Book Reviews

"HE'LL TAKE HIS STAND"

***DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL.** By Mark A. Graber.[1] Cambridge: Cambridge University Press, 2006. Pp. xiii + 264. $40.00.

Ken I. Kersch[2]

I. INTRODUCTION

Mark Graber's *Dred Scott and the Problem of Constitutional Evil* will strike many as one of the more Mephistophelian sallies of constitutional thought published in quite some time. In its dense, tightly argued pages, Graber stumps for the infamous majority opinion of Chief Justice Roger Brooke Taney in *Scott v. Sanford* (1857), and assaults what (these days, at least) is an unwonted *bête noire*: the constitutional thought of Abraham Lincoln. Although this book is good history, drawing extensively on primary source research, Graber's interest in *Dred Scott* is instrumental and theoretical. He uses the case as a vehicle for questioning the legal academy's conventional wisdom concerning what constitutions are, what they do, how we (and judges) should interpret them. At the top of Graber's target list are constitutional theorists, be they liberal "perfectionists" or conservative originalists. As Graber sees it, while these two camps dis-

1. Professor, Department of Government & Politics, University of Maryland.

2. Director, Clough Center for the Study of Constitutional Democracy, and Associate Professor of Political Science, History, and Law, Boston College. Thanks to the members of a panel on Graber's book at the Annual Meeting of the New England Political Science Association (May 2007), Mark Graber, Mark Tushnet, and Beau Breslin, for a stimulating discussion, as well as to Gary Jeffrey Jacobsohn, Ronald Kahn, George Thomas, and Keith Whittington.

agree over both method and results, they are united in their commitment to theorizing the single best way to interpret the constitutional text, and to fixing the right meaning of particular constitutional provisions.

Ever the pugalist in fighting form, Graber attacks the perfectionists not at the weakest but at their strongest point. He alights upon the *Dred Scott* case, not for its intrinsic interest, but precisely because the rejection of the "best" possible interpretation of a constitutional provision here has the worst possible consequences: pure and unadulterated evil.[3] If the "best" interpretation is off-limits in countering human bondage, he asks implicitly, when would it ever be in limits?

Perfectionist constitutional theorists like James Fleming, Christopher Eisgruber, and Ronald Dworkin (and, perhaps, constitutional theorists more generally) (p. 18), Graber complains, engage in "[o]bsessive searches for 'correct' answers to past and present contested questions of constitutional law [that] are politically futile, even when possible jurisprudentially" (p. 3).[4] His criticism of these theorists is that, mired as they are in philosophical abstractions, they misunderstand fundamentally the worldly politics of the genesis and nature of constitutional governments.

"Powerful social groups," Graber, the social scientific empiricist, instructs:

> are unlikely to accept any constitutional arrangement, clear or ambiguous, that they believe undermines their vital interests and fundamental values. Constitutions settle political conflicts successfully in the short run by providing pre-existing answers to contested political questions. They successfully settle po-

3. Hence, Graber's ostensible subject: "the problem of constitutional evil," which "concerns the practice and theory of sharing civic space with people committed to evil practices or pledging allegiance to a constitutional text and tradition saturated with concessions to evil" (p. 1).

4. Here, Graber insists that the inherently political nature of constitutions may not be overcome by even the most dexterous—and intellectually successful—efforts at interpretation. Subsequently, however, Graber seems to back away from this position, emphasizing instead for issues that count, there are likely to be multiple plausible "correct" answers ("When political controversies have long excited a constitutional community, the central legal claims of all prominent participants will be well grounded in institutional, historical, aspirational, or other constitutional logics" (p. 4).); See also p. 17: "Constitutional law is almost always structurally incapable of generating the clear right answer that might resolve hotly disputed constitutional questions. When a relatively enduring constitutional controversy divides a society, every position that enjoys substantial political support rests on plausible constitutional foundations."). On this point, in the end, the book is inconsistent.

> litical conflicts in the long run by creating a constitutional politics that consistently resolves contested questions of constitutional law in ways that most crucial political actors find acceptable (p. 3).

Such territory is, thus, by its very nature, inhospitable to perfectionism.

There is much to this critique. But one of the most interesting consequences of taking this empirical, social scientific critique to its logical conclusion is that (in Graber's hands, at least), this New York Yankee arrives at the most vigorous defense of Calhounian and Confederate constitutional thought published in nearly half a century. As such, a book that started out canvassing the limitations and blindspots of contemporary constitutional theory ends up unwittingly shedding considerable light on the limitations and blindspots of contemporary empirical political science. Potentially then—and in ways that the author doesn't always grapple with—this is a very deep book.

II. GRABER AS POLITICAL SCIENTIST

Readers of *Dred Scott and the Problem of Constitutional Evil* should not be fooled by the absence of graphs, charts, and statistical regressions: Graber may be a law professor and lawyer, but here he preens his bona fides as a card-carrying political scientist. The presuppositions of the book—and the base from which Graber sets out to attack the conventional wisdom of the legal academy, including constitutional theory's various interpretative schools—are in (value free) social science. The argument Graber advances in *Dred Scott and the Problem of Constitutional Evil* depends upon a resolutely social scientific understanding of a Constitution as a bargain struck amongst self-seeking groups and individuals with diverse assumptions, goals, and interests. Each comes to that bargain, and signs on to it, with the understanding and expectation that over the long term, those goals and interests will be advanced through a life lived within the framework of that agreement.[5]

5. In a lengthy discussion towards the book's end, Graber does re-consider these same issues in a lawyerly way from the perspective of various law of contracts frameworks, including those discussing "relational contracts." Of course, the problem of "evil" inherent in this particular agreement also raises issues of contractual provisions against public policy and unconscionablility. This playful and engaging chapter taking up the question of the degree to which contractual agreements and constitutional agreements are analogous seem to have been appended as an afterthought to engage that slice of the legal academy allergic to the political scientific framework of the rest of the book (pp.

Such an approach, of course, is not premised on the notion that people are without values and moral convictions. Rather, in the distinctively modern spirit that underwrites contemporary social science, it brackets them. It takes the existence of diverse, divergent, and often deeply felt convictions about issues that matter to people a great deal as givens. More than that, it takes their existence as rendering political society necessitous in the first place. Only by entering into such an arrangement can such potentially warring individuals live together in peace. As such, to the modern sensibility, the bracketing of moral questions—including, as here, matters of good and evil—is not shallowness or evasion: it is the point.

The spirit of two social science moderns, the seminal Thomas Hobbes, and the contemporary Arend Lijphart, loom over this book, though the first is not mentioned, and the latter only in passing (pp. 188–91). Hobbes was the first to argue rigorously and systematically that the primary purpose of founding a state—the Leviathan—was to exit a state of war and enter a condition of peace.[6] It is perhaps less appreciated that, in fashioning this argument concerning the origins and purpose of government, Hobbes became the progenitor of modern political science. For ancient political thinkers, like Plato and Aristotle, the study of politics began with (inherently philosophical) questions of the nature of justice, virtue, and the good. Hobbes, instead, was animated by a single empirical, "value free" question: he wanted to know, given actual, real-world conditions, what worked.[7]

The contemporary political science comparativist, Arend Lijphart, is a Hobbesian in the sense that all empirically-oriented political scientists are Hobbesians: he brackets questions of justice, virtue, and the nature of the good, and asks what works. Lijphart is a student of constitutional arrangements, with a particular interest in what sort of constitutional arrangements "work"

198–218).

6. *See* THOMAS HOBBES, LEVIATHAN (1651). The social contract theorist who might have loomed over Graber's argument, but doesn't, is, of course, John Locke. Given that Locke combines the social contract with a theory of inherent natural rights whose denial justifies a refusal to enter into civil society—and a right of revolution—a Locke-haunted discussion of the constitutionalism of Lincoln, Taney, and *Dred Scott*, would force the author to contemplate matters from a perspective that transcends the pure empiricism that he endeavors to stick to here. *See* JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (1690).

7. *See* LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953). This orientation is evident in at least one important work of another early modern, NICCOLO MACHIAVELLI, THE PRINCE (1515).

successfully in divided or "plural" societies where there is pronounced "segmental" disagreement, whatever its source, be it divergent pecuniary interests, or deep moral antagonisms. As for Hobbes, the desideratum for Lijphart is peace: successful constitutional arrangements in plural societies are evident when the polity remains politically stable, unified, and functional.

Graber's litmus test for the U.S. Constitution is Lijphart's litmus test for the world's many constitutions. Graber's analysis is premised on his understanding of antebellum American political society as what Lijphart called a plural society. His understanding of the American Founding conceives of it as what Lijphart called a "consociational" bargain. What many will take as Graber's provocative sympathy for the constitutional arguments advanced by Roger Taney, Stephen Douglas, and the Constitutional Union Party's 1860 presidential candidate John Bell, is premised on Lijphart's contention that plural polities stay together by bracketing deep moral disagreement, and by agreeing (as the American Founders did) to give significant minority interests the power to veto initiatives that effect their vital interests—all features of consociationalism.

In Graber's hands, then, the story of the *Dred Scott* case thus becomes a story about how, as conditions changed—the invention of the cotton gin, the rise of abolitionism, and westward expansion—majoritarian understandings of the nature of the original constitutional bargain began to overpower the original consociational constitutional understandings, and a majoritarian political order threatened to eclipse a consociational one. In a consociational constitutional order, when a segmental interest (like the South) begins to lose—or perceives it is losing—its veto power over matters trenching upon its vital interests, it is pointless to blame it for either the substance of its interests (inquiries into that are bracketed; if they consider it important, constitutionally speaking, it is), or for its decision to exit the political order altogether (which, so far as consociationalism is concerned, is a "right" in the value-free sense that it can be done). The measure of the success of the consociational order is whether it fell apart or not. This one did: therefore, what the Union side did must have violated the (consociational) spirit of the original Constitution. Lincoln's constitutional understandings took insufficient cognizance of the consociational nature of the original constitutional bargain, something that Douglas and Bell understood better than Lincoln did. It is this that wins them Graber's

high praise, and merits the devaluation of Lincoln as a constitutional thinker.

III. THE CONSOCIATIONAL CONSTITUTIONAL VISION

With a few exceptions, scholars of domestic American constitutionalism have not considered our constitutional arrangements from the perspective of comparative political scientists who study the failures and successes of constitutions around the world.[8] And the possibility that our original constitutional understandings might best be understood as consociational has figured hardly at all. A brief introduction to consociationalism, by way of the work of Arendt Lijphart, would thus be apt.

The core issue that the consociational paradigm addresses is the problem that "it may be *difficult*, but it is not at all *impossible* to achieve and maintain stable democratic government in a plural society."[9] The question is how to succeed in such an endeavor. On the basis of empirical evidence, Lijphart argues, the road to success is paved with constitutional consociationalism.

> Consociational democracy can be defined in terms of four characteristics. The first and most important element is government by a grand coalition of the political leaders of all significant segments of the plural society. This can take several forms, such as a grand coalition cabinet in a Parliamentary system, a "grand" council or committee with important advisory functions, or a grand coalition of a president and other top officeholders in a presidential system. The other three basic elements of consociational democracy are (1) the mutual veto or "concurrent majority" rule, which serves as an additional protection of vital minority interests, (2) proportionality as the principle standard of political representation, civil service appointments, and the allocation of public funds, and (3) a high degree of autonomy for each segment to run its own internal affairs.[10]

"Elite cooperation is the primary distinguishing feature of consociational democracy."[11] Governing takes place through elite

8. *But see* WALTER MURPHY, CONSTITUTIONAL DEMOCRACY (2006); MARK BRANDON, FREE IN THE WORLD (1998); STEPHEN ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC (2006).

9. AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES 1 (1977) [hereinafter, LIJPHART, DEMOCRACY].

10. *Id.* at 25.

11. *Id.* at 1.

bargaining. It involves not government by majority vote (which requires losing minorities to lump losing votes, even if they are on matters which, to them, are matters of deep concern), but instead by government through a grand coalition—which Lijphart calls "coalescent" or "consensus" government.[12]

The power of mutual veto is a crucial feature of consociational arrangements:

> Decisions have to be made in grand coalitions, and when these are reached by majority vote, though the minority's presence in the coalition does give it a chance to present its case as forcefully as possible to its coalition partners, it may nevertheless be outvoted by the majority. When such decisions affect the vital interests of a minority segment, such a defeat will be regarded as unacceptable and will endanger intersegmental elite cooperation.[13]

Coalescent or consensus government thus naturally entails a considerable degree of segmental autonomy.

Although he underplays the provenance of his conceptual framework, it is clear throughout this book that Graber is discussing the antebellum constitutional system in the United States in a thoroughly consociational language. This would make considerable sense to Lijphart himself: after all, he cites the antebellum U.S. as being a classic consociational order. There, a segmental cleavage posed a threat to the stability of the system if its interests were not accommodated through consociational means. Even without hewing to explicit Calhounian theory of concurrent majority (which Lijphart cites repeatedly, and favorably, as one of the most highly developed discussions of a key mechanism of consociational constitutionalism), federalism and a difficult-to-amend written constitution served as important instruments for the minority veto, one of the pillars of consociationalism.[14]

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12. *Id.* at 25.

13. *Id.* at 36.

14. AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIANISM AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 33 (1999) [hereinafter, LIJPHART, PATTERNS]. For allusions to Calhoun's concurrent majority in Lijphart's work, see LIJPHART, DEMOCRACY, *supra* note 9, at 30; AREND LIJPHART, THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS 125 (1968); LIJPHART, DEMOCRACY, *supra* note 9, at 37, 125, 149. *See* JOHN C. CALHOUN, DISQUISITION ON GOVERNMENT (1849).

IV. REHABILITATING DRED SCOTT

The vehicle Graber uses for driving home these conceptual points about the consociational origins of American constitutionalism is *Dred Scott v. Sanford* (1857). In *Dred Scott*, the Court declared as a matter of law, first, that blacks are not citizens, and, second, that, because slaves were the property of their owners under the protection of the Fifth Amendment's due process clause, Congress has no power to ban slavery in the territories.[15]

Graber complains that most contemporary assessments of the *Dred Scott* decision are undertaken with contemporary legal agendas in mind that warp our understandings of constitutional history. These assessments, propagated by contemporary perfectionists and originalists alike, assume that: 1) the Founders were "wise and virtuous," 2) slavery is evil; and, therefore, 3) Taney's opinion in *Dred Scott* sustaining it on originalist grounds must have been a fundamental misreading of the Founders' Constitution. Such assessments, in Graber's view, "[minimize] the extent to which the original Constitution accommodated that peculiar institution" (p. 22).

This is something that Chief Justice Taney understood. Graber endeavors to prove that "Taney's constitutional claims in *Dred Scott* were well within the mainstream of antebellum constitutional thought" (p. 28). He does so through extensive historical research into the nature and content of those understandings. Citing a cascade of antebellum state court opinions, for instance, Graber concludes that "The judicial denial of black citizenship reflected beliefs held by the overwhelming majority of antebellum jurists in both the North and the South. Virtually every state court that ruled on black citizenship before 1857 concluded that free persons of color were neither state nor American citizens" (pp. 28–29).

Taney's views on slavery and citizenship, moreover, were in the mainstream of Jacksonian and Democratic Party thought. And they were anticipated in formal opinions issued by the U.S. Attorney General (p. 30). Moreover, these understandings were not held by Democrats alone. Graber marshals a raft of contemporaneous declarations from northern officials, Republican and Whigs, expressly agreeing with Taney's view in *Dred Scott* that blacks could not be citizens. He notes that Lincoln himself, in his

15. *Scott v. Sandford*, 60 U.S. 393 (1857).

debates with Stephen Douglas, refuses to criticize this aspect of Taney's opinion (p. 32). Even the harshest critics of Taney's opinion, like Susan B. Anthony, acknowledged that it reflected the widely held understandings of the time (p. 33). Graber contends that Taney's much mocked argument that the fact that blacks had voted in the Founding era (cited by the vehement dissents of Justices Curtis and McLean) did not, *ipso facto*, entail black citizenship was, historically, dead-on: non-citizen suffrage was common at the time, and politicians from across the political spectrum agreed that suffrage did not entail citizenship (p. 49).

The story is similar when it comes to the power of Congress to ban slavery in the territories. Here, there was disagreement over the scope of Congress's powers from the outset. Graber observes that "Thirty years after ratification, all living Southern Framers maintained that they had not intended to vest Congress with the power to ban slavery in the territories, while the surviving Northern framers uniformly maintained they ***had*** intended to vest Congress with that power." Both, Graber argues, were plausible interpretations of the 1787 Constitution (p. 66). Contemporary efforts defending Congress's power to accomplish this on the basis of *McCulloch v. Maryland's* broad reading of the necessary and proper clause, Graber claims, are anachronistic, reading that decision more in light of Franklin Roosevelt's New Deal than of Andrew Jackson's America (pp. 71–72). In reality, the scope of Congress's powers in this area is a matter to which the Framers either gave, or expressed, little thought (p. 73). Taney's arguments on these matters may not have been right. But there is little doubt they were familiar, common to their time, and plausible.

However plausible these arguments may have been, given the depth of the conflict, was the (unelected) Court the right institution to resolve these questions? Many antebellum political actors certainly thought so, Graber explains: they repeatedly insisted that the question was one that would be best resolved by the judiciary (pp. 33–35).[16] And many saw the Taney Court in particular as especially well-suited to resolving it. They looked at that Court—which was dominated by Southern unionists and conservative northerners—not as a tool of the slave power (as many today talk about it), but rather as a "remarkably centris[t]" institution, and the most likely venue for resolving contentious

16. *See also* Mark A. Graber, *The Non-Majoritiarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46–50 (1993).

sectional questions in a moderate, workable way (pp. 36–37). How centrist was the Court? Graber suggests that we decide by comparing its political temper, not to our own, but to that of other contemporaneous national institutions. He adduces a fair amount of evidence, for instance, that it was more centrist than the Congress of the same era.

The implications of this research are potentially quite significant. For, if Taney's opinions on these legal issues were well within the mainstream of their time then, even if we concede that Taney's reading of the Constitution was flat-out wrong (as Graber does not), we are led ineluctably to conclude that his *Dred Scott* opinion was neither arrogant nor activist—that it manifestly did not involve a judge willfully reading his own idiosyncratic political views into law. In the context of the evidence adduced by Graber, *Dred Scott* becomes (to borrow Jeffrey Rosen's terms—though not his judgment about the *Dred Scott* case itself) a classicly "multilateralist" decision.[17]

But can we at least concede the *Dred Scott* was activist and infamous in its effects? Did *Dred Scott* create a political firestorm that hastened the disintegration of the Union? Graber insists that that question must be answered by looking to the reactions not of committed secessionists, but to those of peaceful unionists. Drawing on the previous work of historians, he finds no evidence that the decision led to any more votes for Republicans which, in spiral of action and reactions, hastened the dissolution of the Union. In this regard, he fingers the Lecompton constitution, not *Dred Scott*, as the real culprit (pp. 40–41).

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17. That is (to borrow Jeffrey Rosen's nomenclature), the *Dred Scott* decision was a case of the Court acting "multilaterally," on the basis of considerable support in the polity for its constitutional understandings. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006). As I noted in a brief review of Rosen's book—and as Graber's book makes evident as a case in point—even when the Court seems to be acting most preemptively (and, hence, in an "activist" way), rather than simply inventing its arguments out of whole cloth, it is usually relying on *some* widespread understandings held *somewhere* in the polity. This makes Rosen's model considerably less useful than he supposes. The trick (and the trick Rosen adopts in his book) is to look hard for that support in areas that he likes, and to do a cursory search that fails to discover it in areas that he doesn't. *See* Ken I. Kersch, Review of Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America*, 112 COMMENTARY 70–72 (Oct. 2006). This point may be deepened, as Graber, drawing on the work of Rogers Smith, deepens it, by emphasizing the "multiple traditions" of liberalism, republicanism, and ascriptive Americanism simultaneously threading through American political thought throughout the country's history. All are available as anchors for political argument at most points in American history. Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549–66 (1993). Rosen himself uses *Dred Scott* (and *Roe v. Wade*) as examples of classically "unilateralist" decisions.

None of this, as noted above, means that *Dred Scott* was not "wrong" in a normative or moral sense, or (relatedly) as a matter of interpretive method: on an issue of such deep moral import, shouldn't the Court's justices (as today's aspirationalist theorists might suggest) have followed their hearts and not their heads, and—in this case at least, involving fundamental issues of bondage and freedom—recurred to their own sense of morality and justice in interpreting the broad provisions and spirit of the Constitution? Here, once again, Graber spies an anachronism, one which unmasks the wonted solipsism of contemporary constitutional theorists. All the evidence suggests that had the justices hearing the *Dred Scott* case been committed to aspirationalism, Chief Justice Taney's majority in *Dred Scott* would actually have swelled even larger. The historical record is clear, Graber instructs his contemporaries, that even Justice Curtis of Massachusetts, who wrote one of the case's famed dissents, was a committed racist, and evinced considerable sympathy for slavery. In other words, white supremacy ***was*** the aspirational position for these judges. "The aspirational critique of *Dred Scott*," Graber writes, "is at bottom based on the silly proposition that Southerners fought to the death to preserve what they know in their hearts was a necessary evil. Slavery was embedded in the way of life that most Southerners and some Northerners thought intrinsically valuable and expressive of the highest constitutional aspirations" (p. 83). Put otherwise, slavery's proponents and defenders in antebellum America *were aspirationalists*: they had racist, and white supremacist aspirations.[18]

Graber uses these facts as an opportunity to criticize virtually any sort of constitutional method as a hedge against bad—even evil—political results. He explains:

> all forms of constitutional logic are capable of yielding evil results. Institutional arguments yield evil results whenever elected officials and popular majorities support evil laws. Historical arguments yield evil results whenever constitutional framers and ratifiers constitutionalize evil practices. Aspirational arguments yield evil results whenever constitutional framers have evil constitutional values (p. 83).

Thus, approaching *Dred Scott* through the prism of contemporary academic debates about the best way to interpret the constitutional text is folly. Graber argues that we would gain a richer, and more accurate understanding of the case, and the

18. *See* Smith, *supra* note 17.

constitutional questions it raised, if we look at it through the prism of the framework of government that was set up by the original constitution, and then consider how well these institutions functioned in resolving disputes in a changing polity developing, over time, economically, geographically, socially, and politically. The real problem—for which the *Dred Scott* case became a flashpoint—was not one of erroneous interpretations but rather one of "flawed constitutional institutions" (p. 91).

Of course, this does not free Graber from the burden of interpretation. It requires that he advance his own interpretation of the purposes that the institutions created at the founding were designed to achieve. "The Constitution of 1787," he writes, "sought to secure a balance of sectional power by establishing institutions thought to give both the free and slave states a practical veto on national policy.... The framers understood that slavery might be restrained or even abolished under the constitutional arrangements agreed upon in 1787, but they believed that would happen only when many Southerners thought such policies desirable" (p. 92).

The core principle of the original Constitution, for Graber, the social scientist, was bisectionalism. The constitutional founders "were more concerned with devising institutions that would facilitate bisectional agreements on slavery policy than with determining the substance of those agreements in advance. The more perfect union crafted in Philadelphia primarily relied on a constitutional politics constructed to yield policies that moderates in both the North and the South would support" (p. 96). As such, they created not—as the constitutional theorists insist—constitutional law, but rather the framework for a constitutional politics. "[T]he framers bequeathed to their descendents a set of constitutional institutions they hoped would facilitate future bargaining over the constitutional status of slavery. Constitutional exegesis was supposed to resemble renegotiation as much as interpretation" (p. 171).

In agreeing to the 1787 Constitution, "Northerners were assuaged by the paucity of explicit textual protections for slavery, Southerners by their expected control of the national government" (p. 109). "Poor communication between different regions prevented most participants in state ratification conventions from fully realizing the different interpretations of the constitutional compromises over slavery being advanced during the ratification process in noncontiguous states" (p. 110). "The Constitution drafted in Philadelphia was interpreted as sufficiently

proslavery to be ratified in the South and sufficiently antislavery to be ratified in the North" (p. 12).

The test of the wisdom of these constitutional arrangements was in the living. The constitutional order framed at Philadelphia initially functioned fairly well. "National parties [whose rise was neither predicted nor desired by the Founders] became the primary vehicle for preserving the original constitutional commitment to bisectionalism." Underlying the original constitutional bargain, Graber contends, was an understanding that "crucial . . . political elites in both the free and slave states had to approve all constitutional settlements on slavery issues" (pp. 3, 92, 115, 140–44).

Southerners indeed were dominant in national politics, initially, and, when they were dominant, they favored the expansion national power (pp. 116–17).[19] As the Louisiana Purchase manifests, they were also initially quite supportive of westward expansion (pp. 118–20). Things changed, however. Over time, settlers unexpectedly flocked to the Northwest rather than the Southwest (p. 92). "[E]very decade between 1820 and 1860 witnessed an increase in the relative population and political power of the North" (p. 126) And in what Graber calls "the new constitutional politics of slavery," it became increasingly clear to all that the region that controlled the west would control the national government (p. 136). That region, it also became increasingly clear, relatively early on, would be the North.

Nevertheless, between 1820 and 1850, under what Graber calls the "modified constitution," the slaveholding republic was maintained by the "combination of representatives with Southern sensitivities, presidents with bisectional coalitions, and proslavery majorities on the federal bench" (p. 149). "The Jacksonian Party system and the Jacksonian Democratic Party were the primary means by which mid-nineteenth century Americans preserved their original commitment to bisectionalism," he writes. The national party system "fostered cooperation between free- and slave-state politicians" (p. 144). "Public policy under the Jacksonian regime was both republican and proslavery because politicians in the free states gained necessary Southern support

19. The degree to which southerners actually favored national power at this time is perhaps overstated by Graber here, though his drawing attention to the significant instances in which they did is a helpful corrective to the conventional wisdom that they were unalloyed states-righters from the beginning.

for their nonslavery interests only by providing certain protections for slaveholders" (p. 145).

As time went on, free soilers and abolitionists came to see, understand, and execrate this *modus vivendi* (pp. 149–50). Soon, there developed a "real debate . . . over whether the original constitutional commitment to bisectionalism should be modified or abandoned" (p. 13) The Wilmot Proviso, and the Treaty of Guadalupe Hidalgo were arrows aimed at the heart of the order's bisectional assumptions. But they fell without making a direct hit on their target. Nevertheless, "balance rule" power-sharing arrangements continued to unravel as demographic trends led to persisting free state control over the House of Representatives and, in time, the Presidency, and as slaveholders divided amongst themselves by "party, ideology, and region" (pp. 5, 143–44). In an ominous sign, sectional parties developed.

By the time of *Dred Scott*, the stresses on the old order were intense. The origins of the *Dred Scott* case were in efforts by party leaders to preserve the bisectional status quo constitutional order—and not in the inclination of the Court to resolve the question by fiat. "The national party leaders who foisted responsibility for slavery on the federal judiciary," Graber explains, "attempted to maintain bisectionalism by vesting veto power over slavery policies in the only remaining national institution with a Southern majority"—the Supreme Court (p. 13).

What else were they to do? The original design of the Constitution practically foreordained that it would be left to the Court, rather than other institutions, to seek to resolve this incendiary matter. Over time, Article II shunted the moderates on the question out of contention for the Presidency. For instance, Graber observes that Millard Fillmore, a committed New York constitutionalist who might have been the Whig candidate for President in 1852, and won with the sort of bisectional support that would have promoted sectional compromise, was done in by Article II. Graber notes that Fillmore had a lot of support in many states, but majority support only in one, which earned him 3 percent of the electoral college vote, while he had the support of 22 percent of the voters. Those candidates who could have appealed to the more compromising median voter—which they hadn't the incentive to do under the prevailing rules of our constitutional system—were similarly frustrated (pp. 154–55). Stephen Douglas and John Bell were presidential candidates who appealed to the median voter, but who lost out given these rules (p. 166). Under these arrangements, come the 1850s, the

Taney Court was arguably the national government's most representative institution.

Graber contends that the candidate for president in 1860 who remained truest to the spirit of Constitution's original spirit was not Lincoln—who insisted, wrongly, that the framers intended to place slavery "in the course of ultimate extinction" and, accordingly, "promised to accommodate no more evil than constitutionally necessary"—but rather John Bell, "who promised bisectional solutions to contested constitutional questions," with the aim of "preserve[ing] the conditions under which slavery ***might*** have been abandoned peacefully" (p. 5).[20] As such, Graber concludes, "The Constitution caused the Civil War by failing to establish institutions that would facilitate the constitutional politics necessary for the national government to make policies acceptable to crucial elites in both sections of the country" (p. 167).

For Graber, it is precisely what many people praise about Abraham Lincoln that he finds most damning: the fact that Lincoln repeatedly declared slavery a moral and constitutional evil. This status as evil, Lincoln believed, "obligated slave-state citizens to acquiesce whenever Republican constitutional majorities interpreted. . . constitutional ambiguities as sanctioning antislavery policies" (p. 173). This, however, was a fundamental misreading of the nature of the Constitution, whose nature was consociational, and, whose abiding founding commitment was to bisectionalism.

V. THE LIMITS OF SOCIAL SCIENTIFIC CONSTITUTIONALISM

Strangely enough for a scholar whose other recent writings tout a "regime politics" approach to U.S. constitutional development, Graber's analysis of the nature of America's constitutional regime stops dead in its tracks with the election of 1860: in this book, Graber says practically nothing about what came after. For a work of history, which would be limited in temporal scope, this ordinarily would not be a problem. For a work of constitutional theory, however, it is. Without any consideration of the new constitutional nation that arose in the Civil War's aftermath—the new constitutional *regime*—it is difficult to make

20. Quoting Abraham Lincoln, 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 18 (Roy P. Basler, ed., 1953).

any useful assessment of the virtues of Abraham Lincoln's constitutionalism. This is because, to be counted a successful constitutional thinker, Lincoln's reputation must rest in considerable part not only on how, looking backwards, he described the constitutional republic, but in how the nation realized his understandings after the war. Lincoln's most enduring success, after all, was to forge a constitutional vision that purported not only to comprehend the past, but to make the future.

There may be lots of talk about development in this book—economic, political, geographical. But, in Graber's hands, all that development plays out against the backdrop of a constitutionalism that is determinatively—perhaps definitionally—static. It is true that Graber provides for the possibility that an originally consociational constitution might develop into something different.[21] But he insists that, if it does so, it must be through—and only through—the means set out by a rigidly adhered to consociationalist theory—that is, by bisectional methods.[22] In this, Graber is, in his own way, as rigid as the starchiest of conservative originalists.

Put otherwise, Graber makes this a book about fidelity rather than (as we might expect from a scholar committed to a regimes perspective) about transitions. Douglas and Bell were, similarly, preoccupied with fidelity—which is why Graber is so fond of them. Lincoln is a much more complicated case—which is why pretty much everyone else is so fond of *him*. Clearly, Lincoln is setting out new constitutional understandings (while, at the same time, drawing deeply upon the Constitution and thought of the American past). And the war came.

Even if we once had a consociational constitution, or a constitution that a key group of southern segmental elites understood as having been consociational, the Union victory in the Civil War brought the consociational period of American consti-

21. Lijphart provided for the possibility that consociationalism, in some cases, could be a developmental concept: it could succeed, and render itself superfluous. LIJPHART, DEMOCRACY, *supra* note 9, at 2.

22. As such, the rules of consociationalism are to Graber's Constitution what the Article V amendment process are to today's originalists. Regarding the means to change, Graber argues—briefly, and in passing—that Lincoln was too precipitous. If he had understood and acknowledged the bisectional foundations of U.S. Constitutional arrangements, as did Stephen Douglas and John Bell, the sectional disagreements over slavery in the territories might have been worked out over time, gradually, and peacefully (this throw-away counterfactual is asserted, not argued). Instead, Lincoln took the more radical (and, ultimately, disastrous) course of insisting on altogether new constitutional understandings—of insisting on the amendment of the Constitution by means outside of its (implicitly) stipulated procedures.

tutionalism to a close. Or put, otherwise (to transpose what seems novel in this book into the eminently familiar), the Civil War essentially brought the Webster-Hayne debate to a close: the Whigs (and the Republicans) won.[23] This being the case, and given that Graber's stance is rather statically originalist, one is lead to the conclusion that, so far as the United States is concerned, the consociational starting point he adopts here for thinking about constitutions amounts to little more than an interesting foray into antiquarianism. To be sure, there are other countries around the world that, today, might be best described as sectional and plural. But, the U.S. after 1865—after Lincoln—should not properly be counted amongst them.

For a book that aims to speak to contemporary (American) constitutional theorists, this is no small matter. Given where the book ends, Graber doesn't effectively address the question of whether or not, even if we accept his controversial characterization of the American constitutional founding as consociational, the constitutional order we live in *today* is consociational. If it isn't, and if the consociational Constitution Graber describes died in the Civil War, Graber's rejoinder to perfectionist (and other) constitutional theorists is seriously undercut. For presumably these theorists are offering their views on the best way to interpret our Constitution *today*—and not the best method for interpreting the Constitution in 1857. At the end of this book, Graber asks that we approach our own *present day constitutional disputes* as if we were voting for John Bell over Abraham Lincoln, because John Bell properly understood the antebellum constitution consociationally. But, at bottom—and remarkably—what he is asking us to do is interpret the Constitution today as if the Civil War had never taken place. Graber has made no argument, and adduced no evidence whatsoever, for the proposition that this is a sensible way to think about our own present day constitutional disputes. Surely it is no accident that we today are more appreciative of Lincoln's constitutionalism than John Bell's.[24]

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23. *See* ROGAN KERSH, DREAMS OF A MORE PERFECT UNION (2001); see also Graber (p. 60).

24. Lijphart characterizes the U.S. system as an "intermediate form" between the majoritarian "Westminster Model" and the consociational "consensus model." He argues that "majoritarian democracy is especially appropriate for, and works best in, homogeneous societies, whereas consensus democracy is more suitable for pluralist societies." He notes that "[I]n a political system with clearly separate and potentially hostile population segments, virtually all decisions are perceived as entailing high stakes, and strict majority rule places a strain on the unity and peace of the system." Majoritarian systems are

Well, some people are more appreciative of Lincoln. Drawing upon the very best understandings of contemporary social science, we can, today, appreciate the folly of Abraham Lincoln. Like Graber, Lijphart, the consociational empiricist, is full of warnings about the path that Lincoln actually took:

> Although the replacement of segmental loyalties by a common national allegiance appears to be a logical answer to the problems posed by a plural society, it is extremely dangerous to attempt it. Because of the tenacity of primordial loyalties, any effort to eradicate them not only is quite unlikely to succeed, especially in the short run, but may well be counterproductive and may stimulate segmental cohesion and intersegmental violence rather than national cohesion. The consociational alternative avoids this danger and offers a more promising method for achieving both democracy and a considerable degree of political unity.[25]

Graber's argument leads ineluctably to the conclusion that, were he advised by card-carrying members of the American Political Science Association stocked to the brim with empirical studies of the conditions for the maintenance of consociational constitutional systems in plural societies, Lincoln would have been told in no uncertain terms not to do what he did. Similarly, extensively cited APSA comparativists, Graber instructs us, could have told the intransigent foes of the expansion of slavery westward (not to mention those committed to abolishing it where it actually existed) that they were on a dangerous mission. What they were engaged in was likely to lead to calamity. Since we can predict the likely outcome, given the prevailing conditions (social science) and since peace is the paramount value (Hobbes), ergo, Taney and Douglas and Bell were right, and Lincoln was wrong.

Was the original U.S. Constitutional order consociational or majoritarian? This depends on whether or not American society

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able to transcend division—though perhaps not the deepest—through the mechanisms of cross-cutting cleavages, and through the assumption that power will alternate between segments over time. When a single issue—like slavery—grows in significance to the point where the segmenting grows close to becoming uni-dimensional, and where members of the minority segment lose faith in the possibilities for the alteration of power over time, the constitutional system begins to break down. LIJPHART, PATTERNS, *supra* note 14, at 3; LIJPHART, DEMOCRACY, *supra* note 9, at 28–29. This simply pushes the question back a step, and asks whether the U.S. is (or was) best understood as a homogenous or a pluralist society. Graber insists that, prior to the Civil War, it was essentially—or, at least, potentially—plural. Lincoln insisted it was essentially homogenous.

25. LIJPHART, DEMOCRACY, *supra* note 9, at 24.

as it is, and as it was, is better described as "homogenous" or "plural." Which is it? Was the fact that we had a Civil War evidence of a constitutional failure? Or was the real failure in rooted either in the institution of slavery itself, or (as the old "irrepressible conflict" school of Civil War studies—whose arguments Graber echoes repeatedly here) in irreconcilable sectional differences that no initial agreement could have navigated effectively?[26] In the face of profound evil, is the fact that a nation resorts the war a sign of failure or of virtue? Is war ever justified?

Graber the constitutionalist makes a valiant—if not necessarily noble—effort to move beyond these inherently normative judgments through recourse to modern, empirical social science. While the fruits of his effort were instructive, however, it was ultimately a lost cause.

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26. This outlook was succinctly summarized by the historian F.W. Owsley in his contribution to the important statement of the Nashville agrarians, *I'll Take My Stand*, published in 1930: "This agrarian society had its own interests, which in almost all respects diverged from the interests of the industrial system of the North. The two sections, North and South, had entered the revolution against the mother country with the full knowledge of the opposing interests of their societies. . . . [T]hey had joined together under the Constitution fully conscious that there were . . . united two divergent economic and social systems, two civilizations, in fact. The two sections were evenly balanced in population and in the number of states, so that at the time there was no danger of either section's encroaching upon the interests of the other. This balance was clearly understood. Without it a union would not have been possible. Even with the understanding that the two sections would continue to hold this even balance, the sections were very careful to define and limit the powers of the federal government lest one section with its peculiar interests should get control of the national government and use the powers of that government to exploit the other section. . . . But the equilibrium was impossible under expansion and growth. One section with its peculiar system of society would at one time or another become dominant and control the national government and either exploit the other section or else fail to exercise the functions of government for its positive benefit. Herein lies the irrepressible conflict, the eternal struggle between the agrarian South and the commercial and industrial North to control the government either in its own interest or, negatively, to prevent the other section from controlling it in its interests. Lincoln and Seward and the radical Republicans clothed the conflict later in robes of morality by making it appear that the "house divided against itself" and the irrepressible conflict which resulted from this division marked a division between slavery and freedom. Slavery . . . was part of the agrarian system, but only one element and not the essential one. To say that the irrepressible conflict was between slavery and freedom is either to fail to grasp the nature and magnitude of the conflict, or else to make use of deliberate deception by employing a shibboleth to win the uninformed and unthinking to the support of a sinister undertaking." F. W. Owsley, *The Irrespressible Conflict*, *in* TWELVE SOUTHERNERS, I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION 24–25 (Louisiana State University Press, 1977 [1930]). In DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL, Graber tracks this argument in most of its essentials—though, unlike the adherents to the Irrepressible Conflict thesis—he does place slavery at the heart of the Southern system.