Introduction

Melvin I. Urofsky

In the last issue, we noted that a longtime friend of the Society, Justice John Paul Stevens, had retired from the Court after more than three decades of service. As is our custom, we are pleased to offer two tributes to Justice Stevens. One is from his former colleague, a man we honored similarly only a year ago, former Justice David Souter, who, throughout his own tenure on the Court, served alongside Stevens. The other is from one of Justice Stevens' former clerks, Cliff Sloan. Both tributes reinforce the widespread view of John Paul Stevens as not only a fine judge but also, even more importantly, a very fine human being.

This issue is devoted primarily to the lectures delivered in 2009, the year that the entire nation celebrated the 200th anniversary of the birth of Abraham Lincoln. As with many of our series, the number of lectures—and the resulting articles—could have been far longer. A quick search of the Library of Congress online catalogue came up with more than 1,000 entries for the nation's sixteenth President, and, because of his leadership of the Union during the Civil War, he figures prominently in any study of the Constitution and its development.

The four articles by Robert K. Faulkner, Lucas E. Morel, James F. Simon, and Paul Finkelman look at different aspects of Lincoln's constitutional views. These views have been denounced by some—primarily those who endorsed the secessionist view—as a betrayal of the document, and they damned Lincoln for his alleged flouting of constitutional limits on presidential authority. Most scholars believe that given the circumstances of the rebellion, Lincoln miraculously kept the Constitution alive, and showed that the Framers—even if they had not specifically foreseen such an event as a civil war—had nonetheless clothed the government with authority to deal with the crisis. This notion of the "adequacy of the Constitution" has been a key element in our thinking ever since, especially when confronted by domestic crises or foreign wars.

Speaking of long lists, the annual output of books dealing with the Court, its members, and the issues it must face is also far more

than we could possibly review in this journal, even if we devoted every page of every issue to the task. So we are, as always, grateful to Grier Stephenson for winnowing through that pile and calling our attention to those books he deems particularly worthwhile.

So, as with every issue, we hope that you will be enlightened and that you will enjoy.

Tribute to John Paul Stevens

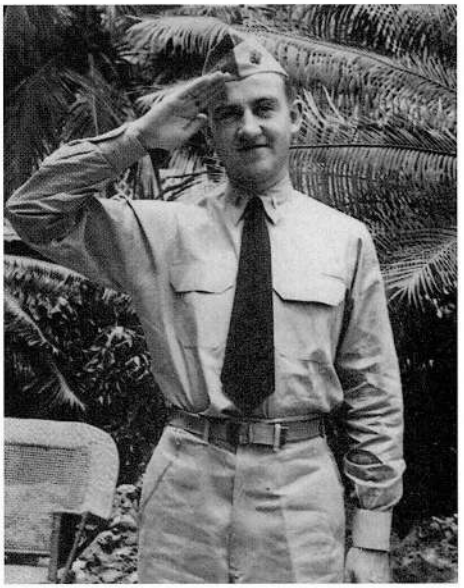
DAVID H. SOUTER

Justice Stevens is supposed to be older than I am, but the evidence is mixed. I remember one morning back in June of 2009, for example, when he and I happened to get to work at just the same time. I was in a suit, but John was still in tennis shorts, after one of his four weekly singles matches at 7:00 a.m. (He usually arrived in civvies.) I asked him, how'd the game go. There was a little victory leap. "I really beat him." John's a player.

Which is enough to make you wonder why the old urge to win another game didn't keep him on the Bench for just two years and a few days more, all it would have taken to pass Justice Douglas's record tenure. There was no reason he had to step down from the one Court while he was still running around the other one; he had deputized me to tell him if he stayed too long, thereby giving me the only sinecure I ever held. And it's not as though he only skirmished on a tennis court: consider the bridge playing and dissents like *Citizens United*.[1]

But the Supreme Court isn't a personal game, and there's more to John Stevens than the player. He doesn't live his life reacting to the way others live theirs, any more than he ever felt a need to know how someone else on the Court viewed a case before he decided what to do on it himself. You could see it in the way he worked over the years. Justices range all over the spectrum of inclination (or not) to talk about the argued cases in the couple of days between coming off the Bench and sitting down at conference. John's door was always open to anyone who wanted to bat something around, but he was hardly ever (maybe never) the one to ask about a colleague's take on an issue before all nine of us were sitting down together, ready for the first pass at it. He thought the Court would do its best thinking if we brought our own thinking fresh to the table; the singular insight was less likely to get lost in hasty consensus, and any homogenizing could be done just as well after conference. He didn't reach out for the comfort of pre-agreement.

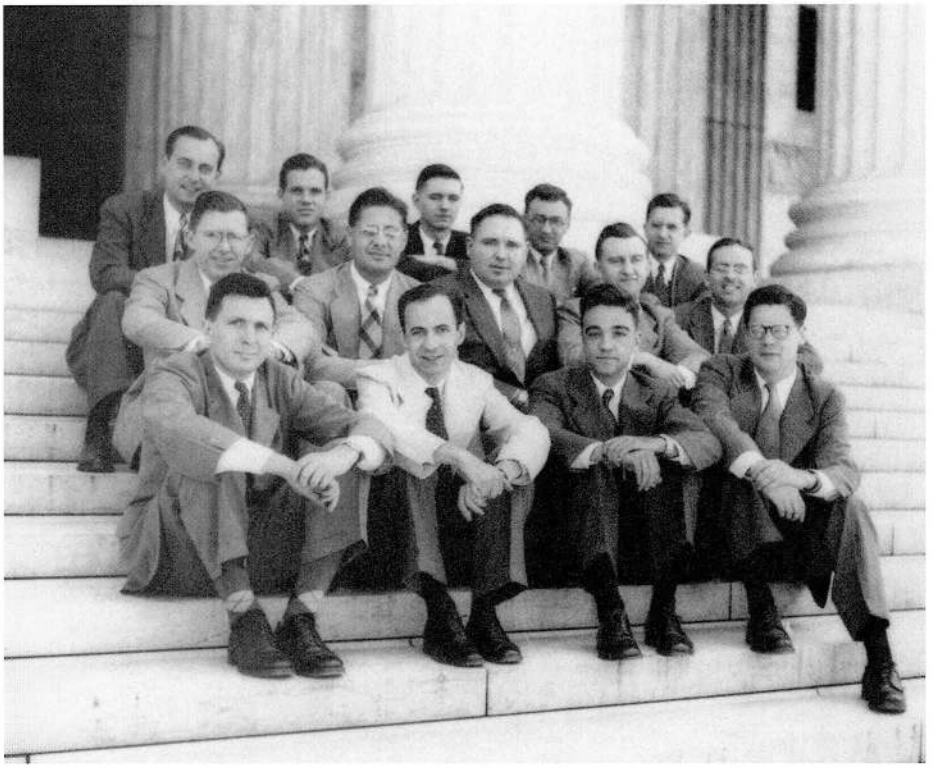
And a good thing that was, for often enough he was the one who saw something the rest of us didn't, or saw it in some way we didn't, especially in those cases that challenge the best of judges to stay awake. The Court has its share of them, usually raising statutory construction issues: is the clause limiting something or just giving a random illustration? Matters like that. It's not that you let yourself



John Paul Stevens was assigned to a code-breaking team from 1942 to 1945 and earned a Bronze Star for his service in 1946. While stationed in Pearl Harbor, Hawaii, he served as a watch officer analyzing intercepted Japanese communications.

give them short shrift when they come along; they just don't stimulate. When it was time to take up one like that at conference, I (at least) might be sitting there with a weak pulse, and then it would be John's turn, and we'd hear something like this: "You know, when you get into it, this is really a fascinating little case." And he'd mean it, and he'd say why. He might not get eight other votes for "fascinating," but he'd give the case a shot of pep it hadn't had before. No appellate judge I've ever known has done more honor to the rule an old New Hampshire trial judge told me years ago: "There are no unimportant cases." That's not so hard to remember when the parties are right there in front of you in a trial courtroom, but John didn't seem to have any trouble realizing it two courts later, when the sky wouldn't fall no matter which way we went.

Thus, for nearly thirty-five years he has paid the same attention to the least as to the



Stevens clerked for Justice Wiley Rutledge during the 1947–1948 Term. He is pictured here with his co-clerks on the front steps of the Supreme Court (second from the right, second row).

greatest. He's shared Holmes' genius for finding the universe in a grain of sand, and it's been an expanding universe, too, not measured only by the numbers on the *United States Reports*, but by the thought of a judicial lifetime compounding on itself as he doubled back from time to time on the enduring issues that are ever with us.[2] Through all the years and all the Stevens opinions, there run the unbroken strands of intelligence, honesty, and decency: whence comes the integrity that alone earns the Republic's trust and the Supreme Court its authority.

ENDNOTES

[1] *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 929–79 (2010) (Stevens, J., dissenting).

[2] Just look at his valedictory opinion in *McDonald* v. *City of Chicago, Ill.*, 130 S. Ct. 3020, 3088–120 (2010) (Stevens, J., dissenting).

A Clerk's View

CLIFF SLOAN

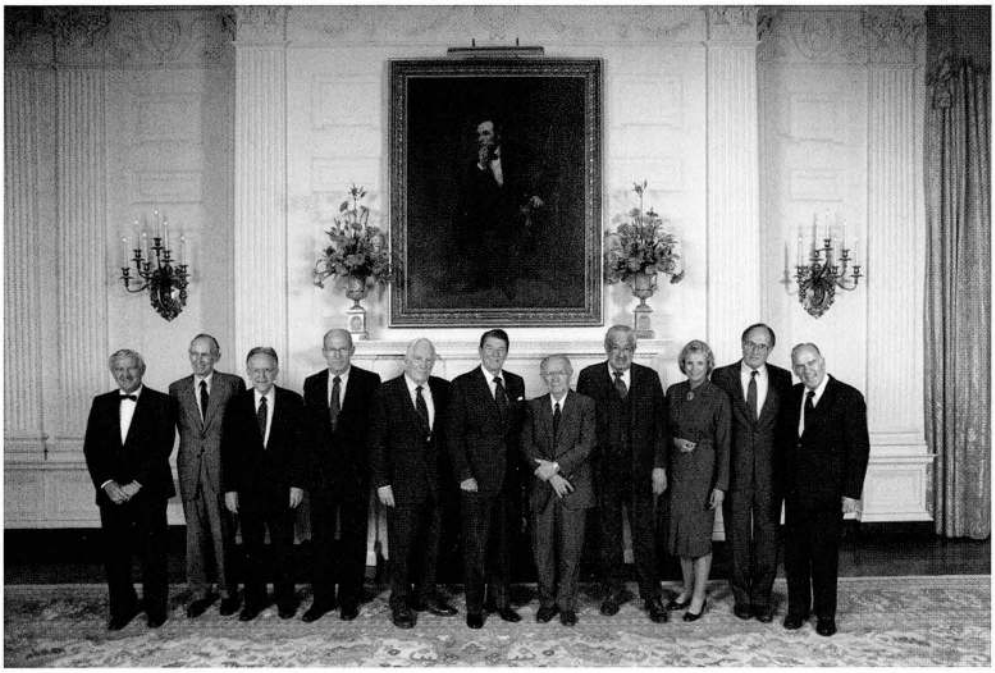
One enduring challenge of being a law clerk for Justice Stevens was trying to prove, at least to yourself, that the Justice actually needed a clerk. He could do it all himself—and he frequently did. It wasn't just the fact that he drafted his own opinions, although that was definitely part of it. (What exactly do you say as a young, recent lawschool graduate when he gives you his polished and carefully conceived draft? "Good effort, Justice, I think you're coming along nicely"?) And it wasn't just the fact that he would read the same mountain of briefs as you and then come up with an insight that nobody had seen and that irrevocably turned the case on its side for all concerned, including the lawyers and the other Justices.

It was also the fact that he already possessed a vast, intimate, and easy knowledge of seemingly all legal subjects, including, of course, the decisions of the Supreme Court. In his modest, genial manner, he always assumed that everybody shared that same familiarity. I remember him commenting collegially that it was redundant to include the year of the decision in Supreme Court case citations. If you knew the reporter volume number, then, of course, you already knew the year. My co-clerk and I nodded sagely.

Justice Stevens' profound and lasting contributions to the Court's jurisprudence have been chronicled elsewhere,[1] and they will endure for generations. He is the "rule of law" Justice, and he blazed trails on issues ranging from civil liberties and national security[2] to the presidency,[3] the right to liberty,[4] the First Amendment in cyberspace,[5] and numerous other areas.[6] From a former clerk's perspective, he stands for all of that and for something more—an example about how to live a life.

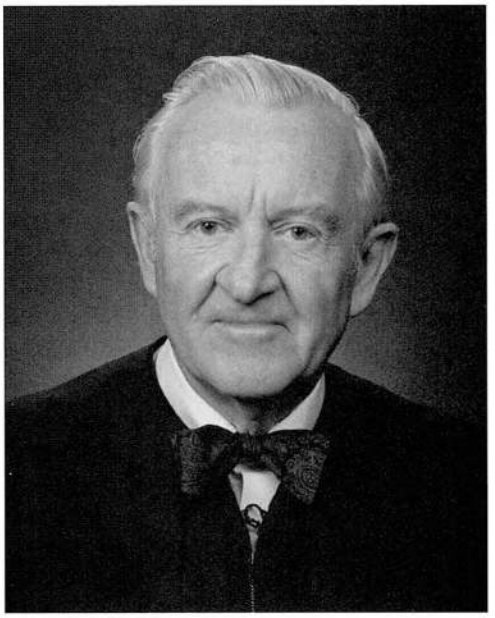
Justice Stevens taught us to do the right thing. Not in a preachy, self-righteous way, but rather through his own habits and practices. Every case is important—because that's the right thing to do. A judge gives every case a fair hearing, with his or her all—because that's the right thing to do. You come to your own views carefully and honestly, and then you lay them out for the world to see—because that's the right thing to do.

Justice Stevens frequently tells a story from his time on the Seventh Circuit in the early 1970s. Father James Groppi, an antipoverty protestor, led a group that disrupted



Members of the Supreme Court posed underneath a portrait of Abraham Lincoln in the East Room of the White House in 1985 with Ronald Reagan. Justice Stevens is at left wearing his signature bow tie.

Justice Stevens and Chief Justice Roberts were photographed on the day of Roberts' investiture in 2005. Stevens had sworn in Roberts at a White House ceremony several days earlier.



Justice Stevens served on the Supreme Court for almost thirty-five years, having been appointed by Gerald Ford in 1975. Only William O. Douglas and Stephen J. Field had longer tenures.

the Wisconsin legislature by occupying the floor of the Assembly. Groppi was cited for contempt and jailed, without any procedural safeguards. Then-Judge Stevens dissented from the Seventh Circuit's *en banc* decision to uphold the contempt punishment, and he wrote extensively on the lack of due process.[7] At the time, he felt certain that his dissent meant that he was giving up any chance of going on the Supreme Court. This was the height of tensions over unlawful and disruptive protests, after all, and President Nixon was in office. Dissenting on behalf of a notorious protestor was no way to advance a judicial career. But Justice Stevens knew what he had to do. In the end, Justice Stevens' position was unanimously approved by the Supreme Court,[8] and his courageous dissent was hailed as one of his important contributions when he was nominated to the Court. I know more than one clerk who has made a life decision to follow his or her conscience with that story in mind.

But it would be a mistake to think that Justice Stevens' example about leading a life is about being serious and moralistic. To think of Justice Stevens is to think of him laughing. He'd talk with delight about subjects ranging from baseball to Shakespeare. We'd hear about tennis and bridge, about his wife and his family. His immersion in the law as a Justice was a passion and a joy, just as it had been for him as a lawyer, not drudgery or obligation. Life in the law, he taught us, needn't narrow you as a person, needn't restrict or confine your interests or your happiness. That, too, has been a lesson of abiding importance.

Justice Stevens is the most unassuming of men, with no pomp or pretense. Although the description surely would embarrass him, he also is a genuine American hero, in law and in life.

ENDNOTES

[1] *See, e.g.*, "The Honorable John Paul Stevens," 43 *U.C. Davis Law Review* 885 (2010).

[2] *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[3] *See, e.g., Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting); *Clinton v. Jones*, 520 U.S. 681 (1997).

[4] *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting), *see also* the majority opinion in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("Justice Stevens' analysis . . . should have been controlling in *Bowers* and should control here").

[5] *Reno v. ACLU*, 521 U.S. 844 (1997).

[6] *See, e.g., Wygant v. Jackson*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting)

[7] *Groppi v. Leslie*, 436 F.2d 331, 332 (7th Cir. 1971) (Stevens, J., dissenting).

[8] *Groppi v. Leslie*, 404 U.S. 496 (1972).

Lincoln and the Rebirth of Liberal Democracy

ROBERT K. FAULKNER

It is a privilege to speak in this, the house of the Supreme Court of the United States, of Abraham Lincoln, our supremely great President. His task, he said, was greater than George Washington's. In the United States' gravest crisis and most terrible war, Lincoln saved the country, its democratic republic, and the republic's devotion to the equal rights of man. He did more than save. He renewed the republic and purified it of slavery.

My topic this evening is more about the saving and the renewing than the purifying. I mean to discuss chiefly not the new birth of freedom, but the rebirth of a republic fit to be the home of freedom. Lincoln knew that "[slavery] was, somehow, the cause of the war."[1] He had always hated slavery, and he devised, in my opinion, the only practicable way to emancipation. But only if "the home of freedom" lived could it provide that new birth of freedom.

We live amidst a lesser rebirth, a revived appreciation of Lincoln's greatness. If anything is original in this essay, it is the comprehensive political focus. I try to bring out Lincoln's understanding of what makes a liberal democracy work. Put prosaically, away from Lincoln's gorgeous metaphors, he revived both a government and a people. He energized constitutional institutions grown weak with strict construction and sedition. He turned in a liberal direction a Northern majority tempted to be excessively populist, and he turned in a politic direction Northern leaders tempted to be excessively principled. Very broadly put, he carved a way just as well as politic between Stephen Douglas's popular sovereignty and William Lloyd Garrison's abolitionism. So I shall contend. I talk first of Lincoln's energizing of our institutions, and then of his fostering in majority and their leaders reverence for free institutions and equal rights—both.

Popular Government—with Teeth

Lincoln is famous or notorious for contending that the Civil War's chief purpose was to defend our republican government and union, not to abolish slavery. His first war message to the new Congress explains: "Is there, in all republics, this inherent, and fatal weakness?

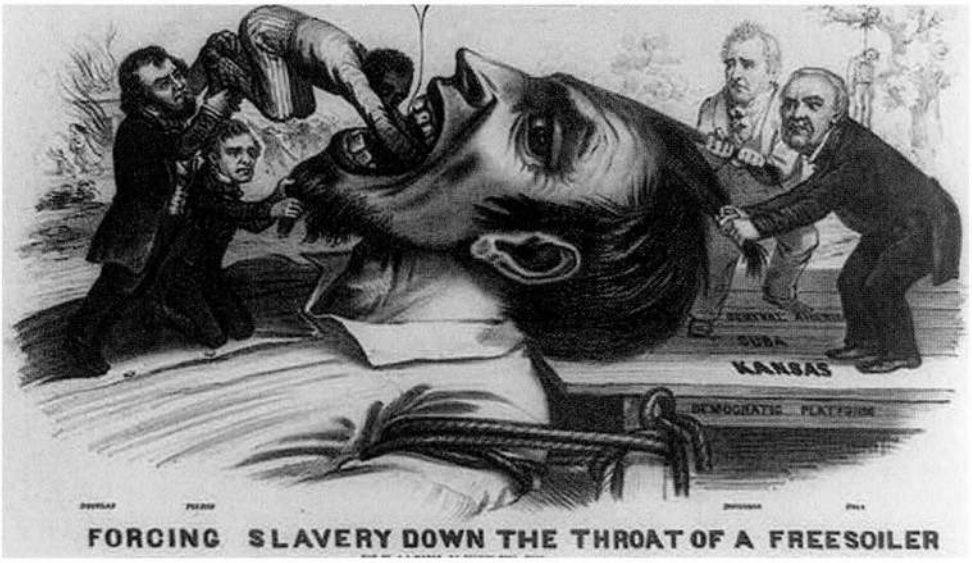
Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"[2] This was no idle question. Since its famous revolution, France had had six other revolutions, two official republics (not counting the crises within each), two monarchies, and two Napoleonic emperors, not to mention a reign of terror and the revolutionary and imperial wars that killed millions. In 1861, the year of Lincoln's message, France had been for nine years under its second Napoleonic tyranny. Back home, in the United States, skeptics had existed from the start. Alexander Hamilton doubted whether a democratic republic could be forceful enough; Thomas Jefferson, whether any forceful government would not tyrannize. Lincoln was not a skeptic, but he knew the skepticism: the liberal party throughout the world, he said in the Peoria Address, worries about the fate of the United States.[3] He saw the Civil War itself as a great test of the republican experiment: the "central idea" of this struggle is the necessity of proving "that popular government is not an absurdity."[4] Two points had already been proved: a "constitutional republic, or democracy," could be established, and it could be administered. A third test remained, he told Congress: could it be maintained against a formidable rebellion?

To pass the test, the people and their government had to demonstrate for the world—not just for us—"that those who can fairly carry an election, can also suppress a rebellion." The government had to show elemental authority: strength enough to defend a constitutional majority's decision. It was a great object of his, he said, to teach "the futility of... [an] appeal... from the ballot to the sword." So the country must not give in to a politics of extortion. It must not permit an extortion of slavery extension in the Territories by threats against an administration whose leading promise was to oppose just that. The extortionists would thus overrule popular government on a crucial point. As Southern states continued to declare independence, Lincoln, as President-elect, refused the compromises that would condone extension. Without encouraging war, he allowed war to come, and he repeated the significance: no popular government could survive a precedent that forces those elected to obtain their offices only by renouncing their principles.[5]

But there was another side to Lincoln's forceful republicanism: the country's constitutional institutions. A war had to be fought not only effectively, but also constitutionally. If the fighting of a war did not abide by our institutions, it refuted what it was to prove: it would show that popular government *was* too weak to defend itself. What the Framers constituted and followers put into practice, Lincoln's generation had to perpetuate. That was his fundamental duty. His first major address was titled "On the Perpetuation of Our Political Institutions," and it recommended popular "reverence" for our law, especially for our fundamental law. Lincoln's later actions matched his early words, despite the charges often heard of Lincoln the Dictator and Lincoln the Lawbreaker. During terrible civil war, he moved between relentless forcefulness, so that popular government could prevail, and respect for liberties and the Constitution, so that it could live up to itself. I shall take up examples to sketch the two sides and to argue, despite some stretchings, for Lincoln's complicated consistency. After all, even in the Perpetuation Address he gave himself a small but inevitable out: obey law... "if not too intolerable."[6]

Lincoln's first forcefulness as President was to insist that the nation was to endure and that he would defend it. Despite legal language and measured reassurances, his first Inaugural Address held up an iron fist. "I hold... that the Union of these States is perpetual,... [and] that no State, upon its own mere motion, can lawfully get out of the Union." And then: "I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States."[7]

The iron stood out. The previous President, James Buchanan, had dithered. When Southern planning led to actual secession after Lincoln's election, the lame duck Buchanan dithered crucially. Seven states had claimed



President James Buchanan did not address the issue of slavery and secession head-on, and he denied the right of the federal government to coerce a state either to permit or to forbid slavery within its territory.

independence and had seized federal facilities, including armories and arms. Buchanan himself spoke of a "great revolution" in progress. But he caved. He proposed to the lame-duck Congress an amendment recognizing slavery in the Territories and in states that chose to adopt it. These were proposals contrary to the platform of the incoming President just elected. True, Buchanan *did* deny the right of a state to secede. But he also denied the possibility of resisting it. For he denied the right of the federal government to coerce a state, and he threw upon a Congress dominated by rebels the issue of preserving the country. The revolution, he said, was so "vast and alarming" as to be "above and beyond Executive control."[8]

The new President Lincoln, on the other hand, was emphatic to the new Congress. The U.S. Constitution, like all others, supposed its own perpetuity. It made no provision, express or implied, for its own dissolution. The word "secession" was "an ingenious sophism." The South was actually in a vast rebellion. The Constitution was the "supreme law of the land," and the supreme government it established, like all others, had powers to put down a rebellion that threatened its supremacy.

Those powers were especially executive powers. Lincoln's energizing of government was especially an energizing of the executive's powers over war. His presidency was a war presidency, more than any other before or since. War came within a month after Lincoln's inauguration with the assault on Fort Sumter in Charleston (April 12–13, 1861). This President did not forgo his powers or his duty. He called forth 75,000 members of the militia, ordered a blockade of rebel ports, and then called forth 80,000 more men. With that call he first brought into the open his war power, his authority as Commander-in-Chief as well as executive of law. He had "no choice but to call out the war power," he told the new Congress.[9]

In war, Lincoln was a force. He was pressing, pressing, pressing for comprehensive action from his generals until he finally found his Grant, his Sheridan, his Sherman. Impatient with the generals, he even inspired and directed a successful attack on Norfolk that ended in destruction of the feared Confederate ironclad *Virginia*. Nothing had been happening, said a union officer, until Lincoln began "stirring up dry bones." But the forcefulness was chiefly in the planning and prodding. Lincoln, before Grant, thought up the winning strategy of multiple simultaneous attacks by multiple armies. Thus the Union's

The attack on Fort Sumter came within a month of Lincoln becoming President. Charleston, South Carolina was ransacked toward the end of the war, in 1865, and is shown here in ruins.

superior wealth and numbers could overcome the South's ability to transfer forces within a compact perimeter. The President most without military experience became, James McPherson says, our greatest and most engaged Commander-in-Chief.[10]

But—was Lincoln unconstitutional in his forcefulness? Was his a presidential dictatorship? The charge came first from Democratic partisans angry at coercion of states and then from radical Republicans angry that he did not fight from the start for emancipation and reconstruction. Scholars to this day have condemned his exercise of powers to raise money and troops, his suspension of the writ of habeas corpus, and the establishment of widespread martial law. Lincoln as war President, said one scholar, dealt "with both Congress and Constitution in a manner more imperious than any President before or since."[11] If true, did that make him a dictator, or one who acted beyond the constitutional limits of his office? It is not enough to reply, as did the impressive J.G. Randall, that Lincoln made war without disdaining moderation, proportion, and law, and that his intent was good. He made war as a duty to preserve a popular republic of liberties and law, not for glory or empire, to say nothing of revenge.[12] But Randall underplayed Lincoln's stretchings of the law. Granting a disposition to observe the law, did Lincoln observe it? He himself intimated violations, while never admitting them.

The big picture, I think, is this. Lincoln fundamentally restored the presidency to the energetic power that its Framers had planned . . . even when he stretched some provisions. As Commander-in-Chief the President has a general power of conducting war, albeit with specific exceptions for Congress to declare war and to raise and support armies.[13] Besides, the President is to preserve, protect,

and defend the Constitution. But that, Lincoln said, obliged him to preserve the government and nation "of which that constitution was organic law." He could use "every indispensable means." Accordingly, he might free slaves in enemy states—but not in loyal states. The critics of limited executive emancipation miss the limits of Lincoln's office. He could not act against slavery just because he or Congress thought it wrong, given the constitutional guarantees, and given, too, the division of powers between federal government and states. But as Commander-in-Chief, he could seize for war on things not ordinarily to be touched by the federal government. That included slavery. Another of his wonderful metaphors: "by general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."[14]

This spirit justifies in emergencies what would otherwise be violations. Lincoln proclaimed a blockade, although the Constitution says that Congress is to declare war.[15] Two years later, the Supreme Court held that civil war may exist by dint of rebellion, even without a congressional declaration of war, and that it may be met with force under the Commander-in-Chief's war power.[16] Else, the country would go undefended.

This interpretation of the war power according to the necessities of defense underlies other stretchings. Lincoln at the start raised money and regular troops, although the Constitution prescribes that Congress appropriate money and raise and support armies.[17] Even Lincoln did not claim that this initial expansion of the military on 3 May 1861 was strictly legal. "Whether strictly legal or not," he said, the measures were by "a popular demand, and a public necessity," trusting that Congress would ratify what was not beyond Congress's "constitutional competency."[18] Consider the two excuses, and then the ultimate subordination to Congress's judgment. First, the republican argument: to follow popular demand while raising popular armies signaled a legitimate intent. Besides, raising troops was within at least Congress's constitutional authority. But the question remains: why could the President do it? So the second and decisive argument, from necessity: Lincoln had to defend the government or surrender it. This is executive action beyond the law, and sometimes against the law, but under pressure of real necessity. It is what the Framers had in mind, as did John Locke, inventor of the constitutional executive.[19] There were American precedents. I quote a scholarly authority: Lincoln acted "as Presidents Washington and Jefferson did in making military purchases when the threat of war suddenly loomed in 1793 (with France) and in 1807 (with Great Britain); and he justifies himself before Congress and sometimes before a court of law."[20] So Lincoln acted and justified himself. He reinvigorated executive power, fulfilled a constitutional duty, and preserved the Constitution's fundamental superiority.

But what of suspension of the writ of habeas corpus even outside zones of combat? The Constitution places suspension among Congress's powers,[21] and the judiciary is to decide civil cases. This executive act Lincoln defended. The Constitution permits suspension when the "public safety" requires it, and it does not say who should suspend. Since the provision was made for a "dangerous emergency," Lincoln would not suppose that the Framers wished "the danger should run its course, until Congress could be called together." "Are all the laws, *but one*," he said, "to go unexecuted, and the government itself go to pieces, lest that one be violated?"[22] Our popular government was a modern government, and it contained in the executive a general-in-chief for emergencies.

A final and famous illustration: the military arrest, when Ohio was not under military rule, of a prominent Ohio Democrat for big speeches against conscription. Lincoln and his cabinet were dubious about such an arrest. Nevertheless, Lincoln stoutly defended his general's power to do it when necessary. The real issue here, Lincoln wrote to some restive Northerners, was not what critics charge, that

is, judicial trial without safeguards. The real issue was preventive detention during a vast rebellion in which spies, guerrillas, and sympathizers penetrated a divided population. A civil court would be useless: half the jury might hang the prosecutor rather than the defendant. Nor was this a case about freedom for speech criticizing the administration. It was a case of seditious words that amount to "warring on the military." Lincoln's illustration was published all over the North: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"[23]

Nevertheless, there is another side to Lincoln the forceful constitutionalist that Randall rightly saw: an eye for humane proportion. Yes, Lincoln would be forceful as necessary. But there must be a real, a genuine, necessity.[24] While he would press for audacious strategy and aggressive fighting, he discouraged cruelty, retaliation, and harsh punishments. His government freed those who agitated against conscription, for example, after the relevant conscription quota had been reached.[25] Similarly, Lincoln's own papers are cluttered with cancellations of death sentences for simple-minded soldier boys who had deserted. During the whole rebellion, according to one scholar, the Union side took no life and carried out no sentence of fine or imprisonment in any judicial prosecution for treason. Charges and arrests there were, but the charges involving political offenses were almost always continued and then dismissed. Four treason cases came to trial and conviction during Lincoln's presidency. They ended with judgments unenforced and the prisoners released.[26]

Lincoln's tolerance and humanity came out not least as he dealt with a critical press and seditious churches. Some Democratic papers assaulted Lincoln's war as merely a war on slavery, and Southern generals gleaned from them details of Union troop movements. Yet only two major papers were suppressed, and this for a total of six days. Anti-Lincoln and anti-Union organs were, as a rule, left undisturbed. A similar leniency appeared as to disloyal preachers and divided congregations. If a preacher had to be arrested for disloyalty, or a church had to be used for military purposes, so be it—but the government must not undertake "to run the churches."[27] Lincoln's instruction to a general summed up his outlook: "You will only arrest individuals, and suppress assemblies, or newspapers, when they may be working palpable injury to the military in your charge; and in no other case will you interfere with the expression of opinion in any form, or allow it to be interfered with violently by others. In this you have a discretion to exercise with great caution, calmness, and forbearance."[28] A country is fortunate when such forcefulness is accompanied by such discretion.

The Morals of Self-Government

I turn from forceful government to Lincoln's second great effort: the rebirth of a people capable of governing and being governed.

"Public opinion in this country is everything," Lincoln once said. It is "the great moving principle of free government." To that extent, popular government is by the people, not the government. Government of, by, and for the people Lincoln thought right, even in a pinch. He held the 1864 election despite the war, and despite the likelihood he would lose to a candidate who would give up war, union, and the priority of freedom. But Lincoln won. Victories by Sherman and Sheridan turned around popular discouragement. The moving principle could be moved—and by persuasion as well as victories. "He who moulds public sentiment," Lincoln also said, "goes deeper than he who enacts statutes or pronounces decisions."[29]

Lincoln is probably this country's master of popular persuasion, and he knew that his example could teach other statesman-orators. His speeches are magnificent mixtures of cool reasoning and poetic inspiring, coolly wielded to mould public sentiment. His first important speech, the Lyceum (or Perpetuation) Address, breeds popular reverence for the law.

His last, the famous Second Inaugural, moderates gloating in the triumphant North, to help restore a union even in sentiment with a humiliated South.

I concentrate here on four less well-known speeches that focus on the morals of a liberal democratic people. The famous speeches deal with the urgent problem: the slave states' demands and the subsequent war. So Gettysburg, Peoria, Dred Scott, House Divided, Cooper Union, and the two inaugurals. But two pairs of speeches deal with defending a liberal democratic regime, not from an urgent external threat, but from causes within—from, indeed, internal dissolution. These are the Perpetuation and Temperance addresses from 1838 and 1842, and two speeches from 1859, on Discoveries and Inventions and a free economy ("Address before the Wisconsin State Agricultural Society").

These four speeches stand out, as pairs and as peculiarly meditative. As pairs, they indicate something of Lincoln's comprehensive thinking as to the morals and the economy fitting self-government; as meditative, they get to fundamentals. They deal with big dangers inherent in both the people and their leaders: that is, with inherent difficulties in both democracy and liberal leadership. So Lincoln takes up popular lawlessness, intemperance, inhumane righteousness, mere ambition and greed, a general preoccupation with consumer luxuries and technological progress, and the oppressions of big property and big capital. Popular self-government needs self-governing citizens freed from passions for drink and indignant vengeance and freed also from obsessions with wealth and technical devices. The Perpetuation and Temperance addresses foster a people law-abiding—especially Constitution-abiding—and leaders who encourage humane self-restraint and refrain from preacherly righteousness. The speeches on progress and the economy encourage popular education, rather than a leisured class of the learned, and small business and thorough work, rather than great acquisitiveness and money kings or land kings.

The best known of these four, the Lyceum Address, focuses expressly on "The Perpetuation of Our Institutions." It makes this startling recommendation: a "political religion" of reverence for law and especially the Constitution. This initiative, I think, is intended to correct both sides of the founding tradition, the Jeffersonian and the Federalist. Lincoln praises Jefferson's principles as "the definitions and axioms of free society."[30] But he abstains utterly from Jefferson's fatuous optimism as to the endurance of popular government: the suggestions that each generation remake the Constitution and that intellectual progress leads inevitably to better and better constitutions. Jefferson supposed that more democracy and more enlightenment would promote more human rights and more popular institutions. Lincoln sees otherwise. The Democratic party, which Jefferson founded and Jackson further democratized, was in the South defending slavery and in the North proclaiming indifference as to whether slavery was right or wrong (let "popular sovereignty" decide). Jefferson had feared above all enemies of the people—"the few" who were rich and powerful. Lincoln fears also our people's own disregard of their institutions. He fears in particular vigilantism against criminals and gamblers—and against blacks and abolitionists. "Wild and furious passions" replace "the sober judgment of Courts;" "worse than savage mobs" replace "the executive ministers of justice."[31] Like the Framers and Federalists, unlike Jefferson, Lincoln would revere our constituted institutions as a blessing from the great Washington.

Yet the proposal for a cult of reverence also corrects Washington and the party of the Framers.[32] The Framers had thought to check a majority's excesses by a diversity of factions, thus to protect minority rights, and by a Senate, Presidency, and Court, thus to balance the democratic House. But the cause of minorities had been taken up by Southern slaveholders to the extent of state nullification of federal laws. And Senate, Presidency, and Court were dominated by the Democratic party, with a Southern

wing leaning toward slave-supported aristocracy and a Northern wing toward plain and thus illiberal democracy. The party's Southern leaders defended states' rights and would not defend the nation against the states. Nor would they defend a key principle of the nation. Said a Senator on the Senate floor, the proposition that all men are created equal is "a self-evident lie." These leaders dangled the presidency before Stephen Douglas and James Buchanan, ambitious Northerners who would condone the expansion of slavery. Great ambition, said the Perpetuation Address, "thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving freemen."[33]

Hence the need to strengthen popular reverence for our institutions, institutions that will inevitably be challenged. By reverence, Lincoln has in mind more than veneration, of which the Framers did speak. Veneration comes from habit and time. But habits fade. The American people's devotion to representative institutions has faded with time. The "giant oaks" of the old revolutionary generation are dying off, and with them living reminders of the great cause. Besides, there is the problem of natural passions once suppressed by revolutionary ardor. That redirection is long gone. Popular envy and spite, aimed at leaders above, was once directed toward the foreign enemy. No longer. Ambition for distinction and glory had once bent itself to demonstrate *"the capability of a people to govern themselves."* No longer. That "game is caught."[34] The people are losing their devotion to constitutional government, Lincoln thought, just as the few look for new ways to honor and glory. Lincoln's solution is popular dedication, a rational but general reverence for our institutions in which each dedicates himself.

But what brings *that* about in a public not so rational? Answer: the statesman-orator, even statesman-poet. Lincoln's memorable speeches are meant to be memorable, and to show others how to do it, too. He restores something of the self-conscious political-moral importance of the ancient poet. Here is a longish but quintessential sample from the Lyceum Address.

> As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the charter of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap . . . let it be taught in schools, in seminaries, and in colleges;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the *political religion* of the nation; and let the old and young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.[35]

Now, if all this doesn't carry you away, you will note a certain bemused self-parody followed by, just afterward, a cool and quiet qualification. Obey the law . . . "if not too intolerable." Lincoln knows what he is doing, and he indicates to those who can follow how they, too, can knowingly do it.

The Morals of a Reasonable People

Indeed, just how to move people in a rational direction is a thematic topic of Lincoln's other great early speech, on temperance.[36] The secret: the road to a man's reason is his "heart." Lincoln's example here is a transformed temperance movement that appeals humanely to equals, rather than preaching righteously to sinners.

We smile at temperance movements, and yet thoughtful people even now do not smile at the drug culture and the alcoholic. Our laws can be harsh as to the former, and strict

The Kansas-Nebraska Act of 1854 allowed slavery in the formerly restricted areas wherever voters approved, prompting Lincoln to return to the political realm.

therapies abound for the latter. Lincoln did not despise the temperance movement as to alcohol. But he strongly commended a version more humane and less moralistic in both teacher and manner. These lessons in popular persuasion were intended to apply to others of these moral movements, I suspect, and perhaps not least to the antislavery movement.

The old way, the preacherly way of a "cold abstract theory" of abstinence, was of limited appeal. But when reformed drinkers were put in charge, as in today's Alcoholics Anonymous, the creed of abstinence becomes a spreading conqueror of hearts. "A drop of honey catches more flies than a gallon of gall." Convince by persuasion, as a man's friend, not with the righteousness of a "Lordly judge," who utters "anathema and denunciation." So man must be led, Lincoln declares, even to his own best interest. If the Perpetuation Address breeds reverence for political institutions, its mate, the Temperance Address, would replace lordly moralists—or perhaps Kantian moralists—with leaders who humanely lead free human beings to control themselves. This is a rational morality for equal citizens. Lincoln calls it "moral freedom," as did Kant. He fosters it seriously, although, truth to tell, one sees an unKantian twinkle—and indeed considerable sympathy for warm-hearted types who fall for drink. Nevertheless, he seems serious in a striking conclusion: moral freedom from corrupting appetites is both more valuable than political freedom and a "noble ally to it."[37] Living rationally is good for you. It is good for a free country, too. Devotion to free government does not come from the drunk, the greedy, or, in general, those driven by wild and furious passions.

The Morals of Enlightenment and Work

The pair of speeches on "Discoveries and Inventions" and the economy think out the progress and prosperity that best fit a free people. Progress in knowledge, we learn, is

only secondarily about technology and new products. Progress is crucially the improvement of language and mind, and especially the improvement in enlightening the popular mind—to the point of "universal education." The greatest invention, then, is that of writing, or perhaps printing. Cheap books mean general enlightenment and widespread equality. Printing came into the world to emancipate "the great mass of men" from the belief that the educated few are "superior beings" while they themselves are "incapable of rising to equality."[38]

As to economics proper, Lincoln calls for a free labor economy, by which he means an economy that gives a chance to all and allows the industrious to improve their lot. He praises equality of opportunity, both the equality and the opportunity for inequality, with special attention to the equality. The beginner works for someone else, then for himself, then hires others. Yet Lincoln worries about the power of capital and landed wealth. Politics must enter. He recommends a free labor party and, elsewhere, unions, although he also cautions unionists against class warfare.[39] In this speech he dwells on the moral side, especially for the people at large. In a free economy, as in free politics, popular self-control is crucial. He praises especially the virtue of thoroughness: that is, of devotion to complete and excellent work. Educated or not, a majority must work to live. Thoroughness breeds pride in one's work and therefore more devotion to it. Also, thoroughness enables even the smallholder and small businessman to improve his lot. And finally, it encourages education. A person who perfects what he does wants to learn, first about bettering his work, and then often about more. Thoroughness in work breeds enlargement of mind. So Lincoln points us. He fosters moral seriousness and intellectual development, while discouraging the passion to acquire more and more. Here, too, there is reform in the rebirth.

In short, our most contemplative President provides four remarkable meditations on the class composition and citizen morals that make democracy work and that also ennoble it. I've touched only the surface. These speeches repay study.

The Morals of Equal Freedom

To complete this account of Lincoln's revival of patriotic devotion we must at least touch the famous speeches: those dealing with the crisis revolving about slavery. For Lincoln's task came to involve a revival of popular devotion to his country's distinctive purpose, securing the equal rights of man. The fundamental danger goes beyond our institutions to their animating spirit and becomes clear with the Kansas-Nebraska Act of 1854. That law, spearheaded by Senator Stephen Douglas, broke the old restriction on the spread of slavery laid down by the Missouri Compromise of 1820–1821. The old Compromise had restricted slavery in the Kansas and Nebraska territories, a portion carved from the Louisiana Purchase. The new law allowed slavery in the formerly restricted areas wherever voters approved. The right to be free would be secondary to the right of democratic choice. Slavery, then, was on the rise. It was not "in course of ultimate extinction," as Lincoln (and many others) had once supposed. This was a threat to the liberal cause worldwide, as Lincoln says in the Peoria Address of 1854, and indeed to the "white man's charter of freedom" as well as the black man's. It amounted to a revolution and brought on a crisis. Lincoln saw it as nothing less. The Kansas-Nebraska Act brought him back to political speaking and organizing with a passion and for his greatest acts of devotion.

The Peoria Address confronts the revolutionaries. It is in some ways the peak of Lincoln's rhetoric. His key appeal is to the majority: the new dispensation threatens the white man's equal place as well as the black man's rights. By moving to permit slavery where it had been prohibited by a seminal compromise for thirty-four years, the Kansas-Nebraska Act challenged the primacy of freedom in the whole. A union for liberty was in danger of a new "basis." "Near eighty years

ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for SOME men to enslave OTHERS is a 'sacred right of self-government.'" The very existence of a modern free society is at stake, including the free-enterprise economy. For it is the principle of equal rights that "clears the *path* for all—gives *hope* to all—and, by consequence, *enterprise*, and *industry* to all."[40]

How then to revive the primacy of "our ancient faith?" That great task, of course, involved chiefly great deeds. It required a Republican party, a political campaign, a new Congress and President, the war, victory in the war. But how to revive the old faith so that the North, West, and middling South would rouse itself as a union, vote Republican, draw a line, fight, and win? Speech was needed to rouse men to the deeds.

In the Peoria Address, Lincoln returns to the country's most sacred political text, the Declaration of Independence. But this return, too, is also reform. Lincoln dwells on the sacredness, not merely the rightness or the self-evidence. The principle that all men are created equal is "our ancient faith." Here is another facet of our political religion. Lincoln would make the Declaration, like the Constitution, a revered object, much as the Good Book proclaiming the Savior unites the Christian flock. This helps explain the peculiar national importance of the Gettysburg Address. It is a liberal democratic Apostles' Creed, if one may decently say such a thing. It has fittingly exalted prose ("Four score and seven years ago," not eighty-seven). Indeed, the Peoria Address has perhaps the most gorgeous Lincolnian poetry. Turn from this new indifference as to the wrong of slavery; be dedicated (Lincoln implies) as the faithful are to Christ. "Our republican robe is soiled, and trailed with dust. Let us turn and wash it white, in the spirit, if not the blood, of the Revolution."[41]

In short, Lincoln returns to the Declaration with his own touch. The proposition that all men are created equal becomes an ideal to which citizens are to dedicate themselves, not a self-evident or natural truth that can be presumed.[42] The Declaration, Lincoln said later, sets up a "standard maxim" to be "constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated." It is for "all people of all colors everywhere."[43]

Reviving this faith was not the totality of Lincoln's comprehensive plans for preserving the republic. This essay dwells on the more usual means needed among people and their leaders. Lincoln grasped the typical dangers of lawlessness, misleading education, technology in excess, consumerism, and unequal economic power. But his great and urgent task arose with the fundamental challenge, a challenge implying the superior rights of mastery, aristocracy, and states' rights, and even of plain democracy, with its erroneous liberties. He defended intransigently our elective republic, the power of its representative government, and especially its noble cause. The defense of the proposition that all men are created equal was the cornerstone—not the only stone, but the defining stone—in Lincoln's effort to save American liberal democracy.

ENDNOTES

[1] **The Collected Works of Abraham Lincoln**, ed. Roy P. Basler, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953), "Second Inaugural Address," VIII:332–33 (hereafter cited as **Collected Works**).

[2] July 4, 1861, in **Collected Works**, IV:426.

[3] October 16, 1854, in **Collected Works**, II:276.

[4] Diary entry of May 7, 1861, in James McPherson, **Tried by War: Abraham Lincoln as Commander in Chief** (New York: Penguin Press, 2008), p. 5; Michael Burlingame and John R. Turner Ettlinger, eds., **Inside the White House: The Complete Civil War Diary of John Hay** (Carbondale, Ill.: Southern Illinois University Press, 1997), p. 20.

[5] "Fragment of Speech Intended for Kentuckians" (c. February 12, 1861), in **Collected Works**, IV:200–201; **Collected Works**, IV:176, 268, 426; "Message to Congress in Special Session," in **Collected Works**, IV:439; "Fragment c. 26 August, 1863," in **Collected Works**, VI:410.

[6] **Collected Works**, I:113.

[7] **Collected Works**, IV:265.

[8] "Message to Congress," 8 January 1861, in John G. Nicolay and John Hay, **Abraham Lincoln, A History**

(New York: Century Co., 1886–90), vol. 2, pp. xviii, xxii.

[9]"Message to Congress in Special Session," in **Collected Works**, IV:426.

[10]McPherson, **Tried By War**, pp. 4–5, 269, 89–90.

[11]Wilfred F. Binkley, **President and Congress** (New York: Vintage Books, 1962), p. 134; *see also* Edward S. Corwin, **The President: Office and Powers** (New York: New York University Press, 1957), p. 30.

[12]James G. Randall, **Constitutional Problems Under Lincoln** (New York: D. Appleton and Company, 1926), p. 519.

[13]Robert Scigliano, "The War Powers Resolution and the War Powers," in Joseph W. Bessette and Jeffrey Tulis, eds., **The Presidency in the Constitutional Order** (Baton Rouge: Louisiana State University Press, 1981), pp. 115–53, esp. pp. 124–43.

[14]"To A.G. Hodges" (April 4, 1864), in **Collected Works**, VII:281–83.

[15]U.S. Const. art. I, § 8, cl. 11.

[16]*Prize Cases*, 67 U.S. 635 (1863).

[17]U.S. Const. art. I, § 9, cl. 7; art. I, § 8, cl. 12.

[18]"Message to Congress in Special Session," in **Collected Works**, IV:426.

[19]*Cf.* John Locke, **Two Treatises of Government**, ed. Peter Laslett (Cambridge: Cambridge University Press, 1997), vol. 2, pp. 143–48, 157–58.

[20]Scigliano, "The War Powers Resolution and the War Powers," p. 142.

[21]U.S. Const. art. I, § 9, cl. 2.

[22]"Message to Congress in Special Session" (July 4, 1861), in **Collected Works**, IV:431.

[23]McPherson, **Tried by War**, pp. 174–75; "To Erastus Corning and Others" (June 12, 1863), in **Collected Works**, VI:266. *See also* Mark E. Neely, Jr., **Abraham Lincoln and Civil Liberties** (New York: Barnes & Noble, 2007), an exacting examination of shifting scholarship and the facts on the ground. That no systematic, organized disloyal opposition to the war existed in the North does not mean that dangerous opposition (especially to conscription) did not exist in specific states and on specific occasions. Neely, **Abraham Lincoln**, pp. 3, 234. Alternatively, that thousands and thousands of civilians underwent military arrest, despite a largely loyal population, does not exhibit a despotic executive beyond the law. Most of the military arrests had nothing to do with the writ of habeas corpus or ordinary political disputes. They followed from the shifting fronts of war, which produced refugees, informers, guides, defectors, carriers of contraband, and so forth. Most of those arrested outside the fronts were not free citizens of the free North but "citizens of the confederacy, blockade-runners, foreign nationals, returning Southern sea captains, and the like." Neely, **Abraham Lincoln**, p. 233. This account is indispensable, despite Neely's dubious supposition that Lincoln is practical in a sense making constitutional arguments merely instrumental and secondary and making Lincoln "neither an intellectual nor a systematic political thinker." Neely, **Abraham Lincoln**, pp. 210, 215. *See especially* ch. 10.

[24]For examples, see **Collected Works**, IV:531–32, 448; **Collected Works**, VII:488, 507; **Collected Works**, VIII:292–93; Nicolay and Hay, **Abraham Lincoln**, VIII:33–34.

[25]Nicolay and Hay, **Abraham Lincoln**, VIII:33–34.

[26]Randall, **Constitutional Problems**, pp. 91, 93–94.

[27]"To Gen. Samuel R. Curtis" (2 January 1863), in **Collected Works**, VI:33–34; *see also* **Collected Works**, VII:247, 284, 339, 427–28.

[28]Quoted by Nicolay and Hay, **Abraham Lincoln**, 8:225.

[29]"Speech at Columbus, Ohio" (September 16, 1859), in **Collected Works**, III:424; "Whig Protest in Illinois Legislature Against the Reorganization of the Judiciary" (February 26, 1841), in **Collected Works**, I:246; "First debate with Stephen Douglas at Ottawa, Illinois" (August 21, 1858), in **Collected Works**, III:27.

[30]"to Henry L. Pierce and Others" (April 6, 1859), in **Collected Works**, III:375.

[31]"Address Before the Young Men's Lyceum of Springfield, Illinois," in **Collected Works**, I:109.

[32]Both the Lyceum and Temperance addresses conclude with hosannas to Washington, but the ironic and almost drunken exaggerations must make the observant smile.

[33]"Address Before the Young Men's Lyceum of Springfield, Illinois," in **Collected Works**, I:114. Lincoln quotes Pettit: "Speech at Peoria, Illinois" (October 16, 1854), in **Collected Works**, II:275.

[34]*Id.*, I:113 (emphasis in original).

[35]*Id.*, I:112 (emphasis in original).

[36]February 22, 1842, **Collected Works**, I:271–79.

[37]See Harry V. Jaffa, **Crisis of the House Divided** (Seattle: University of Washington Press, 1973), pp. 236–72, which doubts that the speech was serious about moral reformation.

[38]**Collected Works**, III:362–63.

[39]"Reply to New York Workingmen's Democratic Republican Association" (March 21, 1864), in **Collected Works**, VII:259–60; *see also* "Annual Message to Congress" (December 3, 1861), in **Collected Works**, V:51–53.

[40]"Speech at Springfield, Illinois" (July 17, 1858), in **Collected Works**, II:514; "Speech at Peoria, Illinois" (October 16, 1854), in **Collected Works**, II:275 (emphasis in original); "Fragment on the Constitution and the Union" (c. January 1861), in **Collected Works**, IV:168–69 (emphasis in original).

[41]**Collected Works**, II:276.

[42]See Jaffa, **Crisis**, pp. 308–30; Glen E. Thurow, **Abraham Lincoln and American Political Religion** (Albany: State University of New York Press, 1976).

[43]"Speech at Springfield, Illinois" (June 26, 1857), in **Collected Works**, II:406; *see* "Speech at a Republican Banquet (Chicago, Illinois)," in **Collected Works**, II:385.

Lincoln and the Constitution: A Unionist for the Sake of Liberty

LUCAS E. MOREL

> Ever true to *Liberty*, the *Union*, and the Constitution—true to Liberty, not *selfishly*, but upon *principle*—not for special *classes* of men, but for *all* men; true to the Union and the Constitution, as the best means to advance that liberty.
>
> Abraham Lincoln to a Committee of German Republicans, June 30, 1858[1]

A perennial question regarding Lincoln's understanding of the federal Constitution is whether preserving the American Union was more important to him than promoting liberty for all. Lincoln took up the question of liberty when he addressed a sanitary fair (the Women's Central Association of Relief) in Baltimore, Maryland, on April 18, 1864. He said,

> The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatable [sic] things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatable names—liberty and tyranny.[2]

So what does it mean to be for liberty? For Southerners who rejected Lincoln as President and attempted to form a government separate from the American Union, liberty meant the right of a slaveholder to deprive a black man of his freedom simply on the basis of race. Lincoln reminded Americans that this policy of whites doing just what they please with black slaves, "being responsible to God alone," bore

Lincoln's nemesis, Illinois Senator Stephen A. Douglas (pictured), proposed an alternative doctrine, called "popular sovereignty," which made consent the prime directive and would simply "let the people decide" on the question of slavery in the territories.

a "strong resemblance to the old argument for the 'Divine right of Kings.'"[3] "Freedom for me at the expense of thee" does not sound like the proper application of the Declaration of Independence, but this was how slaveholders translated the fundamental charter of American liberty. This definition could only be found in what Lincoln called at Baltimore "the wolf's dictionary." Needless to say, Lincoln rejected this definition of liberty.

But he also rejected the definition of liberty offered by many abolitionists. Folks like William Lloyd Garrison, publisher of the premier abolitionist newspaper in America, *The Liberator*, defined liberty as the equal possession of all human beings, regardless of race.[4] So far, Lincoln would agree. However, Lincoln found their definition untenable as a practical matter because Garrison and his ilk dismissed the federal Constitution because it represented a union with slaveholders and therefore an unconscionable compromise with God's endowing all men with the same rights. In addition, so long as the national government could be enlisted in the protection of slavery—through the notorious Fugitive Slave Law of 1850, for example—it was not a government morally binding on any decent American citizen.

Garrison's rhetoric also created difficulties for civic discussion and resolution regarding the future of slavery and freedom in America. In 1832, Garrison called the U.S. Constitution "the most bloody and heaven-daring arrangement ever made by men" and "an unblushing and monstrous coalition to do evil that good might come." In 1838, he helped establish the New England Non-Resistance Society, which proclaimed, "We cannot acknowledge allegiance to any human government." In 1845, he said the United States "was conceived in sin, and brought forth in iniquity." In his most infamous formulation, Garrison called the Constitution a "covenant with death" and an "agreement with hell," and concluded that it was "a mighty obstacle in the way of universal freedom and equality."[5] Clearly, Garrison was no constitutionalist! Beholden only to his conscience, he gave short shrift to the consent of the governed that makes government legitimate, and, in America's case, brought the Union—the *United* States—into existence. This was a non-starter for Lincoln, as it championed one principle of the Declaration of Independence, equality, while giving short shrift to that other key principle of the Declaration, consent.

Lincoln's nemesis, Illinois Senator Stephen A. Douglas, proposed an alternative to the immediatist abolition folks: his doctrine of "popular sovereignty" made consent the prime directive and eclipsed liberty as the *summum bonum* of American politics. It applied to what became the Nebraska and Kansas territories in 1854 and would simply "let the people decide" on the question of slavery in those territories. Congressional noninterference would be the rule, allowing only the settlers of the territories to decide the fate of slavery there. What could be more American than letting majority rule determine the outcome?

But where Garrison sought equality for all at the expense of government by the consent of the governed, Douglas enshrined majority rule at the expense of human equality. Douglas's professed indifference regarding the future of slavery in the federal territories—a position Lincoln referred to as the "don't care" policy because it taught Americans not to care about slavery as long as it was black slavery—would actually result in the spread of slavery and its eventual legality in every state of the Union. As Lincoln noted in his speech on the 1857 *Dred Scott* opinion of Chief Justice Roger B. Taney:

> This *declared* indifference, but as I must think, covert *real* zeal for the spread of slavery, I can not but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.[6]

Applying popular sovereignty to the slavery question taught Americans that as long as folks voted on the issue, majority rule could determine whether slavery was right or wrong.

Lincoln wanted both human equality and government by consent of the governed. He believed justice required both, and so he was devoted to the principles of the Declaration of Independence as well as the practice of self-government as manifested in the Constitution and the rule of law. Replying to a committee of German Republicans, Lincoln wrote: "Ever true to *Liberty*, the *Union*, and the Constitution—true to Liberty, not *selfishly*, but upon *principle*—not for special *classes* of men, but for *all* men; true to the Union and the Constitution, as the best means to advance that liberty."[7] He exhorted the committee to be true to three things: liberty, union, and the Constitution. First on the list is liberty. Lincoln explained that the way to be true to liberty is to do so "not *selfishly*, but upon *principle*," which means universally: to wit, "not for special *classes* of men, but for *all* men." This was his restatement of the human-equality principle of the Declaration of Independence, what he once called "*that immortal emblem of Humanity*."[8]

Turning to union and the Constitution, Lincoln said that true devotion to these things is intimately tied to liberty, for they are "the best means to advance that liberty." For Lincoln, one demonstrates his commitment to liberty by upholding the American Union and federal Constitution as the best practicable means of promoting liberty. Because the liberties each person possesses by nature are not self-enforcing, the mechanism by which these liberties are to be protected becomes especially important. In other words, to speak of liberty as a priority without also explaining how one believed liberty ought to be secured in practice was to engage in mere moral grandstanding.

At a Republican banquet in Chicago after the fall election of 1856, a reporter noted the connection Lincoln made between liberty as an end and union as its means: "He maintained that the Liberty for which we contended could best be obtained by a firm, a steady adherence to the Union. As Webster said, 'Not Union without liberty, nor liberty without Union; but Union and liberty, now and forever, one and inseparable.'"[9] Note the extremes Webster seeks to avoid: Union without liberty is a union of American states indifferent to the spread of black slavery, while liberty without Union is a call to free American slaves without concern for the rule of law and the Constitution—the principal political mechanisms that secure liberty in a civil society. Lincoln makes clear that

union and liberty in America needed to be "one and inseparable" in order for self-government to survive.

After the Civil War, the former vice president of the Confederate States of America, Alexander H. Stephens, denigrated Lincoln's devotion to union: "I do not think he intended to overthrow the Institutions of the country. I do not think he understood them or the tendencies of his acts upon them. The Union, with him, in sentiment rose to the sublimity of a religious mysticism, while his ideas of its structure and formation, in logic, rested upon nothing but the subtleties of a sophism!"[10] Did Lincoln have only an emotional attachment to union, as Stephens suggests, with no principled understanding of what it was or how it operated, or did he explain what he believed the American Union consisted of, how it operated, and what its ends were? Lincoln wanted citizens to favor, not just any union of the American states, but a particular kind of union: one he believed was established by the American Founders, but that in the mid-nineteenth century appeared to be losing its hold on the public mind.

Lincoln's reverence for the American Union reflected his awareness of the fragility of self-government. This explains his willingness to support the Constitution, despite its protections for slavery as it then existed, for the good it already achieved and was yet capable of achieving. The peace of the union, vital to the rights that the American experiment in free government aimed to secure, was something Lincoln never took for granted. In fact, as he pointed out at length in his 1838 speech on "the perpetuation of our political institutions," the public peace was no simple matter to achieve. It was the product of the orderly processes of law and courts, and conducive to the justice that is the hallmark of self-government. But it also required the orderly processes of thought in public discourse.

Lincoln believed that the true enemy of American self-government was internal, not external, to the regime: namely, a condition of political laxity whereby the people were corrupted by their own freedom, unmindful of the true ground of their rights, and unaware of the threat posed by mob violence that sought justice but subverted the rule of law in the process. That threat was a "towering genius" who would exploit the instability and discord of the community in the pursuit of glory either "at the expense of emancipating slaves, or enslaving freemen."[11]

Much is made of Lincoln's focus on preserving the Union as the aim of his presidential administration. Why not pursue something nobler, like emancipating slaves? Lincoln believed that the executive department's primary responsibility was to enforce the laws. As he put it at his first inauguration, "I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States."[12] Almost eight months into the Civil War, in his first State of the Union address, Lincoln discussed the main objective of the war—as far as the federal government was concerned:

> In considering the policy to be adopted for suppressing the insurrection, I have been anxious and careful that the inevitable conflict for this purpose shall not degenerate into a violent and remorseless revolutionary struggle. I have, therefore, in every case, thought it proper to keep the integrity of the Union prominent as the primary object of the contest on our part, leaving all questions which are not of vital military importance to the more deliberate action of the legislature.[13]

The following year, in a famous letter responding to *New York Tribune* editor Horace Greeley, Lincoln described his purpose in a statement still debated to this day:

> My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I

> could save it by freeing *all* the slaves, I would do it; and if I could save it by freeing some and leaving others alone I would also do that.[14]

But again, why is "the Union" so important to Lincoln that he would make emancipation a secondary priority in the war effort? For Lincoln, not any union, but a union of a certain character, is essential. One hears so much about Lincoln's devotion to the Union that one should not overlook what union signified for Lincoln: a national, common devotion to certain principles of self-government that Lincoln believed "gave promise that in due time the weight would be lifted from the shoulders of all men."[15] In preserving the American Union, Lincoln believed he was defending self-government, which was the key to securing individual liberty. As Lincoln put it in his Peoria Address of 1854: "Let us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it.... If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving."[16] He believed that rejecting the universal principles of American self-government, especially "the sentiment of liberty in the country," would lead people "to transform this government into a government of some other form."[17] Only by restoring liberty as the end served by the Constitution would the American Union be worth saving. Two years later, he would argue that "we have an interest in the maintenance of the principles of the Government, and without this interest, it is worth nothing ... I think we have an ever growing interest in maintaining the free institutions of our country."[18]

As the nation grew increasingly divided over the future of slavery, Lincoln repeatedly cited the Declaration of Independence to remind Americans of the goal to which their federal union and governmental structures should be devoted. To lose sight of the goal of "Liberty to all" was to subvert American self-government. It would turn republican government into a form of majority rule that allowed mere numerical might to determine which individuals would receive the protection of their rights. If this were to happen, Lincoln once remarked, he would "prefer emigrating to some country where they make no pretence of loving liberty—to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocracy."[19]

This particular union, therefore, required a particular constitution: namely, one devoted to liberty. Lincoln understood this liberty to be the birthright of all men and women, the equal entitlement of every human being, regardless of race. For Lincoln, "[t]he Union, the Constitution, and the freedom of mankind" were always inextricably linked.[20] Again, the Constitution and the American Union do not exist for their own sake, but to secure liberty. As the Declaration of Independence states, "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." One could say that the Constitution channels the consent of the governed, and if it is a prudently designed constitution, it directs that consent toward protecting the natural rights of all.

What Lincoln called "the sheet anchor of American republicanism"—the consent of the governed—found its political expression in the rule of law and the Constitution.[21] In contrast with vigilante justice or mob rule, laws and courts operate to secure the public's pursuit of justice in an orderly, deliberative fashion. What some interpret as Lincoln's "inaction" toward slavery is simply Lincoln's profound awareness that any good he tried to achieve politically must derive from the powers of office vested in him by the American people, whom he called "my rightful masters."[22] Lincoln explained this in his now famous 1864 letter to Albert Hodges: "I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted

right to act officially upon this judgment and feeling."[23] He could not exercise power or authority that was not first delegated to him by the American people.

Now, the constraint of consent sets the context for any progress in securing the rights of individuals in a free society. True statesmanship in a self-governing society displays a clear grasp of this just and necessary connection between republican means and ends. Simply put, political prudence in a government "of the people, by the people, for the people"[24] recognizes that to achieve justice, moral posturing is not enough; one has a duty to *persuade* one's fellow citizens, which involves an appeal to both their heart as well as their head. Persuasion, not platitudes, is the democratic order of the day. And Lincoln thought the best way to persuade people to pursue justice in the political arena was to show them how it was in their best interest to do so. This meant he had to inform their opinions while he accommodated their prejudices.[25]

What form did this persuasion take for Lincoln? It took a constitutional form. Simply stated, a "constitutionalist" is someone who understands the Constitution as a *limiting* delegation of political power, as well as an *aspiring* instrument of liberty. In fact, without the principled aspirations of the Constitution, there would be no limitations on government's authority. To focus on the Constitution as a limiting document, important as that is, without due attention to the Constitution as an aspiring document, is to forget that the Constitution is a means to an end and not an end in itself. That said, Lincoln thought the Constitution deserved to be revered as the best means of securing civil and religious liberty.

As early as 1838, at the Young Men's Lyceum of Springfield, Lincoln addressed a problem the United States faced as its Revolutionary War veterans passed this earth, leaving no living memory to help perpetuate the grand American experiment in self-government. Lincoln saw this as a major weakening of the republic, and he believed that only a "political religion" of reverence for the laws and the Constitution could prevent mob rule from giving rise to a "towering genius" who sought to gratify his thirst for fame "at the expense of emancipating slaves, or enslaving freemen." Lincoln proclaimed:

> Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the *political religion* of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.[26]

This political religion needed a political preacher; by alerting his audience to the danger that lurks in vigilante justice, Lincoln fulfilled the role.

This early concern about lawlessness in a self-governing regime turned out to be quite prescient, as Lincoln would have to deal with the most extensive lawlessness in the nation's history almost a quarter-century later when he became President of a divided country. In his First Inaugural Address, we find one of several proof texts for establishing Lincoln's bona fides as a constitutionalist. After equating secession with anarchy, a lawless social condition, Lincoln presents the only truly American alternative:

> A majority, held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism.[27]

A month before the 1864 presidential election, Lincoln said of the citizenry: "Their will, constitutionally expressed, is the ultimate law for all."[28] Note the phrase "constitutionally expressed." For Lincoln, a written constitution, with suitable "checks and limitations," enables the people to secure their individual rights and pursue the common good in a deliberate, thoughtful manner—what the *Federalist Papers* called "the cool and deliberate sense of the community."[29]

Lincoln's constitutionalism reminded citizens that the Constitution, laws, and courts should be used by the people to secure the rights of all and not just the self-interest of the majority. To forget this is to undermine the basis of the majority's right to rule. This leads to tyrannical abuses of power and hence the subversion of constitutional self-government. In particular, just as Lincoln limited his presidential authority to his powers and role stipulated in the Constitution, American citizens should limit their political objectives to those consistent with the ideals of the American republic. Lincoln located these in the Declaration of Independence, what he called "the father of all moral principle" in the American people.[30] Contrary to Douglas's popular sovereignty, which turned majority rule into crude majoritarianism by divorcing it from the natural equality of human beings, Lincoln taught the nation to resist the temptation to become tyrants themselves: he exhorted them to resist using their freedom to enslave, or permit the enslavement of, others. In a note to himself, Lincoln wrote, "As I would not be a *slave*, so I would not be a *master*."[31] In a public letter, this became, "he who would *be* no slave, must consent to *have* no slave. Those who deny freedom to others, deserve it not for themselves; and, under a just God, can not long retain it."[32] In the heat of the Kansas-Nebraska crisis, Lincoln summed up everyone's justifiable fear of unaccountable power when he said that "no man is good enough to govern another man, *without that other's consent*."[33]

On December 30, 1860, President-elect Lincoln received a letter from his former Whig friend Stephens, who had spoken against secession (to no avail) in his home state of Georgia and would nevertheless be elected vice president of the Confederate States of America. He asked Lincoln to "do what you can to save our common country," and quoted from Proverbs 25:11: "A word fitly spoken by you now would be like 'apples of gold in pictures of silver.'"[34] A student of the Bible in his own right, Lincoln reflected on Stephens' biblical reference and, in a note to himself, used the "apples of gold" reference to clarify the connection between America's constitutional union and the principle of "Liberty to all."[35]

This note offers a telling description of the principle of equality that informed Lincoln's political philosophy. Lincoln wrote that "the principle of 'Liberty to all,'" expressed in the self-evident truth of the Declaration of Independence that "all men are created equal," was "the primary cause of our great prosperity." He thought that the American colonists could have declared independence from England without that principle, "but *without* it, we could not, I think, have secured our free government, and consequent prosperity." Lincoln distinguished "independence" from "our free government[] and consequent prosperity" to point out that mere separation from Great Britain would not have prospered the American people unless they had established their new government on the principle of liberty. Without freedom as the goal, "our fathers" would not have fought for "a mere change of masters."[36] What Lincoln called "a philosophical cause" was the very heart of American self-government.

Alluding to Proverbs 25:11 ("A word fitly spoken is like apples of gold in pictures of silver") himself, Lincoln added: "The assertion of that *principle*, at *that time*, was *the* word, '*fitly spoken*' which has proved an 'apple of gold' to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*,

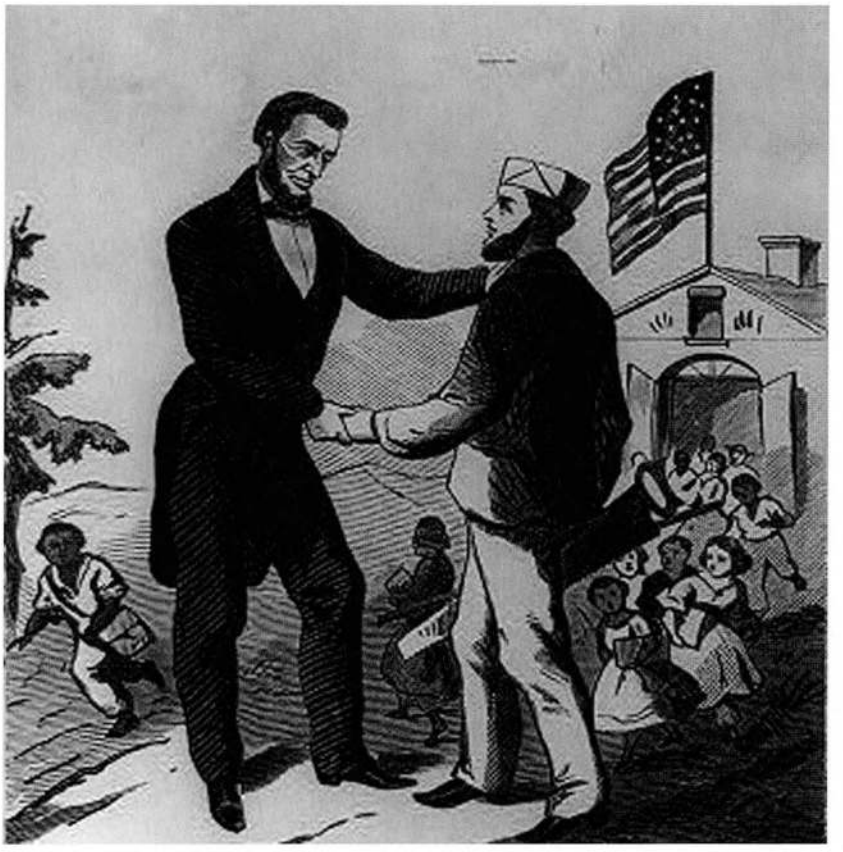
and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture." Lincoln's repeated emphases of words and phrases in his note on constitutional union and liberty, especially in reference to Proverbs 25:11, shows that he believed the word fitly spoken had already been uttered—in the Declaration of Independence, a document Stephens rejected in his infamous "Corner Stone Speech" of March 21, 1861.[37] All Lincoln could do was to point the nation back to it as a way of moving forward so that "neither *picture*, or *apple* shall ever be blurred, or bruised or broken."

Lincoln's illustration suggests how means could be mistaken for ends in themselves. "Pictures" or settings made of silver could be mistaken as the main object of beauty, thereby obscuring the real object to be noticed—the apples of gold. Similarly, without human liberty as the aim of the Constitution and Union, the republican forms of government could become instruments of oppression, as when one group of people (for example, whites) uses its numerical might to deprive another group of people (for example, blacks) of their natural rights.

To the extent Americans began thinking that slavery could be made compatible with liberty—for example, by making slaves of some men according to race—Lincoln believed the ground of liberty was eroding. In his first State of the Union address, he warned "against this approach of returning despotism."[38] He said that he always hated slavery, but that he kept "quiet about it" in the knowledge that "the great mass of the nation ... rested in the belief that slavery was in course of ultimate extinction."[39] Back in his Peoria Address of 1854, he cleverly equated the Founders' approach to the peculiar institution with its eventual demise: "Let us turn slavery from its claims of 'moral right,' back upon its existing legal rights, and its arguments of 'necessity.' Let us return it to the position our fathers gave it; and there let it *rest in peace*."[40] With the send-off "rest in peace," Lincoln employed the proverbial tombstone epitaph to suggest the restoration of the Founders' intention that slavery be eliminated gradually, so as not to disturb the civil peace that would be necessary for self-government to take hold in the nascent American republic. But the pun "rest in peace," *requiescat in pace*, makes clear that Lincoln joins the Founders in expecting the American people to put slavery in its grave as soon as practicable. Alas, the peace of the nation was disturbed by the notion of the compatibility of freedom and slavery, as long as it was the enslavement of the African and what Douglas called "other inferior races."[41]

Lincoln once wrote that the passage of the Kansas-Nebraska Act in 1854 "aroused him as he had never been before."[42] This act repealed the 1820 Missouri Compromise by treating slavery, not as an evil to be tolerated where it already existed, but as a good for those who would seek its use in the territory hitherto held by the federal government as free. Lincoln called American slavery "a state of oppression and tyranny unequalled in the world."[43] Contrast this with Stephen Douglas, whom Lincoln said had "no very vivid impression that the negro is a human" and therefore viewed slavery, in Lincoln's words, as "an exceedingly little thing" and "something having no moral question in it."

Lincoln's public statements and policy proposals indicate that his concern for the survival of self-government meant that the key priority in the 1850s was preventing slavery's spread into the federal territories. This required that he remind white Americans in free states such as Illinois that their rights derived, not from their race or ethnicity, but from their humanity, a nature they shared with the black man on American soil. If he could not get whites in the North to acknowledge the *natural* rights of blacks, it was pointless even to raise the question of equal *civil and political* rights with that same prejudiced citizenry. Put differently, we know how much Lincoln was devoted to liberty by the seriousness with which he took the greatest threat to liberty: namely, the spread of slavery into the federal



Lincoln had to remind white Americans in free states that their rights derived not from their race or ethnicity, but from their humanity, a nature they shared with the black man on American soil. If he could not get whites in the North to acknowledge the *natural* rights of blacks, it was pointless even to raise the question of equal *civil and political* rights.

territories. He feared the American Union was becoming a nation he did not recognize: "On the question of liberty, as a principle, we are not what we have been."[44] During the 1856 presidential campaign, he stated the issue directly: "This government is sought to be put on a new track. Slavery is to be made a ruling element in our government."[45]

Lincoln argued that during the founding era, ownership of black slaves was viewed by white citizens as a necessary evil. However, by the 1850s, slavery was increasingly defended in the South as good for both the master and the slave, and a state institution that could not be interfered with by the federal government. This view of the Constitution meant that "the Blessings of Liberty" promised in its preamble would apply only to white Americans. Lincoln believed the Constitution was being reinterpreted to establish a race-based, federal system of government that would eventually extend slavery into every territory and state of the American Union. This "blurred" the meaning of the Constitution, as it became a tool of despotism rather than liberation.

By 1860, Lincoln would exhort the nation to "have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it."[46] He believed that matters of right and wrong were not the mere product of majority vote but derived from moral standards that transcended nations and reached across time. Lincoln believed the American Founders declared their independence by

appealing to these standards of right, and that the nation now faced a crisis that could best be resolved by a return to the Founders' approach to the issue.

So why did Lincoln want to save a constitutional union that permitted the enslavement of men on the basis of race and hence violated "the original idea" of equality that formed its basis? He replied, "We had slavery among us, we could not get our Constitution unless we permitted them to remain in slavery, we could not secure the good we did secure if we grasped for more, and having by necessity submitted to that much, it does not destroy the principle that is the charter of our liberties."[47] He added, "If we cannot give freedom to every creature, let us do nothing that will impose slavery upon any other creature." Lincoln pointed out that this holds true only if the people rest in the conviction that slavery is in the course of ultimate extinction. With the "don't care" rhetoric of an incumbent U.S. Senator gaining credence, the American people began to think they could continue to "secure" the good of self-government while maintaining slavery in their midst. The security of self-government required, therefore, not only the right political institutions, but also the right political convictions for their long-term preservation.

But this required a certain understanding of the American regime, a devotion to the equal rights of humanity. Keep sight of this, and Americans would be able, in the words of Lincoln, to "rise up to the height of a generation of men worthy of a free Government."[48] In Lincoln's devotion to both "the cause of the union and the liberties of the country," one finds a statesmanship of the highest order and an abiding invitation to rise to the challenge of American self-government. Lincoln's legacy is his repeated appeals to "the better angels of our nature" in his political rhetoric. He was concerned that the lesser angels of American politics and society—the democratic demons, if you will—would sabotage the nation's experiment in self-government.

Abraham Lincoln loved union because of what it could accomplish on behalf of liberty. And when he saw it being corrupted for the sake of slavery, or disrupted to that same end, he made it his political goal to defend the United States with words and deeds that stand as the greatest political legacy of any American President.

ENDNOTES

[1]Abraham Lincoln, "To Anton C. Hesing, Henry Wendt, Alexander Fisher, Committee" (June 30, 1858), in **Collected Works of Abraham Lincoln,** ed. Roy P. Basler, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953), 2:475. Hereinafter cited as **CW**; emphases in original unless otherwise noted.

[2]Abraham Lincoln, "Address at Sanitary Fair, Baltimore, Maryland" (April 18, 1864), in **CW**, 7:301–2.

[3]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:278.

[4]For William Lloyd Garrison's praise of the Declaration of Independence and condemnation of the U.S. Constitution, see "On the Constitution and the Union" (December 29, 1832), in **William Lloyd Garrison and the Fight against Slavery: Selections from *The Liberator,*** ed. William E. Cain (Boston: Bedford Books of St. Martin's Press, 1994), 87–89.

[5]Ibid., 87, 101, 113–14, 115. See also the excellent biography by Henry Mayer, **All on Fire: William Lloyd Garrison and the Abolition of Slavery** (New York: St. Martin's Press, 1998), esp. chaps. 6–15.

[6]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:255.

[7]Abraham Lincoln, "To Anton C. Hesing, Henry Wendt, Alexander Fisher, Committee" (June 30, 1858), in **CW**, 2:475.

[8]Abraham Lincoln, "Speech at Lewistown, Illinois" (August 17, 1858), in **CW**, 2:547.

[9]Abraham Lincoln, "Speech at a Republican Banquet, Chicago, Illinois" (December 10, 1856), in **CW**, 2:383.

[10]Alexander H. Stephens, **Recollections of Alexander H. Stephens: His Diary Kept When a Prisoner at Fort Warren, Boston Harbour, 1865**, ed. Myrta Lockett Avary (New York: Doubleday, Page and Company, 1910), 61–62.

[11]Abraham Lincoln, "Address Before the Young Men's Lyceum of Springfield, Illinois" (January 27, 1838), in **CW**, 1:114.

[12]Abraham Lincoln, "First Inaugural Address—Final Text" (March 4, 1861), in **CW**, 4:265.

[13]Abraham Lincoln, "Annual Message to Congress" (December 3, 1861), in **CW**, 5:48–49.

[14]Abraham Lincoln, "To Horace Greeley" (August 22, 1862), in **CW**, 5:388. Lincoln actually paced the

country through all three of these options: the First Inaugural Address objective (save the Union without freeing any slaves); the Emancipation Proclamation (save the Union by freeing some slaves while leaving others alone); and the 13th Amendment (save the Union by freeing all the slaves).

[15]Abraham Lincoln, "Speech in Independence Hall, Philadelphia, Pennsylvania" (February 22, 1861), in **CW**, 4:240.

[16]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:276.

[17]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **CW**, 2:500.

[18]Abraham Lincoln, "Speech at Kalamazoo, Michigan" (August 27, 1856), in **CW**, 2:364.

[19]Abraham Lincoln, "To Joshua F. Speed" (August 24, 1855), in **CW**, 2:323.

[20]Abraham Lincoln, "To John M. Clay" (August 9, 1862), in **CW**, 5:364.

[21]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:266.

[22]Abraham Lincoln, "First Inaugural Address—Final Text" (March 4, 1861), in **CW**, 4:265.

[23]Abraham Lincoln, "To Albert Hodges" (April 4, 1864), in **CW**, 7:281.

[24]Abraham Lincoln, "Address Delivered at the Dedication of the Cemetery at Gettysburg" (November 19, 1863), in **CW**, 7:23.

[25]For a sophisticated reflection on responsible rhetoric and public opinion, see Abraham Lincoln, "Temperance Address" (February 22, 1842), in **CW**, 1:271–79. Its true subject is less about temperance with respect to alcohol consumption than about temperance or moderation in speech. See Lucas E. Morel, **Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government** (Lanham, Md.: Lexington Books, 2000), 124–62.

[26]Abraham Lincoln, "Address Before the Young Men's Lyceum of Springfield, Illinois" (January 27, 1838), in **CW**, 1:112.

[27]Abraham Lincoln, "First Inaugural Address—Final Text" (March 4, 1861), in **CW**, 4:268. For an analysis of Lincoln's understanding of secession as tantamount to the destruction of self-government, see William Lee Miller, **President Lincoln: The Duty of a Statesman** (New York: Alfred A. Knopf, 2008), 140–54.

[28]Abraham Lincoln, "Response to a Serenade" (October 19, 1864), in **CW**, 8:52.

[29]James Madison, **The Federalist Papers**, ed. Clinton Rossiter, intro. Charles R. Kesler (New York: Penguin, 1999), essay no. 63, 382.

[30]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **CW**, 2:499.

[31]Abraham Lincoln, "Definition of Democracy" (August 1, 1858?), in **CW**, 2:532.

[32]Abraham Lincoln, "To Henry L. Pierce and Others" (April 6, 1859), in **CW**, 3:376.

[33]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:266.

[34]Alexander H. Stephens, cited in Abraham Lincoln, "To Alexander H. Stephens" (December 22, 1860), in **CW**, 4:161 n.1.

[35]When Lincoln was elected the first Republican President of the United States on November 6, 1860, he received no votes from nine Southern states. What Lincoln called in 1858 the "crisis" of the American "house divided" had come to a head. On December 22, 1860, the President-elect wrote Stephens, a former Whig ally in Congress, to assuage his fears about the incoming administration: "Do the people of the South really entertain fears that a Republican administration would, *directly*, or *indirectly*, interfere with their slaves, or with them, about their slaves? If they do, I wish to assure you, as once a friend, and still, I hope, not an enemy, that there is no cause for such fears." Stephens, who in February 1861 would be elected vice president of the Confederate States of America, replied with his December 30 letter, which led Lincoln to jot down what is known as his "Fragment on the Constitution and Union." Lincoln sketched a brief but insightful reflection on the importance of the ideal of individual liberty to the constitutional structure and operation of the American Union.

[36]Abraham Lincoln, "Fragment on the Constitution and Union" (c. January 1861), in **CW**, 4:169.

[37]What follows is the relevant passage from Stephens' speech regarding the improvement of the Confederate constitution upon the original U.S. Constitution with respect to slavery:

> The prevailing ideas entertained by him [Thomas Jefferson] and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature; that it was wrong in *principle*, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the constitution, was the prevailing idea at that time. The constitution, it is true, secured every essential guarantee to the institution while it should last, and hence no argument can be justly urged against the constitutional guarantees thus secured, because of the common sentiment of the day. Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the

government built upon it fell when the "storm came and the wind blew."

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.

This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth. . . .

With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system . . . [B]y experience we know that it is best, not only for the superior, but for the inferior race, that it should be so. It is, indeed, in conformity with the ordinance of the Creator. It is not for us to inquire into the wisdom of his ordinances, or to question them. For his own purposes, he has made one race to differ from another, as he has made "one star to differ from another star in glory."

Henry Cleveland, **Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During, and Since the War** (Philadelphia: National Publishing Company, 1866), 721–23.

[38]Abraham Lincoln, "Annual Message to Congress" (December 3, 1861), in **CW**, 5:51.

[39]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **CW**, 2:492.

[40]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:276 (emphasis added).

[41]Stephen A. Douglas, cited in Abraham Lincoln, "First Debate with Stephen A. Douglas at Ottawa, Illinois" (August 21, 1858), in **CW**, 3:9.

[42]Abraham Lincoln, "Autobiography Written for John L. Scripps" (c. June, 1860), in **CW**, 4:67.

[43]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **CW**, 2:494.

[44]Abraham Lincoln, "To George Robertson" (August 15, 1855), in **CW**, 2:318. He made a similar statement a year earlier: "I particularly object to the NEW position which the avowed principle of this Nebraska law gives to slavery in the body politic. I object to it because it assumes that there CAN be MORAL RIGHT in the enslaving of one man by another. I object to it as a dangerous dalliance for a few [free?] people—a sad evidence that, feeling prosperity we forget right—that liberty, as a principle, we have ceased to revere." "Speech at Peoria, Illinois" (October 16, 1854), in **CW**, 2:274.

[45]Abraham Lincoln, "Speech at Kalamazoo, Michigan" (August 27, 1856), in **CW**, 2:365.

[46]Abraham Lincoln, "Address at Cooper Institute, New York City" (February 27, 1860), in CW, 3:550.

[47]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **CW**, 2:501.

[48]Abraham Lincoln, "Speech to the One Hundred Sixty-Fourth Ohio Regiment" (August 18, 1864), in **CW**, 7: 505.

Lincoln and Chief Justice Taney

JAMES F. SIMON*

Abraham Lincoln and Chief Justice Roger B. Taney may have met only twice—in 1849, when Lincoln made an oral argument before the Supreme Court, and in 1861, when Chief Justice Taney administered the presidential oath of office to Lincoln. The two men's roles in American history are inextricably bound nonetheless, as I will attempt to demonstrate in this essay.

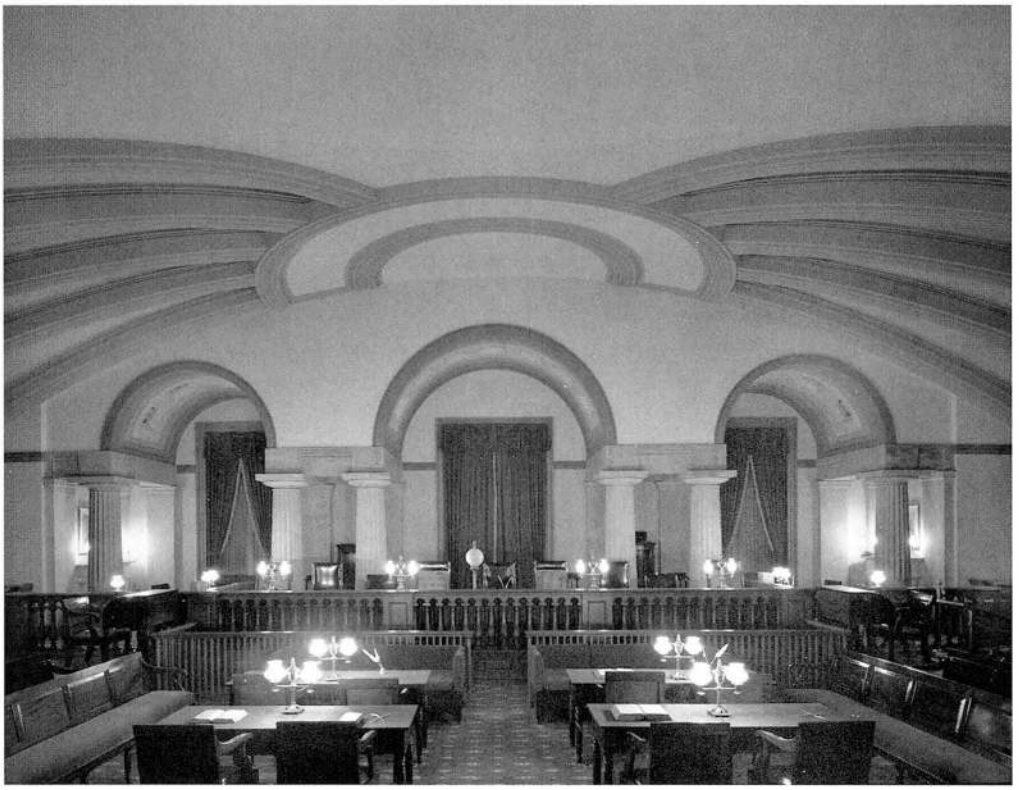
The first meeting of Lincoln and Taney probably took place when Lincoln made his only argument before the Supreme Court of the United States in March 1849. It occurred shortly before he had completed his single—and, to Lincoln, very disappointing—term as a member of the U.S. House of Representatives. At that time, he felt that he had made no significant mark in his two-year congressional term and was resigned to returning to Springfield to resume his full-time law practice.[1]

In his Supreme Court argument, Lincoln represented the estate of an Illinois resident, Matthew Broadwell, who in 1819 had sold a parcel of land in Ohio to a man named William Lewis. The problem, Lewis later discovered, was that Broadwell did not own the land. After the rightful owner ejected Lewis from his land in 1825, Lewis sued Broadwell for damages.[2]

In his Supreme Court argument, Lincoln did not dispute that Broadwell had sold Lewis land that he did not own. He argued only that by the time Lewis sued, the statute of limitations had run, so Lewis could not lawfully collect from Broadwell's estate. It came down to a legal question of statutory interpretation. Lincoln lost the case, and Chief Justice Taney wrote the majority opinion rejecting his argument.[3] It was the first time that Lincoln and Chief Justice Taney disagreed in a dispute before the Supreme Court, but it would not be the last.

When Lincoln presented his argument in the Lewis case, the Justices of the Supreme Court did not sit in the current magnificent courtroom— or any other. In fact, they listened to Lincoln's argument in a room in the basement of the Capitol building. One member of the Court, Justice John Catron of Tennessee, later blamed the dark, dank basement quarters for the bad health of many of the Justices.[4]

We have no physical description of Lincoln when he argued the Lewis case



Lincoln argued one case before the Supreme Court, *Lewis v. Lewis*, in 1849, a mundane land-sale dispute that received little attention. Lincoln was admitted to the Supreme Court Bar on March 7 on the motion of Washington attorney Alexander H. Lawrence, who argued the case that day. As co-counsel, Lincoln made the concluding remarks the following day in what is now the refurbished Old Senate Chamber.

before Chief Justice Taney and his Brethren. But thanks to photographs and contemporary accounts, we know that Lincoln was very tall—about 6′4″—and thin and spoke in a high, slightly shrill voice. His success as a trial lawyer was by then well established. He spoke plainly and effectively to both juries and judges.[5]

In his Supreme Court brief, Lincoln appealed to what he termed "the dictate of common sense," which, he added, "seems to be the perfection of reason." In urging the Court to adopt his statutory interpretation, Lincoln asked the Justices to draw their conclusions, in his words, "without any metaphysical or hair splitting distinctions."[6]

When Taney heard Lincoln's oral argument, the Chief Justice was seventy-two years old, thirty-two years older than Lincoln. Like Lincoln, Taney was tall and thin. But unlike the Illinois lawyer, Taney never possessed Lincoln's physical vigor. Since Taney had been a young lawyer in Maryland, he regularly complained that the stress of his work threatened his health. His complaints were constant, and so was his success as a trial lawyer and as the state's attorney general. Later, he served President Andrew Jackson as U.S. Attorney General and Secretary of the Treasury and shared Jackson's aversion to vested corporate interests. Taney, like President Jackson, was an avowed Democrat (capital D) and populist. It was no surprise, then, that Jackson nominated Taney in 1836 to become the nation's fifth Chief Justice, succeeding John Marshall.[7]

Taney's judicial appointment was greeted with outrage and scorn by his and

President Jackson's detractors in the Whig party. The *New York American*, a Whig paper, complained that "[t]he pure ermine of the Supreme Court is sullied by the appointment of that political hack, Roger B. Taney."[8] After Daniel Webster, a leading Whig, had argued his first case before the new Chief Justice, he observed that "Taney is smooth and plausible, but cunning and jesuitical, and as thorough going a party judge as ever got onto a bench of justice."[9]

But by the time that Lincoln made his only Supreme Court argument in 1849, Taney had convinced the skeptics that he was an outstanding leader of the Court. His colleagues, as well as leaders of both major political parties, Democratic and Whig, came to respect his intellect, his quiet authority, and his well-crafted judicial opinions.

In the Taney Court's early decisions dealing with the nation's most divisive issue, slavery, the Chief Justice maintained a cautious position that state law, whether in the slave states or free states, governed.[10] He refused to write expansively about the constitutional issue until his disastrous 1857 opinion in *Dred Scott v. Sandford*,[11] in which he declared that African Americans had no constitutional rights that white Americans were bound to honor.

It is startling to realize that the author of that opinion had been lauded only a few years earlier for his high competence and fairness, not only by pro-slavery Southerners but also outspoken anti-slavery men in the North, such as U.S. Senator William Seward of New York, who would later serve as President Lincoln's Secretary of State. Seward wrote Taney in 1851 of "the high regard which, in common with the whole American people, I entertain for you as the head of the Judicial Department."[12]

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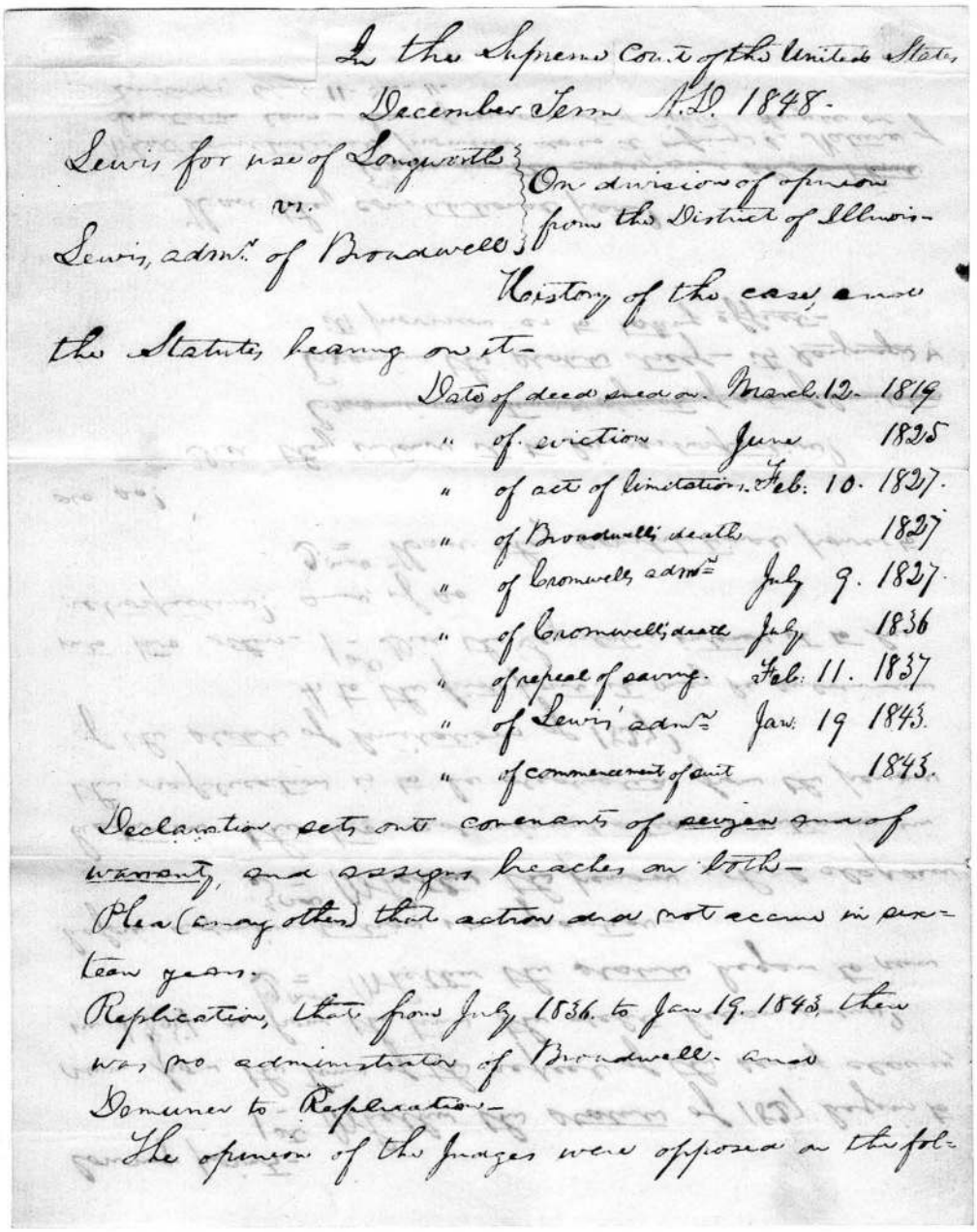
Five years after Seward wrote that admiring letter to Taney, the Supreme Court heard oral arguments in the *Dred Scott* case. Three questions were presented for resolution by the Court. First, could Dred Scott, an African-American slave who had been owned by an army surgeon in the slave state of Missouri, sue for his freedom in a federal court? Second, had Scott become emancipated when he had traveled with his master to the free state of Illinois and later, to the northern part of the Louisiana Purchase, which, under the Missouri Compromise, was free? And finally, was the Missouri Compromise of 1820, which prohibited slavery in the northern section of the Louisiana Purchase, constitutional?

A majority of the Justices first appeared ready to decide the case on the narrow ground that Dred Scott remained a slave under Missouri law, affirming the Missouri supreme court's earlier decision, without reaching the broader constitutional questions. This seemed to be the uneasy compromise arrived at by a majority of the Justices, despite the wishes of individual members of the majority who preferred to decide all of the issues presented. Justices from slave states, including Taney, wanted to strike down the Missouri Compromise as unconstitutional because, they believed, Congress did not have the authority to prohibit slavery in the territories. The two Justices in dissent, John McLean of Ohio and Benjamin Curtis of Massachusetts, insisted that the Missouri Compromise was constitutional and that Dred Scott should have been declared a free man.

The most cautious member of the Court majority, Associate Justice Samuel Nelson of New York, was assigned the Court opinion and was expected to affirm the decision of the Missouri supreme court that Dred Scott remained a slave under Missouri law. Justice Nelson did not intend to reach the broader and more controversial issues posed by the case. But no sooner had Justice Nelson begun writing his opinion than the compromise unraveled, with Nelson's colleagues in the majority vowing to write separate and more sweeping opinions. Why this happened has never been fully documented. But we do know that on the motion of Justice James M. Wayne of Georgia,



In the Supreme Court of the United States
December Term A.D. 1848.

Lewis for use of Longworth
vs.
Lewis, admr. of Broadwell

On division of opinion from the District of Illinois.

History of the case, and the Statute, bearing on it—

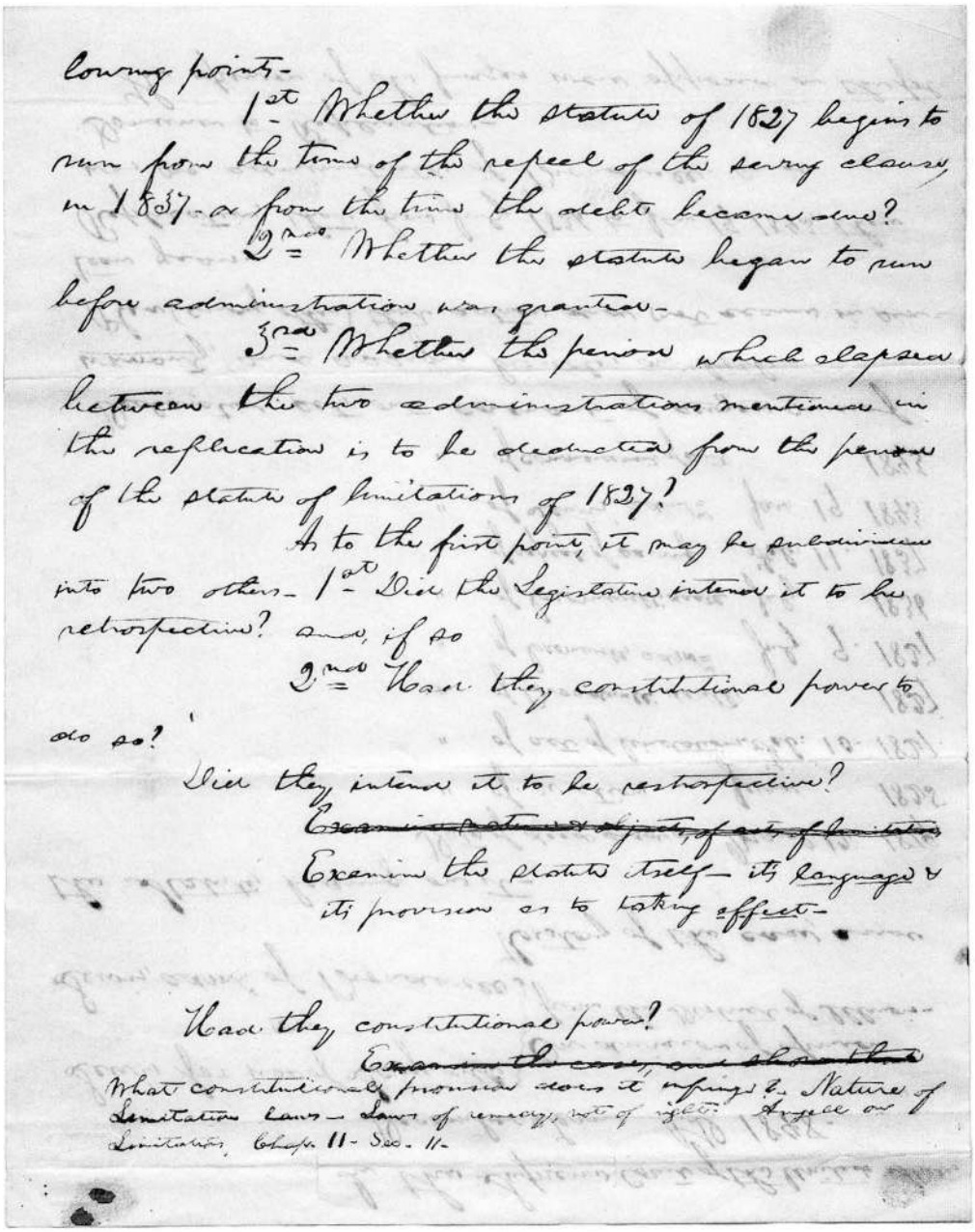
Date of deed sued on. March 12. 1819
" of eviction June 1825
" of act of limitation. Feb. 10. 1827.
" of Broadwell's death 1827
" of Cromwell, admr July 9. 1827.
" of Cromwell's death July 1836
" of repeal of saving. Feb. 11. 1837
" of Lewis' admr Jan. 19 1843.
" of commencement of suit 1843.

Declaration sets out covenants of seizen and of warranty, and assigns breaches on both—
Plea (among others) that action did not accrue in preceding years.
Replication, that from July 1836. to Jan 19. 1843. there was no administrator of Broadwell. and
Demurrer to Replication—
The opinion of the Judges were opposed on the fol-

Lincoln made notes to prepare for his argument, outlining the applicable statutes and listing cases he thought would support his argument. He wrote on both sides of the paper. Occasional prompts such as "Read" and "Read x Comment" seem to indicate that Lincoln intended to refer to the notes during his presentation. However, there is no known transcript of what he actually said.

the Court's opinion was reassigned to Chief Justice Taney, who then wrote his calamitous opinion.[13]

For two hours on March 6, 1857, Chief Justice Taney read aloud his *Dred Scott* opinion in a low, almost inaudible voice. His opinion covered fifty-five pages in the official report of Supreme Court decisions. In that opinion, the Chief Justice emphatically rejected all three arguments made by Dred Scott's



coming points-

1st Whether the statute of 1837 begins to run from the time of the repeal of the saving clause, in 1857 - or from the time the debts became due?

2nd = Whether the statute began to run before administration was granted -

3rd = Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1837?

As to the first point, it may be subdivided into two others - 1st Did the Legislature intend it to be retrospective? and, if so

2nd = Had they constitutional power to do so?

Did they intend it to be retrospective?

~~Examine the statute & objects of such statutes~~

Examine the statute itself - its language & its provision as to taking effect -

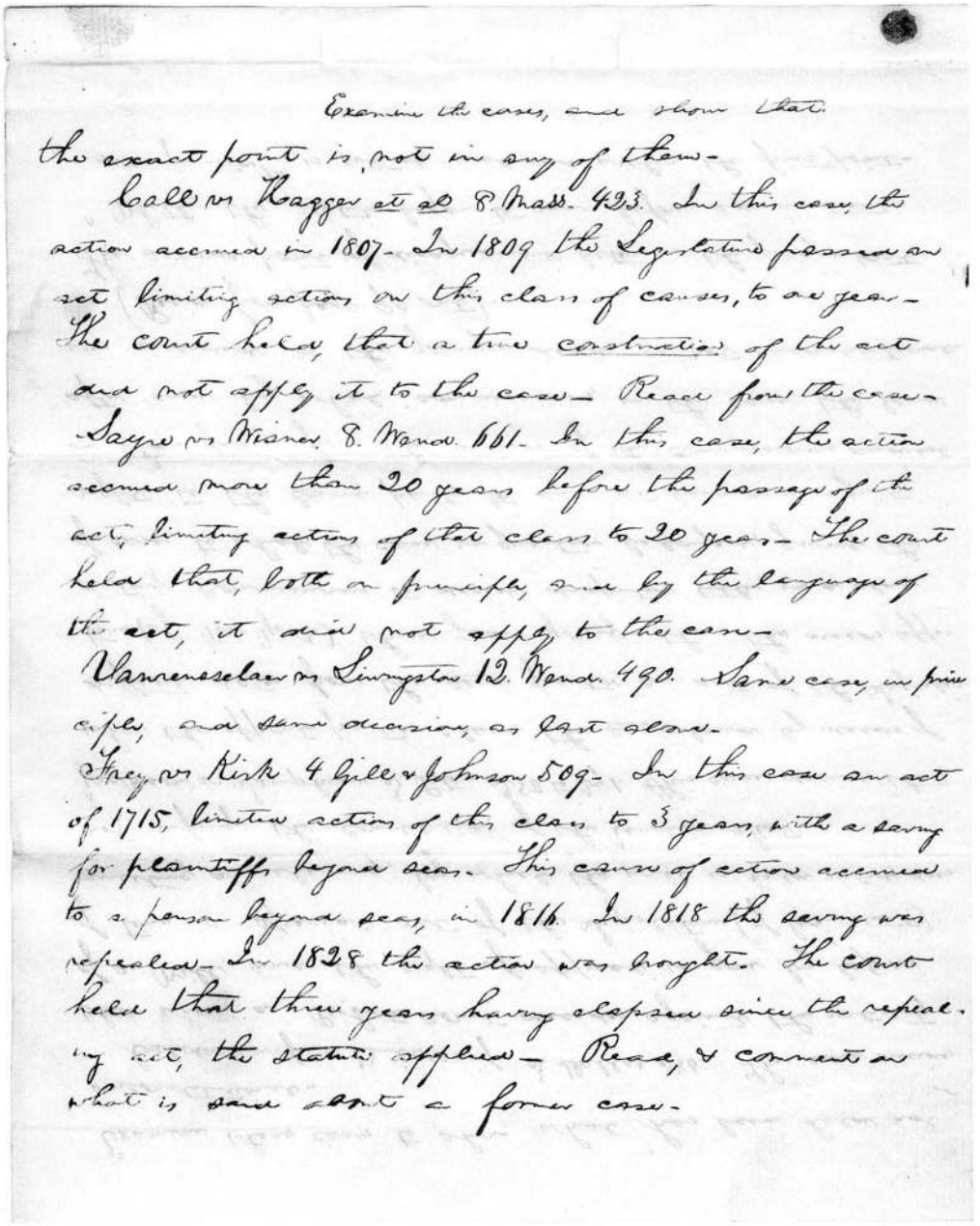
Had they constitutional power?

~~Examine the cases, and show that~~

What constitutional provision does it infringe? 6. Nature of Limitation Laws - Laws of remedy, not of right. Angell on Limitations, Chap. 11 - Sec. 11 -

attorney.[14] He said that Scott, as an African American, could not be a U.S. citizen entitled to sue in federal court. He also wrote that Congress was not authorized under the Constitution to prohibit slavery and that the Missouri Compromise was therefore unconstitutional. And finally, he concluded that Scott remained a slave under Missouri law, as the Missouri supreme court had decided.

In uncompromising terms, the Chief Justice declared that the Framers of the Declaration of Independence and the Constitution

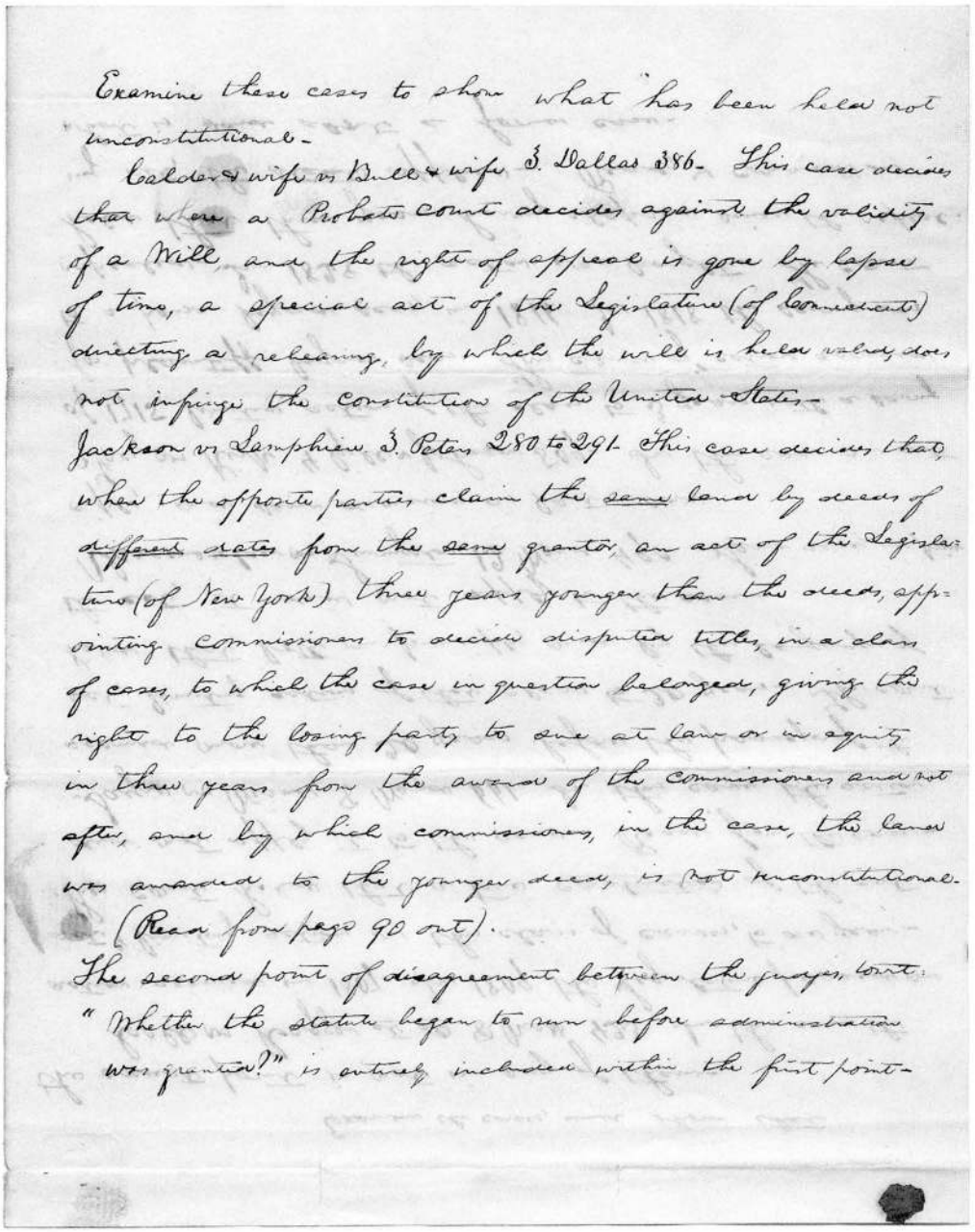


Examine the cases, and show that
the exact point is not in any of them -
Call vs Hagger et al 8 Mass. 423. In this case the
action accrued in 1807 - In 1809 the Legislature passed an
act limiting actions on this class of causes, to one year -
The court held, that a true construction of the act
did not apply it to the case - Read from the case -
Sayre vs Wisner 8 Wend. 661 - In this case, the action
accrued more than 20 years before the passage of the
act, limiting actions of that class to 20 years - The court
held that, both on principle, and by the language of
the act, it did not apply to the case -
Vanrensselaer vs Livingston 12 Wend. 490. Same case, on prin-
ciple, and same decision, as last above -
Frey vs Kirk 4 Gill & Johnson 509 - In this case an act
of 1715, limited actions of this class to 3 years, with a saving
for plaintiffs beyond seas. The cause of action accrued
to a person beyond seas, in 1816. In 1818 the saving was
repealed - In 1828 the action was brought. The court
held that three years having elapsed since the repeal-
ing act, the statute applied - Read, & comment on
what is said about a former case -

intended that Dred Scott and every other African American, slave or free black, were forever destined to remain in a degraded status in the United States and could never rise to the level of national citizen.

It is beyond the scope of this essay to discuss in detail why I believe that *Dred Scott* was the worst opinion Taney ever wrote. Suffice it to say that the Chief Justice ignored significant textual and historical evidence that supported Dred Scott's claims, as Justice Curtis skillfully pointed out in his dissent.[15]

Why did Taney destroy his widely acclaimed judicial reputation by writing his *Dred*



Examine these cases to show what has been held not unconstitutional -

Calder & wife vs Bull & wife 3. Dallas 386. This case decides that when a Probate court decides against the validity of a Will and the right of appeal is gone by lapse of time, a special act of the Legislature (of Connecticut) directing a rehearing, by which the will is held valid, does not infringe the constitution of the United States -

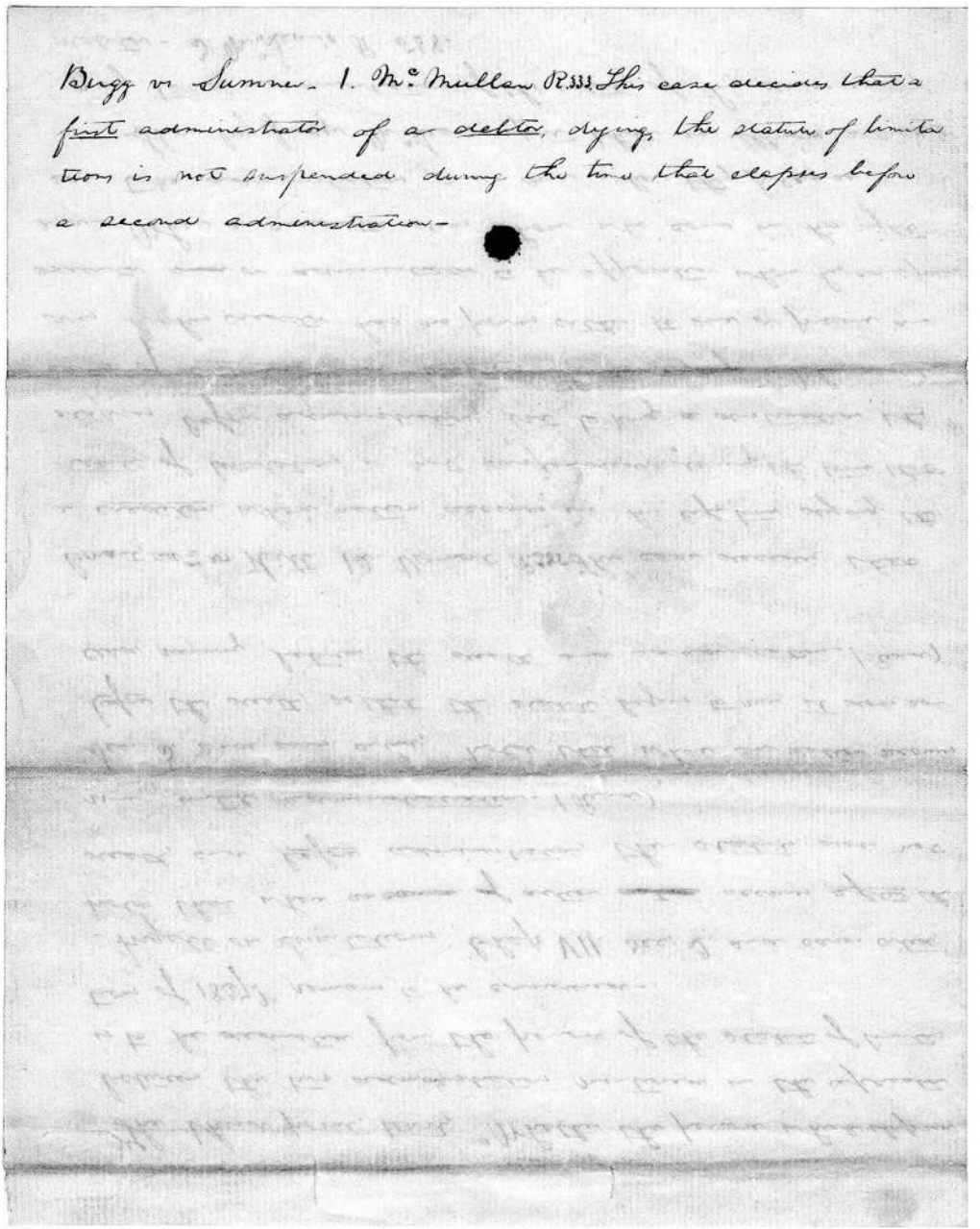
Jackson vs Lamphire 3. Peters 280 to 291. This case decides that, when the opposite parties claim the same land by deeds of different dates from the same grantor, an act of the Legislature (of New York) three years younger than the deeds, appointing commissioners to decide disputed titles, in a class of cases, to which the case in question belonged, giving the right to the losing party to sue at law or in equity in three years from the award of the commissioners and not after, and by which commissioners, in the case, the land was awarded to the younger deed, is not unconstitutional.

(Read from page 90 out).

The second point of disagreement between the judges, court: "Whether the statute began to run before administration was granted?" is entirely included within the first point -

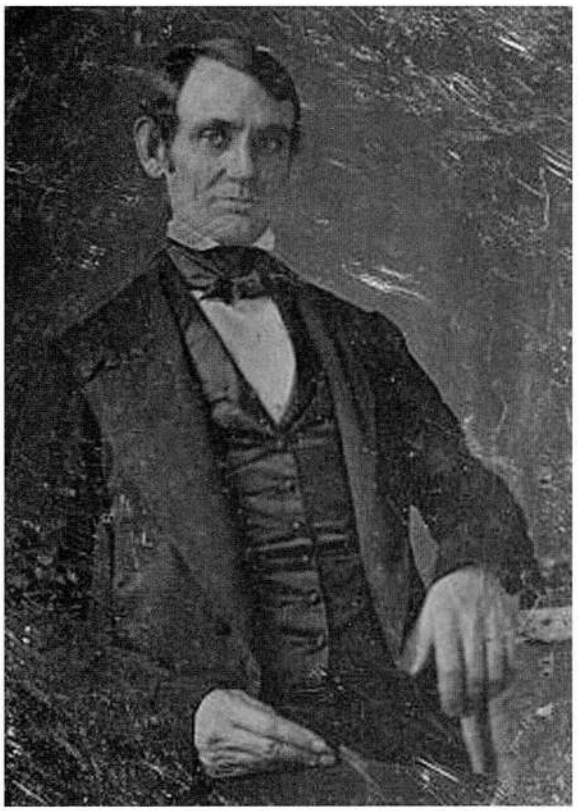
Scott opinion? After all, until that opinion, he was considered a worthy successor to the great Chief Justice John Marshall.

One explanation was later offered by Taney's colleague, Justice Wayne. According to Wayne, the Justices in the majority had, in his words, become "convinced that it was practical for the Court to quiet all agitation on the question of slavery in the Territories by affirming that Congress had no constitutional power to prohibit its introduction."[16] In other words, Taney, Wayne, and other



members of the *Dred Scott* majority believed that they were performing a great public service by resolving an important constitutional issue that was dividing the nation. By deciding that Congress could not prohibit slavery in the territories, they thought that the issue would simply disappear from the national political debate.

The Court majority's calculation was tragically wrong. The *Dred Scott* decision widened and deepened the gap between the slave and free states. Taney's opinion galvanized



Only five days after oral argument, the Court handed down its 6–1 decision. Lincoln lost, with only Justice John McLean dissenting from the majority opinion written by Chief Justice Roger B. Taney. Despite being the attorney of record in five other cases docketed at the Court, Lincoln (pictured here circa 1846) would never argue before the Justices again.

political opposition to slavery in the North, not only among abolitionists, but also among more moderate anti-slavery politicians such as Abraham Lincoln of Illinois.

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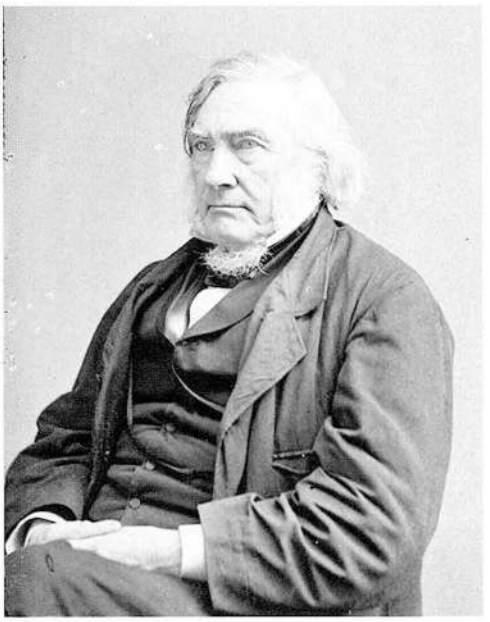
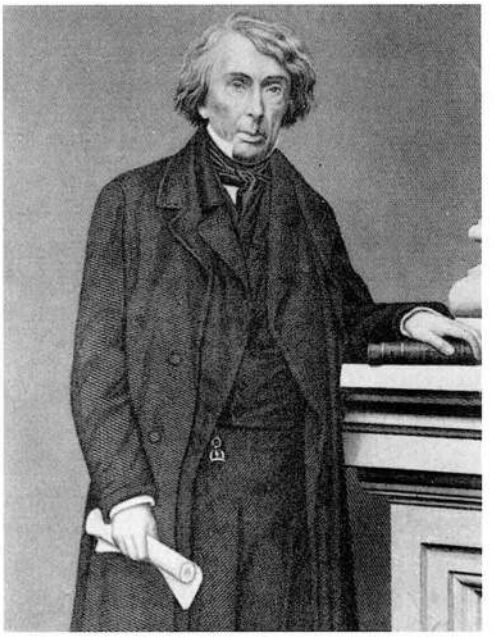
After returning to Illinois in 1849, Lincoln had resumed his lucrative law practice and seemed resigned to abandoning his political ambitions. He remained active in the Whig party nonetheless and took positions on the leading issues of the day, including slavery. In the early 1850s, before the Court's *Dred Scott* decision, Lincoln's views on slavery were, ironically, not so different from those of his future antagonist, Chief Justice Taney. Both Lincoln and Taney opposed slavery. Lincoln could not remember a time that he did not think slavery was wrong.[17] As a young attorney, Taney expressed a similar view in a Frederick, Maryland courtroom in his defense of an abolitionist preacher.[18] And he acted on his belief, freeing his own slaves. Both Lincoln and Taney hoped that African Americans, free blacks, and emancipated slaves would eventually be relocated to a self-governing colony in Africa. Both were active in colonization societies in their respective states that worked toward achieving that goal. Both also believed that the Constitution protected the institution of slavery in the Southern states and could only be outlawed by the voters in those states.

The critical disagreement over slavery between Lincoln and Taney centered on Congress's authority to prohibit the spread of slavery, as provided by the Missouri Compromise. Lincoln believed that Congress had the authority to outlaw slavery in the territories. Taney did not.

After the Supreme Court announced its *Dred Scott* decision, Lincoln publicly attacked the Taney opinion. In part, he was provoked by a passionate defense of Taney's *Dred Scott*



Associate Justice Samuel Nelson was assigned the Court opinion in *Dred Scott* and was expected to affirm the decision of the Missouri supreme court without reaching the broader and more controversial issues posed by the case.

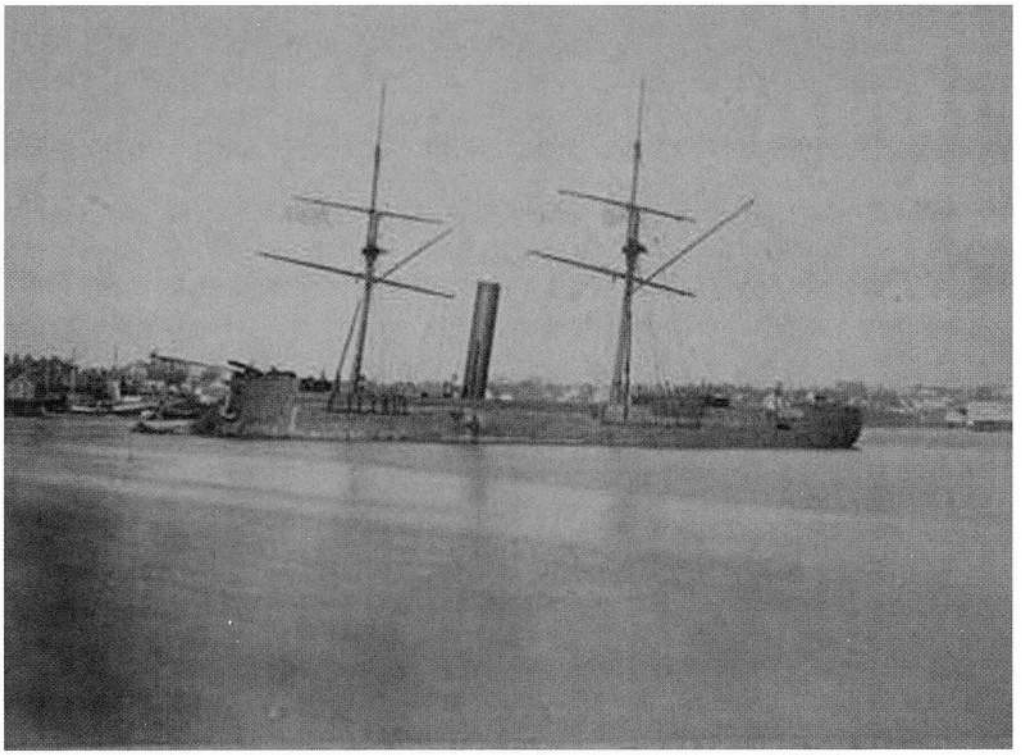


Chief Justice Taney's opinion in *Dred Scott* galvanized political opposition to slavery in the North, not only among abolitionists, but also among more moderate anti-slavery politicians such as Abraham Lincoln of Illinois.

opinion by Senator Stephen Douglas of Illinois. By then, Douglas was considered a favorite to win the Democratic party's nomination for President in 1860. And Lincoln, whose political ambitions had been rekindled by the intensifying debate over the future of slavery in the United States, planned to challenge Douglas for his Senate seat in 1858.

Lincoln sat attentively in the audience in June 1857 when Douglas, in a major public address in Springfield, applauded the Court's *Dred Scott* decision and accused critics of the decision of being "enemies of the Constitution." Attacks on the Court's decision, Douglas said, were tantamount to revolution. In supporting the decision, Douglas proclaimed that "negroes were regarded as an inferior race, who, in all ages, and in every part of the globe . . . had shown themselves incapable of self government."[19]

In response to Douglas's speech, Lincoln challenged the Senator's assertion that critics of the Court's decision were "enemies of the Constitution." Lincoln said that he spoke as a lawyer and loyal U.S. citizen who challenged a badly reasoned, morally flawed decision of the Court that misread the intentions of the Framers of the Declaration of Independence. To Chief Justice Taney's assertion in his *Dred Scott* opinion that the Declaration of Independence's words "all men are created equal" were limited to white men, Lincoln retorted: "I think the authors of that notable instrument intended to include all men." The Framers considered all men equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness," Lincoln contended. "This they said," he concluded, "and this they meant." Lincoln charged that the Court's *Dred Scott* decision guaranteed, in his words, "the spread of the black man's bondage," further frustrating the Framers' noble aspirations. "In those days," he said, "our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it



The *Prize Cases* were argued for twelve days before the Taney Court in February 1863. Since Congress had not declared war at the time that Lincoln ordered the blockade of Southern ports, shipowners contended that there was no constitutional justification for seizing their property.

is assailed, and sneered at, and construed, and hawked at, and torn, till, if the framers could rise from their graves, they could not at all recognize it."[20]

*****

After his spirited attack on Senator Douglas and the Court's *Dred Scott* decision, Lincoln was nominated by the newly formed Republican party to challenge Douglas for his Senate seat in 1858. In accepting the nomination, Lincoln delivered his "House Divided" speech, predicting that the nation could not endure "permanently half *slave* and half *free*."[21] He also accused Chief Justice Taney—together with Senator Douglas, former President Franklin Pierce, and President James Buchanan—of being a member of a pro-slavery national conspiracy. Lincoln's point was that all four men were perpetuating the enormous moral wrong of slavery.

After the famous Lincoln-Douglas debates, Lincoln lost the election to Douglas by a narrow margin and was deeply disappointed. He was satisfied nonetheless that in his opposition to slavery, he had championed a righteous cause. But he wrote one friend, "I now sink out of view, and shall be forgotten."[22] He was only half right in his self-appraisal. He was justly proud of his campaign against the spread of slavery, but he woefully miscalculated his political future. Far from being buried in obscurity, he would, just two years later, be elected President of the United States.

*****

On March 4th, 1861, Lincoln took the presidential oath of office from Chief Justice Taney on a specially built platform at the east portico of the Capitol. By then, seven states had seceded from the Union and formed the Confederate States of America. In his

inaugural address, Lincoln insisted that the Southern states had no constitutional right to secede, because the Union was perpetual and could not be broken up without the consent of all the states. With the Chief Justice seated nearby, he again attacked the *Dred Scott* decision, suggesting that the Taney Court would not have the final word on the issue of slavery. The final decision, he said, would be made by the American people. He ended his address with a conciliatory appeal to the Southern states. "We are not enemies, but friends," he said. And he reminded all Americans, North and South, that they shared "the mystic chords of memory." He looked forward to a future Union when all would be touched "by the better angels of our nature."[23]

The South's response to the new President's appeal came on April 12th at 4:30 a.m. General Pierre G.T. Beauregard, commander of the Confederate troops in Charleston, South Carolina, ordered more than 4,000 rounds of mortar and cannon shells to rain down on Fort Sumter, one of the last federal military outposts in the lower South. The Civil War had begun. Within a week, four more states had joined the Confederacy.

At that time, the loyalty to the Union of crucial border states, such as Maryland, was in doubt. In fact, the struggle over Maryland led to the most dramatic confrontation between an American President and a Chief Justice of the United States in our history.

*****

To understand the conflict between President Lincoln and Chief Justice Taney, it is important to be aware of what today we might term "facts on the ground." In April 1861, shortly after the firing on Fort Sumter, large sections of Maryland supported the Confederate cause. In the state's largest city, Baltimore, the Confederate flag was proudly displayed in front of many of the city's buildings and private homes. Baltimore's mayor and police chief openly supported the Confederacy.

Meanwhile, secessionists in northern Maryland cut telegraph lines and destroyed railroad bridges between Washington, D.C. and the Northern states. As a result, President Lincoln suspended the ancient writ of habeas corpus for the critical area between Philadelphia and the nation's capital. The order allowed military commanders to arrest suspected secessionists and imprison them indefinitely without an indictment, judicial hearing, or trial. One of the suspected secessionists arrested by military troops in northern Maryland was John Merryman, a wealthy landowner, state legislator, and suspected secessionist cavalry officer. Merryman's arrest and imprisonment in Baltimore's Fort McHenry set into motion the events that led to the confrontation between President Lincoln and Chief Justice Taney.[24]

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Merryman's lawyer immediately drafted a petition of habeas corpus demanding that the prisoner be brought before a civilian court to hear the specific charges against him. The petition was delivered to Chief Justice Taney on April 25th, the same day that Merryman was imprisoned. The next day Taney, acting in his capacity as a circuit court judge, signed the writ ordering General George Cadwalader, commander of the military forces at Fort McHenry, to appear before him with the prisoner in the federal courtroom in Baltimore on May 27th.

On the appointed day, the Chief Justice was escorted through the overflow crowd outside the courtroom to take his seat on the bench. But neither General Cadwalader nor Merryman appeared. Instead, Cadwalader sent a military aide who told Taney that the general's absence was regrettable but unavoidable given the pressing military business at Fort McHenry. He then read aloud a statement from the commander, informing the Chief Justice that Merryman was charged with various acts of treason and that his arrest was authorized by the President of the United States, Abraham Lincoln. Chief Justice Taney immediately announced his decision. General Cadwalader had acted in disobedience of the law, Taney

said, and he ordered the general to appear before him the next day to show cause why he should not be held in contempt of court.

The next day, Taney again waited in vain for the general to appear. The Chief Justice then read a written statement. John Merryman, he said, was illegally detained at Fort McHenry. Taking direct aim at President Lincoln, Taney announced that "[t]he President, under the Constitution and laws of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize any military officer to do so."[25]

Later, in his full opinion, Taney gave his reasons for his conclusion that Lincoln had violated the terms of the Constitution. Taney wrote that the Constitution provided for the suspension of the writ of habeas corpus in Article I, which dealt with the authority of Congress, not the President. The President was given powers as Commander-in-Chief under Article II, Taney acknowledged, but those war powers were severely limited by Congress and the states and, in any case, did not include the authority to suspend the writ of habeas corpus. If military officers such as General Cadwalader, under instruction from President Lincoln, could deprive citizens of their civil liberties "upon any pretext or under any circumstances," Taney wrote, "the people of the United States are no longer living under a government of laws." Under those intolerable circumstances, he continued, every citizen would "hold life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."[26]

Taney directed the clerk of the court to send a copy of his opinion, under seal, to President Lincoln. "It will then remain for that high officer, in fulfilment of his constitutional obligation, to 'take care that the law be faithfully executed' to determine what measure he will take to cause the civil process of the United States to be respected and enforced."[27]

For a month, Lincoln ignored Taney's judicial order. Finally, on July 4th, 1861, in an address to Congress, Lincoln gave his answer. In a pointed reference to the Chief Justice's *Merryman* opinion, Lincoln said that "the attention of the country has been called to the proposition that one who is sworn to 'take care that the laws be faithfully executed,' should not himself violate them."[28] But Lincoln insisted that he had not violated the Constitution, contending that, under his Commander-in-Chief powers, the Constitution gave him the authority to suspend the writ of habeas corpus. Whereas Chief Justice Taney had concluded that the power was indisputably Congress's because it was placed in Article I, which dealt with legislative authority, Lincoln stressed that the text of the Constitution was silent on which branch could suspend the writ.

Lincoln called attention to the dire situation faced by the Union, a fact that was entirely ignored in Taney's opinion. He noted that a third of the states were in open rebellion. "It cannot be believed the framers of the instrument intended that in every case, the danger should run its course until Congress could be called together," he said. "[T]he very assembling of Congress in such an emergency might be prevented," Lincoln continued, "as was intended in this case, by the rebellion." In such an emergency, he asserted, the President must have the authority to act.

Lincoln framed the constitutional question raised by the *Merryman* case differently from Taney: must a single law, the writ of habeas corpus, be enforced at the cost of sacrificing the government itself? His answer was contained in another question. "[A]re all the laws, but one, to go unexecuted," he asked, "and the government itself go to pieces, lest that one be violated?" For Lincoln, preservation of the government must be the nation's highest priority.

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Lincoln and Taney's disagreement over the President's authority to suspend the writ of habeas corpus was not the only constitutional issue that divided the President and the Chief Justice during the Civil War. In fact, before

Taney wrote his Merryman opinion, President Lincoln had already taken military action that would lead to the major constitutional challenge of the Civil War before the Taney Court. It focused on the President's authority to blockade ports in the Southern states without a declaration of war against the Confederacy.

When Lincoln announced the blockade of Southern ports on April 19th, 1861, he chose his words carefully. His action was necessary, he said, because the Union was threatened by "a combination of persons engaged in insurrection."[29] The rebellion was initiated by individual citizens, he insisted, not the seceding Southern states. The President's denial of the sovereignty of the seceding states was essential to his overall war strategy. He wanted to keep open the possibility that the seceding states would soon return to their rightful place in the Union. At the same time, Lincoln was signaling to the European powers, especially Great Britain, that the war was an internal rebellion, not a conflict between two sovereign nations. Lincoln's description of the insurrection and blockade made clear that his administration would object to a foreign nation's diplomatic recognition of the Confederacy.

But the blockade posed legal problems for Lincoln. A naval blockade was commonly understood to be a military act against a belligerent. By imposing the blockade, Lincoln was implicitly acknowledging that the Union was engaged in a civil war against the Confederate States of America. Under the Constitution, however, only Congress could declare war. At the time that Lincoln issued his orders to blockade the Southern ports, Congress was adjourned.

Within months of Lincoln's action, the issue of the constitutionality of the blockade—and the war itself—was raised in federal courts in Florida, Massachusetts, and New York. In each case, a ship was captured and its cargo confiscated by Union naval forces when the vessel was either entering or leaving a Southern port. In all of the cases, the owners claimed that their ships and cargoes had been illegally seized by the Union navy. Since Congress had not declared war at the time of the blockade, they argued, there was no constitutional justification for seizing their property.[30]

The law suits, known collectively as the *Prize Cases*,[31] were argued for twelve days before the Taney Court in February 1863. The stakes for the Lincoln administration were extremely high. If the Justices decided that the Union had illegally seized the ships as prize, the financially strapped government would be liable for huge sums in restitution. Politically, an adverse ruling would be profoundly embarrassing to the administration. Of even greater consequence, such a ruling would undercut the Union's legal authority to put down the rebellion.

The most formidable advocate for the shipowners who challenged the legality of the blockade was James Carlisle, a prominent Washington lawyer.[32] Carlisle contended that the case ultimately turned on Lincoln's constitutional argument that, as Commander-in-Chief, he was authorized to take extraordinary measures to preserve the Union, including blockading Southern ports. The words of the Constitution betrayed such a claim, Carlisle argued. "It comes to a plea of necessity," but "[t]he Constitution knows no such word." Nowhere in the Constitution, Carlisle noted, did the Framers give the President the authority to declare war. That power was entrusted to Congress alone. For the Court to give the President the power to declare war when the Constitution did not, Carlisle argued, would "assert that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional government be at an end."

Carlisle's argument was answered by Richard Dana, Jr., the U.S. Attorney for Massachusetts, who was better known as the author of **Two Years Before the Mast**, a memoir recounting his adventures at sea as a young man. Defending Lincoln's action, Dana asked: "If a foreign power springs a war upon us by sea and land during a recess of Congress,

exercising all belligerent rights of capture," should the President not be authorized to repel it? Dana's answer, like Lincoln's, was yes. The purpose of a blockade, Dana argued, was to coerce an enemy into submission. It was of no consequence whether war had been officially declared or not. The blockade was justified by the actual state of hostilities between combatants, not by the legislative will. And there could be no doubt that the Union was engaged in a war against the rebellious states. He pointed out that only two months after Lincoln blockaded the Southern ports, Congress had ratified his action. Without presidential authority to act in an emergency, Dana said, "there is no protection to the State." Both the President and Congress had endorsed the blockade, he said. "This is conclusive on the Courts."

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Lincoln's Attorney General, Edward Bates, described Dana's argument as "luminous and exquisite." But Dana's most important admirer was Justice Robert Grier of Pennsylvania. Grier was quoted by one court attendant as saying, "Well, your little 'Two Years Before the Mast' has settled the question."[33]

On March 20th, 1863, Grier announced the Court's decision in the *Prize Cases* for a narrow majority of five Justices who supported the Lincoln administration's position.[34] Justice Grier was joined, critically, by three recent Court appointees, all nominated by Lincoln. The fifth member of the majority was Justice Wayne, a strong nationalist who had chosen to remain on the Court in Washington rather than return to his home in Georgia. Chief Justice Taney joined three other members of the Court in dissent.

In typically robust style, Justice Grier attacked the contention of the shipowners that Lincoln did not have the constitutional authority to blockade the Southern ports before a congressional declaration of war. "The President was bound to meet [the insurrection] in the shape it presented itself, without waiting for Congress to baptize it with a name," he wrote, "and no name given to it by him or them could change the fact." It was no less a war because it was a rebellion against the lawful authority of the United States. Under Grier's interpretation of the Constitution, Lincoln possessed ample authority as Commander-in-Chief of the armed forces to suppress the rebellion by whatever military means he deemed necessary.

*****

Everything about wartime Washington infuriated Chief Justice Taney. Life in the nation's capital was "adulterated and corrupt," he wrote, and "truth and honesty is not the general rule but the exception."[35] He complained that his mail was being read and censored by government officials. He blamed Lincoln specifically for curtailing his selection of newspapers. "Although it may be difficult to say what are the boundaries of the President's power at this day—or whether it has any boundaries," he wrote his son-in-law, "I am not willing to admit that he has a right to prescribe what newspapers I shall read—although I know from experience that he has the power to prescribe what I shall not read."[36]

But newspaper censorship was the least of the Chief Justice's criticisms of the President's policies. Taney made frequent scathing references to the paper currency that Congress had authorized to help finance the war. As his personal bills mounted, he lamented that his salary was paid "in the miserable trash which will soon be utterly worthless."[37] He prepared for the day that the government's paper money, authorized by the Legal Tender Act, would be declared unconstitutional by the Supreme Court. At home, he wrote a long memorandum of law stating the reasons that he considered the congressional statute unconstitutional. This opinion was never published, since the issue did not reach the Court for resolution during the war.[38]

Taney wrote another unofficial opinion, entitled "Thoughts on the Conscription Law of the U[nited] States," in which he charged that the federal government's draft statute, which Lincoln vigorously defended, violated

the rights of the states under the Tenth Amendment. That opinion also remained unpublished, because the issue was never argued before the Supreme Court.[39]

*****

Chief Justice Taney was hounded by his critics in Congress even after his death in October 1864. Early in 1865, abolitionist Senator Charles Sumner of Massachusetts rose to oppose a bill to appropriate funds for a bust of Taney to be displayed in the courtroom of the Supreme Court. "[I]f a man has done evil during life," Sumner intoned, "he must not be complimented in marble."[40] The bill was defeated.

Sumner predicted that "an emancipated country will fasten upon [Taney] the stigma which he deserves."[41] And more than 150 years later, Taney's judicial legacy is largely defined by his *Dred Scott* opinion. But there was another, admiring, view of Taney's legacy that was presented after his death by his former colleague, Justice Curtis, who had written a devastatingly persuasive dissent in *Dred Scott*. Taney's power of legal analysis, said Curtis, exceeded that of any man he ever knew. Curtis credited Taney and his predecessor, Chief Justice Marshall, with bringing "stability, uniformity, and completeness to our national jurisprudence."[42]

Which portrait of Taney survives, Sumner's or Curtis's? Both do, actually, though Sumner's has proved to be more enduring. Certainly Sumner, vitriol aside, accurately forecast that Taney's destructive *Dred Scott* opinion would never be forgotten. But Justice Curtis justifiably pointed to Taney's broader judicial record, which was characterized by a careful, craftsmanlike approach to constitutional problems. Taney abandoned that approach in *Dred Scott*, and the Court's decision cost the nation and the Supreme Court dearly.

Had Taney died before he wrote his *Dred Scott* opinion, he would undoubtedly have secured a prominent place in our constitutional history. But even his post–*Dred Scott* opinions merit a respectful reading. His opinion in the *Merryman* case, for example, viewed in the calmer atmosphere of a United States at peace, has been endorsed by respected scholars as well as later Supreme Court decisions. No less an expert on the Court than Chief Justice Charles Evans Hughes recognized Taney's exceptional judicial talent. More than a half century after Taney's death, Hughes surveyed Taney's opinions in a wide range of fields, including federal-state relations and civil liberties, and concluded that he was "a great Chief Justice."[43]

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If Abraham Lincoln had died before Taney wrote his *Dred Scott* opinion, his place in American history, like the Chief Justice's, would have been radically different. Without *Dred Scott*, Lincoln might well have been remembered after his death as a good man, a fine lawyer, and a frustrated politician. But he was outraged by the *Dred Scott* decision and the prospect of slavery spreading across the United States. He challenged Senator Douglas for his Senate seat in 1858 and very nearly won, in large part because of his effective attack on *Dred Scott* and what he termed the pro-slavery conspiracy that included Douglas and Chief Justice Taney. Even in defeat, Lincoln's political star was ascendant, leading to his election as President in 1860.

After the firing on Fort Sumter, Lincoln prosecuted the war relentlessly, ignoring criticism that his policies violated the Constitution. In this regard, Chief Justice Taney was his unwitting foil, challenging Lincoln's assumption of sweeping executive powers. But Lincoln was not to be denied by Taney or anyone else in his goal to preserve the Union and, ultimately, to free African Americans from slavery. For those achievements alone, he will always be revered as one of our greatest Presidents.

Lincoln's constitutional legacy is more ambiguous. Like every other wartime President, he took measures to protect the nation's security at the expense of individual liberties. But in judging Lincoln's actions, unlike those of other wartime Presidents, it is important to

keep in mind that he had taken the presidential oath to see that the laws were "faithfully executed" shortly before the Civil War created the worst crisis in American history. Lincoln is the only President to have blockaded domestic ports and suspended the writ of habeas corpus. But he is also the only President who faced a rebellion that threatened the very existence of the United States.

To be sure, Lincoln's record on civil liberties was vulnerable to scholarly criticism, and that criticism has continued to this day. In his defense, he consciously weighed the legitimate security needs of a nation under siege against the individual liberties of its citizens. That balancing impressed a recent member of the Supreme Court, the Honorable Sandra Day O'Connor. In a 2005 lecture, Justice O'Connor said of Lincoln: "He appreciated that the strength of the Union lay not only in force of arms but in the liberties that were guaranteed by the open, and sometimes heated, exchange of ideas."[44]

For Lincoln, the essential goal of the Union in the Civil War was to repair the rupture to the constitutional government established by the Framers. He had anticipated that monumental task when he told his friends at Springfield's Great Western Railroad depot on a chilly morning in February 1861 that his presidential challenge was greater than George Washington's. He had been elected to preserve what he later described to be "the last best hope"[45] for democratic government in the world. When his body was returned to Springfield in May 1865, the entire nation knew that he had met that challenge with courage and wisdom to become the wartime President indispensable to the future of the United States.

ENDNOTES

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[1]James F. Simon, **Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers** (2006), 73–76.

[2]*Lewis v. Lewis*, 48 U.S. (7 How.) 776 (1849).

[3]*Lewis*, 48 U.S. at 777–80.

[4]Simon, **Lincoln and Chief Justice Taney**, 178.

[5]*Id.*, 1, 68, 69.

[6]Lincoln's brief, *available at* http://www.lawpracticeofabrahamlincoln.org/Search.aspx (last visited Oct. 23, 2010).

[7]For Taney's early life and career as lawyer, see Simon, **Lincoln and Chief Justice Taney**, 5–26.

[8]*New York American*, March 17, 1836.

[9]Daniel Webster to J. Mason, Feb. 3, 1837, quoted in Carl Brent Swisher, **History of the Supreme Court of the United States: The Taney Period, 1836–64** (1974), vol. 5, 86.

[10]Simon, **Lincoln and Chief Justice Taney**, 38–42.

[11]*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[12]William Seward to Taney, Jan. 31, 1851, quoted in Samuel Tyler, **Memoir of Roger Brooke Taney** (1872), 318.

[13]For background on the *Dred Scott* case, the best study is Don E. Fahrenbacher, **The *Dred Scott* Case: Its Significance in American Law and Politics** (1978).

[14]*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399 (1857).

[15]*Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting).

[16]Wayne quotation in Benjamin Robbins Curtis, **Memoir and Writings of Benjamin Robbins Curtis** (1879), vol. 1, 206.

[17]Lincoln to A. Hodges, April 4, 1864, in **Collected Works of Abraham Lincoln** (hereafter cited as **CWAL**), ed. Roy P. Basler, 9 vols. (1953), vol. 7, 281.

[18]John D. Lawson, ed., **American State Trials** (1914), vol. 1, 88.

[19]Quoted in Robert W. Johannsen, **Stephen A. Douglas** (1973), 567–71.

[20]Lincoln's Springfield speech, June 26, 1857, in **CWAL**, vol. 2, 398–410.

[21]Lincoln's "House Divided" speech, June 16, 1858, in **CWAL**, vol. 2, 461–69.

[22]Lincoln to A. Henry, Nov. 19, 1858, in **CWAL**, vol. 3, 339.

[23]Lincoln's draft and final text for first inaugural address, in **CWAL**, vol. 4, 249–71.

[24]Background on Merryman case: Simon, **Lincoln and Chief Justice Taney**, 184–90.

[25]Tyler, Memoir of Roger Brooke Taney, 645.

[26]*Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

[27]*Id.*, 155.

[28]Lincoln's address to Congress, July 4, 1861, in **CWAL**, vol. 4, 421–41.

[29]Lincoln's blockade proclamation, April 19, 1861, in **CWAL**, vol. 4, 338, 339.

[30]Simon, **Lincoln and Chief Justice Taney**, 204–08.

[31]*The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

[32]Briefs and oral arguments in the *Prize Cases*: Philip B. Kurland and Gerhard Casper, eds., **Landmark Briefs and Arguments of the Supreme Court of the United States** (1978), vol. 3, 337–678.

[33]Quoted in Charles Francis Adams, **Richard H. Dana** (1890), vol. 2, 269.

[34]*The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

[35]Taney to J. Campbell, June 29, 1862, in Howard Papers, Maryland Historical Society, Baltimore, Md.

[36]Taney to J. Campbell, Sept. 13, 1861, in Howard Papers.

[37]Taney to D. Perine, Feb. 1, 1863, in Perine Papers, Maryland Historical Society, Baltimore, Md.

[38]A copy of Taney's unpublished opinion on the Legal Tender Act is available at the New York Public Library, New York, N.Y.

[39]A copy of Taney's unpublished opinion on conscription law is also available at the New York Public Library.

[40]*Cong. Globe*, 38th Cong., 2d Sess. (1865), 1013.

[41]*Id.*

[42]Tyler, **Memoir of Roger Brooke Taney**, 516.

[43]"A great Chief Justice": 17 *American Bar Assoc. Journal* (1931), 790.

[44]Trachtman lecture, Feb. 26, 2005, delivered by Justice O'Connor to the American College of Trust and Estate Counsel, Orlando, FL.

[45]Lincoln's message to Congress, Dec. 1, 1862, in **CWAL**, vol. 5, 537.

Lincoln and Emancipation: Constitutional Theory, Practical Politics, and the Basic Practice of Law

PAUL FINKELMAN

Abraham Lincoln is, by any measure, our greatest President. Whenever we are asked to rank our Presidents, Lincoln comes out on top. This makes sense. His job, leading the nation through four years of Civil War, was the hardest of any President and he accomplished it so stunningly well: winning the War, preserving the Union, and ending slavery.

His reputation is mostly a function of the challenges he faced and the success he had in leading the nation. That he was a towering giant surrounded by six decades of Lilliputian Presidents is also a factor.[1] So too was his incredible use of language. Lincoln's Second Inaugural is one of the greatest speeches of nineteenth-century America; his Gettysburg address helped resurrect the core values of the Declaration of Independence while providing a higher meaning than even nationalism for the Civil War. Lincoln's martyrdom made him mysterious, tragic, and heroic.

Finally, of course, Lincoln's place in history rests on his role as the Great Emancipator.[2] With a stroke of his pen, Lincoln brought liberty to about three million slaves. The Emancipation Proclamation was essentially a political document in the guise of a war measure. But for Lincoln, the Proclamation was also a constitutional document. It reflected his constitutional thought and understanding, filtered through the reality of the War and political conditions. In March 1861, Lincoln declared—honestly and correctly—that he had no constitutional power to touch slavery where it existed. A year and a half later, in September 1862, he declared—honestly and correctly—that he did, in fact, have the constitutional power to attack slavery in the Confederacy and order the emancipation of about three million slaves.[3]

Lincoln's Proclamation did not, and could not, end all slavery in the United States. Total emancipation required military success and the Thirteenth Amendment. Furthermore, Lincoln was hardly the only agent in the process. Tens of thousands of slaves left their owners during the War and ran to the protective shield of the United States Army. From day one of the War, slaves, former slaves, and free blacks participated in the military effort as guides, spies, civilian workers, and ultimately uniformed soldiers. The more than 200,000 blacks who served the Union cause made significant contributions to victory and liberty. Moreover, as Ira Berlin has argued, simply by showing up at military bases, slaves left United States soldiers no choice but to offer them shelter and protection. Berlin further argues that slaves, by their very presence, helped shape military policy, and that in turn helped shape civilian policy. Slaves "did what they could to secure" freedom, "throwing their full weight behind the Federal cause, volunteering their services as teamsters, stable hands, and boatmen; butchers, bakers, and cooks; nurses, orderlies, and laundresses; blacksmiths, coopers, and carpenters; and, by the tens of thousands, as common laborers."[4] Slaves cared for the wounded and helped bury the dead, doubtless saying their own prayers to speed the blue-clad liberators on to their final destiny.

Similarly, Congress played a role in ending bondage, with two confiscation acts, the immediate end of slavery in the District of Columbia through compensated emancipation, an act ending slavery in the Territories without any compensation, the repeal of the federal Fugitive Slave Laws in 1864, and other measures. Most importantly, in early 1865 Congress sent the states the Thirteenth Amendment, which permanently ended slavery everywhere in the United States. The states played their proper role by ratifying the Amendment in less than a year. Finally, of course, the Army and Navy made emancipation possible. Without military victory, emancipation would have been impossible, or at least incomplete.

But without a viable constitutional and political theory that allowed Congress, the Army, and the President to free slaves, emancipation could not have happened. A number of people helped shape these theories, including Lincoln's abolitionist Secretary of the Treasury, Salmon P. Chase; one of his political generals, Benjamin Butler; and the antislavery Republicans in Congress, especially Thaddeus Stevens, Charles Sumner, and Lyman Trumbull. In the end, however, the chief architect of emancipation was the President.

I

Lincoln was a lifelong opponent of slavery. During the Civil War, he famously declared that he was "naturally antislavery" and could "not remember when" he "did not so think, and feel." He believed that "if slavery is not wrong, nothing is wrong."[5] His career bears this out. With the exception of one lapse of judgment when he represented a longtime client in a fugitive-slave case, Lincoln never acted as an attorney to defend the rights of slave owners.[6] He lost this one fugitive-slave case, and some scholars think he may even have represented his client less than zealously. More importantly, in *Bailey v. Cromwell* (1841), Lincoln helped end the last vestiges of slavery in Illinois.[7] Throughout his political career, Lincoln sought to hem in or constrict slavery. In 1837, he was one of six members of the Illinois legislature who opposed a proslavery resolution that attacked abolitionists and declared that slavery was "sacred to the slaveholding States." Lincoln then framed his own resolution—supported by only one other member of the Assembly—asserting that slavery was "founded on both injustice and bad policy." In this protest against the actions of a majority in the legislature, Lincoln acknowledged the traditional understanding that the national government had "no power, under the

constitution, to interfere with the institution of slavery in the different States." However, Lincoln also asserted that Congress did have "the power under the constitution, to abolish slavery in the District of Columbia."[8] In his one term in Congress, Lincoln tried unsuccessfully to bring forward a bill that would have led to the gradual abolition of slavery in the District.

II

This, then, was Lincoln's record on slavery when he entered the White House. As a lawyer, he had almost always supported liberty. As a candidate, he had famously opposed the spread of slavery, and in his debates with Stephen Douglas in 1858 had vigorously and forcefully denounced the *Dred Scott* decision.[9] As a public official, he had always supported limiting slavery in any way that was constitutional and never supported any resolution that sought to justify the morality of the institution. As an individual, he never missed an opportunity to make clear that he was "naturally antislavery" and that slavery is "wrong."[10] But, while "naturally antislavery," he was not a Garrisonian abolitionist, willing to throw out the Constitution and ignore its limitations in order to achieve social justice.[11]

A successful lawyer and lifelong student of the U.S. Constitution, Lincoln began his presidency with a strong sense of the limitations that the Constitution placed on any emancipation scheme. In his first inaugural, he urged the seven seceding states to return to the Union. Lincoln reminded the secessionists that slavery was safe under the Constitution and under his administration. He reiterated a point made during the campaign: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." He underscored this position by quoting the Republican party platform:

> *Resolved,* That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend. . . .

He promised that during his administration, "all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another."[12]

Lincoln's position reflected an orthodox and almost universally accepted interpretation of the U.S. Constitution. Since 1787, virtually all mainstream constitutional theorists—whether Southern or Northern, proslavery or antislavery—had understood that national government had no power to interfere with the "domestic institutions" of the states. Thus, the states—and not the national government—had sole power to regulate, within their jurisdiction, issues of personal status such as marriage, divorce, child custody, inheritance, voting, and freedom, whether one was a slave or a free person. The only exception to this general rule was the Fugitive Slave Clause of the Constitution, which prohibited the states from emancipating runaway slaves from other jurisdictions, and the Full Faith and Credit Clause, which required the states to give legal recognition to marriages, divorces, adoptions, and other changes of social status that took place in other states.

After the Constitutional Convention, General Charles Cotesworth Pinckney told the South Carolina House of Representatives: "We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution,

and that all rights not expressed were reserved by the several states."[13] On the eve of his presidency, Lincoln, like almost all constitutional theorists, lawyers, and jurists, accepted Pinckney's understanding of the Constitution: that it created a government of limited powers and that any powers not explicitly given to the national government were retained by the states. Antebellum constitutional jurisprudence had strengthened this understanding and had also expanded it to actually encroach on the powers of Congress, limiting the reach of Congress to regulate slavery even in areas where the Constitution appeared to allow this to happen.[14] Except for a few constitutional outliers, such as Lysander Spooner,[15] no antebellum politicians or legal scholars believed Congress had the power to regulate slavery in the states. In 1860, a claim of federal power to end slavery in the states was simply unthinkable for someone like Lincoln, who took law and constitutionalism seriously.

In *Dred Scott v. Sandford*, Chief Justice Roger B. Taney had asserted that Congress could never ban slavery in the federal territories. Lincoln and most other Republicans rejected the legitimacy of that portion of the decision on the grounds that once Taney found Dred Scott had no standing to sue, the case became moot, and everything Taney said after that was mere dicta.[16] Republicans such as Lincoln also rejected Taney's conclusions on substantive grounds. They argued that Congress did indeed have the power to ban slavery from the Territories. But even if Lincoln and his fellow Republicans were correct on this issue—and Chief Justice Taney was wrong—that did not affect emancipation in the states. There was a huge difference between banning slavery in new territories and taking slave property from people in the states or even in federal jurisdictions, such as Washington, D.C., where slavery was legal. Thus, the accepted view was that the national government could not end slavery in the states. The only issue in dispute was whether the Republicans were right and Congress could ban slavery in the Territories and the District of Columbia, or whether Chief Justice Taney was correct and Congress could not ban slavery in any federal jurisdictions.

In addition to the constitutional limitation on federal power, emancipation at the federal level also raised significant issues surrounding property rights—what modern legal scholars call "takings." The Fifth Amendment declares that "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." An emancipation proclamation might violate the due process aspects of this Amendment; even if it did not, it might violate the Takings Clause. Like almost all lawyers at the time, Lincoln understood that even if Congress had the power to take slaves from U.S. citizens, it could only be done through compensation, as required by the Fifth Amendment.

As noted above, in his only term in Congress, Lincoln had proposed a bill to end slavery through gradual emancipation, a process that would not constitute a taking because no living slaves would be freed. Under gradual abolition schemes, the children of all slave women were born free but indentured to the owners of their mothers until they reached the age of majority. This compensated the masters for raising these free-born children of slaves while not actually taking any property from the masters. Such legislation had been used to end slavery in most of the Northern states in the wake of the American Revolution.[17]

Although Lincoln's bill for gradual emancipation in Washington never reached the floor of Congress, it illustrates Lincoln's understanding that slave property could not be taken from masters without compensation. Indeed, when Congress finally did end slavery in the District of Columbia during the Civil War, it did so through compensation, because that was the only constitutionally permissible way of immediately taking slave property in the nation's capital.[18] By 1862, however, gradual abolition was no longer realistic. No one in

the government—and certainly not the slaves in the Washington, D.C.—had any patience for any emancipation that was gradual.

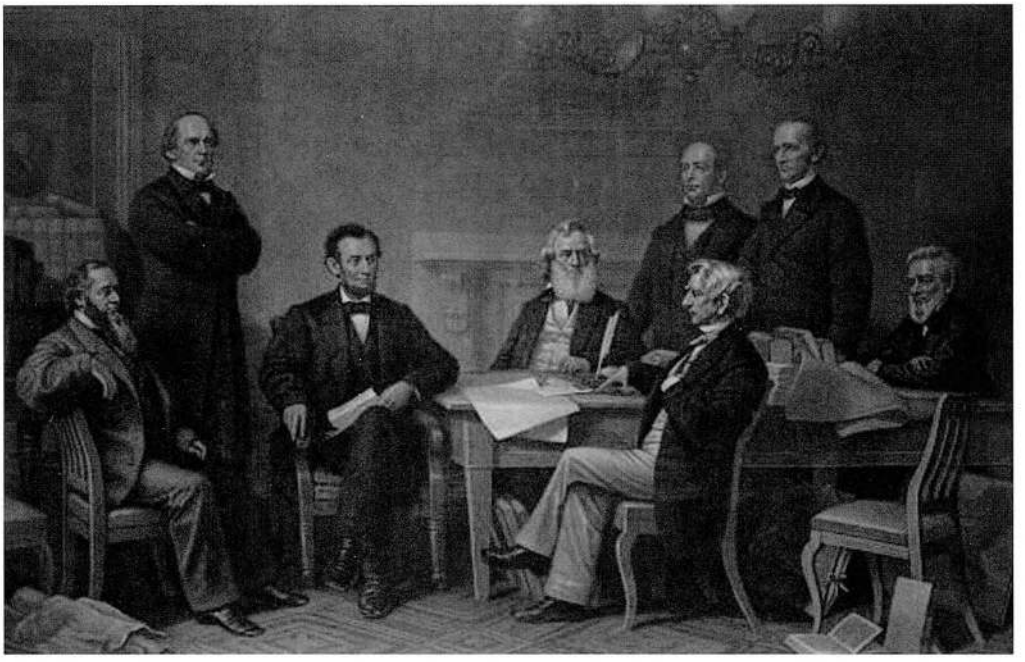
Thus, when Lincoln entered office he fully understood that he had "no lawful right" to "interfere with the institution of slavery in the States where it exists." Because he had no "lawful right" to free slaves in the South, he could honestly tell the seceding states he had "no inclination to do so." This statement in his Inaugural Address could be interpreted to mean that Lincoln had no personal interest in ending or desire to end slavery. But Lincoln chose his words carefully. His personal views on slavery were clear: he hated slavery and had always believed that slavery was wrong. But his personal desires could not overcome constitutional realities. Because he had no power to touch slavery in the States, he could honestly say he had no inclination to do so. Consistent with his long-standing Whig ideology, Lincoln rejected the idea of acting outside the Constitution. Reflecting his sense of the politically possible, Lincoln willingly reassured the seceding states that he had no "inclination" to do what he could not constitutionally, legally, or politically accomplish. When circumstances changed, so would Lincoln's "inclination," but in March 1861, Lincoln had no reason to think that circumstances would change.

This, then, was the constitutional framework Lincoln understood as he entered the White House. He personally hated slavery—he was "naturally antislavery."[19] But he understood the constitutional limitations on his actions.

Lincoln also knew, as all Americans did, that slavery was the reason for secession and the cause of the Civil War. Almost all the Confederate states made this clear when they seceded. South Carolina, for example, explained that it was leaving the Union because of the "increasing hostility on the part of the nonslaveholding States to the institution of slavery."[20] South Carolina asserted the "right of property in slaves was recognized" in the Constitution, but that "these ends for which this Government was instituted have been defeated, and the Government itself has been made destructive of them by the action of the nonslaveholding States."[21] The free states had "denied the rights of property" in slaves, "denounced as sinful the institution of slavery," and "permitted the open establishment among them of societies, whose avowed object is to disturb the peace and to eloign the property of the citizens of other States."[22] The South Carolinians also complained that the Northern states had "united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery."[23] The other seceding states expressed similar views. Thus, because slavery was clearly the cause of secession and the War, it would seem that attacking slavery should have been the first goal of the Lincoln administration. Root out the problem, destroy the institution, and the Union could be restored. However, such a simplistic response did not comport with the reality of the crisis Lincoln faced. As much as he hated slavery and would have liked to destroy it—and as much as he understood that the slaveholders of the South were the cause of the crisis—Lincoln also understood that an assault on slavery required the complete or partial fulfillment of four essential preconditions.

III

From the moment the Civil War began, Lincoln faced demands for emancipation. Abolitionists and antislavery Republicans wanted Lincoln to make the conflict a war against slavery. Northern free blacks were anxious to serve in a war of liberation. From the beginning of the War, slaves escaped to U.S. Army lines, where they assumed—usually correctly—that they would find freedom. But the seriously committed opponents of slavery in the North were relatively few in number, free blacks in most of the North were politically



Both Lincoln and Congress began to move towards emancipation only after a series of Union victories in early 1862. Lincoln then waited to announce emancipation until after a major victory that stopped Lee's army dead in its tracks—with huge casualties—at Antietam. Above is a staged portrait of the first reading of the Emancipation Proclamation by Lincoln's Cabinet in July 1862; below are some of the Confederate dead at Antietam.

disfranchised, and Southern slaves had no political influence in the first year of the War. Most Northerners wanted a quick end to the conflict and a restoration of the Union. Any attempt at emancipation would prevent a speedy restoration of the Union. Moreover, any national program for emancipation beyond the Territories or the District of Columbia did not fit into any generally recognized interpretation of the Constitution.

Early attempts at emancipation, such as General John C. Frémont's precipitous and near-disastrous proclamation freeing slaves in Missouri, illustrate the complexity of the issue and the delicate nature of achieving black freedom. Many abolitionists (and some modern-day critics of Lincoln) have bristled at the idea that achieving freedom could be delicate.[24] From their perspective, slavery was immoral, wrong, and the cause of the War. Thus, emancipation would be a great humanitarian act that would strike at the heart of traitorous Confederates. Without any regard to constitutionalism, the early proponents of emancipation simply argued that it was justified by secession. President Lincoln, however, could not accept such facile and simplistic arguments. For Lincoln, emancipation required the convergence of four preconditions involving legal and constitutional theory, popular support on the home front, securing the loyal slave states, and military success. Without these preconditions being met, emancipation was both meaningless and impossible.

First, Lincoln needed a constitutional or legal framework for taking slaves—the private property of masters—and for freeing those slaves. Mere hostility to the United States by slave owners was not a sufficient reason for taking their property. Creating a constitutional framework for emancipation was complicated by the different statuses of the slave states. Four of the slave states—Maryland, Delaware, Kentucky, and Missouri—had not joined the Confederacy. Their citizens still enjoyed all of the protections of the United States Constitution. Since neither Congress nor the President had any power to interfere with the local institutions of the states, Lincoln had no constitutional power to end slavery in those states. Thus, Frémont's proclamation raised significant constitutional issues, because Missouri was part of the Union and its citizens were fully protected by the Constitution. The government (including the army) could not take property—even slave property—from loyal citizens (which all citizens of Missouri presumptively were) without due process and just compensation. Lincoln did believe Congress could end slavery in the District of Columbia, the Indian Territory, and other federal territories such as Utah and Nebraska. However, emancipation in those places presumably required compensation, since the Fifth Amendment prohibited the taking private property without due process of law and just compensation. This provision of the Constitution would also hold true for ending slavery in the loyal slave states, if Lincoln somehow found a constitutionally acceptable method of ending slavery in these states.

The status of slaves in the putative Confederate nation was much less clear. Lincoln believed that secession was unconstitutional and that the Confederacy could not legally exist. If this was true, then presumably the citizens of the Confederacy were still protected by the Constitution. However, as combatants and enemies of the United States, Confederates were surely not protected by the Constitution while making war against the United States. Personal property used against the United States—a weapon, a wagon, or a horse—could, of course, be confiscated. Presumably, slaves used to aid the Confederate cause—as teamsters, laborers, or even cooks in military camps—might also be seized.

Thus, at the beginning of the War, there was no clear legal theory on which emancipation might proceed, because it was not clear if all the people in the Confederacy were enemies making war on the United States. Lincoln believed that the Supreme Court, still dominated by Chief Justice Taney and his proslavery

allies, would overturn any emancipation scheme that was not constitutionally ironclad. At the beginning of the War, every one of the six Justices on the Supreme Court was a proslavery Democrat.[25] Five of the Justices, including Chief Justice Taney, had been part of the majority in *Dred Scott* and had held that the Fifth Amendment protected slave property in the Territories. The sixth, Nathan Clifford, was a classic "doughface"—a Northern man with Southern principles—who could be expected to support slavery and oppose emancipation. In fact, Taney—a "seething secessionist"—drafted an opinion striking down emancipation, just in case he had the opportunity to use it.[26] Lincoln reasonably assumed the Court would strike down any emancipation act that was not constitutionally impregnable.

Second, even if Lincoln could develop a coherent legal and constitutional theory to justify emancipation, he still needed to have political and popular support to move against slavery. Most Northerners disliked slavery, but this did not mean they were prepared for a long bloody crusade against slavery. When the War began, even Republicans who had been battling slavery all their adult lives, such as Chase and William H. Seward, did not think there was sufficient public support to attack slavery. Lincoln, who was already on his way to becoming a master politician, needed to create the right political climate to make emancipation an acceptable wartime goal. The War began as one to save the Union, a goal that commanded support among almost all Northerners. Lincoln could not afford to jeopardize that support by moving too quickly to end slavery, even though he deeply hated it.

Third, Lincoln needed to secure the four loyal slave states before he could move against slavery. This required a combination of political and military success. The demographic and geographic issues were crucial. There were more than two and a half million whites living in these states. If Missouri and Kentucky seceded, they would become the second and third largest states in the Confederacy. More importantly, in terms of the crucial white population that would provide troops for the Confederacy, they would be the largest and third largest states in the Confederacy. If the border slave states left the United States, they would also provide three of the four largest cities in the Confederacy—Baltimore, St. Louis, and Louisville—dwarfing all other Confederate cities except New Orleans.[27] Strategically and geographically, they were even more important. If Maryland joined the Confederacy, the nation's capital would be completely surrounded by the enemy. If Missouri seceded, there would be a Confederate army on the upper Mississippi poised to threaten Lincoln's home state of Illinois and able to penetrate into Iowa and Minnesota.

Kentucky was the most crucial of the states. A Confederate army on the southern bank of the Ohio River would interrupt east-west commerce and troop movements; threaten the vast agricultural heartland of Ohio, Indiana, and Illinois; and endanger key cities, including Cincinnati, Chicago, Indianapolis, and Pittsburgh. With more than 200,000 slaves in the state, Kentucky was vulnerable to Confederate entreaties. A precipitous movement towards emancipation would push the Bluegrass State into the hands of the enemy, and that would probably lead to secession in Missouri as well. Early in the War, a group of ministers urged Lincoln to free the slaves, because God would be on his side. He allegedly responded, "I hope to have God on my side, but I must have Kentucky."[28] Early emancipation would almost certainly have cost him that crucial state, and possibly the War.

This leads to the fourth precondition for emancipation: the actual possibility of a military victory. Lincoln could only move to end slavery if he could win the War; if he attacked slavery and did not win the War, then he accomplished nothing. Lincoln's reply to a group of ministers illustrates this point. In September 1862, Lincoln had already decided to move against slavery, but was waiting for the right moment—a substantial military victory. He could not tell the ministers of his plans and instead told them that emancipation was

useless without a military victory. He said an emancipation proclamation without a victory would be "like the Pope's bull against the comet." He asked how he "could free the slaves" when he could not "enforce the Constitution in the rebel States."[29]

This analysis turns modern critiques of Lincoln on their head. Critics of Lincoln argue that he eventually moved towards emancipation for military and diplomatic reasons, because he needed black troops to repopulate his army and to prevent Britain and France from giving diplomatic recognition to the Confederacy. Emancipation is explained as a desperate act to save the Union, reflecting the idea behind the title of Lerone Bennett's book that Lincoln was "forced into glory" by circumstances.[30] But the chronology of emancipation and all of Lincoln's statements leading up to emancipation do not support this analysis. Both Lincoln and Congress began to move towards emancipation only after a series of Union victories in early 1862. Lincoln then waited to announce emancipation until after a major victory that stopped Lee's army dead in its tracks—with huge casualties—at Antietam. Early emancipation would probably have thrown Kentucky and Missouri into the Confederacy and perhaps doomed the Union cause.

While emancipation may be properly seen as one of the elements of victory, it must also be seen as an outcome of the ultimate victory. Victory would probably have been possible without emancipation, although it might have been more difficult and perhaps taken longer.[31] Victory could also have been accomplished without black troops, although they surely made a huge difference in the last years of the War, but a general emancipation was not a precondition to enlisting blacks. But, while victory was possible without emancipation, emancipation was clearly impossible without victory. Conditions looked bright after Antietam, when the preliminary proclamation was announced, and Lincoln assumed they would look just as bright in 100 days, when he planned to sign the Emancipation Proclamation on January 1, 1863. Thus, rather than being forced into glory when he announced the preliminary Emancipation Proclamation, Lincoln understood that moral glory—emancipation—could only be possible through military glory.

IV

In the spring of 1861, none of the four preconditions for emancipation existed. A year later, the situation had dramatically changed. As already noted, in July 1861, Congress passed the First Confiscation Act; in the spring and summer of 1862 it ended slavery in the District of Columbia and the Territories, and later in the summer it passed the second Confiscation Act. This signaled to Lincoln that he had strong political support for ending slavery. Similarly, military victories in early 1862 secured the loyal slave states and gave Lincoln good reason to believe that he would eventually win the War. Thus, three of the preconditions for emancipation were in place by the end of the summer of 1862. By this time, as I will discuss below, Lincoln had developed a constitutional theory that allowed for emancipation. Before seeing how that theory developed, it is important to look briefly at the military developments.

The change began in November 1861, when Admiral Samuel DuPont seized most of the sea islands off of South Carolina. This was the beginning of the shrinking of the Confederacy and of "one of the brightest periods of the War for the North."[32] In early February, General Ulysses S. Grant's stunning triumphs at Forts Henry and Donelson not only secured Kentucky, but also allowed the United States to move into Tennessee. By the end of the month, the United States Army was sitting in Nashville, Tennessee, the first Southern state capital to fall. Instead of Kentucky possibly going into the Confederacy, it was more likely that Tennessee would be returned to the United States. Similarly, in Arkansas, the Union

victory at Pea Ridge in early March secured Missouri and eliminated any chance of that state seceding. In the next five months, the United States Navy sealed off or captured every Southern Atlantic port except Charleston, South Carolina, and Wilmington, North Carolina. By May, the navy controlled the entire Mississippi River except for Vicksburg; United States soldiers had marched into a second Confederate state capital, Baton Rouge, the Confederacy's biggest city, New Orleans, as well as Natchez and many smaller river towns in Mississippi, Louisiana, and Arkansas. Hard fighting and much bloodshed would still happen in Tennessee, and horrible guerilla warfare would take place in Missouri, but by the spring of 1862, the likelihood of United States military victory seemed high.

Meanwhile, Lincoln pondered how to develop a constitutional theory of emancipation. However, demands for emancipation would not wait until the circumstances allowed for it. In the first half-year of the War, Lincoln faced three different models for attacking slavery. Two of these models satisfied the first three preconditions: there was a legal/constitutional basis for these two modes; they would not undermine Northern support for the War; and they would not chase Kentucky and Missouri out of the Union. The third one, Frémont's proclamation freeing slaves in Missouri, failed all of these tests, and Lincoln wisely overruled it.

Almost immediately after the War started, slaves began to abandon their masters and flee to the safety and protection of the United States Army. In exercising this self-emancipation, these fleeing slaves created the need for a clear government policy well before anyone in the administration was ready to develop such a policy. This set the stage for the clever lawyering that ultimately created a constitutional basis for emancipation. In his second inaugural, Lincoln would assert that in 1861, "[a]ll knew" that slavery "was somehow the cause of the War." However, when the War began, the administration could not attack slavery as the cause of the War because of the lack of preconditions necessary to do so. Most importantly, Lincoln still hoped to reunite the Union without a war, and when the War clearly came, he needed to keep the loyal slave states in the Union. These priorities and the absence of a constitutional theory for Emancipation led Lincoln to defer any consideration of ending slavery.

The slaves, however, were under no such constraints. They knew, even more than their masters or the blue-clad enemies of their masters, that this war was about slavery—about them and their future. While Lincoln bided his time, waiting for the moment to strike out against slavery, hundreds and then thousands of slaves struck out for freedom on their own.

From almost the beginning of the War, slaves streamed into U.S. Army camps and forts. The army was not a social welfare agency and was institutionally unprepared to feed, clothe, or house masses of refugees. Initially, the army returned slaves to masters who came after them. This situation undermined the morale of United States troops, who fully understood that they were returning valuable property to their enemies who would use that property to make war on them. Slaves grew the food that fed the Confederate Army, cared for the horses the Confederates rode into battle, and labored in the workshops and factories that produced the metals and weapons necessary to fight the War.[33] As Frederick Douglass noted, "The very stomach of this Rebellion is the negro in the form of a slave." Douglass urged the government to "arrest that hoe in the hands of the Negro" and "smite the rebellion in the very seat of its life."[34] Returning slaves to Confederate masters was hardly different from returning guns or horses to them. Initially, however, some army officers did just that.

Circumstances began to change on May 23, 1861, when three slaves owned by Confederate Colonel Charles K. Mallory escaped to Fort Monroe, under the command of General Benjamin F. Butler. A day later, Butler faced

the surrealistic spectacle of Confederate Major M. B. Carey, under a flag of truce, demanding the return of the slaves under the Fugitive Slave Law. Major Carey, identifying himself as Mallory's agent, argued that Butler had a constitutional obligation to return the slaves. Butler, a successful Massachusetts lawyer before the War, had devoted some thought to the issue. He told Major Carey "that the fugitive slave act did not affect a foreign country, which Virginia claimed to be[,] and she must reckon it one of the infelicities of her position that in so far at least she was taken at her word." Butler then offered to return the slaves to Colonel Mallory if he would come to Fort Monroe and "take the oath of allegiance to the Constitution of the United States."[35] Until Mallory took such an oath, however, his slaves were contrabands of war and could not be returned.[36]

That was the end of Mallory's attempt to recover his slaves, but it was the beginning of a new policy for the United States. In need of workers, Butler immediately employed the three fugitives, who had previously been used by Mallory to build Confederate defenses. Thus, taking slaves away from Mallory and other Confederates served the dual purpose of depriving the enemy of labor while providing labor for the United States.

As slaves poured into military camps in the summer of 1861, Butler's new contraband policy took hold gradually. During this period, some officers returned slaves to all masters; others only returned them to loyal masters in Maryland, Kentucky, and Missouri. Some offered sanctuary to all slaves who entered their lines.

Clarity of sorts came on August 8, when Secretary of War Simon Cameron informed Butler of the President's desire "that all existing rights in all the States be fully respected and maintained" and that the War was "for the Union and for the preservation of all constitutional rights of States and the citizens of the States in the Union." Because of this, "no question can arise as to fugitives from service within the States and Territories in which the authority of the Union is fully acknowledged." This meant, of course, that military commanders could not free fugitive slaves in Missouri, Kentucky, Maryland, and Delaware. All of this was consistent with Lincoln's public position at the beginning of the War. But Cameron added an important new wrinkle, noting that the President also understood that "in States wholly or partially under insurrectionary control" the laws could not be enforced, and it was "equally obvious that rights dependent on the laws of the States within which military operations are conducted must be necessarily subordinated to the military exigencies created by the insurrection if not wholly forfeited by the treasonable conduct of the parties claiming them." Most importantly, "rights to services" could "form no exception" to "this general rule."[37]

Lincoln had now quietly changed his administration's policy towards slavery in the Confederacy. Under this policy, the military would return fugitive slaves from the loyal slave states—but not the Confederate states, where, of course, most of the slaves were located. The slaves of loyal masters who lived in the Confederacy presented a "more difficult question." The solution was to have the army employ the fugitives, but to keep a record of such employment, so at some point loyal masters might be compensated for the use of their slaves. Speaking for the President, Cameron admonished Butler not to encourage slaves to abscond or to interfere with the "servants of peaceful citizens," even in the Confederacy, or in the voluntary return of fugitives to their masters "except in cases where the public safety" would "seem to require" such interference.[38]

By late August, Butler's contraband policy had become the norm: the United States Army could employ any slaves who ran to its lines, provided they came from Confederate states. This was not a general emancipation policy, and indeed, the army was not supposed to deliberately attempt to free slaves. But the army would not return fugitive slaves to masters in the Confederate states, even if the

The Lincoln administration helped spur both emancipation and the war effort when it allowed the United States Army to employ any slaves who ran to its lines, provided they came from Confederate states. Moreover, the army was not permitted to return fugitive slaves to masters in the Confederate states, even if the masters claimed to be loyal to the United States. Pictured is "contraband" coming into a Union camp as a consequence of the Emancipation Proclamation.

masters claimed to be loyal to the United States. Shrewdly, the Lincoln administration had become part of the process of ending slavery while professing not to be doing so. To abolitionists, the administration could point to the growing thousands of "contrabands" who were being paid a salary and often wearing the only clothing available, blue uniforms.[39] By contrast, to conservatives and loyal masters still living in the United States, the administration could point out that it was not interfering with slavery *in the states*, only in those places that claimed to be outside the United States and were at war with the United States.

This emerging policy began with Butler's response to a Confederate colonel and was soon adopted by the Department of War and the President. It was not a direct attack on slavery and it was not an emancipation policy *per se*. But it did protect the freedom of thousands of slaves who were developing their own strategy of self-emancipation by running to the United States Army. By the time Cameron spelled out the policy to Butler, Congress had endorsed it and pushed it further along with the First Confiscation Act.

The First Confiscation Act, which Congress passed on August 6, 1861, allowed for the seizure of any slaves used for military purposes by the Confederacy.[40] This was not a general emancipation act and was narrowly written to allow the seizure of slaves only in actual use by Confederate forces. The law did not jeopardize the property of masters in the loyal slave states, even those sympathetic to the Confederacy. Freeing slaves under the Confiscation Act might have violated the Fifth Amendment if it was seen as taking private property without due process. But the law was carefully drawn as a military measure. Surely the army could seize a weapon in the hands of a captured Confederate soldier or take a horse from a captured Confederate without a due-process hearing.

Similarly, slaves working on fortifications or being used in other military capacities might also be taken.

The First Confiscation Act was ambiguous and cumbersome and did not threaten slavery as an institution. Under the law, only those slaves being used specifically for military purposes—relatively few in number—could be freed. But the law did indicate a political shift towards emancipation. It was not decisive, because its emancipatory aspects were limited, but it did show that Congress was ready to support some kind of emancipation. Neither Congress nor the American people were ready to turn the military conflict into an all-out war against slavery. However, Congress—which presumably reflected the ideology of its constituents—was ready to allow the government to free some slaves in the struggle against the Confederacy.

The First Confiscation Act and the contraband policy were major steps toward eventual public support for emancipation. In the Confiscation Act, Congress embraced the principle that the national government had the power to free slaves as a military necessity. The logical extension of this posture could be the total destruction of slavery in the Confederacy. If Congress could free some slaves through the Confiscation Act, or the executive branch could free some slaves through the contraband policy, then the two branches might be able to free all slaves if the military and social conditions warranted such a result.

Just a few weeks after Lincoln signed the Confiscation Act, Frémont issued his "Proclamation" declaring martial law in Missouri and announced that all slaves owned by Confederate activists in that state were free.[41] This proclamation went well beyond the Confiscation Act. More importantly, it applied to a state that was still in the Union. Lincoln immediately and unambiguously urged Frémont to withdraw his proclamation, pointing out that it undermined efforts to keep Kentucky in the Union: "I think there is great danger that the closing paragraph, in relation to the confiscation of property, and the liberating slaves of traitorous owners, will alarm our Southern Union friends, and turn them against us—perhaps ruin our rather fair prospect for Kentucky." Lincoln asked the general to "modify" his proclamation "on his own motion" to confirm with the Confiscation Act. Aware of the exaggerated egos of his generals, Lincoln noted that "[t]his letter is written in a spirit of caution and not of censure."[42]

While Lincoln waited for Frémont to withdraw his proclamation, politicians, generals, and border-state unionists urged him to directly countermand Frémont's order. One Kentucky Unionist told Lincoln, "There is not a day to lose in disavowing emancipation or Kentucky is gone over the mill dam." [43] Lincoln agreed. He told Senator Orville Browning that "to lose Kentucky is nearly . . . to lose the whole game."[44]

Lincoln hoped that Frémont—who had been the Republican candidate for President in 1856—would be politically savvy enough to withdraw the order. However, hoping to score points with the abolitionist wing of the Republican party, embarrass Lincoln, and set himself up to be the Republican candidate in 1864, Frémont refused to comply with the request of his Commander-in-Chief. Instead of withdrawing his proclamation, he asked Lincoln to formally countermand it. In effect, this would allow Frémont to later blame the President for undermining emancipation. Lincoln "cheerfully" did so, ordering Frémont to modify the proclamation. Still playing politics, Frémont claimed he never received the order, but only read about it in the newspapers, and even after Lincoln issued it, Frémont continued to distribute his original order.[45] Frémont's stubbornness, lack of political sense, and military incompetence led to his dismissal by Lincoln on November 2, 1861.[46] He would get another command and fail there; by the end of the War he would be marginalized and irrelevant.

Some scholars have asserted that Lincoln's response to Frémont illustrates his

insensitivity to black freedom. Here was a perfect moment to strike a blow against slavery and turn the War into a crusade against slavery. However, unlike Frémont, Lincoln understood that an unwinnable war would not end slavery; it would only destroy the Union and permanently secure slavery in the new Confederate nation. Lincoln's comments to Frémont bear out his realistic assessment that if Kentucky—and perhaps Missouri—joined the Confederacy, the War might be lost. Frémont's proclamation jeopardized Kentucky, and that led Lincoln to overturn it. The fall of 1861 was simply not the time to begin an attack on slavery, especially in the loyal slave states.

Lincoln could have responded to Frémont with a lecture on constitutional law. Freeing slaves as contrabands of war in the Confederacy was probably constitutional. Freeing slaves *within* the United States—which included Missouri—was not constitutional unless those slaves were actually being used as part of an active resistance against the government. Because Missouri had not seceded, Confederate sympathizers who were not involved in direct combat were still protected by the Constitution. But Frémont's plan was ambiguous about their status or the status of their property. Moreover, because Frémont's plan would have summarily deprived U.S. citizens living in the United States of their property without due process, it clearly violated the Fifth Amendment.

Some abolitionists within the Republican party were deeply troubled by Lincoln's response to the Missouri Proclamation. Privately, Lincoln assured Senator Charles Sumner that the difference between them on emancipation was only a matter of time—a month or six weeks. Sumner accepted this statement and promised to "not say another word to you about it till the longest time you name has passed by."[47] In fact, the time would be more like a year, but there is little reason to doubt that Lincoln was moving toward some sort of abolition plan.

For Lincoln, timing was critical. He could only attack slavery if he could win the War; if he attacked slavery and did not win the War, then he accomplished nothing. Critics of Lincoln argue that he eventually moved toward emancipation because he needed black troops to win the War. But, the alternative reading—starting with his correspondence with Frémont—is that he could only move against slavery after he had secured the border states and made certain that victory was possible. Only then could he actually make emancipation work. Rather than a desperate act to save the war effort, emancipation became the logical fruit of victory. Frémont's proclamation did not fit that bill; consequently, Lincoln countermanded it.

V

Lincoln clearly underestimated the time needed before he could move against slavery. The preconditions he needed for emancipation did not emerge in the month or six weeks he had forecast to Sumner. As noted above, it would be nearly a year before they were in place. A call for emancipation had to be tied to a realistic belief that the War could be won; there was no point in telling slaves they were free if the government could not enforce that freedom.

But by the spring of 1862, Lincoln had a reasonable chance of implementing an emancipation policy for a substantial number of slaves. Even if the War ended with some part of the Confederacy intact, the President could break the back of slavery in the Mississippi Valley. Once free, these blacks could not be easily re-enslaved.

Lincoln was also moving towards a legal theory that would justify emancipation. The theory was not complete, but it had been developing since Butler discovered the legal concept of contrabands of war and brilliantly applied it to slaves. The First Confiscation Act had supplemented it. In March 1862, Congress

prohibited the military from returning fugitive slaves, whether from enemy masters, loyal masters in the Confederacy, or masters in the border states. Under this prohibition, any officers returning fugitive slaves could be court-martialed and, if convicted, dismissed from military service.[48] None of these laws or policies attacked slavery directly. Freeing contrabands required that the slaves take the initiative of running to the army *and* that the army be in close proximity to them. The Confiscation Act only applied to slaves being used for military purposes. Most slaves fit neither category. But these policies showed that the national government was now secure in its understanding that it could implement an emancipation program. These policies also indicated that Lincoln was becoming comfortable with the idea that he could attack slavery as Commander-in-Chief. By the fall of 1862, Lincoln was convinced that there were "no objections" to emancipation "on legal or constitutional grounds; for, as commander-in-chief of the army and navy, in time of war, I suppose I have the right to take any measure which may best subdue the enemy." [49]

VI

As Congress moved to end slavery in the Territories and the District of Columbia, Lincoln contemplated a much larger issue: ending slavery in the Confederacy. Before Lincoln could act, one of his generals once again began to move against slavery without authority. On May 9, 1862, Major General David Hunter, the commander of U.S. forces in the Department of the South, issued General Order No. 11, declaring martial law in his military district, which comprised the states of South Carolina, Georgia, and Florida. The General Order declared all slaves in those states to be free. Hunter justified this on the grounds that slavery was "incompatible" with a "free country" and undermined military operations and his imposition of martial law.

Hunter had vastly exceeded his authority. Even if Lincoln had wanted to support Hunter's program, he could not possibly have approved of a general acting in this manner without authority from the executive branch. Not only did Hunter lack authority for such an action, but he had not even consulted with his military superiors, the War Department, or the President. No President could allow a military commander to assume such powers. Not surprisingly, ten days later Lincoln revoked Hunter's order.[50]

This was not like the situation in Missouri when Frémont acted in 1861. Lincoln did not have to placate border-state slaveholders. South Carolina, Georgia, and Florida were already out of the Union. Nor would such an order cause Lincoln any great political harm. Most Northerners were by this time ready to see the slaveocracy of the deep South destroyed, and Hunter's action was a major step in that direction. Politically, it would not have cost Lincoln much to move against slavery in South Carolina, where the rebellion began. But the need to preserve executive authority and maintain a proper chain of command, if nothing else, forced Lincoln to act. He simply could not let major generals set political policy or, more importantly, create new constitutional law.

Even as he countermanded Hunter, Lincoln gave a strong and unambiguous hint of his evolving theory of law and emancipation. He rebuked Hunter for acting without authority, but he did not reject the theory behind Hunter's General Order: that slavery was incompatible with both a free country and the smooth operation of military forces suppressing the rebellion. Instead, in his "Proclamation Revoking General Hunter's Order of Military Emancipation of May 9, 1862," Lincoln wrote:

> I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the Slaves of any state or states, free, and whether at any time, in any case, it shall have become a

> necessity indispensable to the maintenance of the government to exercise such supposed power, are questions which, under my responsibility, I reserve to myself, and which I can not feel justified in leaving to the decision of commanders in the field.[51]

Lincoln ended his public proclamation by urging the loyal slave states to accept Congress's recent offer to provide funds for compensated emancipation to those states that would "adopt a gradual abolishment of slavery." He asserted that "the change" such a policy "contemplates" would "come as gentle as the dews of heaven, not rending or wrecking anything." He asked the leaders of the slave states—both within the Union and, presumably, those who claimed to be outside it—if they would "not embrace" this offer of Congress to accomplish "so much good... by one effort."[52]

In hindsight, this document is a stunning example of Lincoln deftly and subtly shaping public opinion in advance of announcing his goals. By this time, he was fully aware that none of the Confederate states were ever going to end slavery on their own and that, for the foreseeable future, neither would the border states. But he was willing to continue to make conciliatory gestures, urging a peaceful and seemingly painless solution to the problem. This led him to court conservatives, who might be opposed to federal action against slavery, while at the same time advocating abolition and preparing the public for an eventual end to slavery. He was offering a solution to America's greatest problem with the least amount of social disruption. But he also hinted that there were alternative solutions. He did not exactly say he had the power to end slavery as Commander-in-Chief; he merely asserted that if such power existed, it rested with him, and that he was prepared to act against slavery if he felt emancipation had "become a necessity indispensable to the maintenance of the government."

Lincoln was preparing the public for what he would do. He was carefully laying the groundwork for public support and constitutional legitimacy, on the basis of military necessity. Lincoln the Commander-in-Chief had found the constitutional authority to end slavery that Lincoln the President did not have. Like any good courtroom lawyer, Lincoln was not ready to lay out his strategy all at once. He wanted to prepare his jury—the U.S. public—for what he was going to do. He did not emphatically assert that he had the constitutional power to end slavery in the Confederacy; he merely raised it as a theoretical possibility. At the same time he made it unmistakably clear that if such power existed, it rested with him, and that he was prepared to use that power.

In mid-July 1862, a series of events converged to convince Lincoln that emancipation would have to come soon. On July 12, he met for the second time with representatives and senators from the Upper South, urging them to endorse compensated emancipation—with federal help—for their states. He argued that by taking this stand, the loyal slave states would help the war effort by showing the rebels "that, in no event, will the states you represent ever join their proposed Confederacy." Although Lincoln did not expect the border states to join the rebellion, he apparently believed that voluntary emancipation in those states would be a blow to Confederate hopes and morale.

He also urged the border-state senators and representatives to act in a practical matter to salvage what they could for their constituents. He famously told them that the "incidents of war" could "not be avoided" and that "mere friction and abrasion" would destroy slavery. He bluntly predicted—or, more accurately, warned—that slavery "will be gone and you will have nothing valuable in lieu of it." He also pointed out that General Hunter's proclamation had been very popular and that he considered Hunter an "honest man" and "my friend."[53] The border-state representatives and senators did not take the hint. Two

days later, more than two-thirds of them signed a letter denouncing any type of emancipation as "unconstitutional."[54]

On July 14—the same day that the border-state representatives denounced emancipation—Lincoln took a final stab at gradualism, although he doubtless knew the attempt would fail. On the 14th, he sent the draft of a bill to Congress that would provide compensation to every state that ended slavery. The draft bill left blank the amount for each slave that Congress would appropriate, but provided that the money would come in the form of federal bonds given to the states. This bill was part of Lincoln's strategy to end slavery through state action where possible, as a way of setting up the possibility of ending it on the national level. If he could get Kentucky or Maryland to end slavery, it would be easier to end it in the South. This was also consistent with pre-War notions of federalism and constitutional interpretation, which held that the states had sole authority over issues of property and states. Congress reported this bill and it went through two readings, but lawmakers adjourned before acting on it.

Lincoln surely knew that this bill, like his meeting with the border-state representatives, would not lead to an end to slavery in the Upper South. Nevertheless, this very public attempt at encouraging the states to act to end slavery was valuable. As with his response to Hunter, Lincoln showed the nation that he was not acting precipitously or incautiously. On the contrary, he was doing everything he could to end slavery with the least amount of turmoil and social dislocation possible.

The proposed bill must also be seen in the context of Lincoln's actions on July 13, the day before he proposed the bill and the day after his meeting with the border-state representatives. On the 13th, Lincoln privately told Secretary of State William H. Seward and Secretary of the Navy Gideon Welles that he was going to issue an emancipation proclamation. This was not a sudden response to the border-state representatives rejecting compensated emancipation. Had they accepted Lincoln's proposal, it would not have affected slavery in the Confederacy, where most slaves lived. Indeed, Lincoln told Welles that for weeks, the issue had "occupied his mind and thoughts day and night."[55] That was probably an understatement: Lincoln had almost certainly been troubled by the issue since he had been forced to countermand Frémont's proclamation, maybe even from the moment he first heard of Butler's contraband solution to runaways. Lincoln's conflicting views over emancipation—his desire to achieve it and his sense that the time was not right—were surely evident in his response to Hunter's proclamation, which Lincoln announced on May 19—nearly two months before he spoke with Welles.

Up until this time, Lincoln had stressed that he could not move against slavery until there was a fair prospect of securing the border states and winning the War. He had also framed his power to end slavery as inherent within his powers as Commander-in-Chief. By early July 1862, Lincoln believed he was winning the War, he knew the loyal slave states were secure, and he had a coherent legal and constitutional rationale for emancipation. Ever the master politician, Lincoln suddenly shifted the argument for emancipation to one of military necessity. This was the key to gaining full Northern support for what he was about to do.

Thus, he told Welles that the issue was one of military necessity. "We must free the slaves," he said, "or be ourselves subdued." Slaves, Lincoln argued "were undeniably an element of strength to those who had their service, and we must decide whether that element should be with or against us." Lincoln also rejected the idea that the Constitution still protected slavery in the Confederacy. "The rebels," he said, "could not at the same time throw off the Constitution and invoke its aid. Having made war on the Government, they were subject to the incidents and calamities of war."[56] Here Lincoln sounded much like General Butler in his response to Major Carey.

Since that incident, the administration had accepted the idea that the Fugitive Slave Clause of the Constitution could not be invoked by rebel masters. But why, Lincoln might have asked, was the Fugitive Slave Clause different from any other part of the Constitution? If rebel masters were not entitled to the protection of that clause, then they were not entitled to the protection of any part of the Constitution. Thus, Lincoln had found a constitutional theory that would be acceptable to most Northerners. It might not pass muster with the U.S. Supreme Court, but that issue might not arise until after most slaves had been freed. More importantly, it would help secure Northern public opinion.

The military-necessity argument is a more curious one. Lincoln did not begin to move towards emancipation until after the United States had had substantial military success in the first five months of 1862. Thus, emancipation was not a desperate act forced by military necessity. Rather, it was an act that could only be accomplished by military success. However, in framing its constitutionality, Lincoln argued simultaneously that emancipation grew out of military power—that is his power as Commander-in-Chief—and that as Commander-in-Chief he could do whatever was necessary to win the War and thus preserve the Union. This, too, would garner public support. Lincoln might know that he should free the slaves for moral reasons and that he had the constitutional power to do so, but he also knew that he would have greater support in the North if his actions appeared to be tied to military necessity. Thus, the irony of emancipation emerged. Lincoln could only move against slavery when he thought he could win the War, but he could only sell emancipation to the North—and only justify it constitutionally—if he appeared to *need* it to win the War. This irony, however, may be more apparent than real: Lincoln moved against slavery when he was winning the War, but he reasonably believed that emancipation would help secure a final victory.

Four days after speaking with Welles and Seward, Lincoln signed the Second Confiscation Act into law.[57] This law was more expansive than the First Confiscation Act. It provided a death penalty, as well as lesser penalties—including confiscation of slaves—for treason and also allowed for the prosecution of "any person" participating in the rebellion or who gave "aid and comfort" to it. The law also provided for the seizure and condemnation of the property of "any person within any State or Territory of the United States . . . being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion." This included Confederate sympathizers in the border states as well as in the Confederacy.

Two separate provisions of the Second Confiscation Act dealt, in a comprehensive way, with the issue of runaway slaves and contrabands. Under Section 9 of the law, any slave owned by someone "engaged in rebellion against the government" who escaped to Union lines or was captured by U.S. troops would be "forever free of their servitude, and not again held as slaves." Section 10 prohibited the military from returning any fugitive slaves to any masters, even those in the border states, unless the owner claiming the slave would "first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner, and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto."

The Second Confiscation Act was one more step toward creating public opinion that would allow emancipation. It also helped clarify the legal and constitutional issues by once again affirming that under their respective war powers, either Congress or the President might emancipate slaves. The Act did not, however, do much to actually free any slaves. Although it provided numerous punishments for rebels, their slaves would only become free after some judicial process. Had there been no Emancipation Proclamation or Thirteenth Amendment, the Act might have eventually been used to

litigate freedom, but it would have been a long and tedious process. The only certain freedom created by the Act came in Sections 9 and 10, which secured liberty to fugitive slaves escaping rebel masters, but this was not really much of a change from existing policy.

On July 22, five days after signing the Second Confiscation Act, Lincoln presented the Cabinet with his first draft of the Emancipation Proclamation. The draft began with a reference to the Act and contained a declaration warning "all persons" aiding or joining the rebellion that if they did not "return to their proper allegiance to the United States" they would suffer "pain of the forfeitures and seizures" of their slaves.[58] This language would not appear in the final proclamation. However, a few days after he showed this language to the Cabinet, he recast it as a separate public proclamation.[59]

The rest of the first draft of the proclamation focused on Lincoln's intent to urge Congress to give "pecuniary aid" to those states voluntarily ending slavery and "practically sustaining the authority of the United States." This was one more attempt to get the loyal slave states to end slavery. The final sentence of this draft proclamation finally went to the main issue. Lincoln declared that "as a fit and necessary military measure," he did "order and declare" as "Commander-in-Chief of the Army and Navy of the United States" that as of January 1, 1863, "all persons held as slaves within any state or states, wherein the constitutional authority of the United States shall not then be practically recognized, submitted to, and maintained, shall then, thenceforward, and forever be free."

This was the great change for Lincoln. The Cabinet now knew the President believed that he had the constitutional power to end slavery in the Confederacy.

VII

For the rest of the summer, Lincoln quietly prepared the public for emancipation. Illustrative of this was his famous letter to the *New York Tribune* on August 22. In an editorial titled "The Prayer of Twenty Millions," Horace Greeley had urged Lincoln to end slavery. Lincoln responded with a letter declaring that his goal was to "save the Union" and that he would accomplish this any way he could. He would free some slaves, all slaves, or no slaves to save the Union. He also noted that this position was a description of his "*official* duty" and not a change in his "oft-expressed *personal* wish that all men every where could be free."[60]

The answer to Greeley was one more step to creating the political conditions for emancipation. Lincoln had now warned the nation that he would end slavery if it were necessary to preserve the Union. He was also now on record as asserting that he had the power to end slavery, although he did not spell out exactly what that power was or where in the Constitution he found it.

Lincoln had been quietly and secretly moving toward this result all summer. His letter to Greeley was a prelude to what he had already determined to do. No Northerner could be surprised when he did it. Abolitionists could be heartened by having a President who believed, as they did, that "all men every where [should] be free." Conservatives would understand that they had to accept emancipation as a necessity.

On September 13, Lincoln replied coyly to an "Emancipation Memorial" from a group of Chicago ministers. He asserted that emancipation was useless without a military victory and would be "like the Pope's bull against the comet." He asked how he "could free the slaves" when he could not "enforce the Constitution in the rebel States."[61] Tied to this problem, he noted, was the possibility that emancipation would take "fifty thousand bayonets" from Kentucky out of the Union army and give them to the Confederates.[62] Lincoln surely no longer believed this was the case, since Kentucky was firmly in the Union, but the statement underscored his long-standing belief that

Lincoln issued the preliminary Emancipation Proclamation in his dual capacity as "President of the United States of America, and Commander-in-Chief of the Army and Navy." The purpose of the Proclamation was the "restoring [of] the constitutional relations" between the nation and all the states.

he had to make sure Kentucky was secure before he could move against slavery in the Confederacy. He also noted that he needed full public support to succeed. Thus, he urged the ministers to be patient. Emancipation could only come with military success and the ability to "unite the people in the fact that constitutional government" should be preserved. In passing, Lincoln also noted that he had the power, as Commander-in-Chief, to emancipate the slaves in the Confederacy. Most importantly, perhaps, he also told these ministers that he had no "objections of a moral nature" to emancipation.[63]

Even as he responded to the ministers, evading any commitment and refusing to reveal his plans, Lincoln knew the moment of emancipation was close. To end slavery, he needed the prospect of military success, the ability to secure the border states, public support for black freedom, and a constitutional theory to justify his actions. The War had being going well since the previous December, but he needed a significant battlefield victory to have all his prerequisites in place. When he had that victory, emancipation would not be a "necessity" of preserving the Union, as he had said in the Greeley letter; rather, it would be the fruit of victory. The victory at Antietam was the last piece of the puzzle. Lincoln could now issue the Emancipation Proclamation as the logical fruit of the military successes that had taken place since the previous December.[64]

On September 22, Lincoln issued the preliminary Proclamation, declaring that it would go into effect in 100 days. He chose the 22nd carefully, because it would be exactly 100 days until January 1, 1863, thus tying emancipation to the new year. He also now had his constitutional and legal theory for issuing the proclamation, which he had laid out in the Greeley letter.

He issued the Proclamation in his dual capacity as "President of the United States of America, and Commander-in-Chief of the Army and Navy." The purpose of the Proclamation was the "restoring [of] the constitutional relations" between the nation and all the states. The preliminary Proclamation authorized the enlistment of black troops and put the nation on notice that in 100 days, Lincoln would move against slavery in any place that was still in rebellion against the nation.[65]

On January 1, 1863, the final Proclamation was put into effect. Here Lincoln made the constitutional argument even more precise. He issued the Proclamation "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion." Constitutionally, this was a war measure designed to cripple the ability of those in rebellion to resist the lawful authority of the United States. It applied only to those states and parts of states that were still in rebellion. This was constitutionally essential. As Lincoln had told the ministers from Chicago, he only had power to touch slavery where he could not "enforce the Constitution." Where the Constitution was in force, federalism and the Fifth Amendment prevented presidential emancipation. The document was narrowly written, carefully designed to withstand the scrutiny of the Supreme Court, still presided over by Chief Justice Taney. It narrowly applied only to the states in rebellion. It would not threaten Kentucky or Missouri, and it would not threaten the constitutional relationship of the states and the federal government.

VIII

In 1948, the great historian Richard Hofstadter began a frontal assault on the iconic image of Abraham Lincoln in U.S. history and culture. Hofstadter's Lincoln was a cynical politician, "among the world's great political propagandists."[66] Hofstadter severely criticized the Emancipation Proclamation and Lincoln's road to it. It had taken Lincoln more than a year to even propose emancipation, and even then Lincoln seemed to vacillate, apparently willing to withdraw the preliminary Proclamation if the rebellious states would return to the Union. He did not issue the final Emancipation Proclamation until nearly two years into the War. And when finally issued, the Proclamation did not free all the slaves in the United States. Hofstadter offers a caustic critique of the final document. Lincoln was one of the greatest craftsmen of the English language in U.S. political history. But here, in the most important moment of his life, he was a pettifogger, drafting a turgid and almost incomprehensible legal document that had, in Hofstadter's words, "all the moral grandeur of a bill of lading."[67]

A careful reading of the Proclamation suggests that Hofstadter was right: it did have all the moral grandeur of a bill of lading. But Hofstadter failed to understand the significance of a bill of lading to a skilled railroad lawyer, which is what Lincoln had been before the War. A bill of lading was the key legal instrument used to guarantee the delivery of goods between parties who were far apart and might never have known each other. A bill of lading allowed a seller in New York to ship goods safely to a buyer in Illinois, with both knowing the transaction would work. One contemporary of Lincoln's living in Britain, Karl Marx, fully understood the highly legalistic nature of the Proclamation. Writing for a London newspaper during the War, Marx had a clear fix on what Lincoln had done and why he did it the way he did: the "most formidable decrees which he hurls at the enemy and which will never lose their historic significance, resemble—as the author intends them to—ordinary summons, sent by one lawyer to another."[68]

Thus, in the end, when all the preconditions were met—the border states secured, military victory likely, political support in place, and the constitutional and legal framework

developed—Lincoln went back to his roots as a lawyer and wrote a carefully crafted, narrow document: a bill of lading for the delivery of freedom to some three million Southern slaves. Fearful of a constitutional challenge, Lincoln offered a document with no frills and a concise constitutional theory: that as Commander-in-Chief, he could use his powers to take war-making property away from the enemy. He did not use the Proclamation to make a speech or to inspire. He wanted a tight business document for the business at hand. He wanted a bill of lading. The vehicle for delivery would be the U.S. Army and Navy, of which he was Commander-in-Chief. As the armies of the United States moved deeper into the Confederacy, they would bring the power of the Proclamation with them, freeing slaves every day as more and more of the Confederacy was redeemed by military success. This was the moral grandeur of the Proclamation and of Lincoln's careful and complicated strategy to achieve his personal goal: that "all men every where could be free."[69]

ENDNOTES

[1]Andrew Jackson left office in 1837 and Theodore Roosevelt took office in 1901. Lincoln stands as the only great President in that period. One need not endorse the blundering-generation theory of the Civil War to acknowledge that Lincoln was preceded by three of the worst Presidents in our history. *See generally* Paul Finkelman, **Millard Fillmore** (2011); Jean Baker, **James Buchanan** (2004); and Michael Holt, **Franklin Pierce** (2010). Similarly, Lincoln was followed by one of the worst of them all, Andrew Johnson. In the three decades after Lincoln's death, only Grover Cleveland and William McKinley—hardly household words—rise to the level of a good or successful President. Ulysses S. Grant was America's greatest general, but failed as a President. James Garfield had potential, and Chester Arthur was better than we might have expected from such a political hack.

[2]See most recently Eric Foner, **The Fiery Trial: Abraham Lincoln and American Slavery** (2010). I have dealt more extensively with these issues in Paul Finkelman, "Lincoln, Emancipation and the Limits of Constitutional Change," 2008 *Supreme Court Review* 349–87 (2009), and Paul Finkelman, "Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading," in William A. Blair and Karen Fisher Younger, eds., **Lincoln's Proclamation: Race, Place, and the Paradoxes of Emancipation** (2009) 13–44.

[3]Determining exactly how many slaves were covered by the Emancipation Proclamation is impossible. In 1860, the U.S. Census counted 3,953,760 slaves in the country. This was an increase of about 750,000 over the 1850 census. Using this crude measure, we could extrapolate that, absent the War, by January 1863 the slave population would have increased to over 4,100,000. The Proclamation excluded all four of the loyal slave states—Maryland, Delaware, Kentucky, and Missouri—as well as Tennessee, which, Lincoln asserted (based mostly on political considerations), was back in the Union. Slavery had already been abolished in the District of Columbia. These states had over 725,000 slaves in 1860. In addition, the proclamation excluded various counties in Virginia, including the forty-eight that made up West Virginia, and a number of named parishes in Louisiana. It is likely that these places contained at another 300,000 to 400,000 slaves. Thus, I am guesstimating that the Emancipation Proclamation affected about 3,000,000 slaves.

[4]Ira Berlin, "Who Freed the Slaves? Emancipation and Its Meaning," in David W. Blight and Brooks D. Simpson, **Union and Emancipation: Essays on Politics and Race in the Civil War Era** (1997) 110–17, quoted at 111.

[5]Lincoln to Albert G. Hodges, April 4, 1864, in Roy P. Basler, **The Collected Works of Abraham Lincoln** (1953) 7:262–63 [hereafter cited as **CW**].

[6]*In re Jane, A Woman of Color*, 5 Western Law Journal 202 (Ill., 1848).

[7]*Bailey v. Cromwell*, 3 Scammon 71 (Ill., 1841).

[8]"Protest in the Illinois Legislature on Slavery," in **CW**, 1:74–75.

[9]*Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857). Space does not permit an analysis of Lincoln's critique of *Dred Scott*. I discuss this at some length in Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (1981; reprint, 2001) and Paul Finkelman, "*Dred Scott v. Sandford*: The Case That Made Lincoln President," *Lincoln Lore* 1892, 2–9 (Spring 2008).

[10]Lincoln to Hodges, in **CW**, 7:281.

[11]Garrison believed the Constitution was unalterably proslavery and advocated disunion as the only remedy. I have written about this issue in the following places: Paul Finkelman, **Slavery and the Founders: Race and Liberty in the Age of Jefferson**, 2d ed. (2001) (hereafter cited as **Slavery and the Founders**); "The Founders and Slavery: Little Ventured, Little Gained," 13 *Yale Journal of Law and the Humanities* 413–49 (2001); "The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations," 4 *Barry Law Review* 1–19 (2003); and "The Proslavery Origins of the Electoral College," 23 *Cardozo Law Review* 1145–57 (2002). Other radical abolitionists, such as Lysander Spooner, believed it

proper to ignore all constitutional restraints and simply end slavery.

[12]Abraham Lincoln, "First Inaugural Address—Final Text," in **CW**, 4:262–63.

[13]Quoted in Jonathan Elliot, **The Debates in the Several State Conventions on the Adoption of the Federal Constitution**, 5 vols. (1888; reprint, Burt Franklin, 1987) 4:286. For greater discussion of this issue at the Convention, see Finkelman, **Slavery and the Founders**.

[14]This was the outcome in *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857); see Paul Finkelman, "Was *Dred Scott* Correctly Decided? An 'Expert Report' for the Defendant," 12 *Lewis & Clark Law Review* 1219 (2008).

[15]Helen J. Knowles, "The Constitution and Slavery: A Special Relationship," *28 Slavery and Abolition* 309 (2007); Helen J. Knowles, "Securing the 'Blessings of Liberty' for All: Lysander Spooner's Originalism," 5 *NYU Journal of Law & Liberty* 34 (June 2010); Randy E. Barnett, "Was Slavery Unconstitutional before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation," 28 *Pacific Law Journal* 977 (1997).

[16]Paul Finkelman, ***Dred Scott v. Sandford*: A Brief History** (1995).

[17]For a discussion of these laws, see Arthur Zilversmit, **The First Emancipation: The Abolition of Slavery in the North** (1967); Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (1981); Gary B. Nash and Jean R. Soderlund, **Freedom by Degrees: Emancipation in Pennsylvania and Its Aftermath** (1991); Shane White, **Somewhat More Independent: The End of Slavery in New York City, 1770–1810** (1991), and Robert Fogel and Stanley Engerman, "Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation," 3 *Journal of Legal Studies* 377 (1974).

[18]"An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia," April 16, 1862, 12 Stat. 376.

[19]Lincoln to Hodges, in **CW**, 7:281.

[20]"Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina, December 24, 1860," reprinted in Kermit L. Hall, Paul Finkelman, and James W. Ely, Jr., eds., **American Legal History**, 3d ed. (2005) 250.

[21]*Id.* at 251.

[22]*Id.*

[23]*Id.* at 252.

[24]For modern critical assessments of Lincoln and emancipation, see Richard Hofstadter, **The American Political Tradition** (1948); see Lerone Bennett, Jr., **Forced into Glory: Abraham Lincoln's White Dream** (2000); LaWanda Cox, "Lincoln and Black Freedom," in Gabor S. Boritt and Noman O. Forness, eds., **The Historian's Lincoln: Pseudohistory, Psychohistory, and History** (1988); Berlin, "Who Freed the Slaves?"; Julius Lester, **Look Out Whitey! Black Power's Gon' Get Your Mama!** (1968); and Lerone Bennett, Jr., "Was Lincoln a White Supremacist?" 23 *Ebony* 35 (1968).

[25]There were three vacancies on the Court when Lincoln took office, and he could not fill them right away. The seats could not be filled until Congress reconfigured the circuits for Justices.

[26]Don E. Fehrenbacher, **The *Dred Scott* Case: Its Significance in American Law and Politics** (1978).

[27]Peggy Wagner, Gary W. Gallagher, and Paul Finkelman, **The Library of Congress Civil War Desk Reference** 70–72 (2002).

[28]Lowell Hayes Harrison, **Lincoln of Kentucky** (2000) 135; *see also* David Lindsey, "Review of **The Civil War in Kentucky** by Lowell H. Harrison," 63 *Journal of American History* 136 (1976).

[29]"Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," September 13, 1862, **CW**, 5:419–25, quotations on 420.

[30]Bennett, **Forced into Glory**.

[31]However, it is also possible to argue that the Emancipation Proclamation led to a longer, bloodier war. Without black troops fighting against them, the Confederates might have been willing to return to the Union before all their armies were completely defeated. Racism and the desire to hold on to slavery may have prevented more rational forces in the Confederacy from working for a negotiated peace.

[32]Quoted in James M. McPherson, **Battle Cry of Freedom: The Civil War Era** (1988), 368.

[33]Charles Dew, **Bond of Iron: Master and Slave at Buffalo Forge** (1994) 264–311.

[34]Quoted in McPherson, **Battle Cry of Freedom**, 354.

[35]Maj. Gen. Benjamin F. Butler to Lt. Gen. Winfield Scott, May 24/25, 1861, in **The War of the Rebellion: The Official Records of the Union and Confederate Armies**, 127 vols., index, and atlas (1880–1901), ser. 2, vol. 1:752 (hereafter cited as **O.R.**)

[36]Benjamin F. Butler, **Butler's Book** (1892) 256–57.

[37]Simon Cameron to Maj. Gen. Benjamin F. Butler, Aug. 8, 1861, **O.R.**, ser. 2, vol. 1:761–62.

[38]*Id.*

[39]Special Orders No. 72, October 14, 1861, and General Orders No. 34, November 1, 1861, **O.R.**, ser. 2, vol. 1: 774–75 (setting out pay scale for black laborers).

[40]"An Act to confiscate Property used for Insurrectionary Purposes," August 6, 1861, 12 Stat. 319.

[41]J. C. Frémont, **Proclamation**, August 30, 1861, **O.R.**, ser. 1, vol. 3:466–67.

[42]Lincoln to John C. Frémont, Sept. 2, 1861, in **CW**, 4:506.

[43]Quotation in William E. Gienapp, **Abraham Lincoln and Civil War America: A Biography** (2002) 89.

[44]Lincoln to Orville H. Browning, Sept. 22, 1861, in **CW**, 4:531–32.

[45]Lincoln to John C. Frémont, Sept. 11, 1861, in **CW**, 4:517–18.

[46]General Order No. 28, Nov. 2, 1861, **O.R.**, Additions and Corrections to Series 2, vol. 3, 558–59 (1902).

[47]Stephen Oates, **With Malice Toward None: The Life of Abraham Lincoln** (1978) 292.

[48]"An Act to make an Additional Article of War," March 13, 1862, 12 Stat 354. This law modified an important part of the Fugitive Slave Law of 1850, which had authorized the use of the military or the militia to return fugitive slaves.

[49]"Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," September 13, 1862, in **CW**, 5:419–25, quotations on 421.

[50]"Proclamation Revoking General Hunter's Order of Military Emancipation of May 9, 1862," May 19, 1862, in **CW**, 5:222.

[51]*Id.*, 222–23.

[52]*Id.*, 223.

[53]"Appeal to Border State Representatives to Favor Compensated Emancipation," July 12, 1862, in **CW**, 5: 317–18; Gienapp, **Abraham Lincoln and Civil War America**, 110; McPherson, **Battle Cry of Freedom**, 503.

[54]**CW**, 5: 319; Gienapp, **Abraham Lincoln and Civil War America**, 110; McPherson, **Battle Cry of Freedom**, 503.

[55]Quoted in McPherson, **Battle Cry of Freedom**, 504.

[56]*Id.*

[57]"An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes," July 17, 1862, 12 Stat 589.

[58]"Emancipation Proclamation—First Draft (July 22, 1862)," in **CW**, 5:336.

[59]"Proclamation of the Act to Suppress Insurrection," July 25, 1862, in **CW**, 5:341.

[60]Lincoln to Horace Greeley, August 22, 1862, in **CW**, 5:388–89.

[61]"Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," 420.

[62]*Id.*, 423.

[63]*Id.*, 424, 421.

[64]In hindsight, of course, it is clear that Antietam was not the knockout blow Lincoln was hoping for, and the end of 1862 and the first half of 1863 would be a period of enormous frustration for Lincoln as the War went badly. But Lincoln could not have known or foreseen this when he issued the preliminary proclamation.

[65]"Preliminary Emancipation Proclamation, September 22, 1862," in **CW**, 5:433; "Proclamation No. 16," 12 Stat. 1267 (Sept. 22, 1862).

[66]Richard Hofstadter, **The American Political Tradition**, 110, 115, 131.

[67]*Id.*

[68]Quoted in Phillip Shaw Paludan, **The Presidency of Abraham Lincoln** (1994) 187–88.

[69]Lincoln to Horace Greeley, August 22, 1862, in **CW**, 5:388–89.

The Judicial Bookshelf

DONALD GRIER STEPHENSON, JR.

Change at the Supreme Court may be most visible and frequent in the progression of statutory and constitutional questions the Justices resolve collectively, but it may also be equally highlighted by an individual Justice's decision. This reality became plainly apparent in a letter that Justice John Paul Stevens sent to the White House on April 9, 2010, just eleven days shy of his 90th birthday: "My dear Mr. President: Having concluded that it would be in the best interests of the Court to have my successor appointed and confirmed well in advance of the commencement of the Court's next Term, I shall retire from regular active service as an Associate Justice . . . effective the next day after the Court rises for the summer recess this year."[1] His statement was dated almost a year after Justice David Souter dispatched a similar notice to President Obama on May 1, 2009, announcing his intention to leave the Bench. Thus, for the fifth time in as many years, the machinery of executive nomination and senatorial advice and consent for the High Court churned again.

Many who follow the Court closely probably grasped the significance of the departure of this Justice who had taken his seat on December 19, 1975. President Gerald R. Ford had nominated him on November 12 to fill the vacancy created by the retirement of Justice William O. Douglas after thirty-six years of service. Indeed, Douglas had shattered the record long held by Justice Stephen J. Field, who sat for thirty-four years and nine months, between March 1863 and December 1897. Stevens' tenure, stretching across thirty-four years and six months, even surpassed Justice Hugo L. Black's thirty-four years and one month.[2]

The American political system underwent major changes between Justice Stevens' arrival and his departure. As evidence, one need look no further than the judicial confirmation process itself. The hearings before the Senate Judiciary Committee on the Stevens nomination filled three days in December 1975.[3] Alongside proceedings for more recent nominees to the High Court, the hearings for him merit a revisit. Senators seemed nearly as concerned about his health—Stevens had had heart surgery in the summer of 1974—as his approach to constitutional interpretation. Although *Roe v. Wade*,[4] the landmark abortion ruling, had come down in February

1973, no Senator queried him about a woman's constitutionally protected right to terminate a pregnancy. Discussion of a constitutional right to privacy instead occurred in the context of criminal justice, particularly with respect to searches and seizures and electronic surveillance.

As surprising as it may seem today, the near invisibility of abortion as an issue in the hearings[5] in one sense merely reflected the times. Abortion had remained largely in the background as an election issue in 1972. Neither party platform mentioned it, although Democrats considered and voted down 1,570 to 1,103 a minority plank favoring abortion rights. Republican Richard Nixon was already on record in opposition to "abortion on demand" but advocated no action by the federal government. In separate statements during in the winter and spring of 1972, Democrat George McGovern spoke of abortion as "a private matter which should be decided by a pregnant woman and her own doctor." Nonetheless, he believed that abortion was "a matter to be left to the state governments," which had "sole jurisdiction."[6] Even as late as the year before *Roe* came down, abortion seemed to be a subject presidential politics should largely avoid.

That rule tended to characterize much of the 1976 campaign as well. With Ford and Jimmy Carter heading their respective tickets in 1976, after *Roe* had come down, neither pro-abortion nor anti-abortion activists could point to an outspoken champion. Carter personally disapproved of abortion but opposed a constitutional amendment to end the practice, as did Republican incumbent Ford. Instead, Ford favored the status quo ante—an amendment that would return abortion policy to the states. Of major contenders for the Democratic and Republican nominations in 1976, only Ronald Reagan was uncompromising in his criticism of policies that countenanced abortion. Indeed, with Ford claiming a lead of barely sixty delegates in the days before the Republican convention, Reagan tried to woo uncommitted delegates by claiming, among other things, that Ford was duplicitous on the issue.[7] Accordingly, both Carter and Ford avoided polarizing extremes and played down the issue of abortion rights in their campaigns. It would not be until 1980 that abortion rights seized a prominent place in presidential campaign rhetoric, a position the topic has not yet relinquished. Indeed, it was not until Sandra Day O'Connor's nomination to the Supreme Court in 1981 that the subject first became entangled in the politics of Supreme Court confirmations. Thus, unencumbered by divisive social issues, the Senate's vote of 98–0 to confirm Ford's nominee Stevens on December 17 seemed almost anticlimactic.

The Stevens experience, however, stood in sharp contrast to what lay not far ahead. When President Reagan picked Judge Robert Bork to fill Justice Lewis Powell's place little more than a decade after Stevens took his seat, the confirmation process had become truly nasty. The Senate Judiciary Committee "took everything Judge Bork had ever said or written, ripped it from context, wove it into a rope, and flung it across his shoulders like a hangman's noose," according to one observer. "Ambitious young lawyers watched and rethought their old assumption that it would help them in their rise to be interesting and quotable. In fact, they'd have to be bland and indecipherable."[8]

If confirmation politics changed markedly between 1975 and 2010, so did the Court's business itself. When Justice Stevens arrived on the Bench, the Justices had yet to decide an affirmative action case on the merits involving higher education. Well before his retirement, the Court had issued opinions in three.[9] Moreover, one suspects that, as President Ford ranked the short list of prospective nominees that Attorney General Edward Levi had prepared for him,[10] of all the various considerations that might have led Ford to pick Stevens, the legal status of captured terrorists was not among them.[11] Yet near the end of Stevens' career, not only was that question prominent on the docket, but Stevens had spoken for the majority in one of

the Court's most important pronouncements on it.[12]

Ironically, the Judiciary Committee's hearings gave the nominee an opportunity to address both topics indirectly. The first came in an exchange with Senator John Tunney of California about what the Senator referred to as "avoidance techniques,"[13] whereby the Court would sometimes decide a case without addressing the underlying constitutional question. When asked to illustrate that with an example, Judge Stevens replied; "I was surprised at the law school reverse discrimination case. I would have thought the court would have reached that issue on the basis of the facts."[14] Stevens was referring to *DeFunis v. Odegaard*,[15] which was decided the year before his nomination. Here, the Court held that a suit brought by a white lawschool applicant challenging a racially preferential admissions program at the University of Washington was moot. Although the case had attracted national attention, the majority concluded that since Marco DeFunis had already been admitted to law school by court order and was about to graduate, he had suffered no injury.[16]

Stevens' comments on treatment of captured combatants occurred in an exchange with Senator Robert C. Byrd of West Virginia. The Senator referred to the chapter in **Mr. Justice**[17] that then-attorney John Stevens had authored on Justice Wiley Rutledge, for whom the nominee had clerked during 1947–1948. Byrd focused specifically on a quotation Stevens had drawn from Justice Rutledge's dissent in *In re Yamashita*,[18] in which the Supreme Court upheld the denial of General Tomoyuki Yamashita's writ of habeas corpus following his conviction by a military commission for war crimes committed by Japanese forces in the Philippines near the end of World War II.[19] Joined by Justice Frank Murphy, Rutledge argued in a lengthy opinion that the procedures and rules of evidence employed by the military commission in Yamashita's trial departed greatly from those used in courts-martial and so fell short of what justice required. "It is not too early—it is never too early—for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process.... This long held attachment marks the great divide between our enemies and ourselves."[20] "Twenty-nine years have passed since those words were written," mused Senator Byrd. "I am curious as to how you would respond philosophically to the opinion in this case. Is this a concept of law you would take with you to the Supreme Court if you are confirmed?" "Senator," replied Judge Stevens, "when I wrote that chapter on Mr. Justice Rutledge, I felt I could not improve upon his language at the time it was written and I could not do so now."[21]

Even these brief exchanges at the hearings illustrated that the Court remains central in the American political system as much in terms of its rulings as in the identity of those who sit on its Bench, a reality reflected in recent books about the judiciary.

Consider, for example, the first sentences in **The Supreme Court and the American Elite, 1789–2008** by Lucas Powe, Jr.,[22] who teaches law and government at the University of Texas: "Since the 1984 election the Supreme Court has been front and center in presidential politics. Each party's candidate warns of dire consequences should his opponent prevail and be afforded the opportunity to appoint new Justices, thereby impacting the future well after the president leaves office. Today the Supreme Court is confident and powerful (enough so to enter without hesitation the 2000 presidential contest). It did not begin this way. Nor did it have to end up this way. The Court's history, like all histories, is contingent."[23]

Powe has written a history of the Court within a larger history of the United States and its politics. "In a typical book on American history," he explains, "the Supreme Court appears, if at all, as an interruption here and there.... Conversely, in a history of the Supreme Court, political events intrude occasionally, but the Court is so busy there

is no chance for a sustained narrative of that history."[24] Accordingly, the author attempts to combine both, although, as befitting a volume with barely 400 pages, the result could be neither a full history of the Court nor a full political history of the nation. Given the complexity of each subject, the book is profitably best read by someone who begins with at least some knowledge of both American political history and the Court. It would probably not be serviceable as a stand-alone volume to introduce a novice to both.

The dominant theme of Powe's book "is that the Court is a majoritarian institution." He sees it "as part of a ruling regime doing its bit to implement the regime's policies."[25] As Powe acknowledges, this was Finley Peter Dunne's point in his newspaper column near the turn of the twentieth century, when he had his fictional Irish American saloonkeeper Mr. Dooley observe that "th' Supreme Coort follows th' ilictions returns."[26] Powe's theme and Mr. Dooley's comment also embody a familiar principle of political science that anticipates that the Court will be responsive to changing political winds sooner rather than later. "The political views on the Court," Robert Dahl concluded in the 1950s, "are never for long out of line with the views dominant among the lawmaking majorities of the United States."[27] That is, instead of persisting in a counter-majoritarian role at odds with the popular mood, the Court eventually reverts to a legitimizing role in which the Justices place the stamp of approval on policies that once may have been deemed constitutionally unacceptable. The proposition assumes that time is on the side of the dominant political party, either precipitating a change of mind by a previously contrarian Bench or allowing the appointment of Justices who reflect the values of the ruling coalition. Moreover, as Powe explains, "Justices are, after all, subject to the same economic, social, and intellectual currents as other upper-middle class professional elites."[28] This was Judge Benjamin Cardozo's point when the future Justice advised decades ago that "[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[29] Still, Powe adds as a corollary to Mr. Dooley's wisdom that "it is easier for the Court to follow the election returns if several justices die or retire shortly after the election."[30] Readers will want to test Powe's theme alongside the examples his narrative offers.

The narrative itself unfolds quickly and is sprinkled with both insight and opinion. No one's favorite Justice or Court escapes without needling. Consider several sentences about the Florida election case, *Bush v. Gore*.[31] "As between the Florida [supreme] court and the Court, Scalia had little doubt about who should decide the matter. He also claimed that the Court needed to put an end to the contest, because for the past three weeks the nation 'look[ed] like a fool in the eyes of the world.' It was, apparently, one brief shining moment when Scalia cared about world opinion."[32] "In dissent Stevens asserted that it was 'perfectly clear [that] the Nation's confidence in the judge as an impartial guardian of the rule of law' had been compromised. But opinion polls showed virtually no change in the public's view of the Court before and after the decision."[33] As for the stylistic quality of the Court's output in some recent decades, the author seems unimpressed: "The Court of the Carter-Reagan period could compete with any for producing lengthy, ponderous opinions on top of more lengthy, ponderous opinions, necessitating reducing the type size in the *United States Reports*. . . . Opinions were occasionally lightened by Brennan's bewailing a majority's refusal to adhere to precedent—hypocritical words that he never uttered when he was riding high during the Warren era. Nevertheless, with Black, Douglas, and Harlan gone, it became clear that this was a diminished court, one lacking the intellectual vigor of the past. Only someone whose job required it would read the Court's opinions."[34]

Presumably, the Court matters principally not because of the style of its prose, but because of the significance of the rulings it

proclaims. And those declarations embody "some of America's most contentious issues," although the author is quick to add that the list does not include the "hard ones like dealing with the Wall Street financial crisis, health care, Social Security, trade policy, immigration . . . and North Korea." In his view, the Justices will steer clear of most such knotty matters. "[H]owever confident and pretentious, the Court will continue to function as it has for most of its existence—to harmonize the Constitution with the demands of majoritarian politics."[35]

Lincoln and the Court, by attorney Brian McGinty,[36] offers both a proving ground for Powe's majoritarian thesis and a description of a judiciary that confronted truly "hard" questions in a situation unlike any the United States had ever encountered. The presidential election of 1860, which brought Abraham Lincoln to the White House, demonstrated, among other things, a colossal failure of politics. At its best, politics is a mechanism for conflict resolution. In 1860, however, a large section of the country refused to accept the dictates of the ballot box, and violent calamity ensued. Moreover, the election was what students of American electoral politics term a critical or realigning event—a once-a-generation occurrence. In this kind of political phenomenon, the electorate decidedly moves from the ranks of one party into another, thus handing control of most machinery of government—the presidency, Congress, and many state political systems—to the newly dominant party for a period of years that typically span several presidential terms. As a result, the limits of what had been thought to be politically possible expand considerably.[37]

In this instance, realignment allowed the Republican party to emerge from the Civil War with a firm grip on the presidency and Congress. Not until 1874 did Democrats recapture control of the House of Representatives for a term, and not until the election of 1878 did they dominate both houses of Congress. Until the election of 1912, the executive branch remained out of their hands entirely, aside from Grover Cleveland's bifurcated administrations following the elections of 1884 and 1892.

But in the near term, the newly inaugurated President confronted secession and civil war by the spring of 1861. He and Congress then took extraordinary steps to confront this unprecedented crisis. Most scholars who have studied Lincoln as Chief Executive recognize him as one of the great molders of the American presidency. Most especially, his years as Chief Executive demonstrate the impact that happenstance—what happens on a particular President's watch—can have on any administration. One has only to try to imagine a Lincoln administration without the Civil War. But whatever effects the Civil War had on Lincoln and Lincoln on the Civil War years, events of his presidency significantly affected the Supreme Court. This is the story McGinty tells in **Lincoln and the Court**. A determined President was pitted against an equally determined Chief Justice Roger B. Taney in a context and series of events that shaped both the Court and the nation. Probably to the benefit of both, neither the Court nor the new Republican majority pressed its own interests too far. The story that McGinty's book relates is good drama. In scope, style, and readability, it is much like **The Great Decision**,[38] which recently recounted the conflict among Presidents John Adams and Thomas Jefferson and Chief Justice John Marshall that surrounded *Marbury v. Madison*.[39]

For several reasons, McGinty believes relations between Lincoln and the Court "have a just claim on the attention of history."[40] First, the Civil War was, at its heart, "a struggle between two competing theories of constitutional law. According to one view the United States was a league of sovereign states whose legal ties were severable at any time for any reason, subject only to the political judgment of the severing states. . . . According to the other, the United States was a permanent union of states created by sovereign 'people of the United

States' and tied together by a 'supreme law' that created firm bonds of nationhood."[41] Second, "Lincoln was, more than any other chief executive in the nation's history, a 'lawyerly' president. . . . Many young men in nineteenth century America became lawyers first and sought political careers thereafter. . . . Lincoln, in contrast, developed his interest in politics at about the same time that he became interested in law."[42] Third, the future President's emergence as a major figure on the national scene was manifestly assisted by the series of the seven widely publicized debates during the summer and fall of 1858 that, at Lincoln's invitation, he had with Senator Stephen A. Douglas of Illinois, who was already the frontrunner for the Democratic presidential nomination in 1860. The first round of that campaign, however, began in 1858 in a contest for Douglas's seat in the United States Senate. "The prairies are on fire,"[43] commented a New York newspaper in describing the heated race. Republicans in the state wanted Abraham Lincoln to replace two-term Democrat Douglas. This being long before the Seventeenth Amendment mandated direct election of United States Senators, the Illinois legislature was to make that choice. Accordingly, if voters elected more Democrats to the state house in Springfield on November 2, 1858 (as in fact happened), Douglas would "defeat" Lincoln. Similarly, if Republicans obtained a majority, Lincoln would "win," even though neither man's name was on any ballot that any voter would cast. And a principal focus of those debates was the Supreme Court's decision of the previous year in *Dred Scott v. Sandford*.[44] Indeed, given the number of words Lincoln and Douglas exchanged with respect to the *Dred Scott* case, one wonders what the two men would have talked about had the Justices prudently avoided trying to settle the vexing and sectionally divisive question of Congress's powers over slavery in the western territories.[45] Fourth, both that decision and Lincoln's law practice had helped the future President firm up his opinions both about slavery generally and, as a former Whig, secession in particular, even though McGinty makes clear that Lincoln "was not a constitutional scholar"[46] and never claimed to be one.

Moreover, McGinty's study is worthwhile because of the Supreme Court cases that arose during the Lincoln administration and sustained the President's and Congress's "key efforts to put down the rebellion and bring the secessionist states back into the Union."[47] It is the story of the litigants and judges involved in instances such as the *Prize Cases*,[48] the outcome of which may have done nearly as much as some battlefield successes to secure victory for the North, that comprise much of the book. Finally, and as background to those decisions, there are the sometimes-overlooked changes in judicial organization and the Court's membership that the turmoil of secession and war made possible.[49]

At the very least, by the time of Lincoln's assassination in April 1865, the Court that had been predominantly Democratic in its membership and perceptibly pro-Southern in slavery cases became mainly a Republican, or Lincoln, Court. Inheriting an unfilled vacancy from the last months of the Buchanan administration and being presented with four additional vacancies, Lincoln was able to appoint five Justices by 1864, four Republicans and one Democrat.[50] All five easily met Lincoln's principal criterion: each was a firm Union man. Even the Court's size was in flux, as Congress raised the number of Justices to ten in 1863, only to cut the roster to seven in 1866 (the reduction would take place through retirements), and then to fix the number at nine in 1869, where it has remained ever since. While several reasons account for these adjustments, the effect was to deny the Union Democrat from Tennessee, Vice President Andrew Johnson, any appointments to the Supreme Court once he succeeded Lincoln in the White House.[51]

Congress also undertook reorganization of the circuits in both 1862 and 1866, to incorporate westward expansion and especially to

reduce the Southern states' dominance in the circuits. By 1866, only one circuit was composed exclusively of states that had seceded; only two of the nine circuits comprised only states that had allowed slavery in 1860. So far as future Supreme Court appointments might be "by circuit" (and that had long been the custom, although it was not a legal requirement), the new arrangement would minimize the number of Southern Justices in the future. Indeed, the Supreme Court practically became off-limits to Southerners. After the death of Jackson appointee James Wayne of Georgia in 1867, twenty-one years passed before another Southerner graced the High Bench. Congress wanted to make sure that the judiciary remained "safe for the North—and Republicans."[52] Yet it is evidence of the richness of McGinty's book that even a relatively obscure Justice such as Wayne merits more attention than he typically receives in writings on this period. Unlike Justice John Campbell, who resigned his seat and returned to Alabama, Wayne remained on the Court after Georgia seceded, insisting that "I shall leave posterity to do me justice." But as the author observes, "[b]efore posterity could pass judgment . . . his fellow Georgians claimed the right to do so. Early in 1862, a grand jury assembled in Savannah to declare the justice an 'alien enemy' and order that his property—real estate, stocks, and even some slaves—all be confiscated."[53]

If Lincoln is nearly uniformly ranked among the greatest American Presidents, William Howard Taft is not. Aside from whatever deficit he may have had in leadership and visionary qualities, the twenty-seventh Chief Executive had the misfortune, for his one-term administration, to be wedged between the eight years of Theodore Roosevelt and the eight years of Woodrow Wilson. Taft lacked the excitement of the former and the inspiration of the latter. Furthermore, in contrast to his impressive victory in 1908, when he won thirty states and received two-thirds of the electoral vote,[54] he was the victim of a stunning defeat when he ran for a second term in 1912. Carrying only the states of Utah and Vermont, Taft finished third in the popular vote, behind the Progressive or Bull Moose candidacy of Roosevelt and the Democratic ticket headed by Wilson.

***The William Howard Taft Presidency*, by historian Lewis L. Gould of the University of Texas at Austin, is interesting to Supreme Court aficionados because it examines the six Court appointments Taft (pictured) made during his presidency.**

Taft is now the subject of a new volume in the American Presidency Series published by the University Press of Kansas.[55] **The William Howard Taft Presidency**,[56] by historian Lewis L. Gould of the University of Texas at Austin, replaces an earlier volume on Taft in the same series that was written by Paolo E. Coletta and published in 1973.[57] As explained by a note from the series publisher, the "change reflects our plan to refresh volumes in the American Presidency Series as unused source material and new interpretations come to light."[58]

Gould's thesis is that while Taft was not an outstanding Chief Executive, "he was a credible president who confronted an unfavorable political climate for his party and the challenges of Theodore Roosevelt as an alternative

leader of the Republicans. Within these important constraints, Taft was a competent chief executive who, as he argued in 1912, had kept the nation out of war, presided over a prosperous economy, and observed the constitutional limits of his office. Although these accomplishments do not enable him to rise above the middle level of all presidents, they seem more positive in light of the performance of some of his modern successors who accomplished few of the specific tangible achievements that Taft enumerated."[59]

Yet, aside from the facts that Taft remains the only President to have also sat on the Supreme Court (he was appointed Chief Justice of the United States by President Warren G. Harding in 1921) and that he is also the only President to have sat as a judge on a lower federal court (President Benjamin Harrison nominated him to one of the newly created circuit courts of appeals in 1891),[60] readers of the *Journal* may fairly wonder why a book on the Taft presidency belongs in a review article on books about the Supreme Court. After all, students of the Court typically consider Taft's Supreme Court legacy as consisting principally of two significant and lasting accomplishments, both of which date from his years as Chief Justice: first, his energies in shaping and encouraging passage of the Judges' Bill of 1925, which greatly expanded the Court's *certiorari* or discretionary review authority over its appellate jurisdiction into something similar to what the Justices enjoy today; and second, securing the congressional appropriation for and overseeing the planning of the Supreme Court building (even though the actual cornerstone laying for the new structure fell to Taft's successor Chief Justice Charles Evans Hughes in 1932, after Taft's death in 1930).

Yet Taft did leave a Supreme Court legacy as President—one that derived from his judicial appointments. During Taft's four years in the White House, unfolding events allowed him to make a total of six appointments to the Bench. This number included naming five Associate Justices and elevating a sitting Associate Justice to the Chief Justiceship. This is a remarkable tally. To date, besides George Washington (who, in the Court's first decade, made the initial six appointments plus an additional four) and Franklin D. Roosevelt (who, having been elected for an unprecedented four terms, made a total of nine appointments including one elevation), only Presidents Andrew Jackson, Lincoln, and Dwight Eisenhower also placed as many as five new faces on the Court. Moreover, as Gould makes clear, Taft hardly adopted a hands-off approach to judicial selection. Whether for the lower federal bench or the Supreme Court, the President "acted as a kind of one-man search committee who sought out judges sympathetic to his conservative views."[61] Although President Taft had a highly competent Attorney General in George Wickersham, he "acted as his own attorney general when it came to making judicial nominations."[62]

In light of Taft's resume, of course, this presidential style is entirely understandable. Not only had he been a federal appeals judge, he had sat on the Superior Court of Ohio in Cincinnati and had been Solicitor General of the United States from 1890 to 1892. This experience even carried over to other aspects of his presidency. As the author explains, "On issue after issue, whether it was the tariff, conservation, antitrust, or foreign affairs, Taft brought judicial temperament to the Oval Office. He consulted few people, weighted his options in isolation, and rendered political judgments as he had once delivered verdicts."[63] Indeed, an affinity for the judicial process seemed to be in his blood. "I love judges, and I love courts," he said in 1911. "They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[64]

Understandably, therefore, and particularly because of its aging members, it was the Supreme Court for which Taft had a special concern from practically the moment he began his presidency. "The condition of the Supreme Court is pitiable, and yet those old fools hold on with a tenacity that is most

discouraging," wrote the new President at age fifty-two. He described Chief Justice Melville W. Fuller as "almost senile." Other Justices were deemed lazy or deaf. "It is most discouraging to the active men on the bench."[65]

In the ninth chapter ("Taft as Administrator"), Gould describes Taft's efforts in filling the Bench. He wanted to name individuals of superior intellect who would be no older than their mid-fifties when they took their seats, with the expectation that they would be able to serve at least a decade. The President had difficulty, however, in consistently applying these criteria when making his selections, as other considerations sometimes intruded. For example, Taft's first opportunity to make a Supreme Court nomination occurred upon the death of Justice Rufus Peckham in the fall of 1909. Taft immediately turned to an old friend, Horace H. Lurton, with whom Taft had served on the Sixth Circuit Court of Appeals. The drawback with Lurton, however, was that he was nearly sixty-six years old. Taft was torn, writing his Secretary of War that "there was nothing that I had so much at heart in my whole administration as Lurton's appointment."[66] The occasion demonstrated that where there is a will, there can be a rationalization: Taft convinced himself that Lurton's experience compensated for his age and so justified the nomination. Besides, as a Tennessee Democrat (and Confederate veteran), Lurton might aid Taft in his objective of strengthening the Republican party in the South as a sufferable alternative for Democrats for whom a vote for the Grand Old Party was still an act of sectional betrayal.

The death of Justice David J. Brewer in March 1910 opened the way for a Republican replacement in the form of New York's governor, Charles Evans Hughes. Not only was Hughes an outstanding choice, but his selection would remove a potential rival for 1912 should Taft choose to run for a second term. The implied understanding with the nominee was that the Court's center chair would be his should it become vacant.[67] It did, upon Chief Justice Fuller's death in July. Moreover, Taft actually soon found that he had two vacancies to fill because of Justice William H. Moody's resignation in November.

Yet, it was the replacement for Fuller that caused Taft real consternation. While Mrs. Taft had been thoroughly content with Taft as President, it was the Chief Justiceship that had long been her husband's goal. "If the Chief Justice [Fuller] would only retire," Taft said before his election, "how simple everything would become."[68] Even after becoming ensconced in the White House, he was uncomfortable. "If I were now presiding in the Supreme Court of the United States as chief justice," he confided to a friend, "I should feel entirely at home, but... I feel just like a fish out of water." Then, while pondering Fuller's successor, he sadly acknowledged, "It seems strange that the one place in the government which I would like to fill myself I am forced to give to another."[69] Furthermore, handing that nomination to Hughes, who was forty-eight, would be doubly painful in that it would likely have foreclosed "any possibility for Taft to be chief justice during his lifetime."[70] Thus, alongside other considerations, Hughes's anticipated longevity made Associate Justice Edward Douglass White, who was sixty-five, an especially appealing prospect. More charitably, one should add that, like Lurton, White was a Democrat and a Confederate veteran and so fit with the President's Southern strategy. Besides, Taft liked White's "attitude toward antitrust issues."[71] White was also conveniently Roman Catholic. Nominating a Catholic Democrat from the South would be consistent with the Midwestern Unitarian Republican President's "profound distaste for bigotry."[72] Taft's plan to use appointments as a vehicle to make the Republican party attractive for white Southerners proved to be little more than a hope, however. "Did you keep up with my appointments to the Federal bench during my term as President?" Taft once asked North Carolinian Josephus Daniels, who was President Wilson's Navy Secretary. When Daniels assured Taft that Southerners appreciated what

he had done, the former President commented, "I am sure the Southern people like me. They would do anything except vote for me."[73]

For White's seat, Taft turned to U.S. appeals judge Willis Van Devanter, age fifty-one, of Wyoming. Even though he had "already shown some of the difficulties in writing opinions that would characterize his work on the Supreme Court,"[74] Taft was nonetheless impressed by Van Devanter's views and Western background. Moody's seat went to former Georgia supreme court justice Joseph R. Lamar, who was then in private practice in Augusta. Taft had played golf with Lamar and had visited with the former judge and his wife during a national tour in 1909. His "proximity to Taft's social circles did not do him any harm."[75] Justice John Marshall Harlan's death in late 1911 allowed the President his final Supreme Court nomination, which he extended to Judge Mahon Pitney, age fifty-four, who was Chancellor of the New Jersey courts.

In the author's view, what was Taft's impact on the Court? Gould notes that Taft was proud of his judicial choices. As he was leaving office, "the president recalled that he had told these jurists, 'Damn you, if any of you die, I'll disown you.'"[76] White served as Chief Justice until 1921, though not as a notably successful leader of the Court. Van Devanter probably best served Taft's goal of longevity, sitting for twenty-six years—well into the New Deal era. Indeed, the retirement of this intellectual leader of the conservative bloc in 1937 would present President Franklin Roosevelt his first opportunity to send someone to the Supreme Court. Lurton and Lamar defied Taft's admonition and died during the Wilson administration. Hughes did indeed harbor presidential aspirations, as Taft suspected, and he resigned to run against Wilson in 1916, only to be returned to the Court as Taft's successor in 1930. "For all the time Taft devoted to the judiciary, he was not a president who infused the Court with excellent selections. Favoritism to men he knew such as Lurton and Lamar and a desire to preserve his own chance to be chief justice one day, as in the case of White, governed his decisions."[77] In short, bountiful vacancies proved to be no assurance of substantial influence on the Court's direction.

While the McGinty and Gould books demonstrate the efforts by Presidents Lincoln and Taft, respectively, to mold the Supreme Court, surely no President has had greater incentive to attempt to reshape the Court's decisions than Franklin D. Roosevelt. Having crushed Republican President Herbert Hoover's hopes for a second term in the election of 1932, Democrat Roosevelt, with the help of substantial congressional majorities, embarked on an aggressive legislative agenda that he christened the New Deal to combat the economic collapse that came to be known as the Great Depression. Various innovations, however, soon met legal challenges. Indeed, in twelve rulings between the years 1934 and 1936, the Supreme Court declared unconstitutional all or part of eleven New Deal measures[78] —and these decisions were made by a Bench without a single Roosevelt appointee. None of the "nine old men" (as some journalists called them) opted to retire during FDR's first term. By the summer of 1936, it looked as if the Court had put the New Deal firmly on the rack of unconstitutionality, rendering government impotent. The entire legislative program apparently approved by the American people at the polls in 1932 and 1934 appeared to be in danger. What was the President to do? He and Congress might limit the jurisdiction of the Supreme Court, sponsor constitutional amendments limiting the Court's power or reversing its rulings, or wait for vacancies to allow the appointment of Justices more accepting of an expansive regulatory authority. Although many members of Congress urged that something be done, they were uncertain what to do, not quite sure whether the trouble was the fault of the Constitution or of the judges.

Throughout the campaign of 1936, FDR had little to say about the Court, and Democratic orators muted the administration's

dismay, giving no hint of what Roosevelt, if re-elected, might do with respect to the Court. The election results in 1936 could hardly have produced a more resounding validation of FDR's first term, and they consolidated a true electoral realignment that persisted until the late 1960s. His 61 percent of the popular vote exceeded any previous President's share. In carrying every state but Maine and Vermont, his 523 electoral votes surpassed the allotment of any candidate since the advent of the party system in 1800. In the House of Representatives, Democrats added twenty-one seats to an already swollen majority; in the Senate, the gains were even more impressive, with sixteen new seats. Congressionally, Republicans seemed to have become an endangered species.

In the wake of such an impressive electoral tally, the President concluded that the propitious moment had arrived for a move against the Supreme Court. Unwilling to wait for retirements or to pursue the arduous and uncertain route of change via constitutional amendment, FDR sent to Congress on February 5, 1937 his message proposing a drastic shake-up in the judiciary because the Court was behind in its docket. Justices past the age of seventy would have six months in which to retire. A Justice who failed to retire within the appointed time could continue in office, but the Chief Executive would appoint an additional Justice, up to a maximum Bench size of fifteen Justices—individuals presumably younger and better able to carry the heavy load. Because there were six members of the Court already in this category, Roosevelt would have been able to make that number of appointments at once. In presenting his proposal, the President gave no hint of wishing to stem the tide of anti–New Deal decisions. He tendered the hemlock cup to the elderly jurists on the elevated ground that they slowed the efficient dispatch of judicial business. It was as if the President—or, more likely, an adviser such as his Attorney General Homer Cummings—had read a passage from **The American Commonwealth**: "The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. . . . One thing only was either forgotten or deemed undesirable, because highly inconvenient, to determine—the number of judges in the Supreme court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate."[79]

The story of the attempt to penetrate that shield—the story of what quickly came to be called the "Court-packing Plan"—is the subject of **Supreme Power**, by Jeff Shesol,[80] a published political analyst[81] and deputy speechwriter for President Bill Clinton. The author's interest in a constitutional confrontation dating from well over seven decades in the past was apparently sparked when an associate called his attention to "Joseph Alsop and Turner Catledge's as-it-happened account, **The 168 Days**—one of the lost classics of political literature."[82] The book drew Shesol "into the ongoing arguments about the events of 1937 and their causes, believing that "there was more to a familiar story."[83] The happy result of his curiosity is an exhaustively researched and engagingly written volume that brings to life significant events from an important juncture for the political system, the Constitution, and the Supreme Court.

As those already at least modestly familiar with this episode will recall, President Roosevelt ultimately lost his battle with the Supreme Court but won the war. Skilled politician though he was, FDR lost the battle in part because of the efforts of Justice Louis D. Brandeis, one of the Justices most friendly to the New Deal agenda, to bring together Chief Justice Hughes and progressive Democrat Senator Burton Wheeler[84] of Montana, who led Senate opposition to the President's proposal. Hughes prepared a carefully worded document for Wheeler's use that not only undercut the President's charge that the "old men" were not abreast of their docket but also revealed its composer as a canny dialectician. Though carefully refraining from open opposition to the plan, the letter suggested that the

Supreme Power, by Jeff Shesol, a political analyst and former deputy speechwriter for President Bill Clinton, re-examines the Court-packing episode of 1937 in great detail and in an engaging manner. Here, Joseph D. Keenan, Assistant to the Attorney General, is shown on March 12 on one of his daily visits to the Senate Judiciary Committee. He is conferring with Senator Henry Ashurst of Arizona on the progress of the Court-enlargement bill.

President's idea of an enlarged Court and the hearing of cases in divisions might run counter to the constitutional provision for "one Supreme Court." This demolition of FDR's principal argument put a fatal crimp in the President's scheme.

Roosevelt nonetheless prevailed against the Court. In late March and mid-April, the narrowest of majorities in *West Coast Hotel v. Parrish*[85] and *National Labor Relations Board v. Jones & Laughlin*[86] upheld state minimum-wage and federal labor-organizing statutes, respectively, that were strikingly at odds with some recent decisions.[87] The message was unmistakable: Chief Justice Hughes and Justice Owen J. Roberts, in the famous "switch in time that saved nine,"[88] had modified their positions. What had been unacceptable use of government power would now be acceptable. Then Justice Van Devanter announced in May his intention to retire, handing the President his first opportunity to make a Court appointment. Congressional enthusiasm for Court-packing, which had already faced increasing public opposition, consequently waned.[89] In July, a watered-down version of the bill was sent back to the Senate committee, thus sealing its fate. It was as if the person who had found in Bryce mention of the Court's soft underbelly should have read further, for benefit of Congress, the President, and the Court: "Towering over Presidents and State governors, over Congress and State legislatures, over conventions and the vast machinery of party, public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it."[90] Princeton's Professor Edward Corwin called it "Constitutional Revolution, Ltd."[91] It was a revolution American-style, without violence.

Effects of FDR's assault on the Court, however, went far beyond a string of pro–New Deal rulings. Had there been nothing more than this, the confrontation between FDR and the Court in 1937 would have been important, but hardly epochal. Had they chosen an alternative route, the Justices—probably without grave political consequences—could have continued to oversee economic and social policy by approving most such regulations but

occasionally invalidating others. Instead, the event marked a constitutional divide in two principal respects.

First, a majority of the Justices soon revealed that they had abandoned a half-century or more of jurisprudence that accorded property rights and, to a lesser extent, state prerogatives a preferred place in the hierarchy of constitutional values. As Shesol notes, by 1938, the Justices "signaled a near total retreat from the realm of economic policy."[92] Henceforth, the government would no longer have to justify a regulation by convincing the Justices of the need for its enactment. Reasonableness would be assumed from the fact that a legislature had acted. Thus, an approach to constitutional interpretation going back as far as 1890—the "show us why this infringement on economic liberty is necessary" way of thinking—was jettisoned.[93]

Yet the constitutional revolution has had a second dimension that was independent of the first: by 1938 the Court unveiled a new set of constitutional values that would replace the old. An early clue was appended as a footnote in Justice Harlan Fiske Stone's opinion in *United States v. Carolene Products Co.*[94] The footnote's three paragraphs floated three exceptions to the Court's newly professed "tolerance for the majority" rule. The first was legislation that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." The second was legislation "restricting those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." The third was legislation "directed at particular religious . . . or national . . . or racial minorities." Such "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[95] Under the freshly ascendant banner of self-restraint, property rights would be left to the ballot box. Judicial activism old-style was dead; judicial activism new-style was just around the corner. Thanks in no small measure to Roosevelt, the Court rewrote its job description. New concerns—nonproperty aspects of the Bill of Rights and the Fourteenth Amendment—would replace the old. "The Court," the author summarizes, "at long last had reconciled itself to the twentieth century."[96]

"It is an abiding irony that so much of this constitutional revolution, as well as the crisis that instigated it, occurred during the tenure of Charles Evans Hughes," writes Shesol. "Decades earlier, he had been known as a reformer, but never a revolutionary. He placed his faith, above all, in reason—in rational gradual progress, the slow unfolding and maturing of ideas."[97] At the height of the Court's resistance to the New Deal, Hughes was caught—uncomfortably and untenably—between the Court's two camps. It was at about this time that "a dance company performed an interpretation of the Supreme Court. The three liberals danced on one side, the five conservatives (including Roberts) on the other, and Hughes flitted back and forth between them. This once godlike man had become a tragic, or tragicomic, figure."[98] Perhaps Hughes thought that his refusal "to alight for long in either camp established some kind of balance. In fact, it did the opposite. It accentuated the imbalance. It confirmed many Americans' sense of the court as a political institution."[99] In short, his behavior helped to deal the Court one of the "self-inflicted wounds" about which Hughes had lectured, and warned, before becoming Chief Justice.[100]

The irony of Hughes's situation was only magnified in light of the observation by the former Justice and future Chief Justice, amidst his ruminations about self-inflicted wounds, that "[i]t has repeatedly been sought to use for political purposes the power of Congress to fix the number of justices."[101] Yet it was in that same assessment, published in 1928, that Hughes observed that "[w]hen we consider . . . the fact the [Court] has come out of its conflicts with its wounds healed, with its integrity universally recognized, with its

ability giving it a rank second to none among the tribunals of the world, and that today no institution of our government stands higher in public confidence, we must realize that this is due . . . to the impartial manner in which the Court addresses itself to its never ending task, to the unsullied honor, the freedom from political entanglements and the expertness of the judges who are bearing the heaviest burden of severe and continuous intellectual work that our country knows."[102]

Well after Hughes's tenure as Chief Justice, the twin dimensions of the revolution of 1937 acquired substantial permanency[103] in American constitutional law only because of a succession of new faces that Roosevelt was eventually able to send to the High Court.[104] One of these was the chair of the Securities and Exchange Commission, William O. Douglas, whose seat John Paul Stevens would fill many years later.

As suggested by the Court-packing episode, the American political system is governed by what Shesol terms a "dialectic" between law and individuals. "It is "one of the many unhelpful antitheses that prevailed [during the 1930s] and persist to this day . . . that the Court is either a purely legal institution or a political body; that the framers' intentions are either easily discernible or always ambiguous (or even irrelevant); that legal doctrines are either preordained by the Constitution or are artificial constructs; and that the justices are either impervious to social, political, and cultural influences or utterly at their mercy."[105] As demonstrated by the books surveyed here, the acts of judging, and certainly the selection of those who do the judging, are more complex.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

GOULD, LEWIS L. **The William Howard Taft Presidency**. (Lawrence: The University Press of Kansas, 2009). Pp. xv, 269. ISBN: 978-0-7006-1674-9, cloth.

MCGINTY, BRIAN. **Lincoln and the Court** (Cambridge, MA: Harvard University Press, 2008). Pp. 375. ISBN: 978-0-674-02655-1, cloth.

POWE, LUCAS A., JR. **The Supreme Court and the American Elite, 1789–2008** (Cambridge, MA: Harvard University Press), 2009. Pp. x, 421. ISBN: 674-0-03267-5, cloth.

SHESOL, JEFF. **Supreme Power: Franklin Roosevelt vs. the Supreme Court** (New York: W. W. Norton, 2010). Pp. 644. ISBN: 978-0-393-06474-2, cloth.

ENDNOTES

[1]Letter, Justice John Paul Stevens to President Barack Obama, *available at* http://www.supremecourt.gov/publicinfo/press/JPSLetter.pdf (last visited on Oct. 23, 2010).

[2]Ironically, had Justice John A. Campbell not resigned from the Court to return home to Alabama after secession, he could very probably be on the longevity roster as well. He died in 1889, not quite thirty-six years after his appointment to the Court by President Millard Fillmore in 1853.

[3]Hearings before the Committee on the Judiciary, United States Senate, 94th Congress, 1st session, on Nomination of John Paul Stevens, of Illinois, to be an Associate Justice of the Supreme Court of the United States (1975), hereafter cited as *Hearings*.

[4]410 U.S. 113 (1973).

[5]The one exception is in the testimony of Margaret Drachsler of the National Organization for Women (NOW). The organization opposed Judge Stevens' confirmation. Among other things, Ms. Drachsler referred specifically to the nominee's participation in the panel that decided *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir. 1973). This decision overturned a district court's order that the defendant hospital make its facilities and staff available to a doctor for the immediate performance of an abortion. See *Hearings*, 80.

[6]Donald Grier Stephenson, Jr., **Campaigns and the Court: The Supreme Court in Presidential Elections** (1999), 197.

[7]*Id.*, 200.

[8]Peggy Noonan, "The Lamest Show on Earth," *Wall Street Journal*, May 15–16, 2010, p. A-15.

[9]*Regents v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[10]A photo reproduction, from the Gerald Ford Presidential library, of the list of potential nominees is reprinted in David M. O'Brien, **Storm Center: The Supreme Court in American Politics** (5th ed. (2000), 42.

[11]As Chief Justice Rehnquist would later observe, "Neither the President nor his appointees can foresee what issues will come before the Court . . . , and it may be that none had thought very much about these issues. Even though they agree as to the proper resolution of current issues, they may well disagree as to future cases involving other questions." Quoted in Stuart Taylor, "Re: Shaping the Court," *New York Times*, July 2, 1988, p. 9.

[12]*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[13]*Hearings*, 67.

[14]*Id.*

[15]416 U.S. 312 (1974).

[16]In fact, when the Court first directly addressed affirmative action in higher education in *Regents v. Bakke*, three years after Stevens joined the Court, he wrote an opinion joined by the Chief Justice and Justices Stewart and Rehnquist maintaining (1) that the challenged admission policy at the medical school at the University of California at Davis violated Title VI of the Civil Rights Act of 1964, and (2) concurring in the Court's judgment insofar as it affirmed the judgment of the court below ordering the admission of respondent Allan Bakke. 438 U.S. 265, 408 (1978).

[17]Allison Dunham and Philip B. Kurland, eds., **Mr. Justice** (rev. ed., 1964), 319–44. The book is a collection of twelve biographical essays on as many Supreme Court Justices.

[18]327 U.S. 1 (1946).

[19]Yamashita was hanged by American authorities in 1946.

[20]*Id.*, 41–42 (Rutledge, J., dissenting). In Stevens' essay on Rutledge in **Mr. Justice**, the quotation falls on pages 341–42.

[21]*Hearings*, 51. Moments before, in response to another question from Senator Byrd, Stevens stated that he was not clerk for Rutledge in the Yamashita case. *Id.*, 50.

[22]Lucius A. Powe, Jr., **The Supreme Court and the American Elite, 1789–2008** (2009), hereafter cited as Powe.

[23]*Id.*, vii.

[24]*Id.*, viii.

[25]*Id.*, ix.

[26]*Id.*, 162.

[27]Robert A. Dahl, "Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy Maker," 6 *Journal of Public Law* 279, 285 (1957).

[28]Powe, ix.

[29]Benjamin Cardozo, **The Nature of the Judicial Process** (1921), 168.

[30]Powe, 194.

[31]531 U.S. 98 (2000).

[32]Powe, 339. Without looking at the endnote citation in the book for the words attributed to Justice Scalia, the reader might reasonably conclude that the words come from an opinion Scalia filed in the case. Scalia did not file an opinion in *Bush v. Gore*. Rather the endnote in Powe's book refers the reader to an article in the *New Yorker* as the source for the comment. Powe, 386 n.62.

[33]Powe, 339.

[34]*Id.*, 289.

[35]*Id.*, 350.

[36]Brian McGinty, **Lincoln and the Court** (2008), hereafter cited as McGinty.

[37]Walter Dean Burnham, **Critical Elections and the Mainsprings of American Politics** (1970), 10. The election of 1860 was, in turn, reinforced by the critical election of 1896, which ensconced a Republican majority that, with only a few deviating elections, persisted until it was shattered by Democrats in 1932.

[38]Cliff Sloan and David McKean, **The Great Decision** (2009). *See* Donald Grier Stephenson, Jr., "The Judicial Bookshelf," 34 *Journal of Supreme Court History* 625–27 (2009).

[39]5 U.S. (1 Cranch) 137 (1803).

[40]McGinty, 2.

[41]*Id.*, 1–2.

[42]*Id.*, 2.

[43]Harold Holzer, ed., **The Lincoln-Douglas Debates** (1993), 1. The quotation comes from the editor's introductory essay.

[44]60 U.S. (19 Howard) 393 (1857). Chief Justice Roger B. Taney did not confine his opinion in the case to the question of black citizenship and Scott's right to bring suit in federal court. He proceeded to discuss the extent of congressional power over the territories. Accordingly, Congress had no power to prohibit slavery in the territories, and therefore the Missouri Compromise of 1820, which was at issue in the case, was invalid. In so doing, the Court declared as illegitimate the organizing principle of the new Republican party. The *Dred Scott* decision marked a major expansion of judicial review. Unlike the statute that the Marshall Court struck down in *Marbury v. Madison*—the Court's first true exercise of judicial review—the statute in the *Dred Scott* case did not pertain to the Judicial Department or contravene a seemingly unambiguous provision of the Constitution. *Marbury v. Madison*, 5 U.S. [1 Cranch] 137 (1803). Indeed, the Taney Court ruled as it did even though the Constitution contained express authority in Article IV for Congress to legislate concerning "the Territory . . . belonging to the United States." By vetoing a major legislative policy, the Bench forestalled future congressional efforts to deal with the foremost political issue of the day.

[45]Douglas, a former Illinois judge and the chair of the Senate's Committee on Territories, defended with

difficulty the Court's conclusion that denied such power, while former one-term U.S. House member Lincoln deplored it.

[46]McGinty, 8.

[47]*Id.*, 9.

[48]67 U.S. (2 Black) 635 (1863). On April 19, 1861, Lincoln ordered a blockade of Confederate ports. On July 13, Congress authorized the President to declare that a state of insurrection existed, and on August 6 it voted to ratify retroactively the military decisions that Lincoln had made. Claiming the President had acted unlawfully, owners of four vessels seized before July 13 sued to recover their property. Could the President impose a blockade without congressional authorization? Was an insurrection—the Lincoln administration refused to recognize the Confederacy as a separate country—a "war," to which the rules of prize applied? The *Prize Cases* upheld both Lincoln's theory of the war and his authority to act without Congress. The Court, Justice Robert Grier explained for a majority of five, could not be asked "to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race." *Prize Cases*, 67 U.S. at 669.

[49]*See* McGinty at 92–117.

[50]The lone Democrat was also a tenth Justice, Stephen J. Field of California, from the new (and temporary) Tenth Circuit. Lincoln concluded that Field's "real politics" matched his own. See Henry J. Abraham, **Justices and Presidents**, 3d ed. (1992), 121.

[51]In 1866, Johnson nominated Attorney General Henry Stanbery, a Republican from Ohio, to succeed Justice Catron, but the nomination fell victim to Congress's decision to downsize the Court.

[52]Stanley I. Kutler, **Judicial Power and Reconstruction Politics** (1968), 63.

[53]McGinty, 101–2.

[54]Taft's campaign song for the 1908 campaign against Democrat William Jennings Bryan was "Get on the Raft with Taft." Although Taft was hardly a physical lightweight, the song helped persuade voters that Roosevelt's Secretary of War was a worthy successor to the energetic President.

[55]The series now boasts some thirty-five entries. The founding editors were Clifford S. Griffin, Donald R. McCoy, and Homer F. Socolofsky; they are now deceased. For a list of the series titles in print, readers should consult the University Press of Kansas's Recently Published Books page, *available at* http://www.kansaspress.ku.edu/newbyseries.html (last visited on October 23, 2010).

[56]Lewis L. Gould, **The William Howard Taft Presidency** (2009), hereafter cited as Gould.

[57]Paolo E. Coletta, **The Presidency of William Howard Taft** (1973).

[58]Gould, vii.

[59]*Id.*, xiii.

[60]Taft was confirmed in 1892 and was a judge on the Sixth Circuit until his resignation in 1900.

[61]Gould, 122. As testament to the maxim that old habits die hard, Taft behaved similarly after he became Chief Justice in trying to influence judicial appointments. This was true with both President Harding and, after Harding's death, his successor, Calvin Coolidge. As one of Taft's biographer's writes, "The wily chief justice took no chances. The train from Marion Ohio, no sooner pulled into Union Station than he was on the way to the New Willard Hotel to see President Coolidge. There, Taft went to work on the new president, and not without effect." Alpheus Thomas Mason, **William Howard Taft: Chief Justice** (1964), 185–86. *See also* Walter F. Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," *Supreme Court Review* (1961), 159–93.

[62]Gould, 128.

[63]*Id.*, xiii.

[64]Mason, **William Howard Taft**, 19.

[65]Gould, 128.

[66]*Id.*, 129.

[67]*Id.*

[68]Alpheus Thomas Mason, "William Howard Taft," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court: Their Lives and Major Opinions** (1969), vol. 3, 2107.

[69]*Id.*

[70]Gould, 129.

[71]*Id.*

[72]Mason, **William Howard Taft**, 2108.

[73]*Id.*, 158.

[74]Gould, 129.

[75]*Id.*

[76]*Id.*, 130.

[77]*Id.*

[78]The Economy Act of 1933 in *Lynch v. United States*, 292 U.S. 571 (1934); Agricultural Adjustment Act of 1933 in *United States v. Butler*, 297 U.S. 1 (1936); Joint Resolution of June 5, 1933, in *Perry v. United States*, 294 U.S. 330 (1935); National Industrial Recovery Act of 1933 in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Independent Offices Appropriation Act of 1933 in *Booth v. United States*, 291 U.S. 339 (1934); 1933 Amendments to Home Owners' Loan Act in *Hopkins Federal Sav. & Loan Asso. v. Cleary*, 296 U.S. 315 (1935); 1934 Amendments to Bankruptcy Act of 1898 in *Ashton v. Cameron County Water Improv. Dist.*, 298 U.S. 513 (1936); Railroad Retirement Act of 1934 in *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); Frazier-Lemke Act of 1934 in *Louisville Bank v. Radford*, 295 U.S. 555 (1935); AAA Amendments of 1935 in *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); Bituminous Coal Conservation Act in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[79]James Bryce, **The American Commonwealth** (rev. ed. 1921), vol. 1, 276. The use of the lower case "c" in "court" is in the original.

[80]Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. the Supreme Court** (2010), hereafter cited as Shesol.

[81]*Id.*, 531. Shesol authored **Mutual Contempt: Lyndon Johnson, Robert Kennedy, and the Feud That Defined a Decade** (1998).

[82]Published originally in 1938 by Doubleday, the Alsop and Catledge book was subtitled "The Story Behind the Story of the Supreme Court Fight" (boldface added).

[83]Shesol, 531.

[84]In the Senate's debate in 1930 on the nomination of Charles Evans Hughes to be Chief Justice, Wheeler referred to the Court as an "economic dictator." Shesol, 28.

[85]300 U.S. 379 (1937).

[86]301 U.S. 1 (1937).

[87]*Morehead* ex rel. *Tipaldo v. New York*, 298 U.S. 587 (1936), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[88]Shesol, 434. The quip quickly made the rounds in Washington.

[89]The President had signed legislation on March 1 that sweetened retirement benefits by providing full salary to those who retired at age seventy.

[90]Bryce, **The American Commonwealth**, vol. 2, 257.

[91]Edward S. Corwin, **Constitutional Revolution, Ltd.** (1941). Apparently, it was Corwin who, on December 16, 1936, passed the Court-packing scheme to Attorney General Homer Cummings, having received the idea from Harvard's Arthur Holcombe in a letter dated December 7, 1936. Corwin's involvement may have added persuasiveness to the idea for Cummings, not only because of Corwin's reputation as the nation's leading academic constitutional scholar, but also because it offered a cover of administrative reform. "Once Corwin had blazed the path this far, . . . it did not take Cummings long to trace out the rest of the way." William E. Leuchtenberg, **The Supreme Court Reborn** (1996), 119. Corwin later testified before the Senate Judiciary Committee in support of Roosevelt's proposal.

[92]Shesol, 520.

[93]*See Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890); and *Smyth v. Ames*, 169 U.S. 466 (1898).

[94]304 U.S. 144 (1938).

[95]304 U.S. at 152, n.4.

[96]Shesol., 520.

[97]*Id.*, 521.

[98]*Id.*

[99]*Id.*

[100]*See* Charles Evans Hughes, **The Supreme Court of the United States** (1928), 50–54. Hughes referred specifically to the *Dred Scott* case (*see supra* note 44), the legal tender cases (*Knox v. Lee*, 79 U.S. (12 Wallace) 457, 549 (1871)), and the income tax case (*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), rehearing).

[101]Hughes, **The Supreme Court of the United States**, 51,

[102]*Id.*, 55.

[103]One uses the word "permanency" cautiously when writing about the Supreme Court. As Justice Douglas wrote in his concurring opinion in *Gideon v. Wainwright*, "[H]appily, all constitutional questions are always open." 372 U.S. 335, 346 (1963) (Douglas, J., concurring).

[104]Before the election of 1940, George Sutherland, Cardozo, Brandeis, and Pierce Butler, in addition to Van Devanter, were also gone. In their seats were Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy. When Franklin Roosevelt took the oath of office for an unprecedented third term in January 1941, only James C. McReynolds, Stone, Hughes, and Roberts remained from the "old" Court of 1936–37, and by late spring both McReynolds and Hughes had retired. The President now had "his" Court.

[105]Shesol, 523.

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Cover: Barack Obama, David Souter, and John Paul Stevens in the Justices' Conference Room at Sonia Sotomayor's investiture ceremony on September 8, 2009. Photograph by Steve Pettaway. Courtesy of the Supreme Court of the United States.