

Look at Lincoln: Lincoln and the Constitution

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Feldman, Noah. *The Broken Constitution: Lincoln, Slavery, and the Refounding of America.* New York: Farrar, Straus, and Giroux, 2021. HARDBACK. \$30.00 ISBN 9780374116644 pp. 384, with illustrations.

Noah Feldman's *The Broken Constitution* is the case-in-chief for his proposition that President Abraham Lincoln repeatedly violated the United States Constitution with intent and effectively rewrote the interpretation of the founding document in the American system. The revised document exists today. Like any good lawyer, Mr. Feldman makes his case by presenting his strongest evidence, while disallowing any contradictory evidence to contradict his assertions. He suggests that this new "moral constitution" is unambiguous. Unfortunately, this is detrimental to the work, although it does mention interesting points in a well-written and well-researched book.

Mr. Feldman, a law professor, has previously authored nine other books addressing both subjects of politics and history. A reader must be warned the book requires a focused reading to understand the author's points. It would also behoove any reader to be familiar with the general history of the 1800s, including the slavery question, to understand Lincoln's choices and actions.

Since Lincoln's death, more than 16,000 books have been published regarding his life. Among those books, this may be one of the most beguiling. Many authors have written of Lincoln's relationship with the U.S. Constitution. Some suggest that Lincoln used his wartime powers provided by the Constitution to save the Union successfully. Others, like Mr. Feldman, argue that Lincoln's choices and deeds violated the Constitution and impact our lives and the interpretation of that foundational document to this day.

Mr. Feldman's book compares the "compromise constitution," which he establishes as the original framing of the Constitution, which included compromises as to the issue of slavery, with a "moral constitution" which was created by Lincoln's broad interpretation of the document and enshrined therein in the Thirteenth, Fourteenth and Fifteenth Amendments as well as the 1866 Civil Rights Act.

The Broken Constitution describes the “compromise constitution” as a document upon which this country was founded. It considers the rupture between the several states when some decided to secede. The “moral constitution,” was created by Lincoln during the initial phases of the Civil War. The results included martial law, political imprisonment, suspension of habeas corpus and civil liberties, and the emancipation proclamation. However, while reading these chapters, I was left to wonder how Lincoln—who never considered the secessionist states to have left the Union and believed he had not violated the Constitution—would reply to the charges made by the author.

Many would argue that Lincoln’s actions were authorized by the wartime powers of the commander-in-chief, adopted and written alongside the same words which Mr. Feldman vigorously argues Lincoln violated. Mr. Feldman contends that the suspension of habeas corpus in Union states while civilian courts remained operational and limitations on both the freedom of speech and press could simply not be considered within Lincoln’s wartime powers.

Mr. Feldman also contends that, because of Lincoln’s actions our Constitution is now a “moral constitution,” which has never reached its potential and goals for creating a just society. Ironically, Abraham Lincoln said many times it was the Declaration of Independence, where all should have an equal chance, is the primary vision for which we should strive.

He also contends that subsequent presidents have used Lincoln’s actions as a source of precedent for unilateral actions and provided for a federal government that affects every American every day. With that in mind, Mr. Feldman concludes that Lincoln’s actions failed to lead our nation to the promised “more perfect union.”

However, any reader should be mindful—as many Americans are—that Lincoln’s interpretation of the Constitution has led him to be lionized over many generations. In other words, Mr. Feldman’s thesis should be judged by weighing the evidence and credibility of Abraham Lincoln’s actions. After finishing this book consider whether our society has benefitted from Lincoln’s actions all those years ago or suffered from them.

Mr. Feldman also relies, not in small part, on Jefferson Davis’ argument in favor of secession to support his theory that Lincoln’s actions were unjust and unlawful. Importantly, Mr. Feldman does not sympathize with Jefferson Davis’ insistence that slavery was an ethical system.

Furthermore, Mr. Feldman’s writing regarding the Constitution, as originally written, and its position on slavery is questionable. Mr. Feldman fails to acknowledge that during the

Constitutional Convention, the antislavery delegates formed a strong counterweight to the pro-slavery delegates from the South. He fails to consider or address the Constitution's provisions authorizing the abolition of the United States' participation in the Atlantic slave trade as an antislavery delegate victory at that convention. That same victory, lamented by James Madison, was one of if not the first victory by antislavery delegates over the pro-slavery delegates. Mr. Feldman also fails to consider the Constitution as a sometimes vague and ambiguous document—a failure that seems odd during the times we live in today. The Constitution offered protections both to slaveholders all the while providing abolitionists reasons to hope. In fact, Benjamin Rush considered the Constitution to be the death knell of slavery. More recently, James Oakes in his *The Crooked Path to Abolition* has argued convincingly the Constitution was anti-slavery.

The Broken Constitution is published at a time when many scholars and authors question our Constitution, and some contend that it is indeed broken. Mr. Feldman argues that it took Lincoln—a tyrannical leader—to emancipate the slaves and create the United States as a new nation. Such contention is bone chilling. But it should not alarm the reader, despite Mr. Feldman's bold brilliance and contrarianism.

However, *The Broken Constitution* wants for constitutional soundness and context.

Stories regarding slavery, the compromises staving off the Civil War, abolitionist movements prior to the Civil War, the Civil War itself and much more may lend a great deal to Mr. Feldman's legal considerations. By incorporating the view of the era's political groups and voters, a reader would be better served. But without such context, Lincoln's suspension of the writ of habeas corpus and political and press censorship appear shocking and without merit.

Furthermore, Mr. Feldman's accusations against Mr. Lincoln for his suspension of the writ of habeas corpus and the freedom of press and speech fail to acknowledge the very real constitutional violations from Lincoln's adversaries. The Confederacy too violated the Constitution by attempting to leave the Union, all the while suppressing civil liberties and refusing to acknowledge Lincoln's own election. The author contrasts President James Buchanan's belief that the federal government could not make war on states with Lincoln's conviction that he had the constitutional obligation and duty to do just that: suppress rebellion. *The Broken Constitution* sometimes reads as an indictment accusing Lincoln of taking uncritical and unthinking actions to expand the scope of his office and its powers. Ignored is the President's oath of office, the only

oath literally described in the Constitution, to see that all the laws are protected by adhering to the Constitution.

This review is not meant to say that Mr. Feldman's work is not invaluable—quite the contrary. Mr. Feldman provides a thought-provoking case that the Union's own war aims were the subject of a significant rupture will likely give rise to debate for years to come. However, this potential debate would have been better served by a less controversial framing.

Additionally, Mr. Feldman offers a look into Lincoln's incremental thinking. The author demonstrates how Lincoln articulated a "before" and "after" Constitution. The Gettysburg Address can be considered a compromise document as opposed to a moral document. Yet, all that the President did, in part, was elocute the United States "are," not "is."

It cannot be disputed that Lincoln personally abhorred slavery. But, as a trained lawyer, he understood that the institution of slavery had some protections within the Constitution. He, as a follower of Henry Clay, prescribed to the Whig Party platform that slavery would simply not exist by the end of the century.

Mr. Feldman's framed "compromise constitution" was revered by Lincoln, who understood it through countless hours of study. Yet upon his election and the breakout of the Civil War, the Southern states shattered the "compromise constitution." To uphold the Constitution as required by his oath, Lincoln may indeed have been forced to violate its terms.

The Broken Constitution is a thought provoking and incendiary tome. It surely will provide debate for historians of all persuasions in the years to come.

Frank J. Williams is the founding Chair of the Lincoln Forum, President of The Ulysses S. Grant Association and Presidential Library, and regular Civil War Book Review columnist for Abraham Lincoln, the Civil War, and Reconstruction.