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ARTICLE

LINCOLN V. THE PROSLAVERY CONSTITUTION: HOW A RAILROAD LAWYER'S CONSTITUTIONAL THEORY MADE HIM THE GREAT EMANCIPATOR

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When he entered the presidency in March 1861, Abraham Lincoln faced an unprecedented national crisis. Between the time of his election and his inauguration, seven Southern states had held secession conventions and declared themselves no longer part of the United States.[1] They claimed to

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1. South Carolina seceded on December 20, 1860 and was followed in early 1861 by

be part of a new nation, the Confederate States of America. In his inaugural address, Lincoln urged the renegade states to return to their proper place in the nation, promising not to initiate any military action against them: "In *your* hands, my dissatisfied fellow countrymen, and not in *mine*, is the momentous issue of civil war. The government will not assail *you*. You can have no conflict, without being yourselves the aggressors."[2]

While Lincoln had no intention of using force against the Confederate States, he also emphatically rejected the legality of secession and reminded the Southern states of his legal obligation to uphold the Constitution: "*You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to 'preserve, protect, and defend' it."[3] Lincoln similarly denied the legitimacy of the South's reasons for leaving the Union. He noted, "Apprehension seems to exist among the people of the Southern States, that by the accession of a Republican Administration their property, and their peace, and personal security, are to be endangered."[4] But, Lincoln emphatically argued, "There has never been any reasonable cause for such apprehension."[5] The Southern states claimed secession was necessary to protect slavery,[6] but Lincoln pointed out that the Republican platform emphatically and unambiguously asserted that the federal government had no power to harm slavery in the Southern states.[7] Throughout his political career, Lincoln had taken the same position. Quoting from one of his published speeches,[8] Lincoln reminded the nation—and especially the Southern states: "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."[9]

Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. Arkansas, Virginia, North Carolina, and Tennessee would secede after the Civil War began.

2. Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

3. *Id.*

4. *Id.* at 262.

5. *Id.*

6. Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Coming of the Civil War*, 45 AKRON L. REV. 449–78 (2012) [hereinafter Finkelman, *States' Rights*] (describing how Southern secessionists openly asserted they were leaving the Union to protect slavery).

7. Lincoln, First Inaugural Address, *supra* note 2, at 263.

8. Lincoln first used this language in his debate with Stephen A. Douglas at Ottawa, Illinois on August 21, 1858. He used the exact same language in various speeches from 1859–1860. *See, e.g.*, Abraham Lincoln, Speech at Columbus, Ohio (Sept. 18, 1859), *in* 3 COLLECTED WORKS, *supra* note 2, at 400, 402 (reading from a newspaper report of his debate with Sen. Douglas).

9. Lincoln, First Inaugural Address, *supra* note 2, at 263.

This was an accurate summary of Lincoln's understanding of the Constitution and its limitations. He fully accepted the constitutional understanding that the national government had no power to regulate the domestic institutions—including slavery—of the states. This position comported with most constitutional theorists of the period.[10] The Republican Platform of 1860, which Lincoln quoted in his inaugural address,[11] also took this position.[12]

However, within a few months of taking office, Lincoln would authorize the Army to liberate slaves who escaped from rebel masters.[13] In August 1861[14] and July 1862,[15] Lincoln would sign legislation that allowed for the confiscation of property, including slaves, owned by masters in rebellion. The second of these acts also authorized the emancipation of any slaves owned by people in rebellion who escaped to the United States Army.[16] In July 1862, Lincoln would also authorize the

10. For a more detailed discussion, see generally WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN THE UNITED STATES, 1765–1848 (1977), PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (3d ed. 2014) [hereinafter FINKELMAN, SLAVERY AND THE FOUNDERS], and PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981) [hereinafter FINKELMAN, AN IMPERFECT UNION].

11. Lincoln, First Inaugural Address, *supra* note 2, at 263.

12. *Republican Party Platform of 1860*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29620 (last visited Nov. 21, 2015). I discuss this *infra* at note 143. The platform is also available online. CENT. PAC. RAILROAD PHOTOGRAPHIC HIST. MUSEUM, *Republican National Platform, 1860*, http://cprr.org/Museum/Ephemera/Republican_Platform_1860.html (last updated Apr. 13, 2013).

13. Letter from Simon Cameron, Sec'y of War, to Benjamin F. Butler, Major Gen. (Aug. 8, 1861), *in* 1 U.S. WAR DEP'T, THE WAR OF THE REBELLION: THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES ser. 2, at 761–62 (Wash., Gov't Printing Off. 1880) [hereinafter WAR OF THE REBELLION]. In this letter, Secretary of War Cameron told General Butler that the President 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.

Id. Most importantly, "rights to services" could "form no exception" to "this general rule." *Id.* See Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2009 SUP. CT. REV. 349, 364–66 (2009) for further discussion [hereinafter Finkelman, *Limits of Constitutional Change*].

14. An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act), Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

15. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes (Second Confiscation Act), Act of July 17, 1862, ch. 195, 12 Stat. 589.

16. *Id.*

enlistment of black troops, most of whom were former slaves.[17] Two months later, on September 22, 1862, Lincoln would issue the preliminary Emancipation Proclamation, declaring that all slaves in the rebellious states would be free if those states did not return to the Union within one hundred days.[18] A hundred days later, the President issued the final Emancipation Proclamation, freeing all slaves in the Confederacy.[19] By the end of the Civil War, in April 1865, slavery would be over in most of the South and the states would be in the process of ratifying the Thirteenth Amendment, which ended slavery everywhere in the United States.[20]

This Article explores the development of Lincoln's constitutional thought, from when he ran for President—and asserted that he had no power to touch slavery in the states where it existed—to his dramatic actions to end slavery "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 against the authority and government of the United States."[21]

While a work of legal history, this Article is timely. In June 2015, nine African Americans were murdered in an historic black church in Charleston, South Carolina.[22] The accused murderer, Dylann Roof, had Confederate flag license plates on his car, was photographed surrounded by Confederate flags, and was ideologically a neo-Confederate.[23] As this Article demonstrates, the Confederacy was created to protect slavery and

17. Act to Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-Eight, Seventeen Hundred and Ninety-Five, and Acts Amendatory Thereof, and for Other Purposes, Act of July 17, 1862, ch. 201, § 12, 12 Stat. 597, 599.

18. Proclamation No. 16 (Preliminary Emancipation Proclamation), 12 Stat. 1267 (Sept. 22, 1862). Lincoln indicated that the Proclamation would go into effect in one hundred days only if the Confederate states did not return to the Union. He had no expectation that any of the Confederate states would accept this offer, so his vacillation is more apparent than real. Had the Confederate states returned to the Union before the Proclamation went into effect, he would have had no constitutional power to end slavery in them. For a thorough history of the events in this period, see LOUIS P. MASUR, LINCOLN'S HUNDRED DAYS: THE EMANCIPATION PROCLAMATION AND THE WAR FOR THE UNION (2012).

19. Proclamation No. 17 (The Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

20. U.S. CONST. amend. XIII.

21. 12 Stat. 1268.

22. Jason Horowitz et al., *Nine Killed in Shooting at Black Church in Charleston*, N. Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html.

23. Tim Murphy, *Dylann Roof Had Confederate Plates. Here's Why the Rebel Flag Still Flies in South Carolina.*, MOTHER JONES (June 18, 2015), http://www.motherjones.com/mojo/2015/06/why-south-carolina-flies-confederate-flag.

preserve white supremacy.[24] The actions of Lincoln, and his evolving constitutional theory, would destroy slavery and the Confederacy. In doing so, Lincoln and Congress would rewrite what had been a proslavery constitution.[25] To understand the current atmosphere, in 2015, it is useful to recall how slavery dominated American constitutional politics and how Southern fears that Lincoln would harm slavery led to secession and Civil War.

Part I of this Article explains how the Convention of 1787 created a proslavery Constitution, which helped establish a slaveholder's republic. Part II discusses how the Republican Party, in 1860, pledged to not interfere with slavery where it existed but was intent on not allowing the creation of any new slave states. Part III demonstrates how the first seven states to secede did so because they believed secession was necessary to protect and perpetuate slavery, which the Texas Secession Convention, for example, declared "should exist in all future time."[26] Part IV examines the acts of Congress leading up to emancipation. Part V examines how the War, combined with those act of Congress, shaped the evolution of Lincoln's constitutional theory that allowed him "to interfere with the institution of slavery in the States where it exists"[27] within a few months after taking office, despite his belief before taking office that he had no constitutional power or authority to do so. Part VI shows how Lincoln prepared the nation for his new understanding of the Constitution and how he applied that interpretation to achieve emancipation for the vast majority of American slaves.

I. CONSTITUTIONAL POLITICS IN A SLAVEHOLDER'S REPUBLIC

When the Americans declared their independence, slavery was legal in

24. As I have argued elsewhere, secession was not about protecting Southern states' rights. On the contrary, secessionists complained about the Northern use of states' rights to criticize slavery. *See* Finkelman, *States' Rights*, *supra* note 6, at 450 (mentioning South Carolina justified its secession stating, "A geographical line has been drawn across the Union, and all the States north of that line have 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." (quoting *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (1861), *reprinted in* J.A. MAY & J.R. FAUNT, SOUTH CAROLINA SECEDES 76–81 (1960))).

25. On the origins of the proslavery Constitution, see FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10 and Paul Finkelman, *The Root of the Problem: How The Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1 (2003).

26. *A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union, reprinted in* JOURNAL OF THE SECESSION CONVENTION OF TEXAS 1861, at 61–66 (E.W. Winkler ed., 1912) [hereinafter *Texas Declaration*].

27. Lincoln, First Inaugural Address, *supra* note 2, at 263.

every one of the new thirteen states. By 1787, two states, Massachusetts and New Hampshire, had ended slavery in their new constitutions, and three other states, Pennsylvania, Connecticut, and Rhode Island, had passed gradual abolition acts.[28] Under these laws, no new slaves could be brought into the state to live, and the children of all slave women would be born free.[29] Thus, slavery in these places would literally die out. However, in all the other states, slavery was legal and thriving. In the five southernmost states, where more than ninety percent of all blacks lived, slavery was the central feature of the economy, and the racial subordination of blacks was equally central to the social regime.[30] Slaves constituted more than a third of the population in these states and in many counties, they outnumbered whites.[31] By the time the Constitutional Convention met in 1787, the nation was well on its way to becoming half slave and half free. From the beginning of the nation, slavery posed a problem for the creation of a vibrant political system, even before some of the Northern states began to dismantle the institution. At the beginning of the Revolution, masters throughout New England manumitted military age male slaves so they could fight for the Patriot cause. When he took command of the American Army at Cambridge, in 1775, General George Washington was shocked to see blacks in uniforms, with guns and bayonets.[32] On November 12, 1775, he issued an order prohibiting the enlistment of black troops.[33] But, Washington quickly backtracked on this point, and, by the end of December, asserted the following in his general orders: "As the General is informed, that Numbers of Free

28. *See generally* FINKELMAN, AN IMPERFECT UNION (detailing the end of slavery in the North and its relation to the *Somerset* principle that slaves became free when entering free jurisdictions); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967) (offering a general history of the abolition of slavery in the North following the Revolution).

29. These laws are discussed in ZILVERSMIT, *supra* note 28 and in FINKELMAN, AN IMPERFECT UNION *supra* note 10.

30. The 1790 census found about 40,000 slaves in the North and more than 650,000 slaves in the South. Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970–1990 for the United States, Regions, Divisions, and States* tbls.2 & 4 (U.S. Bureau of the Census, Working Paper No. 56, 2002), http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf.

31. *Id.* at tbl.1.

32. *See* HENRY WIENCEK, AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA 198 (2003) (explaining George Washington's initial viewpoints on slavery); *see generally* W.B. Hartgrove, *The Negro Soldier in the American Revolution*, 1 J. NEGRO HIST. 110 (1916) (outlining the role that blacks played in the Revolutionary War).

33. General Orders (Nov. 12, 1775), *in* 2 THE PAPERS OF GEORGE WASHINGTON 353 (Theodore J. Crackel ed., 2008) ("Neither Negroes, Boys unable to [bear] Arms, nor old men unfit to endure the fatigues of the campaign, are to be Enlisted.").

Negroes are desirous of [e]nlisting, he gives leave to the recruiting Officers, to entertain them, and promises to lay the matter before the Congress, who he doubts not will approve of it."[34] What followed was confusion in formal policy and in actual practice. Most of the New England colonies followed Washington's initial lead and "by the summer of 1776," blacks were excluded from most of the Patriot military forces.[35] But, blacks continued to serve in the Army and recruiters continued to sign them up. By 1777, blacks were being recruited throughout the North and military service became a vehicle for emancipation.[36] By "the summer of 1778 the Continental Army was well sprinkled with blacks."[37] Meanwhile, in June 1777, "the Massachusetts legislature drafted a bill for 'preventing the practice of holding persons in Slavery.'"[38] While this bill went nowhere at that time, it might be seen as the first step on the very long road to the Emancipation Proclamation.

During the Revolution, thousands of blacks, mostly from the North, gained their freedom through military service.[39] The British also offered liberty to slaves who fought for the Crown and in the South, slaves flocked to British lines to join in the fight *against* their masters.[40] In the Declaration of Independence, Thomas Jefferson condemned the King for this by noting, "He has excited domestic insurrection amongst us"[41] but when he was governor of Virginia in 1781, Jefferson refused to emancipate and enlist any of his own male slaves, or anyone else's, to support the Patriot cause, even though Lord Cornwallis's army had invaded his state.[42] During the War, slavery collapsed in New England and was weakened in other parts of the North, through the enlistment of blacks, but Southern

34. General Orders (Dec. 30, 1775), *in* 2 THE PAPERS OF GEORGE WASHINGTON, *supra* note 33, at 620.

35. BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 18 (1961) [hereinafter QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION].

36. BENJAMIN QUARLES, LINCOLN AND THE NEGRO 52–53 (1962) [hereinafter QUARLES, LINCOLN AND THE NEGRO].

37. QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION, *supra* note 35, at 71.

38. *Id.* at 47.

39. *See* QUARLES, LINCOLN AND THE NEGRO, *supra* note 36, at 52–53 ("[S]ome had become free as a result of meritorious military service in the Revolutionary War . . . ."). Thousands of others would gain their liberty by escaping to British lines and serving the King, who offered freedom to any slaves (and their families) who fought against the patriots. QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION, *supra* note 35, at 19 (quoting Governor Dunmore, "I do hereby further declare all indented servants, Negroes, or others . . . free, that are able and willing to . . . join[] His Majesty's Troops.").

40. QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION, *supra* note 35, at 19.

41. DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

42. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 205–06.

masters fought the War for their own liberty, which for them included the liberty to own slaves.

While the presence of black soldiers initially befuddled the slaveholding Washington, he eventually came to terms with the issue, and by the end of the War, a significant number of blacks were serving in the Continental Army. At least 5,000 blacks would eventually serve in the Patriot armies.[43] But, the problem of slavery increasingly complicated the politics of the new nation and compromised its constitutional and legal underpinnings.

During the Revolution, the Continental Congress requisitioned revenue and soldiers from the states based on their populations.[44] This led, in 1776, to a remarkable debate in Congress over the place of slavery in the new regime. At the end of July 1776, the same month the Continental Congress agreed to the Declaration of Independence, the delegates debated whether to count slaves as free people when determining how much revenue each state should contribute to the national government in order to support the Revolution.[45] Taxation was to be based on population, with each state paying an amount based on its population.[46] Northerners insisted slaves contributed to the economy just like free people, and thus should be counted when assessing taxes.[47] Samuel Chase of Maryland complained that slaves were "wealth" not people, and there was no more justification for taxing them than taxing "Massachusetts fisheries."[48] He argued, "Negroes . . . should not be considered as members of the state more than cattle & that they have no more interest in it."[49] They were "wealth" and could not "be distinguished from the lands or personalities [personal property] held in those states where there are few slaves."[50] He also made the rather self-serving, disingenuous, and empirically false argument that old and young slaves were "a burthen to their owners."[51] James Wilson of Pennsylvania sharply responded that in

43. QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION, *supra* note 35, at ix; *see also* WIENCEK, *supra* note 32, at 191 (suggesting the black presence in the army was between 6%–13% in 1778 and determining by the end of the war, these figures were higher).

44. DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820, at 145 (1971).

45. *Id.* at 147–48; 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1079 (debate of July 30, 1776) (Worthington Chauncey Ford ed., 1906) [hereinafter Debate of July 30, 1776].

46. Debate of July 30, 1776, *supra* note 45, at 1079.

47. *Id.*

48. *Id.* at 1079–80. For an excellent discussion of this debate, see ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 120–24 (2006).

49. EINHORN, *supra* note 48, at 121.

50. *Id.* (quoting Samuel Chase).

51. Debate of July 30, 1776, *supra* note 45, at 1079–80. Southerners had slave children as

the South slaves were taxed just as free people.[52] This led Thomas Lynch of South Carolina to utter the first (but not the last) threat of secession from that state, blustering that if Congress "debated whether their slaves are their property" then there would be "an end of the confederation."[53] He argued, "Our slaves being our property why should they be taxed more than the land, sheep, cattle, horses, &c.?"[54] Pennsylvania's Benjamin Franklin, who was not easily intimidated, pungently replied that there was "some difference between them [slaves] and sheep; sheep will never make any insurrections."[55] The Southerners won this debate, and the national government never counted slaves for the allocation of taxes and soldiers during the Revolution or under the Articles of Confederation, which were written in 1777 and served as a de fact constitution that the states ratified in 1781. Slaves were "property" under the Articles, just as Chase and Lynch claimed. This, of course, had a significant implication for the new nation.

In the Second Continental Congress and Congress under the Articles of Confederation, each state had one vote.[56] Population was used to determine a state's financial obligation to the national government taxation and the number of soldiers each state was to supply for the war with Britain. Thus, the Southern states had no incentive to count slaves in their population and had a strong disincentive to do so. But, the Constitutional Convention changed this by using population to determine the size of a state's delegation in the House of Representatives and then using the size of that delegation to determine the number of presidential electors each state would have.[57] This led Southerners to execute a 180-degree pirouette, suddenly arguing that slaves *should* be counted as part of the population.[58]

From the beginning of the Constitutional Convention, until the very end, slavery bedeviled the delegates.[59] In the end, slave owners and the Deep South won huge victories and major concessions in the Convention

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young as five-years old working at various tasks. Even very old slaves were given jobs, including watching over infants and toddlers while their mothers worked in the fields. See ROBINSON *supra* note 44, at 146–49 for more information on the debate.

52. Debate of July 30, 1776, *supra* note 45, at 1079–80.

53. *Id.* at 1080.

54. *Id.*

55. *Id.*; EINHORN, *supra* note 48, at 123.

56. ARTICLES OF CONFEDERATION of 1781, art. V, para. 4 ("In determining questions in the United States, in Congress assembled, each State shall have one vote.").

57. U.S. CONST. art. I, § 2, cl. 3; *id.* art. II, § 1, cl. 2.

58. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 10–21.

59. *Id.*

that protected slavery. The greatest gain was the creation of a national government that had limited powers and was precluded from interfering with slavery in any state. The very idea of centralized power particularly frightened Southerners, who feared the new government would harm slavery.[60] During the debate over representation in the Constitutional Convention, South Carolina's Pierce Butler made the point directly: "The security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."[61] Thus, "more than any other group" at the Convention, the Southerners demanded a government of limited and enumerated powers.[62] Here, they were enormously successful and most Southerners, even those who opposed the Constitution for other reasons, agreed with General Charles Cotesworth Pinckney of South Carolina, who bragged to his state's 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.[63]

Lincoln, like almost every other lawyer and politician in America in 1860, fully accepted this understanding of the limitations of national power under the Constitution of 1787.

But, beyond the creation of a central government that could not harm slavery where it existed, the Southerners gained tremendous support for

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60. *Id.*

61. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS].

62. Paul Finkelman, *Slavery and the Constitutional Convention*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 116, 118 (Jean Allain ed., 2012). The only exceptions to this were James Madison, George Washington, and James McHenry of Maryland, who were significantly more nationalist in their orientation than most of the Southerners at the Convention. These three delegates still wanted protections for slavery and to allocate the number of each state's congressional representatives and presidential electors based on population figures that counted slaves but also wanted a stronger, more expansive national government.

63. Debates in the Legislature and in Convention of the State of South Carolina on the Adoption of the Federal Constitution (Jan. 16, 1787), *reprinted in* 4 ELLIOT'S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 253, 286 (Jonathan Elliot ed., Wash., Taylor & Maury, 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. Patrick Henry, using any argument he could find to oppose the Constitution, feared that "[a]mong ten thousand *implied powers* which they may assume, they may, if we be engaged in war, liberate every one of your slaves if they please." 3 ELLIOT'S DEBATES, *supra*, at 589. Ironically, the implied war powers of the president would be used to end slavery, but only after the South had renounced the Union.

slavery throughout the Constitution. The call for population-based representation led to vitriolic debates over whether slaves were part of the population or merely property. Eventually, the Convention agreed to count three-fifths of the slaves for the allocation of representation.[64] This did not change the status of slavery or slaves, but only gave the South extra political power in the national legislature based on counting slaves, even though none of the Southern state legislatures based apportionment on slaves. Many Northern delegates were disgusted by this political gift to the slave owners on account of the number of slaves they owned. William Paterson of New Jersey complained that everyone knew that slaves should be seen "in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master."[65] Paterson pointedly asked, "Has a man in Virga. a number of votes in proportion to the number of his slaves?"[66] Paterson's complaints, however valid, could not prevent the Convention from giving political power to the South for its slave property, and doing so in the guise that slaves were somehow "other persons."

The proposal to give Congress the power to regulate all international and interstate commerce led delegates from the Carolinas and Georgia to demand that Congress be specifically prohibited from interfering with the African slave trade for at least a significant number of years.[67] After a nasty debate on this subject, the Convention agreed to suspend the application of the Commerce Clause to African slave trade for at least twenty years.[68] This clause did not require that Congress ever end the trade, and the delegates from the Deep South hoped—incorrectly as it turned out—that by 1808, they would have enough power and votes in Congress to prevent any ban on the trade. As with other clauses dealing with bondage, the Framers did not use the word "slave" or "slavery" because they did not want to upset Northerners who might oppose the Constitution because of its blatantly proslavery provisions. Thus, rather than honestly state what the clause was about, the Framers used language

64. U.S. CONST., art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

65. 1 FARRAND'S RECORDS, *supra* note 61, at 561.

66. *Id.*

67. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 22–32.

68. *Id.* at 29.

that was designed to mislead readers:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[69]

Gouverneur Morris, a New Yorker who happened to represent Pennsylvania at the Convention, considered this clause a betrayal of the Revolution. He exploded in anger and frustration, arguing that when combined with the Three-Fifths Clause, the continuation of the slave trade

> when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice.[70]

Morris understood that in the end, the Convention was giving extra representation to the owners of slaves, which was fundamentally undemocratic, and that the clause would only encourage the importation of more slaves.[71] Politicians and judges, including Chief Justice Roger B. Taney, also understood that this clause specifically sheltered slavery and helped make the system of slavery a specially protected institution and elevated slaves to a specially protected form of private property.[72]

The debate over the election of the President was directly connected to the Three-Fifths Clause and congressional representation. In this debate, James Madison conceded that "the people at large" were "the fittest" to choose the President.[73] But, he argued this was impossible because under such a scheme the "Southern States . . . could have no influence in the election on the score of the Negroes."[74] Thus, Madison helped create the electoral college in which the Three-Fifths Clause enhanced Southern political power in electing the President.[75] The clause gave Southerners a

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69. U.S. CONST., art. I, § 9, cl. 1

70. 2 FARRAND'S RECORDS, *supra* note 61, at 222.

71. *Id.*

72. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05, 415 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

73. 2 FARRAND'S RECORDS, *supra* note 61, at 56.

74. *Id.*

75. *See generally* Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002) [hereinafter Finkelman, *Proslavery Origins*] (describing how Madison and other delegates at the Constitutional Convention considered slavery when creating the electoral college).

greater influence than Northerners over the election of the President, based on the slaves in their states.[76]

The Three-Fifths Clause, which affected Congressional representation and the election of the President, has often been misunderstood as a statement that the Founders believed that a black man counted as three-fifths of a person for voting purposes. But, this is completely wrong. Under this clause, *free* blacks were counted fully for representation.[77] However, opponents of slavery did not want to count *slaves* at all in determining representation—arguing that under Southern law, slaves were property, not people and they could never vote or participate in the government.[78] Opponents objected to giving the slave states extra political power as a reward for keeping people in bondage and, as Gouverneur Morris noted, for bringing more slaves over from Africa.[79] Proslavery Southerners—who believed blacks were legitimately held as slaves, and legitimately treated as property—nevertheless wanted to count slaves fully for representation because it would give them more seats in Congress and more influence in electing the President, even though the slaves would never be able to participate in the government.[80] This system gave the South extra votes in Congress (and in the electoral college), and Chief Justice Taney used these facts to bolster his argument that slavery was a specially protected form of private property in *Dred Scott*.[81] It also gave Southerners more power in Congress and the election of the President, which they could use to further strengthen the legal and political chains that kept their slaves in bondage.

Debates over taxation led to successful demands that the Constitution ban export taxes because Southerners feared they would be used to indirectly tax slavery by taxing the tobacco, rice, and indigo that slaves produced.[82] Again, this helped demonstrate that slavery had a protected

76. The clause would have a profound effect on Madison's own career. In 1800, Thomas Jefferson would gain the presidency because of the presidential electors created by counting slaves for representation. Without those extra slave-based electors, John Adams would have been reelected. GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 62 (2003) (attributing twelve of Jefferson's electoral votes to "the slave count"). Jefferson chose Madison as his Secretary of State, which was Madison's stepping-stone to the presidency.

77. U.S. CONST., art. I, § 2, cl. 3.

78. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 10–21.

79. 2 FARRAND'S RECORDS, *supra* note 62, at 222.

80. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 10–21.

81. Dred Scott v. Sandford, 60 U.S. (19. How.) 393, 399–453 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

82. Cotton, which would become the most important export crop of the South, would not be commercially grown until the late 1790s. The bans on export taxes are Article I, Section 9, Clause 4

status in the Constitution.

The Fugitive Slave Clause[83] further strengthened slavery by overruling the existing common law precedent inherited from the English decision in *Somerset v. Stewart*.[84] This case resolved the status of James Somerset, a Virginia slave whose master, Charles Stewart, had taken him to England. Somerset ran away from his master, who hired men to capture him and then consigned him to a ship to be taken to the British Caribbean where he would be sold.[85] The question before the Court of Kings Bench boiled down to whether a slave could be held in England against his will.[86] Ultimately, William Murray, Lord Chief Justice Mansfield, concluded that this would violate English law:

> So high an act of dominion [as holding someone in slavery] must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.[87]

The logic of *Somerset* was simple: slaves became free when they entered a jurisdiction where there were no laws creating slavery or supporting the system. The case was part of the common law before the American Revolution, and thus was received into American law, except where statutes or constitutions overruled it.[88] Initially, *Somerset* had no effect in the American colonies, where slavery was legal everywhere. By the time of the Constitutional Convention, however, Massachusetts and New Hampshire had ended slavery,[89] and Pennsylvania, Connecticut, and

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and Article I, Section 10, Clause 2 of the Constitution.

83. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

84. Somerset v. Stewart, (1772) 98 Eng. Rep. 499; Lofft 1.

85. WIECEK, *supra* note 10, at 28–39; William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 86 (1974).

86. *Somerset*, 98 Eng. Rep. at 510; Lofft 19.

87. *Id.*

88. On the reception of the common law, see generally WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 (1975).

89. FINKELMAN, AN IMPERFECT UNION, *supra* note 10, at 41–42; ZILVERSMIT, *supra* note 28, at 115–17.

Rhode Island were in the process of doing so.[90] At this time, none of the states had applied the *Somerset* rule to emancipate any slaves,[91] and Pennsylvania specifically allowed visiting masters to bring slaves into the state for up to six months.[92] Nevertheless, Southerners demanded that the Constitution prevent states from harboring or emancipating fugitive slaves, which the free states could do under the *Somerset* rule.[93] This demand led to the Fugitive Slave Clause of the Constitution.[94] Awkwardly phrased and ambiguous in how it was to be implemented, the clause would undermine interstate harmony almost from the adoption of the Constitution itself.[95] It led to a federal statute in 1793 that did little to help recover fugitive slaves and symbolized that the national government would use its powers under the new Constitution to protect slavery.[96] By the 1840s, the return of fugitive slaves had become a significant source of irritation in the North,[97]—while Northern personal liberty laws, designed to protect their neighbors from being kidnapped,[98] led to Southern claims that the Constitutional Clause and the 1793 Fugitive Slave Law were not being enforced. In its overwhelmingly proslavery decision in *Prigg* v. *Pennsylvania*,[99] the Supreme Court struck down all Northern laws that had

90. FINKELMAN, AN IMPERFECT UNION, *supra* note 10, at 41–42; ZILVERSMIT, *supra* note 28, at 115–17; *see also* Paul Finkelman, *Human Liberty, Property in Human Beings, and the Pennsylvania Supreme Court*, 53 DUQ. L. REV. 453, 458–67 (2015) [hereinafter Finkelman, *Human Liberty*] (noting that Pennsylvania's legislature passed a gradual abolition act before the adoption of the Constitution in 1787 but vestiges of slavery continued many years after).

91. For a history of the *Somerset* rule in the United States, see FINKELMAN, AN IMPERFECT UNION, *supra* note 10.

92. An Act for the Gradual Abolition of Slavery, Act of Mar. 1, 1780, ch. 146, 1780 Pa. Laws 296, *reprinted in* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 492 (Phila., John Bioren 1810); *see also* FINKELMAN, AN IMPERFECT UNION, *supra* note 10, at 49–55 (explaining the application of the six-month law in Pennsylvania); Finkelman, *Human Liberty*, *supra* note 90, at 458–61 (examining the progression of Pennsylvania's attitudes toward slavery).

93. 2 FARRAND'S RECORDS, *supra* note 61, at 443, 449; FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 30–31, 103–04.

94. U.S. CONST. art. IV, § 2, cl. 3.

95. Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397 (1990) (describing conflicts between Virginia and Pennsylvania over fugitive slaves in the early 1790s that led to the Fugitive Slave Law of 1793).

96. An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters, Act of Feb. 12, 1793, 1 Stat. 302.

97. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 626 (1842) (finding a Pennsylvania state law protecting fugitive slaves unconstitutional); Paul Finkelman, *Story Telling on the Supreme Court*: Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1995) (analyzing Story's majority opinion in *Prigg v. Pennsylvania*).

98. THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861 (1974).

99. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

been passed to protect free blacks from kidnapping.[100] This led to many Northern states simply refusing to help Southerners regain their fugitive slaves,[101] which in turn led to Southern demands for a new, stronger fugitive slave law with significant federal enforcement. The result was the Fugitive Slave Law of 1850, which led to riots and rescues, and relatively few returns of fugitives.[102] Northern hostility to this law in the 1850s emerged as one of the key issues leading to secession.[103] But, through all this controversy, the clause also stood for the proposition that the Constitution provided special protections for slavery, although it did not provide any special or specific protections for any other type of property or any other status created by state law. The Fugitive Slave Clause provided enormous support for Chief Justice Taney's assertions in *Dred Scott* that slavery had specific constitutional protections.[104] In his first inaugural address, President Lincoln acknowledged the 1850 law was flawed and perhaps needed to be changed,[105] but he also insisted that his administration would enforce the law: "I add too, that 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."[106]

Other parts of the Constitution protected slavery without, even indirectly, referring to slaves. The Constitution guaranteed that the federal government would help suppress "Insurrections" and "domestic Violence."[107] Slave owners understood this meant the national government would be used to suppress slave rebellions.[108] During the ratification process, some anti-federalists cited these clauses as reasons to

100. *Id.* at 622–26.

101. The Northern personal liberty laws passed after *Prigg* are discussed in MORRIS, *supra* note 98.

102. Fugitive Slave Act of 1850, Sept. 18, 1850, ch. 9, 9 Stat. 462; *see* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860, app. at 207 (1970) (finding only 366 fugitive slaves were returned under the law).

103. *See* Kentucky v. Dennison, 65 U.S. 66, 98–103 (1861) (addressing the Court's authority to compel state officials to turn over a fugitive of another state); *see also* Ableman v. Booth, 62 U.S. 506, 507–08 (1859) (concentrating on a prisoner held in federal custody on charges of aiding and abetting the escape of a slave under the Fugitive Slave Act); STEVEN LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL 50–52 (2010) (exploring the Fugitive Slave Act's radicalization of Northern states).

104. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 411–12 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

105. Lincoln, First Inaugural Address, *supra* note 2, at 267.

106. *Id.* at 263.

107. U.S. CONST. art. I, § 8, cl. 15; *id.* art. IV, § 4.

108. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 7–8.

oppose the Constitution.[109] Three opponents of the Constitution in Massachusetts noted that the Constitution bound the states together as a "whole" and "the states" were "under obligation . . . reciprocally to aid each other in defense and support of everything to which they are entitled thereby, right or wrong."[110] Thus, the Northern states might be called to suppress a slave revolt or in some other way defend the institution. They could not predict how slavery might entangle them in the future, but they did know that "this lust for slavery, portentous of much evil in America, for the cry of innocent blood . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime."[111]

Perhaps the greatest victory for slavery was in the amendment process. Amendments require a two-thirds vote of each house of Congress and ratification by three-quarters of the states. Under such conditions, the slave states would have a perpetual veto over any constitutional amendment. In 1860, there were fifteen slave states. If there had been no Civil War, even today, in 2015, those fifteen states could still block any amendments in the fifty-state Union.

Thus, when Lincoln ran for President, he sought to be the chief executive of a nation where slavery was legal and powerfully protected by the national Constitution. Despite his deep hatred for slavery—he said he was "naturally antislavery"[112]—Lincoln knew he had no power to touch slavery in the states where it already existed. Furthermore, he knew Congress lacked any power to do so.[113] At most, Lincoln could hope to stop the spread of slavery to the western territories and prevent the admission of any new slave states. This might put slavery "in the course of ultimate extinction," Lincoln said, in his famous *A House Divided* speech,[114] but it would be an exceedingly long "course." Thus, it is not surprising that in a number of speeches in the late 1850s Lincoln denied he had any intention of interfering with slavery where it existed. As he said in his inaugural address, "I have no purpose, directly or indirectly, to interfere

109. *Id.* at 35–36.

110. Consider Arms, Malichi Maynard, and Samuel Field, *Reasons for Dissent*, HAMPSHIRE GAZETTE, Apr. 16, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, 262–63 (Herbert Storing ed., 1981).

111. *Id.*

112. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* 7 COLLECTED WORKS, *supra* note 2, at 281, 281.

113. Lincoln, First Inaugural Address, *supra* note 2, at 263.

114. Abraham Lincoln, A House Divided, Speech at Springfield, Illinois (June 16, 1858), *reprinted in* 2 COLLECTED WORKS, *supra* note 2, at 461, 461.

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."[115] But, in less than a year and a half, he would discover the power and develop the inclination to do exactly that.

II. THE REPUBLICAN POSITION ON SLAVERY IN 1860

In 1860, Lincoln ran for President on a platform that promised to prevent the spread of slavery into any western territories.[116] The platform declared:

> That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no "person should be deprived of life, liberty or property, without due process of law," it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.[117]

Central to the platform was an implicit attack on Chief Justice Taney's decision in *Dred Scott*. In that case, the Court concluded that Congress had no power to regulate the territories or to prohibit slavery in the territories.[118] On the contrary, Taney held that slavery constituted a specially protected form of private property, and that all Americans were entitled to carry their slaves into any federal territory.[119] Taney reached this conclusion despite enormous evidence to the contrary. In 1787, the Congress, under the Articles of Confederation, banned slavery in the Northwest Territories.[120] After the ratification of the Constitution, the new Congress reenacted this law, with only minor changes to take into account the new constitutional structure.[121] No one in Congress, including a significant number of members who had been delegates to the Constitutional Convention, doubted that Congress had the power to pass this law under the provisions of Article IV of the Constitution.[122] George

115. Lincoln, First Inaugural Address, *supra* note 2, at 263.

116. *Republican Party Platform of 1860*, *supra* note 12.

117. *Id.*

118. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450–53 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

119. *Id.*

120. An Act to Provide for the Government of the Territory Northwest of the River Ohio, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

121. *Id.*

122. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all

Washington, who had presided over the Constitutional Convention and signed the law, had no constitutional reservations about signing the document; nor did any of the members of Washington's cabinet, including Secretary of the Treasury Alexander Hamilton and Attorney General Edmund Randolph, both of whom had been active participants in the Constitutional Convention. In subsequent years, Congress regulated slavery in all of the other territories through numerous statutes, including, of course, the Missouri Compromise of 1820.[123] That law banned slavery in the territories north and west of the new state of Missouri.[124] Dred Scott's residence in that territory was the basis of his federal claim to freedom.[125] With the exception of a few extreme proslavery politicians, no one in 1820 doubted that Congress's power to "make all needful rules and regulations" for governing federal territories[126] allowed the Missouri Compromise. Few Southerners complained when Oregon was organized as a territory without slavery,[127] and although most Southerners voted against the admission of California as a free state,[128] even the ardently proslavery Southern nationalist Robert Toombs of Georgia conceded that this was not "an aggression upon the South" because there were virtually no slaves in California and the overwhelming majority of the people there opposed slavery.[129] Southerners were delighted that the Compromise of 1850 allowed slavery in all of the territories acquired from Mexico, even though some were north of the Missouri Compromise line.[130] Southerners applauded the Kansas–Nebraska Act, which opened up

needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

123. An Act for the Admission of the State of Maine into the Union, Act of Mar. 3, 1820, 3 Stat. 544; An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories, Act of Mar. 6, 1820, 3 Stat. 545.

124. An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories, Act of Mar. 6, 1820, ch. 22, 3 Stat. 545.

125. Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1223 (2008).

126. U.S. CONST. art. IV, § 3, cl. 2.

127. An Act to Establish the Territorial Government of Oregon, Act of Aug. 14, 1848, ch. 177, 9 Stat. 323.

128. PAUL FINKELMAN, MILLARD FILLMORE 83–84 (2011).

129. *Id.* at 114.

130. For a full discussion of the Compromise of 1850, see Paul Finkelman, *The Appeasement of 1850, in* CONGRESS AND THE CRISIS OF THE 1850S, at 36 (Paul Finkelman & Donald R. Kennon eds., 2012) [hereinafter Finkelman, *Appeasement of 1850*].

almost all the remaining portions of the Louisiana Purchase to slavery.[131]

This history shows that almost every administration and every session of Congress, from the presidency of George Washington to presidency of Franklin Pierce, understood that Congress had the power to regulate the territories and to allow or not allow slavery in them. Thus, Taney's conclusion in *Dred Scott* was shocking to most Northerners, as he declared that the territories clause of Article IV was

> confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.[132]

This meant that scores of statutes and judicial rulings, dating from the very beginning of the nation, were unconstitutional.

Taney further argued that slavery was a specially protected form of private property, and it was unconstitutional to emancipate slaves merely because they were taken to federal territories where slavery would be illegal.[133] Taney asserted:

> And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[134]

Emphatically, the Chief Justice argued: "[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution."[135] Taney concluded:

> [N]o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection tha[n] property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the

131. *See* An Act to Organize the Territories of Nebraska and Kansas, Act of May 30, 1854, 10 Stat. 277 (repealing the Missouri Compromise, which had outlawed slavery above the 36° 30' latitude in the Louisiana territories and reopening the national struggle over slavery in the western territories).

132. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 432 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

133. *Id.* at 450.

134. *Id.*

135. *Id.* at 451.

owner in his rights.[136]

This led to the obvious conclusion, in Taney's mind:

> [T]he act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.[137]

The Republican Platform, on which Lincoln ran, rejected Taney's claims, which the Platform called "the new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States."[138] The Party asserted that this new development was "a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country."[139] The Party declared, "The normal condition of all the territory of the United States is that of freedom."[140] While obliquely referring to the Northwest Ordinance[141] and quoting from the Fifth Amendment,[142] Lincoln's party claimed that the Founding Fathers "abolished slavery in all our national territory and ordained that 'no persons should be deprived of life, liberty or property without due process of law.'"[143] Thus, it was the Party's "duty, by legislation, whenever such legislation is necessary, to maintain this

136. *Id.* at 452.

137. *Id.*

138. *Republican Party Platform of 1860*, *supra* note 12, § 7.

139. *Id.*

140. *Id.* § 8.

141. Act of July 13, 1787, ch. 8, 1 Stat. 50.

142. U.S. CONST. amend. V.

143. *Republican Party Platform of 1860*, *supra* note 12, § 8. This was an overstatement on the issue of slavery and the founding generation. The founding generation prohibited slavery in the Northwest Territory in 1787 and reenacted that law in 1789, after the Constitution was adopted. However, neither law prohibited slavery in the Southwest territories, which eventually became the slave states of Tennessee, Alabama, and Mississippi. The acquisition of Louisiana under President Jefferson led to slavery in the territories that would become Louisiana, Arkansas, Missouri, and Oklahoma, and the acquisition of Florida by President Monroe (the last of the founding generation to lead the nation) led to slavery in that territory. In addition, while Congress in 1787 declared there would "be neither slavery nor involuntary servitude" in the Northwest Territory, both forms of bondage continued in Indiana until the 1830s and in Illinois until the mid-1840s. For more information, see FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 46–101 and Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, 111 IND. MAG. OF HIST. 64 (2015) [hereinafter Finkelman, *Almost a Free State*].

provision of the Constitution against all attempts to violate it."[144] The Party "den[ied] the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States."[145]

While making it clear that the Republicans, if they gained power, would not allow slavery to spread to any new territories, members of Lincoln's party also made it clear they had no intention of interfering with slavery in the states where it already existed. Furthermore, they promised to protect the Southern states from abolitionist violence, such as that perpetrated by John Brown in 1859. Republicans included these guarantees in the fourth plank of their party's platform:

> 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 powers on which the perfection and endurance of our political fabric depends; and we denounce the lawless invasion by armed force of the soil of any state or territory, no matter under what pretext, as among the gravest of crimes.[146]

This position comported with well-understood principles of constitutional law dating from the ratification debates of 1787–1788.[147] The Republicans of 1860 would have agreed with General Charles Cotesworth Pinckney's assessment of the Constitution in 1788 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."[148] Nothing had changed since then, with regard to this understanding of Congressional power, and no serious political leaders or legal theorists disagreed with this conclusion.[149]

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144. *Republican Party Platform of 1860*, *supra* note 12, at § 8.

145. *Id.*

146. *Id.* § 4.

147. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 34–36; ROBINSON, *supra* note 44, at 234–47.

148. Debates in the Legislature and in Convention of the State of South Carolina on the Adoption of the Federal Constitution, *supra* note 63, at 286.

149. There were a few outliers, such as Lysander Spooner, who claimed slavery was unconstitutional. *See generally* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Bos., Bela Marsh 1845) (describing Spooner's views on slavery in light of the Constitution). For a more sympathetic discussion of Spooner, see Helen J. Knowles, *Seeing the Light: Lysander Spooner's Increasingly Popular Constitutionalism*, 31 L. & HIST. REV. 531 (2013).

Thus, the Republican Platform offered a political compromise on the issue of slavery and the Constitution. The Republicans would emphatically not attempt to end slavery, or even interfere with it, in the states where it existed. They had no power and, as Lincoln said, "no inclination" to do so.[150] But, the Party would also not allow any new slave states into the Union and would not allow slavery in the territories.

III. SOUTHERN RESPONSE

In the 1860 election, there were four presidential candidates, including two Democrats: John C. Breckinridge of Kentucky and Stephen A. Douglas of Illinois. Lincoln won a substantial victory in the electoral college,[151] with 180 electors, while his three opponents had a combined electoral vote of 123.[152] But, Lincoln won just under 40 percent of the popular vote.[153] He won all the electoral votes of the non-slave states, except New Jersey, which he split with Douglas.[154] But, some of his victories were hardly impressive. He lost the popular vote to Douglas in New Jersey.[155] In California, he won only 32 percent of the vote, barely beating Douglas who carried 31 percent of the vote.[156] Had the Breckinridge Democrats voted for Douglas (or vice versa), the Democrats would have had 60 percent of the popular vote.[157] Lincoln won Oregon with just 36 percent of the vote, while Douglas and Breckinridge combined for 64 percent of the vote.[158] Again, a united Democratic Party would have taken the state. Lincoln won Illinois, Indiana, and Ohio with barely 50 percent of the popular vote and carried New York and

150. Lincoln, First Inaugural Address, *supra* note 2, at 263.

151. There is a bit of an irony in this since the electoral college was designed to help protect slavery by increasing the power of the southern voters through the Three-Fifths Clause. In the debates over the election of the president at the Constitutional Convention, James Madison conceded that "the people at large" were "the fittest" to choose the president. 2 FARRAND'S RECORDS, *supra* note 61, at 56. But, he argued this was impossible because under such a scheme the "Southern States . . . could have no influence in the election on the score of the Negroes." *Id.* Thus, Madison helped create the electoral college in which the Three-Fifths Clause enhanced Southern political power in electing the president. *Id.*; *see generally* Finkelman, *Proslavery Origins*, *supra* note 75 (tracing the roots of the electoral college).

152. *Election of 1860*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1860 (last visited Nov. 21, 2015).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Connecticut with only 52 percent of the popular vote.[159] Clearly, a united Democratic Party would have taken California, Oregon, and New Jersey, and, with a little luck, some of these other states. No president since Andrew Jackson, in 1832, had been reelected to a second term, and in 1860 there was no reason to believe that Lincoln would win again in 1864.

Given these facts, Southerners who were worried about Lincoln's antislavery views and the Republican hostility toward allowing slavery in the territories could almost certainly have waited out Lincoln, with the expectation that they would retake the White House in 1864. After the election, the Democrats still controlled the Senate and with an overwhelmingly proslavery Supreme Court, there were few threats to slavery on the political horizon.[160] Even the ability of the Republicans to prohibit slavery in the territories was unclear. In 1861, slavery was legal in *every* U.S. territory. Most of the federal territories were open to slavery under the Compromise of 1850[161] and the Kansas–Nebraska Act of 1854.[162] Thus, before Lincoln could have banned slavery in the territories, Congress would have had to repeal or amend these laws. Northern dominance of the House would have easily led to the passage of such laws in that body, but before the Southern states left the Union, the Democrats in the Senate had enough power to block such laws. In the 36th Congress, there were thirty-eight Democrats in the Senate and only twenty-six Republicans.[163] The exodus of twenty-one Southern senators (Andrew Johnson of Tennessee did not resign his seat and remained loyal to the United States) meant that, in the 37th Congress, there were only

159. *Id.*

160. In 1860, only one Justice, the seventy-five year old John McLean, was opposed to slavery. He would die in April, 1861. Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 520, 527 (2009).

161. Finkelman, *The Appeasement of 1850*, *supra* note 130.

162. The Kansas–Nebraska Act allowed slavery in all of the territories left over from the Louisiana Purchase, except Minnesota. An Act to Organize the Territories of Nebraska and Kansas, Act of May 30, 1854, ch. 59, 10 Stat. 277. Thus, after that law slavery was allowed in all federal territories except Minnesota and the Oregon Territory, which includes present day Oregon, Washington, and part of Idaho. *Id.* This act repealed the Missouri Compromise, which had outlawed slavery above the 36° 30' latitude in the Louisiana territories and reopened the national struggle over slavery in the western territories. *Id. Dred Scott* stuck down all remaining bans on slavery in the federal territories.

163. There were fifteen slave states in 1860 and eighteen free states. Thus, it would only take four Northern Democrats voting with the thirty Southern senators to block any legislation harmful to slavery. In 1860, there were thirty-eight Democrats and twenty-six Republicans in the Senate. *Composition of Congress, by Political Party, 1855–2017*, INFOPLEASE, http://www.infoplease.com/ipa/A0774721.html.

eleven Democratic Senators and thirty-one Republicans.[164] The existing territorial laws prohibited slavery in what was left of the Oregon territory—what would later become the states of Washington and Idaho—but these laws were void under *Dred Scott.*[165] Thus, had Congress actually passed a law banning slavery in the territories, there would have presumably been a speedy move to take it to the Supreme Court, where the proslavery majority, relying on *Dred Scott*, would have struck it down.

But, the political leadership in the Deep South was not interested in waiting to see what the next four years might bring. Shortly after the election, South Carolina called a secession convention.[166] In its declaration of the causes of secession, the convention observed:

> A geographical line has been drawn across the Union, and all the States north of that line have 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. He is to be entrusted with the administration of the common Government, because he has declared that that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.[167]

Thus, South Carolina wanted to leave the Union, not for anything that had happened, or even for any plans that Lincoln had articulated to actually harm slavery in the state, but solely because he believed slavery was wrong, and must someday be abolished.

South Carolina further explained that the Northern states

> assume the right of deciding upon the propriety of our domestic institutions; and have denied the rights of property established in fifteen of the States and recognized by the Constitution; they have denounced as sinful the institution of slavery; they have permitted 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.[168]

Here, the South Carolina secessionists betrayed their contempt for

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164 *Id.*

165. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857) (noting due process rights extend to the portions of the United States "governed by Territorial Government"), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

166. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (1861), *reprinted in* J.A. MAY & J.R. FAUNT, SOUTH CAROLINA SECEDES 76–81 (1960), http://avalon.law.yale.edu/19th_century/csa_scarsec.asp [hereinafter *South Carolina Declaration*].

167. *Id.* This resolution was adopted four days after the state officially seceded. Here, South Carolina was quoting from Lincoln's "A House Divided Speech," which he gave at the beginning of his 1858 senatorial campaign. Lincoln, A House Divided, *supra* note 114, at 461.

168. *Id.*

states' rights and state sovereignty. They wanted to leave the Union, not because of anything the national government had done, but because Northern states allowed free speech and freedom of the press within their jurisdictions. Thus, in effect, South Carolina wanted to leave the Union because Northern states allowed their citizens to disagree with Southern values.[169]

The secessionists in the Palmetto State observed that, in March 1861, a new administration that would take over the national government had "announced that the South shall be excluded from the common territory, that the judicial tribunals shall be made sectional, and that a war must be waged against slavery until it shall cease throughout the United States."[170] Except for the exclusion of slavery in the territories, the Republicans had not taken any of these positions. But, it is not clear how that administration would have convinced Congress to pass a statute banning slavery in the territories, assuming the Supreme Court did not strike it down. Furthermore, because judges served for life, it was hard to imagine how Lincoln could have remade the Courts in four years.[171] Nor is it possible to imagine how a Republican administration could have appointed Northerners to fill district judgeships in the South.

But, South Carolina was not taking any chances. Lincoln was the first president who openly condemned the morality and propriety of slavery, and South Carolina believed that under his administration "[t]he guaranties of the Constitution will then no longer exist; the equal rights of the States will be lost. The slaveholding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy."[172] These fears and assumptions, whether valid or not, were enough for South Carolina to leave the Union.

Georgia also made it clear that slavery was the force behind secession.

169. For a more detailed elaboration of this argument, see Finkelman, *States' Rights*, *supra* note 6, at 449–78.

170. *South Carolina Declaration*, *supra* note 166, at 76–81.

171. When Lincoln was elected, there was one vacancy on the Court due to the death of Justice Peter Vivian Daniel. There was also only one opponent of slavery on the Court, John McLean of Ohio. McLean died a month after Lincoln took office. Had Lincoln replaced both men with antislavery Republicans, it would have meant seven of the nine justices still supported slavery. Six of them had been on the Court in 1857 and voted with the majority in *Dred Scott*. The seventh was Nathan Clifford, a proslavery Democrat from Maine who supported the holding in *Dred Scott*. Chief Justice Taney died in 1864 and would have given Lincoln a third seat to fill. Justice John Catron died in 1865, and Justice James Wayne died in 1867. Thus, absent the Civil War, Lincoln could not have appointed a Republican majority to the Court until 1867—assuming he would have been reelected in 1864.

172. *South Carolina Declaration*, *supra* note 166, at 76–81.

The Convention explained:

> For the last ten years we have had numerous and serious causes of complaint against our non-slave-holding confederate States with reference to the subject of African slavery. They have endeavored to weaken our security, to disturb our domestic peace and tranquility, and persistently refused to comply with their express constitutional obligations to us in reference to that property, and by the use of their power in the Federal Government have striven to deprive us of an equal enjoyment of the common Territories of the Republic. This hostile policy of our confederates has been pursued with every circumstance of aggravation which could arouse the passions and excite the hatred of our people, and has placed the two sections of the Union for many years past in the condition of virtual civil war.[173]

Mississippi emphatically made the same point, starting with the second sentence of its Declaration: "Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world."[174] Lincoln and the Republicans were opposed to slavery and that was enough for the Magnolia State to follow South Carolina into the Confederacy.

Texas was equally appalled at the prospect of an administration by a Northern president who was hostile to slavery. The state secession convention asserted that the Republic of Texas had joined the Union

> as a commonwealth holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future time.[175]

But now, Texas was determined to leave the Union because Northerners had an "unnatural feeling of hostility to these Southern States and their beneficent and patriarchal system of African slavery."[176] Texans were no longer willing to remain in a nation where people from other states were "proclaiming the debasing doctrine of equality of all men, irrespective of

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173. *Georgia Secession* (1861), *reprinted in* U.S. WAR DEP'T, THE WAR OF THE REBELLION: THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ADDITIONS AND CORRECTIONS TO SERIES IV—VOLUME I, at 81, 81–85 (1902). Georgia was correct that Northerners had "striven to deprive [them] of an equal enjoyment of the common Territories of the Republic," in the sense that they wanted to ban slavery in the territories. *Id.* But, the Georgia secessionists failed to point out that the Southerners had won these battles in the Congress and the courts.

174. *A Declaration of the Immediate Causes Which Induce and Justify the Secession of the State of Mississippi from the Federal Union* (1861), *reprinted in* JOURNAL OF THE STATE CONVENTION, AND ORDINANCES AND RESOLUTIONS ADOPTED IN MARCH 1861, at 86–88 (Jackson, E. Barksdale 1861).

175. *Texas Declaration, supra* note 26, at 61–66.

176. *Id.*

race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law."[177] Again, it is worth understanding that the Texas convention was ready to dissolve the Union over the ideology, ideas, and free speech of Northerners. No Northern state had ever even threatened to leave the Union because Southerners espoused an ideology of slavery and the subordination of blacks.[178] But Texas, like South Carolina, argued that the exercise of free speech in the North, on the other side of the question, justified ending the Union and risking civil war.

The Texas secessionists complained that Northerners "demand the abolition of negro slavery throughout the confederacy, the recognition of political equality between the white and negro races, and avow their determination to press on their crusade against us, so long as a negro slave remains in these States."[179] Finally, the Texas secessionists made it clear that slavery was tied to white supremacy, and that secession was about preserving both. Thus, Texas was leaving the Union because

> in this free government *all white men are and of right ought to be entitled to equal civil and political rights*; that the servitude of the African race, as existing in these States, is mutually beneficial to both bond and free, and is abundantly authorized and justified by the experience of mankind, and the revealed will of the Almighty Creator, as recognized by all Christian nations; while the destruction of the existing relations between the two races, as advocated by our sectional enemies, would bring inevitable calamities upon both and desolation upon the fifteen slave-holding States.[180]

Shortly after Lincoln was inaugurated, the Confederate Vice President, Alexander H. Stephens, confirmed the proslavery and white supremacist basis of the Confederacy. In, what is known as, the "Cornerstone Speech," Vice President Stephens argued that, at the time of the founding, America's leaders accepted "the assumption of the equality of the races."[181] There is in fact very little historical evidence to support

177. *Id.*

178. For a compendium of Southern proslavery views, see PAUL FINKELMAN, DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH (2004).

179. *Texas Declaration*, *supra* note 26, at 61–66. There is little evidence that most Northerners believed in any of these things. Free blacks had political equality in only a handful of Northern states, and while a majority of Republicans may have backed black suffrage, a majority of Northerners in most states did not.

180. *Id.*

181. Alexander H. Stephens, Corner Stone Speech (Mar. 21, 1861), *reprinted in* HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 717, 721 (Phila., Nat'l Publ'g Co. 1886).

Stephens on this point. Ironically, this position put Stephens squarely at odds with Chief Justice Taney's arguments in *Dred Scott* that, at the founding, blacks were

> considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[182]

But, for Stephens it was important to make this argument, however historically absurd it was. This rhetorical ploy allowed Southerners to believe that secession was legitimate because the Union had wrongly been founded on racial equality.[183] Stephens wanted all white Southerners to accept a full break with the American nation, so he alleged that the Founders had favored equality and that the idea of racial equality "was an error."[184]

This historical fiction allowed Stephens to extol what he considered the great virtue of the Confederacy:

> 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.[185]

Stephens denounced the Northern claims that the "enslavement of the African was in violation of the laws of nature; that it was wrong in *principle, socially*, morally, and politically."[186] He proudly declared that the new Confederate government was "founded upon exactly the opposite idea."[187] The Confederate Vice President claimed it was "insanity" to believe "that the negro is equal" or that slavery was wrong.[188] The purpose of the Confederacy was to preserve slavery and to "put at *rest*,

182. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857), *superseded in part by constitutional amendments,* U.S. CONST. amends. XIII, XIV, *and in part by the Insular cases.*

183. Ironically, Lincoln would use the same tactic in the Gettysburg Address to argue that the nation was "conceived in liberty and dedicated to the proposition that all men are created equal." Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* 7 COLLECTED WORKS, *supra* note 2, at 22, 22–23.

184. Stephens, Corner Stone Speech, *supra* note 181, at 721.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

forever, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the *proper status* of the negro in our form of civilization."[189]

Thus, by the time Lincoln took office, seven states had left the Union to preserve slavery "forever" and to insure that blacks would be a perpetually subordinated class. Ironically, Lincoln, who deeply hated slavery and believed that "[i]f slavery is not wrong, nothing is wrong,"[190] entered his office pledging to preserve slavery in the states where it already existed and to uphold those provisions of the Constitution—even the hated Fugitive Slave Clause—that protected slavery.

IV. CONGRESSIONAL ACTION AND THE CHANGING NATIONAL RESPONSE TO SLAVERY AND RACE

As already noted, when he took office, Lincoln denied that he threatened slavery in the Southern states. He had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists."[191] As he read the Constitution, he truly believed he had "no lawful right to do so" and not surprisingly, he had "no inclination" to do what was constitutionally impermissible.[192] Lincoln held this position for almost his entire political career. He thought Congress could regulate or end slavery in the federal territories[193] and in the District of Columbia. During his only term in Congress, Lincoln tried to bring a bill forward to end slavery in the national capital through gradual emancipation, but it went nowhere.[194] As a freshman congressman, he had little clout and received virtually no support for this radical bill.[195] But, he always understood that the Constitution did not allow the President or Congress to interfere with slavery in the states.

Within six weeks after taking office, the Civil War broke out on April 12, as Confederate troops attacked the United States Army stationed at Fort Sumter, in Charleston harbor. On the 14th, the Fort surrendered

189. *Id.*

190. Letter from Abraham Lincoln to Albert G. Hodges, *supra* note 112, at 281.

191. Lincoln, First Inaugural Address, *supra* note 2, at 263.

192. *Id.*

193. Lincoln believed Taney's analysis of the powers of Congress over the territories were dicta because, at the very beginning of the opinion, Taney determined that Scott had no standing to sue in federal court and thus, the Court had no jurisdiction in the case. Hence, the case was not actually before the Court, and any comments on the constitutionality of the Missouri Compromise were pure dicta.

194. Finkelman, *Limits of Constitutional Change*, *supra* note 13, at 355–57.

195. *Id.*

and the next day, President Lincoln issued a proclamation noting that "the laws of the United States" were "opposed" and "obstructed" by "combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the Marshals by law."[196] Thus, he asked the states to provide 75,000 militia troops to quell the rebellion "and to cause the laws to be duly executed."[197] He acted under federal legislation passed in 1795 to quell the Whiskey Rebellion.[198]

Lincoln's call for troops went to the governors of twenty-four states, with a follow-up letter from Secretary of War Cameron specifying how many regiments each state should provide.[199] Most governors responded quickly, often the same day they received the telegram. Some responded with enormous enthusiasm.[200] Significantly, Governor Alexander Ramsey of Minnesota telegraphed Secretary of War Cameron on April 14, the day *before* Lincoln asked for troops, offering 1,000 men to protect the nation.[201] Cameron's telegram went out on the 15th and Governor Israel Washburn of Maine replied that day, saying that, in his state, the people "of all parties will rally with alacrity to the maintenance of the Government and of the Union."[202] In Massachusetts, Governor John A.

196. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), *in* 4 COLLECTED WORKS, *supra* note 2, at 331, 331–32.

197. *Id.* Most historians assert that Lincoln asked for volunteers to serve for ninety days, but in fact that is not in Lincoln's Proclamation. However, that day, Secretary of War Simon Cameron sent the Proclamation by telegraph to the governors of all the states still in the Union, except California and Oregon, specifying how many regiments each state should send and that the regiments would serve for three months. *See infra* note 200 and accompanying text.

198. An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions; and to Repeal the Act Now in Force for Those Purposes, Act of Feb. 28, 1795, ch. 36, 1 Stat. 424. Lincoln did not mention the 1795 act in his proclamation, but Secretary of War Cameron refers to it at the beginning of the letter he sent to twenty-four governors. *See infra* note 200 and accompanying text.

199. Letter from Simon Cameron, Sec'y of War, to the Governors of 24 States (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 68, 68. This letter asked for volunteers for three months and contained a list of how many regiments each state was being asked to send. The letter was sent by telegraph to the governors of: Maine, New Hampshire, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, Tennessee, Arkansas, Kentucky, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Iowa, and Minnesota. The administration asked for a total of seventeen regiments (13,260 men) from the slave states still in the Union, but these soldiers would not be mustered by the slave state governors. However, other states sent more soldiers than were requested.

200. Letters from Various Northern Governors (Apr. 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, at ser. 3, at 70, 70–90.

201. Letter from Alex Ramsey, Governor of Minn., to Simon Cameron, Sec'y of War (Apr. 14, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 67, 67.

202. Letter from Israel Washburn, Jr., Governor of Me., to Simon Cameron, Sec'y of War (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 71, 71.

Andrew did not bother with any flowery language but cut right to the point, simply asking, "By what route shall we send?"[203] Two days later, he told Secretary of War Cameron that two regiments had left the state, one headed to Washington and another to Fort Monroe, in Virginia, and that a third regiment was leaving the next day.[204] Governor William Denison of Ohio, who would later serve in Lincoln's cabinet, as Postmaster General,[205] said there was "great rejoicing" in the Buckeye State over the proclamation and that Ohio would "furnish the largest number" of troops the government would "receive."[206] Governor Oliver P. Morton of Indiana promised six regiments in three days.[207] Iowa's governor wanted to know if he could send more than the one regiment the Secretary of War had requested.[208] While perhaps an exaggeration, Senator Zachariah Chandler of Michigan wrote that his state would provide 50,000 troops if requested.[209]

Lincoln hoped to contain secession and avoid a military conflict that would lead to a full-blown civil war. He believed, incorrectly as it turned out, that Southerners would quickly come to their senses and return to the Union. He also assumed (again incorrectly) that the conflict would be short and thus, 75,000 militia troops would be able to finish the job quickly. While 75,000 militia troops seems small when compared to the more than 2.2 million men who would eventually serve in the United States Army and Navy in the Civil War[210]—this was the largest military call up in the history of the nation, and when combined with the 16,000 or so troops in the regular Army created a larger military force than the total

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203. Letter from John A. Andrew, Governor of Mass., to Simon Cameron, Sec'y of War (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 71, 71. General Irwin McDowell replied as simply: "Send your companies here by railroad." Letter from Irwin McDowell, Gen., to John Andrew, Governor of Mass. (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 71, 71.

204. Letter from John A. Andrew to Simon Cameron, *supra* note 204, at 79.

205. *Cabinet Members Under Lincoln*, INFOPLEASE, www.infoplease.com/ipa/A0101218.html (last visited Nov. 21, 2015).

206. Letter from William Dennison, Governor of Ohio, to Simon Cameron, Sec'y of War (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 73, 73.

207. Letter from Oliver P. Morton, Governor of Ind., to Simon Cameron, Sec'y of War, (Apr. 16, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 75, 75.

208. Letter from Samuel J. Kirkwood, Governor of Iowa, to Simon Cameron, Sec'y of War (Apr. 18, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 87, 87.

209. Letter from Z. Chandler, Sen., to Simon Cameron, Sec'y of War (Apr. 17, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 78, 78.

210. 1 CTR. OF MILITARY HISTORY, U.S. ARMY, THE UNITED STATES ARMY AND THE FORGING OF A NATION, 1775-1917, at 204 (Richard W. Stewart ed., 2d ed. 2009), http://www.history.army.mil/books/amh-v1/ch09.htm.

of all troops used in the Mexican War in 1846–1848.[211] By contrast, when George Washington took command of the Patriot Army in July 1775, he was expecting 20,000 troops, but in fact only had 14,000.[212] Lincoln assumed that this large an army would be sufficient to show the Confederates that they should avoid war.

Lincoln fully understood that suppressing the rebellion was solely about enforcing the Constitution. Since the Constitution did not allow the President or Congress to interfere with slavery in the states, Lincoln was not even thinking, at this point, about ending slavery. Nor did he contemplate any change in federal racial policy, such as allowing blacks to serve in the Army.[213] The issue at hand—the only issue at hand—was the suppression of Confederate violence, preservation of the Union, the enforcement of federal law, and the defense of the Constitution.

While Northern governors were quick to organize their militias and send them to Washington, governors from the eight slave states that had not left the Union denounced the President's call for troops to defend the nation as "wicked," illegal, and unconstitutional.[214] Beriah Magoffin, the

211. The United States used only 78,700 soldiers in the entire Mexican War, which lasted nearly two years. 5 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT, pt. E, at 5-350 to 5-351 tbl.Ed1-5 (Richard Sutch, et al. eds., 2006). The regular army had "an actual strength of 1,080 officers and 14,926 enlisted men on June 30, 1860 . . . based on five-year enlistments." The U.S. Army "[r]ecruited heavily from men of foreign birth [and] . . . consisted of 10 regiments of infantry, 4 of artillery, 2 of cavalry, 2 of dragoons, and 1 of mounted riflemen." 1 CTR. OF MILITARY HISTORY, *supra* note 210, at 204.

212. WIENCEK, *supra* note 32, at 196.

213. Blacks had been excluded from the militia since 1792. *See* An Act More Effectually to Provide for the National Defence by Establishing an Uniform Militia Throughout the United States, Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Militia Act of 1903 (The Dick Act), ch. 196, 32 Stat. 775 ("That [and by whom] each and every free able-bodied white male citizen of the respective [to be enrolled] states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia. . . ."); *see also* An Act to Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-Eight, Seventeen Hundred and Ninety-Five, and Acts Amendatory Thereof, and for Other Purposes, Act of July 17, 1862, ch. 201, 12 Stat. 597 (repealing the Militia Act of 1792). Some free blacks served under Andrew Jackson in the defense of New Orleans in the War of 1812, and blacks served in the navy throughout the antebellum period.

214. Letter from John W. Ellis, Governor of N.C., to Simon Cameron, Sec'y of War (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 72, 72; Letter from Isham G. Harris, Governor of Tenn., to Simon Cameron, Sec'y of War (Apr. 17, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 81, 81; Letter from C. F. Jackson, Governor of Mo., to Simon Cameron, Sec'y of War (Apr. 17, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 82, 82–83; Letter from Beriah Magoffin, Governor of Ky., to Simon Cameron, Sec'y of War (Apr. 15, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 70, 70; Letter from John Letcher, Governor of Virginia to Simon Cameron, Sec'y of War (Apr. 16, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 76, 76.

ardently proslavery governor of Kentucky, Lincoln's native state, curtly replied: "I say emphatically Kentucky will furnish no troops for the wicked purpose of subduing her sister Southern States."[215] Indeed, while Lincoln's call brought in troops from all over the North, it led four more Southern states—Virginia,[216] North Carolina, Tennessee and Arkansas—to secede. Meanwhile, secessionists in Maryland, Missouri, and Kentucky tried to get their states to do the same, but ultimately failed. During this period, the Governor of Maryland offered four regiments to defend the country, but only if they were deployed within his state.[217] The War Department wisely accepted this offer.[218] The governor of Delaware simply refused to respond to the requisition.[219]

To hold the remaining slave states in the Union, Lincoln continued to reiterate his constitutional view that he had no power to touch slavery in the existing states. While there were secessionists in all four of the remaining slave states (Kentucky, Missouri, Maryland, and Delaware), Kentucky was the most important one for Lincoln. With more than 225,000 slaves in the state,[220] Kentucky was vulnerable to Confederate

215. Letter from Beriah Magoffin to Simon Cameron, *supra* note 214, at 70. By the end of the War, Magoffin would flee to the Confederacy to become a general, and between 25,000 and 40,000 Kentuckians would join him in the Confederate army. However, despite Magoffin's insistence that Kentucky soldiers would not fight to defend the nation, by the end of the War, about 100,000 men from Kentucky, including about 24,000 former slaves, would serve in the United States Army. LOWELL H. HARRISON & JAMES C. KLOTTER, A NEW HISTORY OF KENTUCKY 195 (1997); *see also* Garry Adelman & Mary Bays Woodside, *A House Divided: Civil War Kentucky*, HALLOWED GROUND MAG., Spring 2010, http://www.civilwar.org/hallowed-ground-magazine/spring-2010/civil-war-kentucky.html (providing the best estimate of the number of Kentuckians who fought for the Confederacy in 1864). Among the U.S. troops from Kentucky was Captain John Marshall Harlan, a pro-Union slaveholder, who would later become the greatest supporter of civil rights on the Supreme Court in the late nineteenth century. However, given the proslavery sentiments within Kentucky, support for emancipation among white Kentucky troops was limited and even though the state remained in the Union, Kentucky resisted emancipation to the very end. JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 423, 486–88 (2013); John David Smith, *Whither Kentucky Civil War and Reconstruction Scholarship*, 112 REG. KY. HIST. SOC'Y 223, 244–46 (2014).

216. This led the western part of the state to secede from Virginia, forming the state of West Virginia in 1863.

217. Letter from Thomas H. Hicks, Governor of Md., to the President of the United States (Apr. 17, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 79, 79–80.

218. Letter from Simon Cameron, Sec'y of War, to Thomas H. Hicks, Governor of Md. (Apr. 17, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 80, 80.

219. Letter from R. Patterson, Major Gen., to Simon Cameron, Sec'y of War (Apr. 25, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 3, at 110, 110. However, by July, Lincoln would report that Delaware had in fact sent a regiment to the U.S. Army. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 2, at 421, 426.

220. Gibson & Jung, *supra* note 30, at tbl.32.

entreaties. Although Lincoln had been born there, he received only 1,364 votes from Kentucky in 1860.[221] With strong proslavery sentiments,[222] Lincoln understood that a precipitous movement toward emancipation would push the Bluegrass State into the hands of the enemy, and that would probably lead to secession in Missouri as well.

Lincoln believed that losing Kentucky to the Confederacy would be a disaster for the Union cause. Due to both its geography and its size, Kentucky was the most crucial of the loyal slave 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 manufacturing, commercial, and politically significant cities, such as Cincinnati, Columbus, Indianapolis, and Pittsburgh. As Lincoln told Senator Orville Browning: "[T]o lose Kentucky is nearly . . . to lose the whole game."[223] "Early in the War, a group of ministers urged Lincoln to free the slaves because, they said, God would be on his side. He allegedly responded, 'I hope to have God on my side, but I must have Kentucky.'"[224] Any move against slavery in the first months of the War "would almost certainly have cost him that crucial state and possibly the War."[225]

Thus, throughout the summer and fall of 1861, Lincoln continued to reiterate that the War was not about slavery and that he had no constitutional authority to interfere with slavery in the states.[226] He had to do this in the face of mounting pressure from various sources to strike at slavery and enlist blacks. On April 16, only a day after the call for troops, Burr Porter, who had served as a major in the Ottoman army during the Crimean War, urged Secretary of War Cameron to "raise as soon as practicable, two regiments of infantry from the free colored people of the border States."[227] Such a move would doubtlessly have

221. *Election of 1860*, *supra* note 152.

222. Even after Kentucky was solidly in the Union, support for emancipation among white Kentuckians was limited. Kentucky resisted emancipation to the very end. Smith, *supra* note 215, at 244–46 (2014); OAKES, *supra* note 215, at 486–88. Smith, citing Oakes writes: "As late as December 1865, the commonwealth, according to the *Chicago Tribune*, remained intoxicated by the 'insane hope' of reestablishing slavery." Smith, *supra* 215, at 245.

223. Letter from Abraham Lincoln to Orville H. Browning, Sen. (Sept. 22, 1861), *in* 4 COLLECTED WORKS, *supra* note 2, at 531, 532.

224. *Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading*, *in* LINCOLN'S PROCLAMATION: EMANCIPATION RECONSIDERED 13, 20 (William A. Blair et al. eds., 2009).

225. Finkelman, *Limits of Constitutional Change*, *supra* note 13, at 361.

226. *Id.*

227. Letter from Burr Porter to Simon Cameron, Sec'y of War (Apr. 16, 1861), *in* 1 WAR OF

immediately pushed the Border States into the Confederacy. But, the issue was now on the table, just as the War began. No one knew, of course, when it would be "practicable" to enlist black troops and, tied to that, when it would be practicable to strike at the cause of secession and the reason for the Confederacy: slavery. But, as this letter indicates, from day one of the War, thoughtful unionists were considering these issues.

Soon, other Northerners made similar suggestions about enlisting blacks, while also pushing for emancipation. They understood that slavery was the cause of the War and destroying slavery was both necessary to win the War and to preserve the Union for the future. In May, the nation's leading black abolitionist, Frederick Douglass explained in an editorial, "How To End the War": "*The simple way, then, to put an end to the savage and desolating war now waged by the slaveholders, is to strike down slavery itself,* the primal cause of that war."[228] He further urged that blacks be enlisted in the cause:

> LET THE SLAVES AND FREE COLORED PEOPLE BE CALLED INTO SERVICE, AND FORMED INTO A LIBERATING ARMY, to march into the South and raise the banner of Emancipation among the slaves. The South having brought revolution and war upon the country, and having elected and consented to play at that fearful game, she has no right to complain if some good as well as calamity shall result from her own act and deed.[229]

In June 1861, Douglass added to this argument, by noting that emancipation would not only aid the Union cause, but would also cripple the enemy.[230] He said the administration might "evade and equivocate" but in the end, "slavery is not only the cause of the beginning of this war, but slavery is the sole support of the rebel cause. It is, so to speak, the *very stomach* of this rebellion."[231] Douglass argued that because slavery was the cause of the War, abolition was the best way to end the War:

> We wage war against slaveholding rebels, and yet protect and augment the motive which has moved the slaveholders to rebellion. We strike at the effect, and leave the cause unharmed. Fire will not burn it out of us—water cannot wash it out of us, that this war with the slaveholders can never be brought to a desirable termination until slavery, the guilty causes of all our

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THE REBELLION, *supra* note 13, ser. 3, at 77, 77.

228. Frederick Douglass, *How to End the War*, DOUGLASS' MONTHLY, May 1861.

229. *Id.*

230. Frederick Douglass, *Substance of a Lecture Delivered at Zion Church*, DOUGLASS' MONTHLY, Aug. 1861.

231. *Id.*

national troubles, has been totally and forever abolished.[232]

Indeed, everyone knew that slavery was the cause of the War, even if for political reasons the administration refused to acknowledge this obvious truth. In his second inaugural address, in March 1865, Lincoln would in fact admit this, noting that at the time of his first inauguration, in 1861:

> One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the War. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it.[233]

But, in the spring of 1861, Lincoln remained publicly cautious. He could not admit that slavery was the cause of the War, because that would force him to take steps to destroy slavery, which in turn would push Kentucky and perhaps Missouri into the Confederacy and make it impossible to win the War. Events, however, began to shape policy and in turn, shape Lincoln's emerging understanding of constitutional law. To consider emancipation, Lincoln had to develop a constitutional theory that would allow him to move against slavery. He also needed to secure the loyal slave states, especially Kentucky, and to have some certainty that he would actually win the War. Declaring an end to slavery would be meaningless without military success. And, he had to be sure that the North would support him. It would do no good to issue an executive order and then lose reelection before the War could be won.

By September 1862, Lincoln would be convinced that the loyal slave states would not secede, that he would eventually defeat the Confederacy, and that he had sufficient support in the North to make emancipation work. Lincoln needed these three things to be in place for him to move against slavery. He fully understood that any emancipation proposal would be meaningless if it pushed Kentucky and Missouri into the Confederacy, which he believed would cost him the War. Similarly, he understood without popular and political support emancipation would fail, especially if he lost the election of 1864 to a Democrat opposed to black freedom. Thus, Lincoln could not move against slavery until these prerequisites were in place. But, even if they were in place, he had to have

232. *Id.*

233. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), 8 COLLECTED WORKS, *supra* note 2, at 332, 332–33.

a constitutional theory that would actually allow him to move against slavery.

The military elements that allowed Lincoln to move against slavery began to develop in the fall of 1861 and the spring of 1862. They rested on significant victories in the west, including the fall of Nashville, Memphis, Natchez, New Orleans, Baton Rouge, Little Rock, and the defeat of Confederate forces in Kentucky and Arkansas. Especially important in this chronology was the fall of Fort Henry, on the Tennessee River on February 6, 1862,[234] followed by General Ulysses Grant's capture of 12,000 Confederate troops at Fort Donelson, on the Cumberland River on February 16, 1862.[235] These twin victories pushed Confederate forces out of northern Tennessee and ended any Confederate hopes of successfully invading Kentucky. These victories also catapulted General Grant into national prominence, giving Lincoln a new general who was tenacious, smart, and victorious. In the east, there was the successful landing of U.S. troops on the Sea Islands in South Carolina, and finally the defeat of General Robert E. Lee at Antietam.[236] Thus, by September 1862, Lincoln was convinced he would win the War, and that there was no possibility of the loyal slave states—especially Kentucky—seceding.

Indicative of Northern support for emancipation were statutes passed by a Congress that, with the exception of the delegations from the Border States and Senator Andrew Johnson of Tennessee, was made up entirely of Northerners. This Congress, dominated by members of Lincoln's party,[237] passed laws, which allowed for the confiscation of slaves owned by those in rebellion, declared all slaves who escaped to the United States Army were "forever free,"[238] ended slavery in the District of Columbia[239] and in the territories,[240] prohibited the Army from returning fugitive slaves to any masters and providing a court martial for any officers

234. WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 97–105 (1981).

235. *Id.*

236. Finkelman, *Limits of Constitutional Change*, *supra* note 13, at 370–73.

237. *Composition of Congress, by Political Party, 1855–2017*, *supra* note 163.

238. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes (Second Confiscation Act), Act of July 17, 1862, ch. 195, 12 Stat. 589; An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act), Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

239. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, Act of Apr. 16, 1862, ch. 54, 12 Stat. 376.

240. An Act to Secure Freedom to All Persons Within the Territories of the United States, Act of July 1, 1862, ch. 111, 12 Stat. 432.

allowing this to happen,[241] and allowed for the enlistment of black soldiers.[242]

All of these laws were incremental and situational. Ending slavery in the District of Columbia[243] was a huge step forward. It was the first time in American history that the United States actually emancipated slaves by an act of Congress. All other limitations on slavery had been to prevent slavery from spreading to new places and often, as was the case in territorial Indiana and Illinois, the ban did not actually end slavery in those places.[244] But, this was different. Here, Congress passed a law, the President signed it, and slavery came to an end.

However, from a constitutional perspective, this law was not particularly revolutionary. The Constitution explicitly granted Congress plenary power to regulate the District of Columbia.[245] Throughout his career, Lincoln had argued that Congress had complete power over the District.[246] He had relied on this power in a resolution he proposed in the Illinois legislature in 1837. Lincoln's resolution, which only gained one other vote besides his own, asserted that slavery was "founded on both injustice and bad policy."[247] Here, as he would in his inaugural address, Lincoln acknowledged the traditional understanding that the national government had "no power, under the constitution, to interfere with the institution of

241. An Act to Make an Additional Article of War, Act of Mar. 13, 1862, ch. 40, 12 Stat. 354. This law modified the practice under the Fugitive Slave Law of 1850, in which slaves had been removed from the North with the help of the state militias, the regular army, and the coast guard. For an example of the use of the military in this way, see Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996).

242. An Act to Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-Eight, Seventeen Hundred and Ninety-Five, and Acts Amendatory Thereof, and for Other Purposes, Act of July 17, 1862, ch. 201, § 12, 12 Stat. 597, 599. Section 12 explicitly provides for the enlistment of African-Americans.

243. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, Act of Apr. 16, 1862, ch. 54, 12 Stat. 376.

244. *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 46–101 (describing how slavery continued in Indiana and Illinois long after the passage of the Northwest Ordinance); Finkelman, *Almost a Free State*, *supra* note 143, at 75–79 (describing the way slavery lingered in Indiana and how the Indiana Courts dealt with it).

245. U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have power .... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.").

246. Thoughtful opponents of slavery had also taken this position. See THEODORE DWIGHT WELD, THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838) and OAKES, *supra* note 215, at 19–20 for more discussion on the opponents of slavery.

247. Abraham Lincoln, Protest in the Illinois Legislature on Slavery (Mar. 3, 1837), *in* 1 COLLECTED WORKS, *supra* note 2, at 74, 75.

slavery in the different States."[248] But, he also asserted that Congress did have "the power, under the constitution, to abolish slavery in the District of Columbia."[249]

A decade later, in his single term in Congress, Lincoln proposed a bill for the gradual abolition of slavery in the District of Columbia, noted above.[250] His emancipation scheme would have avoided the Fifth Amendment takings problem, because gradual emancipation did not free any existing slaves, but only guaranteed that their as yet-unborn children would be free. Lincoln read the proposed emancipation bill on the floor of Congress,[251] but in the end did not introduce it. A powerless freshman congressman, he explained, "I was abandoned by my former backers."[252] Nevertheless, this bill, like his state legislative resolution, underscores Lincoln's early opposition to slavery and his understanding of the constitutional limitations—and possibilities—of federal action against slavery. He understood Congress could end slavery in the District but that Congress could not take private property without just compensation. Thus, the D.C. Emancipation Act of 1862 provided compensation to masters for their slaves,[253] and certainly neither Lincoln nor any other Republicans, doubted its constitutionality.

Ending slavery in the territories was more problematic, since Chief Justice Taney had held in *Dred Scott* that Congress had no authority to end slavery, or even prohibit it, in the territories. But, the Republican Party had made ending slavery in the territories a major component of its program, and almost all Republicans agreed with Lincoln that Taney's analysis of the territories clause of the Constitution was dicta, wrong, and insulting. Indeed, no scholars have ever offered a plausible explanation or analysis for Taney's argument that the territories clause of Article IV did not apply to territories acquired after 1787. Thus, Lincoln and most other Republicans believed they had the power to regulate the territories and end slavery in them.

The abolition of slavery in the territories did, however, raise at least one legitimate constitutional question. Those few masters who actually lost

248. *Id.*

249. *Id.*

250. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 57–59 (2010); QUARLES, LINCOLN AND THE NEGRO, *supra* note 36, at 30.

251. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 57–59 (2010).

252. QUARLES, LINCOLN AND THE NEGRO, *supra* note 36, at 30.

253. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, Act of Apr. 16, 1862, ch. 54, 12 Stat. 376.

slaves under the law did not receive any compensation.[254] This could have been seen as taking "private property . . . for public use, without just compensation,"[255] in violation of the Fifth Amendment. However, Republicans had long argued that slavery was "contrary to natural right"[256] inconsistent with the law of nature, and violated the precepts of the Declaration of Independence, and "[w]herever it exists at all, it exists only in the virtue of positive law."[257] Charles Sumner, who by 1861 was one of the leaders of the Republican Party in the Senate, captured the essence of this in his speech on the floor of the Senate in 1852 titled: "Freedom National Slavery; Slavery Sectional."[258] Similarly, Lincoln captured the idea succinctly in a speech on the Kansas–Nebraska Act, noting that slavery was "a gross outrage on the law of nature."[259] Therefore slavery could not exist without positive law, as Lord Mansfield had set out in *Somerset*.[260]

Thus, while the Compromise of 1850 and the Kansas–Nebraska Act had not prohibited slavery in the territories, neither had these acts established slavery in the territories. Thus, the Republican position reflected the idea that slavery still could not legitimately exist in the Territories. In the District of Columbia, where the Congress used compensated emancipation to end slavery, the situation had been different because there was in fact extensive legislation creating slavery there.[261]

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254. In 1860, there were only twenty-nine slaves in the Utah Territory; the census reported no slaves in New Mexico, but it seems likely that some of the sixty-four African-Americans in the territory were slaves. Gibson & Jung, *supra* note 30, at tbls.59 & 46. Nebraska had fifteen slaves according to the census. *Id.* at tbl.42. There were no slaves recorded in any other territories, although there were a substantial number of slaves in the Indian Territory, which would eventually become Oklahoma. But, there were no census figures for Oklahoma for that period.

255. U.S. CONST. amend. V.

256. SALMON P. CHASE, SPEECH OF SALMON P. CHASE, IN THE CASE OF THE COLORED WOMAN, MATILDA 8 (Cincinnati, Pugh & Dodd Printers 1837). Chase made this argument in 1837, when he was an antislavery Democrat. In the 1850s, he helped organize the Republican Party in Ohio and in 1861, he became Secretary of the Treasury under Lincoln. In 1865, he would become Chief Justice of the U.S. Supreme Court.

257. *Id.*

258. For further discussion, see generally CHARLES SUMNER, FREEDOM NATIONAL; SLAVERY SECTIONAL (Bos., Ticknor, Reed & Fields 1852).

259. Abraham Lincoln, Speech at Springfield, Illinois (Oct. 4, 1854), *in* 2 COLLECTED WORKS, *supra* note 2, at 240, 245.

260. Somerset v. Stewart, (1772) 98 Eng. Rep. 499; Lofft 1.

261. On laws creating slavery in the District of Columbia, see generally WORTHINGTON, G. SNETHEN, THE BLACK CODE OF THE DISTRICT OF COLUMBIA, IN FORCE SEPTEMBER 1ST, 1848 (N.Y.C., A & F Anti-Slavery Society 1848), *reprinted in* STATUTES ON SLAVERY: THE PAMPHLET LITERATURE ser. 7, at 179 (Paul Finkelman ed., 1988), M. THOMPSON, ABSTRACT OF THE LAWS OF THE DISTRICT OF COLUMBIA (Wash. City, W. M. Morrison & Co., 3d ed. 1855), and A MEMBER OF

Thus, compensation was necessary.

None of the other laws passed in this period were constitutionally problematic, even if the President and Congress accepted *Dred Scott* at face value. Even if blacks were not citizens of the nation, as Taney asserted in *Dred Scott*, Congress could allow them to enlist in the Army, just as Congress allowed immigrants and Indians to serve in the Army.[262] The two Confiscation Acts provided a due process hearing for property confiscated and applied only in narrow circumstances connected to the War.[263] Surely in time of war, Congress has enormous flexibility to take property from the enemy. While the Supreme Court had always endorsed the right of masters to recover fugitive slaves,[264] there was certainly nothing unconstitutional about Congress and the President determining what soldiers might spend their time doing and what they might be prohibited from doing. During wartime it was certainly reasonable for Congress to prohibit soldiers from spending time recovering property for civilians.

During this period, Congress also passed a joint resolution, promising to provide "pecuniary aid" to any state willing to pass a gradual emancipation act.[265] This was not a statute and required no action from the states or any slave owners, but it did indicate yet another change in the politics of law and slavery. For the first time in American history, Congress was on record as willing to compensate a large number of masters who were not under federal jurisdiction, if their states would pass a gradual abolition law. Presumably this resolution, or any law passed under it, would not have raised constitutional issues, except to the extent that proslavery lawyers, politicians, and jurists might have argued that Congress had no power to

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THE WASHINGTON BAR, THE SLAVERY CODE OF THE DISTRICT OF COLUMBIA (Wash., L. Towers & Co. 1862). On ending slavery in the District of Columbia, see An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, Act of Apr. 16, 1862, ch. 54, 12 Stat. 376.

262. At this time, the regular army heavily recruited foreigners and immigrants who were not yet citizens. 1 CTR. OF MILITARY HISTORY, *supra* note 210, at 198. At the time, blacks served in the Navy in various capacities.

263. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes (Second Confiscation Act), Act of July 17, 1862, ch. 195, 12 Stat. 589; An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act), Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

264. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (holding the federal Fugitive Slave Act preempted a Pennsylvania state law that prohibited blacks from being taken out of Pennsylvania into slavery).

265. Joint Resolution Declaring That the United States Ought to Cooperate With, Affording Pecuniary Aid to Any State Which May Adopt the Gradual Abolition of Slavery, H.R.J. Res. 26, 37th Cong., 12 Stat. 617 (Apr. 10, 1862).

spend its money in this way, since ending slavery was not within the enumerated powers of Congress. The resolution did not offer any constitutional theory for justifying such expenditure. In the end, these constitutional issues never mattered because none of the four loyal slave states expressed any interest in ending slavery, and the Confederate states were certainly not going to accept federal money to end slavery.

While none of these new laws offered a remarkable change in constitutional theory, collectively they signaled that Southern secession had fundamentally changed the United States. Secession led to the exit of twenty-one Southern Senators[266] and almost seventy Southern House members.[267] Without these proslavery legislators the Congress ran more smoothly and was able to accomplish all sorts of things that the slave state representatives had stopped in the past. Some of these laws had nothing directly to do with slavery but were important to reshaping America. Before the War, Southerners had opposed some of this legislation because the laws were likely to lead to new free states,[268] might help develop the North,[269] or were seen as implying federal powers that might someday be used to harm slavery.[270] But, with most Southerners no longer in Congress, the legislative agenda had changed. Thus, in the summer of 1862, Congress created the Department of Agriculture,[271] passed the Homestead Act,[272] created a system of public education in the District of Columbia,[273] banned polygamy in Utah,[274] passed legislation to facilitate

266. Eleven slave states seceded but one Southern senator, Andrew Johnson of Tennessee, refused to resign his position or to join the Confederacy.

267. In the previous Congress, the seceding states had a total of sixty-eight members of the House of Representatives.

268. JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 126, 189, 193–95 (1988).

269. *Id.*

270. *Id.*

271. An Act to Establish a Department of Agriculture, Act of May 15, 1862, ch. 72, 12 Stat. 387.

272. An Act to Secure Homesteads to Actual Settlers on the Public Domain (The Homestead Act), Act of May 20, 1862, ch. 75, 12 Stat. 392.

273. An Act to Provide for the Public Instruction of Youth in Primary Schools Throughout the County of Washington, in the District of Columbia, Without the Limits of the Cities of Washington and Georgetown, Act of May 20, 1862, ch. 77, 12 Stat. 394. It is worth noting that in the South only North Carolina had even a rudimentary system of public schools.

274. An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah (The Morrill Anti-Polygamy Act), Act of July 1, 1862, ch. 126, 12 Stat. 501. Southerners were not advocates of polygamy but feared that any regulation of the "domestic institutions" of any territory or state would set a precedent for interfering with slavery. Most residents of Utah were Democrats and some owned slaves. On the other hand, in 1856, the

the building of the transcontinental railroad,[275] and passed laws to create public land grant colleges.[276]

Significantly, during this period, Congress also passed legislation that constituted the first step toward changing the racial hierarchy of America. In addition to creating a public school for whites, the Republican Congress also created public education for African-American children in the District.[277] This law, passed about a month after the District of Columbia Emancipation Act, also had a stunning provision on racial equality:

> And be it further enacted, That all Persons of Color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances [as] free white persons are or may be subject or amenable; that they shall be tried for any offences against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted of any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.[278]

This provision can be understood as the precursor of the Equal Protection Clause of the Fourteenth Amendment and the beginning of the Republican movement towards racial equality. While the school portion of this bill created segregated schools that would not be funded on the same basis as schools for whites, it was nevertheless the first time in the history of the nation that Congress had appropriated money to educate blacks. Meanwhile, Section 4 of the law mandated equality in criminal

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Republican party platform condemned by slavery and polygamy: "Resolved: That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism–Polygamy, and Slavery." *Republican Party Platform of 1860*, *supra* note 12. Having prohibited slavery in the territories the previous month, the Republicans were now attempting to end the other "relic of barbarism," polygamy. *Id.*

275. An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and the Secure to the Government the Use of the Same for Postal, Military, and Other Purposes (The Pacific Railroad Act), Act of July 1, 1862, ch. 120, 12 Stat. 489.

276. An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and Mechanic Arts (The Morrill Land Grant College Act), Act of July 2, 1862, ch. 120, 12 Stat. 503.

277. An Act Providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for Other Purposes, Act of May 21, 1862, ch. 83, 12 Stat. 407.

278. *Id.* § 4.

prosecutions.[279] This was the first provision of its kind in the history of the national government: a promise of equal protection of the laws for blacks charged with crimes.

A similar change in racial policy came about in the foreign affairs. In June, Congress authorized the President to send diplomats to Haiti and Liberia, both of which were ruled by blacks.[280] Under President Thomas Jefferson, the United States had refused to extend diplomatic recognition to Haiti[281] and Southern power in Congress had prevented any change since then. Similarly, Southerners blocked any diplomatic recognition of Liberia.[282] With most slave state representatives no longer in Congress, this situation changed. A week after establishing diplomatic relations with Haiti and Liberia, Congress appropriated money to implement a bilateral treaty with Great Britain to help suppress the illegal African slave trade[283] and to hire agents in other countries to help suppress the trade.[284] While Southerners in Congress always claimed they opposed the African trade, they consistently blocked legislation to adequately fund naval and diplomatic efforts to suppress the illegal trade. Some did this on principle, because they believed that slavery was legitimate and therefore, the trade must be legitimate. Others doubtlessly opposed vigorous suppression of the trade because their constituents benefitted from illegal importations, which were popular in much of the Deep South.

V. THE EXIGENCIES OF WAR AND EARLY MILITARY EMANCIPATION[285]

While Congress passed laws that undermined slavery, the Lincoln administration dealt with the constitutional issue from the perspective of winning the War to preserve the nation. The Constitution does not have a "war time" exception, despite claims by some Supreme Court justices, such as Oliver Wendell Holmes, Jr., who curiously argued *after* World

279. *Id.*

280. An Act to Authorize the President of the United States to Appoint Diplomatic Representatives to the Republics of Hayti and Liberia, Respectively, Act of June 5, 1862, ch. 96, 12 Stat. 421.

281. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 10, at 78–82.

282. Deborah Newman Ham, *Liberia*, 2 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619–1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS 274 (Paul Finkelman ed., 2006).

283. An Act to Carry into Effect the Treaty Between the United States and Her Britannic Majesty for the Suppression of the African Slave-Trade, Act of July 11, 1862, ch. 140, 12 Stat. 531.

284. An Act to Amend an Act Entitled "An Act to Amend an Act Entitled 'An Act in Addition to the Acts Prohibiting the Slave Trade,"' Act of July 17, 1862, ch. 197, 12 Stat. 592.

285. Portions of this section are adapted from Finkelman, *Limits of Constitutional Change*, *supra* note 13.

War I was over, that "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[286] Lincoln, in fact, generally understood that the meaning of the Constitution did not change simply because the nation was at war.[287] With regard to slavery, Lincoln never wavered from his position that neither he nor Congress had any power to end slavery in any of the states still in the Union. On the other hand, Lincoln also understood that in those states that had seceded, the Constitution was not in force, and the exigencies of military combat allowed private property to be taken from those in rebellion. Emancipation would be constitutional as an aspect of military policy. Thus, while Lincoln honestly asserted he had no intention to harm slavery in the states where it existed when he became President, the War changed those circumstances and created a constitutionally permissible emancipation policy that did not exist before the War.

Two events in 1861 illustrate the changing nature of the President's constitutional understandings. Lincoln did not initiate these policies, but he did learn from them and adjust his constitutional thinking because of them.

While Lincoln had to insist that the War was not about slavery, and that he had no power or intention to move towards emancipation, Southern slaves had other ideas. They knew, even if the administration would not admit it, that the War was *about* them. Moreover, soldiers stationed in the South also saw the world in a different light from their Commander-in-

286. Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Korematsu v. United States, 323 U.S. 214, 219–20 (1944) ("[H]ardships are a part of war, and war is an aggregation of hardships.").

287. The great question on this issue concerns Lincoln's suspension of habeas corpus in Maryland at the beginning of the War. Critics of Lincoln argue that only Congress has the power to suspend habeas corpus. However, the text of the Constitution is more ambiguous: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Clearly, the Civil War created the circumstances for suspension—a "Rebellion" where the "public Safety" required a suspension. At the time the rebellion began, Congress was not in session, and most members of Congress were not in the national capital. Pro-Confederate terrorists, like John Merryman, were destroying railroad tracks and bridges and if successful, would have completely cut off the District of Columbia from the rest of the nation. It is hard to imagine the Framers expected the nation to be vulnerable to invasion or rebellion with the President unable to act if Congress was not in session. Lincoln took the position that his primary responsibility was to preserve the nation in the face of a rebellion and that to do this, he had the power to suspend the writ, at least until Congress came back into session. Congress eventually ratified Lincoln's actions. An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

Chief. Circumstances began to change on May 23, when three slaves—Frank Baker, Shepard Mallory, and James Townsend—all owned by Colonel Charles K. Mallory, the local Confederate commander, escaped to Fortress Monroe, at Hampton Roads, Virginia. The Fortress was under the command of Major General Benjamin F. Butler.[288]

Before the War, Butler had been a conservative Democrat, who had voted for John C. Breckinridge in 1860.[289] He was not an abolitionist and had no record of opposing slavery. When he brought troops to Maryland, in April, on his way to Virginia, Butler had offered to help suppress a slave rebellion that was rumored to be imminent.[290] He told the governor of Maryland that he was "anxious to convince all classes of persons that the forces under my command are not here in any way to interfere with or countenance any interference with the laws of the State."[291] This was, of course, completely consistent with was administration policy at the time, which was to not touch slavery and to shore up unionist support in Maryland and other loyal slave states.

But, by late May, Butler was a commanding general in Virginia, inside the Confederacy. His relationship to local law was different. And, as a military commander he needed laborers and was facing an enemy that was using slaves to build its fortifications and to prepare for battle. Butler immediately put Mallory's three slaves to work for the Army (giving them Army uniforms to wear), and similarly employed others (a dozen more arrived a few days later) who were pouring into Fortress Monroe.[292]

A day after Mallory's slaves "delivered themselves up" to Butler's "picket guard,"[293] General Butler faced what was perhaps the most surrealistic spectacle of the War when Confederate Major M. B. Carey appeared under a flag of truce, demanding the return of Mallory's slaves.[294] Major Carey, identifying himself as Mallory's agent, told General Butler was obligated to return the slaves under the Fugitive Slave Clause of the Constitution and the Fugitive Slave Law of 1850.[295]

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288. ADAM GOODHEART, 1861: CIVIL WAR AWAKENING 295–347 (2011); MASUR, *supra* note 18, at 16–17.

289. FONER, *supra* note 250, at 170.

290. Letter from Benjamin F. Butler, Major Gen., to Thomas H. Hicks, Governor of Md. (Apr. 23, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 750, 750.

291. *Id.*

292. MASUR, *supra* note 18, at 17.

293. Letter from Benjamin F. Butler, Major Gen., to Winfield Scott, Lieutenant Gen. (May 24–25, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 752, 752.

294. MASUR, *supra* note 18, at 17.

295. *Id.*

A successful Massachusetts lawyer before the War, Butler had devoted some thought to the issue. After reading as much as he could on the law of war, Butler concluded that the fugitive slaves were "contrabands of war,"[296] no different than weapons, wagons, or horses being used by the enemy. The Confederates had used these slaves to build fortification, and thus they were military "property," which could be legitimately taken from the enemy. Butler 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."[297] With a marvelous touch of irony, Butler offered to return the slaves to Colonel Mallory if he would come to Fortress Monroe and "take the oath of allegiance to the Constitution of the United States."[298] But, until Mallory took such an oath (which of course Butler knew would never happen), his former slaves were "contrabands of war" and could not be returned.[299]

This was the end of Colonel Mallory's attempt to recover his slaves, but it was the beginning of a new policy for the United States. Butler, in need of workers, immediately employed the three fugitives and all other slaves who began to arrive at his fort, including women and children.[300] Forty-seven "contrabands" came on May 27, and more followed.[301] Butler knew he could not call the young children contrabands of war, since, unlike their parents, they had not been commandeered by the Confederate Army to work on military fortifications. Their parents, the adult men and women, however, fit within the parameters of laborers and contrabands. Butler sought advice, asking, "As a political question and a question of humanity can I receive the services of a father and mother and not take the children? Of the humanitarian aspect I have no doubt; of the political one I have no right to judge."[302] But, of course, Butler could easily guess what the answer had to be. Whether the President wanted it or not, the military had become part of a war over slavery. Forty-seven "contrabands" arrived on May 27, and more followed. By the end of July,

296. BENJAMIN F. BUTLER, BUTLER'S BOOK 256–57 (A. M. Thayer ed., Bos., A.M. Thayer & Co. 1892). On slavery and the law of war, see Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 UNIV. OF CHI. L. REV. 2071, 2116–21 (2013).

297. Letter from Benjamin F. Butler to Winfield Scott, *supra* note 293, at 752.

298. *Id.*

299. BUTLER, *supra* note 296, at 256–57.

300. Letter from Benjamin F. Butler to Winfield Scott, *supra* note 293, at 754.

301. FONER, *supra* note 250, at 170–71.

302. Letter from Benjamin F. Butler to Winfield Scott, *supra* note 293, at 754.

more than 850 former slaves were at Fortress Monroe.[303] Three days later, the War Department approved Butler's actions, admonishing him to not seek out slaves to liberate.[304] The administration wisely concluded the "final disposition" of the status of these contrabands "reserved for future determination."[305] Taking slaves away from Mallory and other Confederates served the dual purposes of depriving the enemy of labor while providing labor for the United States. Even Northern opponents of abolition supported this policy.[306]

Butler's action was soon known everywhere as the contraband policy and slaves escaping to U.S. Army lines were quickly dubbed "contrabands." The nomenclature worked well for Lincoln, who humorously called it "Butler's fugitive slave law," and it was equally popular with the Northern public.[307] With this language, the Army was not actually freeing "fugitive slaves," but only confiscating and using "contraband" military assets (human slaves) that had belonged to the enemy. However, these former slaves were now free people. There were no federal laws creating slavery or allowing the United States government to own slaves and thus on the theory of "freedom national"[308] and the *Somerset* principle, if these people were not fugitive slaves subject to return under Article IV of the Constitution, they were free people.

The contraband issue exposed an odd and heretofore never encountered anomaly in the constitutional structure. The Fugitive Slave Clause of the Constitution applied to a "Person held to Service or Labour in one State, under the Laws thereof, escaping into another."[309] The clause did not actually limit the action of the national government, or require that the national government return a fugitive slave. Nor did it apply to slaves escaping within a state (as Mallory's slaves had done) or slaves escaping into a federal jurisdiction, such as a territory, the District of Columbia, or a military fort (again as Mallory's slaves had done). Nor, of course, as Butler pointed out, did the Clause apply to "a foreign country, which Virginia claimed to be."[310] Thus, these former slaves were free and

303. FONER, *supra* note 250, at 170–71.

304. Letter from Simon Cameron, Sec'y of War, to Benjamin F. Butler, Major Gen. (May 30, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 754, 754–55.

305. *Id.*

306. FONER, *supra* note 250, at 170.

307. *Id.* at 170–71.

308. For more on "freedom national," see SUMNER, *supra* note 258, which offers Sumner's speech titled, *Freedom National; Slavery Sectional*, delivered before the Senate on August 26, 1852.

309. U.S. CONST. art. IV, § 3, cl. 3.

310. Letter from Benjamin F. Butler to Winfield Scott, *supra* note 293, at 752.

employed (and being paid wages) by the United States Army to help build fortifications and do other tasks to defeat the Confederacy. Lincoln could say that he was not making war on slavery, even in the Confederate States, while at the same time his Army was actually emancipating slaves. These emancipations were easily defensible as military actions and they were not constitutionally problematic.

The contraband policy was not applied everywhere at once. Some commanders returned slaves to rebel masters, while some Army units went out of their way to emancipate slaves.[311] But by the middle of the summer, slaves floored into U.S. forts and camps, where soldiers had conflicting orders. 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. In July, the House of Representatives passed a resolution declaring that "it is no part of the duty of soldiers of the United States to capture and return fugitive slaves."[312]

Clarity of sorts came from Secretary of War Simon Cameron on August 8, when he informed Butler of the President's desire "that all existing rights in all the States be fully respected and maintained" and reminded Butler 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."[313] The War was still about the Union and the Constitution, and not about emancipation, even though Butler and other generals were becoming emancipators. But, the administration fully understood the constitutional issues. Thus, Cameron reminded Butler that "no question can arise as to fugitives from service within the States and Territories in which the authority of the Union is fully acknowledged."[314] This meant that military commanders could not emancipate fugitive slaves in Missouri, Kentucky, Maryland, and Delaware. This made perfect sense and was consistent with Lincoln's public position at the beginning of the War. The

311. *See* Letter from Caroline F. Noland to Winfield Scott, Lieutenant-Gen. (June 27, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 757, 757 (requesting Scott's assistance to recover a fugitive slave after an earlier failed effort); Letter from E. D. Townsend, Assistant Adjutant-Gen. to Irwin McDowell, Gen. (June 25, 1861), *in* 2 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 757, 757 (asking McDowell to help recover a fugitive slave from Maryland, who had been liberated by an army unit). Townsend noted, "The negro is with some of the Ohio troops . . . [who] have been practicing a little of the abolition system in protecting the runaway." Letter from E. D. Townsend to Irwin McDowell, *supra*, at 757.

312. Resolution Adopted by the House of Representatives, Special Session (July 9, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 759, 759.

313. Letter from Simon Cameron to Benjamin Butler, *supra* note 13, at 761–62.

314. *Id.* at 762.

Constitution still applied to those states and thus, as Lincoln had noted in his inaugural address just a few months before this, the president had "no lawful right" to "interfere with the institution of slavery in [those] States" and similarly, he had "no inclination to do so."[315] Moreover, this position would shore up support for the Union in the loyal slave states.

But, Cameron's letter to Butler added a new wrinkle to the slavery issue, which indicated an important change in administration policy. Cameron told Butler 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."[316] Most importantly, "rights to services" could "form no exception" to "this general rule."[317]

Quietly Lincoln had now changed his administration's policy toward slavery in the Confederacy. Under this policy, the military would not give sanctuary to fugitive slaves from the loyal slave states,[318] but would protect slaves escaping from masters in the Confederate States, where of course most of the slaves were held. The slaves of loyal masters who lived in the Confederacy presented a "more difficult question"[319] because there were, in fact, Americans stuck in the Confederate States who were still loyal to the Union. But, there were also people in the Confederate States who might profess loyalty to get their slaves back. In a war zone, it was difficult, or even impossible, to sort out these issues,[320] so the

315. Lincoln, First Inaugural Address, *supra* note 2, at 263.

316. Letter from Simon Cameron to Benjamin Butler, *supra* note 13, at 762.

317. *Id.*

318. One example of this newly evolving passive policy on fugitive slaves from the loyal slave states is seen in a letter a few weeks later from Major General John A. Dix, reporting that three fugitive slaves from Anne Arundel County, Maryland had come to Fort McHenry in Baltimore. Dix "declined to receive them into the fort on the ground that I could neither harbor them as fugitives from service nor arrest them for the purpose of restoring them to their masters." Letter from John A. Dix, Major Gen. to G. B. McClellan, Major Gen. (Aug. 25, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 766, 766.

319. *Id.*

320. This contrasts, for example, with the mistreatment of Japanese-Americans during World War II, who were deprived of their rights and incarcerated without any due process hearing, even though they were not in a war zone and there was no combat anywhere close to them. For the Supreme Court's utter failure to understand this, see Korematsu v. United States, 323 U.S. 214 (1944) and PETER H. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES (1983) (detailing U.S. government abuses, such as hiding facts and information, and lying to the courts while defending the internment of Japanese-Americans in WWII).

administration suggested the Army employ all fugitives in the South, but keep a record of such employment, so at some point loyal masters might be compensated for the use of their slaves.[321] Speaking for the President, Secretary of War Cameron admonished Butler not to encourage slaves to abscond from the masters nor to interfere with either 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.[322]

These admonitions made sense on a number of levels. The main job of the Army was, after all, to fight a war against a well-armed and increasingly tenacious enemy. The Army needed to direct its energies at defeating the Confederate forces and not anything else, such as returning runaway slaves. Also, since the Army needed civilian workers, giving sanctuary to former slaves who could provide that labor would serve the war effort. But, since the War was not a crusade against slavery, it was also inappropriate for the Army to actively try to free slaves. Purposeful emancipation would also undermine support for the administration's important goal of keeping the loyal slave states, especially Kentucky, in the Union. Finally, actively trying to free slaves would undermine the administration's goal of winning the hearts and minds of white Americans in the South, so they would come back into the Union.

Thus, by late August, Butler's contraband policy had become the norm. The U.S. 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, even if the 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.[323] But, to conservatives and loyal masters still living in the United States, his administration could still point out that it had no emancipation policy and was not interfering with slavery *in the states,* it was only taking military assets from people who claimed to be living outside the United States and were at war with the United States. Indeed, in the loyal slave states, the

321. Letter from Simon Cameron to Benjamin F. Butler, *supra* note 13, at 762.

322. *Id.*

323. Special Orders No. 72 (Oct. 14, 1861), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 774, 774 (setting out pay scale for black laborers).

Army would not accept fugitive slaves.[324]

This emerging policy began with General 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 implementing their own strategy of self-emancipation, in Butler's perfect phrasing, as they "delivered themselves up" to freedom[325] by running to the U.S. Army. By the time Secretary of War Cameron spelled out the policy to General Butler, Congress had endorsed it and pushed it further along with the Confiscation Act of 1861 (what would later be known as the First Confiscation Act)[326] as well as the House resolution that the Army should not be involved in the return of fugitive slaves.

The Confiscation Act of 1861, passed on August 6, allowed for the seizure of any slaves used for military purposes by the Confederacy.[327] 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 slave property of masters in the loyal slave states, even those sympathetic to the Confederacy. As noted above, the administration did not see confiscation as a violation of the Fifth Amendment, by taking private property without due process. Rather, the law was carefully drawn as a military measure, to take military assets from the Confederate Army. Surely, the Army could seize a weapon in the hands of a captured Confederate soldier without a due process hearing, or take a horse from a captured Confederate. Similarly, slaves working on fortifications, or being used in other military capacities, might be taken.

The Confiscation Act of 1861 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.[328] But, the law did indicate a political shift toward emancipation. It was not decisive, because the emancipatory aspects of the law were limited, but it did show that less than four months after the War had begun, Congress was ready to support some kind of emancipation. Neither Congress nor the American people were ready to

324. Letter from John A. Dix to G. B. McClellan, *supra* note 318, at 766 (emphasis added).

325. Letter from Benjamin F. Butler to Winfield Scott, *supra* note 13, at 752.

326. An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act), Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

327. *Id.*

328. *Id.* § 4.

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 order to undermine Confederate military strength.

The Confiscation Act of 1861 and the contraband policy were also important steps in the evolution of a constitutional theory that would allow for emancipation of all slaves in the Confederacy. In the five months since he gave his inaugural address, Lincoln had gone from asserting that he had "no lawful right" to free slaves, to having two different tools—the contraband policy and the Confiscation Act—to do exactly that. In the Confiscation Act, Congress embraced the principle that the national government had the power to free slaves as a military necessity.[329] The logical extension of this posture would be the total destruction of slavery. 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 in the Confederacy if the military and social conditions warranted such a result.

Just a few weeks after Lincoln signed the Confiscation Act, Major General John C. Frémont issued a "proclamation" declaring martial law in Missouri and announcing that all slaves owned by Confederate activists in that state were free.[330] This proclamation went well beyond the Confiscation Act and completely contradicted the Contraband policy, which only applied to the Confederate States. 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."[331] Thus, he asked the general to "modify" his proclamation "on his own motion," to conform to the Confiscation Act.[332] Aware of the exaggerated egos of his generals, Lincoln noted, "This letter is written in a spirit of caution and not of

329. *See id.* § 1 (allowing the President to seize, confiscate, and condemn any property used to promote "insurrection or resistance to the laws" during "the present or any future insurrection against the Government of the United States").

330. J. C. Frémont, Proclamation (Aug. 30, 1861), *in* 3 WAR OF THE REBELLION, *supra* note 13, ser. 1, at 466, 466–67.

331. Letter from Abraham Lincoln to John C. Frémont, Maj. Gen. (Sept. 2, 1861), *in* 4 COLLECTED WORKS, *supra* note 2, at 506, 506.

332. *Id.*

censure."[333]

Lincoln incorrectly assumed that that Frémont would be politically savvy enough to withdraw the order when asked by his Commander-in-Chief. But Frémont, who had been the Republican candidate for President in 1856, hoped to win the nomination in 1864 and foolishly believed that the key to his political future was in scoring points with the abolitionist wing of the Republican Party and embarrassing the President. Instead of withdrawing his proclamation, Frémont asked Lincoln to formally countermand it, thus setting himself up to blame the President for failing to begin a crusade against slavery. Lincoln "cheerfully" did so, ordering Frémont to modify the proclamation.[334] Still playing politics, Frémont claimed he never received the order, but only read about it in the newspapers and even then, Frémont continued to distribute his original order.[335] Frémont's stubbornness, lack of political sense, and military incompetence led to his dismissal by Lincoln on November 2, 1861.[336] He would get another command, fail there, and by the end of the War, Frémont would be marginalized and irrelevant.

While Lincoln waited for Frémont to withdraw his proclamation, politicians, generals, and Border State unionists urged the President to directly countermand Frémont's order. Lincoln agreed with a Kentucky unionist who told him, "There is not a day to lose in disavowing emancipation or Kentucky is gone over the mill dam."[337] Lincoln's long-time friend Joshua Speed, who was a wealthy Kentucky slave owner, warned that the order would "crush out every vestige of a union party" in the Bluegrass State.[338] Lincoln told Senator Orville Browning that "to lose Kentucky is nearly . . . to lose the whole game."[339]

Lincoln's response to Frémont illustrates the reality of the War and the nature of the American Constitution. Lincoln believed (and he was probably correct here) that freeing the slaves in Missouri at this time

333. *Id.*

334. Letter from Abraham Lincoln to John C. Frémont, Maj. Gen. (Sept. 11, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 2, at 517, 518.

335. *Id.* at 518 n.1.

336. J. C. Frémont, General Orders No. 28 (Nov. 2, 1861), *in* U.S. WAR DEP'T, THE WAR OF THE REBELLION: THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ADDITIONS AND CORRECTIONS TO SERIES I—VOLUME IV, at 559, 559 (1902).

337. WILLIAM E. GIENAPP, ABRAHAM LINCOLN AND CIVIL WAR AMERICA: A BIOGRAPHY 89 (2002).

338. FONER, *supra* note 250, at 57–59 (quoting Joshua Speed). See GIENAPP, *supra* note 337, at 176–181 for an extended discussion of Lincoln's correspondence regarding Frémont's order and public reaction to both the order the Lincoln's response to it.

339. Letter from Abraham Lincoln to Orville H. Browning, *supra* note 223, at 532.

would push Kentucky into the Confederacy, shortly after the United States had lost the Battle of Bull Run (what is today known as the First Battle of Bull Run). He was fairly certain that if Kentucky went over to the Confederacy he would not be able to win the War. Lincoln fully understood that an unwinnable war would not end slavery; it would only destroy the Union and permanently secure slavery in the new Confederate nation. His 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 Lincoln correctly countermanded it. The fall of 1861 was simply not the time to attack slavery, especially in the loyal slave states.

Lincoln also understood, as Frémont did not, that the emancipation order was unconstitutional. The administration (which meant Lincoln) had endorsed freeing slaves as contrabands of war in the Confederacy. Thus, Lincoln had a constitutional theory that, as Commander-in-Chief, he could constitutionally take property from the enemy. But, Lincoln did not believe that freeing slaves *within* the United States—which included Missouri—was constitutional. The Constitution still protected slavery in the individual states, and Missouri was one of those states. The Confiscation Act of 1861 could have been used to free slaves that were actually being used by pro-Confederate forces in Missouri for military purposes, which is why Lincoln urged Frémont to use that law for precisely that purpose.[340] However, this is not what Frémont wanted to do. He wanted to take slaves from anyone who supported the Confederacy, even if those slaves were not directly being used for military purposes and were the property of people living in the United States.[341] Because Missouri had not seceded, Confederate sympathizers who were not involved in direct combat were still protected by the Constitution. Moreover, because Frémont's plan would have summarily deprived American citizens living in the United States of their property without due process, it clearly violated the Fifth Amendment.

Some Republicans were deeply troubled by Lincoln's response to Frémont.[342] Privately, Lincoln assured Senator Charles Sumner that he was in favor of ending slavery but that the timing was not right.[343] He

340. *See* Letter from Abraham Lincoln to John C. Frémont, *supra* note 334, at 517–18 (ordering Major Gen. Frémont modify his order to conform to the First Confiscation Act).

341. *See* MCPHERSON, *supra* note 268, at 352–58 (citing Gen. Frémont's goal of intimidating rebel sympathizers).

342. *See* FONER, *supra* note 250, at 178–81 (detailing the reaction to Gen. Frémont's proclamation).

343. *See id.* at 210–11 ("When Charles Sumner urged [Lincoln] to celebrate July 4, 1862, by

told the abolitionist senator from Massachusetts that the single difference between them on emancipation was a matter of time—a month or six weeks.[344] Sumner accepted this statement and promised to "not say another word to [Lincoln] about it till the longest time you name has passed by."[345] In reality, the time would end up being nearly a year, but there is little reason to doubt that Lincoln was moving toward some sort of abolition plan.

For Lincoln, there were two paramount issues to consider. The first was timing. 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. He could only move against slavery after he had secured the Border States and made certain that victory was possible. Only then could emancipation actually work. Rather than a desperate act to save the war effort, emancipation, in Lincoln's mind, was the logical fruit of victory. Frémont's proclamation surely did not fit that bill. It would impede victory or actually destroy any chance for victory by pushing Kentucky, and maybe Missouri, out of the Union. Consequently, Lincoln countermanded it and continued to bide his time for a more appropriate moment to move against slavery.

VI: TOWARDS AN EMANCIPATION POLICY AND THE EVOLUTION OF LINCOLN'S CONSTITUTIONAL THOUGHT

As noted in Part IV of this Article, in the spring and summer of 1862, Congress passed path breaking legislation that changed the nature of American society, ending slavery in places where there was purely federal jurisdiction, authorizing the enlistment of black troops, and even offering the four loyal slave states money if they would begin to dismantle slavery. Lincoln signed and implemented all this legislation and endorsed the resolution on compensated emancipation. By this time he had also reached the conclusion that he possessed the constitutional power to end slavery in the Confederacy through his powers as Commander-in-Chief of the Army. Essentially, Lincoln concluded that if General Butler could emancipate three slaves, as contrabands of war, he could emancipate three million slaves under the same principle.

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issuing a proclamation of general emancipation, Lincoln replied that he would do so if he did not worry that 'half the army would lay down their arms and three other states would join the rebellion.'").

344. STEPHEN OATES, WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN 270 (1977).

345. *Id.*

The first indication of this change in constitutional understanding came in the spring of 1862, almost exactly a year after the Contraband policy first began to develop. 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 "forever free."[346] Hunter justified this on the grounds that slavery was "incompatible" with a "free country" and undermined military operations and his imposition of martial law.[347]

Hunter, who privately strongly opposed slavery, had vastly exceeded his authority. His actions went well beyond the power of any military officer. 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 of the executive branch. Not only did Hunter lack authority for such an action, but he also had not even consulted with his military superiors, the War Department, or the President before he acted. No president could have allowed a military commander to assume such powers. Lincoln tartly told Secretary of the Treasury Salmon P. Chase, the most committed abolitionist in the cabinet, "No commanding general shall do such a thing, upon *my* responsibility, without consulting me."[348] Not surprisingly, ten days after General Hunter issued his order, Lincoln revoked it.[349]

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346. Abraham Lincoln, Proclamation Revoking Gen. Hunter's Order of Military Emancipation of May 9, 1862, *in* 5 COLLECTED WORKS, *supra* note 2, at 222, 222 [hereinafter Lincoln's Proclamation Revoking Hunter's Order]. Hunter's order, reprinted in Lincoln's Proclamation read as follows:

> Headquarters of the Department of the South
> Hilton Head, S.C., May 9, 1862.
> General Orders No. 11. – The three States of Georgia, Florida, and South Carolina, comprising the Military department of the south, having deliberately declared themselves no longer under the protection of the United States of America, and having taken up arms against the said United States, it becomes a military necessity to declare them under martial law. This was accordingly done on the 25th day of April, 1862. Slavery and martial law in a free country are altogether incompatible. The persons in these three States—Georgia, South Carolina, and Florida—heretofore held as slaves, are therefore declared forever free.
> DAVID HUNTER, Major-General Commanding.
> ED. W. SMITH. Acting Assistant Adjutant-General.

Id.

347. *Id.*

348. Letter from Abraham Lincoln to Salmon P. Chase (May 17, 1863), *in* 5 COLLECTED WORKS, *supra* note 2, at 219, 219.

349. Lincoln's Proclamation Revoking Hunter's Order, *supra* note 346, at 222–23.

This was not, however, like the situation in Missouri in 1861, when he countermanded Frémont order. First of all, while Lincoln may have been annoyed at Hunter for exceeding his authority, his annoyance was certainly tempered by their friendship and the knowledge that, unlike General Frémont, Hunter did not do this to annoy Lincoln or to oppose him politically. Hunter had been a strong opponent of slavery before the War, had married into an early and important Chicago family, and had known Lincoln for at least twenty years before the War began.[350] They were friends and allies. During and immediately after the 1860 campaign, Hunter had warned Lincoln about possible attempts on his life, and when the President-elect travelled to Washington he asked Hunter to join him on the trip.[351]

The context in the spring of 1862 was also very different than in the fall of 1861. Hunter's order did not threaten the support for the unionist support in the four loyal slave states, and Lincoln did not have to placate Border State slaveholders. South Carolina, Georgia, and Florida were already out of the Union. Nor did Hunter's order cause Lincoln any great political harm in the North. Many Northerners had been enthusiastic about Frémont's attempt to end slavery in Missouri, even though it was clearly unconstitutional.[352] By the spring of 1862, most Northerners were ready to see the total destruction of the slaveocracy of the Deep South, and Hunter's action was a major step in that direction.[353] Politically, it would not have cost Lincoln much to allow Hunter to abolish slavery in South Carolina where the rebellion began or in Georgia, the home of the Confederate Vice President Alexander Stephens. Indeed, any political costs would have almost certainly been outweighed by gains in Northern public opinion. Furthermore, in May 1862, Kentucky or Missouri were securely in the Union. By this time the U.S. Army was fighting in Tennessee, Mississippi, and Arkansas, and there was no chance that a Confederate army could somehow fight its way into Kentucky and persuade the people of that state to secede.

But, the need to preserve executive authority and maintain a proper chain of command, if nothing else, forced Lincoln to act. He simply could

350. Letter from David Hunter, Major Gen. to Abraham Lincoln (Oct. 20, 1860), http://www.drbronsontours.com/bronsongeneraldavidhuntertoabrahamlincolnoct201860.html.

351. *Id.*; Letter from Abraham Lincoln to David Hunter, Major Gen. (Jan. 26, 1861), http://www.drbronsontours.com/lincolntohunterjan201861.html.

352. FONER, *supra* note 250, at 176–80.

353. Lincoln's Proclamation Revoking Hunter's Order, *supra* note 346, at 222; *see also* Proclamation of Major Gen. David Hunter (May 9, 1862), *in* 1 WAR OF THE REBELLION, *supra* note 13, ser. 2, at 818, 818 (reprinting General Orders No. 11).

not let major generals set political policy. However, even as he countermanded Hunter, Lincoln gave a strong and unambiguous hint of his evolving theory of law and emancipation.

Lincoln 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.[354] Instead, in his "Proclamation Revoking General Hunter's Order of Military Emancipation," 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.[355]

Lincoln ended his public proclamation by urging the loyal slave states to accept Congress's offer to give "pecuniary aid" to those states that would "adopt a gradual abolishment of slavery."[356] He asserted that "the change" such a policy "contemplates" would "come as gentle as the dews of heaven, not rending or wrecking anything."[357] He asked the leaders of the slave states—within the Union and presumably those who claimed to be outside the Union—if they would "not embrace" this offer of Congress to accomplish "so much good . . . by one effort."[358]

In hindsight, this document is a stunning example of Lincoln deftly and subtly shaping public opinion in advance of announcing his goals and also signaling his new understanding of constitutional law. By this time, he was fully aware that the Confederate states were never going to end slavery on their own and that for the foreseeable future, neither would the loyal slave states. None of the loyal slave states had expressed any interest in accepting Congress's April 10th offer to accept federal money in support

354. *See* Lincoln's Proclamation Revoking Hunter's Order, *supra* note 346, at 222–23 (reserving for himself the authority to free slaves and not "leaving [it] to the decision of commanders in the field").

355. *Id.*

356. *Id.* at 223. Lincoln had proposed this in his message to Congress on March 6th, and Congress responded in April. Joint Resolution Declaring that the United States Ought to Cooperate With, Affording Pecuniary Aid to Any State Which May Adopt the Gradual Abolition of Slavery, H.R.J.Res. 26, 37th Cong., 12 Stat. 617 (Apr. 10, 1862).

357. Lincoln's Proclamation Revoking Hunter's Order, *supra* note 346, at 223.

358. *Id.*

of emancipation. But, he was willing to continue to make conciliatory gestures, urging a peaceful and seemingly painless solution to the problem of slavery. This helped him 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 social and constitutional 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 if he felt emancipation had "become a necessity indispensable to the maintenance of the government," he was prepared to act against slavery.[359]

Lincoln was preparing the public for what he would do. He was in no hurry. 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 American 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.

A series of events in mid-July 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,[360] urging them to endorse compensated emancipation (with federal help) for their states based on the April 10 resolution of Congress.[361] 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."[362] Although by this time Lincoln did not expect the loyal slave states to join the rebellion, he argued that

359. *Id.*

360. Abraham Lincoln, Appeal to Border State Representatives to Favor Compensated Emancipation (July 12, 1862), *in* 5 COLLECTED WORKS, *supra* note 2 at 317, 318 [hereinafter Lincoln's Appeal]; GIENAPP, *supra* note 337, at 110; MCPHERSON, *supra* note 268, at 503.

361. Joint Resolution Declaring That the United States Ought to Cooperate With, Affording Pecuniary Aid to Any State Which May Adopt the Gradual Abolition of Slavery, H.R.J. Res. 26, 37th Cong., 12 Stat. 617 (Apr. 10, 1862).

362. Lincoln's Appeal, *supra* note 360, at 317; MCPHERSON, *supra* note 268, at 503.

voluntary emancipation in those states would be a blow to Confederate hopes and morale. He also urged the Border State representatives and senators to act in a practical manner to salvage what they could for their constituents. He famously told them that the "incidents of the war" could "not be avoided" and that "mere friction and abrasion" would destroy slavery.[363] He bluntly predicted—or more properly, warned—that slavery "will be gone and you will have nothing valuable in lieu of it."[364] He also pointed out that General Hunter's proclamation had been very popular and that he considered Hunter an "honest man" and his "friend."[365] This reaffirmed that his proclamation revoking Hunter's order was about the chain of command and the timing of emancipation, not about the constitutional issues or the substance of a Hunter's order.

The Border State representatives and senators did not take the hint and two days later, more than two-thirds of them signed a letter denouncing any type of emancipation as "unconstitutional."[366] Eight Border State representatives then published letters of their own supporting the President.[367] 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 that day, he sent the draft of a bill to Congress that would provide compensation to every state that ended slavery.[368] 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 that the states had sole authority over issues of property and personal status. Congress reported this bill, and it went through two readings, but lawmakers adjourned before acting on it.[369]

Lincoln surely knew that this bill, like his meeting with the Border State

363. Lincoln's Appeal, *supra* note 360, at 318.

364. *Id.*

365. *Id.*

366. *Id.* at 319 n.1; MCPHERSON, *supra* note 268, at 503.

367. Lincoln's Appeal, *supra* note 360, at 317, at 319 n.1; GIENAPP, *supra* note 337, at 110; MCPHERSON, *supra* note 268, at 503.

368. Abraham Lincoln, To the Senate and House of Representatives (July 14, 1862) *in* 5 COLLECTED WORKS *supra* note 2, at 324, 324.

369. *Id.* at 325 n.1.

representatives, would not lead to an end to slavery in the loyal slave states. Nevertheless, this very public attempt at encouraging the states to act to end slavery was valuable. Like 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.

This proposed bill must also be seen in the context of Lincoln's actions on July 13, which was the day before he proposed the bill and the day after his meeting with the Border State representatives. On July 13, 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.[370] 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."[371] That was probably an understatement. Lincoln had probably been troubled by the issue since he had been forced to countermand Frémont's proclamation, or maybe from the moment he first heard of Butler's contraband solution to runaways. Lincoln's conflicting views over emancipation—his desire to achieve it, his sense that the time was not right, and his initial uncertainty about its constitutionality—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 he had secured the loyal slave states and he knew he was winning the War. He had also framed his authority to end slavery as inherent within his powers as Commander-in-Chief. By early July 1862, Lincoln believed he had a fair prospect of winning the War, he knew the loyal slave states were secure, and legislation and resolutions passed by Congress convinced him that he had ample political support for ending slavery. He now had a fully developed, 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, the issue was one of military necessity: "We must free the slaves or be ourselves subdued."[372] Slaves, Lincoln argued, "were

370. MASUR, *supra* note 18, at 72.

371. MCPHERSON, *supra* note 268, at 504.

372. *Id.*; *see also* FONER, *supra* note 250, at 217 (recounting Welles's recollection of Lincoln and

undeniably an element of strength to those who had their service, and we must decide whether that element should be with or against us."[373] 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."[374] Here, Lincoln sounded much like Benjamin 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, still dominated by the adamantly proslavery Chief Justice Taney, but that issue might not arise until after most slaves had been freed. Once emancipated, it would have been impossible for the Court to issue a decision for re-enslaving of millions of people.

The military-necessity argument is more complex. Lincoln did not begin to move toward emancipation until after the United States had had substantial military success from the end of December 1861 through the first six 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 the 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 preserve the Union. This too would garner public support.

It is possible that Lincoln *knew* he should free the slaves for moral reasons, and he had the constitutional power to do so, but he also knew he would have greater support in the North if his actions appeared to be tied to military necessity and preserving the Union. 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

saying emancipation "was a military necessity absolutely essential for the salvation of the Union").

373. MCPHERSON, *supra* note 268, at 504.

374. *Id.*

the War.

Four days after speaking with Welles and Seward, Lincoln signed the Second Confiscation Act into law.[375] This law, which was more expansive than the First Confiscation Act, 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 or comfort" to it.[376] 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."[377] This would include Confederate sympathizers in the loyal slave states as well as in the Confederacy. Two separate provisions dealt, in a comprehensive way, with the issue of runaway slaves and contrabands.[378]

Under Section 9 of the Act, any slaves 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."[379] 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."[380] The Confiscation Act of 1862 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 the War powers, Congress, or the President, might emancipate slaves.

The Act did not, however, free any slaves unless they actually escaped to the U.S. Army lines. Freedom was available to slaves who could reach the American Army, but not to all slaves. The law provided numerous punishments for rebels, but their slaves would only become free after some judicial process.[381] Had there been no Emancipation Proclamation

375. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes (Second Confiscation Act), Act of July 17, 1862, ch. 195, 12 Stat. 589.

376. *Id.* § 2.

377. *Id.* § 9.

378. *Id.* §§ 9–10.

379. *Id.* § 9.

380. *Id.* § 10.

381. *See id.* ("And be it further enacted, That no slave escaping into any State, Territory, or the

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 from 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 Act, Lincoln presented his cabinet with his first draft of the Emancipation Proclamation.[382] The draft began with a reference to the Second Confiscation 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.[383] 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 "Proclamation of the Act to Suppress Insurrection."[384]

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."[385] This was one more attempt to get the loyal slave states to end slavery. The final sentence of this draft proclamation 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."[386]

This was the great change for Lincoln. He was now on record as believing that he had the constitutional power to end slavery in the

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District of Columbia, from any other State, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime, or some offence against the laws, unless the person claiming said fugitive shall 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; and no person engaged in the military or naval service of the United States shall, under any preten[s]e whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service.").

382. Abraham Lincoln, Emancipation Proclamation—First Draft (July 22, 1862), *in* 5 COLLECTED WORKS, *supra* note 2, at 336, 336–37.

383. *Id.* at 336.

384. Abraham Lincoln, Proclamation of the Act to Suppress Insurrection (July 25, 1862), *in* 5 COLLECTED WORKS, *supra* note 2, at 341, 341.

385. Lincoln, Emancipation Proclamation—First Draft, *supra* note 382, at 336.

386. *Id.* at 336–37.

Confederacy. Wartime conditions now made this possible. Kentucky, Missouri, Maryland, and Delaware were securely in the United States, and while their leaders were not ready to end slavery, they clearly would not be joining the Confederacy. Congress had demonstrated its support for emancipation, and many Northern newspapers and commentators agreed it was time to end slavery. With U.S. troops controlling most of the Mississippi Valley, a good deal of Tennessee, the islands off the coast of South Carolina and Georgia, and most Southern ports closed by the Navy, Lincoln knew that an emancipation program would be successful in freeing a substantial number of slaves, even if somehow a shrunken Confederacy survived.

Lincoln was close to being able to finally end slavery. Congress had been moving toward emancipation. Generals such as Hunter were pushing to free all the slaves in their military district. Once he proposed it, everyone in the cabinet agreed with the goal. However, the conservative Montgomery Blair, who was from the slave state of Maryland, expressed reservations about the timing of emancipation.[387] Blair did not oppose the concept but did think it would cost the Republican Party votes in the fall elections.[388] In the next two months, Lincoln would work to lay the political groundwork for gaining greater public support for emancipation while waiting for the right moment to announce his plans.

VII: "THAT ALL MEN EVERY WHERE COULD BE FREE."[389]

For the rest of the summer, Lincoln quietly shaped the political climate to create the necessary conditions 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 his goal was to "save the Union," and that he would accomplish this any way he could.[390] He said, "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."[391]

This part of the letter was Lincoln's coy political response to Greeley.

387. MASUR, *supra* note 18, at 81.

388. *Id.*

389. Letter from Abraham Lincoln to Horace Greeley (Aug 22, 1862), *in* 5 COLLECTED WORKS, *supra* note 2, at 388, 389.

390. *Id.* at 388.

391. *Id.*

By this time, he had already drafted the Emancipation Proclamation, and it was sitting in his desk. He had already resolved to free *all* the slaves in the Confederacy. He was simply biding his time for the right moment to issue it. Furthermore, by this time, hundreds of thousands of slaves had already been emancipated. Thus, his statement that he would "save the Union without freeing *any* slave" was purely rhetorical, for the political consumption of Northern white conservatives and slaveholders in the four Border States. He could clearly *not* save the Union "without freeing *any* slave" because so many slaves had already been freed. The new Confiscation Act promised the liberation of more slaves. In addition, under the militia act he signed the previous month,[392] Lincoln had agreed to the enlistment of former slaves. Arming and training former slaves surely guaranteed that the War was about to evolve into a crusade for freedom. The War Department was already laying plans for this. Just three days after Lincoln wrote his letter to Greeley, Secretary of War Edwin M. Stanton would authorize General Rufus Saxton, headquartered on Hilton Head, to begin to enlist and train black troops from the thousands of former slaves that were on the island.[393] Significantly, had General David Hunter not been on leave, he would have had the honor of organizing the first black regiments. Thus, while Lincoln talked about ending the War without ending slavery, the facts and circumstances of the moment indicated he would soon be launching an all-out attack on slavery.

Lincoln ended his letter to Greeley with an important, indeed almost astounding, final sentence. He noted that his position on saving the Union without ending slavery 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."[394] This was a clear signal of where the President was headed.

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

392. An Act to Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-Eight, Seventeen Hundred and Ninety-Five, and Acts Amendatory Thereof, and for Other Purposes, Act of July 17, 1862, ch. 201, § 12, 12 Stat. 597, 599.

393. Letter from Edwin M. Stanton, Sec'y of War, to Rufus Saxton, Brigadier-Gen. (Aug. 25, 1862), *in* 14 WAR OF THE REBELLION, *supra* note 13, ser. 1, at 377, 377–78.

394. Letter from Abraham Lincoln to Horace Greeley, *supra* note 389, at 389 (emphasis added).

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."[395] Conservatives would understand that they had to accept emancipation as a necessary policy to defeat the rebellion and save the nation.

On September 13, he replied coyly to an "Emancipation Memorial" from a group of Chicago ministers.[396] He asserted that emancipation was useless without a military victory and would be "like the Pope's bull against the comet."[397] This was a reference to an apocryphal story that in 1456 Pope Calixtus III issued a Papal Bull against Halley's Comet passing by the earth.[398] This story, which no scholars today believe, was well known at the time, especially to Protestant ministers. Lincoln's point, of course, was that he would be foolish to try to emancipate the slaves unless he knew he could win the War. Thus, he asked the ministers how he "could free the slaves" when he could not "enforce the Constitution in the rebel States."[399] 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.[400] Lincoln, surely, no longer believed this was the case, since Kentucky was firmly in the Union, but it underscored his long-standing belief that 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.[401] Appealing to the religious nature of this petition, the President also told these ministers that he had no "objections of a moral nature" to emancipation.[402] In passing, Lincoln also noted that he had the power, as Commander-in-Chief, to

395. *Id.*

396. Abraham Lincoln, Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations (Sept. 13, 1862), *in* 5 COLLECTED WORKS, *supra* note 2 at 419, 419–25 [hereinafter Lincoln's Reply to Emancipation].

397. *Id.* at 420.

398. This event was recounted in a biography of Calixtus III published by Pierre-Simon Laplace in 1475. Modern scholars believe this is not a true story, but it was believed at the time of Lincoln. For one discussion of this, see ANDREW DICKSON WHITE, A HISTORY OF THE WARFARE OF SCIENCE WITH THEOLOGY IN CHRISTENDOM 177 (1896).

399. Lincoln's Reply to Emancipation, *supra* note 396, at 420.

400. *Id.* at 423.

401. *Id.* at 424.

402. *Id.* at 421.

emancipate the slaves in the Confederacy.[403] In other words, while not yet ready to issue an emancipation order, Lincoln was now completely comfortable with his constitutional power to do so.

Even as he responded to the ministers, evading any commitment and refusing to reveal his plans, Lincoln knew he was ready to issue his proclamation. He simply wanted a dramatic moment. In August, the United States Army had been routed at the Second Battle of Bull Run. He did not want to issue the proclamation in the wake of defeat, because that would make him appear weak and desperate. He wanted to announce his plans to end slavery in the wake of a significant battlefield victory. When he had that victory, emancipation would not be a "necessity" of preserving the Union, as he had said in the Greeley letter, but rather it would be the fruit of victory. The victory at Antietam, on September 17, was the last piece of the puzzle. Here, Confederate General Robert E. Lee was stopped dead in his tracks, with more than a quarter of his army killed, wounded, or captured, and was forced to retreat to Virginia as fast as he could. In the wake of this victory Lincoln could now issue the Proclamation as the logical fruit of the military successes that had taken place since the previous December.[404]

On September 22, he issued the preliminary Proclamation, declaring that it would go into effect in one hundred days.[405] He carefully chose September 22 because it would be exactly one hundred days until January 1, 1863, thus tying emancipation to the New Year.

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."[406] The purpose of the Proclamation was "restoring the constitutional relation" between the nation and all the states.[407] The preliminary Proclamation put the nation on notice that in one hundred days he would move against slavery in any place that was still in rebellion against the nation.[408]

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403. *See id.* ("[A]s commander-in-chief of the army and navy, in time of war, I suppose I have the right to take any measures which may best subdue the enemy.").

404. In hindsight, it is of course 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 know or foresee this when he issued the preliminary Proclamation.

405. Proclamation No. 16 (Preliminary Emancipation Proclamation), 12 Stat. 1267 (Sept. 22, 1862); Abraham Lincoln, Preliminary Emancipation Proclamation (Sept. 22, 1862), *in* 5 COLLECTED WORKS, *supra* note 2, at 433, 434.

406. Lincoln, Preliminary Emancipation Proclamation, *supra* note 405, at 433.

407. *Id.*

408. *Id.*

On January 1, 1863, the final Proclamation was put into effect. Here, Lincoln made the constitutional argument even more precise. He issued it "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."[409] This was, constitutionally, 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. Lincoln only had power to touch slavery where, as he had told the ministers from Chicago, he could not "enforce the Constitution."[410] Where the Constitution was in force, federalism, the nature of the proslavery Constitution that had been in place since 1787, and the Fifth Amendment prevented presidential emancipation.

The document was narrowly written and 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, Missouri, Delaware, or Maryland, and it would not threaten the constitutional relationship of the states and the federal government.

The awkward style and structure of the Proclamation has troubled scholars. The great historian Richard Hofstadter criticized the Proclamation as a cynical and meaningless document with "all the moral grandeur of a bill of lading."[411] Lincoln was one of the greatest craftsmen of the English language in American political history. But, here in the most important moment of his life, he resorted to the tools of the pettifogger, drafting a turgid and almost incomprehensible legal document. Unlike almost every other public document Lincoln wrote, the Proclamation was without style or grace. Even historians who admire Lincoln think it was "boring" and "pedestrian."[412]

A careful reading of the Proclamation suggests that Professor Hofstadter was right. It did have "all the moral grandeur of a bill of lading."[413] But, Hofstadter failed to understand the significance of a bill of lading to a skilled railroad lawyer, which is what Lincoln had been

409. Proclamation No. 17 (The Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

410. Lincoln, Reply to Emancipation, *supra* note 396, at 420.

411. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 169 (1948).

412. Allen C. Guelzo, *"Sublime in Its Magnitude": The Emancipation Proclamation, in* LINCOLN AND FREEDOM: SLAVERY, EMANCIPATION, AND THE THIRTEENTH AMENDMENT 65, 66 (Harold Holzer & Sara Vaughn Gabbard eds., 2007).

413. HOFSTADTER, *supra* note 411, at 169.

before the War. A bill of lading was the key legal instrument that guaranteed the delivery of goods between parties that were far apart and may never have known each other. A bill of lading allowed a seller in New York to safely ship goods to a buyer in Illinois, with both knowing the transaction would work. One contemporary living in Britain, Karl Marx, fully understood the highly legalistic nature of the Proclamation. Writing for a London newspaper, Marx had a clear fix on what Lincoln had done and method he used: "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."[414]

So, in the end, when the loyal slave states were secured, military victory likely, political support was in place, and he had developed a constitutional framework for emancipation—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. The vehicle for delivery would be the 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."[415]

414. PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 187–88 (1994) (quoting Karl Marx).

415. Letter from Abraham Lincoln to Horace Greeley, *supra* note 389, at 389.