

THE
CONSTITUTION

An Introduction

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CHAPTER 7

CRISIS

Lincoln, the Civil War, and Reconstruction (1860–1876)

THE UNITED STATES CONSTITUTION as we know it today is, in substantial measure, the result of the single most important act of constitutional interpretation in America's history: the Civil War.

The Civil War was, of course, more than an act of ordinary constitutional interpretation. Fought from 1861 to 1865, it was the most devastating war in American history, resulting in the deaths of more than 620,000 men—a death toll greater than all of America's other wars *combined*. The war was the greatest crisis in the history of the nation. It marked a decisive turning point in American history—perhaps *the* pivot point in the story of the United States as a nation.

Yet at the heart of the Civil War, the crisis that triggered it, and the changes that it brought were enormous *constitutional* issues, not just political, military, and moral ones. It is no exaggeration to say that *the Civil War was fought over the meaning of the Constitution—and over who would have the ultimate power to decide that meaning*. Specifically, the war was fought over three hugely important constitutional questions: the question of the present and future constitutional status of slavery in the United States; the question of who would have final power to decide that issue; and the question of the lawfulness of secession—whether the Union could be dissolved by the unilateral decisions of individual states claiming sovereignty to decide for themselves, or whether the Union as a whole was the ultimate sovereign.

These questions—probably the most fundamental questions of constitutional law in our nation’s history—did not obtain their ultimate resolution in the decision of any court. They were settled on the battlefields of the Civil War. It was the outcome of the “case” of *Grant v. Lee*, reduced to final judgment at Appomattox Court House in Virginia on April 9, 1865, that settled the most important and persistent issue of antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South’s state-sovereignty view. It was a great Civil War, not a judicial opinion, that decided that issue. It was likewise the Civil War, not any correcting judicial decision, that ended up overturning the most outrageous decision of the Supreme Court to that point in our history—*Dred Scott*’s enshrinement of slavery as a fundamental constitutional property right of (white) citizens, immune from federal interference, as a matter of (“substantive”) due process of law. The Supreme Court never overruled its decision; it was the Civil War, and the constitutional amendments that followed in its wake, that overruled *Dred Scott*. And it was the Civil War, not any judicial decision, that reversed the most grievous error of the framers themselves: the preservation, protection, and encouragement of slavery under the original Constitution. It took a stunning, unprecedented wartime presidential military order—the Emancipation Proclamation—followed by the success of Union armies, and then finally a constitutional amendment, to undo the original Constitution’s support for slavery.

The Civil War thus produced a fundamental transformation in the legal status of slavery under the Constitution and defined—some would say redefined—American federalism. It did so by repudiating the South’s, and the Court’s, misinterpretations of the old Constitution and by furnishing the circumstances that enabled sweeping new amendments. The result was the more perfect Union we have today, and the end of slavery throughout that Union. The War vindicated the North’s interpretation of the Constitution, rejecting the South’s view of state sovereignty and embracing instead the power of the nation as a whole to guarantee to every person both freedom and equal rights of citizenship. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—abolishing slavery, permanently erasing the notorious Three-Fifths Clause, establishing civil rights for all, and guaranteeing the right to vote without discrimination on the basis of race—were, in effect, the nation’s grand interpretation and implementation of the “Republican Form of Government” and “Privileges and Immunities” clauses

of Article IV of the original Constitution. Those interpretations decisively repudiated the Supreme Court's deformed constitutional vision in *Dred Scott*. These were major interpretive victories, won in a bloody civil war fought over constitutional meaning.

None of this would have happened if President Abraham Lincoln had not believed himself constitutionally compelled—literally *required*, in his view, by an “oath registered in heaven”—to insist on his understanding of the Constitution in the teeth of the competing claims of the South and of the Supreme Court, even if that might mean civil war. President Lincoln was the Commander in Chief of this war over constitutional meaning. And he won. Lincoln, our nation's sixteenth President and almost universally regarded as one of its best, was—along with his many other claims to fame—the most important interpreter of the Constitution in America's history.

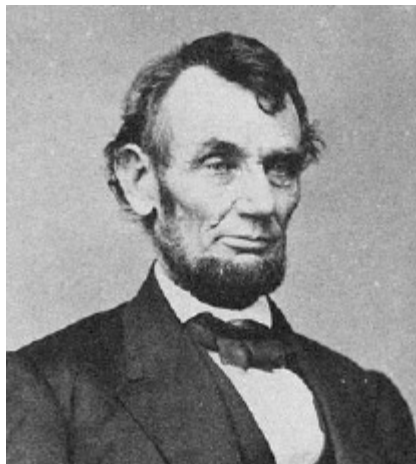
In this chapter, we tell the story of Lincoln, the Civil War, and how this man and that event transformed the Constitution. The story has been often told, from many different angles. The focus here is on secession and civil war as a crisis of constitutional interpretation and on Lincoln as the Constitution's foremost interpreter through that crisis—its preserver, protector, and defender, and ultimately its reformer.

We begin with Lincoln's views on the status of slavery under the Constitution and his willingness to take on—and ultimately defy—the Supreme Court's *Dred Scott* decision and the view that the Court's interpretations of the Constitution were binding on the entire nation. We then turn to the crisis of secession that followed upon Lincoln's election as President in 1860, an election that the South regarded as having installed a *lawless* president bent on denying Southerners' constitutional rights as declared by the Supreme Court. In a sense, Lincoln's election was a rejection by the North of the Supreme Court's supremacy on this issue of constitutional interpretation. Secession, in turn, was the South's rejection of a president, and a Union, that did not accept the supremacy of the Supreme Court's pro-slavery interpretation of the Constitution. Lincoln then rejected the constitutional legitimacy of secession—the claimed right of individual states to decide for themselves whether to remain in the Union, without the consent of the whole. The South would not accept the authority of the Union on these terms; the North would not accept secession on any terms. And so, as Lincoln would later put it, “the war came.”

We next take up the constitutionality of some of Lincoln's extraordinary actions as military Commander in Chief in a time of civil war: his suspension of habeas corpus (and disregard of a judicial order invalidating that suspension); his Emancipation Proclamation freeing slaves in rebel states as a war measure; and his use of military tribunals and suppression of civil liberties.

Finally, we turn to the enduring constitutional legacy of the Civil War, and of Lincoln: the abolition of slavery in the Thirteenth Amendment and, following Lincoln's death, the uneasy "Reconstruction" of the former states of the South and the adoption of the Fourteenth and Fifteenth Amendments, guaranteeing equal civil rights for all and abolishing racial discrimination in the right to vote. Together, these amendments fundamentally transformed the Constitution, decisively rejecting its original pro-slavery character and enacting sweeping protections of individual rights against state governments—provisions that would become the centerpiece of constitutional debates for the next century and a half.

ABRAHAM LINCOLN



The most important constitutional interpreter in our nation's history was a humble prairie lawyer who rose to become President of the United States, presided over our nation's greatest crisis, and saved the Union: Abraham Lincoln.

Born in 1809 in a log cabin in Kentucky, Lincoln rose to become perhaps the greatest President in our nation's history. In his youth, Lincoln worked on farms in Kentucky, Indiana, and eventually Illinois, his adopted home state; he also worked on a riverboat, managed a store, and ran a post office. With less than a year of formal education of any kind, he learned to read as a

boy, “read law” as a young man, and became a lawyer—his primary adult occupation other than politics.

Lincoln served several terms in the Illinois state legislature, and one term in Congress during the Mexican-American War, before returning to Springfield and his law practice. In the 1850s, the growing national controversy over the spread of slavery brought Lincoln back into politics. Lincoln ran for the US Senate in 1856 and narrowly lost. He ran again for the Senate against incumbent Stephen Douglas in 1858, and narrowly lost again.

The loss to Douglas, however, made Lincoln nationally known as a leader of the new Republican Party, committed to curtailing the expansion of slavery. In 1860 Lincoln became the Republican nominee for President, and swept to victory on the strength of Northern support. The South responded to Lincoln’s election by secession, rebels attacked Fort Sumter in April 1861, and President Lincoln led the nation through the four most difficult years of its history—through “the fiery trial” of the Civil War. In 1863, Lincoln proclaimed that all slaves in the rebelling states were permanently free. The Emancipation Proclamation, adopted as a military measure under Lincoln’s authority as Commander in Chief, eventually led to the complete elimination of slavery by the Thirteenth Amendment to the Constitution. The amendment passed Congress and was sent to the states for ratification in 1865, shortly following Lincoln’s reelection in 1864.

When Lincoln took the oath of office as President for the second time, in March 1865, he had accomplished much: he had saved the Union from its greatest threat, presided successfully over the most severe crisis and the deadliest war in our nation’s history, maintained the Constitution and upheld his oath, and freed the slaves—results nearly unimaginable just four years earlier. The Confederates’ final surrender was still a month away, but the principal task ahead was, as Lincoln put it in his Second Inaugural Address, “to bind up the nation’s wounds.”

Unfortunately, Lincoln did not live to see that task completed. On April 14, 1865—just days after the Confederate surrender—Lincoln was shot in the back of the head by John Wilkes Booth, a Confederate sympathizer, while Lincoln and his wife attended a play at Ford’s Theater in Washington. Lincoln never regained consciousness. He died of his wounds the next morning.

Lincoln and the Constitutional Status of Slavery

The man whom history has come to call “the Great Emancipator” was, at least initially, an antislavery *moderate*. Lincoln personally opposed slavery, but believed that the Constitution was most fairly understood as legally shielding, even encouraging, the institution of slavery in important respects. The Constitution required the return of fugitive slaves, and Lincoln believed that it also prohibited federal interference with a state’s decision to permit slavery. The Constitution did not require slavery’s *expansion*, however, and here Lincoln staked out his ground.

His views were not as radical as those of abolitionists, though he shared their antislavery instincts. “I have always hated slavery,” he stated as a (losing) US Senate candidate in 1858. He later wrote, as President: “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not

remember when I did not so think, and feel.” But at the same time, Lincoln recognized that the Constitution protected slave interests in significant ways, concessions that the framers had felt it necessary to make to the Southern states in order to forge “a more perfect Union” under the Constitution. And Lincoln treasured the Union and the Constitution above all. “Much as I hate slavery,” he once said, “I would consent to the extension of it rather than see the Union dissolved.” Only through maintaining the Union and the system of government created by the Constitution, Lincoln thought, could freedom eventually prevail. Under the Constitution, slavery’s expansion to new territories could be checked and the institution would gradually die a natural death. But if the Union and the Constitution collapsed, so too would all hope of liberty for slaves.

Lincoln thus believed that it was necessary for the North to honor the Constitution’s protections of slavery just as written. It was *not* appropriate, he felt, to read the Constitution in some ingenious—but dishonest—fashion, as if it did not mean what it plainly said in protecting slavery. Here Lincoln parted company with antislavery radicals, some of whom imaginatively reinterpreted the Constitution as if it *prohibited* slavery. (Recall the discussion of the antislavery “Utopians” in [Chapter 4](#).) Such interpretations simply were not faithful to the Constitution, Lincoln believed. Lincoln’s views drew the ire of a notable abolitionist radical, the brilliant former slave Frederick Douglass, who deplored Lincoln’s toleration of slavery and, later, his seeming slowness as President to do anything about it. (As discussed in [Chapter 4](#), Douglass eventually came to respect Lincoln greatly; he met with Lincoln in the White House, advised him on political and policy matters concerning emancipation and the treatment of black soldiers, and revered him after his death.)

Lincoln consistently maintained his principled stand on matters of constitutional interpretation. While the Constitution must be understood as a whole and in practical terms, it also must not be deliberately misinterpreted to mean things it plainly does not say, simply because one might prefer different results as a matter of policy. The words of the US Constitution, taken in context and considered as a whole—and applied with common sense—must control the practice of the government. Otherwise, Lincoln believed, the nation would not have a government of laws, but one of men. Lincoln was, above all, committed to faithful interpretation of the Constitution and to the rule of law. It was that commitment that framed his intensely held views

on the inviolability of the federal *Union* under the Constitution. And it was that commitment that determined his views on the status of slavery *under the Constitution*, no matter his personal views about the morality of slavery.

Accordingly, Lincoln freely acknowledged that the Constitution protected the right of slave-owners to recapture fugitive slaves. He even granted that the federal government validly might be thought obligated to enforce that right by passing fugitive slave laws. He further conceded that the Constitution gave states the right to maintain the institution of slavery within their own borders and that the federal government lacked power to interfere with such choices. Finally, Lincoln recognized—how could he not?—the reality that the Three-Fifths Clause gave Southern slave interests enhanced political power in the national government. These constitutional protections of slavery could not be denied. There they were, right in the Constitution. Our modern, iconic identification of Lincoln as “the Great Emancipator” tends to obscure our memory of his prewar positions on these pro-slavery constitutional points. Lincoln accepted them all.

To be sure, Lincoln viewed these provisions as departures from the principles of the Declaration of Independence that “all men are created equal, and are endowed by their Creator with certain unalienable rights.” In this respect, his interpretation of the Constitution was closer to that of the Garrisonians—followers of the famed radical abolitionist William Lloyd Garrison, who read the Constitution’s protections of slavery for what they were and who hated the Constitution as a consequence (see [Chapter 4](#))—than to the Utopians’ view.

Unlike the Garrisonians, however, Lincoln denied that the Constitution was at root a pro-slavery document. The framers did the best they could, Lincoln maintained. The Declaration of Independence was the promise of freedom to all men and women, but its fulfillment could not be achieved all at once. The framers simply could not conceive of freeing all slaves in 1776, or in 1787; doing so was not politically possible. Lincoln took some comfort in the Constitution’s refusal to use the word “slavery.” Lincoln compared slavery to a disease afflicting the nation, but one that the framers had not thought it possible to cure right away without killing the patient. “Thus, the thing is hid away, in the constitution,” he remarked, “just as an afflicted man hides away a wen or a cancer, which he dares not cut out at once, lest he bleed to death; with the promise, nevertheless, that the cutting may begin at the end of a given time.” The framers could not achieve more than this,

Lincoln believed, and they made only the concessions to slavery that were absolutely necessary for the times.

Slavery in the Territories: Lincoln's Line in the Sand

But if it was true that the Constitution protected the institution of slavery in the states where it existed, it was also true that the Constitution did *not* require its extension into federal territories that were not yet states. On this point, Lincoln stood firm. Nothing in the Constitution required the admission of new slave states, and nothing in the Constitution required that Congress permit slavery in federal territories before they became states. Thus, Congress could thwart the expansion of slavery by prohibiting its introduction anywhere it did not already exist—a power that Congress had in fact exercised since the first days of the Constitution, with the Northwest Ordinance laws of 1787 and 1789. And it could decide to admit only free states as new states of the Union, progressively lessening the power of the Three-Fifths Clause and loosening the grip of slaveholders' power in the government. The Constitution, properly interpreted, permitted the nation to draw a line: *no further extension of slavery*.

Lincoln was thus a supporter of the “Free Soil” position. As a young, one-term congressman (1847–1849), Lincoln backed the proposed (but never enacted) “Wilmot Proviso” to ban slavery in all the new territories acquired from Mexico at the end of the Mexican-American War (1846–1848). It was the proposed expansion of slavery into the new territories of Kansas and Nebraska that drew Lincoln's anger and in 1854 lured him out of full-time law practice and back into politics. His chief political antagonist was Stephen Douglas, the powerful Illinois Senator who had written and sponsored the Kansas-Nebraska bill that repealed the decades-old Missouri Compromise law of 1820. The Missouri Compromise had forbidden slavery in federal territory acquired in the Louisiana Purchase of 1803, north of a designated geographic line (except for the state of Missouri itself). Lincoln and many other Northern moderates considered that compromise sacred. But Senator Douglas's bill had proposed leaving it up to the people of each territory whether to permit slavery or not, a position that Douglas gave the appealing name of “popular sovereignty.” Lincoln thought the label a fraud and ridiculed “the ‘gur-reat pur-rinciple’ that ‘if one man would enslave

another, no third man should object,’ fantastically called ‘Popular Sovereignty.’”

The Supreme Court’s decision in *Dred Scott* in 1857 was an even greater assault on Lincoln’s position than the Kansas-Nebraska Act. The Court, it will be recalled, held that it was unconstitutional for Congress to prohibit slavery in the territories. The right to own slaves as property and take them into federal territories was a constitutional right “distinctly and expressly affirmed” by the Constitution and protected against government interference by the Due Process Clause of the Fifth Amendment. (Interestingly, the Supreme Court’s *Dred Scott* decision was also contrary to Stephen Douglas’s position. According to the Court, it was *not* up to the people of each territory to decide whether to permit or forbid slavery: slavery *had to be permitted*—it was a constitutional “right.”) It was Kansas-Nebraska’s repeal of the Missouri Compromise that drew Lincoln back into politics, but it was his opposition to *Dred Scott* and the Supreme Court that propelled Lincoln to national prominence and, eventually, to the Presidency.

Lincoln Takes on the Supreme Court

Lincoln’s position on slavery in the territories and the Supreme Court’s decision in *Dred Scott* were in direct contradiction. Today it seems clear that Lincoln’s interpretation of the Constitution was right and the Supreme Court’s interpretation was wrong—horribly, willfully wrong. Yet, was Lincoln not bound to regard the Supreme Court’s decision against his position as deciding the matter? Indeed, are not all public officials, and all citizens, obliged to treat the Court’s decisions as settling constitutional questions, whether they agree with those decisions or not?

STEPHEN DOUGLAS: THE LITTLE GIANT



Stephen Douglas (1813–1861) of Illinois was perhaps the most influential politician of the 1850s never to be elected President. Known as “the Little Giant” for his small physical stature (five feet four inches) and large political status, Douglas was a formidable politician, debater, and advocate. He is best remembered today as the Illinois Senator who engaged in a remarkable series of debates with his relatively obscure challenger, Abraham Lincoln, in 1858. But before 1860, Douglas was a far more prominent figure than Lincoln.

Famed as a speaker, Douglas rose rapidly up the political ladder to national power. He served two years (1841–1843) as a state judge in Illinois, four years (1843–1847) in the US House of Representatives, and fourteen years (1847–1861) in the US Senate. As Chairman of the Senate Committee on Territories, he was one of the most powerful men in the Senate throughout the 1850s and was at the center of every major constitutional debate over territorial expansion—and whether slavery might expand with it. He fashioned the “Compromise of 1850” and steered it through Congress. He authored the Kansas-Nebraska Act of 1854, which opened up that territory to slavery, notwithstanding the Missouri Compromise—a measure that angered many, drew Lincoln back into politics, and helped spur the creation of the new Republican Party in opposition to the extension of slavery to new territories. Douglas, a Democrat, championed a view he labeled “popular sovereignty”: the right of the (white) people of each territory to choose whether or not to allow slavery in their territory. Douglas insisted that he was strictly neutral on the issue of slavery itself, and indifferent to whether the people of a territory voted for or against it—a view that Lincoln condemned as actually supporting slavery’s growth.

But Douglas also insisted on an honest vote and a legitimate democratic process. He broke with the administration of President James Buchanan over Buchanan’s acceptance of the results of a rigged vote for a pro-slavery constitution in Kansas in 1858, a stand that cost Douglas support in the South (and may have cost him the Presidency in 1860).

Douglas’s 1858 debates with Lincoln—the most famous campaign debates in American political history—focused almost entirely on constitutional issues: the status of slavery in the territories; the power of Congress over the question; the Supreme Court’s decision in *Dred Scott*; and whether Congress had a moral and constitutional duty to accept and implement that decision. Douglas stood for judicial supremacy and the binding character of the Supreme Court’s decisions, right or wrong. Lincoln stood against *Dred Scott* and for the propriety—and necessity—of seeking to overturn the case and to block its extension. Lincoln also cornered Douglas on

the inconsistencies of his “popular sovereignty” position with *Dred Scott*, getting Douglas to deny that slavery could be protected in the territories without the aid of local laws.

Douglas’s stance may have enabled him to hold on to his Senate seat, but it bewildered and angered his pro-slavery supporters in the South. In 1860 the Democratic Party split between Northern and Southern factions over the issue: the Southern Democrats walked out of the national convention rather than nominate Douglas for President. Douglas won the Northern Democrats’ nomination, but lost decisively to Lincoln, the Republican candidate, in the general election, receiving only 12 electoral votes to Lincoln’s 180. In defeat, Douglas remained committed to the Union. Knowing in advance that the race would be lost, Douglas, despite ill health, took the unprecedented step of personally campaigning throughout the nation, including the South, and warning against secession. When Lincoln won, and the South seceded and fired on Fort Sumter, Douglas backed Lincoln strongly: “There are only two sides to the question,” he stated. “Every man must be for the United States or against it. There can be no neutrals in this war, *only patriots—or traitors.*” But Douglas’s health had by then deteriorated—from exhaustion, from a life of stress and political combat, and probably from many years of alcohol abuse. Douglas contracted typhoid fever and died in Chicago in June 1861, at the young age of forty-eight.

That was Stephen Douglas’s position in the famous series of seven debates that he and Lincoln had in their 1858 election contest for the US Senate. Opposing the Supreme Court’s decision, argued Douglas, was equivalent to opposing the Constitution itself.

Lincoln vigorously denied Douglas’s position. Supreme Court opinions decide only the individual case before the court, Lincoln argued. They do not bind members of Congress or the President in their political actions. It was thus proper for the other branches of government—and for the people—to resist wrong and harmful decisions of the Supreme Court and to seek to have them reversed and overturned. That was simply part of the Constitution’s system of checks and balances. Indeed, any other view would set up the Supreme Court as all-powerful, Lincoln maintained, quoting President Thomas Jefferson’s views to the same effect. Judicial supremacy was a recipe for tyranny and the destruction of all popular government. Invoking the words of another memorable President, Andrew Jackson, Lincoln embraced the view that each officer of government is bound by his oath to apply the Constitution faithfully “as he understands it, not as it is understood by others.” It followed, Lincoln argued, that the Supreme Court’s legally wrong, morally harmful decisions did not bind the Congress and the President in their independent exercise of their own constitutional powers.

Moreover, if Supreme Court decisions had to be followed *no matter what*, then what was to prevent the Court from making a “second Dred Scott” decision requiring that no *state* could exclude slavery either? The *Dred Scott* decision was wrong, Lincoln insisted, “an astonisher in legal history.” What was to keep the Court from making another outrageous decision? Would the people be obliged to accept that decision blindly as well? Under Douglas’s reasoning, nothing would keep the Supreme Court from making such a decision, and everybody would have to accept it. The Supreme Court was preparing to make the entire nation “one universal slave nation,” Lincoln charged. “We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme Court* has made *Illinois* a *slave State*.”

Lincoln would remain remarkably consistent—and increasingly insistent—on the constitutional duty of elected officials to resist unlawful decisions of the Supreme Court that they considered harmful to the nation as a whole and to its people. The alternative, in Lincoln’s mind, was resignation of free, popular government under the Constitution into the hands of the Court, no matter how wrongheaded its decisions.

That alternative was simply unacceptable. “I do not forget the position assumed by some,” Lincoln later would say in his First Inaugural Address, “that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all paralel [*sic*] cases, by all other departments of the government.” The *Dred Scott* decision was final for Dred Scott, and it might (if not overruled) be regarded as a precedent for similar cases. But the authority of the Supreme Court had limits established by the Constitution itself, and by the responsibilities of elected officials to the Constitution and to the nation:

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

As President, Lincoln would on more than one occasion defy the supposed authority of “controlling” judicial interpretations of the Constitution. Lincoln and the Civil War Congress disregarded the *Dred Scott* decision entirely in

enacting laws that prohibited slavery in the territories—exactly what *Dred Scott* had said was unconstitutional. In addition, as we shall see, Lincoln defied a judicial decision (*Ex parte Merryman*) purporting to limit his military authority to hold enemy prisoners in the course of his conduct of the Civil War. And if the Supreme Court had ever had the audacity to hold the Emancipation Proclamation unconstitutional or, worse still, to hold that the South had a constitutional right to secede—neither issue ever came before the Court—it is almost certain that Lincoln would have refused to abide by such a decision.

Did this make Abraham Lincoln a lawless president (as some have seriously argued)? Was the South perhaps *constitutionally justified* in seceding, given Lincoln’s “unconstitutional” stance against the Supreme Court’s authority in matters of constitutional interpretation? Or was Lincoln right that the Constitution itself is of superior authority to the Supreme Court? History has vindicated Lincoln’s position in practical terms. Ironically, however, most constitutional scholars today side with Douglas, against Lincoln. The modern consensus favors judicial supremacy in constitutional interpretation: whatever the Supreme Court says, goes.

At the very least, it should give one pause that, on the judicial supremacist view—the view espoused by Douglas—*Dred Scott* was properly the law of the land; that Lincoln was wrong to resist it; that Lincoln’s election as President was indeed the election of a lawless man and an attack on the constitutional rights of the South; and that everything Lincoln did as President rested on an improper view of the Constitution and the authority of the Supreme Court. In short, it is hard to accept modern notions of judicial supremacy without rejecting much of what Lincoln stood for, and much of what he did as President.

Lincoln’s view—not Douglas’s—seems more faithful to the Constitution itself. The *Constitution* is “the supreme Law of the Land,” not the Supreme Court’s misinterpretations of it. The logic of the Constitution’s separation-of-powers arrangement would seem to refute the notion that any one branch has supreme authority over its interpretation. And the framers of the Constitution explicitly denied that the Constitution established judicial supremacy. Lincoln, on the framers’ view, was right.

But that view did not command universal acceptance in Lincoln’s day (just as it does not today). It was hated in the South and regarded with skepticism even by many in the North. Thus, when Lincoln was elected President in

1860, his well-known views stirred a constitutional crisis that had long been brewing.

Lincoln's Election and the Crisis of Secession

Lincoln narrowly lost the 1858 Senate campaign to Douglas, but their debates, and Lincoln's principled stand against the extension of slavery and against the Supreme Court's *Dred Scott* decision, received wide attention and propelled Lincoln to national prominence. A moderate Westerner from a "swing state," the dark horse Lincoln became the surprise nominee of the Republican Party for President in 1860, defeating several better-known but more divisive antislavery candidates, including William H. Seward of New York and Salmon P. Chase of Ohio (both of whom Lincoln would later invite to serve in his cabinet). The opposition Democrats divided between Northern and Southern wings over the question of how aggressively to push for the expansion of slavery into the territories. Stephen Douglas had been the clear front-runner for the Democrats, but his "popular sovereignty" views proved *unpopular* with Southerners—who wanted a national "slave code" for promoting slavery in the territories, capitalizing on their win in *Dred Scott*. The party split between the Southern "fire eaters," who nominated Vice President John Breckinridge, and the Northerners, who nominated Douglas. (A fourth candidate, John Bell, running under the "Constitutional Union" label, adopted a deliberately vague stance on the issues dividing the nation and won little support.)

The division in the national Democratic Party helped pave the way for a united Republican Party to sweep the Northern tier of states and elect Lincoln on a platform that included opposition to the expansion of slavery and to the *Dred Scott* decision. As noted earlier, Lincoln received just 40 percent of the national popular vote—and was not even on the ballot in many Southern states—but won handily in the electoral college by virtue of the strength and unity of the Republican Party in the North (see [Chapter 3](#)).

Lincoln's election became the trigger for secession. The slaveholding states of the Deep South were furious that Lincoln, a Republican opposed to slavery and the *Dred Scott* decision, had captured the Presidency. They regarded his positions as a violation of their constitutional rights as slave-owners as declared by the Supreme Court, and as threatening future restrictions on slavery. And so, with South Carolina leading the way, they

began to pass “ordinances of secession,” declaring themselves no longer states of the United States. By the beginning of February 1861—still more than a month before Lincoln took office—six more states (Florida, Mississippi, Alabama, Georgia, Louisiana, and Texas) had announced their secession from the Union. The seven quickly organized themselves into the “Confederate States of America” and set up a new government in Montgomery, Alabama, with Jefferson Davis as its president.

Thus, even before taking office, Lincoln was confronted with the greatest crisis any president had yet faced—the threatened breakup of the United States and dissolution of the Union under the Constitution. During the four long winter months between his election in November 1860 and his inauguration in March 1861, Lincoln stood firm against any compromise with the South that would reward seceding states by making further concessions to slave-power interests in order to lure the seceders back to the Union. The election had been fairly won, on the principles of the Republican Party platform, which included opposition to the spread of slavery. To give away that victory—to permit the *losing* side of an election to prevail over the winning side by the threat of secession or by force of arms—was to give away the very essence of democratic self-government: the right of the people to self-government, by free elections. The theme that secession, or the threat of it, was an assault on the very idea of representative democracy—government of the people, by the people, and for the people—would figure prominently among Lincoln’s justifications for fighting secession over the next four years. The theme was, of course, central to the inspiring Gettysburg Address, which Lincoln delivered in the middle of the war in 1863.

Lincoln was firmly persuaded that secession was *unconstitutional*. Immediately upon taking office as President, in his First Inaugural Address, Lincoln—a careful constitutional lawyer—laid out in public his argument as to why secession was unconstitutional: The Constitution was the supreme law of the land, governing *all* the states. The Constitution did not provide that states could withdraw from the Union, and to infer such a right was contrary to the letter and spirit of the document. The Constitution’s Preamble announced the objective of forming a “more perfect Union” of the states than had existed under the Articles of Confederation, which themselves had said that the Union would be “perpetual.” Moreover, the Constitution created a true national government, not a mere “compact,” league, or confederacy—in fact, it explicitly *forbade* states from entering into alliances, confederacies,

or treaties outside of national authority. The people of the United States, taken as *a whole*, were sovereign, not the states.

It followed from these views, Lincoln argued, that “no State upon its own mere motion can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances.” Purported secession was simply an illegal—*unconstitutional*—rebellion against the Union. It thus became Lincoln’s sworn duty, by virtue of his oath of office to “preserve, protect, and defend” the Constitution and to faithfully execute the laws of the United States, to preserve the Union. As Lincoln put it:

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part; and I shall perform it, so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary.

Thus, when the South attacked Fort Sumter in April 1861, Lincoln deemed it his constitutional duty to respond to defend the Union. For Lincoln, then, the Civil War was fought out of a sense of constitutional obligation. It was his duty as chief executive to maintain the laws of the United States throughout the United States; to hold on to federal property (such as military forts); and to guarantee to each state, as Article IV required, “a republican form of government” under the Constitution (see [Chapter 4](#)). Not everyone in the South favored secession, Lincoln observed, and so it was the duty of the United States to protect the rights of those *loyal* citizens against their *disloyal, insurrectionary governments*. It was the duty of the national government to put down an unlawful *rebellion* against lawful constitutional government.

The cause of Union, the unconstitutionality of secession, and the duties imposed upon him by his oath to preserve, protect, and defend that Union and uphold the Constitution were Lincoln’s core legal justifications for fighting the Civil War. This was the essence of the constitutional theory that made Lincoln refuse to countenance secession. And he held to that theory as strictly as possible. Lincoln never recognized “the Confederate States of America” as having any valid, legal existence. He instead referred to the “states in rebellion” of the “so-called Confederacy.” Congress did not “declare war”

on the Confederacy, as if it were a foreign nation. That would have been to recognize exactly what the Union denied—that the states in rebellion had somehow ceased to be part of the United States.

Lincoln and the Power of the President as Wartime Commander in Chief

But that did not make the Civil War any less of a *war* in practical terms. It obviously was. It was a *civil* war—an internal rebellion. The President’s constitutional military powers as Commander in Chief, under Article II of the Constitution, were fully in play. And Lincoln employed those Commander-in-Chief Clause powers to their fullest extent. He ordered a blockade of Southern ports. He called on state governors to raise troops. Most controversially, he authorized the military arrest and detention of citizens without resort to judicial process if military commanders deemed it necessary to protect the nation—specifically, to enable Northern troops to reach Washington, DC, to protect the capital from a feared attack by Confederate forces at the outset of the war. To accomplish this, in April 1861, shortly after the fall of Fort Sumter, Lincoln as an emergency measure authorized his military commanders to suspend “the privilege of the writ of *habeas corpus*”—the traditional “Great Writ” of freedom, dating back to the Magna Carta, that entitled citizens to challenge the lawfulness of executive detention.

This produced one of the greatest confrontations between executive and judicial authority in our nation’s history. Notwithstanding Lincoln’s order, Chief Justice Roger Taney—the eighty-three-year-old constitutional nemesis of Lincoln and author of *Dred Scott*—issued a writ of habeas corpus in the notable case of *Ex parte Merryman* (1861). Lieutenant John Merryman was a member of a pro-secession cavalry company in Maryland who (allegedly) had taken part in guerrilla attacks on Union troops from the North, bound for Washington. Mobs had attacked a Massachusetts regiment in Baltimore. Merryman’s unit was believed to have burned railroad bridges and torn down telegraph lines in an effort to disrupt the troops’ movement to the capital. Lincoln’s commanders, pursuant to his authorization, rounded up Merryman and others, suspended the writ of habeas corpus, and held the prisoners in military custody at Fort McHenry in Baltimore.

Merryman’s lawyer quickly sought a writ for his release from Chief Justice Taney. Taney traveled to Maryland and issued an order to military

authorities demanding that they appear, with Merryman, and defend their actions. Military authorities refused to comply with Taney's directive, citing Lincoln's order suspending the writ of habeas corpus. Furious, Taney declared President Lincoln's actions unconstitutional. While Article I, Section 9, of the Constitution permitted suspension of the writ in time of emergency, that was a power of Congress, Taney insisted, not the President. The very purpose of the writ, dating back hundreds of years in English legal tradition, was to enable persons to challenge their detention by executive authority. It would therefore make no sense to permit the executive authority of America—the President—to suspend the writ. Taney ordered his opinion published and transmitted directly to President Lincoln, with instructions that Lincoln's duties as President required him to submit to judicial authority.

Lincoln defied Taney's unilateral order and continued to hold Lieutenant Merryman in military custody, declining even to appeal Taney's order to the full Supreme Court. Instead, Lincoln presented his constitutional justification to *Congress*, which he called into special session on July 4, 1861, several months after Taney's order. Lincoln argued in a special message to Congress that the President possessed the constitutional power to suspend habeas corpus in times of great necessity. Article I, Section 9, of the Constitution authorized emergency suspension of the right to habeas corpus—"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"—and did not specify whether Congress or the President possessed that power, Lincoln explained. Since the provision was designed for emergency situations, it must be the case, Lincoln reasoned, that the President could exercise the power if Congress was out of session. Necessity required his actions and made them constitutional, Lincoln argued. "To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Lincoln asked. "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"

Implicit in Lincoln's actions was his belief that he was not bound as President to obey a judicial order he believed incorrect as a matter of constitutional law—the boldest challenge ever made to judicial supremacy in constitutional interpretation. Lincoln's position prevailed, and Congress soon authorized, retroactively, all of Lincoln's emergency actions.

Lincoln did more yet. He authorized the military arrest and detention of civilians, even Northerners who plotted or acted to assist the rebellion. He approved trial by military commission of spies, saboteurs, and others who were alleged to have acted in aid of the enemy. Some of these proceedings, and certainly some of the actions of Lincoln's generals and cabinet officials pursuant to this authority, undoubtedly went over the line and violated civil liberties—even though, ironically, the Supreme Court upheld the military's authority to act in such dubious cases (*Ex parte Vallandigham*, 1863). These situations—especially the Vallandigham affair, which involved the arrest and military trial of Clement Vallandigham, a former Ohio Congressman, following a speech denouncing the war and the draft—clearly embarrassed Lincoln. Nonetheless, he defended them as inevitable during war and argued that he might just as easily be criticized for having made too few arrests as too many: if he had acted earlier and more aggressively, he might have arrested such traitors as Robert E. Lee and other US military officers who betrayed their oaths and took up arms against the United States—and, Lincoln explained, thereby prevented much harm.

The Emancipation Proclamation

Lincoln's boldest use of his Commander-in-Chief power by far was the Emancipation Proclamation, which on January 1, 1863, declared that all slaves in rebel-held territory "are, and henceforward shall be free." A preliminary Emancipation Proclamation, issued in November 1862, had declared Lincoln's intention to issue the final Proclamation on January 1, 1863, and had given the states of the South that long to return to the Union; the final Proclamation made good on Lincoln's promise.

It is no exaggeration to say that the Emancipation Proclamation was the most stunning, most aggressive, and most important executive order in American history. At the time it was enormously controversial, even in the North. Opponents of slavery cheered it, but many others argued that it was a horrible abuse of presidential power, a violation of the Constitution, and an act of tyranny and usurpation.

It is often forgotten that the Emancipation Proclamation was a *military* order, defended by Lincoln as legally justified by his constitutional military authority as Commander in Chief in time of war. Lincoln himself consistently denied that he had any power to free the slaves merely because he thought it

the morally right thing to do. He had all along conceded that the national government had no such power under the Constitution. Rather, Lincoln justified the Proclamation solely on the military rationale that such action was permitted under the traditional laws of war, which permitted belligerent forces to seize property and matériel of the enemy. Slave property was a resource possessed by the enemy; Lincoln proposed to seize that resource wherever possible and transfer its power to the side of the Union—and the side of freedom.

That is why the Emancipation Proclamation was limited to Confederate-controlled zones. Lincoln did not—and constitutionally could not—free the slaves in those slave states that remained in the Union—the so-called border states of Delaware, Kentucky, Maryland, and Missouri. And that is why the Emancipation Proclamation did not immediately free very many slaves: for the most part, it covered only areas under practical Confederate control. But as Northern armies advanced, slavery contracted. As the North reclaimed control of more territory for the Union, the slaves in those areas became free.

Moreover, as part of the Emancipation Proclamation, Lincoln declared that emancipated slaves would “be received into the armed service of the United States”—a truly radical measure for the day and one that provoked great opposition even in parts of the North. Eventually, some 200,000 free African-American soldiers served in Union ranks, contributing significantly to the Union military’s growing success—and demoralizing the South.

This enraged Southerners, who regarded the use of their “own” slaves against them as an act of barbarity. The Confederacy declared that captured black soldiers—whether former slaves or free blacks from the North—would be executed for insurrection or held as slaves. This outrageous Southern order provoked Lincoln to an outrageous response: for every captured black Union soldier killed, he authorized the killing of a Confederate prisoner in retaliation.

But he never acted on this “Order of Retaliation.” In the end, Lincoln considered retaliation unjust to the innocent Confederate soldier and likely only to produce an endless, escalating cycle of killing of enemy prisoners. Unfortunately, the same cannot be said for the South: Confederate forces massacred hundreds, perhaps thousands, of black Union soldiers, after they had surrendered and laid down their arms, in battles at Fort Pillow, Port Hudson, and elsewhere. Countless others—records were not kept—were enslaved.

Though it was never carried out, Lincoln's Order of Retaliation remains (on paper at least) probably the most extreme use of the President's power as Commander in Chief in our nation's history, and a dramatic illustration of the awesome and fearful powers of the President under the Commander-in-Chief Clause. (As we shall see in [Chapter 9](#), President Franklin Delano Roosevelt's executive order authorizing the imprisonment of Japanese-Americans in detention camps during World War II was the most outrageous executive military order actually carried out—and, unfortunately, upheld by the Supreme Court.)

The constitutionality of Lincoln's actions as Commander in Chief, including the Emancipation Proclamation, remains controversial to this day. Was the Emancipation Proclamation unconstitutional? Did it exceed the President's power under the Commander-in-Chief Clause of Article II of the Constitution? Did it violate citizens' constitutionally protected rights of private property under the Supreme Court's decision in *Dred Scott*?

The best answer, in our view, is that the Emancipation Proclamation was perfectly constitutional—and a nearly perfect illustration of Abraham Lincoln's rigorous and principled, yet pragmatic, approach to constitutional interpretation. As noted, Lincoln believed that the words of the Constitution must be interpreted strictly, but applied realistically and practically. While the national government might not have power, under a strict reading of *other* provisions of the Constitution and under ordinary circumstances, to declare the emancipation of slaves, the Commander-in-Chief Clause and the situation of actual military engagement *did* give the President such a power, for use against the enemy in the context of a terrible civil war. In wartime, property that may be used by the enemy is subject to confiscation without compensation, even if its owner is not himself an enemy. (Indeed, the Supreme Court embraced this principle shortly after Lincoln issued the Emancipation Proclamation; in *The Prize Cases* in 1863, it upheld the seizure of neutral shipping captured during Lincoln's blockade of Southern ports.)

As for *Dred Scott*: even if it applied at all in the context of wartime seizure of enemy property, it remained for Lincoln a fundamentally unsound decision that could not control his actions as President of the United States and Commander in Chief. The Emancipation Proclamation was surely at odds with the *Dred Scott* decision—but so much the worse for *Dred Scott*. The historical evidence shows that Lincoln gave serious and careful attention

to the question of whether he possessed constitutional power, by virtue of his military authority as Commander in Chief, to issue the Emancipation Proclamation. But there is little evidence that the Supreme Court's *Dred Scott* decision figured significantly in his calculation of the constitutionality of his actions. (Lincoln—and Congress—had already defied *Dred Scott* by enacting into law a bill banning slavery in the territories, an act that flew directly in the face of *Dred Scott*'s declaration that any such restrictions were unconstitutional.)

Finally, there was the principle of *necessity*. The presidential oath imposed upon Lincoln the duty to “preserve, protect, and defend the Constitution of the United States.” He took that oath very seriously indeed. And he believed that his duty to *preserve the Constitution* required him to *preserve the nation constituted by that Constitution*. Lincoln explained it best in a public letter he wrote late in his Presidency, defending both the Emancipation Proclamation and the course he had taken generally in fighting the Civil War to maintain the Union. The letter, addressed to newspaper editor Albert Hodges of Kentucky, is worth quoting at length:

I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. I understood, too, that in ordinary civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery.

. . . I did understand, however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together. [emphasis in original]

The public letter to Hodges is a near-perfect summary of Lincoln's constitutional positions. It contains nearly everything that was central to his views: the absolute duty imposed by the Presidential Oath Clause; the idea

that military necessity is sometimes relevant to constitutional power; even Lincoln's views of slavery, the Union, and (by implication) judicial authority versus independent presidential responsibility to interpret the Constitution. The responsibility imposed by his oath obligated Lincoln to defend the Constitution as he understood it, including his understanding of the permanence of the Union. It therefore became his constitutional duty to maintain that Union at all hazards and with all the powers at his disposal, including his unique power as Commander in Chief in time of war. He could not resign that duty into the hands of the Supreme Court, nor could he yield to force or threats of force by the states in rebellion. He was bound by his duty.

Late in the war, Lincoln worried that the Emancipation Proclamation's freeing of slaves might not survive the end of the wartime circumstances that had justified it. It was at least possible that the courts would declare the proclamation unconstitutional or, more likely, no longer operative once the rebellion had been defeated and the states of the South "reconstructed" to their proper place in the Union. For Lincoln, it was horrible to countenance the prospect of some court ordering the return of a freed slave—perhaps even one who had fought for the Union Army—back to slavery. Shortly after his reelection, in what proved to be his last Annual Message to Congress, Lincoln announced that if such a situation came to pass, *he* would never be the one to carry out such a policy; the nation would have to find someone else. More to the point, the promise of freedom had to be honored. He challenged Congress to pass the proposed Thirteenth Amendment to the Constitution, abolishing slavery throughout the nation—North and South—giving permanent effect to the Emancipation Proclamation, and extending freedom even outside the Proclamation's range.

Congress complied. On January 31, 1865, in a dramatic scene in the House of Representatives, the amendment squeaked through that chamber, garnering the needed two-thirds majority with just two votes to spare—and producing an unprecedented display of cheering and weeping for joy on the House floor and a 100-gun salute in the streets of Washington, DC. By year's end, three-fourths of the states, including many states of the old Confederacy, had ratified the amendment—the first change to the Constitution in over sixty years.

The Thirteenth Amendment corrected the gravest failure of the framers' Constitution with these simple words:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

But just as Moses lived to see, but did not himself enter, the Promised Land, Lincoln, the Great Emancipator, did not live to see the Thirteenth Amendment receive final ratification in December 1865. The events of the end of the war—and the end of Lincoln’s life—occurred in surprisingly rapid succession, especially when contrasted with the four agonizing years of war that had gone before. Lincoln was sworn in for his second term as President on March 4, 1865. Richmond, Virginia, the capital of the Confederacy, fell to Union forces on April 2. Lee surrendered to Grant on April 9. Lincoln was shot by John Wilkes Booth on the night of April 14 and died the next morning.

Lincoln’s Legacy

The constitutional legacy of the Civil War, and of Abraham Lincoln’s Presidency, is almost incalculable. The Emancipation Proclamation, the Union’s military victory, and the enactment of the Thirteenth Amendment abolished slavery throughout the nation. What had been utterly unimaginable, even to Lincoln, had become real within the space of five years. Lincoln’s vision had transformed the Constitution.

And the Union had survived its greatest crisis. The United States is the nation it is today because of Lincoln’s view of the Constitution as governing a single, permanent nation and forbidding secession—and because of his unwavering commitment to this view. Lincoln’s vision of Union is so thoroughly accepted by Americans today that we forget how hotly disputed it was for the first seventy years of the Constitution’s history. The result was hardly foreordained. Lincoln’s vision and resolve saved the nation and the Constitution.

None of this would have happened had Lincoln not thought himself constitutionally *authorized* to resist the Supreme Court’s decision in *Dred Scott*; constitutionally *obligated*, by his oath, to resist secession; and constitutionally *empowered*, as Commander in Chief, to fight the enemy with the full powers at his disposal—military force, blockade, suspension of habeas corpus, military arrest and detention, seizure of enemy property, and

emancipation of Southern slaves. Lincoln understood the Constitution *not* necessarily to mean whatever the Supreme Court said it meant concerning slavery and national authority (*Dred Scott*) or concerning presidential power in wartime (*Ex parte Merryman*). No President, before or since, has taken a stronger stance on the President's independent duty faithfully to interpret the Constitution and to act in accordance with that understanding—even if that sometimes means defying the Supreme Court when its decisions violate the Constitution. And when it came to a cataclysmic civil war, Lincoln saw it as his constitutional duty as Commander in Chief to *win* that war, through all available constitutional means.

Lincoln's exercise of the full powers of the wartime presidency transformed the office for all who followed and set the terms of debates that continue today. No President (with the possible exceptions of Theodore Roosevelt and Franklin D. Roosevelt) has taken a more aggressive stance than Lincoln did, and none has defended it more cogently. Lincoln is *the* model for all who today embrace a strong view of the President's powers to interpret the Constitution and to act as Commander in Chief in time of war.

Reconstruction and the Fourteenth and Fifteenth Amendments

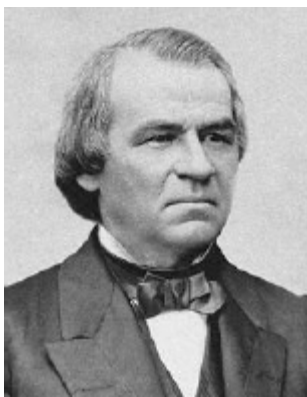
Despite all of this, when Lincoln died he left behind an unfinished constitutional agenda—the “reconstruction” of Southern states to their proper place in the Union and the protection of the equal civil rights (and the right to vote) of the newly freed former slaves. It was left largely to Republicans in Congress—often working in opposition to Lincoln's stubborn, graceless successor, President Andrew Johnson—to complete the work of Reconstruction.

Johnson, a pro-Union Southern Senator from Tennessee, had been added to the Lincoln ticket (called the “National Union” ticket) as the vice presidential candidate for the 1864 election, for symbolic and regional balance. But Johnson's states'-rights inclinations, irrepressible racism, and political ineptitude made him a poor match for the difficult and sensitive issues of postwar Reconstruction. His relations with “Radical Republicans” in Congress rapidly deteriorated to the point where he was eventually impeached by the House of Representatives for flouting Congress's enactments—the first President ever to face an impeachment trial, a historic constitutional event in its own right—and narrowly escaped conviction in the

Senate, by a margin of just one vote. Under the circumstances of political turmoil that prevailed from 1865 to 1870, it is something of a miracle that “reconstruction” of any coherent sort occurred at all—even more so that the period produced two magnificently important constitutional amendments that fundamentally transformed America’s constitutional order.

Lincoln’s vision of Reconstruction had been consistent with his theory of Union. The Southern states had never legally “left” the Union; rather, their rebel *governments* simply had been out of the “proper relation” to national authority. Reconstruction, the process of establishing lawful state governments under the proper authority of the Constitution, was thus primarily an executive function resulting from his military authority to suppress insurrections and his duty to restore the faithful execution of the laws. At the same time, Lincoln was also willing to defer to Congress on matters of what was required before Congress would seat representatives and senators from formerly seceded states. Reconstruction was thus, for Lincoln, a *shared* constitutional responsibility of the entire national government, pursuant to Article IV’s Guarantee Clause obligation of the Union to guarantee to each state “a republican form of government.”

THE IMPEACHMENT OF ANDREW JOHNSON



Andrew Johnson (1808–1875) was hardly lacking in political experience. He had been a mayor, state representative, state senator, US Representative, Governor of Tennessee, US Senator, and—for what proved a very short period of time—Lincoln’s second Vice President, added to the 1864 ticket to balance Lincoln with a pro-Union Southern “War Democrat.” But he proved to be one of the worst presidents in US history: antislavery yet a horrid racist, stubborn and graceless, Johnson succeeded in alienating nearly everybody. Johnson resisted equal civil rights for the newly freed slaves. He vetoed the Civil Rights Act of 1866—a veto Congress overrode—and

opposed the Fourteenth Amendment. He thought Reconstruction was a presidential prerogative, not a matter for Congress. An astonishing fifteen of his twenty-one vetoes were overridden.

In 1868, Johnson became the first President in history to be impeached by the House of Representatives. The charges against Johnson chiefly involved his disregard of the Tenure of Office Act—passed over his veto—which prohibited him from firing his cabinet officers unless and until Congress had confirmed a successor. Johnson thought that the Tenure of Office Act unconstitutionally interfered with the President’s right to control his own administration by firing officers who did not faithfully carry out his policies. He defied the Act, firing Secretary of War Edwin Stanton. Many years later, the Supreme Court would vindicate Johnson’s constitutional position, in *Myers v. United States* (1926). But at the time, Johnson came within one vote of being removed from office by the necessary two-thirds majority in the Senate.

Doubtless the underlying reason for Johnson’s impeachment was not the Tenure of Office Act dispute in particular but the fact that Congress had concluded that Johnson was a *really bad* president—a fair point. This raises interesting constitutional questions about the proper scope of the power to impeach for “high Crimes and Misdemeanors.” Congress certainly can impeach and remove presidents for committing ordinary crimes of a serious nature—things for which any person could be arrested, tried, and imprisoned. But if Congress believes that a president has acted in serious violation of the Constitution he has sworn to uphold, abused his office, or completely failed to fulfill his constitutional duties, might not Congress validly impeach and remove him on that basis? *That* was what Congress tried to do, in effect, in impeaching Andrew Johnson. And it came very close to succeeding.

Such a broad view of the impeachment power would have important implications for the Constitution’s separation of powers: if presidents may be impeached for violation of their constitutional duties *as Congress understands those duties*, impeachment is a potent check on presidents. Indeed, one might argue that it is *too* potent, compromising the independence of the executive and potentially reducing presidents to puppets of Congress. On the other hand, if Congress may not remove a president based on its constitutional judgment that the President’s misuse of power constitutes a serious violation of his oath of office and a threat to the constitutional order, it is unclear what meaningful check Congress possesses against a chief executive who willfully abuses power. The impeachment of Andrew Johnson, and his narrow escape, thus yields unclear lessons about the impeachment power.

More radical Republicans in Congress had decidedly different constitutional ideas. Some viewed seceded states as having committed something like “state suicide.” Once defeated, the states of the former Confederacy reverted to the status of mere territories—conquered provinces—for Congress to govern as it saw fit and to *readmit* as states when and if it so chose, under its Article IV powers (see [Chapter 4](#)).

Throughout the war, Lincoln had sought to avoid, or defer, conflict over what he called such “pernicious abstractions” of constitutional theory. But behind these competing views lurked conflict over which branch, Congress or the executive, would have the primary role in Reconstruction policy. That

conflict erupted under Johnson. Johnson subscribed to Lincoln's theory of Reconstruction, but in a more inflexible states'-rights, presidential-primacy form: the Southern states retained their constitutional existence, status, and legal rights, including the right to representation in Congress, and the executive branch had the exclusive role in enforcing Reconstruction through military means. Though Johnson's views in this regard were not terribly different from Lincoln's, Johnson lacked Lincoln's political skill in defusing disagreements. Johnson's articulation of these positions courted conflict with Congress, which had become even more radical in its composition following the Republican election sweep in 1864.

But far worse was President Johnson's opposition to equal civil rights for blacks. That regrettable position placed him in square opposition to the Reconstruction Congress's most aggressive and constitutionally important acts—the Civil Rights Act of 1866 and the Fourteenth Amendment, which were passed in response to the harsh realities facing recently freed slaves. No sooner had the Thirteenth Amendment legally abolished slavery than Southern white governments adopted “Black Codes,” attempting to reproduce the social relationship that had prevailed under slavery; Black Codes imposed restrictions on blacks' rights to work, travel, make contracts, own property, and make use of the courts to sue for violations of their rights. In combination, the restrictions on blacks' freedom imposed by these laws were tantamount to reenslavement.

The Civil Rights Act of 1866 prohibited such discriminatory legislation. Johnson vetoed the bill, thinking it beyond Congress's powers and a violation of states' rights. But Congress overrode the veto by the required two-thirds supermajority votes of both houses, the first significant veto-override by Congress in our nation's history. The conflict between the branches was heating up.

Still, Johnson had a point. Did Congress's power under the Thirteenth Amendment to enforce the ban on *slavery* give it the power also to ban *racial discrimination*—or was that a step further? The answer was not at all clear. To avoid any doubt, Congress proposed—again, over President Johnson's opposition—the Fourteenth Amendment.

The original proposal was a single sentence, giving Congress sweeping power to enact all laws it felt necessary and proper to protect the privileges and immunities of citizens: “The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all

privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property.”

This went too far for some moderates: it would give Congress power to regulate much private conduct directly, leaving states with little role. Some feared that it would permit Congress to modify *all* state laws affecting “life, liberty and property”—quite a comprehensive reach—and make them “equal” across the nation. The amendment proposal was modified to instead prohibit states from abridging “the privileges or immunities of citizens of the United States”—essentially, transforming the protections of the Bill of Rights (and any other rights of US citizens) into limitations on state governments as well as the national government—and further to prohibit states from depriving any person of life, liberty, or property, “without due process of law” or denying any person “the equal protection of the laws.” Any such conduct by organs of state and local government would not just be within Congress’s power to prohibit; they would be *unconstitutional* in and of themselves. Congress was then given further power (in Section 5 of the reworked amendment) “to enforce, by appropriate legislation, the provisions of this article.” This was still a sweeping power—because it was a power to enforce a sweeping new constitutional prohibition on the misuse of state power in such a way as to abridge US citizens’ rights, deprive persons of legal rights without fair legal process, or deny the equal protection of the laws. But it was limited in its scope to actions of state and local *government* and could not reach private discriminatory conduct in the absence of state failure to protect these rights.

The Fourteenth Amendment put the Civil Rights Act of 1866 on more secure constitutional footing. But it did far more than that. It in effect transferred vast areas of what formerly had been exclusive state responsibility to federal government control: the federal courts could enforce the terms of the amendment directly in lawsuits challenging unconstitutional actions by state government, including violations by states of the “privileges or immunities” of US citizens set forth in the Bill of Rights; and Congress had a more comprehensive power to enforce the amendment by enacting national laws it considered appropriate for carrying into effect the amendment’s broadly worded prohibitions. It is no exaggeration to say that the Fourteenth Amendment has fundamentally altered the federal-state balance of constitutional power in the area of individual rights of citizens. (And, as we

shall see in [Chapter 10](#), the Fourteenth Amendment has become the prime battleground in modern controversies over “judicial activism” by the Supreme Court.)

The Fourteenth Amendment was also designed to correct earlier constitutional errors: it explicitly repudiated both a decision of the Supreme Court and an earlier constitutional provision. The first sentence of the amendment reverses *Dred Scott*’s holding on the issue of black citizenship: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The Thirteenth Amendment, by abolishing slavery, had overruled *Dred Scott*’s judicial invention of a constitutional right to own slaves. In combination, the two amendments decisively rejected the Court’s earlier decision.

There is, of course, nothing wrong with a constitutional amendment rejecting a decision of the Supreme Court. The Thirteenth and Fourteenth Amendments were neither the first nor the last to accomplish such a goal: the Eleventh, Sixteenth, Nineteenth, and Twenty-Sixth Amendments, each in its own way, overruled or disapproved of a prior Supreme Court decision. The power of the people to amend the Constitution to disapprove of how it has been interpreted and applied in the past is simply a special case of the idea of written constitutionalism in general: “We the People” possess the power to control, by written, binding constitutional texts, the actions of all government officials. The people of the United States are the ultimate masters of their Constitution, and the judges are bound by the texts that the people enact as part of the Constitution. A constitutional amendment thus trumps the Court’s interpretation; the Court has no legitimate power to disregard it.

The Fourteenth Amendment also repealed the original Constitution’s infamous Three-Fifths Clause. Section 2 provides that “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” No more convoluted language about counting “three fifths of all other Persons.” Blacks were now counted fully for purposes of representation. Ironically, one immediate effect of counting blacks as a full *five-fifths* of a person was that Southern states would be entitled to even greater representation in Congress than they had had before. Section 2, however, also imposed a proportionate *reduction* in a state’s congressional representation if it denied the right to vote “to any of the male inhabitants of

such state” over twenty-one years old. The amendment did not itself require states to grant the right to vote without discrimination on the basis of race—that reform would have to wait for the Fifteenth Amendment, adopted two years later. But it imposed a representation penalty if states excluded black men from voting. In such cases, rather than counting nonvoters as three-fifths of a person for representation purposes, Section 2 created in effect a *zero-fifths* clause.

Finally, Sections 3 and 4 of the amendment addressed important issues of postwar Reconstruction. Section 3 disqualified from federal office anyone who had previously sworn an oath of loyalty to the Constitution but broken it by engaging in insurrection or rebellion—rebel traitors could not simply be returned to Congress as if nothing had happened. But Congress could remove the disqualification by two-thirds votes of both houses. Section 4 disposed of another war issue by repudiating all Confederate war debt—there would be no payment on rebel regimes’ war bonds. It also rejected any claim for compensation for slaves freed by the Emancipation Proclamation or the Thirteenth Amendment.

At the time, many members of the Reconstruction Congress probably regarded these sections of the amendment—obliterating the Three-Fifths Clause but penalizing a state’s denial of the franchise to free blacks; forbidding former Confederate officials from holding office under the Constitution; and repudiating Confederate debt and any claim to compensation for lost slave “property”—as the most important parts of the amendment. Congress feared backsliding by the states of the former Confederacy, and with reason: witness the Black Codes and the denial of the right to vote. How could a state be deemed “reconstructed”—how could it be thought to have a truly “republican form of government”—if it denied an entire class of its free (male) citizens the right to vote?

President Johnson despised the Fourteenth Amendment, thinking its terms unfair and its manner of adoption unconstitutional. Again, Johnson had something of a point: the Thirty-Ninth Congress refused to seat a state’s senators and representatives unless and until it had ratified the Fourteenth Amendment, in effect holding a state’s national representation hostage to ratification. Only when new, re-reconstructed state legislatures succumbed to the pressure and ratified the amendment were those states readmitted to the halls of Congress.

But was that necessarily so wrong? As Lincoln had recognized, each house of Congress is constitutionally “the Judge of the Elections, Returns and Qualifications of its own Members” (Article I, Section 5). Why could not Congress “judge” as untrustworthy the “returns” of state regimes that were unwilling to subscribe to what Congress thought the basic requirements of republican government embodied in the Fourteenth Amendment and that denied blacks the right to vote on the basis of race? A few legal scholars today take up Johnson’s view that the adoption of the amendment did not comply with Article V of the Constitution. But the dominant consensus is that the Fourteenth Amendment’s adoption, however extraordinary its circumstances—unsurprising, given extraordinary times—fully complied with the Constitution’s rules governing the amendment process.

The Fourteenth Amendment took effect in 1868. That year also witnessed the election of General Ulysses S. Grant, the military hero of the Civil War, as President of the United States. Fittingly, it fell to Grant’s administration to finish the work of Lincoln’s constitutional revolution. The Fifteenth Amendment, proposed by Congress in the waning days of the Johnson administration, was ratified in 1870, forbidding discrimination in the right to vote “on account of race, color, or previous condition of servitude.”

The nation’s Constitution had come a long way—and endured much—in the decade from 1860 to 1870. When the decade began, *Dred Scott* was the reigning law and the abolition of slavery was unthinkable. When it ended, *Dred Scott* and slavery were legally dead, secession was unthinkable, and the Constitution protected equal rights for all citizens—black and white—and forbade racial discrimination in the right to vote. Not since the Constitutional Revolution of 1787–1791 had so much change occurred in so short a period of time.

It would remain for subsequent generations to uphold the promise of the magnificent new Thirteenth, Fourteenth, and Fifteenth Amendments—to extend equal racial justice and return to principles of faithful interpretation for a newly improved Constitution. The decades following Reconstruction—from the mid-1870s to the mid-1930s—did not, however, prove equal to the task, as the Supreme Court once again reasserted itself as an obstacle to the Constitution. The constitutional victories over slavery and discrimination, won in the crisis years of the 1860s, would not be secured for nearly another 100 years.