

# **Lincoln, Congress, and Emancipation**

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## Introduction

### *Freedom, Finally*

**I**N 1776 THIRTEEN American colonies declared their independence from Great Britain and formed a weak confederation called the United States of America. The American colonists offered an elaborate explanation—the Declaration of Independence—for why they were separating from their mother country. Much of the Declaration is a laundry list of specific complaints against the king. But the Declaration is mostly remembered for its stirring language about liberty and fundamental human rights:

We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness—That, to secure these Rights, Governments are instituted among Men, deriving their Just powers from the Consent of the Governed.

The great problem with this brilliant endorsement of liberty, equality, and justice is that neither the primary author of the Declaration—Thomas Jefferson—nor most other leaders of the nation were willing to apply its principles to the 700,000 or so African and African American slaves living in the United States. The right to “liberty” may have been “unalienable,” but the governments of all thirteen states denied this right to the slaves in their jurisdictions. All people may have been “created equal,” but in the new United States all slaves and most free blacks were denied legal equality.

By 1787, when the Constitution was written, Massachusetts and New Hampshire had ended slavery and Pennsylvania, Connecticut, and Rhode Island had passed statutes to gradually end slavery.<sup>1</sup> But the institution was alive and well in New York and New Jersey, and in all of the states from Maryland to Georgia. The new Constitution explicitly supported slavery in a number of ways.<sup>2</sup> Although the Constitution authorized Congress to regulate all international commerce, the document specifically prohibited Congress from banning the African slave trade before 1808, and did not promise that the trade would ever be ended. Although the system of federalism created by the Constitution empowered the states to regulate the status of all people within their jurisdiction, the Constitution specifically prohibited states from emancipating fugitive slaves and required that such people be returned to their owners.

The political structure created by the Constitution both explicitly and implicitly protected slavery. Under the three-fifths clause, slaves were counted in determining how many representatives each state would get in Congress. The Constitution did not count any other form of private property in allocating representatives in Congress. Counting slaves for representation gave the South a bonus in the House of Representatives that provided the margin for passage of numerous proslavery laws, such as the Missouri Compromise of 1820 and the Fugitive Slave Act of 1850. Electoral votes were based on a state's congressional representation, which meant that seats in Congress created by counting slaves also gave the South extra electoral votes. In 1800 the slaveholding Thomas Jefferson would not have been elected president had slaves not been counted for representation and thus affected the Electoral College.

The structure of the Senate indirectly protected slavery as well. Each state had equal representation in the Senate, and thus even though the northern states had nearly twice as many residents as the slave states, the South had as many or more senators for most of the antebellum period.<sup>3</sup> In the 1850s the North had a slight majority of states and thus a majority in the Senate,

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<sup>1</sup>See generally Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago, 1967).

<sup>2</sup>For a full discussion of the proslavery elements of the constitution see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 3d ed. (New York, 2014), chap. 1.

<sup>3</sup>For example, at the time of the Mexican War the South had a two-state majority and thus four more votes than the North in the Senate.

but there were always a few northern Democrats who were willing to vote with the South on issues affecting slavery. Thus, even with a northern majority in the Senate, that body passed the Kansas-Nebraska Act in 1854, which allowed slavery in western territories where it had previously been banned. The constitutional structure and the political realities of antebellum America made it impossible to imagine any federal laws impinging on slavery.

Slaves were the only form of privately held property that the Constitution acknowledged and protected. Thus, in 1857 the Supreme Court could explicitly hold that property in slaves was uniquely protected by the Constitution and Congress had no power to ban this property from any federal jurisdiction.<sup>4</sup>

Even if the northerners in Congress had united to oppose slavery, it is not clear they could have accomplished much. The Constitution of 1787 had created a government of very limited powers, and almost every serious constitutional theorist, lawyer, judge, and politician believed that the national government had no power to interfere with the “domestic institutions” of the states. Because the Constitution created a government with limited powers, Congress had no power to end slavery in the states. As General Charles Cotesworth Pinckney, the head of South Carolina’s delegation, told the South Carolina House of Representatives after the Convention,

We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>5</sup>

At least on its face, the Constitution left the regulation of slavery (and the status of people in general) in the hands of the states.

Thus, short of a constitutional amendment, Congress simply lacked the power to interfere with slavery where it existed, except perhaps in the federal territories and the District of Columbia. But in the antebellum period a constitutional amendment that harmed slavery was more than unimaginable—it would have been simply impossible to achieve. The Constitution is

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<sup>4</sup>*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>5</sup>Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (1888; reprint ed., New York, 1987), 4:286.

extraordinarily difficult to amend. An amendment must be approved by two-thirds of each house of Congress. Until the Civil War the southern states always had enough representatives in both the House and the Senate to block any amendment. But even if somehow an amendment limiting slavery in any way had been voted out of the Congress, it could not have been ratified without substantial support from southern state legislatures. The Constitution requires that amendments be ratified by three-quarters of the states. In 1860 there were thirty-three states, and slavery was legal in fifteen of them. Thus, if all the slave state legislatures had voted against a constitutional amendment, it could never have been ratified. To understand the stranglehold that the slave South had on the constitutional structure, it is worth noting that in 2016, in a fifty-state union, the fifteen slave states could *still* block a constitutional amendment on slavery or anything else. It would take forty-five states to outvote the fifteen slave states to ratify a constitutional amendment ending slavery.

This short lesson in constitutional history and constitutional law helps us understand the problem of emancipation before and during the Civil War.

Thus, when Lincoln took office, in March 1861, the national government had no power to touch slavery in the states where it existed. Lincoln understood this, and said as much in his first inaugural address, noting: “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”<sup>6</sup> The most Lincoln could do, which was all he intended to do, was make sure that no new slave states entered the Union. Other than that, the new president had absolutely no power to affect slavery in the nation. This was his official position as president and did not reflect his personal view. Lincoln hated slavery and had always hated slavery. As he noted, “If slavery is not wrong, nothing is wrong.”<sup>7</sup>

But Lincoln’s personal views of slavery were not on his agenda. When he entered the White House Lincoln’s main goal—his only goal—was to preserve the Union. He took office during the greatest constitutional and political crisis in the history of the United States. Seven states, fearful of Lincoln’s known personal opposition to slavery, had declared they were no

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<sup>6</sup>Abraham Lincoln, “First Inaugural Address—Final Text,” in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, 9 vols. (New Brunswick, N.J., 1953–55), 4:262–63.

<sup>7</sup>Lincoln to Albert G. Hodges, Apr. 4, 1864, *ibid.*, 7:281.

longer in the Union. Lincoln used his first inaugural to assure Southerners that he was not a threat to slavery and would not harm their most important social institution. He understood that the root cause of secession was slavery and the fear that his administration would harm slavery.

The secessionists had made this clear when they left the Union. The leaders of these states simply did not want to be in a nation where the highest officeholder made no secret of his hatred of slavery, even if, as he said in his inaugural address, he had “no lawful right” and “no purpose” to interfere with slavery. But throughout his career Lincoln had also made it clear he opposed slavery, and in his famous “House Divided” speech, in 1858, Lincoln had declared that he thought slavery should ultimately be put on a “course of ultimate extinction.” This was enough for Southern slave owners to attempt to destroy the nation. As the South Carolina secession convention put it:

A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that “Government cannot endure permanently half slave, half free,” and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.<sup>8</sup>

Since 1788, Southerners had dominated American politics and particularly the presidency. Ten of the previous fifteen presidents had been slave owners. They had held the office for fifty-four of the seventy-two years since the Constitution had gone into effect. Lincoln was the first president to hold office who publicly opposed slavery and expressed any hostility to its expansion.<sup>9</sup> Thus, Southerners left the Union rather than remain there to see what Lincoln might do to slavery.

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<sup>8</sup>Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, Dec. 24, 1860.

<sup>9</sup>President Zachary Taylor, a sugar planter who owned hundreds of slaves, opposed the spread of slavery into the New Mexico and Utah territories because he believed the institution was not economically viable there and thus agitation by southern nationalists was foolish and dangerous. But he was an avowed supporter of slavery itself and even purchased more slaves while president. Two northern presidents, Martin Van Buren and William Henry Harrison, came from slaveholding families and owned slaves as adults. An eleventh president, James Buchanan, grew up in a slaveholding family in Pennsylvania, and his family held slaves and indentured blacks (whose mothers were slaves) until his death in 1821. There is no evidence James Buchanan personally owned slaves.



Lincoln believed that most Southerners did not actually support secession, and that in the end the people of the South would reject disunion. Thus, he promised in his first inaugural to do nothing coercive to end the crisis, while at the same time promising not to harm slavery. Even after the Civil War began, Lincoln believed and hoped that disunion was just a passing fancy among a minority of hotheads, and that the war and secession would soon be over. Thus, when the war began he refused to lift a finger to end slavery and rejected the advice of his political allies, some generals, black leaders, and white abolitionists to turn the war for the union into a crusade for freedom. He also understood that any attack on slavery would push the four loyal slave states into the arms of their fellow slaveholders in the Confederacy. When a group of ministers told Lincoln that if he ended slavery he would have God on this side, the president allegedly responded, "I would like to have God on my side, but *I need Kentucky.*"

Slaves and opponents of slavery would not wait for Lincoln, however. Almost immediately slaves began to leave their masters and escape to U.S. Army camps. Some commanders gave sanctuary to these escaping slaves, others returned them to their masters. Some military commanders tried to move aggressively against slavery, while others rejected any attempts at abolition. In the summer of 1861 Congress passed the First Confiscation Act, which provided a process, however cumbersome and unwieldy, to free slaves owned by rebel masters. Meanwhile, the secretary of war, with Lincoln's approval, authorized commanders in the field to give sanctuary to slaves escaping Confederate masters. By the spring and early summer of 1862 Congress had moved further, ending slavery in Washington, D.C., and the federal territories, and promising to provide funds for compensated emancipation in the loyal slave states. In August Congress passed the Second Confiscation Act, which provided more opportunities for the army to emancipate slaves, and more importantly authorized the enlistment of black troops. Meanwhile, unbeknownst to all but a few trusted advisors, in early July Lincoln drafted what would become the Emancipation Proclamation. Lincoln had now determined that as commander in chief of the army and navy he had the power to end slavery in the states that were in rebellion, even though he could never have harmed slavery if there had not been secession and civil war. When he issued the preliminary Proclamation, on September 22, 1862, the War for the Union became the War for Freedom.

In the next three and a quarter years, slavery would come to an end. The United States Army would smash the Confederacy, and in the process liberate a million or more slaves. In the loyal slave states black men would be enrolled in the army and their families would become free. Some of those states, as well as the new state of West Virginia, would abolish slavery outright. In January 1865 Congress would pass a constitutional amendment—the Thirteenth—to completely end slavery in the nation. This was possible because eleven slave states were no longer in the Union and thus were unable to block the amendment. Indeed, the great irony of this monumental constitutional change is that secession made emancipation possible; had the slave states remained in the Union, Lincoln could never have taken steps to end slavery and Congress could never have passed the Thirteenth Amendment and sent it on to the states. In December the amendment was ratified.

The essays in this book flesh out and explore this history. They help us understand the nature of emancipation, the route Lincoln took to achieve it, and how it is remembered both in the United States and abroad. The book takes us from Lincoln's career in Congress in the 1840s to Stephen Spielberg's movie about the sixteenth president and his role in the passage of the Thirteenth Amendment.