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Lessons from Lincoln: A Comment on Levinson

Steven D. Smith*

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I. INTRODUCTION

I have not actually counted, but my strong impression is that in Professor Levinson's engaging lecture on "Compromise and Constitutionalism," the ratio of question marks to periods is much higher than in most English prose. His lecture raises lots of questions and offers only a few very tentative answers. And this cautious approach seems appropriate to the subject. The ethics of compromise essentially involve the problem of how to live morally in a morally disordered world—a world in which the people we live with and care about are morally disordered, and in which we know *that* but not always *when* or *how* we ourselves are morally disordered. It would be surprising if there were clean, orderly, demonstrable solutions to that problem.

Levinson is right, I think, to steer away from the extremes. At one extreme, one might conclude that every choice boils down to a simple matter of "calculating the costs and benefits"—an approach Levinson says Alexander Bickel attributed to Justice Brandeis in the matter of dissenting opinions.¹ The practical danger of this approach is obvious enough—those who take it will end up sacrificing their integrity and their moral commitments altogether. The familiar anecdote about Churchill and the woman who indignantly rejects an indecent proposition for five pounds but

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1. See Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 839–40 (2011).

admits she would accept a proposition for five million pounds seems pertinent here.²

At the other extreme, what we might call the “purity position” views willingness to compromise as a kind of moral deficiency: ideally, a person—or a judge or politician—should always act in accordance with his or her highest moral commitments and should never enter into commerce with persons or parties who reject or depart from those commitments. Though sometimes describing compromise as a “temptation”, Levinson nonetheless appears to reject the purity position, and so would I.³ In fact, I regard the purity position as profoundly immoral.⁴ Purists are morally self-indulgent, I believe, valuing their own virtue above the welfare of their fellows. They incline to hubris, because they fail to take seriously the possibility that they might be wrong and that those who disagree with them may be right. In assuming their own superior virtue, they fall into self-deception, like the Pharisee in Jesus’ parable of the Pharisee and the publican.⁵ Political purists endowed with power (of which the twentieth century had more than its share) are particularly reprehensible: in their self-serving certainty they can inflict vast suffering on those around them.

So, what to do? If compromise is morally perilous but also necessary—not only practically but *morally* necessary—and if there is no comprehensive body of categorical rules telling us when to compromise and when to hold firm, are we then relegated to completely ad hoc, intuition-driven choices? Or are there at least presumptive precepts that might guide us in confronting these challenges?

II. THE MARGALIT-LEVINSON PRINCIPLE

In the course of his lecture, Levinson identifies some relevant factors or criteria, and he also appears to endorse a principle proposed by the Israeli philosopher Avishai Margalit for distinguishing “merely dreadful compromises,” as Levinson puts it, from “rotten compromises” that come

2.

Churchill: “Madam, would you sleep with me for five million pounds?”

Socialite: “My goodness, Mr. Churchill . . . Well, I suppose . . . we would have to discuss terms, of course . . .”

Churchill: “Would you sleep with me for five pounds?”

Socialite: “Mr. Churchill, what kind of woman do you think I am?!”

Churchill: “Madam, we’ve already established that. Now we are haggling about the price.”

Churchill Humor, JOKES (June 28, 2007, 1:51 AM), <http://jo-kes.blogspot.com/2007/06/churchill-humor.html>.

3. See Levinson, *supra* note 1, at 843.

4. In criticizing the purity position and its general condemnation of compromise, I do not mean to deny the possibility of moral absolutes or categorical commands and prohibitions. See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* (1991).

5. *Luke* 18:9–14.

too close to being categorically forbidden.⁶ The kind of compromise that is never or almost never acceptable is one that “agrees ‘to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans.’”⁷ Using this principle, Levinson seems to conclude, albeit faintly, that it was permissible for the Constitution’s framers to compromise on the composition of the Senate but not to support a Constitution that accepted and protected slavery.⁸ Slavery, after all, surely treated a class of human beings in an inhuman, cruel, and humiliating fashion.

I believe that Margalit’s principle overlooks a crucial distinction, and I accordingly find Levinson’s discussion of the problem of slavery and the Constitution engaging but ultimately unpersuasive. To explain why, I want to introduce another famous example of constitutional controversy from American history that also involved slavery. More specifically, I want to briefly consider the approach to slavery that Abraham Lincoln took in the Lincoln-Douglas debates of 1858. From Lincoln’s position I believe we can glean two precepts for acceptable compromise that are different than the principle to which Margalit and Levinson appeal. Using these precepts, I will then briefly reflect on the three problems that Levinson discusses.

III. LINCOLN’S GUIDING PRECEPTS

Lincoln and his opponent, Stephen A. Douglas, are remembered as having clashed on the issue of slavery, but in fact there were important points of similarity.⁹ Neither Lincoln nor Douglas was a purist. Both understood that slavery was a reality in the United States, that the Constitution protected the institution, and that it would be irresponsible as well as politically impossible for the national government preemptorily to abolish the institution. Like Douglas, Lincoln insisted on the right of the

6. Levinson, *supra* note 1, at 826.

7. *Id.* Query: under this principle would it ever have been permissible for the United States to enter into trade or diplomatic agreements with the Soviet Union or other Communist countries?

8. *See id.* at 835 (“One might easily say . . . , with regard to the two ‘great compromises of 1787,’ that the one with slavery was truly ‘rotten,’ while the capitulation to Delaware and other small states regarding voting power in the Senate was merely ‘dreadful.’”).

9. *See, e.g.*, THE LINCOLN-DOUGLAS DEBATES 99 (Rodney O. Davis & Douglas L. Wilson eds., 2008) (third debate).

There is very much in the principles that Judge Douglas has here enunciated that I most cordially approve, and over which I shall have no controversy with him. In so far as he has insisted that all the states have the right to do exactly as they please about all their domestic relations, including that of slavery, I agree entirely with him.

Id.

present southern states to permit slavery,¹⁰ and he even declared his support in principle (though not in its details) for the controversial Fugitive Slave Law—part of the so-called Compromise of 1850 that had earned Daniel Webster the denunciation of abolitionists like John Greenleaf Whittier.¹¹

But Lincoln differed from Douglas on two crucial points. First, while Douglas tried to negotiate the treacherous issue of slavery by insisting on the right of every state and territory to determine for itself whether to permit or forbid slavery (a decision in which the slaves themselves would have no voice), Lincoln flatly opposed the expansion of slavery into the new territories. By quarantining slavery in the states that had already permitted it, he hoped to put the institution “in the course of ultimate extinction,” as he repeatedly said.¹² “I have never manifested any impatience with the necessities that spring from the . . . actual existence of slavery amongst us where it does already exist,”¹³ he explained. “But I have insisted that, in legislating for new countries, where it does not exist, there is no just rule other than that of moral and abstract right!”¹⁴

Second, although Lincoln conceded that slavery was protected by the Constitution and by subsequent legislation, and although he acknowledged that these laws should be obeyed,¹⁵ he also forcefully declared his belief that slavery was a tragic evil.¹⁶ Indeed, his most severe indictment of Douglas, perhaps, was not that Douglas supported measures allowing slavery, but rather that Douglas refused even to say that slavery was wrong.¹⁷ Although Lincoln challenged Douglas to take a stand on the morality of slavery, Douglas explicitly refused to do so.¹⁸ Led apparently by the same logic that

10. *See id.* at 20 (first debate) (“I have no purpose directly or indirectly to interfere with the institution of slavery in the states where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”).

11. *See id.* at 286 (seventh debate) (“I suppose most us—I know it of myself—believe that the people of the Southern states are entitled to a congressional fugitive slave law, that is a right fixed in the Constitution.”). Whittier denounced Webster in the poem “Ichabod.”

12. *Id.* at 100 (third debate); *id.* at 242 (sixth debate); *id.* at 276 (seventh debate).

13. *Id.* at 189 (fifth debate).

14. *Id.*

15. *See id.* at 222–23 (sixth debate) (explaining the obligation to respect constitutional laws protecting slavery, including the *Dred Scott* decision in its immediate force).

16. *See id.* at 222 (“I suggest that the difference of opinion, reduced to its lowest terms, is no other than the difference between the men who think slavery a wrong and those who do not think it wrong. . . . The Republican party think it wrong. We think it is a moral, a social, and a political wrong. We think it is a wrong not confining itself merely to the persons or the states where it exists, but that it is a wrong in its tendency, to say the least, that extends itself to the existence of the whole nation.”).

17. *See id.* at 34 (first debate) (“When [Judge Douglas] invites any people willing to have slavery, to establish it, he is blowing out the moral lights around us. . . . When he says he don’t care whether slavery is voted down or voted up, that it is a sacred right of self government, he is, in my judgment, penetrating the human soul and eradicating the light of reason and the love of liberty in this American people.”).

18. In the sixth debate, Lincoln castigated Douglas for his reticence on the point. Douglas “never says that [slavery] is wrong,” Lincoln charged. *Id.* at 223 (sixth debate). “He has the high

prompts some contemporary judges and scholars to suppose that religious freedom precludes government from doing anything that might even *influence* citizens' religious choices, Douglas maintained that given his commitment to letting each state and territory decide the issue of slavery for itself, he could not properly commend or criticize any decision that different jurisdictions might make.¹⁹

Two precepts are discernible in Lincoln's approach to the difficult challenge of compromising over slavery. First, he evidently believed that accepting an existing evil is quite different than agreeing to introduce or extend an evil where it does not presently exist. This belief, I would say, reflected a healthy awareness of the fundamental fact, as obvious as it is easy to overlook, memorably put by two characters in a William Steig story: "I didn't make the world."²⁰ Thus, Lincoln and Douglas and their fellow-citizens had been thrown into a world in which slavery was already a deplorable but deeply entrenched practice. And though they could work to contain and perhaps ultimately eliminate that practice, they had no power simply to wish it away. Consequently, compromises that accepted the world as it was were not impermissible. Conversely, any compromise that might extend the evil where it did not already exist (as Douglas's "popular sovereignty" easily might) was presumptively—though even then not absolutely²¹—forbidden.²²

distinction, so far as I know, of never having said slavery is either right or wrong. . . . Almost everybody else says one or the other, but the Judge never does." *Id.* In response, Douglas defended his refusal to take a stance. "I do not discuss the morals of the people of Missouri, but let them settle that matter for themselves," *id.* at 241, he declared, adding that

it does not become Mr. Lincoln, or anybody else, to tell the people of Kentucky that they have no conscience, that they are living in a state of iniquity, and that they are cherishing an institution to their bosoms in violation of the law of God. Better for him to adopt the doctrine of "judge not lest ye be judged."

Id.

19. See *id.* at 241.

20. WILLIAM STEIG, *THE AMAZING BONE* (1976).

21. In the second debate, challenged by Douglas to say whether he would ever vote to admit a new state as a slave state, Lincoln responded:

I state to you very frankly that I would be exceedingly sorry ever to be put in a position of having to pass upon that question. I should be exceedingly glad to know that there would never be another slave state admitted into the Union. . . . But I must add that if slavery shall be kept out of the territories during the territorial existence of any one given territory, and then the people shall, having a fair chance and a clear field when they come to adopt the constitution, do such an extraordinary thing as to adopt a slave constitution, uninfluenced by the actual presence of the institution among them, I see no alternative, if we own the country, but to admit them into the Union.

THE LINCOLN-DOUGLAS DEBATES, *supra* note 9, at 48 (second debate).

22. What if it were possible to make a deal in which slavery would be eliminated in two states in return for being extended into one state in which it had not previously been permitted? What if the

Notice the subtle but important difference between this view and the Margalit-Levinson principle. Under that principle, a compromise is unacceptable if it will “establish *or maintain* an inhuman regime.”²³ No distinction is acknowledged between working in a way that “maintains” an existing evil that one did nothing to bring about and helping to “establish” or bring into being an evil that did not previously exist. Under this principle, it seems, there would be no room for a position like Lincoln’s; everyone would be pushed into either denying that slavery was cruel and inhuman or else joining up with the radical abolitionists.

Lincoln’s stance in the debates reflects another guiding precept: even though he was willing to acknowledge and provisionally acquiesce in an evil practice, he refused to relinquish his right and responsibility to declare that the practice was in fact evil. This sort of precept might well be softened in some contexts by the sensible requirements of diplomacy. But the precept seems to me sensible, and perhaps even imperative, as a protection against the very real danger that one who compromises with evil, even with the intention of bringing about a greater good, may end up losing or forgetting his moral commitments altogether.

Indeed, that danger may have been realized in Douglas himself. In his perhaps well-intended desire to prevent disunion, Douglas refused to say that slavery was wrong. He refused to make this judgment to the public and perhaps—who knows?—even to himself. Moreover, Douglas may have been practicing a kind of self-deception. He justified his refusal to condemn slavery on a public-spirited ground: he wanted to preserve the Union. No doubt this justification was sincere, and yet, . . . Douglas also wanted to be President. Can we be sure—and more importantly, could *he* be sure—that his refusal to take a stand on the crucial moral question of the day was motivated entirely by a concern for the public good, rather than by self-serving ambition?

In sum, Lincoln’s stance suggests two precepts for compromising even with an institution or practice one believes to be evil. First, although it is sometimes permissible to compromise by accepting an evil practice that one did not create, it is never (or almost never) alright to enter into a compromise that would create or extend an evil. That guideline would stand as a major constraint on a simple “cost-benefit” approach to the problem. Second, even if one finds it necessary or prudent to compromise with an evil, one should not consent to forbear from declaring one’s belief that the evil *is* an evil. Once again, the cost-benefit calculation is qualified by a commitment to truth-telling—telling it to the public and, perhaps even more importantly, to

ratio of emancipation to extension were four to one, or ten to one? Would Lincoln’s precept forbid this sort of compromise? I suspect so, though the question shows how the precept might be challenged. (I thank Larry Alexander for pressing the point.)

23. Levinson, *supra* note 1, at 826.

oneself.²⁴

Accepting these precepts at least for purposes of reflection, let us consider Levinson's specific questions with regard to the American Constitution.

IV. LEVINSON'S THREE CONFLICTS

Levinson asks, as others have throughout the Republic's history, whether the enactors of the Constitution should have refused to approve it because it accepted and protected slavery. Applying the Margalit principle he suggests, tentatively, that they should have refused.²⁵ A compromise that helps to "establish or maintain an inhuman regime" is strongly presumed to be immoral and unacceptable, and slavery was surely an inhuman regime.

This analysis seems to me misguided. Suppose that the Framers or the northern states, jealously maintaining their own moral purity and unable to persuade the southern states to renounce slavery, had simply refused to approve the new Constitution. What would the result have been? At least according to Jay's and Hamilton's analyses in the first nine of the *Federalist Papers*,²⁶ the new states would not only have lost the economic and political benefits of a larger and consolidated republic; they would likely have faced serious foreign threats to their independent existence and (even more threateningly) a major risk of destructive internal warfare among the various states.

And for what? No slaves would thereby have been freed. Indeed, slaves themselves might have suffered in the general turmoil.

Lincoln, by contrast, did not condemn the Founders for forming the Constitution. Under his guiding precepts, this seems a sensible position to take. For the Founders, slavery was a deplorable but nonetheless existing and deeply entrenched evil, and only a misplaced purity would forbid them to enter into a mutually beneficial political arrangement—one calculated overall to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty"—because it acknowledged and provisionally accepted that evil.²⁷

24. This precept admittedly raises difficult prudential questions. Surely no one is obligated to declare one's moral convictions on all occasions and in all contexts. But when, in order to facilitate compromise, is one warranted in keeping one's condemnations private? I doubt that there is any simple or categorical answer to this question. (Again, I thank Larry Alexander for pressing the issue with me.)

25. See Levinson, *supra* note 1, at 826.

26. THE FEDERALIST NOS. 1, 6–9 (Alexander Hamilton), NOS. 2–5 (John Jay). Levinson's own surmise is not so different. Levinson, *supra* note 1, at 827–28.

27. U.S. CONST. pmbl.

“The exact truth is,” Lincoln asserted, “that they found the institution [of slavery] existing among us, and they left it as they found it.”²⁸

Note that this way of thinking is not equivalent to a simple cost-benefit approach. Suppose that the southern states had consented to approve the Constitution only on the condition that slavery be legalized throughout the nation, even in places where it was not then permitted. Lincoln’s precept would counsel rejection of this compromise, I think, even if a sober calculation of costs and benefits might lead to the conclusion that ratification would on balance lead to more human happiness and avoid more human misery (again, for the kinds of reasons suggested by Jay and Hamilton).

Levinson’s second conflict involves decisions by the Supreme Court to practice the “passive virtues,” as Alexander Bickel put it,²⁹ by declining to remedy constitutional violations when the judicially-imposed remedy would likely provoke political and cultural opposition that might actually damage or undermine the constitutional commitment at stake. He thinks this happened in *Elk Grove School District v. Newdow*,³⁰ the Pledge of Allegiance case from a few years back, and also in *Naim v. Naim*,³¹ when in 1956 the Supreme Court declined to review a Virginia case upholding the state’s anti-miscegenation law. Levinson is not overly distressed about *Newdow* because he thinks the constitutional violation was *de minimis*—I would say non-existent—but he understandably finds *Naim v. Naim* more troublesome.

Again, however, assuming it is true that invalidating the Virginia statute would actually have set back the cause of racial equality by provoking resistance and perhaps imperiling *Brown* itself, then I think Lincoln’s precepts would approve the Court’s decision not to hear the case. After all, the Court did not make the world that included prohibitions on interracial marriage; by refusing to hear the case it was simply choosing not to intervene to remedy that situation. More generally, I think Lincoln’s precepts are generally compatible with the practice of Bickel’s passive virtues. This is not surprising, because Bickel looked to Lincoln as an example and source of his approach.³²

To be sure, there will be complications. For one thing, if established procedures allow the Court to decline jurisdiction only by declaring, implausibly, that a case presents no substantial federal question, then such a decision would arguably violate Lincoln’s truth-telling precept. But this consideration is itself complicated, I think, because language is conventional, and it may be that in some contexts, a refusal to exercise

28. THE LINCOLN-DOUGLAS DEBATES, *supra* note 9, at 278 (seventh debate).

29. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111 (1962).

30. 542 U.S. 1 (2004).

31. 350 U.S. 891 (1955).

32. See BICKEL, *supra* note 29, at 65–69.

jurisdiction ostensibly “for want of a substantial federal question” would be intended and understood—and intended to be understood—to mean something more like what a denial of certiorari would mean today. The “for want of a substantial federal question” phrase might have come to have essentially the same significance that the “swords and staves” language had in later common law trespass writs.³³

Another complication is that it will not always be clear whether the Court helped to “make the world” of which the entrenched evil is a part. Was the Supreme Court in part responsible for the segregation culture that supported anti-miscegenation laws—through its decision in *Plessy v. Ferguson*,³⁴ for example? The question raises daunting issues not only of historical causation but also of institutional identity. To what extent should Justices sitting on the Supreme Court in 1956 regard themselves as implicated in the effects of Court decisions made by different Justices generations earlier? I obviously cannot try to answer such large questions here (or, probably, anywhere else), but instead confine myself to observing that Lincoln’s precepts seem generally friendly to the practice of the passive virtues.

Levinson’s final area of conflict concerns decisions by judges about whether, for the sake of judicial unity, to join in opinions with which they do not fully agree. Usually, of course, a judge can avoid this kind of conflict by writing a dissenting opinion, or an opinion concurring in the judgment, or a concurring opinion that joins in the majority opinion but also adds to or clarifies it. But there are no doubt times, as Levinson observes, when a Justice may believe it is important for the Supreme Court to present a united front: *Brown* may be the outstanding example.³⁵ A Justice might not agree with the outcome favored by a majority but believe that dissenting would do a net disservice by undermining the Court’s institutional authority. Or the Justice might not like the reasoning in a majority opinion but believe it is more important that the law be clear than that it be right in some ideal sense.

This seems by far the least grave of Levinson’s conflicts, so it may seem surprising if Lincoln’s precepts, after allowing compromises with enormities like slavery and racial injustice, suddenly balk at this kind of modest accommodation. But one could take the view that this sort of compromise, in which a judge joins in any opinion that he or she doesn’t believe (if I can put it that way), is forbidden by Lincoln’s second, truth-telling precept. And I can imagine cases in which that is indeed the conclusion I would reach, and

33. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 72–73, 456 (3d ed. 1990).

34. 163 U.S. 537 (1896).

35. Levinson, *supra* note 1, at 838.

recommend. Justice Jackson's unusual dissenting opinion in the *Korematsu* case³⁶ might be an (admittedly very controversial) instance.

Usually, though, other complications will cloud the matter. For one thing, especially to the extent that there is an understood norm that a court should speak with one voice (as Levinson says there sometimes has been, at least aspirationally),³⁷ the fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like "I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on." In addition, to the extent that judicial opinions are understood less as "declaratory" of what "the law" is and more as a special form of legislation, a judge who joins in an opinion different than the one she would have preferred is no more dishonest than a legislator who votes for a bill that isn't exactly the bill he would ideally have favored.

V. CONCLUSION

I don't know whether the ratio of question marks to periods is higher or lower in my comment than in Levinson's lecture. In any case, these are hard questions, and I doubt that there are or can be tight rules for compromising. I've suggested, though, that we can learn some precepts from Lincoln that provide guidance, though not definitive answers, and these precepts provoke doubts about some of Levinson's own (tentative) conclusions. Specifically, I don't think we can properly fault or condemn the Founders for entering into the Constitution, even though that instrument acquiesced in the evil of slavery.

36. 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

37. Levinson, *supra* note 1, at 836–42.