A Bill of Lading Delivers the Goods
The Constitutionality and Effect of the Emancipation Proclamation

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On January 31, 1865, Congress adopted the Thirteenth Amendment, which outlawed slavery in the United States, and sent it to the states for ratification. In an impromptu speech delivered the next day and recorded by the New York Tribune, President Abraham Lincoln promoted the amendment as a means of avoiding the possible legal infirmities of the Emancipation Proclamation: “A question might be raised whether the proclamation was legally valid. It might be added that it only aided those who came into our lines and that it was inoperative as to those who did not give themselves up, or that it would have no effect upon the children of the slaves born hereafter. . . . But this amendment is a King’s cure for all the evils.”

Lincoln was too good a lawyer to leave hostages to legal fortune if the Thirteenth Amendment was not ratified. His “a question might be raised” formulation suggests that he recognized these concerns without sharing them. But the concerns were real, and they didn’t end with potential legal problems. By its terms, the Proclamation only freed slaves in territory in rebellion on January 1, 1863, its date of issuance, leaving slavery untouched in other areas. And as James McPherson has noted, the Proclamation would not outlaw slavery as an institution even if those in slavery at the end of the war were “forever free.” These ills, too, were cured by Lincoln’s panacea when it was ratified in December 1865.

The cure has discouraged study of the ills. Lincoln believed that his issuance of the Emancipation Proclamation was the act for which he would always be remembered, planting the footprint in time and eternity he had craved since youth. The record fulfills his prophecy.

2. James M. McPherson, This Mighty Scourge (New York: Oxford University Press, 2007), 220.

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ters under “emancipation proclamation,” and the list is not exhaustive. But that vast literature includes limited consideration of the constitutionality of the Proclamation, and virtually no consideration of whether it would have destroyed the institution of slavery if the Thirteenth Amendment had not been adopted. The King’s cure reduced the issue of the constitutionality and effect of the Proclamation to shell casings on a battlefield won with a different weapon.

It is worth examining the casings, if only for historical accuracy and interest. This article examines the validity and impact of the Emancipation Proclamation and reaches a number of conclusions. The Proclamation was a constitutional exercise of Lincoln’s powers. The Proclamation, coupled with the friction of war, developments in the border states, and the make-up of Congress and the Supreme Court, would have destroyed the institution of slavery without the aid of the Thirteenth Amendment. The Proclamation’s legal vulnerabilities created a dynamic that made the Thirteenth Amendment possible as well as necessary.

The Rocky Road to Emancipation, and Lincoln’s Road Map

Following the attack on Fort Sumter, Massachusetts Senator Charles Sumner and others tried to convince Lincoln to free the slaves through exercise of his war powers, and they pressed their case until Lincoln issued the Preliminary Emancipation Proclamation. Lincoln resisted the pressure, but his generals and a troublesome cabinet secretary forced him to deal with emancipation before he was prepared to do so.

In May 1861 Lincoln appointed John Charles Frémont—renowned western explorer, Mexican War veteran, son-in-law of the late Senator Thomas Hart Benton of Missouri, charter California senator, first Republican presidential candidate, and protégé (for a while) of a Blair family that was influential in national councils and in Missouri and Maryland—commander of the Department of the West. On August 30, 1861, Frémont, without consulting or notifying Lincoln, issued a decree freeing the slaves owned by rebels and rebel supporters in much of Missouri. His action caused an uproar in Kentucky, threatening to drive that critical border state from the Union. Frémont rejected Lincoln’s request to withdraw the order and sent his headstrong wife, Jesse Benton Frémont, to Washington to explain the rejection, prompting an unhappy Lincoln to peremptorily revoke the order.3 Lincoln’s

state of mind is reflected in his testy response to a letter from his old friend Orville Browning that defended Frémont. After taking umbrage at Browning’s position, Lincoln justified his action on prudential grounds and also set forth the law as he understood it. Speaking of slaves, he said that “if the General needs them, he can seize them, and use them; but when the need is past, it is not for him to fix their permanent future condition. That must be settled according to laws made by law-makers, and not by military proclamation. . . . Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws—wherein a general, or a president, may make permanent rules of property by proclamation?”

Secretary of War Simon Cameron had been a thorn in Lincoln’s side since his early days as president-elect. Then-Senator Cameron was the leader of the Pennsylvania Republican Party, but he was opposed by a faction in the party led by Governor Andrew Curtin, and he attracted limited support outside the state. Under extreme pressure from Cameron supporters and opponents, Lincoln promised a cabinet position to Cameron, tried to withdraw the promise, but ultimately decided that he needed Cameron in the cabinet. It was a decision he soon regretted. Cameron was a disaster, a poor administrator presiding over a War Department looted by corrupt friends and supporters of the secretary. As Lincoln faced mounting pressure to remove Cameron, Cameron sought to curry favor with Radicals in Congress by inserting language in the War Department’s 1861 report suggesting that escaping slaves should be armed and enrolled in the army. While Cameron didn’t address emancipation directly, it was obvious that the enrolled slaves would be freed. When the report was submitted to Lincoln for review, he immediately ordered deletion of the language, alarmed that it might weaken support for the war and offended that Cameron had made this move without consulting him. Shortly thereafter, Lincoln removed Cameron and appointed Edwin M. Stanton to head the War Department.

General David Hunter, commander of the Department of the South, had not learned from Frémont’s mistake. On May 9, 1862, Hunter issued an order freeing all slaves in Georgia, Florida, and South Carolina. Lincoln revoked the order on May 19. The basis for the revocation departed dramatically from the position set forth in the Browning letter. Referring to the emancipation of slaves, Lincoln said that “whether it be competent for me, as Commander-in-Chief of the Army and Navy, to

5. Goodwin, Team of Rivals, 403–5.
declare the Slaves of any state or states, free, and whether at any time, in
any case, it shall 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. . . .”6 Maybe a president
could “make permanent rules of property” after all. Emancipation
was just a step away.

Lincoln took the step on September 22, 1862. One year to the day
after he told Browning that he did not have the power to emancipate
slaves by decree, he issued the Preliminary Emancipation Procla-
mination. It declared that all slaves in insurgent territory on January 1,
1863, would be “forever free.” On January 1, 1863, as the nation held
its breath to see whether Lincoln would follow through, he issued
the Emancipation Proclamation.7 It announced that it was issued “by
virtue of the power vested in [the president] as Commander-in-Chief
. . . and as a fit and necessary war measure for suppressing [the] rebel-
lion.” It declared the slaves in all of the Confederate states except for
Tennessee and parts of Louisiana and Virginia, including the future
West Virginia, to be “free” (rather than “forever free”), and it added
a provision authorizing enrollment of black soldiers. The dropping
of “forever” speaks to Lincoln’s uncertainty as to the extent of his
powers, but he obviously decreed permanent freedom, not freedom
that would end with the war.

The Preliminary Emancipation Proclamation and the Emancipation
Proclamation were expressed in stark, stilted legalese. Lincoln’s only
nod to the nature of his act was a little finishing flourish in the Eman-
cipation Proclamation in which he said that “upon this act, sincerely
believed to be an act of justice . . . , I invoke the considerate judgment
of mankind, and the gracious favor of Almighty God.” Even here,
though, he stayed close to the grindstone, noting that the act of justice
was “warranted by the Constitution, upon military necessity.” Many
commentators have observed that this style was intentional. The criti-
cal audience for the Proclamation was the judiciary, and he did not
want its attention diverted or his motives questioned by a display of
eloquence or seeming emotion.

In an April 4, 1864, letter to Albert Hodges, Lincoln mapped out
his road to emancipation and justified his shifting positions.8 He had
always hated slavery, he said, but had “never understood that the
Presidency conferred upon me an unrestricted right to act officially

8. Ibid., 7:281–82.
upon this judgment and feeling.” His constitutionally required oath to preserve the Constitution, however, imposed a duty to preserve the Union “by every indispensable means. . . . I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution.” He revoked the Frémont and Hunter emancipation decrees because he thought that emancipation was not an “indispensable necessity” when those decrees were issued, and he removed the offending language from Cameron’s message for the same reason. After the border states rejected his proposal for compensated emancipation, “I was, in my best judgment,” wrote Lincoln, “driven to the alternative of either surrendering the Union, and with it, the Constitution, or of laying a strong hand upon the colored element. I chose the latter.” He didn’t explain why compensated emancipation in the border states might have stayed his hand, but he may have thought that free border states would make slavery in the Confederacy untenable in the aftermath of the war and that emancipation in the border states would sap Confederate support in those states.

The Hodges letter explains how and why Lincoln came to emancipation and justifies the Emancipation Proclamation under the preserve-and-protect clause of the Constitution. In an earlier letter to James Conkling, written to be read to a gathering in Springfield, Illinois, Lincoln offered a defense of the Proclamation under the law of war.9 “I think the constitution vests its commander-in-chief, with the law of war, in time of war,” he said. “The most that can be said, if so much, is, that slaves are property. Is there—has there ever been—any question that by the law of war, property . . . may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy? Armies, the world over, destroy enemies’ property when they cannot use it. . . . Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel.”

The great deed was done, and Lincoln had made the legal case for it. Is it a convincing case?

The Constitutionality of the Emancipation Proclamation

The Emancipation Proclamation provoked immediate learned response, and here Lincoln was often wounded in the house of his friends. A number of Republican luminaries—and, most notably, William Whiting, a Boston lawyer who was solicitor of Lincoln’s War Department—wrote

in support of the Proclamation. But several others, including former Supreme Court justice Benjamin Curtis, judge and Harvard Law School professor Joel Parker, former Speaker of the House Robert Winthrop, and R. H. Dana, a prominent lawyer and author of *Two Years Before the Mast*, rose in strident opposition.

In his support of the Emancipation Proclamation, Whiting cited the broadly recognized right of belligerents to capture or destroy enemy property and then stated categorically that the law of war allowed a belligerent to free an enemy’s slaves by proclamation.\(^\text{10}\) He produced instances in which slaves had allegedly been freed by decree. When those examples are examined, however, it is clear that the decree was used as an inducement to bring the slaves to the liberator’s lines, with freedom achieved by physical liberation of or dominion over the slaves, not by decree.

Those who challenged Lincoln’s power to issue the Emancipation Proclamation advanced various grounds of attack. The president could not make law by decree (Curtis and Dana). The president could confiscate slaves that came into Union lines, but could not constitutionally deprive slave owners of property beyond those lines (Curtis and Parker). The president did not possess war powers, and even if he did, they could not be exercised outside the theaters of operation, or against those who did not support the Confederacy (Parker). Lincoln was blinded by “schemes of philanthropy” (Winthrop).\(^\text{11}\)

These contemporary legal challenges to the Emancipation Proclamation are unpersuasive. The contention that the president cannot make law by decree is a position, not an argument; it does not reach, but assumes, the conclusion. The contention that the president does not as a general matter have war powers is absurd; when James Polk waged war in Mexico, he obviously possessed the traditional war powers of a civilian commander in chief. Whether the war powers are available in a civil war is a different issue, but the Supreme Court’s decision in *The Prize Cases*, upholding the blockade, resolved that issue in Lincoln’s favor.\(^\text{12}\) The claim that war powers are limited to enemy

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combatants and supporters or to the immediate theater of operations is also absurd. When General Phillip Sheridan devastated the Shenandoah Valley, and General William Sherman made “Georgia howl,” they did not inquire into the sympathies of those whose property was taken or destroyed, and Sherman raided Georgia precisely because it was untouched by war. Slaves toiling anywhere in the South, whether in bondage to loyal, disloyal, or indifferent masters, helped the Confederacy by producing foodstuffs and other things and freeing whites for military service. The contention by Curtis and Parker that it was unconstitutional to deprive slave owners of property rights by decree is at odds with their acknowledgment that slaves could be freed by escaping to Union lines.

When contemporary supporters and critics of the Emancipation Proclamation weighed in, its constitutionality was a live issue. The Thirteenth Amendment mooted the issue, but it has been revived in a recent full-book treatment.

In An Act of Justice: Lincoln’s Emancipation Proclamation and the Law of War (2007).\(^\text{13}\) Burrus Carnahan explores Lincoln’s power to free slaves under the law of war. He cites and discusses United States v. Brown, in which Chief Justice John Marshall stated that “war gives to the sovereign full right to take the persons and property of the enemy, wherever found.”\(^\text{14}\) Relying on Brown and the practice of nations, John Quincy Adams argued that a belligerent could take and free the slaves of its enemy. During the Civil War that practice was embodied in a code drafted by Professor Francis Lieber of Columbia and adopted as Army General Orders approved by Lincoln. Article 42 of the Lieber Code states that Roman and European practice has for centuries held that a slave escaping to another country is free. Article 43 of the Code adopted that practice for the United States: “... in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by the belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman.”\(^\text{15}\)

The Lieber Code and the law upon which it is based freed the slaves who had entered the Union lines by capture or escape. Neither ad-

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dressed the validity of the Emancipation Proclamation as a decree that by its issuance purported to immediately strike all shackles in the insurgent areas of the Confederacy. Carnahan recognizes that the decree cannot summon support in precedent. Lincoln, he said, “tried to do what no other military commander ever had—the Emancipation Proclamation purported to ‘take’ enemy property that was not yet under his control. No traditional practice supported that. . . .”16

Lacking support for decreed freedom in traditional practice, Carnahan finds it elsewhere. He notes that Emmerich de Vattel, the author of a classic, pre-Civil War work on international law, states that “to deliver an oppressed people is a noble fruit of victory; it is [also] a valuable advantage gained, thus to acquire a faithful friend.”17 Echoing the position advanced by Senator Charles Sumner of Massachusetts,18 Carnahan argues that this “oppressed people” doctrine justifies decreed emancipation of enemy slaves, and he suggests that Lincoln used the doctrine to make the case for his edict of freedom. “By declaring that the U.S. government immediately recognized the freedom of all slaves in the Confederacy,” Carnahan says, “Lincoln dealt with them as an oppressed people, rather than as property, and appealed for their support as humans.”19

Carnahan misconstrues Lincoln’s position. Lincoln did not believe he was empowered by a desire to free an oppressed people. Quite the contrary. As we have seen, Lincoln said in the Hodges letter that, while he had always hated slavery, “he had never understood that the Presidency conferred upon me an unrestricted right to act officially upon this . . . feeling.” In the portions of the Conkling letter quoted above, after claiming that the Constitution clothes the president “with the law of war, in time of war,” Lincoln noted that “the most that can be said, . . . is that slaves are property. Is there—has there ever been—any question that by the law of war, property . . . may be taken when needed?” And in a September 1863 letter to Treasury Secretary Salmon Portland Chase, Lincoln specifically disclaimed an oppressed-people power. Rejecting Chase’s request to extend the Emancipation Proclamation to the exempted parts of Virginia and Louisiana, Lincoln said that if he freed slaves because it was “politically expedient and morally right,” he would “give up all footing upon constitution or law.”20 In issuing the Proclamation, Lincoln dealt with the slaves, not

16. Ibid., 137.
17. Ibid., 115.
18. Ibid., 114.
19. Ibid., 141.
as an oppressed people but as property whose freedom would help
the Union and harm the Confederacy.

Lincoln properly rejected the oppressed-people doctrine. In arguing
that freedom for an oppressed people justifies decreed emancipation,
Sumner and Carnahan confuse motive with power. The desire to free
an oppressed people may prompt a belligerent to issue a decree of
freedom, and the decree may provoke a response by the slaves and
by foreign powers that oppose slavery, but, as Lincoln recognized,
it is the expectation of the response, not the desire, that confers the
power to issue the decree. When Lincoln says in the Proclamation that
his “act of justice” is based “upon military necessity,” he recognizes
that his desire to free an oppressed people is a motive, not a source
of power.

While his reasoning is faulty, Carnahan’s conclusion that Lincoln
had the power to free the slaves by decree is sound. Based on the
precedents and sources he cites, Carnahan rightly concludes that “tra-
ditional practices” in 1862 did not support emancipation of slaves
who were not subject to the dominion or control of the emancipating
power at the end of the war. But he also cites no precedent or sources
suggesting that Lincoln lacked the power to issue an immediately ef-
fective emancipation proclamation. The matter was, and apparently
remains, a matter of first impression. The case for Lincoln is strong.

Lincoln’s case requires an affirmative answer to three questions. Did
the federal government have the power to free all slaves in insurgent
areas by an edict purporting to have the force of law? (This was not
an idle question at the end of the war, for many slaves had not come
into Union lines.) Since the law of war requires surrender of enemy
property at war’s end, could slaves be permanently freed? (Lincoln
recognized this requirement in the Browning letter when he said that
neither a general nor the president could make “permanent rules of
property by proclamation.”) The two wartime confiscation acts per-
manently freed slaves, but emancipation under those acts was based
on punishment for conduct or misconduct determined in judicial pro-
ceedings, not on a claimed power to immediately and permanently
free all slaves as a means of winning the war.) Did the president, as
opposed to Congress, have the power to free the slaves?

Those who claim that slaves could neither be freed by decree nor
permanently freed buckle themselves into a legal straitjacket that
ignores the purpose of the law of war and the unique feature of slave
“property.” The law of war as it deals with enemy property is not
property law. It is not designed to regulate or codify rights to title
or possession, or to establish estates for the duration of the war. It
emerged from the conduct and demands of war, allowing belligerents, in the words of Lincoln’s Conkling letter, to “do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel.” The law of war requires title or possession as a legal matter because it is needed as a practical matter. The law of war requires surrender of captured property at war’s end because the property has been milked of all of its war-waging value to the captor. In the case of emancipation, the mind of the slave casts both these requirements aside.

A slave’s capacity to respond to non-sensory inducements distinguishes him from any other “property.” The Emancipation Proclamation was issued to induce slaves to withhold services from the Confederacy and, in appropriate cases, to offer those services to the Union. It was calculated to achieve the same effect as capturing or destroying Confederate property or imprisoning Confederate soldiers. It achieves by decree what can ordinarily only be achieved by possession or dominion. It is much like the declaration of a blockade, which operates on the mind of man to discourage trading with the enemy. If the Union had perfected a device that would prompt Confederate warhorses to balk in battle, or run away, or bolt to Union lines, the law of war would have authorized use of the device. If a belligerent reasonably believes that a decree of freedom will deprive the enemy of the bondsmen’s services and provide laborers and soldiers to the liberator, the law of war, with its focus on function, authorizes the decree. The only restraints on a belligerent under the law of war are humanitarian restraints, and no one would argue that it is inhumane to free slaves.

The slave’s reasoning faculty made a decree of permanent freedom imperative. If Lincoln had decreed freedom that ended with the war, he would have in effect told the slaves that they should help to achieve a victory that would return them to bondage. Not much incentive in that. The only way for the Union to reap the benefits of freedom during the war was to assure freedom after the war. It would be self-defeating to apply the ordinary rule requiring surrender of captured property at war’s end.

In the Civil War, the power to permanently free slaves authorized by the law of war was, as Lincoln recognized in the Hodges letter, augmented by the terms of the United States Constitution. The Constitution gives the president the duty and power to preserve, protect, and defend the Constitution. The war was being waged to preserve the Constitution. By the time the Emancipation Proclamation was issued, bloody defeats and victories and war weariness had built a
case for African-American troops and other steps to weaken the en-
emy and strengthen the Union. Frémont, Cameron, and Hunter had
unwittingly given credibility to Lincoln’s decision to emancipate
the slaves by proving that he had refused to take that step until the need
was obvious and imperative. The preserve, protect, and defend power
was specific, constitutionally conferred, seemingly plenary, and clearly
applicable. It created power that embodied, but was not limited to,
power arising under the uncertain parameters of the law of war. The
glare peril to the Union conferred power akin to the acknowledged
power of government to destroy property that imperils the public
good, such as an unsafe house or structures or foliage that will kindle
or spread a wildfire. Under the circumstances, there was solid legal
ground to free the slaves, by decree or otherwise.

But did Lincoln hold this power without authority from Congress?
And more specifically, could he, by a mere stroke of the pen, free all
of the slaves in insurgent areas?

In their assault on the Emancipation Proclamation, Parker and Curtis
asserted that the Proclamation was invalid because it unconstitution-
ally deprived slave owners of their property and because it exerted
power that was legislative rather than executive.

The constitutional issue is frivolous. Before the Civil War, the Con-
stitution would not have authorized the federal government to seize
and free slaves, and yet Curtis and Parker and all others who have
considered the matter concede that the Union could free slaves who
fled to its lines during the war. They recognized that the war con-
ferred a power of uncompensated emancipation, and the effect on
the slave owner is the same whether he loses his property by seizure
or decree.

The question of whether Lincoln or Congress held the power to free
the slaves by act or edict is more complicated.

Lincoln believed that he, and not Congress, held the power of eman-
cipation. It is true that he said in the Browning letter that “permanent
rules of property” could only be made by Congress, not by executive
proclamation. But this was not his matured opinion, and it was given
at a time when he, like his countrymen, “looked for an easier triumph
and a result less astounding,” in the words of his Second Inaugural
Address. In his July 8, 1864, message explaining his pocket veto of the
Wade-Davis Bill, he said he was “unprepared . . . to declare a compe-
tency in Congress to abolish slavery in the States.”21 Fearing the veto,
Senator Zachariah Chandler of Michigan had lobbied Lincoln to sign

the bill. When Lincoln told Chandler he opposed the bill because it prohibited slavery in the states, Chandler responded that “it is no more than you have done yourself.” True, replied Lincoln, but “I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress.” Chandler was flabbergasted, but Lincoln was right.

The Emancipation Proclamation is in its nature and effect an executive, rather than a legislative, act. It frees the slaves, but does not acquire rights in the slaves or their services, as a legislative taking would do. It does not punish slaveholders or establish mandates, prohibitions, or other provisions of general applicability that will remain in effect and apply over time. It is complete upon its issuance, as Lincoln recognized in the Conkling letter when he said that “if [the Emancipation Proclamation] is valid, it can not be retracted, any more than the dead can be brought to life.” It is a decree, given the force of law. It is an edict, not a law.

Lincoln took pains to assure that it would be read as an edict and not a law, or even as a means of enforcing a law. In the Preliminary Emancipation Proclamation, Lincoln began by proclaiming that all slaves in areas in insurgency on January 1, 1863, would be “then, thenceforward and forever free.” He then quoted from the provisions of the First Confiscation Act prohibiting military personnel from returning fugitive slaves, and from the provisions of the Second Confiscation Act stating that no slave could be returned to his master by any authority unless the master could prove undying loyalty to the Union. He concluded by ordering all soldiers and seamen to obey these laws and stating that he would, “in due time,” ask Congress to compensate loyal owners for the loss of their slaves.

The Emancipation Proclamation drops all references to the confiscation acts, including orders to enforce them. The soldiers and sailors are ordered, not to obey laws, but to “recognize and maintain the freedom” of the slaves. There is no hint of compensation. In brandishing his edict, Lincoln removes all congressional fingerprints. Slavery dies in the White House, with no help from the Capitol.

Under the Constitution, the president’s authority to issue the Emancipation Proclamation is based in two executive powers. First is the war power arising from the president’s authority to wage war and to command the armed forces of the United States. Second is the power


23. For a discussion of the war powers of the president, and the limits on congressional war powers, see Dueholm, “Lincoln’s Suspension of Habeas Corpus,” 59–63.
of the president explicitly stated in his constitutionally mandated oath “to . . . preserve, protect and defend the Constitution of the United States.” Article II, Section 1 of the Constitution requires those exact words in the presidential oath. Article VI of the Constitution, on the other hand, requires only that congressmen take a non-specific oath or affirmation “to support this Constitution.”

So the great deed was not only done, it was constitutional. And it was constitutional for the reasons advanced by Lincoln in the Conkling and Hodges letters. By biding his time until the demands of war became urgent, carefully considering and explaining the sources of his power, and then selecting a means of emancipation that invoked those powers and cleverly separated executive from legislative action, Lincoln produced a document that should have stood judicial scrutiny if it had come to that. The Tycoon had never been in finer whack; the footprint in time and eternity is the footprint of a Great Emancipator and a very good lawyer.

But what about the ultimate effect? How do we respond to McPherson’s point that the Emancipation Proclamation would have left the institution of slavery intact even if the slaves had remained free? And did the Proclamation generate political support for the Thirteenth Amendment and for broader rights for blacks?

The Fruits of the Emancipation Proclamation

About 190,000 African American soldiers and sailors joined the ranks in response to the Emancipation Proclamation. Their contribution to the war effort was substantial, perhaps decisive, and has been amply chronicled. In assessing the effects of the Proclamation, this paper will focus on the likely slavery-destroying impact of the Proclamation and on its contribution to the Thirteenth Amendment and other post-bellum measures.

At the end of the war nearly all of the slaves in the Confederate states were legally free as a result of the Emancipation Proclamation. If the Thirteenth Amendment had not been adopted, some of the states might have tried to re-enslave them. Did the federal government have a way, and the will, to prevent re-enslavement?

It did. Article VI, Clause 2 of the Constitution, commonly known as the supremacy clause, provides that “this Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding.” Lincoln’s edict was not a legislative act, but it did have the force and effect of law, changing the
legal relationship between master and slave, which seemingly gave it “law of the United States” status. Even if the Proclamation was not a “law of the United States,” it would have supreme law effect as an edict authorized by the Constitution. Courts give supreme-law-effect to administrative rules and regulations authorized by federal laws, and the Constitution is clothed with the same supremacy as laws of the United States. Thus the Proclamation, and the perpetual freedom based upon it, appear to be covered by the supremacy clause, shielding the liberated slaves from any state attempts at re-enslavement. The Supreme Court that included Lincoln appointees Noah Swayne, Stephen Field, Samuel Miller, David Davis, and Salmon Portland Chase, as well as James Wayne and Robert Grier, who had sided with Lincoln in The Prize Cases, probably would have agreed. It might have required federal troops to enforce a Supreme Court decree rejecting a state’s re-enslavement attempt, and President Andrew Johnson was hostile to blacks. If he had refused to enforce a Supreme Court’s decree, though, he almost certainly would have been convicted in an impeachment trial (he had come within one vote of conviction based upon trumped-up charges), and Ben Wade of Ohio—president pro tem of the Senate and scourge of the South—would have become president of the United States.

It is likely, as Lincoln feared, that the Emancipation Proclamation did not free slaves born after the Proclamation was issued, since it was complete upon its issuance. But these slaves would not have provided a labor source for a number of years, with the states forced to look elsewhere in the meantime, and it is unlikely that Confederate state economies in, say, fifteen years would have been viable with an amalgam of free and slave labor. Beyond that, the emancipated parents would have presumably done everything in their power to remove their children from bondage.

Could the Confederate states have revived slavery by acquiring slaves from elsewhere? Not likely. The importation of slaves had been illegal since 1808. Internally, there were few places from which slaves could have been obtained. Missouri, Maryland, West Virginia, Louisiana, Arkansas, and Tennessee had abolished slavery before the end of the war. Freedom conferred by the states could, of course, be denied by the states, but that was unlikely, for free-state economies tended to breed free-state politics. That left Kentucky and Delaware and the small part of Virginia excepted from the Emancipation Proclamation. Those states did not have enough surplus slaves to restock the South,

and Congress in any event had the power, will, and votes to prohibit sales of slaves. Article I, Section 9, Clause 1 of the Constitution states that “the migration or importation of such persons as any of the states . . . shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight” (emphasis supplied). The italicized word extends the power implicit in this provision to the transport, as well as to the importation, of slaves. The Radicals in Congress almost certainly would have wielded that power to prevent the reseeding of slaves in the Confederate states. They probably would have had to override President Johnson’s veto, but they had more than enough votes to do that. The large Republican majorities elected to the House and Senate in 1864 were augmented by the 1866 election, producing what amounted to congressional government, allowing the Radicals to run roughshod over the ineffective and politically inept Johnson.

Any Confederate-state attempt to revive slavery would have faced problems beyond the supremacy clause, the non-migration clause, and a judiciary and Congress willing and able to invoke them. As Lincoln had predicted, the friction and abrasion of war had taken their toll. In the aftermath of the Civil War, the economies of the Confederates states were in shambles, many of their plantations were destroyed or abandoned, much of their workforce was scattered, many of their plantation owners were bankrupt or dead, their transportation systems were ravaged, and their politics were roiled by fierce competition between white supremacists and the freedmen and their supporters. Throw in the legal impediments, and it is hard to see how slavery could have survived as an institution even if the Thirteenth Amendment had not been adopted. Slavery would have remained legal in Delaware and Kentucky and a small part of Virginia, but it is doubtful that they could have held out for long.

The Thirteenth Amendment did make all this moot. It was a King’s cure for whatever ailed the Emancipation Proclamation. But diseases lead to cures. Was that true here? Did the Emancipation Proclamation make the Thirteenth Amendment possible?

At the outset of the Civil War, the North was a deeply racist society. Few states allowed blacks to vote, and fewer still gave them broader civil and political rights. There was little support for abolitionism. All that seemed to change beginning in 1865. The Thirteenth, Fourteenth, and Fifteenth amendments were enacted, as were a number of civil rights acts, and the federal government often acted vigorously to protect the rights of the freedmen. But racial hostility and indifference lurked below the surface. Northern white support for black
rights and equality waned by the early 1870s, was moribund by the end of Reconstruction in 1877, and did not revive for nearly a century. The magic interlude was fruitful but brief. Many things no doubt contributed to this brief and successful appeal to the better angels of the Northern nature, and the Emancipation Proclamation was almost certainly one of them.

The Emancipation Proclamation was controversial when it was announced and issued. Lincoln didn’t know what to expect from the issuance of the Proclamation. It would bring blacks and some whites to the standards, but would discourage enlistment and re-enlistment by others. Radicals would cheer it, but many Democrats and conservative Republicans were opposed. As time went on, it became apparent that in his leap in the dark Lincoln had landed on safe and productive ground. Black soldiers joined the army and navy, contributing to Northern victory. And as the war continued into 1863 and beyond and casualties mounted, officers and soldiers alike came to appreciate the contributions of black soldiers and sailors. Lincoln recognized this in the Conkling letter, stating that “some of the commanders of our armies in the field . . . believe the emancipation policy, and the use of the colored troops, constitute the heaviest blow yet dealt to the rebellion; and . . . at least one of those important successes, could not have been achieved when it was, but for the aid of the black soldiers.”25 This was in mid-1863, in the early stages of black enrollment.

The Emancipation Proclamation generated support for the Thirteenth Amendment in a number of ways. It added emancipation to reunion as a war aim, and the addition would be subtracted if the Proclamation ultimately failed to achieve its goal. The success of the black soldiers and seamen created good will among whites. And perhaps most importantly, and critically so for Lincoln, it produced black supporters of the cause who could not be betrayed. As Lincoln noted in the Conkling letter, blacks rallied to the Union cause in response to the promise of freedom, and “the promise being made, must be kept.” Lincoln was haunted by the imperative of keeping this promise. George McClellan, Lincoln’s opponent in the 1864 election, was both racist and solicitous of Southern rights, so there was a real possibility that, if elected, he would have attempted to abandon the Proclamation even if he won the war. As the Virginia and Georgia landscapes turned red, with Grant stalled in Petersburg and Sherman fighting bloody battles in and around Atlanta, increasing war weariness made a McClellan victory likely. If the election had been held before the fall

of Atlanta and Sheridan’s victories in the Shenandoah Valley, Lincoln almost certainly would have lost. Faced with possible defeat, Lincoln pushed the Thirteenth Amendment in Congress, where it passed in the Senate but died in the House, and he urged Frederick Douglas to accelerate attempts to bring slaves within Union lines or otherwise help them escape.\textsuperscript{26}

When Lincoln in his February 1, 1865, address urged the states to ratify the Thirteenth Amendment approved by Congress the day before, the storm clouds had lifted. He had been reelected, and victory in the war was just a matter of time. His unpressured words provide final evidence of the central role the Emancipation Proclamation played in his insistence upon and support for the Thirteenth Amendment. In his message, he did not promote the amendment on its merits. Instead, by highlighting the possible infirmities of the Emancipation Proclamation, he championed the amendment as the means of fulfilling the Proclamation’s promise. The promise was being kept.

The fulfilled promise led to more. With the increasing realization that freedom alone was not enough to ensure freedom, the Radicals passed the Fourteenth and Fifteenth amendments and a number of civil rights acts, and they tried, unsuccessfully as it turned out, to impose them on a reluctant, resistant South. Certainly, hostility to the South and a settled determination to root out the cause of the war spurred on the Radicals. So did the Emancipation Proclamation.

Conclusion

In the vast literature on the Emancipation Proclamation, a single tart criticism stands out. The unrelieved legalese of the Emancipation Proclamation, historian Richard Hofstadter said, endowed it with “all of the grandeur of a bill of lading.” Most if not all accounts of the Emancipation Proclamation include this quip. It is too good to pass up, and it is a fair, if ungenerous and incomplete, comment on style. Hofstadter’s words capture the essence of the Emancipation Proclamation in ways that he neither envisioned nor intended. A bill of lading is a document issued by a carrier to a shipper acknowledging receipt of goods for transit. This greatest of all bills of lading was constitutionally issued by the Union’s helmsman. And it delivered the goods.

\textsuperscript{26} Guelzo, \textit{Lincoln’s Emancipation Proclamation}, 230.