CONSTITUTION DRAWER 10 EXECUTIVE ROUTINE

Abraham Lincoln's Executive Routine

Lincoln and the Constitution

Excerpts from newspapers and other sources

From the files of the

Lincoln Financial Foundation Collection

B. Transcript Aug 23, 1862

PRESIDENT LINCOLN TO EDITOR GREELEY.

EXECUTIVE MANSION,
Washington, Aug. 22, 1862,

Hon. Horace Greeley:—Dear Sir: I have just read yours of the 19th addressed to myself through the N. Y. Tribune. If there be in it any statements or assumptions of fact which I may know to be erroneous, I do not now and here controvert them. If there be in it inferences which I may believe to be falsely drawn, I do not now and here argue against them. If there be perceptible in it an impatient and dictatorial tone, I waive it in deference to an old friend, whose heart I have always supposed to be right.

As to the policy I "seem to be pursuing," as you say, I have not meant to leave any one in doubt. I would save the Union, and I would save it in the shortest way under the Constitution. The sooner the national authority can be restored, the nearer the Union will be to the Union as it was. If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I would not agree with them.

My paramount object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slaves, I would do it; if I could save it by freeing all slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race I do because I believe it will help to save this Union; and what I forbear I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe what I am doing hurts the cause; and I shall do more whenever I shall believe doing more will help the cause. I shall try to correct errors when shown to be errors, and I shall adopt new views so fast as they shall appear to be true views.

I have here stated my purpose according to my view of official duty, and I intend no modification of my often expressed personal wish, that all men everywhere could be free.

Yours, &c., A. LINCOLN.

Zion's Herald, February 2, 1927.

Lincoln on Nullification

[Extract from an Address on "The Real Referendum" Delivered by Senator William E. Borah before the Citizens Committee of One Thousand at Washington on [illegible]. 6]

"IF a large number of citizens are convinced that the national prohibition act compels them to live lives of hypocrisy, cowardice, and servility, they will feel no moral obligation to observe the law. On the contrary, they will develop an esprit and morale in the breaking of it in the name of patriotism." Is this doctrine peculiar to a prohibition law? May it be limited in its effect to a prohibition law? If once the poison is put out, can you circumscribe its spread? If a number of citizens feel that our laws of property force them to live lives of servility and abject dependence, it is clearly their duty under this doctrine to develop an esprit and morale in breaking down such laws, and all in the name of patriotism. There are plenty of people in the world, fortunately not many of them here, who think just that, and these same people who preach the above doctrine call upon us to crush them down as a menace to civilization. Break the law in the name of patriotism! The American system is to repeal the law in the name of patriotism. If you love the principles upon which this blessed republic is founded, you will seek to obey the law until according to the processes of government the people in their wisdom see fit to repeal it. And if it is wrong, the people will repeal it, as the people do not want laws which are wrong in principle. There is no safer judge as to a righteous law than the judgment of the people, that vast mass of intelligence and character upon whom our institutions depend for perpetuity.

"Some people go so far as to say that this nullification of statutes is wrong in practise as well as theory; that the best way to get rid of a law is to enforce it. But the cost of trying to compel obedience to a law which violates the conscience of the considerable minority of the people or the traditional usages and privileges of anything like a majority is usually too great." This is the doctrine put out by a distinguished educator whose business it is to train and direct the minds of American youth. In plain, unadorned language, this says that if a considerable crowd can be gathered together, they are perfectly justified in breaking the law, in defying the authorities. The learned professor says nothing about the right and the power of the people to change laws, the right of the people to repeal laws, but assumes that the only way the people can deal with the law is to break it. There is no law upon the statute books which may not be repealed. There is no provision of the Constitution which may not be changed. I want to ask you: What would be the condition of this country in a single fortnight if every law displeasing to a considerable number of people were disregarded, some disregarding one law and some disregarding another? Whose home would be safe? Whose happiness would be secure? How long would we enjoy the blessings of orderly regulated liberty? And why does he speak of a "considerable minority"? If it is good, it is good as a matter of principle, not dependent upon numbers, and just as good for a single individual as for a group.

Again it is said: "The attitude [of those who disbelieve in the law] should be one of acquiescence in and encouragement of the process of nullification." Here is your doctrine. No repeal. No respect for the orderly processes of government, but nullification is the general law-breaking violence. By all means, let's have the judgment of the American people upon this policy. Let's recur to this "first principle" to find what the people think of this doctrine of lawlessness.

But let us turn from these teachings to saner counsel and to somewhat safer leadership. In one of the statements sent out to the country by those who are advocating the doctrine to which I have referred, you will find a sentence to this effect: "The nullification of the fugitive slave law developed men like Abraham Lincoln." This seems to be a clear statement to the effect that Abraham Lincoln, as to the fugitive slave law, advocated nullification. The very reverse is true—he gave his life for the integrity of the Constitution. As far back as in 1858 he declared in a public speech: "I have always hated slavery." I do not believe you will find among all his letters and public addresses the use of this word "hate," save in connection with the institution of slavery. The word seems never to have passed his lips except when speaking of human bondage. He did hate slavery. But while he hated slavery, he was devoted to our institutions and believed in our Constitution. "I have always hated slavery but I have always been quiet about it until this new era. . . . By the Constitution all assented to it [slavery] in the state where it exists. We have no right to interfere with it because it is in the Constitution and we are by both duty and inclination bound to stick by that Constitution in all its letter and spirit from the beginning to the end."

Speaking of the fugitive slave law, he said: "We must not withhold an efficient fugitive slave law because the Constitution requires us, as I understand it, not to withhold such a law." On one of the most notable occasions in his career, he declared: "Our safety, our liberty, depends upon preserving the Constitution of the United States as our fathers made it inviolate."

It does not seem to me quite fair to quote Abraham Lincoln in favor of nullification, for I take it that no severer test could have been placed upon his loyalty to the Constitution than to place slavery upon the one side and the Constitution upon the other and ask him to choose his course. He chose his course and never faltered. He did not belong to that group of political philosophers who think because a law is wrong that you have a right to defy it, and that because a constitutional provision does not suit your view of righteousness you have a right to nullify it and trample it under foot.

Lincoln's Contribution to the Constitution[1]

By JOHN ALLEN KROUT, A.B. (Michigan), A.M., Ph.D. (Columbia)

Assistant Professor of History at Columbia University

"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.... It follows from these views 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."

These words, so freighted with the sentiment of nationalism, were spoken by Abraham Lincoln on that blustery March day which marked his inauguration as President of the United States. His audience was agitated; many were genuinely alarmed. Under orders from General Winfield Scott, the scene of the simple ceremony was commanded by the artillery. Lincoln's drive to the capital had been carefully guarded. The fear of violence was in the air. No one could tell how soon, or on what pretext, the dispute between the sections might result in a test of strength on the field of battle. As the President-elect had sorrowfully said to his neighbors in Springfield, Illinois, the task before him was "greater than that which rested upon Washington." It seemed to him that the difficulty of organizing the new Government in 1789 was eclipsed by the necessity of defending it against secession in 1861.

Great though the task was, Abraham Lincoln was ready for the burden. Ever since the day in 1854 that he had delivered his philippic against the repeal of the Missouri Compromise he had been wrestling with the Constitutional aspects of the slavery controversy, particularly as they referred to Congressional control of slavery in the Territories. Having determined in his own way that there was nothing in the Constitution which affirmed the "right of property in a slave" and nothing which prohibited the Federal Government from restricting the spread of slavery into the Territories, he was deeply shocked by the decision of the United States Supreme Court in the Dred Scott case. Without challenging the right of the Court to hold that Congress could not bar the slaveholder "from the common territory of the Union," he attempted to show that the opinion should not be regarded as a precedent for future political action. He believed that the decision had been reached by a majority of the Justices on erroneous grounds, and he was determined to do all in his power to bring out a reversal of the judgment in some future litigation. For him the Constitutional argument was clear-cut. In his debates with Douglas up and down the State of Illinois, and finally in his notable speech at Cooper Union in 1860, he presented the historical evidence on which he based his conclusions.

The framers of the Constitution, reasoned Lincoln, never intended that the document which they drafted should protect the institution of slavery in the Federal Territories, nor did they extend to the slaveholder any guaranty of Federal protection for his slave property. In fact, the "thirty-nine" who signed the Constitution indicated on numerous occasions their belief that slavery was a social evil which would gradually disappear. The first Congress under the new fundamental law enacted legislation designed to enforce the free-soil provisions of the Ordinance of 1787, and thereby prohibited slavery in the whole of the Northwest Territory. Acting on the same Constitutional theory, the National legislators had forbidden the slaveholder to carry slave labor into the Louisiana Purchase north of the 36° 30′ line. These incidents were sufficient, Lincoln maintained, to demonstrate both the theory and the practice of the Congressional right to control slavery in the Federal Territories.

In opposition, leading Southern statesmen contended that the Fifth Amendment to the Constitution prevented Congress from denying to any citizen his property rights, and therefore by implication protected the slaveholder against any discrimination. In this sectional argument Lincoln sensed a greater Constitutional problem than the one concerning the expansion of the institution of slavery. Certain Southerners were boldly asserting that their last resort would be peaceful secession and the disruption of the Union. To this threat Abraham Lincoln responded with a vigorous denunciation of the idea that the Union was an easily broken association of States, asserting at the same time his belief that the Constitution conferred upon the central Government the power to resist every assault upon its integrity. His view that the federation of the United States had become a Nation received its finest expression in the noble phrases of the First Inaugural.

Reluctantly and solemnly, President Lincoln accepted the fact that the clash between the Southern doctrine of secession and his theory of nationalism meant war. But he was determined that it should be a war to preserve the form as well as the spirit of American nationality. All else was subordinated in his thinking to his Constitutional duty to save the Union and enforce the laws. Even slavery, which had figured so largely in his political speeches, was temporarily relegated to the background. In spite of the protests of abolitionists and anti-slavery men, the President insisted that emancipation was no part of the policy of the Administration. Only when he was persuaded that the freeing of the slaves would be of military value to the Northern cause did he issue the Emancipation Proclamation as a war measure. Thus, by 1863 the abolition of slavery had become linked in his thought to the preservation of the Nation. At Gettysburg he voiced his deep conviction that the military struggle was testing whether a nation "conceived in liberty, and dedicated to the proposition that all men are created equal," could long endure.

Once having accepted emancipation as a war measure, it was not difficult for Lincoln to decide that the freedom of the slaves should be made permanent. Working through the anti-slavery groups in Congress, he secured the drafting of a resolution to be submitted to the States for ratification as an amendment to the Constitution. On July 8, 1864, he issued a proclamation to the people in which he expressed the strong hope that the Thirteenth Amendment, delayed in the Senate, might be approved. Later in his last annual Message to Congress he urged immediate action on the Amendment in conformity with his oft-repeated wish "that all men everywhere might be free." At the same time he expressed his earnest desire to aid any State which was ready to return to its normal relations in the Union.

In that last official utterance to Congress he dealt with the two great achievements of his life. One was tangible and took the final form of an amendment to the fundamental law of the land. It abolished slavery. The other was intangible and was written in neither statutes nor Constitutional changes. It was "the drawing together of all the elements of nationalism in the American people and consolidated them into a driving force." The latter achievement settled for all time the Constitutional problem of the nature of the Union. It remains to this day the supreme contribution of Abraham Lincoln.

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LINCOLN LORE

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LINCOLN AND THE CONSTITUTION

A contribution to a well-known religious journal claims that "Lincoln made a door mat of the Constitution." Another writer states in a popular magazine of large circulation that "Lincoln and Wilson were by far our worst Presidents at violating the Constitution."

While it would not be expected that one should attempt to answer these charges in so limited a space as this bulletin affords, the celebration of Constitution Week, just past, has encouraged the compilation of a few statements which Lincoln made with reference to the Constitution.

Abraham Lincoln delivered an address before the Young Men's Lyceum at Springfield, Illinois, on January 27, 1837, in which he said, "To the support of the Constitution and laws let every American pledge his life, his property, and his sacred honor—let every man remember that to violate the law is to trample on the blood of his father and to tear the charter of his own and his children's liberty." Lincoln at this time was but twenty-eight years of age and still a resident of the little village of New Salem.

In the debate with Douglas at Galesburg Lincoln had occasion to argue about the strength and jural authority of the Constitution. No one who reads his argument will conclude that he had any misgiving about the power of the Constitution.

On his way to Washington for the inaugural Lincoln spoke at Philadelphia. In referring to Independence Hall where both the Declaration of Independence and the Constitution were originally framed and adopted, Lincoln said: "All the political sentiments I entertain have been drawn, so far as I am able to dray them, from the sentiments which originated in and were given to the world from this hall."

If it were possible to select a subject for Lincoln's First Inaugural Address it might be worded something like this: "The Union as Viewed Through the Constitution." Lincoln for the first time emphasized the conclusion that the Union is perpetual. Some of the many excerpts from the address which made direct mention of the Constitution follow:

"I take the official oath today with no mental reservations, and with no purpose to construe the Constitution or laws by any hypercritical rules."

"I hold that, in contemplation of universal law and of the Constitution, the Union of these States is perpetual."

"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."

"The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was 'to form a more perfect Union'."

"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."

The signing of the Emancipation Proclamation caused the first general charge that Lincoln had violated the Constitution and his own viewpoint is expressed within the proclamation itself as follows:

"Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as commander-in-chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord One Thousand Eight Hundred and Sixty-three, etc . . .

"And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God."

Some months after the signing of the Emancipation Proclamation, Lincoln had occasion to write a letter to James C. Conkling at Springfield, in which he used an expression which reveals that at this time he was still confident he had been within his constitutional rights in issuing the proclamation. He said:

"You dislike the Emancipation Proclamation, and perhaps would have it retracted. You say it is unconstitutional. I think differently. I think the Constitution invests its commander-in-chief with the law of war in time of war."

Next to the Emancipation Proclamation the Vallandingham case brought forth the most severe criticism of Lincoln's constitutional procedure. It had to do with the question of military arrests.

On May 19, 1863, a letter was written to Lincoln enclosing some resolutions drawn up by a public meeting at Albany. Some excerpts from Lincoln's reply follow:

"The meeting, by their resolutions, assert and argue that certain military arrests and proceedings following them, for which I am ultimately responsible are unconstitutional. I think they are not."

"Ours is a case of rebellion—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of rebellion; and the provision of the Constitution that 'the privileges of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it,' is the provision which specially applies to our present case. This provision plainly attests the understanding of those who made the Constitution that ordinary courts of justice are inadequate to 'cases of rebellion'—attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rule, would discharge."

"If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public safety does not require them: in other words, that the Constitution is not in its application in all respects the same in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security."

Possibly one of the most important direct references bearing on Lincoln's attitude toward the Constitution is found in a letter written to A. G. Hodges, of Lexington, Kentucky, on April 4, 1864, to whom he wrote on the slavery question in part as follows:

"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 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 the 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 assume 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."

LINCOLN LORE

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LINCOLN'S REVERENCE FOR THE CONSTITUTION

Constitution Day offers a congenial atmosphere in which to appraise the extent of Abraham Lincoln's reverence for America's immortal document. Even in childhood Abraham was impressed with the great sacrifice which the fathers of our country made to achieve national independence culminating in the framing of the Constitution. Throughout his entire life there are many incidents which reveal that his reverence for the instrument grew until he was in accord with Webster who said: "It is the only Bond, of the Union of these States; it is all that gives us a national character."

There are three different periods in Lincoln's life when we find him reacting towards the Constitution in such a way as to imply that he looked upon this state paper as something to be revered far beyond any other code of laws in the land; in fact for him it approached the status of a fetish. In the first instance he is unwilling that it should be changed in any particular from the form in which it came from the fathers. Next, as President of the United States, finding his own power as chief executive limited by the instrument, he is fearful lest in any way he should violate the "Higher Power." Finally, when a great emergency appears Lincoln begins to view the Constitution from even a more elevated plane, and looks upon it as a vehicle by which humanity may be served.

The Unalterable Document

Congress at its first session in 1789 proposed ten articles known as the Bill of Rights, which were ratified and became a part of the Constitution and have so been considered along with two other amendments adopted in 1794 and 1804, respectively. All was the work of the fathers of the Republic. Lincoln, who was born in 1809 and died in 1865, although living to be fifty-six years of age, never witnessed a change in the Constitution. While he was serving as a Congressman from Illinois in 1847, he had occasion to make a speech in the House of Representatives which reveals that he then looked upon the Constitution as unalterable. By way of introduction Lincoln said that he wished to submit a few remarks on the general proposition of amending the Constitution:

"As a general rule, I think we would much better let it alone. No slight occasion should tempt us to touch it. Better not take the first step, which may lead to a habit of altering it. Better, rather, habituate ourselves to think of it as unalterable. It can scarcely be made better than it is. New provisions would introduce new difficulties, and thus create and increase appetite for further change. No, sir; let it stand as it is. New hands have never touched it. The men who made it have done their work, and have passed away. Who shall improve on what they did?"

We have lived to see his prophesy fulfilled that "new provisions would introduce new difficulties." The passing of the Twenty-first Amendment in order to repeal the Eighteenth is but one instance to illustrate his foresight. There is no better evidence of Lincoln's deep reverence for the Constitution than his wish to see it left unaltered. In fact he breathed the sentiment of the framers who acclaimed *Esto Perpetua*—may it be perpetual.

The Higher Power

When Lincoln became President he viewed the Constitution from a new angle, as it had specific things to say about his own duties. He began to look upon it as the "Higher Power." On one occasion he said, "I hope I may say nothing in opposition to the spirit of the Constitution." In Philadelphia where he "listened to those breathings rising within the consecrated walls wherein the Constitution of the United States . . . was originally framed and adopted" he assured the people that he hoped he would do nothing "inconsistent with the teachings of these holy and most sacred walls." Upon reaching Washington just previous to the inauguration he informed the citizens gathered to greet him that he was anxious to give them all their rights under the Constitution, "not grudgingly but fully and fairly."

Lincoln's attitude towards the Constitution during his entire administration is well set forth in a letter which he wrote to A. G. Hodges of Lexington, Kentucky. It was in part as follows:

"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."

As a preface to this statement Lincoln had made plain that the Constitution did not confer upon him the right to act upon his own judgment of feelings with respect to certain questions, and he concluded the argument by affirming that he had done no official act "in mere deference to my abstract judgment and feelings" about slavery.

On one occasion a distinguished judge had been arrested, and an appeal on his behalf had been made to Lincoln. After going over the evidence Lincoln wrote to one of the petitioners, "I must confess I was not very favorably impressed towards the judge," and continued, "The judge was trying to help a little by giving the protection of the law to those who were endeavoring to overthrow the supreme law—trying if he could find a safe place for certain men to stand on the Constitution, whilst they should stab it in another place."

It cannot be said that Lincoln allowed his own authority as an executive to strike at the sacred document which to him was the "Higher Power."

A Vehicle for Humanity

"Military Necessity" was the telescope through which Abraham Lincoln got a new view of the Constitution. It became a new instrument in time of war and clothed him as Commander-in-Chief of the Union forces with new power not available in times of peace. It was "Military Necessity" which authorized the Proclamation of Emancipation and the transition from this objective to the Thirteenth Amendment was not difficult to make. In reply to the committee which notified him of his nomination as President on the Union ticket in 1864 he said, "I approve the declaration in favor of so amending the Constitution as to prohibit slavery throughout the nation."

Lincoln's attitude towards the Thirteenth Amendment may seem to nullify this life-long stand against disturbing the Constitution as it came from the fathers. In debate with Judge Douglas as early as 1858 he had sensed the omission of an article in the basic law which he was now anxious to include.

Upon the passage of the Constitutional Amendment by Congress on January 31, 1865, Lincoln, in reply to a serenade at the White House, held in honor of the event, said: "This amendment is a king's cure-all for all evils. It winds the whole thing up. He would repeat that it was the fitting if not the indispensable adjunct to the consummation of the great game we are playing. He could not but congratulate all present—himself, the country, and the whole world—upon this great moral victory."

Here Lincoln looked upon the Constitution, when the newly proposed amendment would be incorporated in the sacred document, as a vehicle which would bring an eternal blessing to all the world. He did not live to see the amendment ratified by the required number of states before it finally became a part of the basic law, but he had no doubts about it eventually becoming a part of the Constitution of the United States.

LINCOLN AND THE CONSTITUTION

Today, Abraham Lincoln's birthday, seems a good day to comment on the current Old Deal talk about how Lincoln loved the Constitution and would have looked with horror on any proposals to change it so as to make it fit changing times. We are hearing more and more of this talk as the campaign warms up and the exploiters grow more afraid that somebody may change the Constitution to make it tougher for them.

Abraham Lincoln

In the first place, it doesn't matter nowadays whether Lincoln loved the Constitution or hated it. He was a great man in his time, and knew more than most people did about how the problems of that time ought to be met. But that doesn't make Lincoln an oracle, or God, for these times. We have to solve our own problems with our own brains. We can't solve them by looking up what Lincoln said on this or that occasion. In his time he said many things, all of them suited to the particular occasion; and from his collected remarks, just as from those of any long-time politician, you can gather passages to prove any point you want to prove.

But did Lincoln love the Constitution? Did he think it came down from Sinai on tables of stone and must not be changed?

It doesn't matter much today whether he did or didn't; but it is an interesting question. Let's have a look at it, and a straight look at Lincoln's life.

Lincoln-Douglas

He was born Feb. 12, 1809, in a log cabin in Hardin County, Ky. He grew up in Indiana, moved to Illinois when he was 21, and became a locally well-liked lawyer and politician. He headed a company of Illinois volunteers against the Indians in the Black Hawk Indian War; was a postmaster at New Salem, Ill.; sat in the Illinois Legislature 1834-41; served one undistinguished term in Congress 1846-48; went back to Springfield and his law office.

Lincoln made mistakes, most notable of which was his opposition to the Mexican War of 1846. He said it would spread slavery to new territories. It did, for awhile. But it got us California, Arizona, New Mexico and parts of states north of those; if we hadn't fought it, those states would be under President Lazaro Cardenas of Mexico today, with religious and labor wars raging through them.

In 1857, the Supreme Court, as we narrated a few days ago, handed down the Dred Scott decision, which declared slavery constitutional all over the United States. This decision ran head-on into Lincoln's deep, lifelong conviction that human slavery was wrong and must be eliminated somehow from the American social system. The next year, Lincoln debated slavery up and down Illinois with Stephen A. Douglas—the most famous debates in our history to date.

Lincoln's general proposition was that slavery should be checked, Supreme Court or no Supreme Court; Douglas' position was: "Let well enough alone." Douglas won the debates and a seat in the United States Senate. Lincoln threw in his lot with the new Republican Party—the Black Republicans as they were then called, because they opposed slavery and were therefore considered "nigger lovers." Those who hurled these epithets at them were (1) Southern slaveholders, and (2) Northeastern financiers who had money dealings down South and didn't want slavery disturbed.

In 1860 the Republicans nominated Lincoln for President. The language used in that campaign makes Al Smith's choicest pet names for President Roosevelt smell like so many roses. The well-known Charleston, S. C., Mercury, for example, said of Lincoln:

> A horrid looking wretch he is, sooty and scoundrelly in aspect, a cross between the nutmeg dealer, the horse swapper and the night man . . . a lank-sided Yankee of the uncomeliest visage and of the dirtiest complexion.

Another favorite name for Honest Abe was "the Illinois Ape."

But he was elected; he fought the Civil War; and his "love" for the Constitution became embodied in the 13th, 14th and 15th amendments, which reversed the Dred Scott decision and outlawed slavery throughout the United States.

So if President Lincoln loved the Constitution, he loved it in the same way the Lord loved the Jews—"Whom the Lord loveth He chasteneth" (Hebrews 12:6). At the very forefront of those who have been dissatisfied with our Constitution, and have struggled to write fundamental changes into it, and have succeeded, stands Abraham Lincoln.

He was shot April 14, 1865, dying next day, at the height of his victory—which was probably just as well for his glory. Had he had to live out the remaining three years of his second term as President, battling with the Civil War's horrible consequences, Lincoln's glory for posterity might have been considerably dimmed.

N.Y. Daily News 2-12-36

Lincoln Cited As Great Defender Of Constitution

News Sentinel 2/12/36

"ALTHOUGH he dreaded war, he recognized that under the Constitution this was a Nation whose contract of existence was not subject to cancellation by any of the parties and that it was his duty to preserve that contract, war or no war, and defend that Constitution."

Thus spoke D. Burns Douglass, former judge of the City Court, while speaking of Abraham Lincoln in an address to the Woman's Republican Club at the Catholic Community Center.

The address, in part, follows:

"Many months of our calendar year are bejeweled with events of national significance. July has Independence Day; May, Memorial Day. But to the month of February is given a double crown of glory; it is the natal month of the two greatest of Americans, George Washington and Abraham Lincoln.

"Washington was of an era of knee breeches, powdered wigs, ruffles and lace cuffs. Warrior, statesman, patriot, he was a product of the educated, refined and cultured American family.

"What a contrast to the background of Lincoln. Born in Hardin County, Kentucky, of an undistinguished family, poor of the poor, illiterate. 'No star, no sign foretold his coming: About his cradle all was poor and mean, save only the mother's love.' But from that humble birthplace he rises steadily; barefoot boy, studying before an open fire; rail splitter and riverman; grocery clerk, surveyor's helper, lawyer, Congressman, and at last, in a halo of glory, President and martyr.

Stands Closer To Mankind.

"It seems to me that Lincoln stands a little closer to the heart of mankind because of his humble origin than does Washington. Of Americans, he was the first great commoner. He was the personification of all that is American, and of all that America can give and hope for its citizens. He was humble, but it was the humility of service; he was poor, but it was the poverty of honesty; he was sad, but it was with the sorrow of others. Almost might we say of him, as did the prophet of old in speaking of the first great Commoner of all mankind, 'Surely he hath borne our griefs, and carried our sorrow: And the Lord hath laid on him the iniquity of us all.'

"As a youth, it was not his fortune to receive what we would call a liberal education. Algebra, geometry, botany, astronomy were then closed books to him. Character reading was not a correspondence course; the art of public speaking was not taught by mail. His astronomy was the arch of the heavens, and there in the stars he read the glory of a Creator and the glories of His handwork . His botany was the glades of the woodland, fields, meadow, and stream; and in the Springtime, when flower and bird and life burst forth anew, he learned to interpret the story of a resurrection and of an immortal soul. Psychology and its kindred subjects he never found in books; he gained its principles by contrast with living men, and was thus able to interpret the soul of a people in its most tragic hour.

Literary Learning Limited.

"His actual training in English was limited. Yet as a writer of English prose, he stands almost unequalled. He attended no school of oratory nor of argumentation; but his debates with Stephen A. Douglas, the 'Little Giant' of Illinois, drew the attention of the entire country. The Bible, Pilgrims' Progress and Shakespeare were the earliest working tools of his library, and with them he demonstrated the principle that it is better to plow deep over a small area than merely to scratch the surface of a large one.

"What gave Lincoln his power among men? In the first place, he personified the hope of men for peace, the prayer of men for Union, the cry of men for liberty from the curse of slavery. Thus, when he spoke, the farmer looked up from his furrow, the merchant from his counter, the mechanic from his lathe, and, inspired by the soul of the President, farmer, merchant and mechanic left all to preserve that Union, destroy that slavery, and restore that peace.

"The second reason for his power among men was his public confidence. Lincoln's steadiness of purpose, I take it, was based upon three great beliefs; beliefs so founded that they were convictions; convictions so strong that they were unshakable. No man without a belief, and no man without a conviction based upon that belief, can attain success in any undertaking.

Knew What Friendship Means.

"Progress is and ever will be based on the affirmatives of life. Unbelief, scepticism, and sophistry never know what the words friendship, loyalty and neighbor mean. Lincoln knew what those words meant. The wilderness days taught him their full import. The pioneer spoke to the point; there was little deception, hypocrisy or real unbelief; man answered the call of man, in sorrow, in joy, in victory or defeat, straight from the heart.

"His first great belief, was, therefore, in the people. His common contacts with them engendered that belief. He knew the people, better than they at first really knew him. They did not know the masterful power of the man. They did not perceive the straight grain of hickory beneath the shaggy bark of common things. He had matured like most boys; he moved forward with the best of his simple companions. But from them he differed in this: He made himself to fully understand what others half understood. He observed, analysed and stored in memory each item of experience, each

sober thought, each profound emotion of the people with whom he walked. 'When he came to the Presidency he was ready for the Presidency.' He knew the people better than the politicians.

All Men His Friends.

"When the Civil War broke in all its fury, it was this belief that enabled him to go forward. The passions of day might sear, and the hatred of the hour might embitter, but Lincoln's people were not enemies but friends, and the angels of their better nature will calm those passions, soften that hatred, and bring them together sane and clean.

"The second belief on which his steadiness of purpose rested was in the Constitution of the United States. 'His breeding among plain people like himself, accustomed to respect

only to honor his memory, but also to learn the lesson of his life. Thus, when we compare the calm purposefulness of this man during the crash of war, with the purposeless, extravagant, contradictory and socialist measures of the national administration, we stand in wonder, amazement and patriotic resentment at the octopus it has spawned.

Saved Nation.

"Seventy-six years ago, a Republican President saved this Nation."

Miss Millie Helmke was hostess for the meeting, assisted by the Misses Sophia Maier, Frances Hock and Helen Jackson and the Mesdames Pearl Clayton, Marjorie Burt, Velma Burns, Chester Teeters, Ed Fisher, C. W. Allen and Kent Sweet. Later, tables were formed at card games and prizes were awarded as follows: At bridge, the Mesdames Freda Carry, Maud Grummond and Flora Stocks; at pinochle, the Mesdames Edna Eylenging, Lela Mason and Myrtle Wigman. Attendance awards were presented to the Mesdames Josephine Black and Mary Schoenbine.

Lincoln and the Constitution

Charles A. Beard, Dean of American Historians, Reveals How Great Emancipator Obeyed Supreme Court's Adverse Decision, Then Carried to Victory Fight for Amendment He Felt Was Needed

At a time when the U. S. Constitution is being widely discussed and may even become a campaign issue, Lincoln's birthday comes with peculiar force. For Lincoln himself faced a constitutional problem not unlike those of today. What it was and how it was solved is told here by Charles A. Beard, dean of American historians and political scientists. He is the author of "The Rise of American Civilization," and "Economic Interpretation of the Constitution."

* * *

By CHARLES A. BEARD

As the fifth decade of the 19th century drew to a close, Abraham Lincoln sprang into fame on a constitutional issue.

In 1856 the Republican party launched a national campaign on the proposition that slavery should be prohibited by Congress in the territories

CHARLES A. BEARD

of the United States. To this proposition Lincoln gave his approval.

But the very next year the Supreme Court of the United States, in the Dred Scott case, declared that Congress had no power to prohibit slavery in the territories. This was a staggering blow to the Republican party.

By a single stroke the court had blotted out the principal plank in its platform, had destroyed its chief reason for existence. The party was seeking to capture the Federal government and proclaim freedom throughout the territories.

The court had said in effect: Under the Constitution this action cannot be taken by Federal authorities.

Why not amend the Constitution?

Republicans proposed to exercise? That sounded well in theory, but it was impossible in practice.

No amendment can be made without approval of three-fourths of the states. Given the number of slave states in 1857, an amendment against slavery in the territories was out of the question.

For Republicans who respected the Supreme Court and the Constitution that was a challenge. It was a "hot one."

* * *

Lincoln Meets Challenge

Abraham Lincoln dared to pick it up and declare his principles and program. He said that he would obey the decision of the Supreme Court in the Dred Scott case. That was an obligation resting on every citizen.

But he added that the Supreme Court had often reversed itself and that he and his supporters would seek to have it reverse the interpretation made in the Dred Scott case.

"Will he appeal to a mob?" cried Stephen A. Douglas.

To questions of this kind Lincoln replied in substance: We think the Dred Scott decision wrong and we shall appeal to the people of the United States.

In time, new judges could be appointed by the president and the Senate, and a majority obtained for a different view of the Constitution. Since an amendment was not then possible, a change in the membership of the court was the only way out for the Republicans.

* * *

Appeals to Voters

"Tampering with the judiciary," screamed horrified Democrats, but Lincoln and the Republicans demanded another interpretation of the Constitution by a Supreme Court differently constituted.

On this point Lincoln was as firm as steel, and in strong words he appealed to the voters for support.

"Familiarize yourselves with the chains of bondage," he said, "and you prepare your limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you.

"And let me tell you that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Without condemning the Supreme Court decision expressly, the Republican platform of 1860 declared the doctrine laid down in the opinion to be contrary to the Constitution, and subversive of the peace and harmony of the country." On this platform, Abraham Lincoln was elected president of the United States.

* * *

Peril to People's Rule

In his first inaugural, President Lincoln paid his respects to the Supreme Court. Its rulings in particular cases were to be obeyed so far as those cases ran.

But he continued, "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 instant they are made, in ordinary litigation between parties in personal actions, 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."

What President Lincoln and the Republican party would have done about this constitutional issue if war had not come, nobody knows or can ever know. What they did do amid the war is a matter of record.

In 1862 they pushed thro[illegible] (missing)

tories of the United States and in any that shall hereafter be acquired."

* * *

Law Is Overridden

The Constitution was unchanged. The Dred Scott decision stood. Chief Justice Taney still lived.

It was written in the law books that Congress had no power to prohibit slavery in the territories. Yet Congress and the president prohibited slavery in the territories.

Not content with this defiance of the past, Lincoln decided to strike a mortal blow at slavery in the states. Under the Constitution only, each state acting alone, "within its own state.

sphere," could vote slavery up or down. Neither the president nor Congress, nor both combined, could touch "the peculiar institution" in any

But war created "an emergency." President Lincoln was commander-in-chief of the armed forces of the Union. And under the sanction of the war power, Lincoln, by mere proclamation, emancipated slaves in the states and districts then in arms against the authority of the United States.

For this fateful stroke of state there was no express warrant in the Constitution. Yet Lincoln made a broad interpretation to justify his action.

* * *

Amendment Is Ratified

At best, this was a "war measure." Could the Proclamation of Emancipation be enforced on the return of peace? On this constitutional point there were grave doubts. Besides, slavery was still in effect in the states and districts not in arms against the Union.

To finish the work thus started, Lincoln took the final step. He sponsored and Congress passed an amendment to the Constitution abolishing slavery throughout the United States.

By skillful maneuvering, Lincoln and Republican managers were able to win the approval of three-fourths of the states. The amendment was ratified. The Constitution drawn by the Fathers was changed to meet the spirit and circumstances of the new time.

Thus a great public policy, both moral and economic in nature, was written down in the Constitution of the United States. The leader who had dared to take up that policy when it was "dangerous," who dramatized it, who gave his life for it, was lifted into immortality, for all ages, for all climes, for all humanity.

Those who imagine that the Constitution is a mere theme for hair-splitting by "great constitutional lawyers" may well ponder and remember the life and labor of Lincoln, the Emancipator.

—THE CINCINNATI POST—

2-12-36

Lincoln and the Constitution

Emancipator Freed Slaves Despite Adverse Court Ruling

"Honest Abe" Won Immortality Through Persistence in Campaign

At a time when the U. S. Constitution is being widely discussed, Lincoln's birthday comes with peculiar force. For Lincoln himself faced a constitutional problem not unlike those of today. How it was solved is told by Charles A. Beard, dean of American historians.

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AS the fifth decade of the 19th century drew to a close, Abraham Lincoln sprang into fame on a constitutional issue.

In 1856 the Republican party launched a national campaign on the proposition that slavery should be prohibited by Congress in the territories of the United States. To this proposition Lincoln gave his approval.

But the very next year the Supreme Court of the United States, in the Dred Scott case, declared that Congress had no uower to prohibit slavery in the territories. This was a staggering blow to the Republican party.

By a single stroke the court had blotted out the principal plank in its platform. had destroyed its chief reason of existence. The party was seeking to capture the federal government and proclaim freedom throughout the territories.

The court had said in effect: Under the Constitution this action cannot be taken by federal authorities.

Why not amend the Constitution and give Congress the power which Republicans proposed to exercise? That sounded well in theory, but it was impossible in parctice.

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Lincoln Meets Challenge

In time, new judges could be appointed by the President and the Senate, and a majority obtained for a different view of the Constitution.

Without condemning the Supreme Court decision expressly, the Republican platform of 1860 declared the doctrine laid down in the opinion to be contrary to the constitution, "revolutionary in its tendency, and subversive of the peace and harmony of the country." On this platform, Abraham Lincoln was elected President of the United States.

Peril to People's Rule

In his first inaugural, President Lincoln paid his respects to the Supreme Court. Its rulings in particular cases were to be obeyed so far as those cases ran.

But he continued. "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 instant they are made, in ordinary litigation between parties in personal actions, 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."

In 1862 the Republicans pushed through Congress and enacted into law a bill prohibiting slavery "in the present territories of the United States and in any that shall hereafter be acquired."

Law Is Overriden

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It was written in the law books that Congress had no power to prohibit slavery in the territories. Yet Congress and the President prohibited slavery in the territories.

But war created "an emergency." President Lincoln was commander-in-chief of the armed forces of the Union. And under the sanction of the war power, Lincoln, by mere proclamation, emancipated slaves in the states and districts then in arms against the authority of the United States.

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To finish the work thus started, Lincoln sponsored and Congress passed an amendment to the Constitution abolishing slavery throughout the United States.

The amendment was ratified. The Constitution drawn by the fathers was changed to meet the spirit and circumstances of the new time.

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Lincoln Daily Courier

LINCOLN AND CONSTITUTION.

ANOTHER Lincoln birthday anniversary arrives—this year at a time when the constitution of the United States is being widely discussed and may even become a campaign issue.

The anniversary thus comes with peculiar force. Not many of the older residents of Logan county have recalled Abraham Lincoln as the president who faced a great constitutional crisis in government—and won it.

Rather they recalled him as the homely country surveyor, as lawyer, neighbor and friend.

But President Lincoln, as is ably told elsewhere in today's Courier, once obeyed an adverse decision by the supreme court and then carried to victory a fight for an amendment he felt was needed for the good of the nation.

Discussion of the constitution is today heard on every side. It was the theme of a Lincoln Day address at a patriotic program sponsored by the Abraham Lincoln chapter of the D. A. R. today. The constitution is discussed in congress, in the press, by civic clubs, in the pulpit and in the home.

When Abraham Lincoln was elected president he faced a supreme court decision and constitutional fight that almost destroyed his political career and that of the then young Republican party.

What it was and what came of it is told in today's Courier by Charles A. Beard, dean of American historians and political economists.

Mr. Beard is one of the foremost students of the constitution in America today. Read his story of Abraham Lincoln and the constitution on this day that we set aside to honor the immortal man whose name we bear and whose memory we shall always cherish.

control of persons who misuse speed could be guaranteed at all times.

Need for such a regulation was aptly expressed recently by Governor Tom Berry, of South Dakota, who said:

"There may be too many governors now, but I'm in favor of one for every car".

OUR CONSTITUTION AND CITIZENSHIP.

To the Editor of The Indianapolis Star:

I notice that a bill has been introduced in the Legislature requiring the teaching of citizenship in our common schools. This is to be commended. This should have been done many years ago. In the first place, let us require good citizenship in the teacher. I have been teaching common school a lifetime. I am proud to say that I have taught citizenship and the Constitution from the beginning of my career. I thought that was part of my duty.

I am also proud of the fact that my school and I raised the first flag over a schoolhouse in Martin county, Indiana. This flag was made altogether by the pupils of the school. They have never forgotten this patriotic fact. From that time till the last school I taught I had a flag floating over my schoolhouse. The flag means my country; the flag means the Constitution of the United States. The flag means patriotism—patriotism means to me sublime citizenship. This is the highest thought in Americanism—that we are sealed to the Constitution by the blood of "the fathers." This thought is too sacred for explanation.

Nothing that has occurred in my lifetime has affected me more than this wholesale disregard for the Constitution, the safeguard of our liberties.

Our "fathers" thought long and carefully before they withdrew from the mother country. They did not go into this blindly or without counting the whole cost. They were willing to die for the principles set forth in the Declaration of Independence. These principles were crystallized into the Constitution of United States. By the blood and sacrifice of thousands of our noble citizens this Constitution has been saved to us. This Constitution is not obsolete. It is good for all time. We cannot outlive the principles upon which it is founded.

This Constitution has been in jeopardy several times in the life of our country. There has always been patriots enough to save it. We have been willing and have given the best blood of America to save it. Our boys have followed the flag wherever it has gone, even in the face of death, without a thought of place or power.

It is inconceivable that anyone who was able to attain to the presidency of the United States of America would so disregard his oath of office that he would again put the Constitution of United States in jeopardy. After he says, "I do solemnly swear that I will preserve, protect and defend the Constitution of the United States of America," proceed to put it in jeopardy.

At this time we need patriots like Washington and Jefferson, like Jackson and the sublime Lincoln. Lincoln, when approached on one occasion by a committee who asked him to make a compromise that would endanger the Union and the Constitution, said: "I have an oath registered in heaven that I will preserve, protect and defend the Constitution of the United States, and this I shall faithfully keep."

WILLIAM C. HALL.

Shoals, Ind.

764 PENNIMAN AVE.
TELEPHONE 73

JOHN S. DAYTON
ATTORNEY-AT-LAW
PLYMOUTH, MICHIGAN

January 13, 1938.

Lincoln National Life Ins. Co.,
Fort Wayne, Indiana.

Gentlemen:

Recently there has come to my attention two bulletins of the Lincoln National Life Foundation, Dr. Louis A. Warren, Editor, being numbers 233 and 284, and both are upon Lincoln and the Constitution. I wish to learn more about these bulletins, when they began and what is the cost of them. I have a feeling that perhaps your policy holders may procure them gratuitously but I am too old for more insurance. I am just now interested in answering some claims that Lincoln had no regard for the constitution and I am enclosing herewith some of the statements from W. E. Woodward's books that you may see what I wish to meet.

I enclose a self addressed and stamped envelope for your convenience in replying. Thanking you for your courtesy, I am,

Very truly yours,

John S. Dayton

P.S. I hope I may heal from you very soon as I must prepare at once.

W. E. WOODWARD on LINCOLN'S UNCONSTITUTIONAL ACTS.

1. From his "A NEW AMERICAN HISTORY."

President Lincoln's conduct was conspicuous for the number and variety of his unconstitutional acts, yet every one of them may be justified on the groung of necessity. The situation demonstrated clearly the constitutional weakness of the chief executive power in a time of emergency. Buchanan was right in declaring that he coul: find no constitutional authority for using force against a state that had seceded. But Lincoln did not look to constitutional authority. He said, in effect:"I have taken an oath to uphold the Constitution, which means, in my opinion, a union of the states. I shall do anything in my power to sustain the Constitution and the union, regardless of the constitutional aspect of what I do." That is obviously a dictum of the most dubious character. It could be invoked by a fascist dictator, and it sets a bad precedent, yet the whole proceeding has been sprinkled with the holy water of history because Lincoln was right. But what about a Lincoln who might be wrong, or inspired by unterior and selfish motives? There may be one someday; it is not impossible, or even improbable.

Lincoln suspended the right of habeas corpus, by executive order, in some parts of the country, though it would appear from the wording of the Constitution that Congress alone has the authority to do that. Thousands of men were thrown into jail and confined for months without even being informed of the charges against them. He gave stupid military officers the power to arrest citizens and put them in prison without a warrant or an indictment. His subordinates raided the offices of newspapers and stopped their publication in defiance of the Forst Amendment of the Constitution which says that the federal authority shall not abridge the freedom of speech, or of the press.

The power to raise armies and to declare war is invested in Congress under the Constitution. Lincoln paid not attention to that. In the early days of his administration he assumed the authority to create armies and to make war against the states in secession. But what else could he have done? It is true that he might have called an extra session of Congress. That would have taken time, and the emergency was so pressing that every day counted heavily. At all events, that was his explanation of his failure to call an extra session.

The legislature of Maryland was to convene on September 17, 1861. The military commander of the district was instructed by the secretary of war to arrest all members who were suspected of disloyalty. Many of them were seized and imprisoned, although there was no charge against them of having committed overt acts of disloyalty or treason. They appealed to Chief Justice Taney who decided that they were held illegally, but they were not released. In this action of President Lincoln's a most dangerous precedent was created. Through the acquiescence of Congress, then in session, the president had become a dictator. A repetition of these incidents may be expected in future emergencies, and we should not lose sight of the possibility that an "emergency" may be readily trumped up to fit the circumstances.

The reason for the incarceration of certain members of the Maryland legislature was the fear of the administration that the state might secede and join the Confederacy. On the face of the record that would appear to be a most unfortunate contingency, for in case of the secession of Maryland the capital city of the federal government would have been surrounded by seceded states. But, on the other hand, it could not have had any practical effect, as the state of Maryland was held by Union troops as tightly as if it had been conquered territory.

2. From his "MEET GENERAL GRANT."

He cared as little for the Constitution and its limitations as any Communist of to-day. In this he fitted in perfectly with the temper of the American people- for hardly anybody ever has taken the Constitution seriously, despite all the learned hypocrisy and patriotic orations about its sanctity.

January 14, 1938

John S. Dayton, Attorney
764 Penniman Avenue
Plymouth, Michigan

Dear Mr. Dayton:

We are very happy to place your name on our Lincoln Lore mailing list. This is the official publication of the Lincoln National Life Foundation which is sent gratis to individuals, libraries, and historical societies where a vital interest in Lincoln is manifested.

The current issues of this bulletin are enclosed and subsequent copies will be assembled and mailed at the end of each month.

Under separate cover we are sending you two pamphlets written by Louis A. Warren, Director of our Foundation, on the Constitution.

Dr. Warren is out of the city on an extended speaking itinerary and will not return until the latter part of March. At that time I will refer your letter to him for further attention.

Very truly yours,

Secretary to Dr. Warren

April 11, 1938

Mr. John S. Dayton, Attorney
764 Penniman Avenue
Plymouth, Michigan

My dear Mr. Dayton:

After having been away from my desk for three months I expect now that it is too late to print any further data with respect to Lincoln and the Constitution as your letter asking for this data was dated, as I observe, January 13, 1938.

While I am somewhat familiar with Mr. Woodward's work, of course it would be quite difficult for him to take an unprejudiced viewpoint, inasmuch as he was born in South Carolina, having spent his formative years in that State, and was on the staff of the Atlanta Constitution at one time.

I do not think all of his findings should be taken seriously, as he is certainly in error in one or two instances which I have noted, and if you feel that there is anything we can do here to assist you with any publication you may still have in mind, we will be happy to do so.

Yours very truly,

LAW:EB

Director

LINCOLN LORE

Bulletin of the Lincoln National Life Foundation - - - - - Dr. Louis A. Warren, Editor
Published each week by The Lincoln National Life Insurance Company, Fort Wayne, Indiana

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A LETTER ON CONSTITUTIONAL PROCEDURE

The Constitution was almost a fetish from Abraham Lincoln's viewpoint and it would seem sacrilegious to allow Constitution Day to pass without making some reference to Lincoln's profound respect for the "Higher Power" as he referred to the document.

During his entire life time, Lincoln had never seen an amendment to it, ratified by the states, and he hesitated to do anything that would seem to reflect upon its grandeur. He said on the occasion when there were those who would amend it: "No sir, let it stand as it is. New hands have never touched it."

One of the finest letters Lincoln ever wrote in which he discussed his constitutional rights in a time of rebellion, was written to Erastus Corning and others, with reference to the Vallandigham case. Excerpts from this letter which makes special mention of constitutional procedure follows.

"Executive Mansion, Washington, June 12, 1863.

"Hon. Erastus Corning and Others.

"*Gentlemen*: Your letter of May 19, inclosing the resolutions of a public meeting held at Albany, New York, on the 16th of the same month, was received several days ago.

"The resolutions, as I understand them, are resolvable into two propositions—first, the expression of a purpose to sustain the cause of the Union, to secure peace through victory, and to support the administration in every constitutional and lawful measure to suppress the rebellion; and, secondly, a declaration of censure upon the administration for supposed unconstitutional action, such as the making of military arrests.

"Ours is a case of rebellion—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of rebellion; and the provision of the Constitution that '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,' is the provision which specially applies to our present case. This provision plainly attests the understanding of those who made the Constitution that ordinary courts of justice are inadequate to 'cases of rebellion'—attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rules, would discharge. *Habeas corpus* does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the Constitution on purpose that men may be arrested and held who cannot be proved to be guilty of defined crime, 'when, in cases of rebellion or invasion, the public safety may require it.'

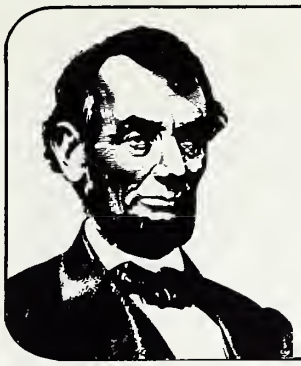
"This is precisely our present case—a case of rebellion wherein the public safety does require the suspension. Indeed, arrests by process of courts and arrests in cases of rebellion do not proceed altogether upon the same basis. The former is directed at the small percentage of ordinary and continuous perpetration of crime, while the latter is directed at sudden and extensive uprisings against the government, which, at most, will succeed or fail in no great length of time. In the latter case arrests are made not so much for what has been done, as for what probably would be done. The latter is more for the preventive and less for the vindictive than the former. In such cases the purposes of men are much more easily understood than in cases of ordinary crime. The man who stands by and says nothing when the peril of his government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy; much more if he talks ambiguously—talks for his country with 'buts,' and 'ifs' and 'ands.' Of how little value the constitutional provision I have quoted will be rendered if arrests shall never be made until defined crimes shall have been committed, may be illustrated by a few notable examples: General John C. Breckinridge, General Robert E. Lee, General Joseph E. Johnston, General John B. Magruder, General William B. Preston, General Simon B. Buckner, and Commodore Franklin Buchanan, now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them, if arrested, would have been discharged on *habeas corpus* were the writ allowed to operate. In view of these and similar cases, I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many.

"By the third resolution the meeting indicate their opinion that military arrests may be constitutional in localities where rebellion actually exists, but that such arrests are unconstitutional in localities where rebellion or insurrection does not actually exist. They insist that such arrests shall not be made 'outside of the lines of necessary military occupation and the scenes of insurrection.' Inasmuch, however, as the Constitution itself makes no such distinction, I am unable to believe that there is any such constitutional distinction. . . . .

"If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public safety does not require them; in other words, that the Constitution is not in its application in all respects the same in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security. The Constitution itself makes the distinction, and I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man because it can be shown to not be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting, that the American people will by means of military arrests during the rebellion lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and *habeas corpus* throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life. . . . .

"I further say that, as the war progresses, it appears to me, opinion and action, which were in great confusion at first, take shape and fall into more regular channels, so that the necessity for strong dealing with them gradually decreases. I have every reason to desire that it should cease altogether, and far from the least is my regard for the opinions and wishes of those who, like the meeting at Albany, declare their purposes to sustain the government in every constitutional and lawful measure to suppress the rebellion. Still, I must continue to do so much as may seem to be required by the public safety."

"A. Lincoln."



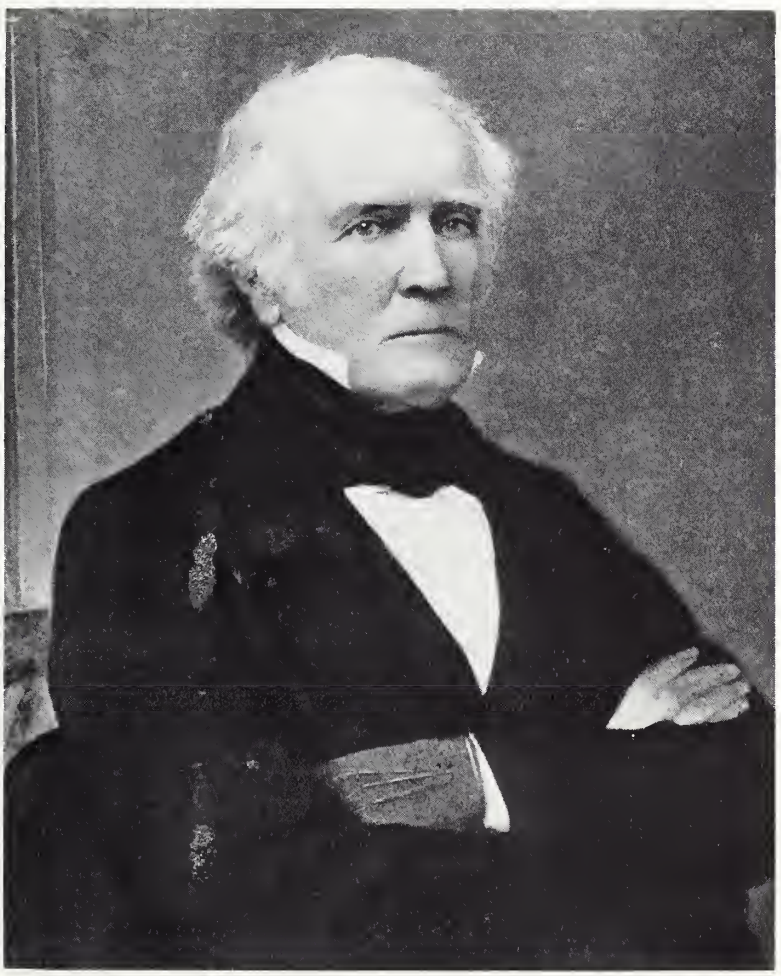
Lincoln Lore

July, 1975 Bulletin of The Lincoln National Life Foundation...Mark E. Neely, Jr., Editor. Published each month by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. Number 1649

A Philadelphia Lawyer Defends the President

"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." This one sentence is the sole mention of the writ of *habeas corpus* in the United States Constitution. Before the Civil War, it had figured only rarely and briefly in the country's seventy-odd years of constitutional disputes and controversies. In 1807, President Thomas Jefferson became sufficiently alarmed over the Burr conspiracy to ask Congress to suspend the privilege of the writ for a period of time. Behind closed doors, the Senate passed a bill to suspend for three months, but the House rejected the bill by a large majority. Chief Justice John Marshall, in a case which also stemmed from the arrest of an alleged member of the Burr conspiracy, *Ex parte Bollman,* said "that if at any time the public safety should require the suspension of the power" to issue the writ, "it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide." Finally, one of the great commentators on the United States Constitution, Judge Joseph Story, said rather tentatively, "It would seem, as the power is given to *Congress* to suspend *the Writ* of Habeas Corpus in case of Rebellion or Invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body."

There was nothing in the history of the use and interpretation of the *habeas corpus* clause in the Constitution to prepare the country for President Abraham Lincoln's suspension of the privilege of the writ of *habeas corpus,* which occurred as early as April 27, 1861. The issue was brought to public attention by the case of one John Merryman, who lived near Baltimore and was arrested on suspicion of being the officer in charge of a pro-secession Maryland military unit, of being a party to destroying railroad tracks and bridges to prevent loyal troops from reaching Washington, and of obstructing the United States mails. The Chief Justice of the United States Supreme Court, Roger B. Taney, also sat as a circuit judge in the Maryland federal court, and he issued a writ of *habeas corpus.* The military officer who had arrested Merryman refused to present Merryman to the court on the grounds that the President had suspended the privilege of the writ. Taney then wrote an opinion—as a circuit judge, not as the Supreme Court's Chief Justice—which claimed that President Lincoln could not suspend the privilege because Congress, like Parliament in England, alone possessed that power. Lincoln and Attorney General Bates ignored the opinion.



From the Lincoln National Life Foundation

FIGURE 1. This portrait of Horace Binney, copied from a photograph, pictures him as he must have looked about the time he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution.* The portrait appears in Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J.B. Lippincott, 1903).

Most of the authorities in print to that date and the Chief Justice of the Supreme Court thus argued that Lincoln could not do, constitutionally, what he had done. The President badly needed some legal opinion supporting his position. The Attorney General supplied one, but most authorities, then and ever since, agree that it was sloppily done and poorly argued. Joel Parker, Royall Professor of Law in the Harvard Law School, supported the President in an article for the prestigious *North American Review* entitled "Habeas Corpus and Martial Law." Parker, who would become a foe of the President after he issued the Emancipa-

tion Proclamation, argued broadly that in time of "paramount military obligation . . . the military law must be held to supercede the civil." Parker's argument was broader than it needed to be, for suspending the *habeas corpus* privilege subjects the party only to arbitrary arrest and confinement; it does not subject him to martial law and thus to trial by military tribunal rather than by jury in a civil court. President Lincoln was still in need of a persuasive defender who could sift the constitutional authorities and, in a rigorous way, supply a logical constitutional argument for the Executive's power to suspend the writ of *habeas corpus*.

1. A Conservative Admirer of Lincoln

The argument Lincoln needed came from an odd source, a conservative octogenarian lawyer from Philadelphia named Horace Binney, a man who had largely avoided political disputes for some thirty years. The President did not seek him out, but Francis Lieber, a German immigrant who became America's greatest early student of politics and probably her first professional political scientist, did. Lieber, who himself wrote many pamphlets encouraging loyalty during the Civil War, urged Binney to publish a pamphlet on the subject of the *habeas corpus*. Binney was interested in the question because he doubted the validity of the arguments he had seen, because he believed heartily in the Union cause, and because he was an admirer of President Lincoln.

Horace Binney was a rather unlikely Lincoln admirer. Born in 1780, he was a generation older than Lincoln. He attended Harvard College and graduated with high honors in 1797. He studied law with Jared Ingersoll in his home town, Philadelphia, and gained admittance to the Philadelphia bar in 1800. He served one term as a legislator elected on a fusion ticket of Federalists and Independent Democrats. Thereafter his law practice amidst the burgeoning commerce of Philadelphia became very lucrative. He became a director of the first United States Bank. In 1832, he ran successfully for Congress, this time as an anti-Jackson candidate (and with the understanding that he would not have to support Pennsylvania's pet interest, the protective tariff; that a vote for him should be considered only a vote against Andrew Jackson; and that he would not be bound to act with any party in Congress). There he became rather embittered against party politics; "the spirit of party," he said, "is a more deadly foe to free institutions than the spirit of despotism." He retired for the most part from active court work twenty-four years before the Civil War began, and, although he wrote several eulogies and an historical piece on the authorship of Washington's Farewell Address, he was little involved in political questions until the war broke out.

Binney disliked democracy, whether with a small or a large "d," and he opposed the provision of the Pennsylvania Constitution of 1838, which made the tenure of the state's judges a period of years rather than during good behavior. He was a rather crusty Federalist as long as that party existed. He always hated the Democratic party, but he had his reservations about the Whigs as well, especially insofar as their leaders, Henry Clay and Daniel Webster, practiced the political arts to gain the Presidency. Writing, appropriately enough, to Alexander Hamilton's son, J.C. Hamilton, in 1864, Binney accused Clay and Webster of caring "nothing about true fame" and of wanting "only . . . to get on the top of the pillar, like Simeon Stylites, to be looked at with upturned eyes by the people, and to be fanned with the *aura popularis* from all quarters of the heavens." He concluded:

> These aspirations for the President's office are to me a wonder and an astonishment, and I sometimes think that the most decisive argument against a republic is that it fools and dwarfs the best minds in the country, by directing their hearts towards the vain, ephemeral show of the first office in it, to be obtained by popular arts and intrigues; and the saving feature of a monarchy is its permanent, though personally insignificant, head, which compels men of great minds from thinking of the pinnacle, and drives them to work for their own fame in the elevation and consolidation of their country. . . .

Thus Binney was a true old Federalist who never quite adjusted himself to the age of the common man which flowered with Jacksonian democracy. His biographer, Charles Chauncey Binney, noted perceptively that it was Binney's dislike of democracy that made him the enemy of the Democrats without really being the friend of the Whigs.

> Mr. Binney's opposition to the Democratic party was due to its having made democracy its fundamental principle from the start, but he was well aware that after the passing of Federalism, the democratic spirit affected all political parties. Writing about 1840, he said, "The Whigs are at this day more democratic in their devices and principles than the Democrats were in the days of Jefferson. There are few or no sacrifices of constitutional principle that the Whigs will not make to gain power, as readily as the Democrats. . . . they have entered into full partnership with those who trade upon the principle that the people are all in all, that their voice is *vox Dei*, that the masses are always right, and that nothing else is fundamental in government but this. What the Whig affix means, I think it is difficult to say. . . . The only question is how to obtain most of the sweet voices and emoluments of government, and this is as much a Whig object as a Democrat object, and there is no obvious or characteristic difference in the nature of their respective bids."

Binney explained his political philosophy, as opposed to his party principles, to his British friend J.T. Coleridge in 1863, "I have a horror of democracy as the radical principle of a government, . . . while I am as firm a friend of free government as any man that lives." He reconciled the two seemingly divergent beliefs by invoking the age-old idea that representatives were responsible to God, though chosen by the people:

> That the people are the final cause and the Constitutional origin of all power among us is true. . . . But the moral source of all power, which is also the source of the people, has respect to the ends and purposes, the sure establishment of freedom as well as its diffusion, [and] the people as people are not the true source of it, but God above, and the moral qualities with which His grace imbues some and not all men. Virtue, reason, love for mankind, which come from the eternal source of all power, have better right to exercise it than man simply.... His moral qualities are his true title; and therefore, while I admit him to be the final cause of political power with us, I do not admit him to be the efficient cause of power in government.

He recognized equality of opportunity for political distinction but not equality of capacity and therefore required "siftings, distinctions, and qualifications, in all preparations for the exercise of political power. . . ."

Despite the dominant anti-democratic theme in his long life, Binney found much to admire in the railsplitter whose skillful practice of the political arts brought him to the Presidency in 1861. He apparently knew little or nothing about Lincoln before he assumed the office, and he therefore judged the President by his acts. Binney liked what he saw. In March of 1861, he discussed Lincoln's Inaugural Address with Coleridge:

> . . . I hope you will agree with me that it is a plain, sensible paper, expressing right doctrines as to the perpetuity of the Constitution, the unlawfulness of *secession*, and the duty of enforcing the laws; and in a kind temper, tho' with all requi-

FIGURE 2 (facing page 2). Horace Binney's pamphlet appears in the upper left hand corner. Judge S.S. Nicholas of Louisville, J.C. Bullitt* of Philadelphia, George M. Wharton* of Philadelphia (in two pamphlets), Tatlow Jackson,* Edward Ingersoll of Philadelphia, John T. Montgomery* of Philadelphia, C.T. Gross, William M. Kennedy, Isaac Myers,* and James F. Johnson* answered it. Sydney George Fisher's "Suspension of Habeas Corpus During the War of the Rebellion" identifies the author of the pamphlet shown in the lower left-hand corner as David Boyer Brown; previous owners have identified it on the cover as Frank Taylor's pamphlet. Wharton's and Montgomery's answers are also pictured. Asterisks (*) indicate pamphlets in the Lincoln National Life Foundation collection.

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

THE

WRIT OF HABEAS CORPUS,

MR. BINNEY.

BY JNO. T. MONTGOMERY.

SECOND EDITION.

PHILADELPHIA:
JOHN CAMPBELL, BOOKSELLER,
[illegible] CHESTNUT STREET.
1862.

REPLY TO HORACE BINNEY
Editor of The Press
from S. Taylor
ON
THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

BY

A MEMBER OF THE PHILADELPHIA BAR.

PHILADELPHIA:
JAMES CHALLEN & SON, PUBLISHERS,
1308 CHESTNUT STREET.
FOR SALE BY
ROSS & TOUSEY, New York; A. WILLIAMS & CO., Boston;
H. TAYLOR, Baltimore.
1862.

REMARKS

ON

MR. BINNEY'S TREATISE

ON THE

WRIT OF HABEAS CORPUS.

BY

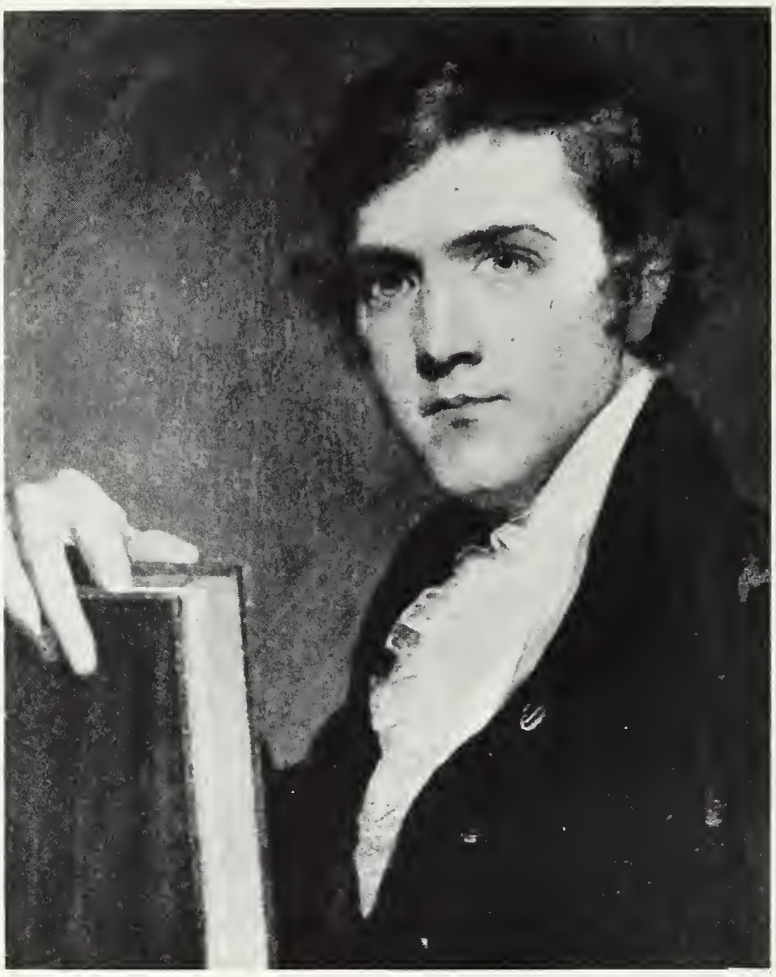
G. M. WHARTON.

SECOND EDITION.

PHILADELPHIA:
JOHN CAMPBELL, BOOKSELLER,
[illegible] CHESTNUT STREET.
1862.

From the Lincoln National Life Foundation

site firmness, declaring his purpose to administer his office with fidelity, and with effect as far as the country shall supply the means. I should think, and this is the common opinion, that the paper has been written by himself; and that it is a proof of a plain, sound mind, free from any disposition to press what he thinks right with much rigour, or what he thinks wrong or plainly expedient, from mere fidelity to party; the best temper, perhaps, for our country. His reasoning upon disputed points, where I have examined it with attention, appears to be accurate, and his heart kind. He is generally regarded as a cordial man, not highly educated, but of good reasoning powers, and both calm and brave. On the whole, I like his début. The *people* will understand him; and that is a great point with us.



From the Lincoln National Life Foundation

FIGURE 3. Proof that Horace Binney's career bridged two widely separated eras lies in comparing this portrait with the one on the cover. This portrait was painted by Gilbert Stuart in 1800. When the painter was told that he had put the buttons on Binney's coat on the wrong lapel, he said, "Have I? Well, thank God! I am no tailor." Then he changed the coat to a double-breasted model. The color (which is claret) Stuart made up because it went well with Binney's complexion; Binney never owned a coat that color. A reproduction of the portrait appears in Charles Chauncey Binney's *Life of Horace Binney*.

Nine months later, Binney was still describing the President in radiant hues for his English correspondent, though with the customary reservations about Lincoln's physical appearance.

> The character of this President has come to be received by nearly all among us (the free North and West) as very frank, unaffected, and honest. I recollect no President, who was so little known when he came into office, who so soon, and in times of vast difficulty and very general self-seeking, as well as of great devotion to public service, has acquired a very full confidence of the people for these qualities. He seems to be an entirely sincere and honest man. He does not appear to think much of himself, but is disposed to give all he has, and is, to the country; and to shew himself always in his own clothes. Perhaps he might get handsomer; but we have been so much annoyed by pretensions in some of our Presidents, that we are not sorry to see a little more of the undress or natural style.

In March of 1862, after the Trent Affair, Binney favorably explained the President's role to Coleridge, who was naturally interested in the strained relations between the United States and Great Britain.

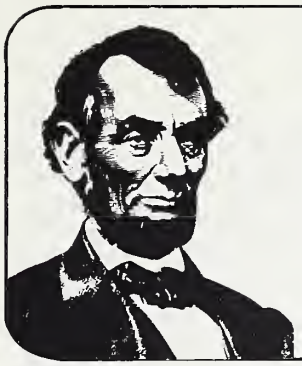
> We feel, I think, more kindly towards England since the settlement of the Trent affair; and perhaps Mr. Seward—I ought to say the President, for he is not thought to be a cipher in such matters—did well in not announcing too promptly his purpose or inclination to the people. He gains daily upon all of us, in the great attributes of integrity, a love of justice, clear good sense, untiring industry, and patriotism. He also is thought to know the people, which is a great matter, as he came in without the reputation of being able to lead them by command.

2. *The Privilege of the Writ of Habeas Corpus under the Constitution*

Fortunately for President Lincoln, Horace Binney was at his lawyerly best when, in the autumn of 1861, he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. This is not to say merely that the Philadelphia lawyer's argument was ingenious, though many constitutional students at the time and ever since have recognized it as such, but that he eschewed unnecessary *dicta* which might have sat poorly with his jury. The jury which judged Lincoln was the American people, and they would not have taken kindly to Binney's old Federalist beliefs, to his uneasiness with democracy, and to his desire for government by those who had been sifted from the common herd by educational distinctions and conservative moral qualifications.

Lincoln's prosecutors, the Democratic politicians, would have had a field day had the ancient Philadelphia lawyer voiced the sentiments in the pamphlet which he voiced in his private letters to Alexander Hamilton's son and to skeptical British conservatives. The Democrats were having trouble distinguishing themselves from the Republicans anyway. They supported the war for the Union as much as the Republicans did, and Lincoln had not yet provided them with an issue by turning it into a war for the freedom of the Negro. Their traditional appeals to the economically disaffected had little appeal in the midst of war-induced economic prosperity. All that was left to them was the issue of civil liberties, and this would have been powerful indeed had the President's defenders justified the suspension of the privilege of the writ of *habeas corpus* as suitable discipline for an unruly democracy. As it was, Democrats would attack the suspension and Binney's defense of it time and time again, but the nature of his argument often confined them to narrow constitutional grounds and denied them any *ad hominem* argument that only crusty old Federalists supported such things in the tradition of the Alien and Sedition Acts of John Adams.

Binney's argument was strictly, which is not to say narrowly, constitutional. There was little or nothing of political philosophy in it. He merely tested the suspension of the privilege of the writ of *habeas corpus* by the various forms of constitutional argument used in his day. *(Continued in next issue)*



Lincoln Lore

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A Philadelphia Lawyer Defends the President (Cont.)

First, he addressed the language of the Constitution itself. Here, and here alone, Binney had to use "the broad constitutional and natural argument" rather than "the merely legal and artificial." The narrow legal argument would say that the clause in the Constitution does not say explicitly who can suspend, but "suspend" means by customary English usage—and it is from English law that ours derives—passing a law to countervail the writ which is instituted by law. Only Congress can make law, and thus Lincoln had no power to suspend the writ. Binney argued that such reasoning did not apply in this case because there is a peculiar American science of politics stemming from the fact that the Constitution is superior to all political power and itself makes things legal which Congress, unlike the British Parliament, cannot make legal or illegal. "Suspending the *privilege* of the Writ," he argued, "is not an English law expression. It was first introduced into the Constitution of the United States." The true reading, therefore, was this:

From the Lincoln National Life Foundation

FIGURE 1. In this detail from a ghoulish anti-Lincoln cartoon, President Lincoln, Secretary of the Treasury Salmon P. Chase, and Secretary of the Navy Gideon Welles watch as Horace Greeley and Senator Charles Sumner lower a coffin labeled "CONSTITUTION" into a grave. Other coffins are labeled "FREE SPEECH & FREE PRESS," "HABEAS CORPUS," and "UNION." The cartoon is entitled "The Grave of the Union. Or Major Jack Downing's Dream, Drawn By Zeke." It was published in 1864 by Bromley and Company in New York City. The cartoons were available at 25¢ per copy, five for a dollar, fifty for nine dollars, and one hundred for sixteen dollars. Although the constitutional argument as outlined by Horace Binney, Roger B. Taney, and Attorney General Edward Bates was dry and complex, the issue of suspending the privilege of the writ was a popular issue exploited by the Democrats in cartoons and campaign literature.

> The Constitution of the United States *authorizes* this [suspension of the privilege] to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done,* that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

To answer "the question of the day" was now easy. All Binney had to do was to determine which department of the government customarily exercised power over the sorts of questions mentioned in the *habeas corpus* clause. The executive is clearly the power which must cope with rebellion and invasion and declare when the public safety has been endangered by them. As a result of the Whiskey Rebellion of 1794 (Binney called it the Western Insurrection), a law of 1795 clearly enacted "that when the United States shall be invaded or be in imminent danger of invasion" and "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." A Supreme Court decision, *Van Martin* v. *Mott* laid it down that the President's judgment was conclusive; he could decide the point at which there was rebellion. In fact, President Lincoln called forth the militia in 1861 by authority of that 1795 act.

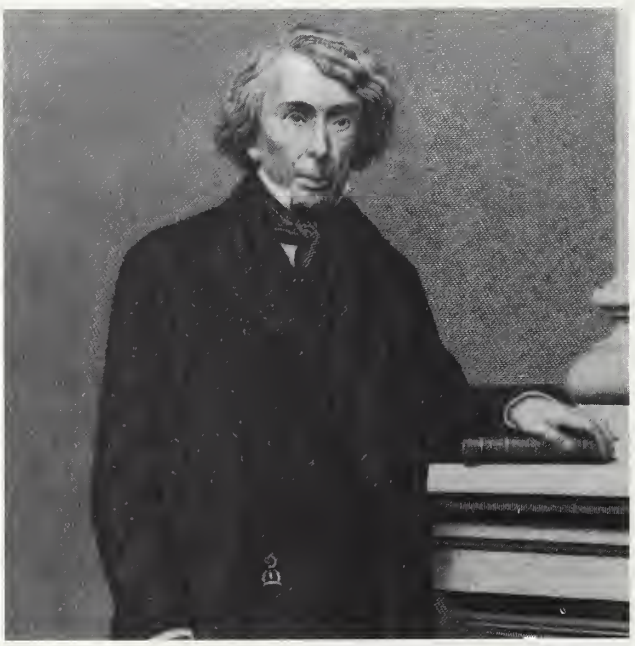
The second and most important aspect of Binney's argument was its rejection of the applicability of British example by analogy. Sydney George Fisher wrote what remains the outstanding treatment of the subject of "The Suspension of Habeas Corpus During the War of the Rebellion" for the *Political Science Quarterly* as long ago as 1888, and his summary of Binney's case in this regard merits quotation at length:

> It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. . . . Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.
>
> There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. . . . But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm.

Having explicated the language in the Constitution itself and having disposed of the argument by analogy with English precedent, Binney then proceeded to examine the intent of the framers of the Constitution, insofar as there was evidence in their writings or in the records of the secret Constitutional Convention of 1787. Charles Pinckney of South Carolina originally contemplated a suspension by Congress only in times of invasion or rebellion. Later, he suggested suspension by Congress on vaguer grounds ("upon the most urgent and pressing occasions") and for a limited time period stated in the Constitution itself. Gouverneur Morris of New York suggested the final language a few days later. According to Binney, the convention rejected Pinckney's English view (suspension by the legislature when it deemed it necessary) for a uniquely American view. Originally, the clause was placed in the article pertaining to the judiciary, but the committee on style placed it in the first article because that section was restrictive throughout, not because most of the section places restraints on Congress.

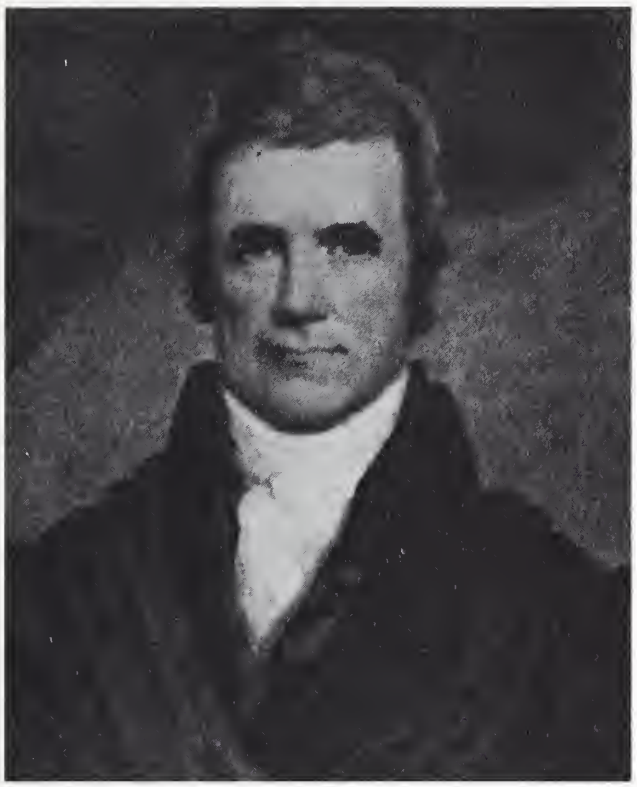
Binney then addressed the rather meagre judicial history of the clause. Taney's recent decision in the Merryman case had no authority because it did not come from the Supreme Court but from a circuit court. John Marshall's language in *Ex parte Bollman* had no bearing on the case, because there was no invasion or rebellion at the time, and neither President nor Congress had suspended. It was strictly an o*biter dictum,* not bearing on the nature of the case he had before him. Finally, Joseph Story's opinion was of little weight because it was the opinion of a *commentator* and not of a judge actually deciding a case or precedent.

Binney wrote before the era of the "sociological brief," and he did not address the question whether, in the abstract, it was better for the American people that Congress or the President have the power of suspension. He eschewed the argument from utility and confined himself to the customary lawyerly grounds for deciding a constitutional case: the language of the Constitution itself, the argument by analogy with English experience, the intent of the framers of the Constitution, the precedents in previous judicial decisions, and the opinions of learned commentators on the American Constitution. His argument was a dazzling courtroom-style performance, tightly woven on strictly constitutional and legal grounds. It astonished everybody, for, as Sydney George Fisher said



From the Lincoln National Life Foundation

FIGURE 2. Roger B. Taney



From the Lincoln National Life Foundation

FIGURE 3. John Marshall

twenty-seven years later, Americans "had supposed that the question was a settled one," and "up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend." Though it prompted many outraged replies, Binney's argument also convinced a goodly number of authorities on the Constitution. Our view of Lincoln's construction of the powers of the Presidency would be much different today had this capable Philadelphia lawyer not taken time in his eighty-first year to defend the President.

3. Horace Binney and Slavery, an Epilogue

Charles Chauncey Binney carefully points out in his excellent *Life of Horace Binney* that the famed Philadelphia pamphleteer "by no means approved every act of the administration during the war, but he held that at such a time loyal men should refrain from all public criticism. He had his own opinions and he expressed them in private, but during the whole war no word fell from him which could have added the smallest feather's weight to the burden of those who were charged with the weighty task of government." By the autumn of 1862, Binney began to find fault, privately, with some of Lincoln's policies.

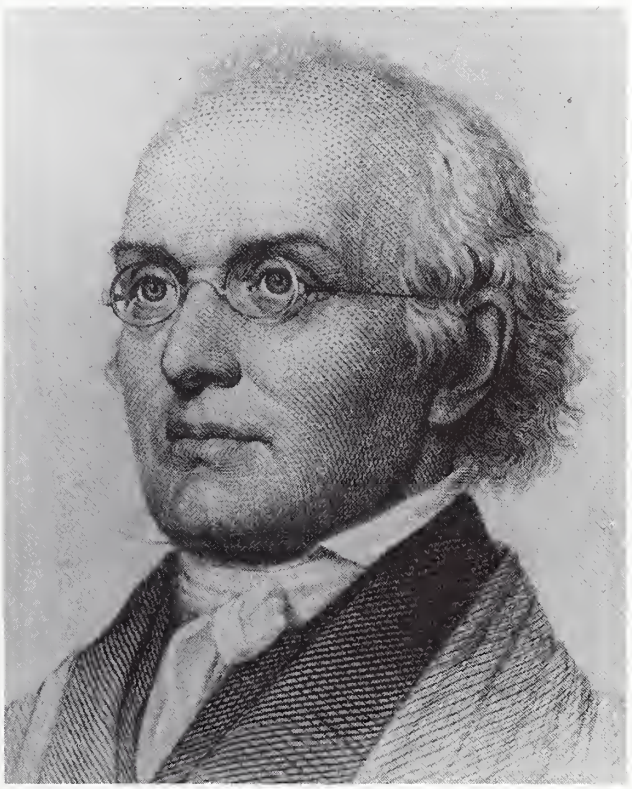
The first sign of misgiving came in an area one would deem surprising if one took Federalism to mean a form of undiluted conservatism. On August 5, 1862, almost two months before the issuance of the Preliminary Emancipation Proclamation, Binney wrote Francis Lieber a long letter about slavery, part of the contents of which follows:

> I have been much struck by the pointed and decisive answer the North is now giving to the pretence of the ambitious bad men of the South, who have poisoned their country with the belief that the North meant to uproot the institution of slavery, and therefore that it was impossible to avoid making war against us. The absence of any such Northern feeling generally, or even to a dangerous extent, is now the cause of our most dangerous and weakening divisions. Even in the midst of a war which is entirely defensive, and in the presence of imminent danger, it is the great impediment to the use of even military power to weaken the South by interfering in any way with their slaves.
>
> God knows I disapprove of the institution of slavery every way,—for its effect upon the slaves, still more for its effect upon the masters, most of all for its incompatibility, growing and incurable incompatibility, with such a government, black slavery pre-eminently. . . . I do not wish to be quoted to the President, or any of the Departments, or to anybody; but while I am not and never have been an abolitionist, in the imputed sense, I have no idea of protecting the slaves of the South in such a war, or of letting them interfere with the full use of our military means, with them or against them, to subdue the enemy. Unless this result is reached and the slaves are made to be *adstricti* [confined] to their own States, I do not see how we are to live hereafter, either united or divided.

Thus this Philadelphia conservative arrived at the position which urged some form of tampering with slave property out of military necessity before President Lincoln felt he could touch the South's peculiar institution.

When Lincoln did attack slavery, Binney expressed his first note of dismay with the President's policies. Binney's reasons were ones of constitutionality, and, by and large, he thought the President should have gone farther. Thus he wrote J.C. Hamilton on October 8, 1862:

> . . . the plans which have been adopted in the application in our immense force and resources I have sometimes disapproved when I thought I understood them, and much more frequently I have not understood them when our rulers have explained them. I go for the support of the government, as *per se* my duty, until mere obstruction shall be obviously better than what government is proposing to do; and that condition is not likely to occur. I say this in special reference to the President's Emancipation Proclamation, which is now the uppermost thing in the country. I do not understand the law of it. And do not believe there is any law for it, unless it be the law of force in war; and if it relies on that (which the Proclamation does not say, as I read it) it would, I think, have been much less disturbing to the country, and even more effectual, to have said it by way of conslusion



From the Dictionary of American Portraits, *Dover Publications, Inc., 1967*

FIGURE 4. Joseph Story

than of premises. . . . I still think the President is sincere and honest; but does the confidence of even his friends increase in his general competency?

In December, he wrote Lieber again. Binney had just read George Livermore's *Historical Research,* which the President was also reading or about to read (see *Lincoln Lore,* Number 1621). "I have travelled alongside of the muse of this history for more than sixty years," wrote Binney, "and all is written in my memory as Mr. Livermore records." He also asked Lieber what he thought of the President's recent Message to Congress. For his own part, he thought it

like his other messages, honest, sincere, and frank; and some of its *short* logic is good enough, but he does not excel, I think, in *long* logic, and I remain quite at a loss to reconcile his proclamation with his *projet* of emancipation, except by supposing that the emancipation shall apply only to those slave States which shall be represented in Congress on the 1st Jany., and to whom the proclamation seems to promise that they shall keep their slaves in slavery as they now are! I shall be glad, however, if he gets through the matter in any way, zigzag or otherwise. There is, I fear, no straight line of passage through it but force, if this people would consent to it.

By January of 1865, Binney had, despite his constant conservatism in the matter of democracy, moved along with the times (or rather ahead of them) sufficiently to write Lieber the following remarkable letter:

As to the universal suffrage of free blacks, my judgment is suspended. I have no repugnance to it. Fifty years ago, as a judge of election, I ruled that a free black native of Pennsylvania, who had paid his tax, was entitled to vote; and there was no dissent. Our Democrats, to accommodate the South, changed our [Pennsylvania] Constitution in 1838 (amended it, they said) by confining the elections to white freemen. But I have always questioned, and almost repudiated, the quietism of the Federal Constitution in turning over to the States the qualification for representatives in Congress.

Since 1903, Horace Binney has been remembered only for his pamphlet on the *habeas corpus.* Almost nothing exists in print on this remarkable man. To know him only by his pamphlet is to dismiss him as a facile conservative who was also an artful pleader of special causes. But we know today that the Federalist party, after the disappearance of which Binney never found a comfortable political home, comprehended an interesting variety of opinions. Some Federalists became politically adaptable in the declining years of their party; this was not, apparently, the case with Binney, who could never really get the hang of party politics. Some Federalists held attitudes towards slavery which were closely akin to those of later Republicans but were held back from any moral crusade by their being accustomed to an orderly hierarchical society which condemned political passion and individual self-assertion as the ultimate political sins. Binney was more at home with the America of 1861-1865 than of 1828-1856, and not merely because he could convert the Civil War to the cause of defending the authority of the national state, but because the times more nearly fit his moralistic vision of a political order. Parties were not gloried in in the 1860's, and slavery was clearly on the way out.

4. Conclusion

Binney receives honorable mention in several notable books. James G. Randall's *Constitutional Problems Under Lincoln* showed considerable respect for Binney's pamphlet. Without expressing a strong opinion as to its merits, Randall did fault Binney for his wish that the language of the Constitution had been more precise in regard to the *habeas corpus.* Writing in the age of "legal realism," Randall rather admired constitutional vagueness for the flexibility it allowed. In this respect, Randall's successor as a student of constitutional problems under Lincoln, Professor Harold Hyman of Rice University, is very much like his predecessor. Quoting a letter from Binney to Lieber with which one edition of *The Privilege of the Writ of Habeas Corpus under the Constitution* was prefaced, Hyman notes with approval that Binney thought the question "a political rather than a legal question,—a mixed political and a legal question. . . . No one should be dogmatical, or very confident, in such a matter," Hyman sounds like Randall when he adds, "At least Binney's frank inconclusiveness hit closer to constitutional realities than Taney's negative certainty or Bates's responsive geometry."

In truth, Hyman's remark and Randall's point of view both fail to capture the spirit of Binney's enterprise. After reading an answer to his pamphlet written by Judge S.S. Nicholas of Kentucky, Binney complained to Lieber:

What is the use of logic? Would you believe that for all my pains I get an answer from Judge Nicholas, which amounts to this and no more: If Congress, without the Habeas Corpus clause had taken away or not given the Habeas Corpus, how could the judiciary have helped it? God save the poor man who wastes lamp-oil on such heads! He does not perceive that this reduces it to a question of force. If the President will imprison without law, how is Congress to help it?

"What is the use of *logic?"* he said. Binney demolished Taney with constitutional logic, that is, with the traditional tools of the constitutional lawyer. For Binney, the life of the law was logic and not experience (to turn Holmes's famous saying on its head). He was vitally interested in what the Constitution actually said, whether American law was like English law, what the framers said, and what other judges said. Even the words of someone no farther removed than an accepted commentator (Story) were suspect. There was little or nothing of legal realism in this; this was a logic-chopper's work. He published no enthusiastic defense of the Emancipation Proclamation, probably for the reason that he could "not understand the law of it." Binney in no way challenged the accepted platitudes of mid-century constitutional jurisprudence. He was no less wedded to the separation of powers, say, than Edward Bates was; he simply located the ability to suspend the privilege of the writ of *habeas corpus* in that power which by long legal precedent could recognize a state of rebellion. If anything, his argument was a detriment to the advent of "legal realism," for Binney stressed a peculiarly American constitutionalism unlike that of Britain's ever-changing unwritten constitution and dashed Taney's analogy to English Parliamenttary practice to pieces.

George Fredrickson's *Inner Civil War* seems off the mark as well in its casual dismissal of Binney as a reactionary old fogey. "For Binney," says Fredrickson, "as for [Wendell] Phillips, the time of the Alien and Sedition Acts had returned, but for Binney it was an occasion for rejoicing." Binney's argument was not, apparently, opportunistic. The President had other defenders, his Attorney General and Joel Parker, for example; Binney entered the fray simply because he thought their manner of defense was wrong. He wanted to make a correct constitutional point. Nor did he rejoice uncritically in the opportunity war afforded authoritarianism. He disliked Nicholas's argument because it reduced law to mere force, and, more importantly, as his biographer points out, Binney had his differences with the Executive. Some of these were on the score that Lincoln took too authoritarian ground.

. . . it should be noted [says Charles Chauncey Binney] that he strongly disapproved of so much of the President's proclamation of September 24, 1862, as extended martial law and suspension of the Habeas Corpus to military arrests for discouraging enlistments, or for other disloyal, but not legally treasonable, acts. This proclamation went far beyond anything that Mr. Binney's pamphlets had justified, but he refrained from any public expression of his views, as he thought it the duty of loyal citizens not to hamper the administration by protests, although it might make mistakes or even exceed its legal power.

President Lincoln was indeed fortunate in having Horace Binney as his unsolicited defender. Binney himself has not been as fortunate in finding students with a sympathetic understanding of his constitutional world.

Lincoln Lore

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The Federalist, the Constitution, and the Civil War

Our age distrusts ideas. They are regarded as fanatics' tools, Freudian rationalizations, or cloaks for narrow economic interests. They no longer appear to be what separates man from the animal kingdom. Constitutional ideas are no exception, and more students of history study social processes than constitutional development.

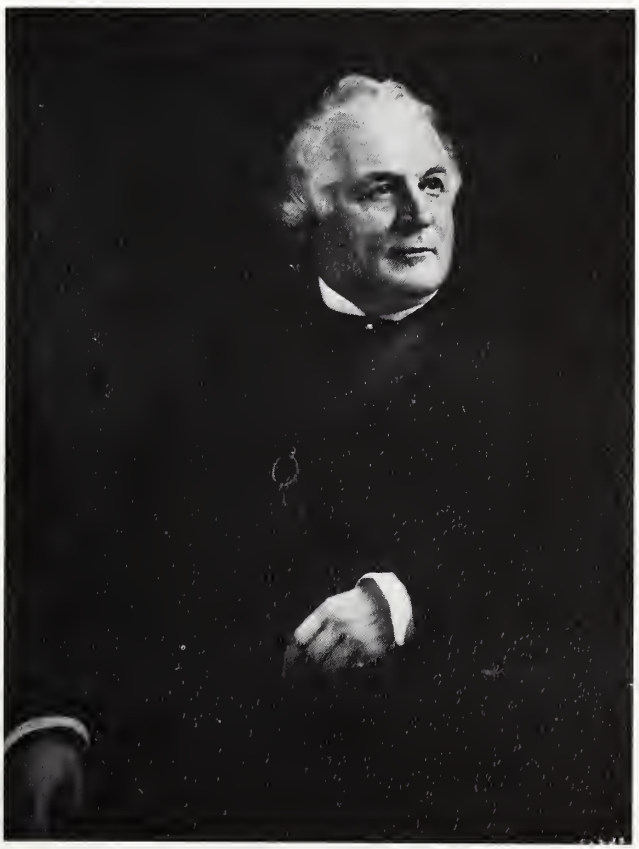
Such assumptions have led students of Lincoln's era to ask in what ways the Civil War shaped the Constitution and not in what ways the Constitution shaped the Civil War. Only recently, with the work of Arthur Bestor, Harold Hyman, and their many students and disciples, have constitutional historians of the Middle Period come to look at events the other way around and see the Constitution as more a shaper than a follower of social, political, and military events.

This has been a most valuable corrective. It has helped us to make sense of Lincoln's age as an age which thought constitutions crucial shapers of human destiny and not the high-sounding rationalizations of the social group which is ruling the other social groups in the nation. It has sent some historians back to the long-neglected texts of the legal commentators, law professors, and students of politics who were most influential in shaping that age's understanding of constitutional conflict.

Right now, there seem to be only two faults, one minor and one more important, with this commendable turn of events. First, some of the work has been rather superficial and poorly grounded, particularly in the pamphlet sources and the drier textbooks of constitutional law and government. This is presumably only a sign of the movement's youth; there has not been enough time for scholars to master a wide range of the literature. Second, and more serious perhaps, the emphasis on the Constitution's stubborn ability to resist social forces that might alter it to their temporary whim slights the rather daring nature of some of the constitutional thought of the Middle Period.

From time to time, articles in *Lincoln Lore* have commented on certain important aspects of constitutional thought (see Numbers 1623, 1649, and 1650 for discussions of William Whiting and Horace Binney, for example). Articles on these subjects will continue to appear because constitutional issues are the crucial ones for the reputations of American Presidents. Anyone who has read the old *History of the United States under the Administrations of Jefferson and Madison* by Henry Adams or one of the newer novels by Gore Vidal, *Burr,* knows that Thomas Jefferson's reputation did not survive his constitutional about-face on the question of the constitutionality of territorial acquisitions by the Executive in the case of the Louisiana Purchase. Likewise, the crucial question for evaluating Abraham Lincoln's administration remains an essentially constitutional question. Was President Lincoln willing to bend the Constitution to save the Union but not to free the slaves?

There is no intention to answer that question here, and it is stated merely to suggest the importance of understanding the constitutional thought not only of Abraham Lincoln but of his era in general. With the thought of that importance in mind, these articles on constitutional issues in the Civil War will continue.



Courtesy the Union League Club of New York City

FIGURE 1. John Jay

One of the signs of the thinness of the work done on constitutional thought during the Civil War is the curious absence of any literature on the question of what happened during Lincoln's administration to the most important commentary on the American Constitution ever written, *The Federalist* papers. There is only one reference to *The Federalist* in all of Harold Hyman's book, *A More Perfect Union,* and there it is given only passing mention as one in a long list of books read by one of the period's constitutional thinkers. Douglass Adair, the noted expert on *The Federalist,* asserts that the Civil War marked a major turning point in American appreciation of the work of Alexander Hamilton, John Jay, and James Madison, but he does not mention any edition of the papers or commen-

tary on them which stemmed from the period of the war itself; he simply notes a much altered understanding *after* the war was over.

There was, however, a rather important edition of *The Federalist* published during the Civil War, and the circumstances surrounding its publication provide an interesting insight into the passions which surrounded constitutional interpretation in the North during that period and the radical sorts of thinking which that great crisis could evoke.

In 1863, Henry B. Dawson of Morrisania, New York, published a new two-volume edition of *The Federalist* based on careful research in the New York Historical Society. It was called *The Foederalist: A Collection of Essays, Written in Favor of the New Constitution, as Agreed upon by the Foederal Convention, September 17, 1787.*

The son of a British gardener who emigrated to New York in 1834, Henry B. Dawson began doing historical writing in the 1850s, after a varied career as gardener, accountant, insurance salesman, and journalist. A temperance advocate, Dawson was an early convert to the Republican party from his original convictions as a Democrat (he voted for Polk in 1844), a Barnburner (the anti-Southern wing of New York's Democratic party), and a Free Soiler in 1848. Dawson retained his old interest in states' rights throughout his flirtation with new reform interests, and by 1860, apparently, he had decided that the Republican party had dangerous tendencies towards centralization and disregard of the Constitution's protections of the rights of the states.

Doubtless his political opinions helped persuade him of the need for a definitive edition of *The Federalist,* and he planned to issue an elaborate set of notes to accompany the two volumes, two volumes of the writings of the Anti-Federalists, and some original work of his own on the meaning of *The Federalist.* Only the edition of *The Federalist* itself appeared, however, and Dawson's other historical interest (in military history, the local history of Westchester County, New York, and the American Revolution) soon displaced his interest in doing a major work on the Constitution. There was an antiquarian and purely historical bent to much of his work; he could get quite excited about the merits of Israel Putnam's generalship (so excited, in fact, that the Connecticut Legislature took special action to protect the reputation of their Revolutionary hero from Dawson's onslaught) or Mad Anthony Wayne's assault on Stony Point. He does not seem to have been active as a political pamphleteer during the Civil War, nor was he notably active in Democratic party politics. Therefore, one might surmise that a fair portion of his interest in *The Federalist* was in producing an historically accurate edition of those very important constitutional commentaries. This conclusion is buttressed by his dedication of the book, not to George McClellan or Jefferson Davis or Fernando Wood, but to that quiet Massachusetts antiquarian George Livermore (see *Lincoln Lore* Number 1621).

Dawson prefaced his edition with an elaborate 89-page introduction which carefully traced the history of the conflict over the authorship of some of the papers and noted some twenty previous editions of the work since the essays first appeared in a New York newspaper. This discussion seems harmless enough, though it does tend to stress the importance of James Madison at the expense of Alexander Hamilton. After the war, exactly the reverse would be the case with most *Federalist* scholars who were anxious to deemphasize the role of the Virginian Madison in writing the definitive interpretation of the Constitution, which had been repudiated by Virginia itself and saved only by a war on Virginia and her sister Southern states.

What provoked the most interest at the time (and still does) was a series of introductory remarks about the political circumstances surrounding the writing of *The Federalist* in the first place. These remarks, made almost in passing, were a startling prefiguring of Charles Beard's *Economic Interpretation of the Constitution of the United States,* written fully fifty years later than Dawson's introduction. Beard's book, though now discredited, dominated thought about the Constitution for forty years.

Dawson stressed the importance of New York for the new nation and the reluctance of New York to ratify. The giant state had the ability to cut New England off completely from the Middle Atlantic and Southern states and had shown very little interest in joining the new national union. Two of the three delegates from New York to the Constitutional Convention in 1787 had walked out, and the opposition to the new instrument of government within the state was well organized and eloquent. The greatest problem of the Constitution's advocates, claimed Dawson, was finding leaders inclined and qualified to take their case to the hostile people of the state. Robert R. Livingston was too lazy (or as Dawson phrased it, "an overpowering love of ease prevailed over every other trait in his character"). James Duane had been too thick with Crown authorities before the Revolution to have any *rapport* with the people now. John Jay, though a capable diplomat and hard-worker, "nevertheless failed — if he ever tried — to secure the hearty sympathy of the masses of his countrymen, and was not qualified to direct them in any struggle whatever." Jay was so uncompromising as to be almost bullheaded, and "the greater number of his fellow-citizens considered him selfish, impracticable, and aristocratic."

Leadership, therefore, fell naturally to Alexander Hamilton, learned, well liked, opportunistic, and eloquent. Hamilton devised this strategy, according to Dawson:

> It is evident, . . . that he resolved to appeal to the cupidity of the commercial classes — with whose well-known tendency to conservatism, at all times, he was well acquainted — by assuming that the immediate adoption of the proposed Constitution, *without amendment,* by the State of New York, was necessary in order to preserve the Union from disruption, and the State from anarchy, if not from dismemberment and annihilation; that a peremptory rejection of it by the State of New York, or a prolonged delay in ratifying it, which would be necessary if a previous revision of the instrument should be demanded by that State, would be productive of the most serious evils, both to the State and to the Union; and that the derangement of the Foederal finances was the legitimate result of a radical defect in the Articles of Confederation; while the apparent stagnation of trade, — the necessary consequence of an oversupply of goods and of an undue proportion of vendors when compared with the aggregate of the population, — by being magnified to such an extent, and presented in such a manner, as to make them appear as the necessary results of a defective form of Government, he hoped, might also afford him great assistance as an introduction both to his projected condemnation of the existing Foederal system, and to his proposed appeal in behalf of "the new Constitution."

When Dawson's introduction fell into the hands of a stalwart New York Republican pamphleteer who happened also to be a grandson of one of the leaders mentioned disparagingly in the work, the fireworks ignited. John Jay was a fiery Republican organizer and pamphleteer. A long-time opponent of slavery, he had been one of the earliest founders of New York's Republican party. He was also a founder of the Union League Club of New York, formed to combat disloyalty in the North, and served as president of that organization in 1866 and in 1877. He was minister to Austria and later a civil service reformer.

During the Civil War, Jay contributed over twenty pamphlets and numerous speeches to the Republican cause. When he saw Dawson's book, he wrote a letter of protest to the *New York Evening Post.* Dawson damned *The Federalist* with faint praise, said Jay, in the very hour when the constitutional work of the Founding Fathers should be most venerated. Dawson had slandered "HAMILTON'S magnificent logic and broad patriotism" by attempting "to belittle his grand and successful efforts to array the people on the one side of the constitution, by representing it as an 'appeal to the cupidity of the commercial classes.'" Finally, he had totally

Courtesy Fort Wayne Public Library

FIGURE 2. Henry B. Dawson

misrepresented the character and reputation of his grandfather, John Jay. "I shall not trouble myself," wrote Jay, "to inquire whether these charges have originated in ignorance or in malice, whether they result from the prejudices of education as a states right democrat, or deeper yet, from your native British instincts, if, as I have heard you are by birth an Englishman, or whether they are in any way connected with the design announced in your prospectus to revive the anti-federal publications . . . , from whose strenuous efforts to prevent the adoption of the constitution the country was so happily rescued by the earnest patriotism of the federalists." Jay ended with a peevish and rather stuffy criticism of Dawson's retaining an accent over the *a* in his grandfather's name despite Jay's having ceased at an early age to sign his name with a dash over the *a*.

Dawson replied in kind, noting that it was, "indeed, proper that you should remember with gratitude the grandfather through whose bounty you eat your daily bread in busy idleness; nor is it strange that you should be jealous of that other portion of your inheritance — 'the fame of your grandfather' — your own best title to distinction." Dawson refused to apologize for his English birth, saying he was a New Yorker by choice and for 30 of his 42 years. He also admitted being "a States'-rights democrat," but added that Jay had been one also at one time, not out of grounded conviction, however, but "because you supposed that you might thereby the sooner establish yourself politically among the German and other European Republicans, and, as it has since apppeared, the sooner obtain your translation to London" (as Ambassador to the Court of Saint James).

Later, Jay published a "Second Letter on Dawson's Introduction to the Federalist" as a pamphlet with the significant phrase on the cover, "New Plottings to Aid the Rebellion" and with an assertion of "Its Connection with Similar Efforts by Traitors at Home and Foes Abroad, to Maintain the Rebel Doctrine of State Sovereignty for the Subversion of the Unity of the Republic, and the Supreme Sovereignty of the American People." Jay had decided that Dawson's were the errors not of ignorance but of malice and that "his 'Introduction' is but part of a wide-spread attempt to mystify and demoralize the American people in regard to the American constitution: to convince them, if possible, that they do not constitute a nation: and to persuade them that their only safety consists in dissolving Union, and recognizing the individual sovereignty of each separate State." Jay recognized immediately that the acceptability of the Constitution depended on the assumption that the period preceding it, when the country was governed by the Articles of Confederation, was a time of disaster, crisis, and national ineffectualness. If times were not as bad as Daniel Webster ("It had its origin in the necessities of disordered finance, prostrate commerce, and ruined credit") and George Ticknor Curtis (the Union was "feeble, and trembling on the verge of dissolution") claimed it was, then, Jay knew, "the American people, by the most scandalous deception, were swindled into the ratification of the Constitution."

This was all too much for Dawson, and he sued John Jay as well as the American News Company, which had distributed the pamphlet, for libel. In October of 1865, the Court of Common Pleas under Judge Alexander Cardozo heard the suit, with two of the greatest lawyers in America, William M. Evarts (who would defend Andrew Johnson in his impeachment trial) and Joseph H. Choate, defending John Jay. Dawson cited the title page of the *Second Letter* as the libellous matter. Jay's skilled counsel evoked laughter in belittling Dawson's case:

> [Dawson's] counsel also asked what was the meaning of having such a motto on the pamphlet as the famous words of General Dix about shooting down the American flag ["If any man attempts to haul down the national flag, shoot him on the spot."]? Was it not intended to convey the significance that Dawson was a traitor, who ought to be shot down for dishonoring the American flag? What else could it mean? Shoot down what? Mr. Choate — The book, not the man. (Laughter.)

Evarts then launched into a ringing defense of freedom of the press and the right to criticize literary and political subjects of a public nature. "The writer of a book on bank note counterfeiting," he added, "might be written down a fool and an ass by a literary critic; but the critic would not be justified in calling the writer a counterfeiter himself." Although several of the biographical sketches of John Jay and Henry B. Dawson note that they had a disagreement, none notes that there was a legal case, despite the eminence of the parties to the suit and their counsel. Such were, nevertheless, the explosive tempers that could be aroused over interpretations of the Constitution in the North during the Civil War. What is striking to the modern reader is the foreshadowing of Charles Beard's economic interpretation of the Constitution. To be sure, Dawson was a long way from Beard. He wrote as though the Constitution were a dog of a product that Hamilton had to sell and that Hamilton hit upon the ingenious idea of selling it as being to the economic interests of the merchants. Beard would insinuate that the very men who wrote the Constitution were attempting to protect their personal economic interests. Neither interpretation is highly regarded by modern scholars who are rediscovering the importance of constitutional ideas.

John Jay sensed only the importance of the interpretation of the course of events under the Articles of Confederation. He found the allegation of an appeal to "cupidity" repulsive but also, apparently, unbelievable and wasted no time in explaining the economic interests of the friends and foes of the Constitution. Jay was so transfixed by the slander on his family name that the argument degenerated to a level almost of name-calling and important issues were lost in the shuffle.

Dawson's introduction to *The Federalist* was an interesting, if only fleeting, instance of the ability of the Civil War to take constitutional thinking in new directions. As such, it was an exception to the rule. Secession wrecked the nation the

Constitution had created and made the whole North, regardless of party, defensive about the Constitution. Neither Republicans nor Democrats tended to think in new ways about the Constitution. Republicans of an anti-slavery bent had long differentiated themselves from abolitionists by saying that they would attack slavery only where the Constitution allowed them. President Lincoln knew that wartime stretching of the Constitution would be unlikely to last and therefore fretted that the Emancipation Proclamation would be null once the war was over. The Republicans were constitutionally conservative. Their opponents, a party which claimed the inheritance of strict constructionist Jeffersonianism, chose to oppose the Lincoln administration with charges that the President rode over the Constitution roughshod. Everyone claimed to be saving the Constitution.

It is important to keep this constitutionally conservative atmosphere in mind in studying Lincoln's Presidency. This should not, however, keep us from noting the ways in which the war strained the Constitution and led, at times, to ideas about that document that were very new indeed.

A Mysterious Presentation Copy of the *Debates*

The recent discussion of the acquisition of the J. S. Bradford presentation copy of the *Political Debates Between Hon. Abraham Lincoln and Hon. Stephen A. Douglas in the Celebrated Campaign of 1858* has aroused considerable interest among *Lincoln Lore's* readers in the location and provenance of the various extant presentation copies (see "Recent Acquisitions: A Presentation Copy of the *Debates*" in *Lincoln Lore* Number 1659). Therefore, this issue initiates a series of articles on the presentation copies in an effort to update the last article on these prized items of Lincolniana, Harry E. Pratt's "Lincoln Autographed Debates" in *Manuscripts,* VI (Summer, 1954), 194-201. *Manuscripts* is not the easiest periodical to come by, and there have been enough developments (changes in ownership, more knowledge of the circumstances surrounding the presentation, etc.) to warrant a brief reexamination of the known copies.

When Pratt wrote his piece, the copy presented to "Stephen S. Winchester, Esq. With Compliments of A. Lincoln" was the property of J. K. Lilly of Indianapolis. It is now in the collections of the Lilly Library at Indiana University.

Nothing of note has turned up to explain the provenance of this presentation copy, and that is too bad, because it remains unclear just who Stephen S. Winchester was and why he should have been one of the privileged recipients of Lincoln's book.

We know the story of its discovery in modern times quite by accident. Charles Goodspeed, the Boston rare book dealer, happened to use the story of its discovery as an illustration of the ironies of the rare book trade (and, perhaps, as a subtle advertisement for his own honesty and thoroughness as an appraiser of estates). Henry Winchester Cunningham, an old customer, told Mr. Goodspeed that he was giving his library to a certain society upon his death. Goodspeed was a member of the society and agreed to select the books needed for the society's collections and then sell the duplicates, giving the society credit for the sales price.

By chance, however, Goodspeed was also asked by an independent appraiser of estates to appraise what turned out to be the very same collection for another purpose: Mr. Cunningham's will had read that the society would receive all of his books and pamphlets except those that a personal friend (unknown to Mr. Goodspeed) might wish to have. Now Mr. Goodspeed would be appraising the estate with something of a conflict of interest involved, for it was likely that the friend would keep anything of great value, and the society would fail to receive it. Nevertheless, he accepted the second commission to appraise the estate as well. The result of Goodspeed's thoroughness was this:

> I had nearly finished my examination when I came to an old-fashioned revolving bookcase in the middle of the room. It was filled with a miscellaneous lot of unimportant books — dictionaries, directories, corporation manuals, and the like — the few books of general literature which it held appearing to be of slight value. One of these was the report of the Lincoln and Douglas debates published in Columbus in 1860. The book is common and worth but a few dollars — not enough to call for separate valuation. What then impelled me to take it from the shelf I don't know, but something made me do it. I opened it casually, glanced at the fly-leaf, and saw what I am firmly convinced had never been seen by the owner — a lightly pencilled autograph inscription from Lincoln to A's [Mr. Cunningham's] uncle!
>
> That was an unlucky discovery as far as it concerned the 'Society,' for, of course, when Z [the friend] saw the book valued on my inventory at several hundred dollars he grabbed it, whereas, had I not examined the book, Z would not have known of the inscription and would have undoubtedly left if for the 'Society' to take with the rest of the library.

As for Mr. Goodspeed's thoroughness, one must offer a modest demurrer. In 1940, Goodspeed's Book Shop (but not Mr. Charles Goodspeed) sold the same presentation copy to Mr. Carroll Wilson. George Goodspeed informed Mr. Wilson that Henry Winchester Cunningham was the nephew of Stephen S. Winchester, the party to whom, presumably, Lincoln had given the book. George Goodspeed found a biographical sketch of Winchester in Cunningham's *John Winchester of New England.* Stephen S. Winchester, described therein, was born in Boston and died in Brookline (in 1834 and in 1880, respectively). He was married in Boston (in 1856) to a woman from Plymouth. He worked in the business firm of his father and grandfather and retired early. The bookseller never suggested any plausible connection between this Stephen S. Winchester and Abraham Lincoln, nor has anyone else been able to since.

Later, the Scribner Book Store in New York bought the book in the Carroll Wilson sale and offered it for sale as a book presented to "an old Illinois acquaintance of Lincoln, who was a 2d Lieutenant in the 59th Regiment, Illinois State Militia, 1841, and afterwards fought in the Civil War." Scribner's then described the book as "the book . . . described in C. E. Goodspeed's Yankee Bookseller, pp. 182-3, and its only previous owners (letter laid in) are the presentee and his nephew, there called Z." If this was the case, of course, then Stephen S. Winchester, Bostonian, served in the Illinois militia at the miraculous age of seven years.

Mr. Pratt observed in 1954 that these could not be the same Stephen Winchesters, "nor has any Stephen or Stephen S. Winchester in Illinois been definitely identified as having any connection with Lincoln." The state of our information remains the same, alas, and bibliophiles and students of Lincolniana still await a satisfactory explanation of the identity of Stephen S. Winchester Esq.

Lincoln Lore

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Some Sober Second Thoughts about the New Constitutional History

In the days of Lincoln's Presidency, constitutional issues were paramount, rivalled only by the ultimate question of military success. Some of those same constitutional questions are still live ones in Lincoln literature. Others have been satisfactorily answered. Very few historians hold, for example, that Lincoln had any potential as a dictator, despite the Democrats' wartime assertions to the contrary. No dictator worth his salt would have missed the opportunity the war afforded to postpone the election of 1864. Other questions are very much alive. Whether Lincoln was willing to strain the Constitution only to save the Union but not for the sake of slaves is still a much-debated topic, as are other constitutional questions. Therefore, changing views of the role of the Constitution during the Civil War are of prime concern to all Lincoln students.

Recently, a group of scholars has begun to challenge the way of interpreting constitutional questions that most historians have used over the last forty years. Students of Lincoln are most familiar with the older approach as the one used by J. G. Randall, one of the greatest Lincoln scholars of all time. In discussing "The Rule of Law under Lincoln," Professor Randall urged: "Throughout our history it is necessary to look through the legal arguments of our leaders to the broad social purposes they have sought to attain. Constitutional history, in its ultimate significance thus becomes social history." Randall could use this insight of what was then called "The New History" in its most reductionist sense, as, for example, when he said of Lincoln's era that "Much of the constitutional reasoning of that time was what James Harvey Robinson has called mere 'rationalizing' — *'finding arguments for going on believing as we already do.'"* The natural result of such assumptions about constitutional debate was to ask how the war shaped the Constitution, that is, how what men wanted to believe in order to win the war altered what they had previously believed in peacetime.

The new constitutional history neatly reverses the assumptions of the old school. This is the way Harold Hyman, one of the major prophets of the new constitutional history, describes the new outlook:

> . . . inquirers have attended almost exclusively to only half the impact question, considering primarily the effects of the Civil War and Reconstruction on the Constitution. The other, largely ignored dimension of this question, perhaps more significant, asks: What were the Constitution's effects on the War and Reconstruction, on the nature of responses to felt wants by nation, state, and local governments, by individuals, by private associations, and by official institutions? If, as I now believe, ascertainable policy alternatives of the 1860's and 1870's were sharply limited as to number, kind, and duration by influential individuals' constitutional perceptions, then insight into those perceptions is in order. For the quarrels of a century ago not only shaped the Constitution, the Constitution shaped the quarrels.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Francis Lieber (1800-1872) was the author of the first systematic works on political institutions published in America. During the Civil War he acted as a consultant for the War Department. He wrote *Guerilla Parties Considered with Reference to the Laws and Usages of War* (1862) and *A Code for the Government of Armies* (1863), which became the official manual of military law for the Civil War armies as *General Orders No. 100.*

Professor Hyman's student, Phillip S. Paludan, learned his lessons well, and in his recent book, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era,* he apologizes that "There is no profound originality in my conclusion that constitutional ideas and preconceptions limited and perhaps destroyed the possibilities for permanent equal justice which the Civil War and Reconstruction spawned." He completely rejects the assumptions of Randall's era:

> . . . I have had to consider the possibility

that constitutional arguments are simply excuses or rationalizations for not acting to protect the Negro. I have rejected such an idea because it rings too much of the twentieth century, rather than the nineteenth. The rationalization of one era may well be the reality of another. . . . When it is asserted that someone is making excuses or rationalizing, what may be meant is that he is not giving the reason *we* would give for *our* behavior. This is hardly the best foundation for beginning historical study.

Starting from Hyman's premises, Paludan is less optimistic about what Hyman calls the adequacy of the Constitution, and he justifies his study on this ground: "The influence of racial attitudes and political necessities on the failure of Reconstruction is a subject of much current study, but the ability of legal and constitutional beliefs to cripple the era's civil rights advances has not been widely investigated."

The new constitutional history is obviously on to something, as the expression goes. It refuses to ignore a great volume of Civil War literature — pamphlets, speeches, platforms — that by other assumptions constitute merely a veil to be pierced in search of true feelings and desires. The new constitutional historians are certainly right to explore the ways in which genuine constitutional scruples shaped the policy alternatives available in the 1860s and 1870s. They have been particularly effective in showing that these scruples kept concerned policy makers from extending the role of the federal government in helping the freedmen during Reconstruction. States rights were not a casualty of the war. However, the new constitutional history is not altogether satisfactory and presents at least three problems that need to be dealt with. First, although it certainly provides a useful insight into the period, the new constitutional history as written thus far has been poorly served by some of its examples. That is to say, some of the particular constitutional thinkers that have been studied in depth seem to prove quite the opposite point from the one the new constitutional history seeks to prove. Second, the new school of thought has been able to state its insight so succinctly that it has the air of definitiveness about it. As a result, there is some feeling that the new constitutional history has exhausted the subject. In fact, its principal service has been to reopen the subject. Third, much of the new school of thought has been aimed at understanding the period of Reconstruction. Much of the new literature does deal with the Civil War but only insofar as it points towards the problems of Reconstruction. This seems to slight some aspects of Civil War constitutional debate. The problem can be explored in more detail by looking at the examples provided by the work of Hyman and Paludan.

The first problem is best exemplified in the work of Phillip Paludan, who explains his historical method this way:

> The inquiry poses a problem in method; two options suggest themselves. The first is to read all the available speeches, pamphlets, and books on constitutional and legal topics and to synthesize from them a composite legal mind of the Civil War era. . . . But this method has its pitfalls. It frequently reveals as much about the mind of the historian as about the mind of the era. The process of selection and synthesis offers too many opportunities for culling from a body of thought only those comments that conform to the historian's generalization.
>
> In addition I think this method is insufficiently historical. While it may tell what happened, it does not tell it the way it happened. Certainly the thought of an era exists, but it does not come into being as "the thought of an era." It is created in the minds of individual men who think of themselves, not as having "the mind of their era," but as unique human beings reaching conclusions based on personal experience and dictated by previous conclusions.
>
> These difficulties are most easily avoided by the more modest method used here: to take what appear to be representative thinkers of an era and analyze their thought in relation to their time. The result, of course, is a narrower focus. Conclusions about the nature of thought during the period must be drawn more tentatively. But the method's merit is that it respects the reality of an enormously complex past. It recognizes that the thought of an age is a composite, not a homogenization of the thoughts of individuals.

This is a superior method, but to present any kind of convincing proof at all it must find unambiguous examples — unless the point to be proved is the ambiguity of the age.

Ambiguity is not the point of the new constitutional history; it does seek to prove that constitutional views shaped critical events. Unfortunately, Paludan is not always well served by the examples he chooses. In a book which examines five particular thinkers by way of proving that the Constitution shaped the war and Reconstruction, it seems strange that one of the thinkers would be Francis Lieber. Though certainly an influential thinker during the Civil War (he had Charles Sumner's ear, for example), Lieber always thought historically stable *in*stitutions much more important than *con*stitutions. Paludan admits the embarrassing fact that "Unlike any of the other subjects of this study, Lieber reacted to the legal questions of the Civil War by rejecting the Constituion as a guide: 'The whole rebellion is beyond the Constitution. The Constitution was not made for such a state of things.'"

Joel Parker, the Harvard Law School professor, presents an equally unsatisfactory case. To be sure, he was constitutionally much more conservative than Francis Lieber, and he argued vehemently for constitutional restraints on the war powers of the President. But, as Paludan points out, after an initial period of support, "Lincoln lost Parker's support after the fall of 1862." Such an observation does not advance our understanding of the importance of constitutional issues in Lincoln's administration. It only repeats one fundamental problem: if the Emancipation Proclamation (announced in the fall of 1862) was going too far but the Presidential suspension of the writ of *habeas corpus* was not, was constitutionalism or hatred of the black man the most important factor?

In the eccentric Philadelphian, Sidney George Fisher, Paludan has an even less fortunate example. Far and away the most innovative constitutional thinker of the Civil War, Fisher had a freewheeling intellect untrammelled by any of the traditional restraints of constitutional logic or tradition. The Civil War led him to advocate *congressional* abolition of slavery and changing the United States government to a parliamentary system on the British model. Nothing in the United States Constitution shaped these views; the British parliamentary system is what it is precisely because there is no written constitution to limit the legislature's will!

The other two figures in the book wrote principally on Reconstruction; indeed, one of them, Thomas M. Cooley, was only nineteen years old when the Civil War ended.

One could say that Professor Paludan chose the men he studies bravely, for the book devotes four of its eleven chapters to men, Lieber and Fisher, who thought the Constitution either irrelevant to the war effort or totally inadequate to the crisis — indeed, to men who were willing to do away with the Constitution either temporarily or forever. The Constitution did not shape Lieber's and Fisher's war. Joel Parker's constitutionalism carried him only part of the way in support of President Lincoln; he balked at the Emancipation Proclamation. That it was the race question which halted Parker's inclination towards broad construction of the President's constitutional war powers could as easily prove that the war shaped his constitutional views as *vice versa.*

The second major problem with the new constitutional history can best be seen in Harold Hyman's *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution.* A large book in a prestigious series by an acknowledged authority in the particular field of Civil War constitutional history, this book may serve to frighten other students and scholars away from the subject. It should not.

A check of the footnotes does reveal that Professor Hyman did his homework. Excluding the common pamphlets by constitutional giants like Francis Lieber, the footnotes contain citations to at least forty-seven original articles and pamphlets on constitutional questions of the war itself, not counting sources for Reconstruction after the war or other constitutional issues during the period. As impressive as these citations are, they hardly exhaust the field. For example, Jay Monaghan's famous *Lincoln Bibliography, 1839-1939* lists at least fourteen pamphlets on constitutional questions which are not cited in *A More Perfect Union.* By looking at two examples of the rich constitutional literature of President Lincoln's day, one can get a feel for the work that remains to be done despite the splendid spadework of Professor Hyman and his students.

An interesting example of what can still be examined is Charles P. Kirkland's *A Letter to the Hon Benjamin R. Curtis, Late Judge of the Supreme Court of the United States, in Re-*

view of His Recently Published Pamphlet on the "Emancipation Proclamation" of the President (New York: Latimer Bros. & Seymour, Law Stationers, 1862), listed in Monaghan's *Bibliography* as item number 136. Judge Curtis of Massachusetts, though he had dissented from the Dred Scott decision, attacked the Emancipation Proclamation as an abuse of Presidential power. Kirkland, a New York lawyer, replied that the Proclamation would have been an abuse of executive power, which "manifestly and from the whole context of the Constitution, has reference to the civil power of the President . . . in time of *peace.*" But the Proclamation stemmed from other powers "which pertain to him *in time of war* as 'Commander-in-Chief.'" These powers, he added, "are provided for by the letter and by the spirit of other provisions of the Constitution, by the very nature and necessity of the case, by the first law of nature and of nations, the *law of self-preservation.*"

Kirkland was able to muster two telling points. First, as a good lawyer, he found a previous Supreme Court decision which was embarrassing to Curtis:

> The same argument which you make against presidential power was made in Cross v. Harrison, 16 Howard, 164, in the Supreme Court of the United States, in a case occurring during, and arising out of, our war with Mexico, in the judgment in which case you, as one of the Justices of that Court, concurred. In that case the President, without any specific provision in the Constitution — without any law of Congress pre-existing or adopted for the occasion, created a civil government in California, established a war tariff, and (by his agents) collected duties. The Court held that . . . "those acts of the President were the exercise of a *belligerent right;* that they were according to the *law of arms* and right on the *general principles of war* and peace." Who will allege, that the acts of the President on that occasion were not, to say the least, as unauthorized by the Constitution and the law as his proclamation in the present case?

Curtis had not denied in his attack on Lincoln that there was a state of war; he had only denied that the powers of the Commander-in-Chief extended to such things as emancipation. Kirkland did find an apparent inconsistency.

Kirkland also found a precedent of sorts. It was not a decided case but the opinion of a former President, John Quincy Adams. In the House of Representatives in 1842, Adams had declared, "that the military authority [in a state of *actual war*] takes for the time the place of all municipal institutions, slavery among the rest, and that under *that* state of things, so far from its being true that the States, where slavery exists, have the exclusive management of the subject, not only the President of the United States, but the (subordinate) commander of the army has *the power to order the emancipation of the slaves.*"

Kirkland's pamphlet, with its reference to John Quincy Adams, is significant for two reasons. First, President Lincoln himself read and liked Kirkland's pamphlet. On December 7, 1862, the President wrote Kirkland: "I have just received, and hastily read your published letter to the Hon. Benjamin R. Curtis. Under the circumstances I may not be the most competent judge, but it appears to me to be a paper of great ability, and for the country's sake, more than my own, I thank you for it." Second, David Donald, in his famous essay "Abraham Lincoln: Whig in the White House," argues that Adams's view of emancipation as a war power was an important aspect of Lincoln's Whig background, but he does not cite Kirkland's pamphlet. The closest link Donald can find between Lincoln's views and Adams's argument is Lincoln's endorsement of William Whiting's *War Powers of the President,* which "leaned heavily upon Adams's argument." In Lincoln's endorsement of Kirkland's pamphlet, there is further proof that the Adams connection was an important one for the Emancipator.

Another fascinating example of unexplored constitutional literature is W.W. Handlin's *American Politics, A Moral and Political Work, Treating of the Causes of the Civil War, the Nature of Government, and the Necessity for Reform* (New Orleans: Isaac T. Hinton, 1864). This eccentric work, referred to in Hyman's book in a vague note about "utopian and antiutopian literature," makes Sidney George Fisher's admiration of parliamentary government seem mild by comparison. Handlin despised universal suffrage and the political system built on it. He claimed that the Civil War itself was caused by political demagogues, originally men with no employment who gained a living by keeping the political cauldron boiling. He wanted to see electioneering "discount-enanced," elective terms longer, judges appointed and not elected, and politics in general returned to the hands of the old and respectable rather than the young and idle men. Demagogues so flattered the people that the people came to think of themselves as potentates; they came to distrust government because of the pernicious idea that governors are servants. "It is natural for men to follow leaders," Handlin asserted, and leaders should have authority and respect.

Handlin was Whiggish in his views. He claimed, curiously, that there would have been no war if there had been a national bank. He supported a protective tariff, he supported colonization and the amelioration of the lot of the slave, and he opposed territorial expansion. He was, although Whigs certainly had no special claim to it, a staunch unionist as well. He valued the Union much more highly than the Constitution:

> But what is the Constitution? It is the fundamental law of the nation. It is not the nation. The nation may exist without it, as many nations do exist without formal or written constitutions. A part of the Constitution is the oath of the President, by which he undertakes to preserve, perpetuate and defend the nation. Everything which is necessary to that end should be done by him. If a case should arise where it would be necessary to go counter to the Constitution to save the nation, he should not hesitate to do it, because it would be his sworn duty; and it would be stupid to say that the government should be lost merely on account of some defective clause in the organic law.

Handlin was less interested in defending the administration's constitutionally questionable acts than he was in solving the problem which had brought on the war in the first place, demagogic politics. Arguing that the excitement caused by Presidential elections "will always cause war," Handlin urged that the President should be chosen by rotation. He recommended that the oldest Senator should become President for life. There was "nothing here . . . favoring . . . monarchy or empire," he said, and the age of the President would be no problem. Many Senators were "vigorous in intellect up to the moment of death." The men he had in mind were "Webster, Crittenden, Clay . . . , and in the last years of their lives they would have filled the office of President with power and credit." The examples were Whigs to a man, of course, and it should be noted that he failed to mention another of the great old Senators of that by-gone era, John C. Calhoun.

The existence of one more isolated thinker like Handlin whose thought on the Civil War overflowed any constitutional channels, does not challenge the essential insight of the new consitutional history in any major way. However, it does suggest that a too-willing acceptance of their insights will diminish any appreciation for the varieties of responses the Civil War evoked.

War and revolution are surely the events which are most capable of provoking innovative political ideas. In focusing on both the Civil War and Reconstruction — and the new constitutional historians tend to look at the two as one critical period in American history — some historians may be slighting the degree to which war shaped the Constitution. *Inter arma silent leges* is hoary doctrine, though it is not American doctrine, and it seems plausible that constitutional restraint may have been relatively greater in peace (Reconstruction) than in war. By not focusing on constitutional issues during the war exclusively, the new constitutional historians may tend to exaggerate the ability of constitutional ideas to restrain social action. The constitutional issues of the war years alone are surely complex enough for a book on the subject which does not look beyond 1865.

These observations, if they mean anything, are meaningful principally for the future study of this subject. The new work that has been done is good. The thinkers in Paludan's study are thoroughly treated. Hyman's work provides an interesting framework, grounded in a wide reading of the sources, for future investigations. Students of Lincoln's Presidency are indeed lucky to have such refreshing insights brought to their subject, but there is still room for much more work. Scholars should begin to explore the numerous pamphlets on constitutional issues; the new constitutional history has proved that this literature is more than "mere" rhetoric.

CUMULATIVE BIBLIOGRAPHY 1976-1977

Selections approved by a Bibliography Committee consisting of the following members: Dr. Kenneth A. Bernard, Belmont Arms, 51 Belmont St., Apt. C-2, South Easton, Mass.; Arnold Gates, 289 New Hyde Park Rd., Garden City, N.Y.; Carl Haverlin, 8619 Louise Avenue, Northridge, California; James T. Hickey, Illinois State Historical Library, Old State Capitol, Springfield, Illinois; E.B. (Pete) Long, 607 S. 15th St., Laramie, Wyoming; Ralph G. Newman, 18 E. Chestnut St., Chicago, Illinois; Hon. Fred Schwengel, 200 Maryland Avenue, N.E., Washington, D.C.; Dr. Wayne C. Temple, 1121 S 4th Street Court, Springfield, Illinois. New items available for consideration may be sent to the above persons, or the Louis A. Warren Lincoln Library and Museum.

1976

BERNS, LAURENCE, EVA BRANN, GLEN E. THUROW, GEORGE ANASTAPLO 1976-21

Abraham Lincoln/The Gettysburg Address/and/American Constitutionalism/Laurence Berns Eva Brann/Glen E. Thurow George Anastaplo/edited by Leo Paul S. de Alvarez/University of Dallas Press/[Copyright 1976 by the University of Dallas Press, Irving, Texas. All rights reserved.]
Book, paper, 8 7/8" x 5 7/8", 203 (5) pp., price, $7.95.

COLVER, ANNE 1976-22

Bad Jack/and the Lincoln Boys/Author/Anne Colver/Illustrated by/George Ulrich/Raintree Editions/[Copyright 1976 by Anne Colver. All rights reserved.]
Brochure, cloth, 8 3/4" x 6 3/4", 47 (1) pp., illus., price, $6.60.
Juvenile literature.

LINCOLN MEMORIAL UNIVERSITY 1976-23

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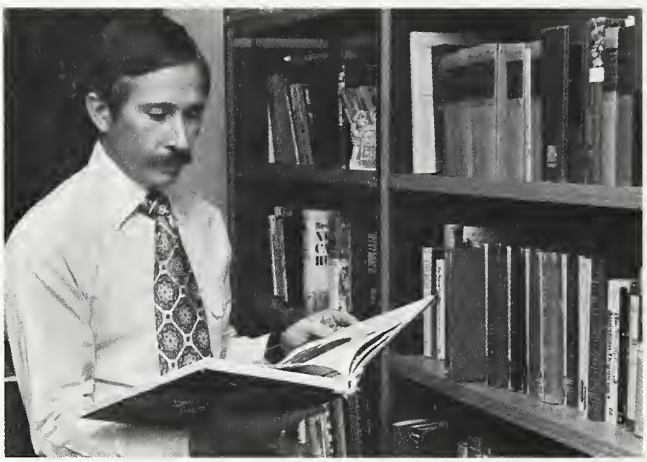
Pamphlet, flexible boards, 10 1/8" x 7 1/8", 137-180 pp., illus., price per single issue, $2.50.

RAPHLING, SAM1976-24

President Lincoln/Operain 4 Acts and 9 Scenes/Book and Music by Sam Raphling/Characters in Order of Apperance/(Caption title) /[Opera in piano reduction. Copyright 1976 by General Music Publishing Co., Inc., Hastings-on-Hudson, New York. International copyright secured. All rights reserved. Published by General Music Publishing Company, Inc.]
Book, flexible boards, 11 1/8" x 8 1/2", 160 pp., illus., price, $15.00.



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Stephen B. Oates

THUROW, GLEN E. 1976-25

Abraham Lincoln/And/American Political Religion/Glen E. Thurow/State University of New York Press/Albany, New York, 1976/[First edition. Copyright 1976 by State University of New York. All rights reserved.]
Book, cloth, 8 3/8" x 5 5/8", xiii p., 133 (6) pp.

WINSTEAD, GUY 1976-26

Lincoln Heritage House/Freeman Lake Park, Elizabethtown, Ky./Built 1789-1805/(Sketch of Lincoln Heritage House)/Open June 1st to October 1st/Tuesday through Sunday/10 A.M. to 5 P.M./The Lincoln Heritage House is entered in the/National Register of Historic Places. A historical/marker has been erected by the State of/Ken-/tucky at the site./(Cover title)/
Folder, paper, 8 1/2" x 3 3/4", single sheet folded once, illus. Sketches by Dr. R.T. Clagett. Lincoln Heritage House photographs by Susan Grubbs. Text by Guy Winstead. Paid for with funds from Hardin County Bicentennial Committee 1976.

LINCOLN NATIONAL LIFE FOUNDATION 1976-27

Lincoln Lore/Bulletin of The Lincoln National Life Foundation . . . Mark E. Neely, Jr., Editor. Published each month/by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801./Number 1661, July 1976 to Number 1666, December 1976.
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ILLINOIS STATE HISTORICAL LIBRARY 1977-1

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Pamphlet, flexible boards, 10" x 7 1/4", 99-119 pp., illus., price, 25¢.

ILLINOIS STATE HISTORICAL SOCIETY 1977-2

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Pamphlet, flexible boards, 10 1/8" x 7 1/8", 1-44 pp., illus., price per single issue, $2.50.

MOCHIZUKI, MASAHARU 1977-4

(Device)/(Portrait of Lincoln facing right)/(1809-1865)/16th President of U.S.A./(Japanese printing)/Lincoln Report/No. 19/Feb. 12, 1977/No. 19/(Japanese printing)/(Japanese printing)/Tokyo Lincoln Center/Masaharu Mochizuki, Director/2-1, Sarugaku-cho 1-chome, Chiyoda ku, Tokyo, Japan/Phone 291-1860/Mail address: P.O. Box 5001, Tokyo International, Tokyo, Japan/(Cover title)/[Printed in Tokyo, Japan in both Japanese and English languages.]
Pamphlet, paper, 10 1/8" x 7 1/8", 7(3) pp. Contains a listing of the collection of the Tokyo Lincoln Center, recent acquisitions, books on Abraham Lincoln published in Japan, pamphlets, clippings & etc. in Japanese language and facts about U.S.A.

OATES, STEPHEN B. 1977-5

With Malice/Toward None/The Life Of/Abraham Lincoln/(Device)/Stephen B. Oates/Harper & Row, Publishers/New York. Hagerstown. San Francisco. London/[Copyright 1977 by Stephen B. Oates. All rights reserved.]
Book, cloth, 9 1/2" x 6 1/2", xvii p., 492 (3) pp., illus., price, $15.95

LINCOLN AND THE CONSTITUTION

By Mark E. Neely, Jr.

Fort Wayne, Indiana

BULLETIN OF THE 39th ANNUAL MEETING
of
The Lincoln Fellowship of Wisconsin
held at Madison, Wisconsin
April 18, 1982

HISTORICAL BULLETIN NO. 38
1983

Illinois Historic Preservation Agency

[Exhibit opened at noon in Old State Capitol on September 17, 1987.]

The Constitution in Crisis

Abraham Lincoln, Slavery, and the Union

presented by the

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THE CONSTITUTION IN CRISIS

Abraham Lincoln, Slavery, and the Union

by Thomas F. Schwartz

Slavery was the most troublesome moral and constitutional question in nineteenth-century America. The Founding Fathers had vigorous and heated debates concerning the issue. Could a republic based upon principles of liberty and freedom also sanction servitude? The Constitution recognized the institution of slavery, but it also prohibited the importation of slaves into the United States after 1808. The uneasy compromise of the ideal of freedom with the reality of slavery produced an ever-increasing political tension. The problem was resolved only at the expense of the costly and bloody Civil War. The story of that crisis is revealed in the following twenty-one prints and documents.

1. **Abraham Lincoln, November 8, 1863**

2. **Letter to Williamson Durley:** Abraham Lincoln was born in the slave state of Kentucky, where his parents were members of a Baptist church opposed to human bondage. Like many people, Lincoln felt that slavery, confined south of the Missouri Compromise line of 1820, had reached its natural limits and would disappear in time. His letter to Durley, a political supporter, illustrates Lincoln's view that slavery would die "a natural death" if left alone.

3. **Lincoln's Notes on Slavery:** The Kansas-Nebraska Act of
4. 1854 eliminated the restrictive limits set by the Missouri Compromise, allowing new states to decide the slavery issue for themselves. Lincoln saw the act as a dangerous impetus toward the spread of slavery into all new territories. He began systematically to examine the issue in 1854 and continued to ponder the role of slavery in a democracy. Lincoln's notes on slavery present a cogent summary of his position.

5. **Abraham Lincoln, February 28, 1857**

6. **Speech of Hon. Abram Lincoln...June 16, 1858:** Familiarly known as the "House Divided" speech, this address was delivered by Lincoln before the Republican State Convention after his nomination to run for United States Senate against Stephen A. Douglas. Lincoln intended to show the differences between the Republican and Democratic positions on the slavery issue. Many national Republicans, such as Horace Greeley, supported Douglas in 1858 because of his disagreement with Democratic President James Buchanan. Lincoln's words were directed to those Republicans as well as to political independents.

7. **"The Coming Man's Presidential Career, a la Blondin":** This cartoon appeared in Harper's Weekly on August 25, 1860. The title refers to the famous French acrobat, Charles Blondin, who walked over Niagara Falls on a tightrope. The Constitution is portrayed as the balancing stick, while the institution of slavery is represented by the black man carried on Lincoln's back. The artist's imagery reflects the serious problems that faced this presidential candidate.

8. **"The Power of the Rail":** Republicans made good use of the unpopularity of President Buchanan in this cartoon that appeared in The Rail Splitter, September 3, 1860. Lincoln uses a hand-hewn rail and the Constitution as a fulcrum to put Buchanan into oblivion. The cartoon was distributed among the Republican faithful. Note the frequent reference to the Constitution and the implication that Republican principles were its true guardians.

9. **Charleston Mercury Extra** and **South Carolina's Ordinance**
10. **of Secession:** Throughout the South, an entire corpus of political theory not only protected the institution of slavery but also the society that servitude supported. The doctrines of states' rights, nullification, and secession developed from a perceived threat to the Southern way of life. John C. Calhoun, the most eloquent spokesman for the "Southern Cause," argued that all three doctrines were justified to protect the rights of the minority when they were endangered by a political majority. South Carolina's Ordinance of Secession reflects the culmination of those political debates.

11. **"A President-elect's Uncomfortable Seat":** By Lincoln's inauguration on March 4, 1861, seven states had seceded from the Union. The cartoon depicts Lincoln's unenviable position as South Carolina was garrisoned along the shores facing Fort Sumter. President Buchanan believed secession to be unconstitutional but allowed his successor, Abraham Lincoln, to deal with the precarious situation in the South.

12. **"Consulting the Oracle":** This pro-Lincoln cartoon appeared in Harper's Weekly, April 13, 1861, just one day before the Confederates fired on Fort Sumter. The Chicago platform is a reference to the Republican platform of 1860. An American eagle is portrayed at the feet of Columbia, wearing the diadem of liberty. In the caption, Lincoln asks Columbia, "And what next?" She replies, "First be sure you are right; and then go ahead."

13. **"Writing the Emancipation Proclamation":** Adalbert Volck's engraving demonstrates that not all Northerners were antislavery. In fact, Volck issued a series of anti-Lincoln prints that reflected his Southern sympathies. The blatant references to Lincoln as satan are apparent. Lincoln is trodding upon the Constitution, while John Brown is referred to as St. Ossawatamie. The picture of St. Domingo recalls the bloody slave riot that abolished servitude on that Caribbean island in 1803.

14. **Emancipation Proclamation:** Lincoln was not an abolitionist--one who desired to eliminate slavery in all of the states--rather, he was opposed to the spread of slavery into new states. Extremists in the South refused to see this distinction, branding Lincoln an abolitionist. After his election to the presidency, South Carolina fired upon Fort Sumter, but Lincoln resisted attempts by supporters to make the war one to end slavery. Lincoln always asserted that the war was being fought to save the Union. As a result, he did not issue the Emancipation Proclamation until 1863. Moreover, he had doubts about the constitutionality of the act, feeling that it overstepped his authority as Chief Executive. He justified it only as a military measure.

15. **Emancipations Proklamation:** This calligraphic portrait of Lincoln was printed for German-Americans. The Emancipation Proclamation was seen by Lincoln's contemporaries as his most important presidential paper. Many printings of the text were issued. This example shows a German translation forming the image of the Great Emancipator. Germans comprised a sizable voting block, many of whom voted for Lincoln in 1860. The imagery reinforces the notion that Republicans were the party of antislavery.

16. **"Reading the Emancipation Proclamation":** Printmakers
17. crafted more renderings of the Emancipation Proclamation than any other act of Lincoln's presidency. In this print, a Union soldier reads Lincoln's proclamation to a slave family. A heroic rendering of the event is captured in the engraving of A. H. Ritchie, based upon the Francis B. Carpenter painting now hanging in the United States Capitol. The Ritchie print was affordable, providing a typical middle-class family an attractive portrait of an important event.

18. **"The Federal Phoenix":** A British view of the Lincoln administration is seen in this cartoon that appeared in Punch, December 3, 1864. Lincoln had curbed certain liberties and suspended the constitutional writ of habeas corpus in certain areas as measures necessitated by war. "The Federal Phoenix" refers to Lincoln's reelection despite his rough treatment of constitutional guarantees. William Safire's Freedom is a modern examination of constitutional issues in Lincoln's administration.

19. **Thirteenth Amendment:** Lincoln lobbied long and hard to obtain passage of the Thirteenth Amendment. Only through a constitutional amendment, he believed, could slavery be forever destroyed. The measure was passed in Congress on January 31, 1865, and Lincoln signed the resolution the following day. The necessary ratification by three-fourths of the states was not achieved until December 18, 1865, eight months after Lincoln's assassination. With its passage, Lincoln's dream of a nation without the cruel institution of slavery was finally realized at the cost of a constitutional crisis and a devastating civil war. But, as a result, both the Constitution and the nation were stronger.

20. **"Lincoln Triumphs in Act to Amend the Constitution"** and
21. **"Uncle Abe's Valentine Sent to Columbia":** These cartoons represent two different opinions on the Thirteenth Amendment. The first shows a triumphant Lincoln presenting the amendment to Columbia. Union generals deliver fallen Confederate strongholds, European royalty carry Lincoln's train, and an impish Irish worker muses over his fate now that free black labor will be a potential competitor. The second view emphasizes the destruction of slave shackles. Although most Northerners welcomed passage of the Thirteenth Amendment, the task of integrating freed blacks as true equals in American society remained an elusive goal.

ILLINOIS HISTORIC PRESERVATION AGENCY

The Illinois Historic Preservation Agency was created in 1985 by an Executive Order of Governor James R. Thompson and accompanying legislation. The agency is administered by a five-member board of trustees appointed by the Governor.

Through its three divisions--the Historical Library, Preservation Services, and Historic Sites--the Historic Preservation Agency offers Illinoisans a wide variety of programs that interpret, preserve, and encourage research into the history of their state.

"A Time Traveler's Guide to Illinois" is the colorful brochure describing the historic sites and memorials operated by the Sites Division. Among the other publications of the Agency are **Illinois History**, the magazine for young people published monthly during the school year; **Historic Illinois**, the bimonthly magazine of the Preservation Services Division; The **Dispatch**, the bimonthly newsletter of the Illinois State Historical Society; and the **Illinois Historical Journal**, a scholarly quarterly.

For more information about the programs and services of the Agency, write the Illinois Historic Preservation Agency, Office of Public Affairs, Old State Capitol, Springfield, IL 62701.

What Lincoln Did to Save Union and Constitution

By JOHN A. HEFFERNAN

The Constitution of the United States is a very precious heritage to Americans. It has undergone many a change since its original adoption, but it still holds the central principle. Circumstances have imposed change on it. Amendment made in accordance with its own provision, has given it a new significance as well as a new life. Wars, internal and foreign, have subjected it to great stress. Nevertheless in its essentials it is still the American Constitution, the greatest instrument of government man ever conceived and the oldest written national Constitution now in existence. The ages wrote the English Constitution which is only a body of laws, customs and institutions, but men, under the spur of necessity, wrote the American Constitution. For inspiration they drew upon the experience of ages that preceded the birth of modern England, taking lesson not only from the Anglo-Saxon experience in government, but also from nations that were in the flower of their civilization when Boadicea was riding in her chariot at the head of her warriors through the primeval forests of England.

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The Constitution is in my mind today because it is the day of the birth of Abraham Lincoln. There have been many times when I thought of the mighty soul of this man, a soul so representative of all that was great and splendid in the America of his day. The imprint of the great mountain masses was on his lofty and deeply lined brow, the depth of the forest shaded valleys was in his sombre eyes, and his ill-proportioned frame still had in its outlines a majesty and dignity which impressed every one with whom he came in contact. Today, however, because of current circumstances, I am thinking of Abraham Lincoln in another relationship—I am thinking of him as the central figure in one of the great crises of our national Constitution.

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The national sky was overshadowed on the day of his inauguration by the black clouds of a fratricidal war. There were men, sincere enough, who believed that the right of a state to secede was a constitutional right; believed it with so much conviction that for that conviction they were willing to die. But foremost in Lincoln's thought was a phrase from the Constitution's preamble—"in order to form a more perfect Union." Before the adoption of that Constitution, we were but a confederation of sovereign states. Thereafter we were a Union, a nation, and in the great mind of Lincoln a nation so nobly born, so greatly dedicated to liberty, and so endowed by nature with inexhaustible natural wealth, that any attempt to dismember it would be treason of the worst kind.

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How did Lincoln, having in mind probably that it would be necessary for him to take extra-constitutional action in order to preserve the Constitution itself, regard his obligation to the source of his executive powers. He himself leaves a record of his thought. He said when peace and division were suggested to him that those making the proposal did not as he had taken "an oath registered in heaven" to preserve and defend the Constitution. I have quoted from memory, but I think the quotation is substantially correct, and certainly it is well today to consider these words of Abraham Lincoln.