

The Story of American Freedom

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Revolution and for this reason had been outlawed in Great Britain. Davis's objection, however, rested on other grounds. In Roman times, the cap of liberty had been bestowed on emancipated slaves and thus, Davis noted, was regarded as "the badge of the freed slave." Such a symbol would be highly inappropriate, he felt, for it would suggest that an analogy existed between the slaves' longing for freedom and the liberty of freeborn Americans. In deference to Davis's sensibilities, Crawford replaced the liberty cap with a feathered helmet.⁴⁵

The colossal *Statue of Freedom*, cast in several pieces in Rome, was transported to the United States in 1859 and assembled at a Maryland foundry under the direction of Philip Reed, a slave craftsman. It was not installed atop the Capitol until 1863. By then, Davis was president of the Confederate States of America, Lincoln had proclaimed the emancipation of the slaves, and a "new birth of freedom" was sweeping over the empire of liberty.

5 A New Birth of Freedom

"We All Declare for Liberty"

BOTH SIDES fought the Civil War in the name of freedom. To be sure, shortly before the war began in 1861, Alexander H. Stephens, the South's vice president, identified slavery as the "cornerstone" of the Confederacy. But those who took up arms for southern independence understood the conflict as a "struggle for liberty." White southerners had inherited from the antebellum era a definition of freedom that centered on local self-government, opportunities for economic self-sufficiency, security of property—including property in slaves—and resistance to northern efforts to "enslave" their region. Confederate victory was indispensable to maintaining these traditions. "I am engaged in the glorious cause of liberty and justice," wrote an Alabama corporal, with no sense of incongruity, in 1862.¹

"The magic word *Freedom*," in the words of one Pennsylvania recruit, also shaped how Union soldiers understood the conflict. The war's purpose, wrote Samuel McIlvaine, a sergeant from Indiana, was to preserve the American nation as "the beacon light of liberty and freedom to the human race." But as the war progressed, prewar understandings of liberty gave way to something new. Millions of northerners who had not been abolitionists before the war became convinced that securing the Union as an embodiment of liberty required the destruction of slavery. "The maintenance of our free institutions," wrote a Massachusetts private in 1863, "must of necessity result in the freedom

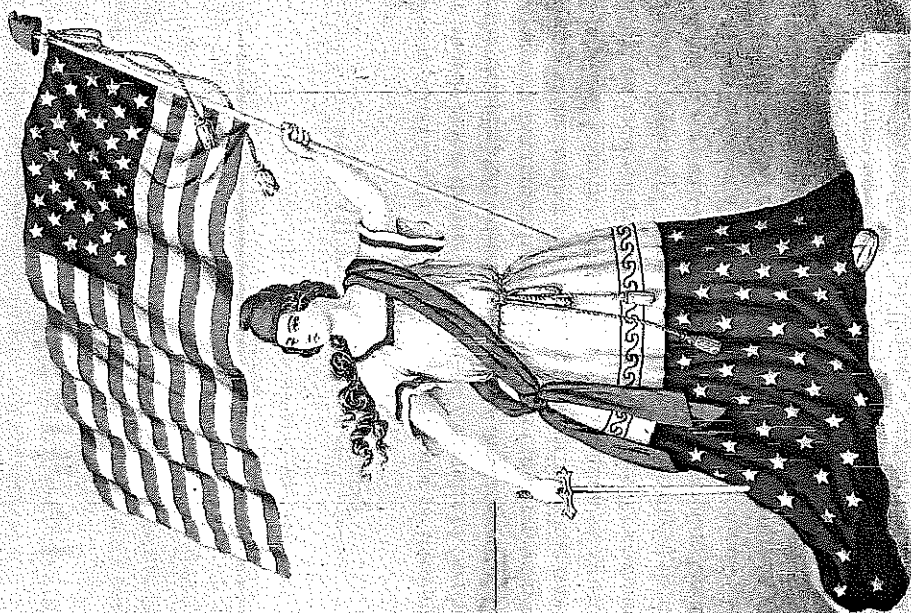
of every human being over whom the stars and stripes wave." For Lincoln, the war's deepest meaning lay in the "new birth of freedom" occasioned by the abolition of slavery. "In giving freedom to the slave," he told Congress in December 1862 on the eve of the Emancipation Proclamation, "we assure freedom to the free—honorable alike in what we give and what we preserve."²

Never was freedom's protean and contested nature more evident than during the Civil War. "We all declare for liberty," Lincoln observed in 1864, "but in using the same word we do not all mean the same thing." To the North, freedom meant for "each man" to enjoy "the product of his labor"; to southern whites, it conveyed mastership—the power to do "as they please with other men, and the product of other men's labor."³ The Union's triumph consolidated the northern understanding of freedom as the national norm. In the process, the meaning of freedom, and the identity of those entitled to enjoy its blessings, were themselves transformed.

Throughout American history, wars have been a vital force in expanding the boundaries of the nation's "imagined community." The War for Independence catalyzed abolition in the North. Women would win the right to vote after World War I, eighteen-year-olds during the war in Vietnam. With the Union's victory in 1865, the abolitionist vision of America also triumphed. Liberty became a universal principle; citizenship was proclaimed the birthright of all Americans. "It is a singular fact," Wendell Phillips wrote in 1866, "that, unlike all other nations, this nation has yet a question as to what makes or constitutes a citizen." From the Civil War emerged the principle of a national citizenship whose members enjoyed the equal protection of the laws, regardless of race.

Early in 1865, the Supreme Court, which eight years earlier had declared blacks forever excluded from the American "family," admitted an African-American lawyer, John S. Rock of Boston, to practice before it. There could no longer be "even the shadow of a doubt," wrote Francis Lieber, that blacks were citizens, entitled to protection by the federal government. Not simply the logic of liberty but the enlistment of 200,000 black men in the Union armed forces during the second half of the war placed black citizenship on the postwar agenda. The inevitable consequence of black military service, one senator observed in 1864, was that "the black man is henceforth to assume a new status among us." In the same year Lincoln, who before the war had never supported suffrage for African-Americans, urged Governor Michael Hahn of Unionist Louisiana to work for the partial enfranchisement of blacks, singling out soldiers as especially deserving. At some future time, he observed, they might again be called upon to "keep the *jewel of Liberty* in the family of freedom." Racism was hardly eradicated from national life. But by 1865, declared George

THE AMERICAN FLAG, A NEW NATIONAL LYRIC.



The illustration adorning a piece of patriotic sheet music exemplifies how the Civil War fused even more emphatically than in the past the symbols of liberty and nationhood. (Library of Congress)

William Curtis, editor of *Harper's Weekly*, the war and emancipation had transformed a government "for white men" into one "for mankind."⁴

But more than redrawing the boundaries of citizenship, the Civil War linked the progress of freedom directly to the power of the national state. "It is war," declared the nineteenth-century German historian Heinrich von Treitschke, "which turns a people into a nation." Begun to preserve the old Union, the Civil War brought into being a new American nation-state. The mobilization of the Union's resources for modern war created what one Republican leader called "a new government," with greatly expanded powers and responsibilities. Equally important, the war forged a new national self-consciousness. "Liberty . . . true liberty," Lieber proclaimed, "requires a country." This was the moral of one of the era's most popular works of fiction, Edward Everett Hale's short story "The Man Without a Country," published in 1863: Hale's protagonist, Philip Nolan, in a fit of anger curses the land of his birth. As punishment, he is condemned to live on a ship, never to set foot on American soil or hear the name "the United States" spoken. He learns that to be deprived of national identity is to lose one's sense of self.⁵

This intense new nationalism, reinforced by the identification of the nation with freedom, automatically made criticism of the war effort—or, in Republican eyes, opposition to the policies of the Lincoln administration—seem equivalent to treason. Although there had been sporadic persecution of opponents of the Mexican War, the Civil War presented, for the first time since the Revolution, the issue of the limits of wartime dissent. "War," insisted Horatio Seymour, the Democratic governor of New York, "does not extinguish liberty." During the conflict, replied the Republican *New York Times*, "the safety of the nation is the supreme law." Lincoln was hardly an aspiring despot, but neither was preserving civil liberties, according to one of his biographers, David Donald, his "primary concern." The same could be said of Confederate officials, who allowed hundreds of Unionists to be imprisoned by military tribunals, many others to be violently driven from their homes, and a few to suffer summary execution by the army or civilian authorities. But since the North emerged victorious, it was the Lincoln administration's policies that established precedents for the future.

Although recent research has considerably reduced the estimate of arbitrary arrests by military authorities in the North, they still numbered in the thousands, ranging from opposition newspaper editors and Democratic politicians to ordinary civilians like the Chicago man briefly imprisoned for calling the president a "damned fool." With the Constitution unclear as to who possessed the authority to suspend the writ of habeas corpus (that is, to hold a prisoner

without charge), Lincoln claimed the right under the presidential war powers and twice suspended the writ throughout the entire Union for those accused of "disloyal activities." To be sure, the Democratic press continued to flourish, evincing little sign of intimidation, and both Union and Confederacy held contested elections during the war. But the Civil War experience offered yet another demonstration—to be amply reinforced during World War I—of the fragility of civil liberties in the face of wartime demands for national unity.⁶

While many northern Republicans interpreted the new nationalism as a force for stability and order, equating patriotism with unconditional loyalty to whatever administration happened to hold office, emancipation demonstrated that the newly empowered national state could disrupt existing institutions and expand the realm of freedom. Among reformers, the war inspired a shift from antebellum anti-institutionalism, which saw the purification of the individual as the route to social change, to a state-centered vision in which political power could be harnessed to social betterment. Emancipation would long remain a model of social change, a touchstone for movements demanding other forms of liberation.⁷

The attack on Fort Sumter crystallized in northern minds the direct conflict between freedom and slavery that abolitionists had insisted upon for decades. Before the war, many Americans, North and South, could speak with no sense of irony of their slaveholding republic as an "empire of liberty." But the war, as Frederick Douglass recognized as early as 1862, merged "the cause of the slaves and the cause of the country." To be sure, a generation of northern schoolchildren had learned to recite Daniel Webster's impassioned words spoken on the Senate floor in 1830: "Liberty and Union, now and forever, one and inseparable." But Webster was condemning the doctrine of states' rights, not the South's "peculiar institution." When Douglass proclaimed that "Liberty and Union have become identical," his target was chattel slavery—now viewed as not simply a moral abomination but an affront to national power. The master's undiluted sovereignty over his slaves, insisted Charles Sumner, the antislavery senator from Massachusetts, was incompatible with the "paramount rights of the national Government." And the destruction of slavery—by presidential proclamation, legislation, and constitutional amendment—was a key act in the nation-building process. It announced the appearance of a new kind of national state, one powerful enough to eradicate the central institution of southern society and the country's largest concentration of wealth.⁸

The scale of the Union's triumph and the sheer drama of emancipation fused nationalism, morality, and the language of freedom in an entirely new combination. As during the American Revolution, religious and secular un-

derstandings of freedom were joined in a rhetoric of national destiny. "As He died to make men holy, let us die to make men free," proclaimed "The Battle Hymn of the Republic." Proponents of America's millennial mission interpreted the Civil War as a divine chastisement for this paramount national sin (a vocabulary the non-churchgoing Lincoln himself adopted in his second inaugural address). But with emancipation the war also offered an opportunity for national regeneration, as well as providing incontrovertible proof of the progressive nature and global significance of the country's historical development. Long after the war had ended, Lincoln and the emancipated slave would remain symbols of freedom and American patriotism.⁹

"What Is Freedom?"

With the Union's triumph, freedom truly defined the nation's existence. A "new nation" emerged from the war, declared Illinois congressman Isaac N. Arnold, new because it was "wholly free." Central to this vision was the antebellum principle of free labor, now further strengthened as a definition of the good society by the North's triumph. In the free labor vision of a reconstructed South, emancipated blacks, enjoying the same opportunities for advancement as northern workers and motivated by the same quest for self-improvement, would labor more productively than slaves. Meanwhile, northern capital and migrants would energize the economy. Eventually, the South would come to resemble the "free society" of the North, with public schools, small towns, and independent producers. Unified on the basis of free labor, proclaimed Carl Schurz, a refugee from the failed German revolution of 1848 who rose to become a leader of the Republican Party, America would become "a republic, greater, more populous, freer, more prosperous, and more powerful, than any state" in history.¹⁰

The concrete reality of emancipation posed freedom as a historical and substantive issue, rather than a philosophical or metaphorical one. It raised in the most direct possible form the question of the relationship between property rights and personal rights, between personal, political, and economic liberty. "What is freedom?" asked Congressman James A. Garfield in 1865. "Is it the bare privilege of not being chained? If this is all, then freedom is a bitter mockery, a cruel delusion." Did freedom mean simply the absence of slavery, or did it imply other rights for the emancipated slaves, and if so, which ones: civil equality, the suffrage, ownership of property? If the abolition of slavery reinforced freedom's status as the keyword of political discourse, this made con-

trol of its definition all the more important. Instead of a predetermined category or static concept, freedom became a terrain of conflict, its substance open to different, sometimes contradictory interpretations.¹¹

"Freedom," declared one black minister, "lived in the black heart long before freedom was born." In the slave quarters, a fugitive who reached the North later recalled, the "constant theme" of conversations was "the desire for freedom." Slaves could hardly remain indifferent to the currents of thought unleashed by the American Revolution, or the language of democracy and liberty that circulated in the antebellum South no less than in the North. Nor were they unaware of the growing national struggle over slavery's future. Indeed, on the eve of the Civil War, President James Buchanan warned that "agitation of the slavery question" had inspired among the slaves "vague notions of freedom."¹²

Slaves' ideas, however, were anything but vague. In bondage, African-Americans had forged their own understanding of freedom, shaped by their experience as slaves and observation of the free society around them. Adopting the nation's democratic and egalitarian rhetoric as their own, slaves interpreted it in light of the compelling biblical story of Exodus, in which a chosen people suffers a long period of bondage only to be released through divine intervention. Slaves saw themselves simultaneously as individuals deprived of their rights and as a people lacking self-determination. Thus, freedom meant both escaping the myriad injustices of slavery—punishment by the lash, the separation of families, denial of access to education, the sexual exploitation of black women by their owners—and collective empowerment, a share in the rights and entitlements of American citizens.¹³

If slavery was part of God's plan, the outbreak of the Civil War heralded blacks' impending passage to the Promised Land of American freedom. Attitudes and aspirations long hidden from outside scrutiny now burst forth, as the South's 4 million slaves, uninvited, entered nineteenth-century America's "public sphere." Black preachers and political leaders (often one and the same persons) proclaimed a new Gospel of Freedom. God had answered His people's prayers and the day of Jubilee had come. Long before Lincoln made emancipation a war aim, blacks, North and South, were calling the conflict the "freedom war." Acting on this understanding, slaves by the thousands in 1861 and 1862 fled the plantations and headed for Union lines, placing the future of slavery on the political agenda and helping to propel a reluctant North down the road to emancipation.¹⁴

In a society that had made political participation a core element of freedom, the right to vote inevitably became central to the former slaves' desire for empowerment and autonomy. As Frederick Douglass put it soon after the South's



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Gettysburg Address

"Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation so conceived and so dedicated can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth."

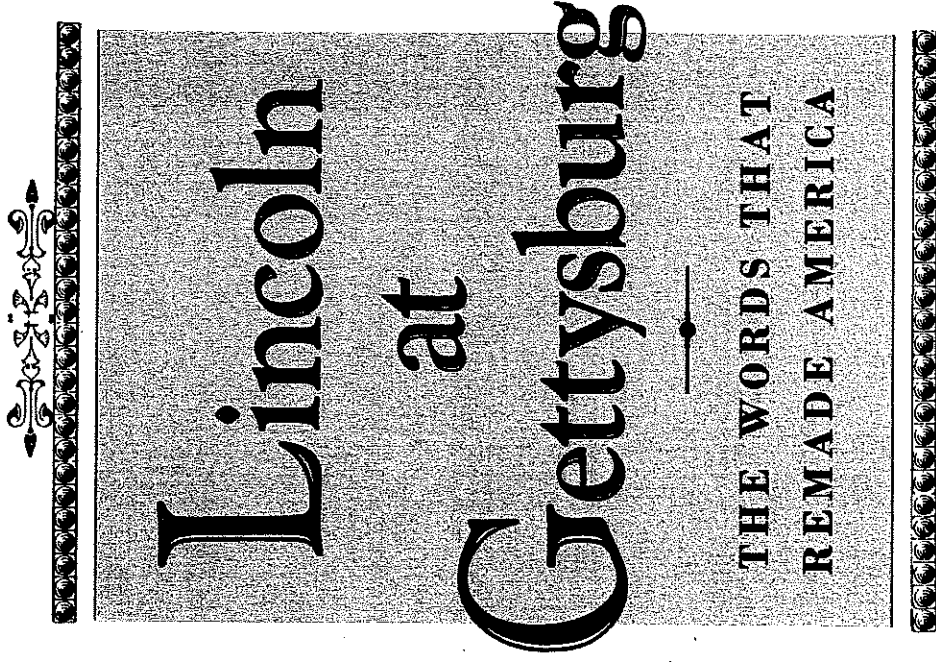
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Garry Wills

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Independence, is going back to the era of our liberty and independence, and, so far as in him lies, muzzling the cannon that thunders its annual joyous return; that he is *blowing out the moral lights around us*, when he contends that whoever wants slaves has a right to hold them; that he is penetrating, so far as lies in his power, the human soul, and eradicating the light of reason and the love of liberty, when he is in every possible way *preparing the public mind*, by his vast influence, for making the institution of slavery perpetual and national. [SW 1.717-18]

"Preparing the public mind" is a thing of great importance in an age of Transcendentalism. To fall silent, or to silence others, on the very notion of equality is the ultimate self-betrayal of a land that was dedicated to a *proposition*. Lincoln does not exaggerate the crisis of the house divided if one accepts his premise—and Parker's—that the only ground of legitimate union for the American nation is the American idea enunciated in the Declaration of Independence.

Lincoln was able to achieve the loftiness, ideality, and brevity of the Gettysburg Address because he had spent a good part of the 1850s repeatedly relating all the most sensitive issues of the day to the Declaration's supreme principle. If all men are created equal, they cannot be property. They cannot be ruled by owner-monarchs. They must be self-governing in the minimal sense of self-possession. Their equality cannot be denied if the nation is to live by its creed, and voice it, and test it, and die for it. All these matters are now contained in the pregnant formulae of the Address. Nothing more specific needs to be mentioned, because a nation free to proclaim its ideal is freed, again, to approximate that ideal over the years, in ways that run far beyond any specific or limited reforms, even one so important as emancipation. A return to the ideal is an *escape* from distracting particulars, a recovery of the long-term tasks of equality and self-government.



Revolution in Thought

Close as was Lincoln's thinking to that of Theodore Parker, one insuperable barrier lay between them. Parker had no qualms about separation of the Union. Better secession of the South, he felt, than further spreading of its poisons to the North. The Union was not worth preserving if that just gave infection a larger body to pervade. Parker, who raised funds to support the crusade of John Brown, was ready to let the division come, violently if necessary, rather than submit to further aggressions from the Slave Power.

Parker's increasingly frenetic crusade against slavery reached its height in the late 1850s, when speaking, publishing, organizing, and fund-raising broke his health. Traveling abroad to repair it, he died in 1860, aged fifty, just before he could witness the breakup of the Union. Though he had been disappointed that Lincoln tried to finesse Douglas instead of denounc-

ing him in the 1858 debates, he would probably have come around, like Emerson, to Lincoln's view of things by the time of the Emancipation Proclamation.¹ Parker's own candidate for the presidency, William Seward, had gone into the Lincoln Cabinet, by then, as a close adviser and supporter.

Parker realized that practicing politicians could not be as fierce as could free-lance reformers of his sort. He pardoned Seward's tactical maneuvers with these words:

I think that the anti-Slavery men have not always done quite justice to the political men. See why. It is easy for Mr. Garrison and Mr. Phillips or me to say all of their thought. I am responsible to nobody, and nobody to me. But it is not easy for Mr. Sumner, Mr. Seward, and Mr. Chase to say all of their thought; because they have a position to maintain, and they must keep that position.²

But there was one politician Parker would never forgive, the one he considered the great betrayer of New England—and that politician was the one whose style and arguments Lincoln used as models all through his political life: Daniel Webster. When the Compromise of 1850 was put together by Henry Clay, Webster supported it, Seward opposed. Part of that complex package of five bills was the Fugitive Slave Act. Nothing, in Parker's eyes, could counterbalance that concession to the Slave Power. For the last two years of Webster's life, Parker hounded him in his home city of Boston, making Faneuil Hall ring with attacks on the man whose fame had been nurtured there. When Webster died in 1852, people flocked to Parker's church, where a eulogy was announced, curious to see if Parker would soften at the memory of Webster's earlier achievements. For three hours Parker held them in a spell of horror as he painted the man darker and darker with sardonic tributes.

Did men honor Daniel Webster? So did I. I was a boy ten years old when he stood at Plymouth Rock, and never shall I forget how his clarion words rang in my boyish breast. I was but a little boy when he spoke those brave words in behalf of Greece. I was helped to hate slavery by the lips of that great intellect; and now that he takes back his words, and comes himself to be slavery's slave, I hate it tenfold harder, because it made a bondman out of that proud, powerful nature.³

Lincoln, as an admirer of both Clay and Webster, did not oppose the Compromise of 1850. Parker dated the climactic campaign of the Slave Power from that year. Lincoln thought the final onslaught began in 1854, with Douglas's passage of the Kansas-Nebraska Act. Parker was disappointed by Lincoln's performance against Douglas since Lincoln refused to be pinned down on repeal of the 1850 Fugitive Slave Act. Partly, of course, this was a matter of Lincoln's constituency. Henry Clay, the author of the Compromise, was still a figure to reckon with in Illinois politics, and Douglas fought with Lincoln for the possession of Clay's mantle in 1858. Lincoln had delivered a long and ambitious eulogy to Clay at his death in 1852 (SW 1.259-72).

But there was also, for Lincoln, a point of principle in his devotion to the memories of Clay and Webster. All their tacking and maneuver in the period of sectional compromise was dictated by their effort to preserve the Union. Lincoln felt they proved that one can remain opposed to slavery while making temporary concessions to the South in order to keep the nation together. The one thing Lincoln would not surrender, as Douglas had, was the continued identification of slavery as an evil, no matter how necessary. Lincoln praised Clay as a way of clearing similar space for his own career. Clay, in Lincoln's view of the man, opposed both the abolitionists for their cavalier readiness to divide the

nation and those who would deny the plain meaning of the Declaration to mollify slaveholders:

Those who would shiver into fragments the Union of these States, tear to tatters its now venerated Constitution; and even burn the last copy of the Bible, rather than slavery should continue a single hour, together with all their more halting sympathizers, have received, and are receiving their just execration; and the name, and opinions, and influence of Mr. Clay, are fully, and, as I trust, effectively and enduringly, arrayed against them. But I would also, if I could, array his name, opinions, and influence against the opposite extreme—against a few but an increasing number of men who, for the sake of perpetuating slavery, are beginning to assail and to ridicule the white man's charter of freedom—the declaration that "all men are created free and equal." [SW 1.269]

Clay and Webster were important symbols to Whigs of Lincoln's background. Coming from different regions, divided in temperament, made rivals by their similar ambition, they offered the hope that a slaveholding Southerner like Clay could agree with a New England celebrant of the Pilgrims like Webster on the importance of finding ways to keep the nation together. Clay picked his way through the political swamp like a flamboyant heron, where Webster dashed in like a moody bull, splashing mud on himself and others—but each, by his own route, reached common ground, and Lincoln was loath to jeopardize that last space of united endeavor.

As a fellow Kentuckian, as one whose political career lay in a state bordering Missouri, Lincoln found Clay the more useful man to cite and celebrate before his constituents.⁴ (Parker, for his part, excoriating Webster as a renegade New Englander, entirely neglected Clay because he never expected statesmanship from a slaveholder.) But Webster provided Lincoln with the

arguments and reasoning he needed for placing such importance on the concept of union.

Some think, to this day, that Lincoln did not really have *arguments* for union, just a kind of mystical attachment to it. That was the charge of Southerners, who felt they had a better constitutional case for secession than he had for compelling states to remain. Alexander Stephens, who had served as vice-president of the Confederacy, was an influential formulator of the view that Lincoln's attitude was not reachable by mundane arguments: "The Union with him, in sentiment, rose to the sublimity of a religious mysticism."⁵ But even Northerners like Whitman felt that "the only thing like passion or infatuation in the man [Lincoln] was the passion for the Union of these states."⁶ Edmund Wilson was following a long tradition when he called his Lincoln essay (later included in his book on the Civil War) "The Union as Religious Mysticism."

Yet Lincoln drew much of his defense of the Union from the speeches of Webster, and few if any have considered Webster a mystic. He was thought of as the leading constitutional lawyer of his day. He argued 180 cases before the Supreme Court, including some of the most famous constitutional cases in our history. In fact, he pleaded almost as many landmark cases as John Marshall decided—*Dartmouth College v. Woodward* (1818), *McCullough v. Maryland* (1818), *Gibbons v. Ogden* (1824), *Ogden v. Saunders* (1827), *Swift v. Tyson* (1842), *Luther v. Borden* (1849).⁷ Theodore Parker, trying to belittle Webster's legal acumen, said he borrowed much of it from his friend on the Court, Justice Joseph Story (whom we have already met as the dedicatory of the Mount Auburn Cemetery).

I know that much of his present reputation depends on his achievements as a lawyer; as an "expounder of the Constitution." Unfortunately, it is not possible for me [in Webster's eulogy!] to

say how much credit belongs to Mr. Webster for his constitutional arguments, and how much to the late Judge Story. . . . From 1816 to 1842 Mr. Webster was in the habit of drawing from that deep and copious well of legal knowledge, whenever his own bucket was dry. Mr. Justice Story was the Jupiter Pluvius [Raingod] from whom Mr. Webster often sought to elicit peculiar thunder for his speeches and private rain for his own public tanks of law.⁸

It is quite true that Story and Webster collaborated in ways inconceivable now for a Supreme Court justice and a senator pleading before the Court; but this does not weaken Webster's claims as an expert on the Constitution. Story was the leading academic expositor of that document in his day. He held the Dane Professorship of Law at Harvard even while he continued sitting on the Court, and his three-volume commentary on the Constitution, the product of that lectureship, appeared to great acclaim in the 1830s. Lincoln knew and used Justice Story's commentary.⁹ It did not hurt Webster's reputation for authority on the Constitution that it was (correctly) rumored that Justice Story read and helped strengthen Webster's major speeches before they were given.¹⁰

Webster's doctrine of constitutional union was forged to answer the subtlest case formulated in defense of the Southern view—John C. Calhoun's. In the late 1820s and early 1830s, Calhoun and Webster fenced with each other in an intellectual duel that set the terms of argument for the next thirty years. The struggle precipitated each man's masterpiece—Calhoun's *Disquisition on Government* (not published till 1853) and Webster's *Reply to Hayne* (1830).

We know what Lincoln thought of these two men's arguments. Though he usually refrained from attack on individual Southerners, out of regard for sectional unity, the following passage was aimed at Calhoun, the "metaphysician" of the South, a

muser whose theory of "concurrent majorities" was in fact a system of multiple vetoes:

They have him [the Negro] in this prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the *concurrence* of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is. [*Italics added.*] [SW 1.396-97]¹¹

About Webster, Lincoln's views could not be more different. He thought his Reply to Hayne the greatest American speech, and he consulted it in composing his House Divided Speech and the First Inaugural.¹² Echoes of it can be found in other Lincoln speeches, including the Gettysburg Address. It would be hard to find any other text, except the Declaration of Independence, which Lincoln used with such familiarity and respect. This is not surprising in a man whose intellectual formation took place during the 1830s, when the Webster speech was everywhere printed, quoted, and praised. The published version was distributed in at least a hundred thousand copies, with subsidized emphasis on the West, where its themes were especially relevant.¹³

Webster's great performance arose from a matter trivial in itself—congressional requisitions for Western surveying in 1830. But the West was the arena being contended for by slave and free factions, and Calhoun had threatened in 1828 that the South might nullify laws it considered injurious. Calhoun could not engage Webster directly in Senate debate, in 1830, since the former was serving as Andrew Jackson's vice-president, which

meant that he presided in the Senate as the animosity mounted—Thomas Hart Benton speaking for the pro-Southern West; Senator Robert Hayne, Calhoun's South Carolina cat's-paw, speaking for the South; and everyone awaiting Webster's reply, presumably to be spoken for the East.

The reply was delivered on January 27, before a packed gallery; and Calhoun cannot have watched from his presiding chair with any comfort as Webster, hour after hour, took apart the case that had been made by Hayne. Webster refused to speak for the East. He spoke for the nation. It was a single people, he argued, that rallied to Washington in the Revolution, heroes from Bunker Hill dying in the South, Southern leaders following Washington north. Men of Massachusetts and South Carolina fought together: "Shoulder to shoulder they went through the Revolution, hand in hand they stood round the administration of Washington, and felt his own great arm lean on them for support."¹⁴ Webster will not confine his pride as an American to Concord, Lexington, or Bunker Hill:

I shall not acknowledge that the honorable member [Hayne] goes before me in regard for whatever of distinguished talent, or distinguished character, South Carolina has produced. I claim part of the honor, I partake in the pride of her great names. I claim them for countrymen, one and all, the Laurenses, the Rutledges, the Pinckneys, the Sumpters, the Marions, *Americans* all, whose fame is no more to be hemmed in by State lines, than their talents and patriotism were capable of being circumscribed within the same narrow limits. . . . Him whose honored name the gentleman himself bears [Isaac Hayne, Robert's uncle, whose hanging by the British caused patriotic fulminations during the Revolution], does he esteem me less capable of gratitude for his patriotism, or sympathy for his sufferings, than if his eyes had first opened upon the light of Massachusetts, instead of South Carolina? Sir [to

Calhoun presiding, himself from South Carolina], does he suppose it in his power to exhibit a Carolina name so bright as to produce envy in my bosom?¹⁵

Webster is deftly making Southerners traitors to their own Revolutionary heroes if they tear apart a nation those ancestors built. If all his speech had been based on such appeals to sentiment, then he, too, might have been charged, like Lincoln, with a merely sentimental or "mystical" attachment to Union—one that reached a climax in the famous conclusion to this speech, "Liberty and Union, now and forever, one and inseparable."¹⁶

But Webster had legal and constitutional arguments to make for the singleness of the nation. Hayne, like Calhoun, treated the nation as a league of "sovereign states" bound only by a pact (the Constitution). Webster argued that Americans had constituted themselves a single people long before the Constitution was drafted or ratified. The single people forged in the Revolution, which declared its independence in 1776, which formed a "perpetual union" in the Articles of Confederation, adopted a new form of government for itself (*not* a pact between different peoples) in the Constitution:

Is it [the government] the creature of the State legislatures, or the creature of the people? . . . It is, Sir [Calhoun again], the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people. . . . I hold it to be a popular government, erected by the people; those who administer it responsible to the people; and itself capable of being amended and modified, just as the people may choose it should be. . . . We are here to administer a Constitution emanating immediately from the people, and trusted by them to our administration. It is not the creature of the State governments.¹⁷

This is Lincoln's doctrine in the First Inaugural, where he admits that some states have spoken for disunion, but not "my rightful masters, the American people" (SW 2.218). The people's existence precedes and makes possible the Constitution. Otherwise, "The United States [would] be not a government proper, but an association of States in the nature of a contract [or pact] merely" (SW 2.217).

According to Lincoln and Webster—and, as we shall see, to Story—the Declaration of Independence was closer to being *the* founding document of the United States than was the Constitution. Webster made the point in many of his writings, as in "The Constitution Not a Compact" (1833):

At least as far back as the first Congress, in 1774, they [the United States] had been in some measure, and for some national purposes, united together. Before the Confederation of 1781, they had declared independence jointly, and had carried on the war jointly, both by sea [a trans-state arena] and land; and this not as separate States, but as one people. When, therefore, they formed the Confederation, and adopted its articles as articles of perpetual union, they did not come together for the first time; and therefore they do not speak of the States as acceding to the Confederation, as though it was a league, and nothing but a league, and rested on nothing but plighted facts for its performance. Yes, even then, the States were not strangers to each other; there was a bond of union already subsisting between them; they were associated, united States; and the object of the Confederation was to make a stronger and better bond of union.¹⁸

And here is Lincoln speaking at his inauguration.

Descending from these general principles, we find the propositions that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older

than the Constitution. It was formed, in fact, by the Articles of Association of 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was "to form a more perfect union." [SW 2.217-18]

Of course, the "states' rights" school of constitutional interpretation did not—and does not—accept this view of the founding process. To this day we hear that, as President Reagan liked to put it, "the federal government hadn't created the states; the states had created the federal government."¹⁹ But another body of theory, the Federalist party's, had existed since 1790, when James Wilson delivered the first set of academic lectures on constitutional law. Justice Story continued and developed Wilson's body of legal thinking. This school of constitutional law, and not a vague sentiment, is what Lincoln relied on in his defense of the Union. Among other things, it emphasized his beloved Declaration of Independence, which Webster called "the title deed of their [Americans'] liberties."²⁰ Story emphasizes the importance of the Declaration precisely as a *founding* document:

It was "a declaration by the representatives of the United States of America in Congress assembled"—"by the delegates of the good people of the colonies," as in a prior declaration of rights they were called. It was not an act done by the State governments then organized, nor by persons chosen by them. It was emphatically the act of the whole *people* of the united colonies, by the instrumentality of their representatives, chosen for that among other purposes. It was not an act competent to the State governments, or any of them, as organized under their charters, to adopt. These charters neither contemplated the case nor provided

for it. It was an act of original, inherent sovereignty by themselves, resulting from their right to change the form of government, and to institute a new one, whenever necessary for their safety and happiness. . . . From the moment of the Declaration of Independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation *de facto*, having a general government over it, created and acting by the general consent of the people of all the colonies.²¹

Lincoln did not cease to regard the Declaration as the expression of a transcendent ideal to be approximated. But the further conception of the Declaration as a *founding document*, gave him considerations to keep in mind that were of no importance to Theodore Parker. In Parker's view, if the South was untrue to the American vision, then those resolved upon following the vision could just leave the South behind, extruding it from a Union in which it had become a contaminant. But if the Declaration is the sovereign act of a single people, that people could not rend itself when brought to face a problem that affected the whole. It will be noticed that Webster, like Parker, used triple formulations about government of, for, by the people; but for Webster the people had a grittier historical reality than for Parker. The term meant, for Webster, the *one* people that brought itself into being while issuing the Declaration. Regard for that sovereign enunciator of the doctrine, and not just for the nobility of the high ideals expressed, is part of the constitutional reality he honored. Both these aspects of the Declaration are affirmed in the conclusion of the Gettysburg Address, since both of them animated Lincoln's words and acts from his moment of taking office, when he spoke of "my rightful masters, the American people."

Lincoln's constitutional view had concrete legal consequences that are hard, almost impossible, to understand if one

treats his devotion to the Union as a mystical notion or sentiment. Only in this context can one assess as he did the legal aspect of belligerency and his emancipation measures. Both of these matters must be seen in the light of the Union created by the Declaration.

1. THE STATUS OF BELLIGERENTS.

On this, Lincoln never wavered. The problem, for him, was insurrection, not war. The South could not be a body of foreign belligerents. He was as insistent, at the end of the war, that "seceded states" was a misnomer (SW 2.699) as he was, in his inaugural address, that "the Union is unbroken" (*ibid.*, p. 218). The states *had* not seceded since they *could* not. It is wrong, therefore, to say, as James McPherson does, that Lincoln came to accept the view that the Civil War was a foreign war and not a civil insurrection.²² It is true that the North had to adopt belligerent procedures (e.g., for exchange of prisoners), in large part because of dealings with foreign powers under international law (e.g., in administering a blockade that affected foreign flags). But these were legal fictions to Lincoln, who thought of Jefferson Davis's army as an outlaw band preying on the South. As he told John Hay after Gettysburg:

Davis is right. His army is his only hope, not only against us, but against his own people. If that were crushed, the people would be ready to swing back to their old bearings.²³

It may be said that this was wishful thinking on Lincoln's part; but if so, he persisted in it. He refused to speak of the states as rejoining the Union; he spoke, rather, of restoring "their proper practical relation" (SW 2.699)—the "old bearings" of his commitment to Hay.

All Lincoln's military measures were taken, in his own

mind, to "insure domestic tranquility," as opposed to "providing for the common defense." The proper constitutional parallel is George Washington's response to the Whiskey Rebellion—or even Lyndon Johnson's response to the urban riots of the late 1960s—rather than any foreign war. As commander-in-chief of the armed forces, Washington had sent federalized militia to Pennsylvania—just as Johnson sent federal troops to Detroit—without a declaration of war. "Martial law" was declared. Citizens were put under curfew, under restriction of their movements, and under arrest for impeding the military. Martial law is more expected in the case of domestic insurrection than of mobilization against a foreign enemy.

Lincoln's suspension of habeas corpus when Baltimore blocked the transit of troops is often compared to the war measures of later presidents like Franklin Roosevelt.²⁴ Lincoln is not necessarily exonerated from blame if one thinks, rather, in terms of restoring domestic tranquillity; but one comes closer to his own conception of the matter. People normally consider only his legal action against Northerners in this respect—on the assumption, apparently, that anything done to Southerners must be counted action against an *enemy*. For Lincoln, however, Northerners and Southerners were equally citizens, and support for the insurrection was the same crime no matter where it occurred. He could suspend habeas corpus in the North by the *same* authority he used in repressing armed insurrection to the South. (In foreign wars, domestic discipline is subordinate to and different from belligerency abroad.)

In wartime, internal supporters of the enemy are called traitors. Lincoln not only refused to use that term about Northern supporters of insurrection; he usually avoided it when referring to Southerners, though it was the favorite term of ardent Unionists. As we have seen, he would not even use the term "seceders" without a disclaiming phrase like "so called." He was

equally quick to pardon Southerners and Northerners, since their basic category was the same in either case: they were citizens.²⁵

It is true that Lincoln was severe, even ruthless, in putting down the insurrection. He hoped to do this swiftly, to prevent it from spreading, and he used carrot-tactics with border states while making the stick a menace not only to dissident states but to some hesitating ones. His frustration with dilatory generals, his agony after Gettysburg when Lee escaped the trap, came from his desire to put down the domestic disorder with rapid finality. But it is misleading to call this a policy of "unconditional surrender," as McPherson does. "Unconditional surrender" is a term in international law for the cessation of hostilities with foreign belligerents. Since Lincoln never thought of the Southerners as foreign belligerents, his attitude was that of a policeman dealing with criminal bands. In arresting them, all necessary force is permissible, and the law they are breaking is not negotiable (as are points of dispute between countries). On the other hand, criminals who "give themselves up" are not thought to be surrendering their basic rights, as an enemy gives up not only war aims but certain rights to an exigent conqueror.

In nothing has Lincoln's constitutional role, as conceived by himself, been so misunderstood, with such unhealthy consequences, as in his use of his *military* authority. He so often invoked this power that he is seen as extending presidential prerogative by this means. Arthur Schlesinger is just one of many historians who make this judgment: "The war power flowed into the Presidency most particularly, as Lincoln saw it, in the presidential role as Commander in Chief. This marked the beginning of a fateful evolution."²⁶ One of the most typical aspects of that sentence is the shortening of the title—an error Lincoln did not make. When he issued the Emancipation Proclamation, for instance, he did it "by virtue of the power in me vested as Com-

mander-in-Chief of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion." He has hedged his authority about very carefully in terms of extent (over armed services), temporal duration (of *actual* and *armed* rebellion), and criteria (only the *necessary* acts for suppressing the rebellion).

In doing this, he was saying nothing more than what the Constitution does. It has become customary to refer to the President as "Commander in Chief" *tout court*—and even civilians now refer to him as "our Commander in Chief."²⁷ But the Constitution makes it very clear whom he commands in that role:

The president shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. . . . [Article II, Section 2]

By referring to the *time when* actual rebellion was in process, Lincoln specified his power to use regular and militia troops against rebellion (as Washington had). He was, legally, no less the commander-in-chief of military men in the South (including Lee) than of Northern troops. When he emancipated slaves as a *military* measure, it was as federal troops seized houses in Detroit during the 1967 riot there. By emancipating slaves *as commander-in-chief of the army and navy*, Lincoln was making it clear that he did not act with any other of his (civilian) presidential powers—only Congress and the states could do that, by amending the Constitution. In fact, his critics among the diehard abolitionists attacked him *because* he used such limited authority. And even soberer judges have been harsh on him in this matter. Richard Hofstadter wrote in 1948:

The Emancipation Proclamation of January 1, 1863 had all the moral grandeur of a bill of lading. It contained no indictment of slavery, but simply based emancipation on "military necessity." It expressly omitted the loyal slave states from its forms. Finally, it did not in fact free any slaves. For it excluded by detailed enumeration from the sphere covered in the Proclamation all the counties in Virginia and parishes in Louisiana that were occupied by Union troops and into which the government actually had the power to bring freedom. It simply declared free all slaves in "the States and parts of States" where the people were in rebellion—that is to say, precisely where its effect could not reach. Beyond its propaganda value the Proclamation added nothing to what Congress had already done in the Confiscation [of *captured* slaves] Act.²⁸

This brings us to the second area where Lincoln's mind can be understood only if we appreciate what Union meant to him. Paradoxically, the Declaration as a *founding* document tied Lincoln's hands with regard to slavery.

2. EMANCIPATION.

Lincoln had often said that he would do nothing individually to disturb slavery in its protected area—because it was protected there by the Constitution, the document adopted by the whole people that came into existence at the time of the Declaration of Independence. It is true that he considered the Constitution imperfect in its treatment of slavery. Its own language he thought shamefaced and provisional, meant to exist only as slavery was "in course of extinction." But it *was* the enactment of the *whole* (single) people, and could be changed only by the whole people—through the amendment process. As the South could not unilaterally secede, the North could not unilaterally emancipate. The

opponents of slavery could criticize it, work for amendment, refuse to accept its morality, point to its inconsistency with the Declaration. But *while* the Constitution's provisions were in effect, they could not ignore them.

Lincoln had many ways of framing this constitutional barrier to forcible emancipation. Arguing for the exclusion of slavery from new territories, he put in vivid terms the different status of slavery as considered in itself and in each of the three relevant jurisdictions of America:

If I saw a venomous snake crawling in the road, any man would say I may seize the nearest stick and kill it. [Slavery in itself.]

But if I found that snake in bed with my children that would be another question. I might hurt the children more than the snake, and it might bite them. [Slavery in the South.]

Much more, if I found it in bed with my neighbor's children, and I had bound myself by a solemn oath not to meddle with his children under any circumstances, it would become me to let that particular mode of getting rid of the gentleman alone. [Slavery in the South as seen from the North.]

But if there was a bed newly made up, to which the children were to be taken, and it was proposed to take a batch of young snakes and put them there with them, I take it no man would say there was any question how I ought to decide. [Slavery in the territories.] [SW 2.137]

Lincoln was very careful in framing these parallels (delivered to a Connecticut audience early in 1860). He does not speak of Southerners as belonging to different states, but as "neighbors" with whom one has a solemn agreement. Nor does he palliate the evil of slavery—it is a snake no matter where one finds it, and it endangers the Southerners' children. But in denouncing the evil, in trying to contain it, in hoping for new agreements, Lincoln will

not divide the "one people" that declared itself united in the Declaration—long before it made the temporary arrangements of the Articles of Confederation or the Constitution. So basic was his commitment not to interfere with slavery, so long as it could be contained, that he gave this extraordinary assurance to the South in his First Inaugural:

I understand a proposed amendment to the Constitution [the Crittenden Amendment]—which amendment, however, I have not seen—has passed Congress, to the effect that the federal government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments, so far as to say that, holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable. [SW 2.222]

Though Lincoln had privately told his aides and supporters not to work for the Crittenden Amendment, he made his own pledge not to work against it as a last way of showing the South he was committed to preserving the Union, not to emancipating slaves by unilateral Northern action, outside the agreed processes of the Constitution.

Once the South rejected even this last plea, many took the attitude that "all bets are off." The South had broken the Constitution; it no longer applied to them. Southerners could not plead the slavery provisions in a document whose other terms they had rejected. Lincoln never took this view. For him, the Constitution was still in force throughout the nation. When his generals talked of protecting "our soil" in the North, Lincoln was furious: "The whole country is our soil."²⁹

Since the Constitution was still in effect, the Southerners

were still in the Union (as any rioters or criminals are still in the polity whose laws they break), and Lincoln, too, was still bound by the Constitution, even by its slave provisions. General John C. Frémont, in the border state of Missouri, responded to raids by Southern guerrillas like William Quantrill by freeing the slaves of anyone who supported the marauders. Lincoln had to instruct Frémont that he was doing the work of Quantrill, helping to scare border states away from the Union. But abolitionists did not understand how Lincoln could *re-enslave* people freed by Frémont. It was even more difficult for Lincoln when General David Hunter, a year later, freed slaves in the Southern states he was responsible for—freed those in the dissident states themselves. At this time Lincoln was working for voluntary emancipation in Missouri, and he again revoked a military emancipation. But he did it in terms that show how he conceived his own authority to emancipate (a step he was already preparing to take):

I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy [the longer title, notice] to declare the Slaves of any state or states free, and whether at any time, in any case, it shall have become a necessity indispensable to the maintenance of the government to exercise such supposed power, are questions which, under my responsibility, I reserve to myself, and which I can not feel justified in leaving to the decision of commanders in the field. These are totally different questions from those of police regulations in armies and camps. [SW 2.318-19]

He distinguishes two military situations here—and both are distinguished from civilian action. As civilian leader Lincoln cannot choose a course he thinks desirable or morally commendable, apart from what the Constitution he is upholding dictates. Nor, as commander-in-chief of the army and navy, can he delegate or

countenance the freeing of slaves for military convenience (to the better conduct of armies in field and camp). Only looking at the highest military necessity—to that which is *indispensable to the maintenance of the government*—could he take such a step. By maintenance of government, of course, he does not mean the saving of Washington as opposed to Richmond; he is pledged to maintain the government of the United States, North and South, against armed rebellion. He must, he is asserting ahead of time, be able to show that such maintenance will be an absolute *military* impossibility, without freeing the slaves being used in support of rebellion.

That, and that only, was what Lincoln threatened to do in September of 1862 (only four months after revoking General Hunter's emancipation, which had *not* claimed absolute military necessity to the whole endeavor). The South was given until the new year to prevent this *military* move by desisting from insurrection. Even within its limited military form, emancipation could have been prevented by a return to compliance with the law. Then, on January 1, 1863, Lincoln issued the military proclamation which Hofstadter denounces for having all the eloquence of a bill of lading. The master of political rhetoric, who relied on the word for his influence over others, deliberately made this document so unlikely to stir moral sentiment that J. G. Randall says it is "more often admired than read."³⁰ Lincoln did not present this as a moral document, or even a political one. It did not free slaves in the nation at large, but only in the theater of active insurrection and only as a "necessary war measure for suppressing said rebellion" (SW 2.424).

Lincoln does everything possible to treat the South's slaves as *commodities of war*:

It [emancipation] is not a question of sentiment or taste, but one of physical force, which may be preserved and estimated as horse-

power, and steam power, are measured and estimated. And by measurement, it [black support] is more than we can lose, and live. [SW 2.621]

Over and over, and always, Lincoln talks of the emancipation as a *purely* military act he *had* to resort to in order to *restore order* in the Southern part of the United States (his task as the President of the entire nation) against armed insurrection. Ironically, he was restricting himself, as a military leader, to the view of slaves as *property* that the Southerners themselves professed:

Is there—has there ever been—any question that, by the law of war, property, both of friends and enemies, may be taken as needed? [SW 2.497]

But why would the Southerners' slaves, seized and used while war was on, remain free *after* the military crisis passed? Because *this* kind of property can only be *used* if it cooperates, and it will not cooperate as a mule does, but as a man or woman.

Nor is it possible for any Administration to retain the service of these people with the express or implied understanding that, upon the first convenient occasion, they are to be re-enslaved. It *can* not be; and it ought not to be. [SW 2.631]

Lincoln could not be more insistent that his act was taken only out of military necessity, a necessity that was absolute.

The original proclamation has no constitutional or legal justification except as a military measure. [SW 2.501]

According to our political system, as a matter of civil administration, the general government had no lawful power to effect eman-

cipation in any State, and for a long time it had been hoped that the rebellion could be suppressed without resorting to it as a military measure. [SW 2.550]

I believed the indispensable necessity for military emancipation and arming the blacks would come, unless averted. [SW 2.586]

Some, who feel that Lincoln was exaggerating the military need for his own purposes, follow Lincoln's early generals in supposing he led only the North. The blacks were clearly not needed to protect Washington. But since Lincoln thought of himself as the President of the South as well, restoring rightful order everywhere was a task that *did* call for military resources of every sort, and on a large scale. This was true, as Lincoln said, even considering slave power as a physical commodity like horse and steam power. It was true for equally important military reasons of morale—and that in a double sense. The threat of emancipation, and then its fulfillment, damaged Southern morale and strengthened Northern hopes. Union troops would have more to fight with (as well as for), and the Southerners would have less:

There is a witness in every white man's bosom that he would rather go to the war having the negro to help him, than to help the enemy against him. . . . It [failing to offer military emancipation] is simply giving a large force to the enemy, for *nothing* in return. [SW 2.621]

He could answer a critic: "You say you will not fight to free negroes. Some of them seem willing to fight for you" (SW 2.498). Hofstadter and others deplore this "low" motive for emancipation. But a new generation of black historians finds in it a realism, a recognition of the black contribution, that avoids the condemnation of doing things *for* the slaves.³¹ If the slaves were

needed, they *earned* their freedom. Lincoln recognized a *superiority* of black "freedom fighters" to white shirkers from all mankind's struggle:

And then [when peace comes], there will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind on to this consummation; while, I fear, there will be some white ones, unable to forget that, with malignant heart and deceitful speech, they have strove [sic] to hinder it. [SW 2.499]

This was one of many ancillary benefits to the constitutional scruple Lincoln observed in *limiting* emancipation to his reach as commander-in-chief of the army and navy. By keeping his pledge to the South, not to interfere with their institutions through the civil power, he made the claim against them as bearable as possible, not indulging moralistic tirades against them. He meant to *govern* these people when order was restored. Meanwhile, the strictly military measure did not contaminate (though it increased indirect pressure for) voluntary emancipation in the border states and the fostering of the civil procedure that would lead to passage of the Thirteenth Amendment, freeing all slaves, in 1865.³²

Above all, by avoiding a unilateral (civil) emancipation, while insisting there could be no unilateral secession, Lincoln kept the Constitution intact (slave clauses and all) for the whole people. Lincoln was expressing in every way possible his determination that the nation remain united.³³ By grounding that Union in the Declaration as the founding document of a single nation, he took from his favored document *both* values that Webster had expressed at the end of his Reply to Hayne: "Liberty and Union, now and forever, one and inseparable!"

If we did not know the actual Address Lincoln gave, most

of us would consider it natural, almost inevitable, to mention the Emancipation that had occurred in the same year as the battle at Gettysburg. (Everett *did* mention it.) But now, I hope, it is clear why Lincoln not only did not but *would* not mention it. He meant to rise above the particular, the local, the divisive. The Emancipation had been only a military measure, an exigency of the war. Lincoln was looking beyond the war to "the great task remaining before us" as a nation trying to live up to the vision in which it was conceived.

James McPherson describes Lincoln as a revolutionary in terms of the economic and other physical changes he effected, whether on purpose or not—a valid point sensibly discussed.³⁴ But Lincoln was a revolutionary in another sense, as well, the one Willmoore Kendall denounced him for—he not only put the Declaration in a new light as a matter of founding *law*, but put its central proposition, equality, in a newly favored position as a principle of the Constitution (which, as the *Chicago Times* noticed, never uses the word). What had been a mere theory of lawyers like James Wilson, Joseph Story, and Daniel Webster—that the nation preceded the states, in time and importance—now became a lived reality of the American tradition. The results of this were seen almost at once. Up to the Civil War, "the United States" was invariably a plural noun: "The United States are a free government." After Gettysburg, it became a singular: "The United States is a free government." This was the result of the whole mode of thinking Lincoln expressed in his acts as well as his words, making *union* not a mystical hope but a constitutional reality. When he spoke at the end of the Address, about government "of the people, by the people, for the people," he was not just praising "popular government" as a Transcendentalist's ideal, like Theodore Parker. Rather, like Webster, he was saying that America is a people addressing its great assignment as that was accepted in the Declaration. This people was "conceived" in

1776, "brought forth" as an entity whose birth was datable ("four score and seven" years back) and placeable ("on this continent"), something that could receive a "new birth of freedom."

By giving this language a place in our sacred documents, Lincoln changed the way people thought about the Constitution. For a states'-rights advocate like Willmoore Kendall, for an "original intent" advocate like Edwin Meese, our politics has all been misdirected since that time. The Fourteenth Amendment was, for them, later "bootlegged" into the Bill of Rights. But, even before that, the Amendment was doing its harm in the eyes of strict constructionists. As Robert Bork put it:

Unlike the [Amendment's] other two clauses, it [the due-process clause] quickly displayed the same capacity to accommodate judicial constitution-making which Taney had found in the fifth amendment's version.³⁵

Bork, too, thinks equality as a *national* commitment has been sneaked into the Constitution. There can be little doubt about the principal culprit. As Kendall put it, Lincoln's use of the Declaration's phrase about all men being equal is an attempt "to wrench from it a single proposition and make that our supreme commitment."³⁶

We should not allow him [Lincoln]—not at least without some probing inquiry—to "steal" the game, that is, to accept his interpretation of the Declaration, its place in our history, and its meaning as "true," "correct," and "binding."³⁷

But, as Kendall himself admits, the professors, the textbooks, the politicians, the press *have* overwhelmingly accepted Lincoln's vision.³⁸ The Gettysburg Address has become an authoritative

expression of the American spirit—as authoritative as the Declaration itself, and perhaps even more influential, since it determines how we read the Declaration. For most people now, the Declaration means what Lincoln told us it means, as a way of correcting the Constitution itself without overthrowing it. It is this correction of the spirit, this intellectual revolution, that makes attempts to go back beyond Lincoln to some earlier version so feckless. The proponents of states' rights may have arguments, but they have lost their force, in courts as well as in the popular mind. By accepting the Gettysburg Address, its concept of a single people dedicated to a proposition, we have been changed. Because of it, we live in a different America.