Review

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Noah Feldman. *The Broken Constitution: Lincoln, Slavery, and the Refounding of America*. New York: Farrar, Straus & Giroux, 2021. Pp. 368.

Noah Feldman is among the most distinguished legal historians of our time. But this book does not meet his high standards or our high expectations. It consists of a series of mostly faulty legal conclusions. Had these conclusions been conveyed to Lincoln as legal advice, and been accepted by him, Lincoln would have declined to forcibly resist secession. Had he done so, he would have had no occasion to issue the Emancipation Proclamation.

Like most other scholars, Feldman hoists Lincoln into the realm of the nearly flawless hero. He baptizes Lincoln as the "true maker" of our Constitution, casting aside the Founders, including James Madison and Alexander Hamilton. But, unlike most other legal histories, *The Broken Constitution* deifies Lincoln only after skewering him. Lincoln deserves the praise lavished upon him in this book, but hardly any of the criticisms.

The author complains that Lincoln violated the Constitution in three respects: first, by unilaterally suspending habeas corpus and by suppressing dissent to the Civil War; second, by forcibly resisting secession in commencing a military invasion of the Confederacy; and third, by issuing the Emancipation Proclamation. According to the Feldman, Lincoln did not merely "violate" the Constitution, he

> fatally injured the Constitution of 1787. He consciously and repeatedly violated core elements of that Constitution as they had been understood by nearly all Americans of the time, himself included.
>
> Through those acts of destruction, Lincoln effectively broke the Constitution of 1787, paving the way for something very different to replace it.[1]

1. This language appears in a guest essay by Prof. Feldman published in the *New York Times* further explaining his book. "This Is the Story of How Lincoln Broke the U.S. Constitution," Nov. 2, 2021.

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This may be an accurate description of Lincoln's conduct with respect to habeas corpus and free speech, but these violations were relatively short-lived, and had no negative long-term impact on the rule of law in our country. They have been universally condemned ever since. They certainly did not "break" the Constitution. Accordingly, I do not address further Lincoln's suspension of habeas corpus, and limit this essay to the Union invasion of the Confederate states and to the Proclamation.

The Broken Constitution absolves Lincoln of guilt for his allegedly serious and serial Constitutional transgressions in forcibly resisting secession and in issuing the Proclamation because they resulted in a new Constitution free from the evil of slavery. But the underlying accusation that Lincoln employed unconstitutional means to achieve a praiseworthy end is misdirected when it comes to forcibly resisting secession and issuing the Proclamation. These two pivotal decisions were commonsensical, and their legality cannot be seriously doubted in light of the Supreme Court's 1863 decision in *Prize Cases*,[2] which upheld Lincoln's blockade of Confederate ports. Unfortunately, that seminal judicial decision is not discussed in this book.

Feldman's criticisms of Lincoln's decisions to forcibly resist secession and to issue the Proclamation miss the fact that these two decisions had momentously positive consequences well beyond constitutional reform. Military resistance to secession kept the country territorially intact, and, combined with emancipation, avoided the creation of a slaveholding rival at our southern flank along the Atlantic Ocean. This policy enabled the United States to become an economic, political, and military behemoth.

Military Resistance to Secession

The book's discussion of this topic is curious. It begins and mostly ends by relying on a report produced by President James Buchanan's Attorney General, Jeremiah S. Black. Feldman describes the "report" as "stating bluntly that the federal government had no constitutional authority to act if states seceded. Nothing in the Constitution authorized war to save the union." (9)[3] Black's report was "blunt," but it did *not* opine that the Constitution prohibited Congress to launch war against a state. Rather, Black thought it was a "question for Congress."[4]

2. *The Prize Cases*, 67 U.S. (2 Black) 635, 669–70 (1863).

3. My citations are to the Kindle version of *Broken Constitution*, not the paper version.

4. The "Report" to which the author refers is actually an official opinion issued by Black in his capacity as Attorney General.

Indeed, soon thereafter, Congress turned to that very question and concluded that it *did* have the constitutional power to wage war against the Confederacy. It exercised that power by ratifying Lincoln's blockade on Confederate ports. In short order Congress's decision was upheld in the midst of the war; indeed, the Supreme Court's opinion in *Prize Cases* went one step further by upholding the president's right to commence war against the Confederacy even in the absence of a congressional authorization to do so.

Against this background it is hard to credit Feldman's statement that "Lincoln had to break the Constitution *as it had until then been understood* (emphasis added) in order to make war to 'preserve' the union." (13) While Southerners in particular may have "understood" the Constitution as not permitting the federal government to wage war against a state, that was certainly not the predominant understanding at the time.[5] We know that to be true because, among other things, this argument was not considered sufficiently valid to be mentioned by the four Confederate-leaning Supreme Court justices in their dissenting opinion in *Prize Cases*.

It is inexplicable that *The Broken Constitution* relies on James Buchanan[6] and Jeremiah Black to support its position but does not address the dispositively contrary *Prize Cases*.

The Emancipation Proclamation

The main thesis of the book is that the Proclamation "broke" the Constitution because it violated the Slavery Compromise underlying the Constitution. This argument assumes, without explanation, that the Constitution applied to the Proclamation even though the Confederate states had left the Union, were at war with the Union, and no longer enjoyed rights and protections under the Constitution. More about this below.

Even assuming that the Constitution applied, Feldman's argument regarding the Compromise is quite problematic. The Compromise, as related in his book, was an essential precondition for the Constitution. It prohibited the federal government from "touching" slavery in any state in which it existed. This is a very thin reed upon which to construct a constitutional argument because this portion of the Compromise does not appear in the Constitution and is not reduced

5. Indeed, Lewis Cass, Buchanan's Secretary of State, resigned in protest against the President's refusal to take steps to prevent secession.

6. Buchanan is consistently ranked in the bottom 5 of our presidents. See also David S. Reynolds, "He Was No Moses," *The New York Review of Books*, Dec. 16, 2021, p. 76.

to writing. Nevertheless, according to Feldman, "No wonder Lincoln's hand trembled. By signing [the Proclamation, Lincoln] was subverting the . . . Constitution." (10) This eye-catching indictment is at odds with reality.

First, Feldman's speculation contradicts Lincoln's statements that the "trembling" resulted from fatigue from shaking hands throughout the New Year's reception at the White House that day, January 1, 1863; and that "I never in my life felt more certain that I was doing right, than I do signing this paper." The author dismisses Lincoln's statement of moral certainty with the speculation that the trembling "suggested a need to reassure himself about contradicting the considered position he had held about slavery for the entire thirty years of his public life." (7) Where Lincoln saw light, Feldman's book sees hypocrisy.

Second, the Slavery Compromise actually embraced four understandings, three of which *were* written into the Constitution: the 3/5 clause, the Fugitive Slave Clause, and the prohibition on banning the importation of slaves until 1808; but one understanding that was *not*.

The singular "understanding" left out of the Constitution was the prong so heavily relied upon in this book, the "gentlemen's agreement" that the federal government could not "touch" slavery.[7] But there is no precedent for arguing, as does Feldman, that presidential or congressional action is unconstitutional because it violated an agreement not expressly contained in the Constitution, especially when the omission was not the result of oversight or accident.

Third, even though the Proclamation willfully "touched" slavery in many areas of the Confederacy, it did not "break" the Constitution or the Slavery Compromise. The Constitution and the Compromise had already been broken, and irreparably so, by the Confederacy when its states seceded. By the very act of secession, the Confederate states had repudiated the Constitution and the Compromise.

Given that the Confederacy had abandoned the Constitution, it is difficult to comprehend the complaint that Lincoln violated the Constitution by issuing the Proclamation. Surely the author cannot believe that Lincoln should have continued to comply with the defunct Compromise after the Confederates had repudiated it and commenced military hostilities. Feldman's criticism seems pointless since there are no legal or moral principles that required the Union to comply with an agreement which had been totally rejected by its belligerent adversary. This criticism also seems hypocritical because

7. Though the Slavery Compromise consisted of four parts, when I refer hereafter to the "Slave Compromise" or the "Compromise" it applies only to the "no touching" prong.

the Compromise supported an institution the author believes was immoral. Why criticize Lincoln for not bending over backwards to appease the Slave Power?

Moreover, once hostilities commenced, Union compliance with the Constitution and the Compromise would have had catastrophic consequences on the Union war effort and would have converted the Constitution into a suicide compact.[8] Adherence to the Constitution and the Compromise would have required the Union to allow the Confederates, with impunity, to continue to use their slaves to boost their military and would have required the Union to repatriate to the Confederacy fugitive slaves for further military use. Surely the Union had no obligation to re-supply military assets to the Confederacy. As Lincoln said, compliance with the Compromise would have meant the Union could not get the "double advantage of taking so much labor from the insurgent cause and supplying the places which might otherwise must be filled with so many white soldiers [in the Union Army]."[9]

The Broken Constitution accuses Lincoln of not only being a scofflaw, but a "conscious" scofflaw, allegedly having committed knowing violations of the Constitution. Even worse, he is portrayed as a hypocrite because in issuing the Proclamation he acted contrary to his "long endorsed" view that the federal government did not have the power to emancipate Confederate slaves in any state.

But just as Lincoln was not a scofflaw when it came to the Proclamation, nor was he a hypocrite. Lincoln had indeed "long endorsed" the position that the federal government had no power to "touch" slavery in the states, but after a laborious intellectual effort, he abandoned that position many months before he issued the Proclamation. At bottom, Lincoln's decision to change course reflected the facts that war was raging and the Union's chances of winning would be measurably increased by depriving the Confederates of their slaves and adding that manpower to the Union army—the coveted "double advantage."

8. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."). Justice Jackson was the first to warn of the dangers of interpreting the Constitution in a suicidal manner. See Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (Princeton: Princeton University Press, 2001), 172 ("For Lincoln to have refrained from issuing the Emancipation Proclamation because of a belief that it was unconstitutional would have given real meaning to the idea that the Constitution is a suicide pact.").

9. Annual Message to Congress, December 8, 1863, in Roy P. Basler, et al., eds., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick: Rutgers University Press, 1953–55, for the Abraham Lincoln Association), VII:50.

Feldman argues that "in the crucible of war, [Lincoln] changed his mind about the [Slavery] Compromise . . . "[10] This is untrue. The Slavery Compromise never meant that the Union had an obligation to comply with it as to slave states that had seceded.

Lincoln never changed his mind about the meaning of the Compromise. Instead, he changed his mind about whether the Constitution governed the legal relationship between the Union and the Confederacy, and more particularly whether the Union was bound not to "touch" Confederate slavery. He correctly decided that "in the crucible of war" the international law of war, not the Constitution, governed the legal relationship between the Union and the Confederacy, that this legal regime gave him virtually unlimited power during the pendency of the war in the theater of war, and that this included the power to emancipate slaves within the Confederate states.

Lincoln believed that Presidential war powers exceeded those of Congress. Thus, in explaining his expected veto of an emancipation bill in mid-1864, he reportedly stated, "I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress."[11]

Once Lincoln recognized that the international law of war provided the relevant legal guidepost, he determined that this body of law provided a belligerent nation with virtually *carte blanche* in conducting war. He famously said in an 1863 public letter to James Conkling, "by the law of war, property, both of enemies and friends, may be taken when needed . . . And is it not needed whenever taking it, helps us, or hurts the enemy?" The only weapons that Lincoln thought he could not use were "a few things regarded as barbarous or cruel." Lincoln did not believe, however, that military emancipation of enemy slaves was "barbarous or cruel." To the contrary, he believed emancipation was morally correct and a relatively painless way of inflicting significant damage on an enemy that relied heavily on slave labor. Freeing enemy slaves did not deprive the enemy of life or limb, and it simultaneously "hurt" the enemy and "helped" the Union.[12]

10. Noah Feldman letter to the editor of the *New York Review of Books*, June 13, 2022, p. 62, responding to Professor James Oakes's review of Feldman's book in the May 12 edition. Feldman's blistering, indeed, *ad hominem* response to Oakes was reciprocated in tone by Oakes's responsive letter, same page.

11. Michael Burlingame and John R. Turner Ettlinger, eds., *Inside Lincoln's White House: The Complete Civil War Diary of John Hay* (Carbondale: Southern Illinois University Press, 1997), 217–18.

12. Letter to James C. Conkling, Aug. 26, 1863, Basler, *Collected Works*, VI: 406–10.

Feldman's suggestion that Lincoln's decision to issue the Proclamation was hypocritical makes no sense in light of the fact that there was a principled and circumstantial basis for the decision. Lincoln's approach was blessed by the Supreme Court in *Prize Cases*. And, of course, there was genuine "military necessity" for the Proclamation, as it deprived the Confederacy of vital military assets, their slaves.[13]

The Proclamation Did Not Violate the Constitution

Feldman's book has been harshly criticized by at least two prominent reviewers, Sean Wilentz and James Oakes. The criticisms revolve largely around whether the Constitution was pro- or anti-slavery. In rebutting Oakes's criticisms, Professor Feldman argues that because the Constitution "enshrined slavery . . . the Emancipation Proclamation had to break the Constitution to end it."[14] This is legal folly. Whether the Proclamation violated the Constitution or not depends in the first instance on whether the Constitution applied to the Confederate states, not whether it had a pro- or anti-slavery tilt.[15] Regrettably, this threshold question, like so much else, is ignored by Professor Feldman.

Whichever way the Constitution tilted on slavery is truly beside the point, since in 1861 the Constitution no longer controlled the legal relationship between the Confederate states and the United States. By seceding, the Confederate states no longer enjoyed rights under the Constitution, and so it is quite wrong for Professor Feldman to argue that it was necessary to "break" the Constitution in order to issue the Proclamation.

The irrelevancy of the Constitution to the issue of slavery within the Confederacy (but not to slave states that remained in the Union) was recognized early in the war. In May 1861 Union General Benjamin Butler reported that he had rejected a request by Confederate officers in Virginia to return slaves fleeing from Confederate lines into a Union fortress. Butler did so on several grounds, one of which was that "that the Fugitive Slave Act did not affect a foreign country, which Virginia

13. See R. Fabrikant, "Lincoln, Emancipation, and 'Military Necessity,' review of Burrus M. Carnahan, *Act of Justice: Lincoln's Emancipation Proclamation and the Law of War*, 52 *Howard Law Journal* 375 (2009).

14. Feldman letter to NYROB.

15. As to this important but irrelevant issue, Feldman has much the better of it: The Constitution clearly has a pro-slavery bias.

claimed to be, and that she must reckon it one of the infelicities of her position that, in so far at least, she was taken at her word."[16]

Feldman's book erroneously asserts the existence of a contemporaneous "consensus view" that the Proclamation was unconstitutional. Surely there were doubters about the constitutionality of the Proclamation, but most of the concerns were political and social, not legal. There was widespread deep dislike of blacks in the North and a fear that they would overrun the North if emancipated. But there was strong support for the Proclamation throughout the Union as a critical war measure that would weaken the Confederacy, strengthen the Union, and shorten the war. Even among anti-black Northerners, many favored the Proclamation because they believed that whites would be replaced at the front by blacks, thus decreasing white casualties.

Many of Feldman's complaints that the Proclamation violated the Constitution are based not only on a misreading of the Constitution and applicable law, but also on a misreading of the Proclamation itself. For example, he claims that the Proclamation permanently abolished slavery in affected parts of the Confederacy, that this was Lincoln's intent, and that Lincoln intended the Proclamation to be a punitive measure against the Confederacy. All of these characterizations are false. The Proclamation did not "abolish" slavery in the affected parts of the Confederacy. Rather, it purported to "free" slaves in those affected areas but without abolishing slavery as an institution.

The author argues that "the moment the Proclamation took effect [on January 1, 1863], the compromise Constitution [of 1787] would be officially and permanently dead. Whatever would replace it would no longer contain the key feature of the Compromise: it would no longer countenance slavery." (283) This too is untrue. The author has conflated emancipation and abolition, given the Proclamation an infinite legal life, and elevated it to a legal status akin to a constitutional amendment.

Contrary to Feldman, the Proclamation did not render the Constitution "dead" or even alter it. Lincoln well understood that he had no power to break, amend, or kill the Constitution, and he did not purport to do any of these things when he issued the Proclamation. Lincoln understood the Proclamation as a war measure which might be deemed to expire upon the termination of the War, and expiry

16. R. Fabrikant, "Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln," 49 *Howard Law Journal* 313, 355 (2006), quoting from General Butler's diaries. Butler denied the request on the further ground that the fleeing slaves were "contraband" since they were valuable military assets for the Confederacy, and that the Union had no obligation to supply such assets to its adversary.

might jeopardize the "freedom" conferred upon emancipated slaves. For that reason, and because the Proclamation did not cover all slaves within the Confederacy or the Union, Lincoln supported a constitutional amendment, which he referred to as the "King's cure," for all issues relating to emancipation. The "King's cure" eventually came in the form of the 13th Amendment, which did permanently bar the institution of slavery everywhere in the nation.[17]

Feldman also claims that in crafting the Proclamation Lincoln "was struggling to define emancipation as a punishment for slaveholders." (298) All available evidence indicates that Lincoln's purpose in emancipating slaves was solely to achieve the "double advantage" of subtracting manpower from the Confederacy and adding it the Union. There is no indication that Lincoln sought emancipation as a punitive matter. Indeed, Lincoln was vociferous in urging that citizens of the Confederacy, irrespective of their loyalty, not be treated in a punitive manner.[18]

Nor did the Proclamation violate the international law of war. Yet Feldman argues that it did, but he does not reckon with the three most important legal authorities on point: the Supreme Court's decisions in *Brown* and *Prize Cases*, and the Lieber Code, a military order signed by Lincoln in mid-1863.[19] These three seminal authorities contradict Feldman's most important arguments regarding the international law of war but are not discussed in his book.[20]

Professor Feldman's argument that the Proclamation violated international law rests on two flawed premises. First, that international law prohibited the confiscation of private property, including slaves; and second, that even assuming that slaves could be taken

17. Lincoln said he supported the passing of a Constitutional amendment for the abolishment of slavery throughout the United States. In his first public address after Congress passed a resolution proposing to the states an amendment to abolish slavery nationwide, it was reported that President Lincoln called the measure "a King's cure for all the evils." These remarks were made on February 1, 1865, in "Response to a Serenade" made to him at the White House. Basler, *Collected Works* VIII: 254.

18. According to Adm. David Dixon Porter, Lincoln said, "I want no one punished; treat them [Southerners] liberally all round. We want those people to return to their allegiance to the Union and submit to the laws." David Herbert Donald, *Lincoln* (New York: Simon & Schuster, 1995), 574, source at 681.

19. The Lieber Code was primarily the work of Francis Lieber, a Columbia University professor. See *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington: Government Printing Office, 1899), 2:5 [hereinafter *Official Record*].

20. Feldman mentions in passing the Lieber Code but does not discuss its relationship to the international law of war or the Proclamation.

during hostilities, they had to be returned upon the cessation of those hostilities.

Professor Feldman claims, wrongly, that emancipating slaves residing in unconquered portions of the Confederacy constituted a taking of private property which violated the widely agreed-upon tenets of the international law of war as it existed at that time, and especially the "version" of that law which was peculiarly American. This is incorrect.

His argument does not take into account the Supreme Court's 1814 decision in *United States v. Brown*, when Chief Justice Marshall specifically acknowledged that "war gives to the sovereign full right to . . . confiscate the property of the enemy wherever found."[21]

The author is also quite wrong regarding depriving Confederates of their slaves. The Proclamation purported to free slaves then living in certain areas of the Confederacy not occupied by the Union military. It did *not* call for the taking, seizure, or confiscation of those slaves. But even assuming that the Proclamation did call for their seizure or confiscation, that "deprivation" of property, and the attendant failure to compensate slave owners for their property loss, would not have violated the international law of war.

It is indisputable that taking enemy slaves during wartime did *not* violate international law. In support of his contrary position, that international law prohibited confiscation and/or required return of slaves, Feldman relies upon Emer de Vattel, a leading 18th-century authority on the international law of war. The author claims that "Vattel cites Roman law to say that slaves can be recovered after the war." (389)

But a close reading of Vattel yields a different conclusion. According to Vattel, slaves captured during war were indeed to be returned to their owners when the war ended, but that was because, according to Vattel, in Roman times, "it was at all times easy to recognize a slave and ascertain to whom he belonged. The owner, still entertaining hopes for recovering him, was not supposed to have relinquished his right."[22] But the Confederate owner's right to recover his or her slaves had been extinguished by what Lincoln described as the "mere friction and abrasion . . . of war," by federal legislation, by the Proclamation, and later by the 13th Amendment. Military emancipation may not have existed in Roman times, but it had become an accepted practice by the Civil War.[23]

21. *Brown v. United States*, 12 U.S. 110, 122 (1814).

22. Vattel, at 209, 385, 394. See § 196: The property of moveable effects is vested in the enemy from the moment they come into his power.

23. The British had successfully engaged in military emancipation during the Revolutionary War and the War of 1812.

The correctness of this interpretation of the then-contemporary international law of war is confirmed by Henry Wheaton, a leading international legal scholar who wrote shortly after the war ended, and also not mentioned in Feldman's book.

> By the Roman law, the master of a slave had the benefit of postliminy in all cases of return during the war, by whatever means effected. It is the opinion of most jurists, that modern international law will not now recognize that right; but that a slave, freed by a conqueror, is fixed in freedom by the peace: and no neutral State will now regard the right of the former master as continuing, for any purpose, after such emancipation.[24]

Feldman claims that well before the war there had developed a "very nearly . . . universal view among American legal authorities" that slaves "could not lawfully be taken in wartime." (268) It is certainly true that American slaveowners had taken that position in their effort to obtain compensation for slaves emancipated by the British during the Revolutionary War and the War of 1812, and that the highly respected John Quincy Adams had advocated that same position as the American representative negotiating with the British after the latter war. But as noted by Wheaton,

> [A]fter the Revolutionary war, the United States Government claimed compensation for slaves who were induced by proclamation to escape to the British lines, and were there protected, and carried off by the British forces; and, in the negotiations after the war of 1812, Mr. J. Q. Adams took the ground, that emancipation of slaves was not a legitimate mode of warfare. But, during this period, the slaveholding power was able to control the action of the government, in all matters bearing upon its interests.[25]

When Adams allowed himself to be controlled by his conscience rather than by the "slaveholding power," he abandoned that position no later than the Mexican American War. As a Congressman he repeatedly affirmed that a military general could emancipate slaves during war. The fact that the "slaveholding power" continued to hold an opposing position most certainly did not constitute a "very nearly universal

24. Henry Wheaton, *Elements of International Law* (orig. 1866), ed. by George Grafton Wilson (Oxford: Clarendon Press, 1936), 370 n. 9. "Postliminy" refers to the ancient principle of international law under which persons and things taken in war are restored to their former status when coming again under the power of the nation to which they belonged.

25. Wheaton, *Elements*, 369 n. 8.

view among American legal authorities." This is made quite clear by the Lieber Code, discussed below.

The Proclamation was Consistent with *Prize Cases* and the Lieber Code

The *Prize Cases* case and the Lieber Code are the most relevant contemporary authorities on whether the Proclamation violated international law. Both important authorities were published shortly after the Proclamation was issued, and they fully support the conclusion that Lincoln's issuance of the Proclamation was entirely proper under international law.

In *Prize Cases*, decided in March 1863, the Supreme Court upheld Lincoln's blockade of Southern ports.[26] The Court reasoned that under the international law of war, the Civil War was a "war" despite the failure of the Union or the Confederacy to issue a formal declaration of war. The Court concluded that the Confederacy was to be treated as a sovereign, even though it was not a nation, and that under international law the Union could exercise "belligerent" measures against the Confederacy. The Court specifically held that the property of all persons residing within the Confederacy was properly subject to capture as "enemy property," thus rejecting one of the principal arguments advanced in Feldman's book.

This very same logic applies to the Proclamation: If international law gave the Union the right to blockade the Confederacy, surely the Union had the right to emancipate the slaves of the Confederacy. As Secretary of War Cameron stated in justifying his instruction that fugitive slaves not be returned to Confederate owners, "Why deprive him of supplies by a blockade and voluntarily give him men [fugitive slaves] to produce them?"[27]

The Court in *Prize Cases* made a number of additional rulings which directly contradict Feldman's arguments about the international law of war. The Court accepted Lincoln's position that the federal government was accorded "belligerent rights" against the Confederacy, and that the President, as Commander-in-Chief, was vested with the full powers of a supreme military commander against the persons and property of the Confederacy. The Court held that "after July 13, 1861, the eleven Confederate states were enemy territory in the meaning of

26. *The Prize Cases*, 635, 669.

27. *Official Record*, 2: 783, quoting Secretary of War Simon Cameron's December 6, 1861, Annual Report.

international law." The Court granted the President unprecedented power during time of war: "He must determine what degree of force the crisis demands," and stated that the President's decisions were virtually unreviewable because the Court "must be governed by the decisions and actions of the political department to which this power was entrusted."[28]

The Supreme Court has continued to endorse the approach adopted in *Prize Cases*. For example, Justice Scalia recognized, albeit in a different context, that "citizens of the Confederacy, while citizens of the United States, were also regarded as citizens of a hostile power."[29]

On April 24, 1863, in the midst of the war, the Union military issued the Lieber Code, one of the most momentous documents in the legal history of the United States. The Code was signed by Lincoln, though there is no reason to believe he had any role in writing it. The Code represented the first time a belligerent nation had set out in writing the rules it believed governed the conduct of war between sovereign states. Since then, for more than 150 years, the Lieber Code has occupied a distinct and distinguished position in the legal firmament of the United States and the international community. It has been described as "the foundation upon which modern international humanitarian law has been constructed," and "without undue exaggeration to be something of a legal masterpiece—a sort of pocket version of Blackstone's Commentaries on the Laws of England."[30]

For our purposes, the Lieber Code is significant not only because it represents the first true compendium of the international law of war, but also because it reflects the content of that law at the very moment the Proclamation was issued. The legality of the Proclamation under the international law of war cannot be gainsaid without specific reference to the Lieber Code, yet no such analysis appears in Feldman's book.

His claim that the Proclamation violated the international law of war has two prongs. First, private property (including slaves) of enemy combatants could not be confiscated during war; second, even if property, including slaves, could be confiscated, it had to be returned when the war ended. The Lieber Code definitively rejects both of these conclusions. It expressly provides that slaves fleeing into the lines of the

28. *The Prize Cases*, 635, 669–70.
29. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 n. 5 (2004) (Scalia, J., dissenting).
30. *Ibid.*

Union army or captured by the Union army were "immediately" free,[31] and it expressly prohibited the return of any such freed slaves.[32]

Confiscation of slaves had been long recognized under international law, and rather than having a duty to return them upon the cessation of hostilities, the Lieber Code made plain that it would have been impermissible for the United States to do so because it "would [have] amount[ed] to enslaving a free person."[33]

Conclusion

If Lincoln had accepted Feldman's legal conclusions regarding forcible resistance to secession and the Proclamation, the Constitution would have been converted into a suicide compact, the Union likely would have lost war, and none of the constitutional reforms so rightly praised in *The Broken Constitution* would have come to pass.

For if the Union had lost the War, the Confederacy and the United States would have relentlessly been at each other's throats regarding territorial expansion in the continental U.S., Central and South America, and the Caribbean. This rivalry would have invited foreign interests, particularly the British and French, both seeking to gain sway in the New World, to exploit the friction between a slave-based, rural Confederate economy, and the free, more industrialized economy of its northern neighbor. The "natural" protection from foreign intervention by the Atlantic Ocean would have evaporated if the "peculiar and powerful interest" of slavery, which Lincoln rightly said, "all knew . . . was somehow the cause of the war,"[34] had been allowed to survive in a separately constituted Confederacy.

Lincoln's true legacy is not in legal documents he supposedly "broke" or "made," but in his helping to create the conditions which enabled the United States to become the most vibrant and affluent country the world has ever known.

31. Lieber Code, Article 43.
32. Lieber Code, Article 42.
33. Lieber Code, Article 43.
34. Second Inaugural Address, March 4, 1865, in Basler, *Collected Works*, 8: 332.