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Slavery, the Constitution, and the Origins of the Civil War

On December 20, 1860, the delegates to the South Carolina secession convention voted to leave the Union. In the declaration explaining the causes of their momentous decision, they charged that "an increasing hostility on the part of the non-slaveholding States to the institution of slavery has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution." "Thus," they concluded, "the constituted compact has been deliberately broken and disregarded by the non-slaveholding states, and the consequence follows that South Carolina is released from her obligation." As almost all historians have increasingly recognized, the institution of slavery was the primary cause of secession and, consequently, of the Civil War. At the same time, as the South Carolina declaration suggests, the debate over slavery and secession was framed in constitutional terms (Figure 1).

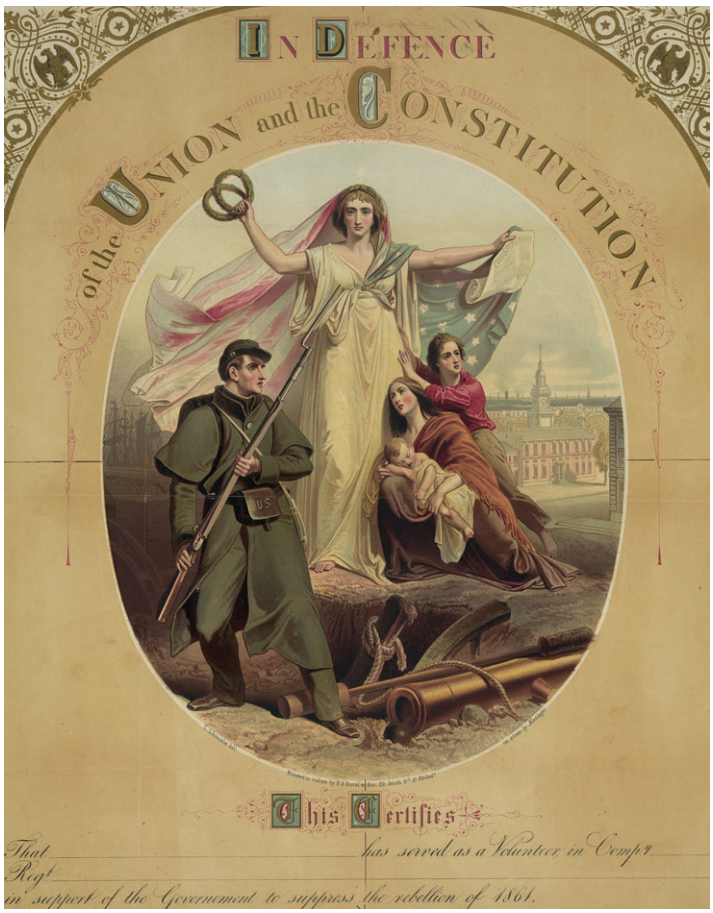

Figure 1. This wartime certificate for Union Army volunteers stresses the role of the Constitution in popular understanding of the sectional conflict. Printed in Philadelphia in 1861, the lithography depicts Columbia bearing two laurel crowns, the flag, and the Constitution, all symbols of national pride. With the Constitution in hand, Columbia protects a family that leans in distress at her side, while a Union volunteer stands attentively. (Courtesy of Library of Congress)

The "objects" of the U.S. Constitution referred to the various protections for slavery written into the document in 1787. In the decades leading to the 1860 Charleston convention, Southern extremists claimed that those protections were increasingly weakened by Northern state laws, court decisions, and abolitionist activity. By 1860, alarmed at the scope of these trends, secessionists argued that Northern states had violated the "compact" underlying the Constitution. In contrast, newly elected President Lincoln argued that the Union was "perpetual," had been created by the people of the nation, and could not be unilaterally dissolved by the act of any group of states. Despite Confederate charges of abolitionism, Lincoln correctly asserted that neither he nor the national government threatened slavery because both lacked the constitutional power to touch slavery in the states. Only when the war came and the Confederacy proclaimed its independence from the United States did Lincoln claim constitutional authority to end slavery. In all these respects, a consideration of constitutional issues is vital to an understanding of the origins of the Civil War.

The Antebellum Period

Most Americans believe that secession was about "states' rights," but the South Carolina delegates' complaints about the "increasing hostility" to slavery suggests quite the opposite. In the four decades before the outbreak of Civil War, Southern leaders had called for Northern states to support and enforce the federal fugitive slave law, change their own state laws to allow Southerners to travel with slaves in the North, and suppress abolitionist speech. In the constitutional debate over slavery, that is, Southerners wanted states' rights for *their* states, but not for the Northern states.

Starting in the mid-1820s, most Northern states had passed personal liberty laws, which were designed to prevent the kidnapping or removal of free blacks who were wrongly seized as fugitive slaves. These laws required southerners to provide evidence to a state court before they could take a fugitive slave out of the state, and the state laws had a much higher standard of proof than the federal Fugitive Slave Act of 1793. Thus, the laws often frustrated southerners who were trying to recover their slaves. In 1842, the U.S. Supreme Court struck down all the state personal liberty laws in *Prigg v. Pennsylvania*. In his opinion Justice Joseph Story, who was from Massachusetts, declared that Southerners had an almost unlimited right to hunt down their fugitive slaves, and while the Northern states could actively help them do so by enforcing the 1793

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federal law, they could not pass their own laws adding requirements to the process. This should have satisfied the South, but it did not, and it only infuriated Northern state leaders who began withdrawing all support for the return of fugitive slaves. This undermined the ability of slaveholders to recover runaway slaves.

The Latimer case illustrates their predicament (Figure 2). In 1842, Virginia slaveowner James Grey discovered that his slave, George Latimer, had escaped to Boston. Upon apprehending him, Grey handed Latimer over to the local sheriff, who jailed him while Grey waited for papers to prove he owned Latimer. Public pressure forced the sheriff, who was an elected official, to release Latimer. The sheriff delivered Latimer to Grey, but then Grey was forced to "sell" Latimer to a group of abolitionists for a small amount. The upshot was that Massachusetts had refused to help a slaveowner recover his slave. In 1843, Massachusetts passed the "Latimer law," which closed all jails to slave catchers, thereby taking the state judicial authorities entirely out of the business of enforcing the federal Fugitive Slave Act. This was completely in line with the Supreme Court's decision in *Prigg*, which held that the states did not have to enforce the federal law. But since there were few federal judges in Massachusetts, enforcement of the law was stymied. Other states followed with similar laws. After passage of the Fugitive Slave Act of 1850—which created a corps of federal commissioners stationed in Northern states—local and state governments were even more hostile to slave catchers. Meanwhile, Northern juries almost never convicted people who rescued fugitive slaves from masters or federal officers.

Figure 2. After escaping from his master in Virginia, George Latimer (1818–c.1880) found his way to Boston where he became the protagonist of a benchmark personal liberty case. Incited by Latimer's apprehension, a series of popular protests culminated with his freedom and the passing of the "Latimer Law," which prohibited state officials from enforcing the federal fugitive slave law. (Courtesy of New York Public Library)

Riots and dramatic rescues in Boston, Syracuse, rural Pennsylvania, Oberlin, Ohio, Milwaukee, and elsewhere angered Southerners, and made them believe that the Constitution was not working to protect their rights. Legally, of course, the system was working fine. The U.S. Supreme Court had held that the states did not have authority to enforce the federal Fugitive Slave Act and the Northern states were acting accordingly. From 1850 to 1861, under the stronger federal law written by slaveholders in Congress, more than 350 fugitive slaves were returned to their Southern masters. More could have been returned if the federal government had been willing to spend more time and money in doing so. Southerners were right that the North was not being cooperative, but the Constitutional provisions for separate state and federal authority allowed this. A new fugitive slave law that provided due process to alleged slaves might have led to a different outcome, but Southerners opposed that as well.

The issue of slave transit was similar. The Southern states all agreed, at least in 1787, that, except for not freeing fugitive slaves, each state was free to regulate slavery as it wished. For decades, most Southern states acknowledged that if a slave was taken to a free state to live, that slave became free. Starting in the 1830s, however, Northern courts began emancipating slaves brought to their jurisdictions by visiting masters. In the 1840s, New York and Pennsylvania passed legislation to require this outcome. In *Lemmon v. The People*, an 1860 landmark case upholding such state legislation, New York's highest court ruled that eight Virginia slaves became free the moment their master brought them into the state. The New York Court reached this decision even though the master came to the state for just one night so he could change ships for direct passage to New Orleans (1). Decisions such as *Lemmon* were consistent with both a century of Anglo-American law and notions of federalism and states' rights. The states had the right to decide who was a slave and who was not under such circumstances. As could be expected, a number of slave states objected to these decisions; some mentioned *Lemmon* in their secession documents. These states argued that the Constitution had failed them by not protecting their right to travel with their slave property.

Ironically, these same Southern states denied any rights to free blacks who lived in the North. When Northern ships docked in Charleston or New Orleans, any free black sailors on them were arrested and held in the local jail. They were allowed to leave only if the ship captain paid the jailer for their upkeep. In the 1840s, Massachusetts sent commissioners to South Carolina and Louisiana to negotiate an agreement on the status of free black sailors, but officials in both states forced the commissioners to leave without even discussing the issue. At this time, slave jurisdictions also arrested visiting white Northerners if they were found in possession of antislavery literature. Thus, Southern states had a view of interstate relations that protected the rights of slaveowners, but not free blacks or whites from the North who were not sufficiently supportive of slavery.

Finally, secessionists complained about abolition societies in the North. In effect, they wanted to prevent the North from allowing free speech to opponents of slavery, just as the South did. Almost every Southern state had banned Harriet Beecher Stowe's 1852 popular antislavery novel, *Uncle Tom's Cabin*. The South wanted to impose that sort of censorship on the North as well.

On the Eve of War

By the time Lincoln took office in March 1861, seven states had declared themselves no longer a part of the Union. South Carolina had been the first to leave and it had set out the arguments the other seceding slave states would follow. In its secession declaration, the South Carolina delegates singled out Northern states whose actions had allegedly undermined the Constitution:

> The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them. In many of these States the fugitive is discharged from service or labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution. The State of New Jersey, at an early day, passed a law in conformity with her constitutional obligation; but the current of anti-slavery feeling has led her more recently to enact laws which render inoperative the remedies provided by her own law and by the laws of Congress. In the State of New York even the right of transit for a slave has been denied by her tribunals; and the

> States of Ohio and Iowa have refused to surrender to justice fugitives charged with murder, and with inciting servile insurrection in the State of Virginia. Thus the constituted compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation (2).

In the face of this ominous portrait painted by secessionists, Lincoln denied that slavery was threatened by either the free states or his administration (Figure 3). He used his first inaugural address to plead with the Southern states to return to the Union. He began by noting that "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." He insisted there was no "reasonable cause for such apprehension," reiterating that he had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists." He reaffirmed the constitutional issue that he had "no lawful right to" interfere with slavery, even if he wanted to do so. Because he had no lawful or constitutional right to interfere with slavery, and because he was pledged to preserve the Constitution—and with it the Union—he also reaffirmed that he had "no inclination" to harm slavery. Lincoln's constitutional thought dovetailed with the politics of the moment. His goal was to bring the seven seceding slave states back into the Union, and to prevent any more from leaving the Union. He could only do this if the people of these states were convinced that a Republican administration did not threaten slavery.

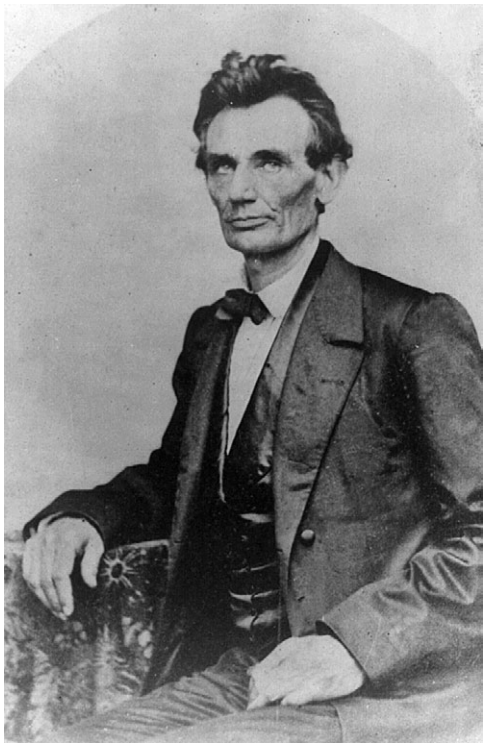

Figure 3. Abraham Lincoln, shown here days after winning the 1860 Republican Party nomination, took a position on slavery that is still a contested topic among historians and laypersons alike. As a presidential candidate, Lincoln faced critics who accused him of being inconsistent in his approach to abolition. However, Lincoln's commitment to defend his interpretation of the Constitution did not falter. With the advent of war, Lincoln found ways to interfere with the institution of slavery without compromising the integrity of the Constitution. (Courtesy of Library of Congress)

The rest of his statement—that he had "no lawful right" to interfere with slavery—was an assertion of both constitutional principles and well understood constitutional law. From the writing of the Constitution in 1787 until Lincoln's inauguration, virtually every legal scholar, jurist, politician, and lawyer in America agreed that the national government had no power to regulate slavery in the states where it existed. Lincoln quoted from the 1860 Republican Party platform to underline his own commitment to this constitutional principle:

> Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter what pretext, as among the gravest of crimes (3).

This statement of orthodox constitutional law mirrored the analysis offered by General Charles Cotesworth Pinckney, the influential proslavery leader of the South Carolina delegation at the 1787 Constitutional Convention. After the Convention, Pinckney bragged to the South Carolina legislature: "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" (4).

In part Lincoln had "no inclination" to touch slavery in the states because he had no power to do so. An orthodox Whig on constitutional principles, Lincoln had no interest in gratuitously trampling on the Constitution. He believed—as did virtually every member of Congress and the Supreme Court—that the national government had no power to regulate or abolish slavery in the states. At the same time, Lincoln also firmly asserted that no state could leave the Union on its own. Here his constitutional theory was also fairly orthodox and, until his own election, generally accepted on both sides of the Mason-Dixon line: "I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself" (5). Thus, Lincoln pledged to support the Constitution by preserving the Union, just as he asserted he would support the Constitution by not threatening slavery in the existing states.

In making this argument, the incoming president reiterated that secession could never be possible under the Constitution: "Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left" (6). In other words, the whole Southern claim of a right to secession was in essence a claim against any continuing form of government. If the South wanted to leave the Union, then the process would have to be followed within the Constitution. Congress might pass legislation allowing states to leave the Union; the states might petition Congress for a constitutional convention, or Congress might pass a constitutional amendment to allow secession and send it on to the states for ratification.

Significantly, almost all of Lincoln's First Inaugural was about the Constitution. The word itself appears thirty-four times in the speech. And there are additional references to it with phrases such as "frame of government." Lincoln's goal in the address was to convince the South to return to the Union, where slavery was protected. Near the end of his speech he made the obvious point that the old Constitution remained in place, unchanged and unlikely to be changed. The so-called Confederate

states claimed the North and the Union threatened slavery in violation of the Constitution, but as Lincoln pointed out, "Such of you as are now dissatisfied still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new Administration will have no immediate power, if it would, to change either" (7). In other words, since both the Administration and the states of the Deep South conceded that the Constitution protected slavery, and that Lincoln was obligated to uphold and protect the Constitution and to enforce the Fugitive Slave Law, there was no reason for secession.

Lincoln's pleas, of course, fell on deaf ears. As he would observe in his second inaugural, "Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came" (8).

War, Constitution, and Slavery

Once the guns started blazing, the existing constitutional restraints changed. Lincoln argued that under the Constitution slavery was secure, but once the seceding slave states left the Union and made war on their own country, they could no longer claim the protections of the Constitution. Thus, while Lincoln had no power to end slavery when he took office—because the national government could not interfere with slavery in the existing states—he could interfere with slavery in those states that had made war on the national government. Thus, starting in early 1861, a new constitutional reality developed around slavery.

The first change came on May 23, 1861, when three slaves owned by Confederate Colonel Charles K. Mallory escaped to Fortress Monroe, then under the command of Major General Benjamin F. Butler. A day later Confederate Major M. B. Carey, under a flag of truce, arrived at the Fort, demanding the return of the slaves under the Constitution and the Fugitive Slave Law of 1850. Butler, a successful Massachusetts lawyer before the war, told Carey that the slaves were contrabands of war, because they had been used to build fortifications for the Confederacy, and thus Butler would not return them to Mallory (9). Ironically, Butler informed Major Carey that "the fugitive slave act did not affect a foreign country, which Virginia claimed to be and she must reckon it one of the infelicities of her position that in so far at least she was taken at her word." Butler then offered to return the slaves if Colonel Mallory would come to Fortress Monroe and "take the oath of allegiance to the Constitution of the United States" (10). Not surprisingly, Colonel Mallory did not accept General Butler's offer.

This ended 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, who had previously been used by Mallory to build Confederate defenses. Taking these slaves away from Confederates served the dual purposes of depriving the enemy of labor while providing labor for the United States. The events at Fortress Monroe were the beginning of an entirely new understanding of the powers of the United States on the central constitutional issue of the age: slavery.

Even before General Butler brilliantly devised the contraband policy, the issue of emancipation had been on the table. Many abolitionists and antislavery Republicans wanted Lincoln to move against slavery immediately, but Lincoln could not act for a variety of reasons. He first needed a constitutional theory under which he could act to end slavery in the Confederacy. This theory evolved throughout 1861 and early 1862. By the spring of 1862, Lincoln accepted the notion that as Commander-in-Chief of the Army and Navy, he could move against the Confederacy's most important military asset: its slaves. What General Butler could do for three slaves, Lincoln could do for the more than three million slaves in the Confederacy (11). He would issue the Emancipation Proclamation in January 1863.

But before taking this fateful step, Lincoln needed to prepare the way for a constitutionally legitimate change. First, he had to secure the four loyal slave states (Maryland, Delaware, Missouri, and Kentucky) in order to prevent them from seceding. Second, he had to have support from the Congress and the people, including Northern conservatives. Thus, initial Republican forays against slavery were partial and eminently constitutional. In April 1862, for instance, Congress ended slavery in the District of Columbia through compensated emancipation. This did not violate the Fifth Amendment because the taking of property was done with "just compensation." Nor did it violate the limitations on the power of Congress, because the Constitution gave Congress the power to regulate the District of Columbia. Third, Lincoln had to have some expectation of winning the war, or at least partially defeating the Confederacy. An emancipation proclamation without victory would be nothing, "like the Pope's bull against the comet" (12). By July 1862, Lincoln believed the war was going his way. Two Confederate state capitals, Nashville and Baton Rouge, were in U.S. hands and, with the exception of Vicksburg, the entire Mississippi River was controlled by Lincoln's Navy and Army. The Confederates had been forced from their largest city, New Orleans, and United States troops were firmly encamped on the Sea Islands off the coast of South Carolina. Raiding parties from those islands were bringing the war home to the very citadel of secession. Lincoln only awaited a big victory—which he would get at Antietam in September 1862—to announce his plan for ending slavery in the Confederacy.

Thus, when it came to ending slavery *inside* the United States, Lincoln and Congress narrowly hewed to the constitutional understandings that had existed before the war. The slaves in the Confederacy, however, were another matter. They were property, used by the enemies of the United States to make war on the United States. Furthermore, the Constitution could not be applied in the Confederate states. There was no "law" there anymore, except martial law and the law of war. Under that theory, General Butler declared runaway slaves to be contrabands of war, and thus legitimately seized and freed. Congress did the same in both Confiscation Acts and in other laws and regulations. Lincoln followed suit in the Emancipation Proclamation, narrowly limiting it to those places that were still at war and not under national jurisdiction.

Significantly, Lincoln issued the proclamation "by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States in time of actual armed rebellion" (13). 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. The purpose of the proclamation was "restoring the constitutional relations" between the nation and all the states.

The irony of secession was that it allowed Lincoln do what he had always wanted. He had always believed slavery was wrong and immoral. But, as a lawyer, a Congressman, and an incoming president he understood that the national government could only regulate or end slavery in the District of Columbia and the territories. In a famous letter published in the *New York Tribune*, Lincoln repeated his "oft-expressed *personal* wish that all men everywhere could be free" (14). He later told a correspondent, "If slavery is not wrong, nothing is wrong" (15). Without secession, however, he could never have acted on these personal views, because, as he told the South in his first inaugural address, the Constitution guaranteed their property rights in slaves. But, once the slave states abandoned the Constitution, they could no longer expect it to protect them.

The end of slavery could not, of course, come through a presidential proclamation or a congressional act, because even as the war ended, slavery remained constitutionally protected in those slave states

that had never left the Union and those places that had come under U.S. control *before* the Emancipation Proclamation. Thus, a constitutional amendment was needed. Lincoln urged Congress to pass such an amendment, which it did in early 1865. By December it had been ratified, slavery was ended, and the Constitution was permanently altered to forever favor freedom and to never protect or legitimize bondage. Two more amendments, ratified in 1868 and 1870, would make former slaves and their children citizens with the same voting rights as other Americans. These were the final steps in the constitutional revolution that began with South Carolina's unconstitutional act of declaring itself separate from the Union. ❑

Endnotes

1. For a discussion of this case, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).
2. "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union" found at <http://avalon.law.yale.edu/19th_century/csa_scarsec.asp>; see also James W. Loewen and Edward H. Sebesta, eds., *The Confederate and Neo-Confederate Reader* (Jackson: University of Mississippi Press, 2010), 111.
3. Abraham Lincoln, "First Inaugural Address—Final Text," *Collected Works* (New Brunswick: Rutgers University Press, 1953), 4:263.
4. Pinckney quoted in Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (New York: Burt Franklin, 1987, reprint of 1888 edition), 4:286.
5. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:264–65.
6. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:268.
7. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:271.
8. Lincoln, "Second Inaugural Address," March 4, 1861, *Collected Works*, 8:332.
9. Benjamin F. Butler, *Butler's Book* (Boston: A.M. Thayer, 1892), 256–57.
10. Maj. Gen. Benjamin F. Butler to Lt. Gen. Winfield Scott, May 24/25 1861, in *The War of the Rebellion: The Official Records of the Union and Confederate Armies*, 127 vols., index, and atlas (1880–1901) , ser. 2, vol. 1:752 [hereafter cited as *O.R.*]
11. For a more elaborate discussion of how Lincoln moved towards Emancipation, see Paul Finkelman, "Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading," in William A. Blair and Karen Fisher Younger, eds., *Lincoln's Proclamation: Race, Place, and the Paradoxes of Emancipation* (Chapel Hill, NC: University of North Carolina Press, 2009) 13-44; Paul Finkelman, "Lincoln, Emancipation and the Limits of constitutional Change," *Supreme Court Review*, 2008: 349–87; and Paul Finkelman, "The Civil War, Emancipation, and the Thirteenth Amendment: Understanding Who Freed the Slaves," in Alexander Tsesis, ed., *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York, NY: Columbia University Press, 2010), 36–57.
12. Ibid., 423.
13. Lincoln, "Emancipation Proclamation," January 1, 1863, *Collected Works*, 6:29.
14. Lincoln to Horace Greeley, August 22, 1862, *Collected Works*, 5:388–89
15. Lincoln to Albert G. Hodges, April 4, 1864, *Collected Works*, 7:281.

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