

BRIAN R. DIRCK

Lincoln and the Constitution



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In memory of Phillip S. Paludan, 1938–2007

LINCOLN AND THE CONSTITUTION

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PROLOGUE

“**T**hat means nigger equality. Now, by God! I’ll put him through.”¹

John Wilkes Booth muttered those words to his accomplice, David Herold, as the two men stood in a crowd gathered around the White House on the evening of April 11, 1865. By this time, Booth’s thoughts had already turned from kidnapping to assassination. But Lincoln’s speech, delivered to the crowd in response to the tidings that Robert E. Lee had surrendered and the Confederate capital city of Richmond, Virginia, was now in Union hands, apparently further hardened Booth’s resolve. Lincoln said something in his speech that served to push Booth even further over the edge.

What exactly was the “that” in Lincoln’s speech that Booth believed meant “nigger equality,” and in his mind provided justification for murder? Lincoln emphasized two broad themes related to American race relations: the need for a constitutional amendment finally and fully outlawing slavery, and the possibility that African American men might be given the vote. Booth’s outburst has usually been interpreted as an instance of his venting displeasure at the racial component of Lincoln’s speech. The president was directing the country down a radically new path, and Booth was a self-professed Southerner whose bigotry ran deep.²

But there was another layer underneath Lincoln’s proposals in that last speech. In speaking of the end of slavery and black suffrage, he

referenced not only policy decisions, but also potential changes to the US Constitution, in the guise of what would eventually become the Thirteenth and Fifteenth Amendments. Such changes would be permanent. Had Lincoln merely expressed a political or personal preference for a greater degree of what Booth derisively styled “nigger equality,” then Booth might have hoped for (what would have seemed to him) better days, when Lincoln and his party could be voted out of office, executive orders canceled, laws passed by Congress changed or superseded. But the Constitution? That carried the unmistakable aura of durability, an aura that may have provided just a bit extra nudge for Booth when he reached for his derringer.

Therein lies a basic truth about the American system. The Constitution and the values surrounding it act as bedrock, a foundational narrative that shapes and guides Americans’ political decisions. American constitutionalism is about the first principles, fundamental values, and basic substructure that shape and set the ground rules for our ongoing national political conversation.

The story of Lincoln’s personal and political journey towards that day in April 1865, when he became the first sitting president to openly endorse African American suffrage, and by which time he had already sealed his legacy as the Great Emancipator and savior of the Union, has been told many, many times. But the constitutional dimension of this journey? Not quite so much; or rather, not in a way that is immediately available or appealing to a broad reading audience. There are fine scholarly studies focusing specifically on Lincoln’s constitutionalism by (among others) George Anastoplo, Daniel Farber, and George P. Fletcher.³ There are excellent studies of Lincoln’s life and career with a good infusion of constitutional analysis, by (again, among others) Phillip Paludan, Mark Neely, and James McPherson.⁴ The rather extensive subgenre of scholarly essay collections on Lincoln also offer occasional nuggets of insight into Lincoln’s ideas about the Constitution.⁵

So there is actually an extensive collection of books, articles, and monographs on Lincoln’s constitutionalism, scattered here and there within the supremely vast field of Lincoln studies. But for all the sophistication and complexity of this literature, we lack something

relatively straightforward and basic: an overview of Lincoln's constitutional thought, spanning his entire lifetime. That is the purpose of this book.

The reader should note that this book is aimed primarily at the general reading audience, providing both a readable overview of Lincoln's views on the US Constitution and a starting point for further inquiry. It is not intended to be a comprehensive academic study of the subject, which would be impossible given the purpose and scope of the Concise Lincoln Library series. There are aspects which I have been constrained to treat with brevity—for example, the complex interplay between radical, moderate, and conservative elements in Congress when formulating wartime policymaking—focusing instead on those issues I believe constitute the core of Lincoln's constitutional thought. The book's bibliography provides a solid starting point for those wishing to engage in further investigation.

In writing this account, I have defined "Constitution" broadly, examining not only what Abraham Lincoln said and did about the nation's founding document itself, but also the set of values, assumptions, and judgments that underlie the first principles of his political and intellectual world. In doing so, I have tried to keep forays into the more abstract and technical areas of constitutional theory and law to a minimum. My primary interest is the ongoing interplay in Lincoln's life of his personal goals, his political ideology, and his constitutional thought.

As we will see, Lincoln's constitutionalism did have certain basic, consistent characteristics: foundational principles that were, on the whole, quite well thought out and carefully reasoned. That said, however, it is important to remember that Lincoln was not an intellectual, formulating his ideas in a vacuum of abstraction. He was a practical man and a pragmatic politician, often forced by the ever-changing circumstances of his remarkably volatile time to formulate solutions to problems on the fly, with few reliable guidelines or precedents. American constitutionalism during the Civil War was filled with blind spots and unforeseen eventualities. Readers will note how often a discussion of a given aspect of the Constitution began with some variation of "no one really knew." Lincoln found himself filling these

blank spaces in the American constitutional tradition, particularly while he occupied the White House.

There have been those who see this filling of constitutional blank spaces as an act of repairing a severely flawed instrument. Justice Thurgood Marshall, for example, during the bicentennial of the Constitution in 1987, argued that the Founding Fathers had created at best an imperfect union two hundred years previously, one shot through with shortsighted and morally dubious compromises, particularly where race and slavery were concerned. “I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention,” Marshall declared. “Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”⁶

There is truth to Justice Marshall’s argument, and I think Lincoln would have sympathized with his point of view, at least where race and slavery entered the conversation. “Your race are suffering, in my judgment, the greatest wrong inflicted on any people,” Lincoln told a group of African Americans who met with him during the war. Before the war he, was deeply troubled by the Constitution’s various compromises with slavery. “I also acknowledge *your* rights and *my* obligations, under the constitution, in regard to your slaves,” he wrote to a Southern friend in 1855. “I confess I hate to see the poor creatures hunted down, and caught, and carried back to their stripes, and unrewarded toils; but I bite my lip and keep quiet.”⁷

Still, Lincoln saw the Constitution of 1787 as a fixed instrument, “the pivotal event in our national history, the event that constituted our national identity,” to quote historian Hendrik Hartog. For Lincoln, there were certain timeless principles—the rule of law, the efficacy and wisdom of democracy, the basic liberty endowed to all citizens—embodied in the Constitution that did not and should not be changed. They were principles put there by man, in the name of God.⁸

Lincoln took an essentially optimistic view of the Constitution, in both its structure as he found it, and its potential to effect positive change in the American future. If there is an overriding theme to Lincoln's relationship with the US Constitution, it is this never fully extinguished faith that the nation's founding document, and the values it represented, were vehicles for advancing that which was good and just.

In some ways it is quite striking: This often morose, fatalistic man, awash in a sea of controversy and blood, somehow managed to keep faith that the Constitution he admired and swore to protect was equal to the severe trials of the age.

THE CONSTITUTION IN
LINCOLN'S EARLY YEARS

Born into a hardscrabble life on the fringes of polite American society in 1809, Abraham Lincoln was not groomed to think high thoughts about the US Constitution, or much of anything else. The semiliterate farmers around him equated reading, other than the Bible or *Pilgrim's Progress*, with idleness—wasted time that was better spent on the business end of a plow or axe. “Abe was awful lazy,” recalled one of his Indiana neighbors; “he worked for me . . . a few days only at a time. [He] was always reading and thinking [and I] used to get mad at him.”¹

His first exposure to the Constitution, such as it was, probably came in one of the early biographies he read of George Washington when he was a boy, or perhaps in other accounts he might have read of the Founding Fathers and the Revolutionary era.² It wouldn't have been much, this early exposure to the Constitution—like any other young boy his age, he would have surely been far more interested in stories about Revolutionary War battles and the romantic rendering of the Founders' heroic wartime exploits common to the histories of the age. But this literature would at least have linked the nation's founding document to the Revolutionary generation and Lincoln's most revered heroes, like George Washington. “Washington is the mightiest name of earth,” he declared years later in a speech on Washington's birthday; “on that name, an eulogy is expected. It cannot be. To add brightness to

the sun, or glory to the name of Washington, is alike impossible. Let none attempt it.”³

Lincoln's reverence for Washington and his generation would have connected the Constitution with things sacred, and a new, powerful American civic religion of reverence for the Revolutionary generation and its seminal works. Lincoln was a true believer. “Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others,” he exhorted in one of his earliest speeches. “As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor.”⁴

In this, Lincoln was not terribly unique. Many Americans of his time harbored a quasi-mystical nationalism that combined secular religious symbolism and pageantry—Fourth of July celebrations, for example—what modern generations might describe as a “cult of personality” centered primarily on George Washington, and a deep-seated reverence for the hallowed texts of the Revolutionary generation, of which the 1787 Constitution was the most conspicuous.⁵

Lincoln's early years afforded him few opportunities to encounter the Constitution in any other more systematic manner. Striking out on his own at age twenty-two, Lincoln drifted into the little river village of New Salem, Illinois, and there spent several years as a local jack-of-all-trades: general store clerk, land surveyor, postmaster (at “a very small office”), flatboat crewman, and farm laborer when absolutely necessary. “This procured bread, and kept soul and body together,” he later wrote.⁶

While living in New Salem, he sometimes watched the proceedings in the local town court and occasionally participated as an impromptu advocate, there being no actual lawyers in the tiny town. He undertook study for the bar in earnest during the early 1830s, during which time he likely first read and studied the entire text of the Constitution. But this would have been a relatively secondary concern, as he would have been far more preoccupied with learning the intricacies of the law's everyday machinery.⁷

His basic legal textbook was Sir William Blackstone's *Commentaries on the Laws of England*, the all-important treatise on the English legal system that served as a portal into the law for generations of American lawyers.⁸ Blackstone would have said nothing at all about the American Constitution, of course; the first edition was written in 1765, and it focused on the English common-law system. But the *Commentaries* did give Lincoln an appreciation for the rule of law, and an understanding of its basic framework and rationale—for constitutionalism, if not necessarily the Constitution. Blackstone encouraged his readers to think of the law as an elegant structure of logic and reason, the best human beings had to offer in the way of understanding justice and conflict resolution in a community, stripped of superfluities and errors by the engine of reason, and yet also anchored in the wisdom of the past. Blackstone fairly gushed in his admiration for the British constitutional system, “perhaps the only one in the universe, in which political or civil liberty, is the very end and scope.”⁹

If the various Washington biographies Lincoln read gave his constitutionalism a romanticized tint, then Blackstone helped give it a conservative streak, if by “conservative” we mean a respect for past tradition, and a tendency to give lawmakers—whether they be, in Blackstone’s case, English jurists, or, in Lincoln’s case, the Framers of the Constitution—the benefit of the doubt. When Blackstone referenced the “constitution,” he did so with the English model in mind, a model that defined “constitution” as the corpus of laws and customs that constituted the English common-law system, rather than a specific written charter like the US Constitution. Relatively few legal treatises dealing directly with the American document were available to law student Lincoln. Joseph Story published his *Commentaries on the Constitution of the United States* in 1833, at the very time Lincoln was trying to master Blackstone, but it is unlikely that Lincoln was able to procure a copy of such a relatively new text on the Illinois frontier.

After passing his bar exam in 1836, he went about the business of building a practice, relocating to the bustling new town of Springfield, and plying his wares in courthouses up and down central Illinois’s Eighth Judicial Circuit. For twenty-five years, he litigated every

type of case for every type of client, very few of which concerned either the US Constitution or constitutional issues in general.

But even if he did not often directly encounter the Constitution in the courtroom, Lincoln's law practice was nevertheless another important brick in the foundation of his constitutionalism. Constitutionalism is, among other things, a sense of how the law should function. Lincoln's practice gave him an understanding of the various ways that the law worked itself out in the everyday lives of ordinary Americans, experiences that in turn gave him a deep pragmatic streak, as well as an appreciation for legal arguments that were simple and straightforward and avoided flamboyance. "In law it is good policy to never *plead* what you *need* not, lest you oblige yourself to *prove* what you *can* not," he admonished.¹⁰

Throughout his life, whenever Lincoln encountered thorny problems, his lawyerly instincts told him to value workable solutions, avoid showdowns, and exercise whenever possible the art of compromise. "Discourage litigation," he advised fellow attorneys. "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." It was a philosophy that he would apply time and again throughout not only his legal career, but his political career, as well.¹¹

Lincoln had a little more to say directly about the Constitution in the political realm—but not much, at least early on. All politics are local, after all, and Lincoln's early speeches during his campaigns for the Illinois legislature (he lost in 1832 but won the first of his four terms two years later) stressed issues of interest to Illinois voters.¹²

Unlike his Illinois farming neighbors, who were usually Jacksonian Democrats, Lincoln joined the Whig Party, which possessed roots stretching back to the old Federalist Party of the Founding era, the party of Alexander Hamilton, and a strong national government. For Hamiltonian Federalists, a strong national government was necessary for good business, and the Constitution should be interpreted accordingly. Federalists supported a school of thought known as "broad constructionism"—meaning interpretation of the

Constitution's language giving the broadest possible latitude to the words and the powers they invest in the national government. "There are implied as well as expressed powers" in the Constitution, Hamilton wrote. "The only question must be . . . whether the means to be employed . . . [have] a natural relation to any of the acknowledged objects or lawful ends of the government."¹³

Hamilton's political opponent Thomas Jefferson, and his party, the Jeffersonian-Republicans, countered with what came to be known as a "strict constructionist" approach to the Constitution—that is, limiting the national government to only those powers explicitly mentioned in the document. "I consider the foundation of the Constitution as laid on this ground, that 'all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.'" Jefferson wrote. "To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition," and therefore liable to the creation of a national government grounded in tyranny.¹⁴

Lincoln was very much a Hamiltonian, broad constructionist in his interpretation of the US Constitution. He saw the Constitution less as a limiter on national government action, and more as a catalyst for necessary economic development. He had little patience with Jeffersonian Democrats' assertion that the Founding Fathers held such a limited view of federal authority. "The Constitution enumerates expressly several powers which Congress may exercise, superadded to which is a general authority 'to make all laws necessary and proper,' for carrying into effect all the powers vested by the Constitution of the Government of the United States," he pointed out in an early speech on the power of the national government to charter a national bank. That rather vague language, "necessary and proper," was plenty good enough, as far as Lincoln was concerned. "One of the express powers given Congress, is 'To lay and collect taxes; duties, imposts, and excises; to pay the debts, and provide for the common defence [*sic*] and general welfare of the United States.' Now, Congress is expressly authorized to make all laws necessary and proper for carrying this power into execution. To carry it into execution,