## *In Justice: Inside the Scandal That Rocked the Bush Administration*

By David Iglesias, with Davin Seay

*John Wiley & Sons Inc., Hoboken, NJ, 2008. 246 pages, $25.95.*

Reviewed by Jon M. Sands

It was January 2006, and a going-away party was being held for the U.S. attorney for the District of Arizona, Paul Charlton, who had announced that he was leaving his post. This reviewer was there and witnessed a long line of law enforcement officers and prosecutors waiting to mount the dais to praise Charlton, extol his virtues, and give him the obligatory plaques. One of the first to speak was the U.S. attorney for the District of New Mexico, David Iglesias. Iglesias spoke at length, was lavish in his praise, and added that he too was leaving his position. Although neither Charlton nor Iglesias said so explicitly, everyone in the room knew that they had been asked to leave, and we all wondered why. At the end of the ceremony, Charlton and Iglesias went quietly into that particular night, but they later refused to go quietly into the good political night when U.S. Department of Justice officials, in an effort to justify dismissing the two men, impugned their professional abilities. *In Justice* is Iglesias' account of what really happened.

Could there have been a better poster boy for the Sun Belt GOP than Iglesias? He was smart, ambitious, conservative, and a veteran of the Navy Judge Advocate General's (JAG) Corps. Indeed, as a young JAG officer, Iglesias had been sent to Guantanamo Bay Naval Base to defend several Marines who had been accused of assaulting a private who was considered a malingerer and whiner. Defending one Marine who had a minor role in the assault (turning out the lights), Iglesias and his team argued that their client had followed the implicit orders of a first lieutenant to teach the victim a lesson by giving him "Code Red" treatment. Iglesias' defense was successful, resulting in a conviction on a lesser charge and avoiding a discharge. One of his fellow defense team members was Debbie Sorkin, the sister of writer Aaron Sorkin, who based his play and the subsequent movie, "A Few Good Men," on the trial. The character portrayed by Tom Cruise in the film, Lt. Daniel Kaffee, was a composite of three JAG officers who took the case to trial. The most memorable line from the film—"You can't handle the truth!"—angrily delivered by Jack Nicholson as the savage Col. Nathan Jessup, was never actually spoken during the trial.

Iglesias was clearly a lawyer on the rise, and the GOP took notice of him. As Iglesias admits, his moral values were a match for what he perceived as the cultural conservatism of Sun Belt Republicans:

> My decision to run as a Republican was also in keeping with my personal convictions. Although I had registered as an Independent in 1976, I switched to the GOP in 1989 primarily because of its stand on the so-called values issues, particularly its pro-life position. I had since come to consider the Republican platform a relatively accurate reflection of my own convictions, although I was less than totally convinced by its free-market, government-is-bad rhetoric. I had been in the trenches of law enforcement long enough to know that America had its share of disenfranchised citizens who needed a helping hand from the government and protection from unfettered capitalism. Yet at the same time, in an era when the best hope for a return to biblical values seemed to lie in coordinated political action, it was clearly the Republicans who offered a way forward.

Iglesias was a good soldier, both literally and figuratively, and after various prosecutorial positions, a White House Fellowship, and an unsuccessful run as the Republican candidate for state attorney general, he was tapped by President George W. Bush to serve as the U.S. attorney for the District of New Mexico. Iglesias had been pushed by his New Mexico Republican political patrons, Sen. Pete Domenici and U.S. Rep. Heather Wilson.

A funny thing happened when Iglesias took his oath of office: he took it seriously. U.S. attorneys are politically appointees and politics are infused in their positions. Nevertheless, U.S. attorneys have a proud tradition of prosecutorial independence, and Iglesias sought to maintain that high tradition when he began investigating allegations of voter fraud by voter registration groups supposedly aligned with the Democratic Party. The Bush administration, Sen. Domenici, and Rep. Wilson pressured Iglesias to bring charges, but he found no adequate grounds and declined to bring them.

Iglesias describes all this in *In Justice*, which is a brief on his behalf, containing the facts surrounding his tenure, his recollections, and his keen disappointment with the actions of political appointees in the Department of Justice. It is an intensely personal account, as Iglesias writes about his life, his honor, and his ambitions. He views what happened to him and the seven other U.S. attorneys who were forced out as a betrayal of principles. Iglesias also offers insight into the leaders of the GOP, who come across as prosperous, powerful, aggressive, and smug. Iglesias writes in staccato prose: facts follow facts, with little soaring rhetoric and a minimum of speculation. His book is very much a lawyer's statement of facts. The facts, however, are damning.

Iglesias and the other seven U.S. attorneys were told to go quietly "or else." But, when leaks surfaced revealing the reason for their dismissal, Deputy Attorney General Paul McNulty maligned their professional abilities. It was the wrong thing for him to do. The ousted U.S. attorneys dropped their self-imposed silence, and the weeks that followed presented a circus of DOJ officials pointing fingers at one another, culminating in then U.S. Attorney General Alberto Gonzales' testimony that misled Congress and the media about

the true reasons for the dismissals and displayed an extraordinary lack of recollection about the entire removal process. Gonzales' lack of credibility was such that he was forced to resign. The entire episode severely tarnished the reputation of the DOJ; an agency that prided itself on impartiality in prosecutions and its supposed commitment to representing the highest ideals of federal legal service became perceived as a political arm of the White House and the Republican Party.

Iglesias' account ends with Gonzales' resignation and the subsequent investigation into the dismissals, which is ongoing. The current attorney general, Michael Mukasey, convened an internal investigation of the ousters, which, on Sept. 29, 2008, concluded that political pressure had driven the dismissals of the federal prosecutors. Iglesias must have felt satisfied and vindicated to read the inquiry's conclusion "that complaints from New Mexico Republican politicians and party activists to the White House and the Department about Iglesias's handling of voter fraud and public corruption led to his removal." Mukasey acknowledged that the fired prosecutors "did not deserve the treatment that they received," and he turned the matter over to a special prosecutor to determine whether to file criminal charges.

As for the fired U.S. attorneys, they seem to have landed on their feet. Most are currently in private practice, and some have entered the teaching profession. Charlton has been honored by the State Bar of Arizona and other associations for his principled stand. Indeed, the Department of Justice inquiry concluded that Charlton was fired because the DOJ perceived him as a maverick for declining to seek the death penalty against a murder defendant because of evidentiary problems as well as for requiring federal agents in Arizona to tape-record suspect interviews. The latter has been a sore spot for the prosecutors for many years; in this age of high-tech investigation, the statements of defendants facing serious charges were neither tape-recorded nor videotaped. This neglect enabled defense counsel to cross-examine witnesses about the sheer sloppiness of investigations.

As for the death penalty, it is disturbing that the DOJ and Alberto Gonzales would have qualms about a prosecutor's position on the appropriateness of the punishment meted out to a particular defendant. Perhaps we should not be too surprised. After all, a federal prosecutor I know has kept a copy of a memo from the attorney general's office in which the prosecutor was chided for demanding more than a few minutes of the attorney general's time to reconsider a capital case.

Perhaps the criminal investigations of the dismissals will reveal other reasons behind them. At the time Charlton was asked to resign, his office was investigating U.S. Rep. Rick Renzi (R-Ariz.), who was later indicted on 35 counts of fraud, money laundering, extortion, and conspiracy. Supposedly, there was no connection between Charlton's resignation and the investigation of Rep. Renzi. *In Justice* gives us a sense of how Iglesias felt to be slandered but, ultimately, vindicated. It would make a great movie—"A Few Good Prosecutors." **TFL**

---

*Jon M. Sands is the federal public defender for the District of Arizona.*

## *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases*

Edited by Mark Tushnet

*Beacon Press, Boston, MA, 2008. 229 pages, $16.00.*

---

Reviewed by Charles S. Doskow

Do Supreme Court dissents matter? They represent the view of the justices on the losing side of case, and, even though a losing party may take solace from having convinced some justices, he has still lost the case. Moreover, of course, we take our law from majority and plurality opinions, not from dissents. Yet, in many cases, a dissent has turned out to have a more lasting influence and importance than the opinion of the Court.

Mark Tushnet, one of the country's most distinguished constitutional law scholars, has concluded that "dissents matter, but almost always indirectly and over a long period." He has compiled a volume of excerpts from 16 dissents (although, as noted below, four are not actually dissents), and, although Tushnet credits himself only as the editor, he has contributed, for each of the 16 dissents, an introduction that places the case in historical context and a conclusion that describes the influence of the dissent and the subsequent history of the legal question it addressed.

The dissents appear in chronological order—starting with *Marbury v. Madison* (1803) and concluding with *Lawrence v. Texas* (2003)—although *Marbury* is one of four opinions examined in the book that are not actually dissents. The two John Marshall cases that are included (*Marbury* and *McCulloch v. Maryland*) were both unanimous decisions (Marshall ran a tight ship as chief justice), and the volume includes arguments against each case's holding. In *Marbury*, the disagreement is by a judge in another case; in *McCulloch*, it is expressed by President Andrew Jackson in a veto message.

The other two nondissents in the book are Brandeis' concurring opinion in *Whitney v. California* (1927), a free speech case, and Justice Robert Jackson's draft concurrence in *Brown v. Board of Education*, which was a unanimous opinion. (Jackson did not publish his draft concurrence, and it did not see the light of day until 1988—34 years after his death.) In the draft concurrence, Jackson wrote that he could not "find in the conventional material of constitutional construction any justification for saying" that segregated schools violated the 14th Amendment. In fact, Chief Justice Warren's opinion in *Brown* did not rest on conventional materials. As a side note, it should be recalled that Jackson's law clerk, William Rehnquist, wrote a memo to Jackson, titled "A Random Thought on the Segregation Cases," in which Rehnquist argued that *Plessy v. Ferguson* "was right and should be reaffirmed." This memo became an issue during the Senate Judiciary Committee hearings on Rehnquist's confirmation as chief justice. Rehnquist claimed that the views he expressed were Jackson's and not his, although some commentators have challenged this claim.

**REVIEWS** *continued on page 54*

The dissenters who are most prominent in this volume are the first John Marshall Harlan and Antonin Scalia. Harlan's two solo dissents, in the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), have become the law. The first is characterized by Tushnet as being "as impassioned about slavery and freedom as any in the Supreme Court reports except perhaps some by Justice Thurgood Marshall. ..." The laws that were challenged in the *Civil Rights Cases* were intended to ameliorate the condition of the freed slaves. Harlan addressed the legacy of slavery and would have found the legislation constitutional under the Thirteenth Amendment. Harlan's dissent in *Plessy* recognized that the Court's opinion legitimizing segregated facilities would have far-reaching effects. He was entirely prescient on that point: it was only in 1954 that *Brown*, without expressly overruling *Plessy*, sounded the death knell of legally sanctioned segregation.

Two of Justice Scalia's many dissents include those in *Morrison v. Olson* (1988), in which the Court upheld the independent counsel provisions of the Ethics in Government Act of 1978, and in *Lawrence v. Texas* (2003), in which the Court struck down a state anti-sodomy law. In *Morrison*, Scalia expressed his belief that the independent counsel law diminished the executive power granted by the Constitution. Surprisingly, Tushnet omits the strongest statement in the dissent, in which Scalia, after quoting the provision in Article II that "The executive Power shall be vested in a President of the United States," adds that "this does not mean *some* of the executive power, but *all* of the executive power." That statement is pure Scalia: originalist, textual, and emphatic. Subsequent abuses of power by independent counsel Kenneth Starr and others make Scalia's concerns highly relevant, although Tushnet points out that the use of a special prosecutor in the Scooter Libby case also resulted in charges that the constraints under which prosecutors ordinarily operate were disregarded.

In his dissent in *Lawrence v. Texas*, Scalia forcefully expresses his disagreement with the Court's view that homosexual behavior merits privacy protection. He accuses the majority of having "largely signed on to the so-called homosexual agenda" and argues that the majority's position would justify parallel protection for more exotic sexual behavior. Scalia's catalog of horrors is extensive. His view clearly runs against the popular tide of opinion, and his dissent is acerbic, sarcastic, and arguably overstated.

Tushnet reserves his highest praise for Brandeis' concurrence in *Whitney v. California*, which Tushnet calls "the best example we have of what a dissent can do." *Whitney* upheld the defendant's conviction for violating laws against criminal syndicalism on the basis of her membership in the Communist Labor Party. Brandeis concurred with the result on procedural grounds, but his concurrence is an essay on the fundamental rights of speech and assembly. In a much-quoted passage, which begins "Those who won our independence believed that the final end of the state was to make men free to develop their faculties," Brandeis expressed ideals of free expression and democracy that he hoped would overcome the fear that he believed motivated prosecutions of people for expressing their ideas. Tushnet writes that this dissent "accurately predicts the future ... because its vision of democracy and the Constitution and its rhetoric themselves contributed to making its doctrine seem correct."

The lowest marks, at least in my judgment, should go to Felix Frankfurter's dissent (joined by the second John Marshall Harlan) in *Baker v. Carr* (1962), in which the majority held that the courts could intervene in situations of extreme malapportionment, reversing earlier doctrine that found apportionment to be a nonjusticiable political issue. Frankfurter's failure to recognize the need for greater equality in legislative representation was both illogical and shortsighted.

What do dissents accomplish? Tushnet believes that those dissents that correctly foresee legal developments "are vindicated because the social, economic, or political environment changes." Yet, he adds, "sometimes, a judge's legal interpretation may help nudge politics and social change on to a new path. ..." In the end, dissents are important, because they reflect the civilized disagreement that is at the heart of democracy. **TFL**

---

*Charles S. Doskow is dean emeritus and professor of law at the University of La Verne College of Law in Ontario, Calif., and past president of the Inland Empire Chapter of the Federal Bar Association.*

## *Corporate Governance: Promises Kept, Promises Broken*

By Jonathan R. Macey

*Princeton University Press, Princeton, NJ, 2008. 334 pages, $35.00.*

---

Reviewed by Christopher C. Faille

I suspect that, even among readers of *The Federal Lawyer*, a relatively prosperous and well-educated segment of the population of the United States, few have recently mailed in a proxy in any contested board of directors' election. It is likely that many of you *TFL* readers do own stock, but even if one of the corporations in which you have an equity interest is in the midst of a contest for control, you're unlikely to take enough of an interest to research the corporate track records of the members of the contending slates, to read their disputative filings (available through the Securities and Exchange Commission's Web site), or even to carefully study the stories about the contest that appear in the financial press. Doing so costs too much (in terms of time spent, mostly) and you have better things to do, right?

This scenario is in sharp contrast with civic elections. Most members of the Federal Bar Association probably voted in the recent presidential election and may have spent a good deal of time researching the issues important to that vote. The emotional, symbolic significance tied to casting such a vote is absent in the corporate context. After all, soldiers have marched and died, protestors have faced water cannons

and dogs, and the civilly disobedient have endured prison terms—all in order to define and redefine who has the franchise. In the face of such history, many of those who possess the vote consider it precious, and it isn't too much to say that some of you would feel ashamed *not* to exercise it.

Voting in corporate proxy contests carries no such symbolic weight. Shareholders will vote if they expect to improve the bottom line of their portfolios or the trade-off of the risk and return of their investments by voting. That's all.

### A Harmony of Interests

Having said that much, let's begin again, from a different perspective. Any society that regards a publicly held corporation, with its transferable shares of equity, as a legitimate institution, must have mechanisms used for corporate governance—mechanisms by which the interests of the management of the institution can be harmonized with the interests of the stockholders. After all, as Jonathan R. Macey, a professor of corporate law at Yale University Law School, reminds us in this book, there are few aspects of modern life more remarkable than "the fact that hundreds of millions of investors have been persuaded to part with hundreds of billions of dollars in exchange for residual claims on the cash flows of companies" and have risked that money in the absence of the sort of formal legal protections enjoyed by a financing company or bond holder.

Again, some system of corporate governance must be in place, but describing it is tricky. Is it the fact that shareholders have a vote in the election of the board of directors and in certain other disputed issues that maintains a harmony of interests? This is where the problem—hinted at above and sometimes called the issue of "rational apathy"—arises. If it is rational for shareholders not to care about voting and not to bother to cast a vote, then the casting of votes isn't a plausible candidate to serve as a central mechanism of governance.

Macey's treatment of this issue appears late in the book but provides some of its best insights. He shows convincingly that some of the academic theorists who have looked at the subject overestimate the cost of informing oneself about the choices, because these theorists ignore repetition and amortization. A particular individual might be a director of several different companies included in a particular investor's portfolio, and that investor does not need to start afresh with research in each context in which the same director is involved.

Several directors of the late unlamented Enron Corporation served simultaneously as directors of other corporations. The death of Enron meant effectively the end of those directors' eligibility as directors elsewhere, and they generally resigned—voluntarily or otherwise—from other boards on which they sat. As a result, as Macey puts it, "shareholders amortized the costly information they obtained about the directors of Enron over their entire investment portfolios, including other companies in which directors of Enron served as directors."

Indeed, if a shareholder was lucky enough not to have Enron stock in his or her portfolio when it entered into its death spiral, then the acquisition of information about the undesirability of those folks as directors of the companies where the shareholder *did* own stock was almost costless. One didn't have to do a lot of digging to discover information about Enron in 2001 and 2002. Indeed, one might have had to do some costly insulation work to avoid it.

More generally, Macey cites research that shows that outside directors who are members of the audit committee of a company that is forced to restate its earnings are likely not only to leave that company but also to lose directorships at other companies. So for a range of directorial choices, participation in the proxy process is more rational for diversified investors than it would be were such amortizations of research costs unavailable.

### Poison Pills and Rationality

Costs are more readily amortized on *issues*, however, than on specific directors. Certain issues recur on proxy ballots with great regularity. An investor with a broad range of stocks in his or her portfolio might expect to have several opportunities to answer the question: Should this company have a poison pill?

A poison pill is a bylaw or charter provision adopted by a stock-issuing corporation that increases the value of what existing shareholders are holding when a potential acquirer accumulates more than a set amount of the issuer's equity. Typically, a poison pill will provide that, if one investor acquires more than, say, 10 percent of the company's equity, then each of the other nonacquiring shareholders will acquire the right to buy new stock at bargain prices. This dilutes the holding of a potential acquirer and requires the acquirer to pay more than he or she would have paid otherwise in order to gain control of the targeted equity. Company managements typically call poison pills "shareholder rights plans," because that sounds better. The effect of poison pills on most of the shareholders accorded these rights is probably negative because, if poison pills deter potential acquirers from actually making such a move and passing the threshold, then they necessarily lower the market demand for the stock.

Anyway, if you have studied the issue and concluded categorically (after the expenditure of time and effort worth $1,000) that poison pills are always a bad idea, and you express this view in 10 different votes, then casting your vote doesn't have to promise a $1,000 benefit in any of those cases to be worth your while. The threshold has fallen to $100 of expected benefit (to you) per company.

Although such considerations don't change the fact that proxy voting is and is likely to remain a common experience only for a small part of the population, they lead one to expect that this part of the population isn't quite as small as some theories suggest. There is such a thing as rational nonapathy.

### Public policy

All the above may serve as preface to a public policy question that has been much debated in recent years. Should laws made in Washington, D.C. (or Dover, Del.), aim to make the proxy contest a more important part of corporate life than it currently

**REVIEWS** *continued on page 56*

is? Some scholars—notably Lucien Bebchuk[1]—answer a hearty "yes" to that question. There are dissenters, such as Frank Easterbrook and Daniel Fischel,[2] who think that existing U.S. law deals more or less correctly with such matters. Further, some analysts, such as Roberta Romano,[3] think that there are too many proxy contests already, that they distract qualified managers from getting the job done, and that both institutional investors and policy-makers ought to move the other way.

Macey's view is that there is a limited range of instances in which stockholders' voting is an important element of corporate governance. Voting can serve them well "in takeover contests and in expressions of shareholder disapproval in salient high-profile instances of corporate governance breakdown." But outside that range, it doesn't matter all that much, and he would not seek either to increase or to decrease its incidence. Voting doesn't improve "the daily governance and operation of a large public corporation."

So what, in Macey's view, *does* matter? The stock price matters: "The pricing capabilities of the capital markets emerge as the greatest corporate governance mechanism we have." Management inevitably wants to keep its stock price high, for many reasons: (1) because the managers own stock and options themselves, (2) because a decline in price can result in a loss of control by means of a hostile takeover, (3) because a severe price decline can get a company delisted by the exchanges, (4) because any decline makes the task of raising capital that may be needed either to face crises or to fund expansions more complicated, and (5) because of a host of other reasons related to those. Desire to protect the stock's price—either to increase it or, at the least, to prevent a disastrous fall—is the great fact linking the interests of stockholders and managers.

I believe that voting matters somewhat more in the corporate context than Macey is willing to concede. Specifically, I believe that there are many corporations in which the entrenched management acts as if the stock price doesn't matter and that activist investors serve a valuable ecological function by disturbing the stagnant ponds. Still, Macey's discussion of a wide range of interrelated issues is marvelously clear and provocative, and I recommend it.

I recommend this book specifically to members of the incoming presidential administration as a primer on market mechanisms as the country heads into a new period of enhanced suspicion of market mechanisms—a politics-driven period marked by what I fear will prove to be unwise hasty re-regulation of markets. **TFL**

---

*Christopher Faille, the managing editor of Hedge Fund Law Report, www.hflawreport.com, has written on a variety of legal and historical issues. He is the author of* The Decline and Fall of the Supreme Court.

### Endnotes

[1]Lucien Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (Jan. 2005).

[2]Frank Easterbrook and Daniel Fischel, *Voting in Corporate Law*, 26 J. OF LAW & ECON. 395 (1983).

[3]Roberta Romano, *Less is More: Making Shareholder Activism a Valued Mechanism of Corporate Governance*, YALE LAW & ECON. RESEARCH PAPER, no. 241 (2000).

## *Lincoln at Peoria: The Turning Point*

By Lewis E. Lehrman

*Stackpole Books, Mechanicsburg, PA, 2008. 412 pages, $29.95.*

---

REVIEWED BY GEORGE W. GOWEN

The election of Barack Obama, even though he is not a descendant of slaves, gives added pertinence to any work on slavery and to our evolving efforts to achieve racial equality. Lewis Lehrman's masterly study of Abraham Lincoln's 1854 speech in Peoria provides a revealing look at Lincoln's evolution from small-town lawyer to a stirring speaker, an adept politician, and, finally, an extraordinary statesman. Implicitly, Lehrman's book is about the moral and spiritual underpinnings of the United States.

Lincoln's Gettysburg Address in 1863 and his Second Inaugural Address in 1864 are his best-known speeches. Both consist of a few hundred words and both are engraved in marble on the Lincoln Memorial in Washington, D.C. Why, then, should we labor with the lesser known 10,000-word Peoria address? According to Lehrman's subtitle, it was "the turning point," which presumably refers to the fact that the speech rejuvenated Lincoln's political career and hence was a prelude for what would follow for Lincoln and for a nation that chose not to live half-free and half-slave.

In the years following the adoption of the Constitution, until 1854, Congress steadily limited slavery. In his Peoria speech, Lincoln gave several examples:

- In 1794, they prohibited an outgoing slave trade—that is, the taking of slaves FROM the United States to sell.
- In 1798, they prohibited the bringing of slaves from Africa, INTO the Mississippi Territory.
- In 1800, they prohibited AMERICAN CITIZENS from trading in slaves between foreign countries—as, for instance, from Africa to Brazil.
- In 1803, they passed a law to assist the laws of one or two states in restraining their internal slave trade.
- In 1807, in apparent haste, they passed the law nearly a year in advance that was to take effect on the first day of 1808—the very first day the Constitution would permit—prohibiting African slave trade by imposing heavy pecuniary and corporal penalties.
- In 1820, finding these provisions ineffectual, they declared the trade piracy and annexed to it the extreme penalty of death.

The Missouri Compromise, which prohibited slavery north of the 36.30 parallel but permitted it in Missouri and Arkansas, was also enacted in 1820. Then, in 1854, the tide began to turn when the Kansas-Nebraska Act

repealed the Missouri Compromise. Three years later, in the *Dred Scott* decision, the Supreme Court ruled that Congress could not prohibit slavery in the territories and that blacks and mulattoes could not be citizens of the United States.

The 1854 act prompted Lincoln's Peoria speech. Lincoln's speech was preceded by one given by Stephen A. Douglas. Lehrman's prelude to the speeches quotes contemporaneous reports that have a Hollywood shoot-out flavor: "Mr. Douglas rode into our city yesterday at the head of a triumphal procession, seated in a carriage drawn by four beautiful white palfreys and preceded by a band," while Lincoln slipped into town about 2 a.m. "unbeknown to any one." Douglas commenced his speech at 2 p.m. on Oct. 16, 1854, before a crowd in front of Peoria's Greek revival courthouse. Douglas finished his speech a little after 5 p.m., whereupon Lincoln suggested an adjournment until 6:30 or 7 p.m. Lincoln resumed at 7 p.m. and spoke for three hours.

The crux of Douglas' speech was the siren song of states' rights: Let the people of each state or territory decide what is best for them rather than having it legislated by Washington. Douglas himself, Lehrman notes, had inserted language to this effect into the Kansas-Nebraska Act in an attempt to mask the repeal of the Missouri Compromise: "it being the true intent and meaning of this act not to legislate slavery into the Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

Lincoln's reply to Douglas was clear:

> I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me. I extend the principles to communities of men, as well as to individuals. I so extend it, because it is politically wise, as well as naturally just; politically wise, in saving us from broils about matters which do not concern us. Here, or at Washington, I would not trouble myself with the oyster laws of Virginia, or the cranberry laws of Indiana.
>
> The doctrine of self-government is right—absolutely and eternally right—but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or is a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is more than self-government—that is despotism. If the negro is a man, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.

Today's reader may have trouble harmonizing Lincoln's anchoring his opposition to slavery on words written by slave-owner Thomas Jefferson. In the Peoria speech, Lincoln declaims—

> What I do say is, that no man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism. Our Declaration of Independence says: "We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED."

Elsewhere in the Peoria speech, however, Lincoln, the adept politician, yielded to popular sentiment and contradicted himself by saying, "Let it not be said I am contending for the establishment of political and social equality between whites and blacks," and "[a] universal feeling, whether well or ill-founded, can not be safely disregarded. We can not, then, make them equals."

The full text of the Peoria speech is printed at the back of the book. I found it useful to read the speech first so that I could better appreciate the book. Lawyers who want to organize their thoughts better and clarify their language cannot do better than to emulate Lincoln's speech. Lincoln was a master of language and learned much from three texts ignored by today's law schools: William Blackstone's *Commentary on the Laws of England*, the King James Bible, and the histories and tragedies of William Shakespeare.

Lehrman concludes that, with the 13th, 14th, and 15th Amendments, "The moral and legal framework of American fundamental law had been so reconstructed that, at some future time, it might house the civil rights reforms which would come a century after President Lincoln's death. Then, with the Civil War constitutional amendments teaching America by example, racism too could be put in the course of ultimate extinction."

The election of Barack Obama provides hope that the promise of the Peoria speech and of the Declaration of Independence might still be fulfilled. **TFL**

---

*George W. Gowen is a partner with the New York law firm of Dunnington, Bartholow & Miller, LLP. His areas of practice are trust and estates, corporate law, and sports law. He has taught at the New York University Graduate School of Business and served on United Nations commissions, as counsel to leading sports organizations, and as an officer of environmental and humane organizations.*