Review Essay

Some Legal Myths About Lincoln

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The Emancipation Proclamation continues to tantalize. Issued almost 150 years ago, it has never lost its hold on the imagination of Americans. It occupies the same lofty pedestal as the Declaration of Independence and the Constitution. We are taught that the Proclamation signified the end of slavery in the United States. But for all of its centrality to the American dream, Abraham Lincoln’s decision to issue it, and the very meaning of the document itself, remain controversial.

The controversy has an ugly side because of concerns relating to Lincoln’s views on race. Brian Dirck’s recent volume contains a collection of essays by distinguished historians that largely focus on whether Lincoln was a racist and how his attitudes about race affect whether he rightfully should be called the Great Emancipator. Because *racism* is the touchstone, many essayists expend considerable effort defining the term and marshaling facts for and against the conclusion that Lincoln was a racist.

Several of the essayists, including Dirck, take a different tack. Rather than confronting directly the palpable evidence of Lincoln’s views on race, they seek to disprove that Lincoln was a racist by arguing that his conduct surrounding issuance of the Proclamation shows that he sought to maximize the prospects for emancipation. These essayists rely heavily on legal and law-related arguments.

Thus, for example, Dirck focuses on a perceived concern by Lincoln that a Supreme Court led by Chief Justice Roger B. Taney would strike down an emancipation proclamation. Accordingly, so goes the argument, Lincoln delayed for almost two years issuing the Proclamation not because he was a racist, but because he needed time to stack the Court with friendly justices. Similarly, to reduce the likelihood of a Supreme Court review of the Proclamation, Dirck argues...
that Lincoln excluded the loyal slaveholding border states from its purview.

Those arguments are legally and factually incorrect. They are advanced with the effect, and undoubtedly the purpose, of enhancing Lincoln’s already mythical stature. But Lincoln’s emancipation-related decisions were based on valid political and military considerations, not the legal myths constructed in Dirck’s volume.

There is, however, an even more fundamental problem. The legal arguments proceed from the premise that Lincoln’s entitlement to be called the Great Emancipator turns on whether he was a racist. I believe this premise is incorrect. The truly important question is whether Lincoln acted with a humanitarian motivation when he issued the Proclamation, not whether he was a racist, whatever that term means (or meant). It is possible, though not likely, that Lincoln could have a humanitarian motivation even if he were a racist. Conversely, if Lincoln was not a racist, that would not necessarily mean that he desired to ameliorate the condition of the slaves when he issued the Proclamation.

I have argued elsewhere that Lincoln’s attitude about blacks makes it unlikely that he wished to benefit them when he issued the Proclamation. But Lincoln’s motivation in issuing the Proclamation is a complicated subject that deserves its own paper. I propose to deal here instead only with legal and law-related misstatements that appear in Dirck’s volume to support the notion that Lincoln was not activated by racial or racist considerations in connection with the Proclamation.

The recess appointment of David Davis

In mid-October 1862 Lincoln made a recess appointment of his former campaign manager, David Davis, to the Supreme Court. Dirck contends that Lincoln “rushed Davis’ nomination . . . in an unprecedented fashion . . . for no discernible reason, except that Lincoln perhaps wanted Davis already on the bench when the Emancipation Proclamation took effect on January 1, 1863” (110). This builds on the dubious assertion in Allen Guelzo’s foreword that Lincoln was looking over his shoulder at the Supreme Court when he crafted the Proclamation. In his foreword,

Guelzo endorses Dirck’s approach, claiming that Lincoln’s “mincing step in the Proclamation” reflected not “latent racism” by Lincoln, “but his determination to make emancipation as Taney-proof as care could make it” (x). According to Guelzo, Lincoln’s purpose in delaying the Proclamation was to preclude the Taney Court from “wreck[ing] all prospects for emancipation” (x).

The reality is that Lincoln’s decisions as to whether and when to issue the Proclamation had nothing to do with concerns about Roger Taney. Likewise, Lincoln’s manner of nominating Davis was not “unprecedented,” and did not reflect a concern that the Court might overturn the Proclamation. More likely than not, Lincoln’s decision to announce Davis’s recess appointment in the fall of 1862 was aimed at helping fellow Republicans in the ongoing Illinois congressional campaign.

The Dirck-Guelzo thesis that Lincoln delayed the Proclamation because of a desire to inoculate the Supreme Court is counterfactual. Most importantly, though Lincoln announced in his December 1861 annual message that he was considering adding a tenth justice to the Supreme Court, he did not rush that plan through Congress. A bill adding a tenth justice did not reach Lincoln’s desk until March 1863, and he did not appoint a tenth justice to the Court until May 1863, more than two years after he took office and more than four months after he issued the Proclamation.

The basis for what Dirck contends is his “reasonable speculation” that the specter of Taney influenced Lincoln is Lincoln’s rushing of “Davis’ nomination in an unprecedented fashion” (110). According to Dirck, “the president no doubt picked Davis and hurried his nomination for a variety of reasons, but it is reasonable to speculate that he hoped Davis could protect emancipation if it came before the Court” (110). The facts refute Dirck’s confessed speculation.

Lincoln advised Davis on August 27, 1862, that he intended to appoint Davis to the Court. Lincoln waited seven weeks, until October 17, to officially appoint Davis to the seat, which had been vacated by Justice Campbell, of Alabama, when he resigned on April 30, 1861, to join the Confederacy. Thus, Lincoln left the seat vacant for more than seventeen-and-a-half months before filling it. The seven-week delay, and especially the seventeen-and-a-half-month delay, are strong evidence that Lincoln did not rush to inoculate the Court in anticipation of the Proclamation.

Dirck seeks to turn that delay to his advantage by noting that Lincoln appointed Davis within a month after announcing the Preliminary Proclamation on September 22, 1862, and inferring that Lincoln
was in a hurry because he took the “highly unusual step of appointing Davis when the Senate was recessed; this was so unusual that [Lincoln] asked his attorney general to furnish a written opinion affirming its propriety” (110).

Contrary to Dirck, recess appointments were neither “unprecedented” nor “highly unusual” at the time Davis was appointed. Davis was the thirty-seventh justice to serve on the Court. The practice of making recess appointments to the Court began in 1791 during the presidency of George Washington. Davis was the ninth recess appointment to the Court. Thus, by the time of Davis’s appointment, almost one quarter of all the justices had come to the Court via recess appointment.

Attorney General Bates’s October 15, 1862, response to Lincoln confirmed the constitutionality of the practice, noting that this same conclusion had been reached by all four of his predecessors (Roger Taney included), who had considered the issue during tenures dating to 1823. “There is no evidence that the constitutionality of any of those 9 recess appointments [including Davis] was questioned, although they were made during a critical period of constitutional interpretation.”3

Lincoln gained no time (or any other advantage) by appointing Davis during a Senate recess. Davis received a commission from Lincoln on October 19, 1862. Congress received Davis’s nomination on December 3, 1862, the day after returning to session, and five days later, on December 8, confirmed them. Thus, Davis was a recess appointee for less than two months. For all but six of those days, however, the Court itself was out of session. The Court’s December 1861 term ended on March 24, 1862, and the December 1862 term did not begin until December 2, 1862. Davis did not actually take his seat until December 10. So, the recess appointment of Davis did not result in his being involved in any Court cases prior to Senate confirmation.

Even assuming that Lincoln hurried to put Davis on the bench, it is doubtful that he acted with the Emancipation Proclamation in mind.4

3. Note, Recess Appointments to the Supreme Court—Constitutional but Unwise, 10 Stanford Law Review 124, 131 (1957). “It was not until [Chief Justice Warren’s recess appointment in 1953] that the constitutional propriety of recess appointments was questioned.” Ibid., 130 n. 12.

4. Dirck claims that Lincoln selected Davis over Orville Browning, also of Illinois, because Browning opposed emancipation, whereas Davis did not (110). The sources cited by Dirck regarding Browning do not discuss Browning’s views on emancipation (110 n. 28). But one of those sources suggests that Davis was not sympathetic to emancipation, contrary to Dirck’s portrayal of Davis: Stephen B. Oates, With Malice Toward None: The Life of Abraham Lincoln (New York: Harper & Row, 1977), 339. (“Even after David Davis . . . [was] appointed to the Supreme Court, [he] begged Lincoln to ‘alter’ his emancipation policy and save the nation.”) Davis’s principal biographer makes
The final Proclamation was not issued until January 1, 1863. It is inconceivable that litigation challenging the Proclamation would have gotten to the Court any sooner than a year later. The all-important *Prize Cases* took more than one-and-a-half years from inception (May 1861) to be argued at the Court (February 1863).

If indeed Lincoln hurried because of concerns about the Court, it could only have been because the *Prize Cases* were scheduled for argument at the Court in February 1863. A Union loss would have been a serious embarrassment for Lincoln and might have impaired the war effort. Lincoln may well have been concerned that the five Democrat-appointed justices, all of whom were still on the Court and who had voted against Dred Scott, would vote against the Union in the *Prize Cases*. Lincoln’s decision to assure Davis a seat for the December 1862 term was critical to the outcome of the *Prize Cases*. The Union won the case in a 5–4 decision, with Lincoln’s three appointees (Noah Swayne, Samuel Miller, and Davis) joined by two justices who voted against Dred Scott (Joseph Wayne and Robert Grier).

It is, however, extremely unlikely that Lincoln believed he had to make a recess appointment of Davis in October to ensure the Senate would have sufficient time to confirm him for the beginning of the December 1862 term. Lincoln’s prior Supreme Court nominations (of Swayne and Miller) had taken only five and six days respectively to clear the Senate, and each by large majorities. Lincoln had no reason to think the Senate needed a lead time of six weeks (in advance of the opening of the December 1862 term of the Court on December 2) in order to confirm Davis. And, of course, the Court was not in session when the appointment of Davis was made. In light of that, it is difficult to conclude that Lincoln appointed Davis in mid-October with an eye towards expediting Davis’s sitting on the Court in December.

There is an alternative explanation, more plausible though less lofty, than the one offered by Dirck. Davis’s chief biographer, Willard L. King, makes the same point: Willard L. King, *Lincoln’s Manager, David Davis* (Cambridge: Harvard University Press, 1960), 199. “‘The Proclamation has not worked the wonders that were anticipated,’ Davis admitted” during Leonard Swett’s fall 1862 congressional campaign. Davis had grown up in a slaveholding family in Maryland. King also reports that in January 1863 Davis told Lincoln “that to save the country, [Lincoln] must change his policy regarding slavery—the Emancipation Proclamation had made suppression of the rebellion impossible.” Ibid., 208.

5. Justice Clifford was appointed by President Buchanan in 1858 to replace Justice Curtis, who had dissented in *Dred Scott*. Clifford dissented in the *Prize Cases*. Dirck wrongly claims that Taney “did file a vigorous dissent . . . in the *Prize Cases*” (117). In fact, Taney did not write separately. He joined in an opinion filed by Justice Nelson.
King, suggests that Lincoln had an eye on Illinois, not the Court, when he appointed Davis in October 1862. In the fall of that year, Lincoln’s good friend Leonard Swett was running as the Republican candidate for a House seat in Illinois. At some point in “Swett’s campaign, the President was asked to intervene. Davis’s appointment to the Supreme Court had not yet been announced,” says King, “and many of his friends in central Illinois resented Lincoln[s] failure to give him an important post. It would help Swett to defeat [his opponent] if this feeling could be removed. The President asked the Attorney General if he could not give Davis an immediate temporary, or recess appointment without waiting for confirmation by the Senate.”

**Geographic scope of the Proclamation**

Dirck argues that because of Lincoln’s concerns regarding Taney’s desire to strike down the Proclamation, Lincoln excluded the slave-holding border states from the Proclamation in order to minimize the possibility of litigation challenging the Proclamation “from the only realistic plaintiffs . . .” (116). According to Dirck, “Lincoln knew that Border state slaveholders were the most likely source of any such litigation. Like pro-Confederate Southerners, they still possessed all of the rights guaranteed United States citizens. Unlike the Confederates, however, border state slave owners still enjoyed unfettered access to the federal court system” (115).

Dirck misreads the law. First, pro-Confederate Southerners did not “possess all of the rights guaranteed United States citizens.” Once war was declared by Congress in July 1861, citizens of the Confederacy (even those loyal to the Union) no longer enjoyed rights under the Constitution. If it were otherwise, the Union would have been obliged to comply with the Fugitive Slave Clause during the War, thus resupplying the Confederates with runaway slaves, one of their most important military assets. The Constitution did not require the Union to engage in such suicidal conduct. Instead, as the Court later confirmed in the *Prize Cases*, the Confederacy was to be treated as a sovereign nation and a hostile power. This meant that Confederate citizens were subject to the international laws of war—not the Constitution—in

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their relations with the United States. In contrast, of course, citizens of border states that remained in the Union retained their full rights under the Constitution.

Second, Lincoln understood that the Proclamation was a war measure, and, as such, it could apply only to the Confederacy. Lincoln adhered to the conventional wisdom that the Constitution did not permit the federal government to exercise its sovereign power to abolish slavery in any state. But once a state sought to leave the Union and went to war against the United States, Lincoln came to believe that as commander in chief he could abolish slavery in that state as an exercise of the United States’ war powers under the international law of war. Thus, Lincoln, believing he had no power to do so, never contemplated applying the Emancipation Proclamation to loyal border states. For Dirck to conclude that Lincoln excluded the loyal border states from the Proclamation in order to avoid litigation is to attribute to Lincoln a decision that rested on a premise that Lincoln knew to be legally erroneous, viz., that his war powers allowed him to emancipate slaves in states that had not seceded.

Third, Dirck claims that Lincoln rejected entreaties to remove the Proclamation’s “exemptions for border state and loyal slave owners” (115). This is factually incorrect. Lincoln was never asked to remove “border state and loyal slave owners” from the exemptions in the Proclamation. Contrary to Dirck, the Proclamation did not “exempt [or “except”] border states and loyal slave owners.” In fact, the Proclamation makes no mention of border states or loyal slave owners. The only “exemptions” (actually “exceptions”) that Lincoln was asked (by Salmon Chase) to remove were ones expressly contained in the Proclamation—portions of Virginia and Louisiana.

Dirck claims that Lincoln “repeatedly denounced the racist content of the [Dred Scott] decision during the late 1850’s.” (104). This is untrue. In fact, Lincoln agreed with Taney’s conclusion that blacks were not “citizens.” Rather, he disagreed only with Taney’s conclusion that Congress did not have the power to ban slavery in the federal territories. Lincoln never accused Taney of being a racist (the word did not even exist in those days), or of expressing racist views in Dred Scott. Indeed, at his infamous August 1862 meeting with a

7. See Emancipation Proclamation Unveiled.
8. This concern underlay, in part, Lincoln’s September 1861 decision to modify the emancipation portion of General John C. Frémont’s proclamation in Missouri.
Prior case law

The legal analysis offered by Dirck to support his argument that the Court would invalidate the Proclamation begins with the infamous *Dred Scott* decision, authored by Taney in 1857. Dirck insists that *Dred Scott* would be the “centerpiece” of an opinion striking down the Proclamation” (111). According to Dirck, all that Taney would have had to do was to “reaffirm *Dred Scott*’s substantive reading of the Fifth Amendment’s takings clause, ruling that presidential emancipation without compensation was unconstitutional” (111).

It is surely the case that Taney would have sought to rule against the Proclamation if given the chance, but he was not the unprincipled, feckless magistrate portrayed by Dirck. Contrary to Dirck, the Fifth Amendment did not apply to the Proclamation or to the citizens of the Confederacy. The Proclamation was a war measure applicable only to citizens of a foreign nation. Hence, Taney could have made little, if any, use of *Dred Scott* in striking down the Proclamation. Moreover, *Dred Scott* did not involve an exercise of war-making authority by Congress or the president. Rather, it involved (or was made to involve) interpretations of the Constitution in time of peace.

Dirck next claims that Taney’s May 1861 decision in Ex Parte *Merryman* (17 Fed. Cas. 144 [No. 9487] C.C.D. Md. 1861), holding that Lincoln exceeded the Constitution by unilaterally suspending habeas corpus, would provide legal support for a prospective Taney opinion striking down the Proclamation. Dirck recognizes the quite limited strength of this argument when he concedes that “the power to emancipate and the power to enforce wartime internal security were on


10. See Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2d ed. (New York: Oxford University Press, 1974), 289 (noting that Taney was ranked “great” as a justice—not simply a chief justice—in a June 1970 poll of sixty-five law school deans and professors of law, history and political science); ibid., 3d ed., 414 (reporting that Taney had made the “roster for the ‘all-time, all-star Supreme Court nine’ based on a distillation of everyone’s” choices), quoting James E. Hambleton, April 1983 issue of the *American Bar Association Journal*, 462–64.
the surface unrelated” (111). Dirck nonetheless attacks *Merryman* on the ground that it offered an excessively narrow interpretation of the wartime powers of the president and commander in chief, and was at odds with prior cases (107). Dirck is incorrect.

First, for all the invective heaped on it by Dirck, *Merryman* has stood the test of time. Shortly after the war ended, in *Ex Parte Milligan* (4 Wall. 2 [1866]), the Court, in an opinion authored by Lincoln’s recess appointee, David Davis, vindicated Taney’s approach in *Merryman*. Indeed, “[f]rom the Civil War down to our own day,” declared constitutional scholar Bernard Schwartz in 1963, “the consensus of learned opinion has been that on the legal issue involved in *Merryman*, Taney was right and Lincoln was wrong.”

Second, Dirck misconstrues the very cases that he claims *Merryman* contradicted. The cases cited by Dirck, *Martin v. Mott* (12 U.S. 19 [1827]) and *Bas v. Tingy* (4 U.S. 37 [1800]), did not confer broad authority upon the commander in chief. Rather, they involved Congress’s war powers, not those of the president.

Third, Dirck fails to cite, no less discuss, the controlling pre-Civil War Supreme Court cases dealing with the scope of the president’s war-making power. These cases, which date back to 1804 and include opinions by Chief Justices Marshall and Taney, made clear that the president’s war powers were subordinate to those of Congress and were quite limited. Taney’s opinion in *Merryman* was entirely consistent with those important precedents, all of which continue to retain their vitality.

Nor does Dirck mention that during the Civil War Congress exercised its war power to countermand certain of Lincoln’s decisions as commander in chief. Most notably, in March 1862, Congress enacted legislation prohibiting Union forces from returning fugitive slaves to their owners, a practice to which Lincoln had long acquiesced in the face of congressional objection. Neither the Constitution, Congress, nor the Supreme Court share Dirck’s capacious view of the president’s war powers.


12. In *Little v. Barreme*, 6 US 170 (1804), Chief Justice Marshall held that in conducting naval operations in time of war the president was subject to legislation enacted by Congress. In *Brown v. United States*, 12 US 110 (1814), the Court held that the president could not seize enemy property found on United States land at the commencement of war absent congressional authorization. Finally, in *Fleming v. Page*, 50 US 603 (1850), Chief Justice Taney limited the commander in chief’s responsibilities to “purely military” matters.
Lincoln assisting a slave owner to recover his slaves

Professor Kenneth J. Winkle, and Dirck (in another recent book), discuss Lincoln’s career in private law practice and find nothing wanting. Indeed, Dirck speaks glowingly of Lincoln “as an antebellum Atticus Finch . . .”13 Neither Dirck nor Winkle express concern regarding Lincoln’s representation of Robert Matson, a slave owner seeking to recover slaves who fled from him after he brought them from Kentucky to Illinois. Dirck dismisses this representation as being “almost beside the point,”14 and Winkle claims it tells us nothing “about Lincoln’s attitude toward slavery and race, but everything about his reverence for the law” (17).

It is inexplicable that Winkle should attempt to turn such a horrific representation into a good thing. Lincoln’s representation of Matson assuredly does not reflect “reverence for the law”; it more likely shows that his opposition to slavery (and empathy with blacks) was considerably shallower than Lincoln’s apologists care to acknowledge.15 Indeed, Lincoln was no Atticus Finch. Lincoln never defended blacks and never risked racially unpopular representations, even though many of his contemporaries, including future Chief Justice Salmon Chase, did just that. Either Lincoln did not have the courage of his convictions, or his convictions were not as deeply held as he sometimes said they were.

Lincoln’s representation of the slave owner most emphatically did not show “reverence for the law.” That singular phrase connotes a responsibility to comply with the law, including laws that one finds repugnant. It does not, however, encompass a duty to advocate legal rights that an attorney believes are repugnant. In any event, Lincoln disobeyed laws with which he disagreed and advocated legal rights that he supposedly found repugnant. The former was evident from Lincoln’s conduct in Merryman, and the latter was reflected in his representing Matson. These are hardly the markers of a person who reveres the law.

In representing Matson, Lincoln agreed to assist a client pursue a legal right to enslave others, though Lincoln found slavery to be repugnant. Lincoln was under no legal or moral obligation to assist Matson in pursuing that right. When Lincoln entered the matter, Mat-

14. Ibid., 149.
son already had (notoriously pro-slavery) counsel. Surely Lincoln’s representation of Matson did not show a “reverence for the law.”

There is a widespread misunderstanding that in representing Matson, Lincoln was simply helping him vindicate his rights under the federal fugitive slave laws. Perhaps that would merely have been showing “reverence for the law” because Lincoln believed enforcement of those laws was an obligation rooted in a constitutional compromise necessary for the founding of the country itself. Distasteful though he may have thought it to be, Lincoln ostensibly considered it a constitutional obligation to assist in returning fugitive slaves.

But Matson’s case did not implicate the federal fugitive slave laws. Those laws applied only to interstate, not intrastate, runaways such as Matson’s. Rather, Matson’s slaves had not escaped from Kentucky (a slave state) to Illinois (a free state). Matson had voluntarily brought them to Illinois, where they eventually left him. Hence, Matson’s claim to his (former) slaves depended on Illinois, not federal, law.

There is no evidence that Lincoln felt a correlative obligation to assist in enforcing slaveholders’ rights under state law, as opposed to federal law. It is difficult to believe that Lincoln entertained such a belief. Whereas the U.S. Constitution required states to return fugitive slaves from other states, it imposed no similar obligation on states to return slaves who had fled their masters within the state. Indeed, the federal Constitution did not regulate intrastate slavery. That was regarded as a matter for the states themselves. Whatever policy a state might choose in that regard had nothing to do with the “founding compromise” underlying the Fugitive Slave Clause.

Illinois’ constitution barred slavery, but in 1843 the Illinois Supreme Court carved out an important exception. The court permitted a slave owner to bring slaves through the state without the slave becoming free if the master’s purpose was simply to pass in transit through Illinois to another state. A small number of free states had, through their supreme courts (not their legislatures), created the in transitu exception as a matter of comity to slaveholding states. Free states were not obligated under the federal or their state constitution to make this exception; their courts did so out of courtesy to the slaveholding states.

Thus, Matson’s rights were rooted in a discretionary, court-created state rule quite unlike what Lincoln perceived to be the organic obligatory nature of the rights associated with the constitutionally based federal fugitive slave law. The constitutional duty, or compulsion, Lincoln may have felt as a lawyer to assist in enforcing the federal fugitive slave law was notably absent with respect to the in transitu exception. Moreover, the Illinois Supreme Court created the exception despite
the fact that almost fifty years earlier England had famously gone in the opposite direction, and that the courts of most of the other free states courts were following England’s lead. Lincoln may have been obligated to honor a court ruling that upheld the in transitu exception, but he was under no duty to advocate on behalf of the exception or to attempt to expand it. But that is precisely what he did.

Matson had kept his slaves in Illinois for several years to tend his farm there. He claimed to have brought the slaves there at their “request . . . on a temporary sojourn with the intention of returning” to Kentucky. Lincoln argued that masters had the right to keep slaves in Illinois to engage in slave labor there so long as they claimed to have brought the slaves there solely for the purpose of bringing them into another state.

The court rejected Lincoln’s attempt to broaden in favor of masters the narrow in transitu exception. Slave owners were not permitted to dictate the outcome of slave recovery cases simply by submitting self-serving, counterfactual testimony. Slavery would be permitted to exist in Illinois no more than necessary to satisfy the limited rationale underlying the in transitu exception. This did not countenance a slave owner putting his slaves to work for years at a time on the pretext of “passing through” the state. Illinois did not have such a wide berth for slavery.

Lincoln’s willingness to advocate for the in transitu exception, and for allowing the poison of slavery to seep into his home state any more than necessary to support that court-created, comity-based, exception is disappointing. It reflects poorly on the depth and quality of his opposition to slavery and on his attitudes about the slaves themselves. If Lincoln’s arguments had been accepted, this would have enabled masters to establish slavery in ostensibly free states. Ironically, this was precisely Lincoln’s complaint about the Dred Scott decision eleven years later.16

Lincoln’s congressional proposal for emancipation in the District of Columbia

Shortly after representing Matson, Lincoln served a single term in the House of Representatives. During his short tenure, Lincoln introduced an antislavery bill, but it did not pass. Winkle characterizes the bill as

“abolishing slavery in the nation’s capital . . . [and making] clear that Lincoln would oppose slavery wherever he felt that he had the legal power to do so” (18). This vastly overstates the matter.

While in the House, Lincoln opposed the many bills that sought to ban slavery outright in the District of Columbia. His own bill was a quite limited measure that fell well short of abolition. Rather, Lincoln proposed emancipation on a gradual basis, with compensation to slave owners, and only if agreed to in a referendum limited to “free white male citizens” of the District. He did not support a bill that would also have allowed black residents of the District to vote in a plebiscite.

Contrary to Winkle, Lincoln’s position did not embrace opposition to slavery to the full extent allowed under the Constitution. Congress had the power to abolish slavery in the District without any of the conditions contained in Lincoln’s proposal. Lincoln’s bill showed his penchant for compromise, not a deep-seated opposition to slavery.

Conclusion

Lincoln needs to be evaluated on the basis of fact, not fiction. Unfortunately, Dirck’s volume is cluttered with legal myths intended to deify Lincoln. In that respect, Dirck’s volume is no different than many recent studies treating Lincoln and emancipation. A recent breath of fresh air is Professor Mark E. Steiner’s *An Honest Calling, The Law Practice of Abraham Lincoln* (Northern Illinois University Press, 2006). What is needed is a new, comprehensive legal history of the Civil War. The last one was James G. Randall’s, more than fifty years ago.