicians to reach a compromise on the slavery issue, the house divided, and the war came in April of 1861. Lincoln believed that secession was unconstitutional. As President he had taken a solemn and sacred oath to uphold and defend the Constitution, and, with that commitment, he was prepared to defend the democratic principles of a government that vested political power in the electorate.

This is not to say that Lincoln was intolerant of dissent. He expected, and even appreciated, different positions and points of view. Lincoln believed in, and was committed to, political party activism and saw politics and politicians as the best means to implement the will of the majority of the people.¹⁹ In Lincoln's view, it was the responsibility of those seeking to represent the people to understand and be informed about the issues that confronted the people. Lincoln wanted to persuade and convince the people that his ideas and solutions to the problems they confronted were the best available. If he was successful in persuading them to agree with his

¹⁸ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 8 COLLECTED WORKS, *supra* note 1, at 332, 333.

¹⁹ See Abraham Lincoln, Circular from Whig Committee (Mar. 4, 1843), in 1 COMPLETE WORKS OF ABRAHAM LINCOLN 72 (John G. Nicolay & John Hay eds., 1920), where Lincoln explains in some detail his position on party loyalty.

position, the people would vote for him, and he could present and argue for their political agenda. Politicians in the mid-nineteenth century and even today frequently seek to tell the electorate what they want to hear without attempting to persuade voters to accept different points of view. Lincoln managed to persuade the people to agree with him and, therefore, vote for him rather than simply telling them what they wanted to hear. This position may seem a bit simplistic but it was remarkably sophisticated in its application in the nineteenth century and may be too sophisticated for modern politicians who tend to rely on polling data to determine what they should say to their constituents. Lincoln was a politician, and politics was his lifelong passion. He wanted to use the political system to make a difference for the greater good.

Lincoln was unable, despite his remarkable persuasive skills, to convince the secessionist in the South to remain loyal to the Union. In 1860, the experiment in popular republican government that began in Philadelphia was now confronted with the prospect of complete failure. As much as anything, the election of Abraham Lincoln in November triggered the potential breakup of the Union. The question before Lincoln and the country after his inauguration was whether a democracy could exist with a strong and militant minority that refused to submit to the will of the majority. Therein was the threat to democracy and popular government.

Lincoln rejected the Southern argument that they were fighting for self-government. The Southern position was based on the refined positions taken by John C. Calhoun and, before him, Jefferson and Madison. The Southern position was that the states had voluntarily entered the Union and temporarily surrendered part of their sovereign authority to the central government. Based on that premise, each state could withdraw from the Union when its local interest was threatened by continued participation in the union of states. The secessionist referred to the revolutionary responsibility of the people to overthrow an oppressive government. Americans, including Southerners, relied on the philosophy of John Locke to legitimize the American Revolution and separate from the oppressive

government of Great Britain. For Southerners, similar oppressions existed and it was their moral obligation to conduct a legitimate revolution to obtain independence and form a new government.²⁰

Lincoln argued that the purpose of secession was first to create a government that protected the institution of slavery. He said in his First Inaugural Address:

If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. 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.²¹

With this statement, Lincoln was simply saying that no constitutional right of any citizen or group of citizens had been encroached upon. Thus, there was no legitimate justification for revolution and secession was nothing more than a violent rebellion.

Lincoln concluded that secession was unconstitutional and therefore unlawful. The President was convinced that if the country was allowed to break up, the world would lose “the last best, hope of earth.”²² This hope was popular government; one that was responsible to the people. Lincoln expressed this view in his December 1862 message to Congress and the American people when he said, “fellow-citizens, *we* cannot escape history. . . . The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation. . . . In *giving* freedom to the *slave*, we *assure*

²⁰ See EMORY M. THOMAS, *THE CONFEDERATE NATION: 1861-1865*, at 62 (Henry Steele Commager & Richard B. Morris eds., 1979).

²¹ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *COLLECTED WORKS*, *supra* note 1, at 262, 267.

²² Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 *COLLECTED WORKS*, *supra* note 1, at 518, 537.

freedom to the *free*. . . . We shall nobly save, or meanly lose, the last best, hope of earth."²³

The fundamental question that still confronts a democracy is one of balance. It is appropriate and necessary in a democracy to protect the rights of a dissenting minority, but it is also necessary to prevent the dissenting minority from destroying the governing institutions established to maintain majority rule. The lofty and idealistic principles set forth in the Declaration of Independence can only be sustained by the practical application of the rule of law as defined in the Constitution. Stated another way, Lincoln saw the Declaration of Independence as an expression of the inalienable rights of every man, while the Constitution provided the governing mechanisms and institutions for sustaining and protecting those fundamental freedoms. The Constitution is the rulebook that governs the country; at the heart of Lincoln's argument that secession was unconstitutional was the sovereignty of the Union.

Lincoln's constitutional arguments were unsuccessful in convincing Southerners that the doctrine of states' rights, as set forward by Jefferson and Madison and expanded by John C. Calhoun, did not legitimize secession. It was Appomattox that completely discredited Calhoun's argument once and for all. Nationalism triumphed and with it a strong centralized government. Although the debate continues between the strong advocates for local government and those desiring more centralized governmental control, ultimately it is the federal government that is sovereign. The defeat of the secessionist and the reconstruction that followed settled the major issue of sovereignty and the Union survived.

The expansion and centralization of federal power during the Civil War is closely associated with the expansion of executive or presidential power. Lincoln believed that the power needed to meet the secession crisis was provided by the Constitution and was vested primarily in the President. Obviously, the rebellion was an emergency sufficient to justify the use of these extraordinary powers.

²³ *Id.*

Lincoln's critics have argued that Lincoln went beyond the necessary powers to suppress the rebellion. However, the extent of the power needed as defined in the Constitution is determined by the magnitude of the emergency. Moreover, that determination is a presidential responsibility and therefore determined by the President, in this case, Lincoln.

The expansion and consolidation of presidential power began with Lincoln's response to the Sumter crisis. After the failed attempt to resupply and reinforce Sumter, Lincoln took extraordinary and extra-constitutional action. He did not call Congress back into session, proclaimed the blockade of Southern ports, called for volunteers without authorization, directed the Secretary of Treasury to spend unauthorized government funds, and ultimately suspended the writ of habeas corpus in certain areas. Later on, as the war progressed, he introduced conscription, authorized military tribunals of civilians, condoned arbitrary arrest and imprisonment, suppressed newspapers, and ultimately emancipated the slaves. Lincoln justified these actions under his authority as Commander-in-Chief and through the use of his emergency war powers.

Lincoln believed that the power needed to meet the secession crisis was provided by the Constitution and was vested primarily in the President. He frequently cited the Commander-in-Chief Clause of the Constitution that required him to "take Care that the Laws be faithfully executed."²⁴ Furthermore, he took his oath of office seriously and declared that the oath of the President was "registered in Heaven."²⁵ The presidential oath of office that Lincoln took also included the clause, "preserve, protect and defend the Constitution of the United States."²⁶ Obviously, the rebellion was an emergency sufficient to justify the use of these extraordinary powers. Lincoln's critics have argued that Lincoln went beyond the necessary powers to suppress the rebellion.

²⁴ U.S. CONST. art. II, § 3; *see* 4 COLLECTED WORKS, *supra* note 1, at 262, 265.

²⁵ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 262, 271.

²⁶ U.S. CONST. art. II, § 1, cl. 8.

It is worth noting that the Constitution Lincoln swore to protect and defend is not the Constitution of today's Americans. Lincoln's actions, and ultimately the outcome of the Civil War, set in motion a series of legislative events and amendments to the Constitution that allowed dramatic new interpretations of that remarkable document. The Reconstruction Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments, required the federal government to protect the individual rights and freedoms of all Americans. The central government after the Civil War was charged with ensuring equal treatment under the law for all American citizens. The original drafters of the Constitution saw the central government as a potential threat to individual liberty and sought to protect Americans from the encroachment of centralized power. The post-Civil War Amendments reflected the changed expectations of the people and signaled a new relationship between the government and the governed in the United States.

In the final analysis, Lincoln believed the Constitution was essentially an extraordinary arrangement for the sharing of authority within a structure of popular government. In ordinary times, that meant that the legislative body, representing the diverse attitudes and interests of the people, would be the most influential of the three branches of government. However, the Civil War and secession was no ordinary time. The power Lincoln assumed as the Chief Executive began a process that was referred to by Arthur Schlesinger, Jr. as the road to an "Imperial Presidency."²⁷ Modern communication and technology have forced recent Presidents to become less imperial but nonetheless powerful. Moreover, if Schlesinger meant the arbitrary use of presidential power to manipulate the system, the Imperial surge continues.

The constitutional crisis of 1860 and the war that followed demanded a great leader to persuade the American people to preserve the Union and constitutional democracy for all mankind. Lincoln was that visionary political leader. Throughout American

²⁷ See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (Houghton Mifflin Co. 1973).

history, the country has called forth great leaders in times of crisis. In this presidential election year, Americans are looking for political leaders to implement the changes required to meet the challenges of the twenty-first century.