

Lincoln Lore

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Lincoln Lore

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Editor:

Sara Gabbard

Vice President and Director of Development

Contributors:

Joan L. Flinspach, President/CEO

Carolyn Texley, Director of Collections/Archivist

Cindy VanHorn, Registrar

For subscription information, contact The Lincoln Museum



THE
LINCOLN
MUSEUM

The Life and Legacy of Abraham Lincoln

200 E. Berry Street, P. O. Box 7838

Fort Wayne, Indiana 46801-7838

(260) 455-3864 Fax: (260) 455-6922

email: TheLincolnMuseum@LNC.com

<http://www.TheLincolnMuseum.org>

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Lincoln Lore Interview

Douglas L. Wilson

Q. How did you first get interested in Lincoln?

A. I think from the time I became a serious reader, I was always interested in Lincoln, particularly as a writer. My main interest in those days was literature, and I was interested in anybody with a reputation as a writer. I remember that I acquired the Collected Works when I was in college as a bonus for joining a book club, so Lincoln has had a prominent place on my bookshelves for over fifty years. But it was his writing, not so much his role in American history, that drew me to Lincoln. When I became a teacher of American literature, I always included Abraham Lincoln when I taught the survey of American Literature. And from the point of view of finally getting interested in Lincoln as a subject of serious study and research, it probably helped that the nineteenth-century American writers, Lincoln's contemporaries, had always been a major interest.

Q. What were the circumstances of your "getting interested in Lincoln as a subject of serious study?"

A. It's an odd story. I was working in the 1970s on a book on agrarianism in American literature, books and writers that had celebrated country life. I was well into this project when I decided that, like so many other things in American culture, this theme ultimately derived from the writings and influence of Thomas Jefferson. So in 1979 I plunged into the study of Jefferson and became so absorbed in him as a subject for research and writing that I eventually abandoned my agrarianism project. Because of where I started with Jefferson, my study of him concentrated on his reading, his early education, the sources of his ideas, his books, his library. I had so many unanswered questions about his youthful literary commonplace book, for example, that I ended up producing an edition of it for The Papers of Thomas Jefferson project.

I was immersed in these investigations for about 10 years, when I somehow got the idea of making a comparative study of the early reading of Jefferson and Lincoln. Even though he grew up practically on the frontier, Jefferson had the finest education it was possible to get. He went to school from the age of five; as a teenager, he got a classical education in Greek and Latin at boarding school; and he went to college. He was an avid student all his life and accumulated a massive library, which eventually became the foundation of the Library of Congress. I didn't know all that much about Lincoln, but I knew that his circumstances were vastly different, and that his formative reading, like Jefferson's, was often said to have been a crucial ingredient in his rise to greatness. I already knew what I needed to know in these respects about Jefferson, so I set out to explore the sources that would tell me what I needed to know about Lincoln. This is what led me to the Herndon materials.

Q. You argued in a number of your essays that Herndon and his informant materials had been unfairly disparaged and under-valued by Lincoln scholars. How did you come to that conclusion?

A. When I went to explore the Herndon materials in the late 1980s, I didn't know much about their standing. I knew that the Ann Rutledge story came through Herndon and that it was considered mostly a myth, but I didn't know much more than that. I knew something of the Herndon materials that had appeared in Emanuel Hertz's collection, *The Hidden*

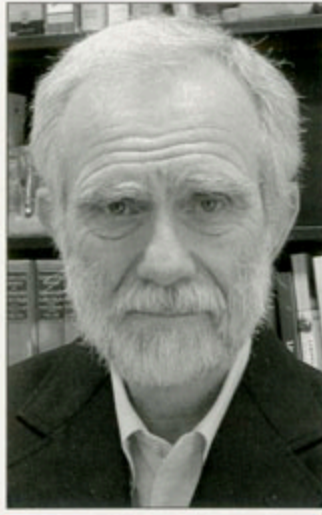
On the Cover: The co-directors of the Lincoln Studies Center at Knox College, Douglas L. Wilson (left) and Rodney O. Davis, are pictured at the site of the fifth Lincoln-Douglas debate. The debaters stood on a platform on the East side of what was then the Main College building, now known as "Old Main." The bas-reliefs mounted on the wall behind Wilson and Davis were created by Avard Fairbanks for the 100th anniversary of the debates in 1958.

Lincoln, but I had no idea that the entire body of Herndon materials was so extensive. I started by reading through the microfilm of the Herndon-Weik Collection at the Library of Congress, and I was amazed by the richness of those materials.

First of all, there are the hundreds of letters and interviews that Herndon collected about Lincoln from people who had known him. For all Jefferson's fame and notoriety, there is relatively little such evidence about the young Jefferson. In addition to the material Herndon collected from others, there are scores of Herndon's own letters to his collaborator Jesse W. Weik, detailing story after story about Lincoln, commenting on his political career, his personality, his habits, propensities, cast of mind, and so forth. It all gives such a rich and textured picture, especially of the younger Lincoln, and I was surprised that so much of what I came across in these material seemed at odds with the conventional story of Lincoln's life that I was familiar with. I was especially struck by the substantial number of informant accounts of the Ann Rutledge story and by the circumstance that most of them seemed quite credible and mainly in agreement on the basic parts of the story. At that point, I went to the principal biographies and commentaries on the Ann Rutledge story, and I discovered that these accounts were conspicuously at odds with what I had just seen in the informant materials.

It was at this point that I was seriously drawn into Lincoln scholarship, because I wanted to know why my own reading of the letters and interviews of Herndon's informants was so different from the conventional wisdom. After I published my comparison of Lincoln and Jefferson as readers, I set to work examining the history of Herndon's materials, how they were collected, how Herndon used them, and how they came to be evaluated by historians. It was only then that I discovered that Herndon had been in the doghouse of Lincoln scholarship for several decades and that both he and his informants were regarded by current historians with deep suspicion. At the same time, it seemed clear that everybody nonetheless used these materials quite freely, that, in fact, they were well nigh indispensable for any picture of Lincoln's early life. There seemed to me to be a double standard operating, by which one could embrace information developed through Herndon and his informants, while at the same time it was always possible to object to the same kind of information from the same informants on the basis that they were tainted by Herndon, or were after the fact, or were not first hand, etc. I decided to use the Ann Rutledge story as a test case for getting at the character of the Herndon evidence and the nature of the objections to it.

Q. Was this when and why you decided to edit the letters and interviews that were printed in Herndon's Informants?



Douglas L. Wilson is co-director of the Lincoln Studies Center at Knox College.

A. Yes. When I went to work on the Ann Rutledge problem, I kept thinking that part of the reason that there was so little understanding of what the informant materials actually had to say is that very few scholars had ever considered them in their entirety, and that this was basically a problem of access. I persuaded my colleague and teaching partner at Knox College, Rodney O. Davis, to join me in a project to edit the Herndon informant materials. It turned out to be a very arduous undertaking, and it took us the best part of nine years before Herndon's Informants finally appeared in December of 1997. In the meantime, I argued in a number of venues that William H. Herndon, his standing as an authority on Lincoln, and the standing and value of his informant materials, had not been fully and fairly assessed and deserved reconsideration. This was a big order, but it came at a favorable moment, for others were just then coming to similar conclusions. John Y. Simon had anticipated my concern about the discrediting of the Ann Rutledge story and was kind enough to share his paper with me before it was published. I then was able to adjust the direction of my own study to consider other data and somewhat different issues. Michael Burlingame was also hard at work on his study of Lincoln that would issue in *The Inner World of Abraham Lincoln* (1994), a study that delved deeply into the Herndon sources. It became clear that these various efforts were paying off when, in 1995, David Herbert Donald, the biographer of Herndon and a leading authority in the Lincoln field, acknowledged in his landmark biography of Lincoln that he had, in fact, been led to reconsider some of his earlier findings, particularly with regard to the Ann Rutledge story.

Q. How did The Lincoln Studies Center at Knox College come about?

A. The Lincoln Studies Center at Knox College came about initially as a retirement project. My teaching partner of 25 years, Rodney O. Davis, had become my partner in Lincoln research. Not only is he a first-rate historian and teacher, but his research specialty is Illinois history, with a special interest in ante-bellum politics. So he was a perfect partner for a project involving Lincoln's early life, particularly for me, since there was so much about that period that I didn't know. We had been working on Herndon's Informants, which we knew we would not be able to finish before retirement. And we knew that we had at least three more related projects we wanted to do: a new edition of the Herndon and Weik biography; an edition of Herndon's own letters, interviews, and lectures about Lincoln; and a new edition of the Lincoln-Douglas debates.

So we approached the officials at Knox College and proposed to create the Lincoln Studies Center, which would be a place to carry on Lincoln research, to sponsor lectures and other Lincoln-related events, to provide Knox students interested in scholarship with opportunities to work as research assistants, and to continue to offer the class we had been teaching, "Jefferson and Lincoln." Because Knox values its many Lincoln connections – for example, Lincoln was in the legislature that granted Knox (founded by abolitionists) a charter in 1837, he debated Stephen A. Douglas on the Knox campus in 1858, the college gave him an honorary degree in 1860, the first degree of any kind Lincoln ever received – the idea appealed to the college authorities, and they set us up with an office and we were in business. We didn't need salaries, but

we did think we needed the advice and support of other Lincoln scholars, so we asked the college to underwrite travel support for an annual meeting of a rotating board of eight advisors, which they very generously did. This turned out to be the best thing we could have done, for the active participation of these scholars has made all the difference. Their ideas, their suggestions, their advice, their interest and even enthusiasm for what we were doing have sustained us for seven years now. Some of our best ideas have come from our advisers. An example is the Lincoln Studies Publication Series, which will publish its first volume in 2006, was conceived and proposed by the one of our first board members, the late William E. Gienapp.

Q. How did you get involved in the Abraham Lincoln Papers Project?

A. We started setting up the Lincoln Studies Center in 1997 and moved into our office in Old Main (where the Lincoln-Douglas debate took place) in 1998. We hardly had the furniture arranged when the Library of Congress approached us about transcribing and annotating the documents in their Abraham Lincoln Papers for the World Wide Web. We told them we already had a full plate and could not accommodate them, but they were persistent. They had raised the funds for this purpose, and since they couldn't do it in-house, they suggested that we put together an editorial team and oversee the work. We decided that we could do this and still maintain momentum on our other projects, so we accepted, and by March 1999 the team was in place and the work began. Our editorial team was made up of former students. Matt Norman, who was ABD at the University of Illinois in history, working with one of our board of advisers, Robert W. Johannsen, was our lead editor, and he was joined initially by Terry Wilson, who was a published Civil War scholar. Later, we were able to add a prize-winning history major and recent graduate, Joel Ward. These were all very able editors, and Rod Davis and I were able to concentrate on the documents in Lincoln's own hand. Most of the collection, of course, consists of incoming mail, and in three years we were able to select, transcribe, and annotate about 10,000 documents, which is about half of the total in the collection.

Q. What is your motivation in undertaking a new edition of the Lincoln-Douglas debates, and what new insights might readers find in your new edition? When will this book be available?

A. Well, let me answer those questions in reverse order. We are committed to having the edition ready by October 7, 2008, the 150th anniversary of the Lincoln-Douglas debate that took place on the Knox College campus. We hope to sponsor a suitable celebration at that time, and there will undoubtedly be a good deal of interest in the debates, especially coming just a few months before the bicentennial of Lincoln birth in 2009. Allen Guelzo is already at work on a new book on the debates, and that is bound to be of great interest. There has never been an edition of the debates that is fully annotated, and that is one thing that we hope to provide in ours. We think the debates would be more widely read in classes if there were an edition that would anticipate the kinds of difficulties the debates present to modern students and provide the kind of annotation needed to deal with them. The debates are justly

famous and very important historically, but modern readers are very often disappointed on first contact. They come expecting to find a high-minded exchange of views on slavery and are shocked and often disenchanted to discover that these are two partisan politicians wrangling over obscure issues and making what appear to be trumped-up charges against each other. But if those same readers could be properly prepared and kept fully apprised of what is going on, we believe they could get much more out of the experience. Rod Davis and I know this to be the case because we taught the debates to Knox students for a good many years.

Also, ours will be the first critical edition of the texts of the debates. That may sound arcane, but bear with me. The standard text of the debates had a very distinguished editor, Lincoln himself. He clipped the newspaper transcripts and made a scrapbook of the major speeches of the 1858 senatorial campaign and the joint debates, clipping his speeches from the reporting of the Chicago Press & Tribune, the leading Republican paper, and Douglas's speeches from the reporting of the Chicago Times, the leading Democratic paper. Making only a few corrections to his own speeches and leaving Douglas's entirely alone, Lincoln essentially laid out the text that we have been using ever since. Then several years ago, Harold Holzer had the idea of bringing out an edition that turned this arrangement around, printing the Times' version of what Lincoln said and the Press & Tribune's version of what Douglas said. This was a great thing to do, because virtually no one had looked at those texts since they were printed, and they have quite a bit to tell us. Newspapers were unapologetically biased in those days where politics was concerned, and having both versions to draw on helps fill out the picture. But you have to bear in mind that if you read Lincoln as reported by the Times, you are getting an unsympathetic and often carelessly reported account of what Lincoln said. Reading Lincoln in the Press and Tribune, you must be aware that sympathetic editors were not above censoring things they didn't think were helpful and touching up their man's speeches to improve them. And both sides occasionally condensed the speeches to save space.

What we propose to do is to use both versions, and any other accounts or evidence we can find, to arrive at a text that is closer than either of these to what the candidates actually said. This is the way Shakespeare's plays are edited, for example, by consulting and comparing various existing versions of the text. We are under no illusions that our critical text will be vastly different from the newspaper texts or that it will revolutionize our thinking about what was said. But we know from our preliminary studies that it is possible to present a more accurate text of what was actually said, and we believe that this in itself will be a contribution.

Q. Another of your upcoming projects is a new edition of Herndon's Lincoln. Do you believe that William H. Herndon's book was a fair assessment of Abraham Lincoln? Do you believe that latter day historians have been fair in their assessments of Herndon?

A. Our new edition of Herndon's Lincoln will appear in 2006. It will be the first volume in the Lincoln Studies Center Publication Series. This project was a natural for us because this biography was largely based on the material we edited as Herndon's Informants. The biog-

raphy, as you know, is considered the most influential biography of Lincoln ever written. More than any other work, it shaped the basic picture of Lincoln that Americans carry around with them. It has been surpassed in terms of accuracy and information, but it can never be replaced. It is like Boswell's *Life of Johnson* in that respect. It is a classic. The last edition was done 75 years ago, and while it was done by a first-rate Lincoln scholar, Paul Angle, he did not then have the benefit of access to the Herndon manuscripts that we did. Having access to not only Herndon's papers but to those of his collaborator, Jesse W. Weik, enabled us to get at many things about the biography that were previously unknown. For example, scholars have never had a very good handle on Weik's role in the enterprise. Herndon's Lincoln is related in the first person, as though it was coming directly from Herndon, but Weik wrote virtually every word of the text. We were able to develop a much better understanding of Weik's role and the way it influenced the substance of the biography. Without going into all the details, I can tell you that Weik's way of writing and looking at Lincoln were noticeably different from Herndon's, and these differences are reflected in the biography. We think our edition will help the interested reader sort these things out. We also have been able, in our annotations, to identify almost all of the sources quoted and drawn on in the biography and to alert the reader to differences between the sources and the Herndon-Weik text.

Your second question has to do with whether or not Herndon's Lincoln was a "fair assessment of Lincoln." I certainly think it was fair in the sense that it is not unfair to him. It is essentially a book about Lincoln's pre-presidential life, with only a single, half-hearted chapter about the presidency, so in that regard it "neglects" Lincoln's most important contributions. It also must be said that it tries very hard to be fair in the sense of facing up to sensitive aspects of the subject. It was greatly criticized and even resented at the time it appeared because it insisted on talking about things you weren't supposed to get into, especially with the life of a national hero and martyr. Herndon was adamant that he was going to disclose things that were important to Lincoln's makeup and career, even if they were outside the bounds of nineteenth-century conventions. For example, just talking about Lincoln's marital troubles was considered reprehensible, but Herndon insisted that this had to be brought in because of its direct bearing on Lincoln's career. In this respect, Herndon is still resented by readers who feel that he is unfair to Mary Lincoln. Some modern readers find his treatment of her mean-spirited and vengeful, as though he was trying to get back at her for some ill treatment in the past, but I have trouble seeing it this way. He disapproved of her behavior, largely because he was aware of the sufferings of his law partner, which he describes in detail. Herndon is sometimes accused of inventing the picture of Mary as a difficult and hot-tempered woman, but this is a misapprehension. Herndon had the same view of her that Springfield people in general had, as Angle, who studied Lincoln's Springfield in depth, aptly points out. But what is mostly ignored is that Herndon says explicitly in the biography what he says in letters to numerous correspondents, namely, that the difficulties in the Lincoln marriage were not all Mary's fault and that Lincoln was also very much to blame. His view was that they were a mismatch and were therefore doomed to be unhappy. The cruelty that Herndon was guilty of was not by intention but by

indiscretion. He said things in his public lectures that he sincerely believed were true and were important for understanding Lincoln's life and career, but they were very painful to Lincoln's family, who quite rightfully resented them.

Your last question – whether latter day historians have been fair in their assessments of Herndon – is one that I have written about a good deal. Let me put it this way. I think that there was a phase in Lincoln scholarship when Herndon, who had figured so importantly in Lincoln literature, went out of favor. Like everyone else, Herndon had his faults and these predominated with the leading Lincoln scholars for much of the last three-quarters of the twentieth century. But as John Y. Simon and others began to notice toward the end of that period, the disposition to denigrate Herndon and discount his evidence (unless it suited one's purposes) went too far, and now, I believe, a correction has finally set in. If the way the material in Herndon's *Informants* has been greeted and used by scholars is any indication, there is a growing realization that Herndon and his materials are simply indispensable resources in the Lincoln field. This suggests to me that part of the problem was a lack of ready access to Herndon's materials, and this is why the Lincoln Studies Center has been assiduously identifying and collecting Herndon's own letters, lectures, and interviews about Lincoln. We hope to get these edited and published in time for the bicentennial of Lincoln's birth in 2009. My sense is that there is now a wider recognition that while there are difficulties to be confronted in using the reminiscent evidence Herndon collected and in gauging his own personal testimony, it would be foolish to ignore such material, so we have no alternative but to find ways of working with it. Unfortunately, as Don Fehrenbacher pointed out, "there is no simple formula" for doing so. The only way to proceed is to exercise caution, care, and good judgment, which implies doing justice to Herndon.

Q. Honor's Voice is such a great book. What was the genesis for your approach to the subject?

A. In the course of going through the Herndon-Weik Collection and locating the other Herndon materials that were scattered in various repositories, I became very familiar with the testimony that had been offered about Lincoln's early life, and I was struck by what a different picture one got by taking seriously what the informants had to say. For example, it seemed to me that most biographers had not come to grips with what Lincoln had gone through in his twenties and early thirties. There was clear evidence, as I believed, of two emotional breakdowns, and a long struggle to come to terms with himself. This was evident in many ways but most tellingly acted out in his courtships, a subject that seemed to me had not been adequately investigated by his biographers. Of course, I was also interested in the problem presented by the evidence itself. As the professionally trained historians had been pointing out for decades, the evidence that Herndon collected about Lincoln's early years was all after the fact, it was often second or third hand, it could not be confirmed by contemporary or documentary evidence, most of it was highly subjective, and it was all liable to the notorious distortions of memory. How can we arrive at anything like historic truth from evidence like this? The logic of this critique suggests that we should simply ignore all such evidence, but that, in the case of Lincoln's early years,

would leave us with almost nothing, for virtually everything we “know” about this subject comes from such evidence. I wanted to explore the ways that one could work with such evidence and, by sifting and sorting and weighing the possibilities, could arrive at conclusions that were at least likely or probable. This is why I started with a chapter on Lincoln’s wrestling match with Jack Armstrong. Not that I thought it was, as some have suggested, a “turning point” in Lincoln’s life, for I don’t think it was. But it was, nonetheless, a colorful and authentic event in Lincoln’s early life, and it has come down to us in a substantial number of supposedly eye-witness accounts that are wildly incompatible. Trying to make sense out of these accounts was, I hoped, a kind of object lesson in how one could weigh and work with disparate accounts and arrive at a sense of what really happened.

Once I became more comfortable with the evidence and its possibilities, I began to see things I hadn’t seen before. For example, it became clear to me that the young Lincoln of this period had to work his way through a series of what he called “scrapes,” such as his duel with Shields and his ignominious jumping out the window of the Second Presbyterian Church. Honor’s Voice was an attempt to shed light on what I first thought of as Lincoln’s emergence, how he engaged the difficulties he encountered as a young man and emerged in the 1840s as a person to be reckoned with. Such difficulties included his lack of education and social refinement, his awkwardness with women, and his emotional vulnerability. This last consideration, which may be the most important he had to deal with, was also the most neglected and least understood. It seemed to me that the prevailing picture of what Lincoln went through to get where he did had been too much colored by his ultimate triumph. I wanted to give a fuller picture of some of those crucial episodes, particularly his struggles in his twenties and early thirties, as they were lived forward by a man who wasn’t sure what was in store for him, who didn’t know

he was going to be a successful lawyer and politician, much less President of the United States.

Q: Besides the editorial work you mentioned, do you have any other Lincoln projects in the works?

A: Funny you should ask. I have just finished writing a new Lincoln book that will be coming out in the fall of 2006. It was prompted by the work the Lincoln Studies Center did for the Library of Congress. Going over the documents in Lincoln’s own hand, I was struck by how much they have to tell us about Lincoln the writer. There is a great deal of draft material in the collection, and these drafts have the virtue of showing us not the finished product, but the stages the document went through in the course of being created. The upshot is that by telling the story of these documents and the circumstances in which they were created, one can gain a very keen sense of Lincoln the verbal craftsman. Working with these materials got me started thinking about Lincoln as a writer, and this led, perhaps inevitably, to thinking about the role that writing played in his presidency. This is, after all, one of the most remarkable things about Lincoln and something that sets him apart. He wrote not one or two memorable pieces, which is more than most presidents could manage, but he produced a whole series of truly provocative writings. Certain of his public letters, for example, had a demonstrable effect on public opinion at crucial times. The emotive force of such writings as the Gettysburg Address and the Second Inaugural is well known. The book that I ended up writing is called *Lincoln’s Sword: The Presidency and the Power of Words*. I have come to believe, and I try to show in the book, that Lincoln’s writing was arguably his most consequential presidential weapon, for not only did it powerfully influence events in his own time but it has continued down through the years to shape our national identity and our understanding of American history

Lincoln on Negro Citizenship¹

By Joseph R. Forniari

“the germ or even the suggestion of the individual rights of man”

— A. Lincoln

I. Introduction: “a schizoid quality.”

At Springfield, June 26, 1857, Abraham Lincoln offered his first public reply to the Dred Scott decision. He claimed that amongst its many flaws, the ruling was “based on assumed historical facts which were not really true.” In particular, he challenged Taney’s assertion that blacks were never part of the sovereign people of the United States. Citing Justice Curtis’s dissent to the contrary, Lincoln proved that, “in five of the then thirteen states...free negroes were voters, and...had the same part in making the Constitution that the white people had.” Without explicitly saying so, this statement of fact implied that free Negroes were entitled to citizenship under the Constitution and the privileges and immunities thereof. The impli-

cation made Lincoln politically vulnerable to the charge that he was a radical abolitionist who favored “perfect” social and political equality between the races. Cognizant that Stephen A. Douglas would exploit the charge of radicalism against him, Lincoln subsequently observed in the same speech that, “There is a natural disgust in the minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races; and Judge Douglas evidently is basing his chief hope, upon the chances of being able to appropriate the benefit of this disgust to himself.” A year later during the Great Debates, after being hammered by Douglas on the race question, at Charleston, September 18, 1858, Lincoln conceded that he was “not in favor of negro citizenship.” Thus, Lincoln walked a political tightrope between his opposition to Dred Scott, and the abolitionist implications of this opposition. To state the matter bluntly: it is one thing to criticize the Supreme Court for its erroneous reading of history in regard to Negro citizenship; it is quite another to advocate publicly Negro citizenship in the state of Illinois during an election season.

In view of this political dilemma, the late historian Don E. Fehrenbacher notes the "schizoid quality" of Lincoln's *Springfield Address*.² Does Lincoln's equivocation on Negro citizenship display the intellectual incoherence of a divided mind? Does it prove that he was a mere pragmatist who placed interest before principle, who simply followed the crests and tides of public opinion to get elected? To remedy these lingering misperceptions, I seek to reveal the core principles of Lincoln's position on Negro citizenship, and to trace their development from his first public reply to Dred Scott to his actions as President. In sum, Lincoln's leadership on this volatile issue was guided by his prudent judgment that the principle of equality should be advanced as much as possible under the circumstances.³ More specifically, it was predicated upon his *moral conviction* that (a) "the negro is a man; that his bondage is cruelly wrong, and that the field of his oppression ought not to be enlarged," and (b) his corresponding *legal conviction* that the Constitution allowed for the possibility, but did not mandate, Negro citizenship.



Joseph R. Fornieri is Associate Professor of Political Science at Rochester Institute of Technology.

Notwithstanding some hedging that may be attributed to the political limits of the man and his times, I wish to emphasize the coherence and overall consistency of Lincoln's stance, particularly his suggestion in his *First Inaugural Address* of March 4, 1861, that free Negroes were entitled to the privileges and immunities of national citizenship and his administration's *de jure* recognition of Negro citizenship a year later through an opinion of his Attorney General on November 29, 1862. Indeed, the very suggestion of federal protection for Negroes in the First Inaugural, not to mention the actual legal recognition of citizenship a year later, constituted a bold defiance of Dred Scott and a principled stride toward black freedom and civil rights. Inexplicably, Lincoln's inclusive reading of the privileges and immunities clause, and his willingness to put this belief into practice as President have not received the scholarly attention it deserves. This crucial link between principle and practice offers a fuller picture of Lincoln's stance on Negro citizenship, thereby helping to place in context his disparaging remarks during the debates with Douglas.

II. Legal and Historical Background: "a general citizenship."

To appreciate Lincoln's view, it is necessary to have some understanding of the legal and historical background to the problem of Negro citizenship, and to note its unsettled constitutional status at the time of Dred Scott. The following presents only a general overview, not a comprehensive treatment.

Aside from delegating to Congress the power to legislate a uniform rule of naturalization (Article 1 sec. 8, clause 4), the Constitution did not provide a definition of national citizenship. It did, however, recognize implicitly certain rights that appertained to citizenship through the privileges and immunities clause of Article 4 sec. 2 clause 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In his *Commentaries on the Constitution*, Joseph Story interpreted the clause to confer "a general citizenship" in the common political community of the United States:

*It is plain and simple in its language; and its object is not easily mistaken. . . . It is obvious, that, if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may say so, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.*⁴ (emphasis added)

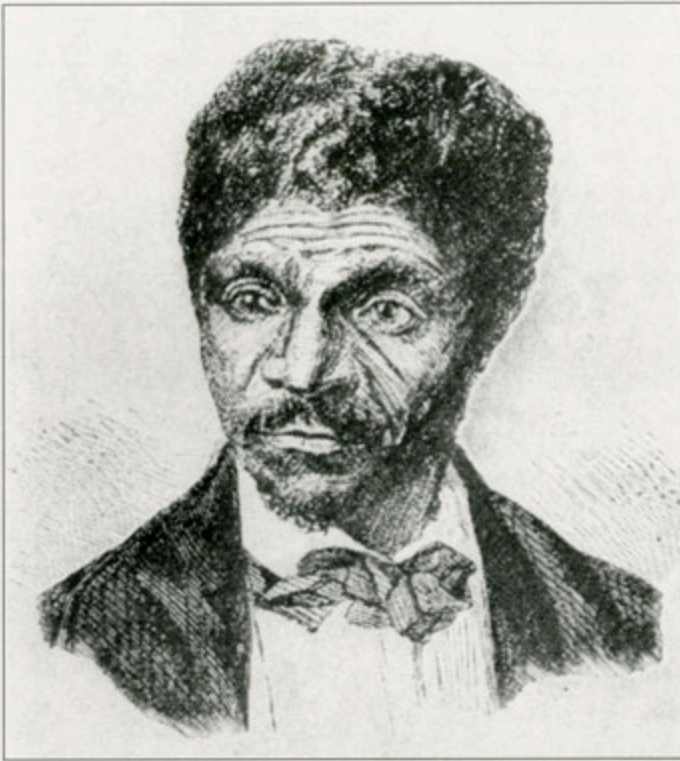
Traditionally, free birth in one's state made a person a citizen of both that state and of the United States. Free blacks, of course, were an exception that posed a constitutional conundrum: Could they be citizens of the United States? Did the conferral of state citizenship upon blacks translate into national citizenship under the Constitution, as it did for free whites? And if the Constitution did confer a "general citizenship," as Story contended, did it then apply to free blacks, thereby clothing them with federal protection against discriminatory practices of other states, as it did for free whites? The problem would not be fully resolved until after the Civil War with the passage of Section 1 of the Fourteenth Amendment, 1868.

Specifically, what rights appertained to the aforementioned "general citizenship" spoken of by Story? Article 4 of the Articles of Confederation provides a further clue to the meaning and purpose of the clause since it enumerates some of the specific privileges and immunities enjoyed by citizens under that frame of government in 1781:

*The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.*⁵

In sum, Article 4 comprehended a right to travel, equal protection in commercial relations, and the right to move property from one state to another.

The language of Article 4, however, was not without its ambi-



Dred Scott, no date (TLM #1346), published in *Century Magazine* June 1887, p. 208.

guities. Concurring with an observation made in the *Federalist Papers*, Story noted the “strange confusion” caused by the use of the various terms “free inhabitants,” “free citizens” and “people” in the same article. Were these terms synonymous? Did they apply to free blacks?

While the Articles of Confederation made no mention of color in regard to citizenship, Thomas Jefferson’s *Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth*, 1779, clearly did, thereby excluding blacks from the privileges and immunities of the state of Virginia:

Be it enacted by the General Assembly, that all white persons born within the territory of this commonwealth... shall be deemed citizens of this commonwealth.... The free white inhabitants of every of the states, parties to the American confederation... shall be intitled [sic] to all rights, privileges, and immunities of free citizens in this commonwealth, and shall have free egress, and regress, to and from the same, and shall enjoy therein, all the privileges of trade, and commerce, subject to the same duties, impositions and restrictions as the citizens of this commonwealth. (emphasis added).⁶

Thus, the stage was set for a conflict over the definition of citizenship even before the Constitution.

In contrast to civil rights, Jefferson made no mention of color or race when speaking of the natural or inalienable rights. As Harry V. Jaffa has demonstrated, Jefferson saw natural rights as universal, applying in the abstract to all human beings at all times. And while he may have subscribed to some of the racial prejudices of his time, Jefferson nonetheless recognized the common human-

ity of Negroes, believing that they too were entitled to natural (inalienable) rights.⁷ Jaffa notes that in the 1780s Jefferson described slaves as “one half the citizens” of Virginia, suggesting the “extraordinary” belief at that time that slaves were “citizens by natural right, if not by positive law....”⁸

What then accounts for Jefferson’s color consciousness in regard to civil rights; and his color blindness in regard to natural rights? Jefferson seemed to accept the distinction at the time of the Founding between inalienable rights, which were universal, pre-political and abstract; and the more concrete, historically obtained rights of Englishmen, which were recognized by the common law, granted by charters, and codified by positive law.

The distinction between natural rights and the ancient rights of Englishmen was reflected by the *Declaration and Resolves of 1774 of the First Continental Congress*, which distinguished between the inalienable rights of “life, liberty, and property” and “the rights, liberties, and immunities of free and natural-born subjects within the realm of England.”⁹ The *Resolves* further noted: “That these, His Majesty’s Colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.” Dating back to England in the Middle Ages, the term “privileges and immunities” originally referred to the respective benefits and exemptions granted by the crown. It would later denote common membership in the British Empire, prohibiting discrimination between subjects from different provinces. In sum, at the time of the Revolution, the term privileges and immunities constituted a litany of rights traditionally enjoyed by subjects of the British Empire.

Though inalienable natural rights and the more customary rights of Englishmen were often seen as coincident, the distinction between them during the Revolution presaged a further distinction in American public law between three kinds of rights: 1) natural rights; 2) political rights (voting); 3) civil rights. This legal and moral complexity is worth noting since Lincoln and the proponents of Negro citizenship would likewise distinguish between these three kinds of rights.¹⁰

For example, in *Crandall v. State*, 1834, a case dealing with the privileges and immunities of out of state blacks to attend Negro schools in Connecticut, the proponents of Negro citizenship argued that the political right “of voting is not the criterion of citizenship: the one has no natural or necessary connexion with the other. Cases may exist where persons vote who are not citizens, and where persons are citizens and do not vote. The right of suffrage is nowhere universal and absolute. It is founded in notions of internal police, varying frequently, even in the same government; whereas citizenship grows out of allegiance, which is every where the same, and is unchanging.”¹¹ That is to say, the political right to suffrage—or lack thereof—did not determine the question of whether or not free blacks were entitled to citizenship and some of the privileges and immunities thereof. After all, women and children were considered citizens and they did not enjoy the right to vote at the time.

The records of the Constitutional Convention as noted by James Madison also shed light on the meaning of the privileges and

immunities clause. According to Madison, the original wording of the clause as framed by the Committee of Detail on August 6 read: "The free Citizens of each State shall be intitled [sic] to all Privileges and Immunities of free Citizens in the sevl. States."¹² On August 28th a slightly revised version was placed under the heading of Article XIV and reported to the Convention, "The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Article XIV was then taken up the same day. Madison noted that Pinckney of South Carolina "was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves."¹³

Pinckney's misgivings anticipate the future controversy in *Dred Scott* over the right to property in a slave. Since the privileges and immunities guarantee was understood to include equal protection of commercial rights and the freedom of transit, Pinckney's demand "in favor of property in slaves" amounted to a federal privilege to chattel slavery and a corresponding immunity from state laws that restricted their movement and importation. In effect, Taney would read Pinckney's proslavery view into the Constitution. Yet, as Lincoln would subsequently note in his *Cooper Union Address of 1860*, Taney reached this erroneous conclusion contrary to Madison's own admission on August 25 that he "thought it wrong to admit in the Constitution the idea that there could be property in men."¹⁴

In spite of Pinckney's objection, on August 28th Madison recorded that Article XIV passed with 9 states voting aye; 1 state (South Carolina—that is, Pinckney's state) voting no; and 1 state (Georgia) divided.¹⁵ Aside from changes in capitalization, the final version included in the Constitution was identical to the language of Article XIV, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Significantly, the Constitution made no mention of color in regard to citizenship, nor did it enshrine a federal right to property in a slave.

Nonetheless, the problem of Negro citizenship was left unresolved. To complicate matters, while the Constitution made no mention of color, the first naturalization law enacted by Congress in 1790 did: "Any alien, being a free white person, may become a citizen, by complying with the requisites hereinafter named."¹⁶

The problem came to a head with the Missouri Compromise of 1820. The Missouri Constitution excluded free blacks from entering its territory.¹⁷ Certain Northern members of Congress objected to this provision, claiming that it deprived free blacks of their privileges and immunities under the federal Constitution. This precipitated a debate over whether or not blacks were citizens of the United States.¹⁸

The remarks of William Eustis, a representative from Massachusetts in the U.S. House at the time, are illustrative of the northern side of the debate. Eustis reminded his opponents that blacks from the Middle and Northern States had served valiantly in the Revolutionary War. Moreover, he argued that in his own State of Massachusetts they were entitled to "all the broad and essential rights of citizens—the right, in common with the whites, to hold real and personal estate; the right of course to hold and convey land; the right of trial by jury; the right to the writ of habeas

corpus; and, in this Government, the all-important right of the elective franchise...."¹⁹ He rebutted the argument, later made by Taney in *Dred Scott*, that state laws prohibiting marriage between the races necessarily divested blacks of the privileges and immunities of citizenship since "the same law... interdicts the marriage of a white man with a black woman." Therefore it "applies equally to both, and cannot justify the inference which has been drawn from it." Finally, Eustis argued that the state's denial of *some* civil rights to blacks—for example, their exclusion from the militia, did not negate their status as citizens of the United States. That is to say, according to Eustis, Negro citizenship under the Constitution was not contingent upon the condition of a perfect civic, political, and social equality between the races. As noted, women and children were traditionally considered citizens even though they did not enjoy equal civil and political rights with adult males. And as will be seen, the nuances of Eustis' argument that the actual condition of perfect civic, political and social equality between the races does not preclude the possibility of Negro citizenship altogether corresponds to Lincoln's position in the Debates against Douglas.

In response to the furor caused by the admission of Missouri to the Union, Charles Pinckney, whom we have already met as the South Carolina delegate who demanded a right to property in a slave at the Convention, reiterated his own interpretation of the privileges and immunities clause. On February 13, 1821, Pinckney invoked his authority as a Founding Father against Negro citizenship. "[A]t the time I drew that constitution," he recollected, "I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could have ever existed in it; nor, notwithstanding all that has been said on the subject, do I now believe one does exist in it."²⁰ The views of Pinckney and Eustis thus represented polar opposites at the time of the Missouri Compromise.

In 1821, the same year as Pinckney's remarks, a dispute over the status of free Negroes in Virginia ensued. In his opinion on November 7, 1821, William Wirt, The Attorney General of the United States declared:

*I am of the opinion that the constitution, by the description of "citizens of the United States," intended those only who enjoyed full and equal privileges of white citizens in the State of their residence.... Upon the whole, I am of the opinion that free persons of color in Virginia are not citizens of the United States, within the intent and meaning of the acts regulating foreign and coasting trade, so as to be qualified to command vessels.*²¹

Finally, the case of *Corfield v. Coryell* (1823) merits attention since it was the only ruling by a Federal Court on the meaning of the privileges and immunities clause.²² *Corfield* involved the constitutionality of a New Jersey law that prohibited out-of-state citizens from oyster fishing in New Jersey waters. Writing for the District Court, Justice Bushrod Washington maintained that there are "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign." Justice Washington's claim that there are "fundamental" rights

appertaining to a general citizenship meant that no state could deprive citizens of these rights.

He then proceeded to enumerate those privileges and immunities that constituted the “fundamental rights” of citizens under the Constitution:

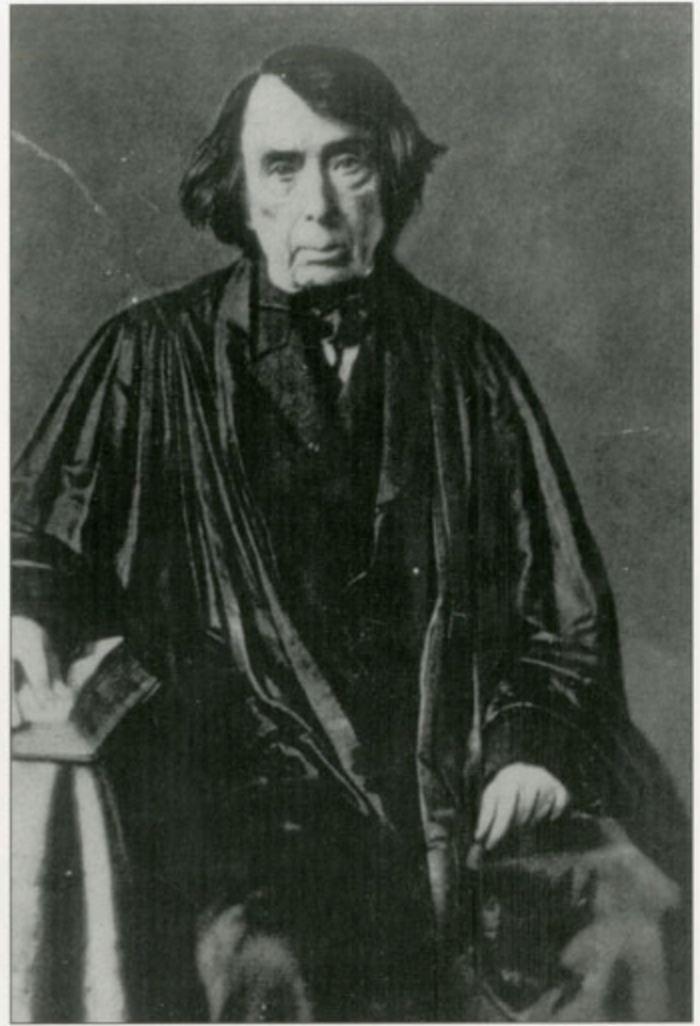
Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes of impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of the privileges deemed fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.²³

Though *Corfield* did not deal with Negro citizenship directly, its principle of “fundamental rights” suggested that if free Negroes were citizens under the Constitution, then they were entitled to federal protection and legal safeguards against abuses of the Fugitive Slave Act. While pregnant in its implications, however, this revealing portion of Justice Washington’s opinion dealing with fundamental rights was dictum. In fact, he ruled that the New Jersey law prohibiting nonresidents from fishing oysters in its waters did not violate the privileges and immunities clause.

III. Taney vs. Lincoln on *Dred Scott*: “the germ or even the suggestion.”

The foregoing narrative brings us to Taney’s opinion in *Dred Scott*, 1857. Seeking to settle the problem of Negro citizenship once and for all, the Chief Justice squarely confronted the question: “Does the Constitution of the United States act upon him [the Negro] whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?”²⁴ Answering this foregoing interrogative in the negative, he categorically denied that blacks were entitled to national citizenship, foreclosing the possibility that they could ever become citizens of a state in the sense spoken of under the Constitution in Article 4 section 2.

Taney disregarded the fact that citizenship for whites was conferred by birth and/or residency in a state within the Union. His opinion also precluded a foreign, free black person from ever becoming a naturalized citizen of the United States. Moreover, he applied his ruling indiscriminately to the entire black race, failing to recognize any legal distinction between slave, freeborn, and manumitted blacks. Taney ignored these finer points of the law



Roger B. Taney, no date (TLM #2387)

even though the Constitution itself distinguished between “free persons” and “other persons”—the latter term being an oblique reference to slaves. The sum of his opinion thus divested all blacks—whether free, enslaved, or manumitted—of citizenship and federal protection, enshrining racism and color consciousness as a principle of the Constitution.

At best, Taney conceded that a person of the African race might be considered narrowly as a “citizen” of the particular state in which he resided, but this was for local purposes only. It did not entitle him to a “general citizenship” of the United States and the corresponding privileges and immunities thereof. Taney’s ruling denied that states could make Negroes citizens in this broader sense of the term. And, as if to add insult to injury, Taney included a summary of the privileges and immunities enjoyed by whites only, never to be enjoyed by Negroes:

More especially, it cannot be believed that the large slaveholding States regarded them [Negroes] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they consid-

*ered to be necessary for their own safety. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.*²⁵

Insofar as free blacks enjoyed any rights at all, they were entirely relative to the discretion of the state in which they resided and were forfeit upon leaving that state's jurisdiction. The constitutional historians Alfred H. Kelly, Winfred A. Harbison, and Herman Belz explain the status of free blacks as a result of Dred Scott: "In effect, Taney placed Negroes in a third category between citizenship and alienage, as subject-nationals or quasi-citizens. This determination was nowhere recognized in the American law of citizenship, but it was not greatly at variance with the actual conditions of Negro life in the antebellum period."²⁶

Taney's ruling also meant that free blacks venturing outside the boundaries of their state could be stripped of due process rights. Because they were denied federal protection of the writ of habeas corpus, the lives and fortunes of free blacks were extremely vulnerable to deprivations by southern agents who indiscriminately sought to reclaim them as fugitives under the draconian Fugitive Slave Act of 1850. And, as Lincoln would warn, the holding of Dred Scott portended the evisceration of state laws that restricted the importation and movement of slaves since they would be infringing upon the federal right to chattel slavery.²⁷ Indeed, Taney had vindicated Pinckney's proslavery reading of the Constitution.

Taney's denial of federal protection to free born blacks was itself based upon a novel definition of the term citizen—one that equated citizenship not with the traditional criteria of free birth, allegiance to the regime, and/or residency in a state; but with the exercise of sovereign power by those who voted and ruled at the time of the Constitution, and their descendants. Tailored for the purpose of excluding free blacks, Taney's definition of citizen was applied narrowly to the class of white, property owning, male citizens of Anglo-American ancestry, and their descendants, who could vote and exercise power in government at the time of the Constitution in 1787. Throughout his opinion, Taney was at pains to emphasize that, "We the people..." of the Preamble and "All men are created equal" of the Declaration did not include blacks.

In his first public reply to Dred Scott at Springfield on June 26, 1857, Lincoln employed an internal argument against Taney by assuming his peculiar definition of citizenship—namely, that it was based upon the exercise of sovereign power by those and their descendants who voted and ruled at the time of the Constitution. He then cited Justice Curtis's dissent, which proved that in five states, at the time of the Founding—namely, 1) New Hampshire; 2) Massachusetts; 3) New York; 4) New Jersey; and 5) North Carolina—free blacks enjoyed the right to suffrage and voted in

the state ratifying conventions that adopted the Constitution. Thus, by Taney's own novel definition, free blacks exercised sovereign power and were part of the sovereignty of the people at the time of the Constitution. As a result, they and their descendants were entitled to *bona fide* citizenship under the Constitution.

However, Lincoln stopped short of explicitly drawing this implication. He noted that as a matter of fact Taney's reading of history was erroneous and that it did not support his categorical denial of Negro citizenship "in every possible event." What prevented Lincoln from taking the further step of demanding that free Negroes be made citizens? What accounts for his reluctance to do so?

As noted at the beginning of this essay, in the very same speech Lincoln disassociated himself from the radical abolitionist position: "There is a natural disgust in the minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races...." It is noteworthy that Lincoln observes this as a statement of fact and does not reveal whether he personally shares this "natural disgust." By contrast, he forthrightly draws attention to the salient fact that, "Judge Douglas evidently is basing his chief hope, upon the chances of being able to appropriate the benefit of this disgust to himself." Perhaps Lincoln shared the prejudices of his time against black people. The interior convictions of his heart cannot be known with certainty. What can be shown, however, was that Lincoln was fully cognizant that the implications of his critique of Dred Scott made him politically vulnerable to the damning charge of radicalism, and that his political opponent was attempting to exploit this charge against him. A careful reading of Lincoln's replies to Douglas reveal as much about his own sense of political vulnerability as they do about the Little Giant's racial pandering: "I am quite aware what the Judge's object is here by all these allusions. He knows that we are before an audience, having strong sympathies southward by relationship, place of birth, and so on. He desires to place me in an extremely Abolition attitude." This context needs to be kept in mind when considering the full picture of Lincoln's stance on Negro citizenship.

Indeed, it can be argued that Lincoln's denial of Negro citizenship was a matter of political necessity; that the public advocacy of civil rights for blacks in the state of Illinois was tantamount to political suicide for someone running for elective office in that state.²⁸ Testifying to this view is the fact that less than ten years earlier the state of Illinois had passed by 70% a black exclusion law, which prohibited free Negroes from even setting foot within its borders. Fehrenbacher himself notes that the question of race was an issue that tended to divide the Republican Party and unite the Democratic Party, while the issue of slavery divided the Democratic Party and united the Republican Party.²⁹ Thus, Lincoln's failure to respond to the charge of radicalism against him threatened to dash his political fortunes in Illinois.

But while he stopped short of advocating Negro citizenship, Lincoln nonetheless insisted the blacks were entitled to natural rights. Moreover, he would consistently keep alive the core conviction that the Constitution permitted under some circumstances, but did not mandate, Negro citizenship. Rebutting the ugly charge of miscegenation, at Springfield, Lincoln explained: "Now I protest against that counterfeit logic which concludes that, because I do not want a black

woman for a *slave* I must necessarily want her for a *wife*. I need not have her for either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of any one else, she is my equal, and the equal of all others.”

It must be emphasized that for Lincoln the theoretical acknowledgement that Negroes were entitled to natural rights was not merely an academic matter. Rather it held significant practical consequences. I must therefore respectfully disagree with David Donald’s assessment in his nonetheless outstanding biography that the abstract question of inalienable rights “had little practical relevance to this election. For example, the controversy over whether the framers of the Declaration of Independence intended to include blacks in announcing that all men are created equal dealt with an interesting, if ultimately unresolvable, historiographical problem, but it was not easy to see just what it had to do with the choice of a senator for Illinois in 1858.”³⁰

On the contrary, I concur with Harry V. Jaffa who explains, “that the still unfulfilled achievement of equal political rights for Negroes would not even be imaginable if there had not first been the recognition of the Negro’s humanity that the Declaration of Independence demands.”³¹ The affirmation of the principle



Stephen A. Douglas, no date (TLM #65)

of equality to all human beings served as an important moral compass that guided Lincoln’s leadership and that distinguished his core convictions from the white supremacy of Taney and Douglas. As a moral end that governed both the regime and his statesmanship, Lincoln saw equality as a normative standard that was to be approximated as much as possible under the circumstances. Lincoln criticized Taney’s denial of natural rights to Negroes precisely because it “shorn” the Declaration of “its vitality, and practical value; and left [it] without the *germ* or even the *suggestion* of the individual rights of man in it....” That is to say, Taney ruled out the universality and practical relevance of the Declaration as a moral aspiration. As will be seen, Lincoln’s reference to the principle of equality as a “germ” or “suggestion” can likewise be seen as a subtle yet powerful metaphor describing the development of his own position on Negro citizenship: what began as a “germ” or “suggestion” in his criticism of Dred Scott flowered into the actual legal recognition of black citizenship when he became President. Indeed, this development testifies to the power of principle in politics.

IV. The Lincoln Douglas Debates: “in every possible event.”

Lincoln’s *House Divided Speech* constituted his opening salvo in the battle for the Illinois Senate against Douglas. In it, Lincoln alleged that Dred Scott was part of a conspiracy to nationalize slavery. Taney’s denial of Negro citizenship, according to Lincoln, was the first part of a methodical design to extend slavery and to perpetuate it indefinitely:

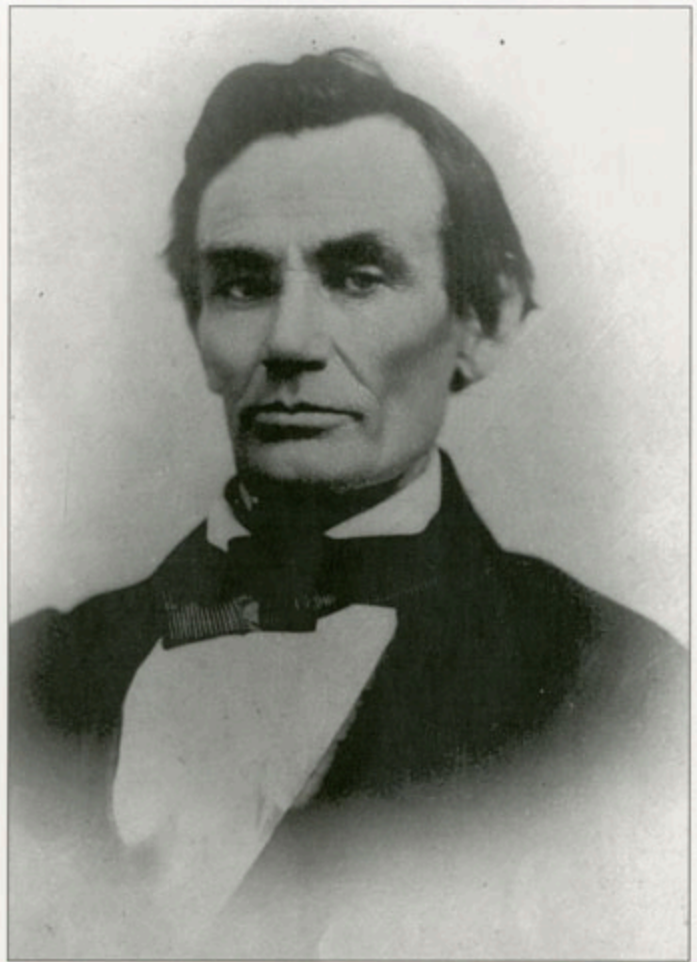
The *working* points of that machinery are: First, that no negro slave, imported as such from Africa, and no descendant of such slave can ever be a citizen of any State, in the sense of that term as used in the Constitution of the United States. This point is made in order to deprive the negro, in every possible event, of the benefit of this provision of the United States Constitution, which declares that— “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” (underline added)

Consistent with the *Springfield Address* a year earlier, *The House Divided Speech* on June 16, 1858 reiterated Lincoln’s criticism of Taney’s ruling on Negro citizenship. As seen above, Lincoln claimed that Taney’s opinion was made to deprive the negro of citizenship “in every possible event.” (emphasis added). It therefore can be inferred from Lincoln’s criticism and his wording that he believed that Negro citizenship was indeed possible in some events and that his primary issue with Taney was that the Chief Justice categorically denied Negroes from “ever be[ing] a citizen of any State...in every possible event.”

As Lincoln expected, Stephen A. Douglas seized upon the implication of his critique of Dred Scott as a weapon to stigmatize him as a radical abolitionist. In the First Debate at Ottawa, August 21, 1858, Douglas shamelessly exploited the racial fears and prejudices of the audience:

We are told by Lincoln that he is utterly opposed to the Dred Scott

decision, and will not submit to it, for the reason that he says it deprives the negro of the rights and privileges of citizenship. That is the first and main reason which he assigns for his warfare on the Supreme Court of the United States and its decision. I ask you, are you in favor of conferring upon the negro the rights and privileges of citizenship? Do you desire to strike out of our State Constitution that clause which keeps slaves and free negroes out of the State, and allow the free negroes to flow in, and cover your prairies with black settlements? Do you desire to turn this beautiful State into a free negro colony, in order that when Missouri abolishes slavery she can send one hundred thousand emancipated slaves into Illinois, to become citizens and voters, on an equality with yourselves? If you desire negro citizenship, if you desire to allow them to come into the State and settle with the white man, if you desire them to vote on an equality with yourselves, and to make them eligible to office, to serve on juries, and to adjudge your rights, then support Mr. Lincoln and the Black Republican party, who are in favor of the citizenship of the negro. For one, I am opposed to negro citizenship in any and every form. I believe this government was made on the white basis. I believe it was made by white men, for the benefit of white men and their posterity for ever, and I am in favour of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians and other inferior races.



Abraham Lincoln October 11, 1858 (TLM #0-11) from an ambrotype by William J. Thompson, taken in Monmouth, IL.

opposed the use of this discretionary power. "If the State of Illinois had that power," he confessed, "I should be opposed to the exercise of it. That is all I have to say about it." Nonetheless, it bears repeating that Lincoln's admission did not change his underlying principle that under certain circumstances free blacks could still be made citizens. His unwillingness to exercise this discretionary power in the particular case of Illinois does not abolish the general principle or precedent. Indeed, Lincoln holds open the possibility that if another state—or the state of Illinois at some future date—so exercised its discretionary authority, it could make free blacks citizens under the Constitution. A careful reading of Lincoln's statement reveals that his core principle remained intact—namely, that Dred Scott's ruling was wrong because it categorically denied the Negro from "ever be[ing] a citizen of any State...in every possible event."

V. The 7th Debate at Alton, October 15, 1858: "an especial objection."

The exchange between Lincoln and Douglas during the 7th and last Debate at Alton on Oct. 15 reveals the lengths to which Lincoln went to keep alive the suggestion of Negro citizenship in his critique of Dred Scott while minimizing its abolitionist implications. Playing the race card once again, Douglas accused Lincoln of waging "a crusade against the Supreme Court of the United States

"[U]nder heavy pounding from Douglas," as Fehrenbacher describes it, and as a matter of political survival, Lincoln expressly declared his opposition to Negro citizenship on September 18th, at Charleston:

Judge Douglas has said to you that he has not been able to get from me an answer to the question of whether I am in favor of negro citizenship. So far as I know, the Judge never asked me the question. He shall have no occasion to ever ask it again, for I tell him very frankly that I am not in favor of negro citizenship....I mentioned in a certain speech of mine which has been printed, that the Supreme Court had decided that a negro could not possibly be made a citizen, and without saying what my ground of complaint... Judge Douglas has from that thing manufactured nearly every thing that he ever says about my disposition to produce an equality between the negroes and the white people.

In his magisterial work on Dred Scott, Fehrenbacher cites the remarks above as confirmation that Lincoln's views were indeed "schizoid." However, Fehrenbacher fails to note the significance of a crucial qualification that Lincoln adds to his disclaimer of Negro citizenship. "Now my opinion," Lincoln replies, "is that different States have the power to make a negro a citizen under the Constitution of the United States if they choose. The Dred Scott decision decides that they have not that power." Here Lincoln forthrightly acknowledges that states have discretionary authority under the Constitution to confer citizenship upon free blacks. Contrary to Taney's wholesale denial of Negro citizenship, Lincoln's denial is not absolute, but qualified by his further claim that states indeed have discretionary authority to make Negroes citizens under the Constitution. Thus, Lincoln holds open the important possibility—a "germ" or "suggestion"—of Negro citizenship under some circumstances.

Granted that at the time of the debates with Douglas, Lincoln

because of the Dred Scott decision; urging as an especial reason for his opposition to that decision that it deprived the negroes of the rights and benefits of that clause in the Constitution of the United States which guarantees to the citizens of each State, all the rights, privileges, and immunities of the citizens of the several States." In reply, Lincoln explained:

So far as Judge Douglas addressed his speech to me, or so far as it was about me, it is my business to pay some attention to it. I have heard the Judge state two or three times what he has stated to day—that in a speech which I made at Springfield, Illinois, I had in a very especial manner, complained that the Supreme Court in the Dred Scott case had decided that a negro could never be a citizen of the United States. I have omitted by some accident heretofore to analyze this statement, and it is required of me to notice it now. In point of fact it is untrue. I never have complained especially (Lincoln's emphasis) of the Dred Scott decision because it held that a negro could not be a citizen, and the Judge is always wrong when he says I ever did so complain of it. I have the speech here, and I will thank him or any of his friends to show where I said that a negro should be a citizen, and complained especially of the Dred Scott decision because it declared he could not be one. I have done no such thing, and Judge Douglas' so persistently insisting that I have done so, has strongly impressed me with the belief of a pre-determination on his part to misrepresent me. He could not get his foundation for insisting that I was in favor of this negro equality anywhere else as well as he could by assuming that untrue proposition. Let me tell this audience what is true in regard to that matter; and the means by which they may correct me if I do not tell them truly is by a recurrence to the speech itself. I spoke of the Dred Scott decision in my Springfield speech, and I was then endeavoring to prove that the Dred Scott decision was a portion of a system or scheme to make slavery national in this country. I pointed out what things had been decided by the court. I mentioned as a fact that they had decided that a negro could not be a citizen—that they had done so, as I supposed, to deprive the negro, under all circumstances, of the remotest possibility of ever becoming a citizen and claiming the rights of a citizen of the United States under a certain clause of the Constitution. (author's underlining) I stated that, without making any complaint of it at all. . . . I mentioned [this] as evidence tending to prove a combination and conspiracy to make the institution of slavery national. In that connection and in that way I mentioned the decision on the point that a negro could not be a citizen, and in no other connection.

Out of this, Judge Douglas builds up his beautiful fabrication—of my purpose to introduce a perfect, social, and political equality between the white and black races. His assertion that I made an "especial objection" (that is his exact language) to the decision on this account, is untrue in point of fact.

First, as someone who was a master at parsing words, Lincoln's emphasis upon the term *especially* is noteworthy. The word *especially* means "particularly," "mainly," "to a marked degree," "unusually." By using this adverb, Lincoln qualifies that his primary or principal objection against Dred Scott was not that it deprived Negroes of citizenship. As he would repeat, this was not "an especial objection" to Dred Scott. Yet the qualifier tacitly admits of the

possibility that although the issue of Negro citizenship was not Lincoln's principal objection against Dred Scott, it was nonetheless an objection among others.

Here Lincoln's equivocation on Negro citizenship is reminiscent of his later reply to Horace Greeley on the question of Emancipation. It will be recalled that when Greeley confronted him with an either-or scenario, Lincoln likewise chose his words carefully stating that his "paramount object" or "foremost" goal was to save the Union, not to free the slaves. But as David Donald and Allen Guelzo have so convincingly demonstrated, Lincoln's language did not exclude the possibility of freeing the slaves, since in his mind the Union's preservation and the promise of freedom to all were inextricably linked in the long term.³²

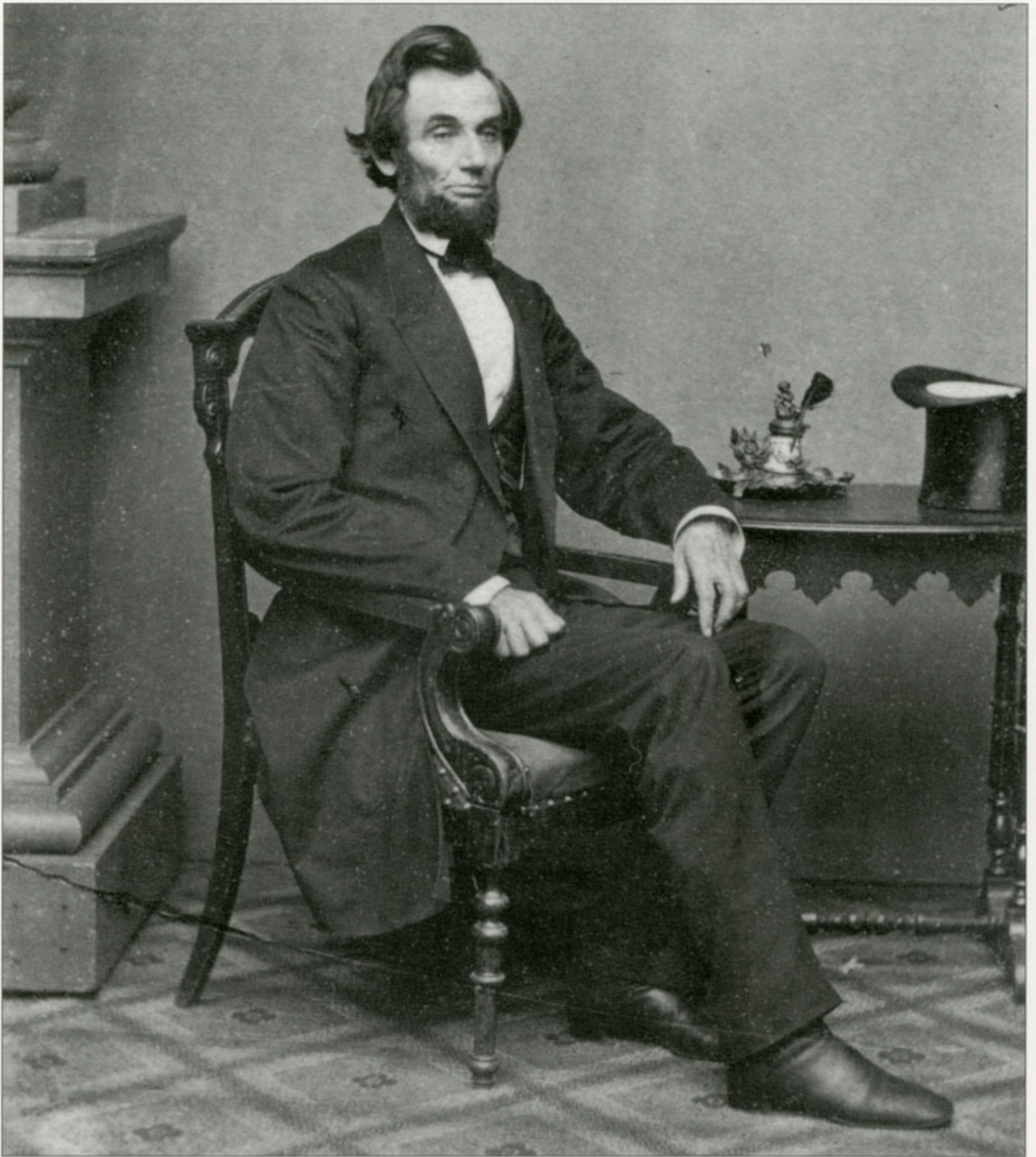
Second, consistent with his earlier views and contrary to Dred Scott, Lincoln takes issue with the categorical aspect of Taney's denial of Negro citizenship, implying that under certain circumstances it should be permitted. Lincoln repudiates Taney's ruling because it seeks to "deprive the negro, under all circumstances, of the remotest possibility of ever becoming a citizen and claiming the rights of a citizen of the United States under a certain clause of the Constitution." Mindful of the radical implications of this statement, Lincoln sought to minimize the damage by placing it in context as a part of his wider discourse related to the conspiracy charge. It was in connection to the conspiracy charge, Lincoln insisted, not to endorse Negro citizenship or a "perfect," social, political equality between the races—that he mentioned this point of fact. Consistent with earlier statements, Lincoln's disavowal of "perfect" equality between the races, unlike the ruling in Dred Scott, still allows for the possibility of Negroes to become citizens. The strained language seems to reflect the pressure of the situation and by no means amounts to a wholesale denial of Negro citizenship.

Finally, Lincoln's use of the adjective "perfect" to qualify the kind of racial equality he eschews is noteworthy. Again, the use of this qualifier suggests that although Lincoln did not support the politically untenable position of "perfect" equality between the races, unlike Taney and Douglas, he did support equality as a standard that should be approximated as much as possible under the circumstances.

Lincoln's equivocations on Negro citizenship stated in the heat of political battle with Douglas do not represent the full picture however. Rather they are parts of the greater whole that constitute his prudent statesmanship. For that fuller picture we must consider the correspondence between Lincoln's speech and deed during his Presidency.

VI. Lincoln's Presidency: "all the safeguards of liberty"

While much has been said about Lincoln's *First Inaugural Address*, March 4, 1861, little has been noted of his suggestion of Negro citizenship in it. Indeed, Fehrenbacher does not mention it. After conceding the North's obligation to return fugitive slaves, Lincoln remarked: "Again, in any law upon this subject, ought not all the safeguards of liberty known in civilized and humane jurisprudence to be introduced, so that a free man be not, in any case,



Abraham Lincoln, February 24, 1861 (TLM #0-51b) photograph by Alexander Gardner at Brady's Gallery, Washington D. C.

surrendered as a slave? And might it not be well, at the same time, to provide by law for the enforcement of that clause in the Constitution which guarantees that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?'" This statement, coupled with his subsequent remark in the same speech that Dred Scott should not be regarded as an authoritative precedent, constituted a bold defiance of

Taney's holding on Negro citizenship. Moreover, it was consistent with his earlier views. Lincoln's "germ" or "suggestion" of Negro citizenship, implied four years earlier at Springfield, was now dropped as a bombshell in the *First Inaugural Address!*

Harry V. Jaffa and Herman Belz have correctly recognized the constitutional import of Lincoln's suggestion of Negro citizenship

in the *First Inaugural*. In a recent article, Belz refers to Lincoln's "rhetorical inquiry" as a "significant move" further noting that, "in presenting the policy of the administration, he advanced a civil rights proposal that was deeply offensive to southern and border state opinion."³³ Belz then cites the classic study of the secessionist movement by Dwight L. Dummond as confirmation of this thesis: "The suggestion that the citizens of each state should be guaranteed the privileges of citizens in other states by congressional legislation was especially repulsive to states-rights men of the slave states."³⁴ In sum, Belz concludes that, "In addition to setting a dangerous precedent, Lincoln's proposal would strike at the inequality of the races, the fundamental principle on which slavery rested."³⁵ Indeed, under the new circumstances of his election as President, Lincoln put into practice the civil rights implications of his earlier speeches.

Lincoln's reply to a Pennsylvania Delegation on March 5, 1861—the day after his Inauguration—provides confirmation of his intention in the *First Inaugural Address* and his prudent approach to the volatile question of Negro citizenship. Reaffirming his earlier remarks in the *First Inaugural*, Lincoln explained: "We must remember that the people of all the States are entitled to all the privileges and immunities of the citizens of the several States. We should bear this in mind, and act in such a way as to say nothing insulting or irritating. I would inculcate this idea, so that we may not, like Pharisees, set ourselves up to be better than other people."³⁶

Apparently, the Pennsylvania Delegates greeted Lincoln's allusion to Negro citizenship with enthusiasm, seeing it as an opportunity to advance the cause of freedom. Consistent with his earlier more measured responses, however, Lincoln then cautioned the delegates against self-righteous intonations that would gratuitously antagonize the South. The trumpeting of the issue would only exacerbate the secession crisis.

Finally, the development of Lincoln's position culminates with his administration's official recognition of Negro citizenship through an Opinion of Attorney General Bates, November 29, 1862.³⁷ The issue was raised by the question of whether or not a schooner could be commanded by a "'colored man,' and so by a person not a citizen of the United States." Perhaps it was no accident that the Attorney General's Opinion was delivered nearly a month before the final Emancipation Proclamation went into effect. Noting the unsettled constitutional status of the issue, Bates explains, "I have often been pained by the fruitless search in our law books and, the records of our courts, for a clear and satisfactory definition of the phrase citizen of the United States. I find no such definition, no, authoritative establishment of the meaning of the phrase...." Reiterating the argument of Eustis, Bates then distinguishes between the political right of suffrage and the right to citizenship. There is no necessary connection between the two; the enjoyment of the former does not entitle or exclude one to the latter. Rather, Bates discusses citizenship in terms of a mutual bond between the individual and the nation. This bond is one of "reciprocal obligation of allegiance on the one side and, protection on the other." Denying the principle of *Dred Scott*, Bates "affirmed that every free person born in the United States was, 'at the moment of birth, *prima facie* a citizen."³⁸

But what of the prior opinion of Attorney General Wirt as quoted above? Bates distinguishes his opinion from Wirt's since the former deals with a state rather "than a national point of view; and hence we ought not to be surprised to find the whole argument for the exclusion based upon local institutions and state laws." In other words, the Virginia case dealt with local privileges and immunities, not the national rights of a generalized citizenship. Contrary to *Dred Scott*, Bates therefore concludes that "if born in the United States" "the man of color" "is a citizen of the United States...." Although he died before the enactment of the Fourteenth Amendment, the development of Lincoln's position on Negro citizenship shows that he anticipated its inclusive definition based upon free birth in the United States.

VII. Conclusion: Prudence as The Harmonization of Principle to Practice.

Notwithstanding some hedging that perhaps reflect the political limits of the man and his times, the overall correspondence in both speech and deed between Lincoln's first public reply to *Dred Scott*, and his subsequent actions as President confirm that he extended the principle of equality to include Negro citizenship. Moreover, Lincoln's abstract critique of *Dred Scott* should not be disparaged as a mere hypothetical exercise, devoid of practical relevance. Rather, it was a masterful political stroke of prudent leadership that enabled him to survive Douglas's onslaught while upholding the core principle that Negro citizenship was indeed possible under the circumstances. When these circumstances were ripe, Lincoln's actions were consistent with his core convictions. Thus, upon closer reflection, the apparent "schizoid quality" of Lincoln's Springfield Speech should neither be attributed to intellectual incoherence nor to political opportunism, but to the prudent leadership of one who confronted the inevitable tension between principle and practice in politics.

Endnotes

¹ I have retained the use of the word "Negro" instead of African-American because this is the term that was used in the context of Lincoln's time.

² Don E. Fehrenbacher, *The Dred Scott Case* (New York: Oxford University Press, 1978), 436.

³ For a discussion of the virtue of prudence see: St. Thomas Aquinas, *Summa Theologica: Volume Three: II-II* (Westminster, MD: Christian Classics, 1981), II-II Q. 47-51, 1383-1406. See also: Joseph R. Fornieri, "Lincoln, the Natural Law, and Prudence" in *The Language of Liberty*, ed. Joseph R. Fornieri (Washington, DC: Eagle Publishing, 2003), xix-lxi; Ethan Fishman, "Under the Circumstances: Abraham Lincoln and Classical Prudence" in *Abraham Lincoln: Sources and Style of Leadership*, ed. Frank J. Williams, et al. (Westport: Greenwood Press, 1994), 1-15.

⁴ Joseph Story, *Commentaries on the Constitution of the United States*, in *The Founders' Constitution*, ed. Philip B. Kurland

- and Ralph Lerner (Chicago: University of Chicago Press, 1987), 4: 506. Founders Constitution. Volume One, Ch 12 no. 27
- ⁵ Quoted from *The Founders' Constitution*, 4:506.
- ⁶ Quoted from *The Founders' Constitution*, 4:487–488.
- ⁷ Harry V. Jaffa, *A New Birth of Freedom* (Lanham: Rowman & Littlefield, 2000), 20–29.
- ⁸ *Ibid.*, 21.
- ⁹ Quoted from *The American Constitution: Its Origin and Development*, ed. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz (New York: W.W. Norton & Company, 1983), 60.
- ¹⁰ Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Chicago: University of Chicago Press, 1982), 377–381.
- ¹¹ *Crandall v. State*, quoted from *The Founders Constitution*, 4:506–516. An important case that anticipates Lincoln's debate with Taney in *Dred Scott* over Negro citizenship. It is noteworthy that Taney's arguments in *Dred Scott* highly resemble the arguments, in both wording and content, of the Attorney for the State.
- ¹² Quoted from *The Founders' Constitution*, 4:488.
- ¹³ James Madison, *Notes of the Debates in the Federal Convention of 1787* (New York: Norton, 1987), 545.
- ¹⁴ *Ibid.*, 532. and Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 8 vols. (New Brunswick, N.J.: Rutgers University Press, 1953–1955), 3:549.
- ¹⁵ Madison, *Notes*, 545.
- ¹⁶ *Crandall v. State*, quoted from *The Founders' Constitution*, 4:513.
- ¹⁷ Kelly, *The American Constitution*, 280.
- ¹⁸ *Ibid.*, 280.
- ¹⁹ William Eustis, Admission of Missouri, House of Representatives 12 December 1820, *Annals* 37: 635–638. Quoted from *The Founders' Constitution*, 4:494.
- ²⁰ Charles Pinckney, Admission of Missouri, House of Representatives, 13 Feb. 1821, *Annals* 37: 1129, 1134. Quoted from *The Founders' Constitution*, 4:495.
- ²¹ Kurland, *The Founders' Constitution*, 4:495–96.
- ²² George Anastaplo, *Reflections On Constitutional Law* (Lexington: University Press of Kentucky, 2006).
- ²³ *Corfield v. Coryell*, 6 Fed/ Cas/ 546, no 3,230 (C.C. E.D.Pa 1823). Quoted from *The Founders' Constitution*, 4:502.
- ²⁴ *Scott v. Sanford*, 1857, 60. U.S. 393., 4.
- ²⁵ *Ibid.*, 9.
- ²⁶ Kelly, Harbison and Belz, *The American Constitution*, 279.
- ²⁷ The pending case was *Lemmon v. the People*. See: Fehrenbacher, *Dred Scott*, 60–61, 444–445, 692.
- ²⁸ Fehrenbacher, *Dred Scott*, 490–491; Harry V. Jaffa, *Crisis of the House Divided*, 382.
- ²⁹ *Ibid.*, 437.
- ³⁰ David Herbert Donald, *Lincoln* (New York: Simon and Schuster, 1995), 226.
- ³¹ Jaffa, *Crisis of the House Divided*, 381.
- ³² Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery In America* (New York: Simon and Schuster, 2004), 132–137; Donald, 368.
- ³³ Harry V. Jaffa, *A New Birth of Freedom*, 266–267; Herman Belz, "Lincoln's Construction of the Executive Power in the Secession Crisis," in *Journal of The Abraham Lincoln Association* 27, no. 1 (2006): 34–35.
- ³⁴ *Ibid.*
- ³⁵ *Ibid.*
- ³⁶ Basler, *Collected Works*, 4:274.
- ³⁷ Attorney-General Edward Bates, *Opinion of Attorney General Bates on Citizenship*, Official Opinions of the Attorneys General, Vol. 10, 382–413. Washington: Government Printing Office, 1863.
- ³⁸ Bates quoted from James M. McPherson, *The Negro's Civil War* (New York: Random House, 1993), 254.

The Impact of Abraham Lincoln's Constitutional Legacy: A Global Outlook

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by William D. Pederson, American Studies Endowed Chair and Professor of Political Science, Louisiana State University in Shreveport

Viewed in broad historical perspective, the United States Constitution is an impressive document. Elegant in its brevity, notable for its longevity, it is the world's oldest written constitution in continuous existence. Its endurance becomes even more impressive when considering that more than two-thirds of the written constitutions of other nations have existed only since the end of World War II. Louisiana, where I teach, is the only code-law state in the nation. It also happens to hold a more dubious constitutional distinction: Louisiana has adopted more constitutions than any other state. The state's constitution of 1921 was amended so many times that it was the nation's lengthiest by the time it was replaced in 1974. Since 1974, Louisianans have returned to their traditional ways, approving amendments without restraint while the governor who championed the current constitution is now serving time in a federal prison.¹

There are those who believed that Abraham Lincoln, too, belonged in prison. Confederates and revisionist libertarians have viewed his actions as those of a constitutional "dictator," but the overwhelming opinion shared by the public and scholars is that Lincoln ranks as America's greatest president. Some also view him as one of the ten best lawyers in United States history.² Lincoln's model of leadership has been saluted around the world as one of the gifts that American government has made to the theory and practice of modern democracy. That is a partial explanation why there are more books written about him than any other democratic leader in world history.³ He cast his shadow to Argentina, where a city is named in his honor; to an island in Asia that bears his name; and to countries around the world where street signs inscribed with his name and stamps bearing his likeness testify to his international legacy. Peoples around the globe have identified Abraham Lincoln as their champion of universal democratic values.⁴

Yet his leadership style and his jurisprudence are difficult to define. The argument of this presentation is that his legal philosophy embodied his democratic values and consisted of mounting an executive approach to fight a bitter civil war, constructing a human rights rationale to modify the U.S. Constitution, and pursuing "classical magnanimity." All three components of this jurisprudential philosophy had international implications that still strike responsive chords abroad.

From the first day he took office with the Civil War brewing, America's sixteenth president was destined to become either a failure like his predecessor, James Buchanan, or to preserve the world's first democratic experiment as he dealt with the issue of slavery. In relying on his long experience in the law and his fulfillment in the political arena, Lincoln's active-flex-

ible character responded to the challenge and he forged a new jurisprudence that transformed the nation while establishing the international touchstone for democratic leadership.

For purposes of analysis and discussion, this paper is divided into four sections. First is Lincoln's role in preserving the Union and self-government in the world. Second is Lincoln's role as the Great Emancipator, not just of minorities but the Great Commoner who championed the entire middle class by assuring all the same opportunity that he had to rise in society. Third is Lincoln's role as the Great Reconciler who contributed to the codification of international law for humanitarian warfare and practiced classical magnanimity, apparent in his desire to bring the South back into the Union as quickly as possible. Finally, conclusions that suggest why the synthesis of these three aspects of his "peoples' jurisprudence" not only made Lincoln one of the best lawyers in American history, but *the* greatest democratic political leader in world history.



William Pederson is American Studies Chair and Director of the International Lincoln Center at Louisiana State University Shreveport.

Preserving the Union and Self-Government: "The Last Best, Hope of Earth"

This is essentially a People's contest. On the one side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life. Yielding to partial, and temporary departures, from necessity, this is the leading object of the government for whose existence we contend.

—Abraham Lincoln, July 4, 1861

Lincoln viewed political issues realistically. He did not confuse his personal preferences with what was neither constitutional nor practical, nor did he decline to promote justice when the

opportunity presented itself. After the new Republican Party captured control of the U.S. House of Representatives in 1858, it was poised to capture the presidency in 1860. Lincoln unexpectedly won the Republican ticket that year; he received a plurality (39.8 %) of the popular vote in the fall election and one hundred eighty electoral votes.

Despite his willingness to accept slavery in the Old South since the Constitution recognized the 1787 compromise over that issue, he was forced to take action after extremists in the South started down the fateful road of revolution. Prior to 1858 Southerners had controlled both the presidency and the Supreme Court for most of American history and they had the added power of filibuster in the Senate. Suddenly power shifted, and what the South expected from the American political system was no longer assured. Slavery was threatened. The chasm between Southerners' expectations and the new political reality split the American political landscape with seismic force after the 1858 and 1860 national elections.⁵

Southern reaction was immediate and intense: secession and firing the first shot at Fort Sumter. It was a desperate and extremist reaction. The Confederates, along with apologists and revisionists, would later rationalize such behavior in terms of the right to self-determination and "small government," but their actions made them guilty under the law. Their revolutionary disregard for the law was equaled by their hubris—disregard of the much greater resources controlled by the Union in terms of human, natural, and financial resources. The South's rebellion was encouraged by initial Union military ineptness. However, the Union's force was sufficient to prevent a quick win by the Confederates and gave Abraham Lincoln time to build a national and international legal brief against the insurgents who sought to nullify the Constitution by force. It was, in essence, Lincoln's "unwritten legal brief" based on his democratic jurisprudence that justified the Union and self-government during an age of empires and monarchs abroad.

A traditional "law and order" Whig who opposed the twin evils of mob violence and anarchy, Lincoln acted, unlike his Democratic predecessor, James Buchanan. Buchanan believed that secession was illegal; however, he found no constitutional basis for the chief executive to fight secession. Buchanan also vetoed social legislation that Lincoln later signed into law, contributing to the unsurpassed record of his administration. Rather than respond as a mere caretaker president, Lincoln, the democratic leader, acted.

He first defined the problem of secession as an attempt by Southern extremists to destroy the Union rather than be bound by the legal results of the 1860 presidential election. Therefore, the Confederate rebellion against the federal government was illegal and unconstitutional. Creatively relying on his war powers as commander-in-chief, while Congress was out of session, Lincoln boldly took a series of extra-constitutional steps.

Among other measures, he blockaded Southern ports, raised funds to finance the conflict, suspended *habeas corpus*, initiated the draft, issued paper money and eventually issued the Emancipation Proclamation.

What made these steps at least provisionally constitutional was that he realized that Congress would ultimately have to pass judgment on his actions. When Congress did act, it supported his actions.⁶

Lincoln realized that the U. S. Supreme Court would eventually judge his leadership. The Chief Justice at the time was Lincoln's adversary. Roger B. Taney wrote the 1857 *Dred Scott* decision—considered by many to be the worst decision in Supreme Court history. Despite that egregious decision, scholars today rank Taney among the dozen greatest justices in the history of the high bench.⁷ Timing ultimately was Lincoln's ally in dealing with the Supreme Court, for he was able to name five new justices to the Court, including the replacement for Taney, who died on October 12, 1864. Even before Taney was replaced, the Judiciary Act enabled Lincoln to appoint a tenth justice on March 3, 1863. These appointments essentially allowed Lincoln to conduct the war without the threat of interference from the Court. The revised composition of the Court also increased the likelihood that his most important legacies would be upheld by it after the Civil War ended.

The combination of creative executive actions, practical political considerations, and Lincoln's ability to communicate to the public that the conflict was "a people's contest" would determine whether a militant minority could undermine the experiment in democracy. These factors also inspired Union forces to help their president preserve that "last best, hope of earth." Holding the 1864 election amid the turmoil of a civil war proved that Lincoln meant what he said, especially since he expected to lose the election.⁸

Ordinary citizens, soldiers at home, and people abroad understood Lincoln's goals. San Marino nationals, working class folk in England, and farmers in France, heard Lincoln's voice of democracy. Domingo F. Sarmiento responded to that voice by writing the first biography of Lincoln in Spanish. Argentina named the first new city on its frontier in honor of America's sixteenth president.⁹

Such tributes were at the forefront of the nineteenth century trend that continued throughout the twentieth century as leaders and countries everywhere paid homage to Lincoln. Sun Yat-sen would adapt Lincoln's definition of democracy stated in the Gettysburg Address for the Chinese. The Republic of China would depict Lincoln on one of its postage stamps, making him the first non-Chinese so honored. In the world's largest parliamentary democracy, Jawaharlal Nehru, India's founding prime minister, and Mahatma Gandhi both sang Lincoln's praises. Nehru even displayed a painting of Lincoln in his office and kept a replica of Lincoln's hands on his desk.¹⁰ After World War I, Thomas Masaryk established a democratic state in the heart of Eastern Europe. Masaryk, founding president of Czechoslovakia, was thoroughly inspired by Lincoln.¹¹ Both Masaryk and Nehru governed in democratic style.

It is clear that America's sixteenth president deserves full credit for preserving the Union and for perpetuating the ideal of self-government during a decidedly undemocratic age, but that is only part of his constitutional legacy. He is also one of history's great champions of human rights.

The Great Emancipator: Equality and Human Dignity

Fellow-citizens, we cannot escape history.... We say we are for the Union. The world will not forget that we say this. We know how to save the Union. The world knows we do know how to save it.... In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give, and what we preserve. We shall nobly save, or meanly lose, the last best, hope of earth.

—Abraham Lincoln, December 1, 1862

Most Americans credit Lincoln—and rightly so—for preserving the Union and for ending slavery. Still, a handful of revisionists, libertarians, and Confederates have tried to undermine his role as the Great Emancipator.¹² Ironically, while that may be his best-known legacy at home and abroad, many criticized that action during his presidency and even today when it is taken out of context. That vulnerability arises from the fact that Lincoln was neither an abolitionist nor a southern planter, but a politician who wanted to both preserve the Union and uphold a Constitution that recognized slavery. As the war evolved, so did his jurisprudence, allowing Lincoln to reveal himself as genuinely committed to human rights. He not only used his presidential power to end racial slavery but he used his power also to promote the rights of labor through enlarging the middle class and equalizing opportunity. To focus on freedom for slaves is to focus too narrowly, for he also in a very real sense freed the working class by placing both land ownership and college educations within their grasp.

It is difficult to pinpoint when Lincoln first opposed slavery. He seems to have held a lifelong aversion to it. Perhaps his dislike for slavery was rooted in his youthful trips to Louisiana where he could have witnessed slave auctions firsthand. On the other hand, Lincoln, like prior American presidents, supported *voluntary* colonization as the simplest solution to what he viewed as a secondary problem. To Lincoln the primary issue was secession. Some abolitionists were willing to permit the South to secede, but Lincoln adhered to the Constitution and rejected secession.

The Kansas-Nebraska Act (1854), which turned the question of extending slavery over to a popular vote, brought Lincoln out of political retirement. The *Dred Scott* decision in 1857 and the Lincoln-Douglas debates helped him to formulate and articulate his emerging jurisprudence on the subject. His election to the presidency and the South's secession moved Lincoln from first advocating compensated emancipation, to emancipating slaves by executive order. He used his war powers to issue the Emancipation Proclamation on January 1, 1863.¹³ His support for the Thirteenth Amendment demonstrated to Congress that he wanted slavery to be abolished in the entire nation.

Of course, even before taking these actions, Lincoln had taken gigantic steps in terms of social and economic legislation that would ultimately emancipate not only slaves but the entire middle class. Lincoln signed into law three pieces of legislation that collectively reshaped American society. The Homestead Act of 1862, which James Buchanan had vetoed, drew thousands of Europeans to settle and develop the American West. The Land Grant College

(Morrill Act) of 1862, which Buchanan also had vetoed, transformed American higher education into the envy of the world. And the Pacific Railroad Act of 1862 led to the building of the transcontinental railroad.¹⁴ It would bind the nation together and transform the national economy.

In the Gettysburg Address, Lincoln elegantly defined democracy and reconciled the contradiction between the provision of slavery in the U.S. Constitution and the call for universal rights embedded in the Declaration of Independence. His personal behavior was consistent with his rhetoric. The way that the Lincolns treated black Americans who worked in their Springfield, Illinois, household and in the Executive Mansion in Washington, D.C., suggests that they truly believed in equality and human dignity.¹⁵ If there were any doubt, Lincoln's arrival in Richmond, Virginia, confirmed this. His refusal to allow freed slaves to kneel before him demonstrated no outward sign, no egotistical desire to be regarded as a saint, much less a god. Lincoln merely practiced what he preached in dealing with others as humans.¹⁶

Of course, Lincoln's actions reverberated abroad. He was the first American president to grant formal diplomatic recognition to Haiti. Mexico's first non-European president, Benito Juarez, as well as those persons of African ancestry throughout Central America fully appreciated Lincoln's actions.¹⁷ Kwame Nkrumah from Ghana, first president of an independent nation in Sub-Saharan Africa, was educated at Lincoln University in Pennsylvania;¹⁸ Lincoln was celebrated as the Great Emancipator on many of that country's early postage stamps.

Despite Lincoln's major contributions as the Great "Democrat" and Great Emancipator, to understand his unique jurisprudence and its particular relevance to the 21st century, one must turn to his handling of his political opponents and military enemies. He pioneered a jurisprudence that sought justice for all.

The Great Reconciler: "With Malice Toward None"

...the greatest and the noblest man of the last century was Abraham Lincoln.... Though America was his motherland and he was an American, he regarded the whole world as his native land.

—Mahatma Gandhi, August 26, 1905

While Lincoln labored to preserve America's great experiment in democratic government, he also pioneered the first modern effort in the law of war. Throughout his wartime presidency, he demonstrated a magnanimous philosophy that late in his presidency is best summarized in his famous phrase, "with malice toward none." He treated Indians, soldiers, and southerners the same. Rather than pursue "ethnic cleansing," Lincoln, the military victor, sought to heal the nation's wounds by practicing "classical magnanimity."¹⁹

Similarly, Lincoln respected Indians as human beings who deserved to be treated with dignity and equality, although his grandfather had been killed by an Indian and he himself had

served in the Black Hawk War. Lincoln felt that Indians needed an opportunity to adjust to the modern economic development that was threatening their way of life.

Unfortunately, early in his administration during the summer of 1862, there was a Sioux Indian uprising in southwestern Minnesota in which some 800 whites were massacred and others were brutally raped. More than three hundred warriors were tried, convicted and sentenced to death. Despite being enmeshed in the Civil War, which was not going well for the Union troops, Lincoln chose to intervene at a time when state and military authorities would have gladly sought revenge. Rather than avoid responsibility, Lincoln personally reviewed each case, trying to identify only the ringleaders for hanging. He reduced the number of executions from 303 to 38. Lincoln did this despite the Republican Party losses in the off-year election, poor Union performance on the battlefield, and Minnesotans' demands for revenge against the Sioux.²⁰

That episode foreshadowed Lincoln's magnanimity during the entire Civil War. Rather than refusing amnesties and pardons like most chief executives do because such actions are viewed by the public as short-circuiting the judicial system, Lincoln enacted justice through executive action. He granted the second largest number of amnesties in American history.²¹

In addition to his domestic actions mitigating injustice, Lincoln went on to leave his mark on international humanitarian law. In early 1863, he had Francis Lieber, the most important political scientist since James Madison, draft a code of the rules of land warfare. The Lieber code eventually was promulgated in May 1863 as General Orders No. 100, "Instructions for the Government Armies of the United States in the Field." It became the first code of law governing land warfare and led up to the Hague Conventions of 1899 and 1907 as well as the Geneva Conventions in 1929 and 1949.²² Rather than a legacy of genocide, Lincoln's legacy in a large civil war is virtually one of a kind to this day.

Rather than punish the South, Lincoln wanted to restore it to the Union as soon as possible after the Civil War. His reconstruction policy would have echoed his wartime jurisprudence expanding opportunities for all while according others dignity and equality. Of course, his last public address from the Executive Mansion on April 11, 1865, dealt with Louisiana. It took almost another century, and then only in private, for a former Louisiana governor to admit that Lincoln was right.²³

Perhaps the political leader of the late twentieth century who best captures this third dimension in Lincoln's jurisprudence and practiced it, was fellow lawyer Nelson Mandela, South Africa's first post-apartheid president. Mandela knew of Lincoln before his twenty-seven year imprisonment, but read a biography of Lincoln for the first time while he was incarcerated. Many observers of South Africa who had expected a bloodbath when Mandela emerged from prison were shocked that instead he was a "magnanimous" political leader.²⁴ Thereafter, Mandela tweaked his enemies with decency and set a new tone for his entire nation.

Conclusions: A "Peoples' Jurisprudence"

So what exactly is Lincoln's jurisprudence? It is not just a matter of natural law and positive law, or activism and restraint. It incorporates aspects of classical magnanimity and Lockean philosophy, but its creativity is best captured in the imagination of writers. Herman Melville in "Billy Budd" and Victor Hugo in *Les Miserables* hinted at its essence. In the same sense that Lincoln referred to the Civil War as a "people's war," one may label his legal philosophy as a "peoples' jurisprudence." It applies to people globally and that is why they continue to identify with him. To fully understand and appreciate Lincoln's jurisprudence, one needs to keep in mind his active-flexible character. He strove to uphold the law and the Constitution while transforming it because Southern firebrands and others refused to compromise with him. While they committed political suicide, he reconciled the Constitution with the Declaration of Independence. He emancipated not only slaves and the South; he also promoted economic and social legislation to enlarge the entire middle class. Moreover, he managed to accomplish all of this while maintaining classical magnanimity, rare especially during the modern age of ideology.

American soldiers—white and black—died by the thousands for the democratic vision that Lincoln offered. "The people's contest" was a message not lost on those abroad, even though he drew harsh public criticism at home. The world's tiny and oldest republic, San Marino, offered Lincoln honorary citizenship. The French population contributed pennies to honor him after his assassination. His words were the last spoken during the Hungarian Uprising of 1956 and in Tiananmen Square.²⁵ The current South Korean President, Roh Moo-hyun, a former human rights lawyer, quotes Lincoln and has written a biography of him.²⁶

Unfortunately, when critics take Lincoln's "Peoples' jurisprudence" out of context, they merely parrot Lincoln's words without understanding his vision and practice. Lincoln was a rational democrat, an egalitarian who believed in equal opportunity, and a magnanimous leader who upheld human dignity even during a protracted civil war.

In contrast, a young Hirohito had busts of *both* Lincoln and Napoleon in his room as a youth. Bold action alone, however, does not a Lincoln make. The Nationalist Chinese recognized Lincoln Island off the coast of southern Vietnam during the 1930s, yet Chaing Kai-shek practiced genocide during the Chinese Civil War. Although the founding president of an independent Indonesia claimed to admire Lincoln, Sukarno engaged in genocide against his opposition. Closer to home, both Fulgencio Batista and Fidel Castro issued Cuban postage stamps with Lincoln on them, and Castro displays a Lincoln bust in his office, but neither comprehends Lincoln's magnanimity nor practices it.²⁷

In conclusion, it may be too easy to quote Lincoln's eloquent lines; it is much more difficult to emulate his jurisprudence at home or abroad. As we approach the bicentennial of his birth it will be worth the effort to make a renewed attempt to understand his philosophy and practice of the law.

Endnotes

- ¹ For example, see Norman W. Provizer and William D. Pederson, eds., *Grassroots Constitutionalism* (Lanham, MD: University Press of America, 1988).
- ² Bernard Schwartz, *A Book of Legal Lists* (New York: Oxford University Press, 1997), pp.210–236.
- ³ Peter Dickson, "Experts' Pick," *Book World*, Vol. 29, No. 37 (September 12, 1999), p.7.
- ⁴ William D. Pederson, "Lincoln's Legacy Goes Beyond U.S. Borders," *Washington Times* (October 5, 2002), p.B3.
- ⁵ James C. Davies, "The J-Curve of Rising Expectations and Declining Satisfactions as a Cause of Revolution and Rebellion," in William D. Pederson and Ann McLaurin, eds., *The Rating Game in American Politics* (New York: Irvington, 1987), pp.164–171.
- ⁶ Law Professor Daniel Farber's detailed evaluation of Lincoln's steps finds them essentially passing constitutional muster, see his *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003). A short evaluation is found in Mark J. Rozell, "Executive Prerogative" in Frank J. Williams and William D. Pederson, eds., *Abraham Lincoln: Contemporary* (Campbell, CA: Savas Woodbury, 1996), pp.133–156.
- ⁷ William D. Pederson and Frank J. Williams, "Roger B. Taney: A Jacksonian Chief Justice Who Favored 'Dixie' on the Bench," in William D. Pederson and Norman Provizer, eds., *Leaders of the Pack* (New York: Peter Lang, 2003), pp.51–60.
- ⁸ For example, see David E. Long, *The Jewel of Liberty: Abraham Lincoln's Re-Election and the End of Slavery* (Mechanicsburg, PA: Stackpole Books, 1994).
- ⁹ William D. Pederson, "Lincoln's Legacy," *Washington Times* (October 5, 2002), p.B3.
- ¹⁰ William D. Pederson, "Abraham Lincoln's Political Legacy in Asia," Annual Meeting of the Association of Third World Studies, National Taiwan University, Taipei, December 30, 2002.
- ¹¹ Thomas D. Matijasic, "In the Footsteps of Lincoln; Wilson, Masaryk and Czechoslovak Independence," *Lincoln Herald*, Vol. 96, No. 4 (Winter 1995), pp.133–139.
- ¹² For example, see Jeffrey R. Hummel, *Emancipating Slaves, Enslaving Free Men* (Chicago: Open Court, 1996); Lerone Bennett, Jr., *Forced Into Glory: Abraham Lincoln's White Dream* (Chicago: Johnson Publishing, 2000), and Michael Lind, *What Lincoln Believed* (New York: Doubleday, 2004).
- ¹³ Allen C. Guelzo, "The Emancipation Moment: Lincoln's Other 'First of January,'" *Lincoln Lore*, No. 1880 (Spring 2005), pp.2–8.
- ¹⁴ William D. Pederson and Frank J. Williams, "The Abraham Lincoln Model of Modernization," *International Lincoln Journal*, Vol. 2 (2001), pp.29–37; David H. Bain, *Empire Express* (New York: Viking, 1999), p.115.
- ¹⁵ For example, see Elizabeth Keckley, *Behind the Scenes* (New York: Oxford University Press, 1988); Lloyd Ostendorf and Walter Oleksy, eds., *Lincoln's Unknown Private Life* (Mamaroneck, NY: Hastings House, 1995); and Jennifer Fleischner, *Mrs. Lincoln and Mrs. Keckley* (New York: Broadway Books, 2003).
- ¹⁶ David H. Donald, *Lincoln* (New York: Simon and Schuster, 1995), p.576.
- ¹⁷ William D. Pederson, "Lincoln's Legacy," *Washington Times* (October 5, 2002), p.B3.
- ¹⁸ A. B. Assensoh, "Abraham Lincoln's Legacy in Africa," *Abraham Lincoln Abroad*, Vol. 11, No. 3 (January–April 1999), pp.4–5.
- ¹⁹ Larry Arnhart, "Statesmanship as Magnanimity: Classical, Christian, and Modern," *Polity*, No. 2 (Winter 1983), pp.263–283.
- ²⁰ Hank H. Cox, *Lincoln and the Sioux Uprising of 1862* (Nashville: Cumberland House, 2005), pp.182–183.
- ²¹ William D. Pederson and Frank J. Williams, "America's Presidential Triumvirate: Quantitative Measures of Character," in Ethan Fishman, William D. Pederson and Mark Rozell, eds., *George Washington. Foundations of Presidential Leadership and Character* (Westport, CT: Praeger, 2001), pp.143–161.
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- ²³ "And that was Earl Long in 1960," A. J. Liebling, *The Earl of Louisiana* (Baton Rouge: Louisiana State University Press, 1970), p.138.
- ²⁴ William D. Pederson, "Abraham Lincoln's Legacy on Nelson Mandela," Annual Meeting of the Association of Third World Studies, Macon, Georgia, October 7–9, 2004.
- ²⁵ Joseph R. Fornieri, "The Global Significance of Abraham Lincoln's Mission," *International Abraham Lincoln Journal*, Vol. 2 (2001), pp.1–26.
- ²⁶ "Roh Compares Self to Lincoln," *Washington Times* (May 13, 2003), p.1A.
- ²⁷ William D. Pederson, "Abraham Lincoln's International Impact," forthcoming.

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Upcoming Events

For inclusion of your event, please contact Hon Frank Williams at alincoln@courts.ri.gov or SGabbard@LNC.com.

- *Encounters With Lincoln* an exhibit of illustrations by **Thomas J. Trimborn** opened to the public on April 22 and will run through summer 2006 in Springfield's **Old State Capitol**. The exhibit initially opened at the **University Art Gallery at Truman State University** on February 16. The exhibit brings together Trimborn's life-long interest in President Lincoln and illustrations. As a child, Trimborn was drawn to study Lincoln simply by the character of his face. *Encounters With Lincoln: Images and Words* is the title of a new book from the **Truman State University Press** in which Trimborn chronicles Lincoln's life in pictures and text including important contemporaries of Lincoln's such as Frederick Douglass and Stephen Douglas.
- Ed Bearss will be the historian guide for "Lincoln and Blackhawk: A Rising and a Falling Star" sponsored by **HistoryAmerica**, September 13–21, 2006. www.historyamerica.com
- The annual conference, *Churchill in the Land of Lincoln*, of **The Churchill Centre**, will be held in Chicago, September 28–30. **Frank J. Williams** will present "Lincoln and his Generals" and **Harold Holzer** will present "Lincoln's Oratory." info@winstonchurchill.org.
- The exhibition, *The Lincoln Family Album*, with snap shots of life among the Lincolns will open at **The Lincoln Museum** on September 29, 2006 and close on February 19, 2007. The exhibition will provide us with information about life among the Lincolns—the Abraham Lincolns, the Robert Todd Lincolns, and their descendants.
- **Lincoln Memorial University** and the **Abraham Lincoln Library and Museum**, Harrogate, TN will host a symposium "Now He Belongs to the Ages": *Lincoln's America*, October 20–21, 2006. **Frank J. Williams** will moderate and presenters will include **Paul Bergeron**, **Elizabeth Leonard**, **Jason Phillips**, **Barry Schwartz**, and **John David Smith**.
- The **11th Annual Lincoln Forum** will be held in Gettysburg, November 16–18. **Doris Kearns Goodwin** will be the keynote speaker ("The Political Genius of Abraham Lincoln") and there will be presentations by **Craig L. Symonds** ("Abraham Lincoln, Admiral-In-Chief"), **John Y. Simon** ("Abraham Lincoln and the Politics of Command"), **Joshua Wolf Shenk** ("Lincoln's Melancholy"), **Richard Striner** ("Lincoln and the Struggle to End Slavery"), **John Marszalek** ("The Military Genius of Abraham Lincoln"), **Gabor Boritt** ("Gettysburg Gospel"), and a joint presentation by **Edna Greene Medford**, **Harold Holzer**, and **Frank J. Williams** ("The Emancipation Proclamation—Three Views"). There will be a panel discussion moderated by **Harold Holzer** with graduate students from **Howard University**, **Edna Greene Medford**, and **Frank J. Williams** addressing "How Did African-Americans View Abraham Lincoln?" **Ralph Gary** will present "Visiting Lincoln Sites" with slides and **Jim Getty** will replicate Lincoln's Farewell Address to Springfield.
- **Gabor Boritt** will speak at the annual meeting of **The Lincoln Fellowship of Pennsylvania** luncheon on November 19 in Gettysburg and **Tom Brokaw** will be the **Dedication Day** speaker at the **Soldiers National Cemetery** on that day.
- **The 45th annual Robert Fortenbaugh Memorial Lecture** will be presented by **James O. Horton** and **Lois Horton** on November 19 at **Gettysburg College**.
- **The National Trust for Historic Preservation** has announced that it will dedicate the restored **Soldier's Home** at the **Armed Forces** retirement home in Washington on September 22, 2007—the anniversary of Abraham Lincoln's preliminary Emancipation Proclamation. The National Trust is also considering creating a **Center for the Lincoln Presidency** to preserve Lincoln's ideas and legacy.
- **Robert Todd Lincoln's Hildene** will conduct the symposium, *Most Important Elections in American History*, from May 28–30, 2008. Included will be the 1858 U.S. Senate election between Stephen A. Douglas and Abraham Lincoln, the 1860 and 1864 elections.
- **JAMCO Films**, for the **Abraham Lincoln Foundation of the Union League of Philadelphia**, is producing a series of four, one-hour long programs, providing an historical analysis of the medical crisis the country faced during the Civil War with epidemic disease, malnutrition, and starvation compounded by battle wounds. Lincoln's influence in his legacy to medical innovations is integrated throughout the body of the four episodes. JAMCOFilms@yahoo.com.
- **The American Singers Theater** completed the opera *Our American Cousin* composed by **Eric Sawyer** with libretto by **John Shoptaw**. The piece tells the story of the assassination of President Lincoln from the standpoint of the actors presenting the comedy of the same name at **Ford's Theatre**. The opera will premiere at the **Academy of Music**, North Hampton, MA in April 2007. As part of a weeklong festival honoring the Civil Rights movement and Lincoln's impact upon American democracy. www.eunicewilliams.com.
- **The City of Hodgenville, KY** will hold its annual **Lincoln Day Celebration**, October 14–15. The festival, its thirty-third, promotes the influence of Abraham Lincoln's Kentucky years on his future politics and policies.
- **The Manhattan Youth Players**, a teenage theater troupe, premiered the play *Apart from That* which is a recreation of the April 14, 1865 performance of *Our American Cousin* in January 2006. This group will be producing a curriculum for the play in 2008 which will enable other groups to stage productions of the play. www.manhattanyouth.org.
- By invitation of Connecticut's Lieutenant Governor, artist **Wendy Allen** will exhibit her work in "Portraits of Abraham Lincoln: The Freedom Series" from September 1st through the 29th. The exhibit will be displayed in the Upper Concourse of the Connecticut Legislative Office Building in Hartford.