Completing the Work of the Framers: Lincoln’s Constitutional Legacy

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When we think of the architects of our constitutional order, we naturally think of the Founding Fathers. In particular, we think of James Madison, the “father of the Constitution.” Madison and his colleagues at the Philadelphia Convention drafted the document; Madison and Hamilton provided the most illuminating explanation of the Constitution in the Federalist Papers; Madison introduced the Bill of Rights on the floor of the First Congress. In contrast, Lincoln is known as a great defender of the Constitution. What we fail to realize today, however, is how much Lincoln was involved in reshaping the very constitutional order that he was seeking to defend.

Admittedly, it is understandable to overlook Lincoln’s creative role in constitutional law. From a lawyer’s perspective, the most important constitutional effect of the Civil War was the adoption of the Fourteenth Amendment. Under the original Constitution, the Bill of Rights limited the powers of the federal government. But the original Constitution provided precious few guarantees of individual rights against state governments. Filling this gap, the Fourteenth Amendment mandates that states provide due process and equal protection of law. But this did not come to pass until well after Lincoln’s death. Nor was Lincoln a constitutional theorist like Madison: the Federalist Papers are often cited by the United States Supreme Court today, but Lincoln gets little more than a respectful nod. We tend to ignore his constitutional impact.

Nevertheless, Lincoln deserves far more credit than he has received as an architect of American constitutional law. Because of the absence of explicit constitutional amendments during Lincoln’s lifetime, we underestimate how much he helped reshape the Constitution. The Constitution drafted by Madison was profoundly incomplete and crucial issues were left unsettled; only after the Civil War were those ambiguities resolved and the voids filled.
There were three key gaps in Madison’s Constitution. The first was the most fundamental. Until Lincoln’s time, the nature of the Constitution itself was unclear, and with it the question of whether ultimate sovereignty resided with the states or the nation. This confusion over whether the United States was a confederation or a nation gave plausible legal cover for secessionists. In contrast, Lincoln thought that “our forefathers brought forth . . . a new nation,” not a mere confederation. But that was a question open to debate before his presidency.

The second constitutional gap related to the nature of the presidency. Today, the president is at the heart of the national government, the most powerful single individual in the world. But Madison’s Constitution was singularly uncommunicative about presidential authority. Lincoln’s unprecedented initiatives as president did much to lay the foundation for the modern chief executive.

The third gap was the failure of Madison’s Constitution to protect human rights from invasion by the state governments—a failure that Madison himself deeply regretted. Slavery itself was the worst blot on human rights, but it was not the only one. Here, too, Lincoln’s vision was triumphant—a vision of a nation “conceived in Liberty, and dedicated to the proposition that all men are created equal.” Lincoln’s call for a “new birth of freedom” was realized in the form of the three crucial constitutional amendments: the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment’s guarantees of due process and equal protection, and the Fifteenth Amendment’s guarantee of the right to vote.

Lincoln’s constitutional legacy contained internal tensions. National power can be used to invade civil rights and civil liberties as well as to protect them. Presidential emergency powers can be abused at the expense of individuals and communities, as some events during Lincoln’s own administration demonstrated. Those are important issues, and in a sense they too are part of Lincoln’s legacy. But the central question is how Lincoln contributed to the building of our present scheme of American government.

The Unsettled Nature of the Union

In a speech shortly after the Fort Sumter crisis, Jefferson Davis defended the constitutionality of secession. During the American Revolution, Davis said, the British threat to American liberty led to a close alliance in which each state expressly retained its sovereignty. The war was won by this “contract of alliance.” In 1787 the states then appointed delegates to the Constitutional Convention, and those delegates ne-
gotiated what Davis called “a compact between independent States.” State sovereignty, Davis declared, was then explicitly reaffirmed in the Tenth Amendment. But in the North arose a heresy, said Davis—one which held that the Constitution did not create a compact of states but rather “in effect a national government.” Despite the Constitution’s support for slavery, the Republicans sought to stamp it out, in violation of the original compact, and the Southern states were forced to secede.¹

From our perspective, Davis’s view was the heresy, not the northern perspective that he attacked. But the compact theory was a heresy with a long history. John Calhoun was perhaps its most articulate spokesman. He claimed that the states had separately become sovereign when they declared independence of England. This sovereignty remained intact through the Articles of Confederation. In the Constitution, Calhoun argued, to the states had merely appointed the federal government as their agent to perform certain functions. According to Calhoun, the “government is a federal, in contradistinction to a national government—a government formed by the States; ordained and established by the States, and for the States—without any participation or agency whatever, on the part of the people, regarded in the aggregate as forming a nation.” There was, Calhoun insisted, “no such community, politically speaking, as the people of the United States, regarded in the light of, and as constituting one people or nation.” In short, Davis said, the Constitution created “the government of a community of States, and not the government of a single State or nation.”²

Lincoln’s views were, as Davis indicated, starkly different. Lincoln famously insisted that the “Union is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union threw off their old dependence, for them, and made them States. . . .” For, Lincoln said, “much is said about the ‘sovereignty’ of the States; but the word, even, is not in the national Constitution; nor, as is believed, in any of the State constitutions. . . . The states have their status IN the Union, and they have no other legal status. If they break from this, they can only do

so against law, and by revolution.” Similarly, in his First Inaugural, Lincoln said: “I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. . . .”

Calhoun might have agreed with the general proposition about national governments but found it inapplicable because, in his view, the union simply was not a “national government.” Lincoln entertained no doubts on that score. He traced the Union back to 1774 and then to the Declaration of Independence. Then, Lincoln said, the Union was strengthened by the Articles of Confederation, which were declared to be perpetual, and by the Constitution, which sought a “more perfect Union.” Next comes the critical point: “But if the destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity.” If the Confederation was perpetual, and the Constitution created a more perfect union, then the Constitution had to provide for a perpetual bond.

How was it possible for intelligent people to hold such diametrically opposing views? The problem was that the framers of the Constitution were never completely clear themselves about the nature of the “more perfect Union” they were creating. Even during the Constitutional Convention, the framers debated whether separation from England had created “separate sovereignties,” which had then confederated, or whether independence was a collective action. Indeed, the historical record is ambiguous. The Declaration of Independence speaks in the plural, declaring the colonies to be “Free and Independent States.” But no colony declared independence or adopted its own constitution without being authorized first by the Continental Congress. The Articles of Confederation spoke in terms of a league between independent states. But Madison viewed this as one of the main flaws of the Articles: the Union being regarded as a “league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power.” One purpose of the Constitution was to establish a firmer national bond, but just how firm was less than crystal clear.

4. Ibid., 286–87.
The framers themselves had no established orthodoxy on this point, and the muddled political developments of their times confound efforts to identify the “true” location of sovereignty in the states or in the national government. In Federalist 39, Madison emphasized the messy, mixed nature of the new government. The proposed Constitution, he said, “is, in strictness, neither a national nor a federal Constitution, but a composition of both.” (By “federal” he meant the states acting in federation; by “national” he meant the independent sovereignty of the country as a whole.) As Madison explained, the Constitution combined some features of each. “In its foundation,” Madison said, “it is federal, not national.” But “in the sources from which ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national.” Finally, according to Madison, the amendment process “is neither wholly federal nor wholly national.” Thus, as Madison recognized, the Constitution provided no simple answer about the location of sovereignty in the states versus the federal government.

After the Constitution went into effect, these highly theoretical disputes about the location of sovereignty were reflected in very practical disputes about federal supremacy. In particular, did the Supreme Court or state officials have the last word on Constitutional issues? Under the leadership of Chief Justice Marshall, the Supreme Court took the position that it had the final word regarding the validity of state laws under the Constitution. State judges, let alone state legislators, had no independent authority to decide the meaning of the Constitution, and their judgments were subject to oversight by the Supreme Court. Beginning with the Virginia and Kentucky Resolutions, Southern constitutionalists sought to create a space for independent constitutional judgments by states. Calhoun’s defense of state nullification is the best known of those efforts today. But equally striking is the insistence of some leading state courts that the Supreme Court had no power to review their judgments. For example, the Virginia Supreme Court insisted long before the Civil War that, because the state and federal governments are “separate from, and independent of, each other,” each “must act by its own organs: from no other can it expect, command, or enforce obedience, even as to objects coming within the range of its powers.” Not too surprisingly, the Supreme Court said it begged to differ with this view. But the extent of the

6. Hunter v. Martin, 18 Virginia 1, 4–9 (1814).
Supreme Court’s authority over state officials remained controversial in a way that is hard to understand today.

The weight of the evidence supports Lincoln’s view that the Constitution created a national government, not a compact, and that at least after the Constitution went into effect, ultimate sovereignty was held by “We the People” of the entire nation, not by individual states. Yet it is striking that even on such a fundamental point as the right of states to secede, Madison’s Constitution spoke so indirectly to the point, if it spoke at all. Lincoln’s rejection of secession was warranted, but the failure of the constitutional text to provide an explicit, definitive answer was a nearly fatal flaw in the original Constitution. If we regard the point as settled beyond argument today, if we take it for granted that the United States is “one nation . . . indivisible,” we must credit Lincoln rather than the Founding Fathers for giving us this clarity.

The Inkblot of Presidential Power

The Constitution proclaims itself, and the laws made pursuant to it, the “supreme law of the land.” But when the secession crisis erupted, the federal government’s power to enforce this supremacy was severely limited. It is the executive branch that is charged with enforcing federal law, but the executive branch was pathetically weak. The regular army and navy were small to begin with and further weakened by the defection of southerners (including, most famously, Robert E. Lee.) The federal government’s only law-enforcement arm consisted of a scattering of U.S. marshals. In the entire country, there were only seventy federal judges and eighty-one federal attorneys, marshals, and other court officials. The FBI did not exist. The attorney general had only recently become a full-time federal employee, and his staff was minimal.

Indeed, Lincoln’s own staff was minimal—compare Nicolay and Hay to the modern Executive Office of the President. That Congress did not appropriate funds for White House staff until 1857 underscores the difference. It was only well after Lincoln’s death that the size of the White House staff reached six.

After the fall of Fort Sumter, Lincoln took decisive action. He issued a proclamation calling out the militia, based on a finding that the execution of the laws was blocked by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the pow-

8. Farber, 145.
9. Ibid., 118–19.
ers vested in the Marshals by law.”10 Lincoln called for 75,000 troops, and just over a week later he proclaimed a blockade of Southern ports. Lincoln also took other bold steps. He expanded the regular army by ten regiments and ordered the enlistment of 18,000 additional sailors. He directed the navy to obtain and arm fifteen steamboats. Finally, he authorized the federal treasury to advance $2 million to private citizens for use in recruiting troops. Later, of course, Lincoln would make the boldest use of executive power in history in the form of the Emancipation Proclamation, freeing millions of slaves and thereby striking a death blow at an institution that the Constitution acknowledged.

Today, this vigorous use of presidential power might not come as such a surprise. We expect our presidents to take the lead in responding to national crises, whether that crisis is an economic depression or an attack on American soil. The presidency in Lincoln’s day was a more modest venture. True, some of Lincoln’s predecessors had been willing to take the initiative: Washington’s neutrality declaration, Jefferson’s purchase of the Louisiana Territory, and Jackson’s attack on the Bank of the United States come to mind. But these were isolated actions.

This was little wonder because the Constitution itself was tight-lipped, if not cryptic, about the scope of presidential powers. When we look at the modern presidency and then look at the text of the Constitution, it seems amazing that so much should have grown from so little. Article II of the Constitution is devoted to the presidency. It begins by saying that the “executive power” is vested in the president, which would be more illuminating if the framers had offered a definition of the executive power. Almost half of Article II is devoted to the mechanics of the office, such as election procedures, qualifications for office, and salary. The first section of Article II ends with the oath of office, calling upon the president to “preserve, protect and defend the Constitution of the United States.” The next two sections of Article II combined are about half as long and contain a laundry-list of presidential powers, most notably the commander-in-chief power and the duty to “take Care that the laws be faithfully executed.” Also listed are the power to make treaties and appoint key officials (but only with Senate approval), to issue pardons, to give the State of the Union address, to receive ambassadors, and to demand the opinions of cabinet officers in writing. Lest these powers be unchecked, Article II closes with a section establishing procedures for impeachment. Article II is brief: it can be read aloud in about two minutes.

10. “Proclamation Calling Militia and Convening Congress,” in Selected Speeches and Writings, 296.
How did the framers envision the presidency? On the one hand, Article II, vests the presidency with the “executive power,” which sounds weighty, not to mention the power to command the armed forces (though the military is subject to a good deal of congressional control elsewhere in the Constitution). On the other hand, one might question whether the presidency was such a big deal. If the framers felt that they had to give the president express authority merely so he could get his subordinates’ written opinions or recommend legislation to Congress, the implication seems to be that the general powers of the office were considered to be less than awesome.

Statesmen and scholars alike have been debating the scope of the office ever since. Robert H. Jackson, one of the great Supreme Court justices of the mid-twentieth century and a former attorney general under President Franklin D. Roosevelt, once summarized the debate as follows: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.” Justice Jackson added that “a century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.”

The framers knew that they had left these questions less than wholly resolved. Indeed, in Federalist 39, Madison himself had said that “experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.” Instead, Madison said, these boundary lines would have to be fixed over time, in the practical operation of the government.

The modern presidency is not a pure invention of Lincoln or anyone else. But as originally described in the Constitution, the office of the presidency was an ambiguous potentiality rather than a defined instrument. Lincoln was far from being the only president who helped shape the modern presidency, but he was among the earliest and the greatest. It was he who first made the full potential of the office manifest. For better or worse, then, he bears much of the responsibility for what the presidency has become today.

**Madison’s Missing Rights Guarantee**

The third gap in Madison’s Constitution was perhaps the most troubling. The original Constitution contained very little in the way of

express guarantees of liberty. The states and the federal government were forbidden to engage in the impairment of contracts or to pass ex post facto laws. The rights of jury trial in federal criminal case and of federal habeas corpus were established. Religious tests for office were forbidden. The Bill of Rights added important rights, such as free speech, the right to remain silent, and freedom from unreasonable searches, but they applied only to the federal government. As far as the original Constitution and Bill of Rights were concerned, states were essentially free to do whatever they wanted to their own citizens, such as suppress speech, establish a state religion, authorize unlimited searches, or utilize torture. The assumption was that the states generally could be trusted to police themselves; federal law provided little restraint.

Madison felt keenly that this was a mistake. During the Philadelphia Convention, he was deeply mistrustful of the states. He pressed hard but unsuccessfully for a federal veto over state laws. When the Constitutional Convention ended without including such a federal veto, he was pessimistic about its future prospects. He predicted to Thomas Jefferson that the Constitution would “neither effectuate its national object nor prevent the local mischiefs which everywhere excited disgust against state governments.”

12 Madison’s initial version of the Bill of Rights tried to remedy this gap by protecting key rights from the state governments. His proposed language was that “No state shall infringe the right to trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press.” To his great disappointment, the restriction on the states failed to make it into the final version of the amendment.

It is understandable that the Constitution did not provide protection against state human-rights abuses. How could it, when it guaranteed the right to engage in slavery? It might be true in some hopeful sense that the nation was “conceived in liberty and dedicated to the proposition that all men are created equal.” Yet neither liberty nor equality was truly guaranteed by the Constitution. Freedom was clearly going to reign in some parts of the country but not in others. This was a situation that Lincoln acknowledged but believed to be unsustainable in the long term. The house divided could not stand.

The Thirteenth, Fourteenth, and Fifteenth Amendments finally remedied this situation and completed Madison’s Constitution by protecting human rights from being trampled by the states. Lincoln

13. Ibid., 261.
was alive only for the initial step of this process, the passage of the Thirteenth Amendment. Certainly, much of this process had nothing to do with Lincoln and was not even envisioned by him. But he did play a pivotal role. He was deeply involved in the critical first step of passing the Thirteenth Amendment. And he articulated a vision of American freedom that would underlie later constitutional changes.

Lincoln’s greatest blow against slavery was of course the Emancipation Proclamation. But he also played an important part in the adoption of the Thirteenth Amendment, which made the end of slavery permanent and nationwide. (The Proclamation freed individual slaves but did not abolish the institution, nor did it apply outside of the rebel states.) Lincoln took the occasion of his December 6, 1864, message to call upon Congress to pass the amendment.\textsuperscript{14} While the amendment was under consideration, he told one member of Congress: “your brother died to save the Republic from death by the slaveholders’ rebellion. I wish you could see it to be your duty to vote the Constitutional amendment ending slavery.”\textsuperscript{15} He also exerted more direct political pressure on key legislators, promoting a formidable lobbying effort on behalf of the Amendment.\textsuperscript{16}

Lincoln also helped promote ratification of the amendment. In February, after the amendment got through Congress, he called it a “King’s cure for all the evils” of slavery and a “fitting if not indispensable adjunct to the consummation of the great game we are playing,” as well as a “great moral victory.”\textsuperscript{17} In his final speech about reconstruction, just days before his death, he called for recognition of the newly constituted government of Louisiana, in part to add another vote for ratification of the Amendment.\textsuperscript{18}

The Thirteenth Amendment was only an initial step in the campaign to make freedom national. It was followed by the Civil Rights Act of 1866, which was designed to implement the amendment by assuring the civil rights of freed blacks, and then by the Fourteenth Amendment, which was designed to entrench and expand on the civil rights act. The Fifteenth Amendment followed, giving blacks the right to vote. Even then, the process was not truly complete. Only in the 1960s did the courts make it clear that the Bill of Rights applied with full force to the states, and only in that decade and the next did

\textsuperscript{14} Selected Speeches and Writings, 440–41.
\textsuperscript{15} Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment (2001), p. 198.
\textsuperscript{16} Ibid., 198–206.
\textsuperscript{17} “Response to Serenade, Washington, D.C.,” Selected Speeches and Writings, 446.
\textsuperscript{18} “Speech on Reconstruction,” ibid., 458.
Congress enact new civil rights legislation to make a practical reality of the constitutional guarantee of racial equality. So it was a very long process indeed. Lincoln’s practical role was a limited but significant one at the early stages of the process.

In the end Lincoln’s role as a constitutional visionary may have been more important than his specific actions. He encapsulated that vision at Gettysburg, and it is instructive to line up some of his words at Gettysburg with the later constitutional amendments. Lincoln emphasized American nationhood (“a new nation,” “this nation”). Correspondingly, the first sentence of the Fourteenth Amendment conveys national citizenship on all who are born here, making state citizenship a mere byproduct. Lincoln spoke of the nation as “conceived in Liberty.” Likewise, the due process clause of the Fourteenth Amendment forbids the deprivation of life, property, or liberty without due process of law. Lincoln also spoke of that nation as “dedicated to the proposition that all men are created equal.” The Fourteenth Amendment guarantees all citizens alike “the privileges or immunities of citizens of the United States” and the “equal protection of the laws.” Lincoln spoke of a “new birth of freedom,” and the Thirteenth Amendment abolishes slavery; he spoke of government “by the people,” and the Fifteenth Amendment guarantees the right to vote. The similarities are unmistakable.

In his opening words at Gettysburg, Lincoln portrayed the nation as dating to the Declaration of Independence “four score and seven years ago.” He thus recentered American nationhood in the Declaration rather than in Madison’s Constitution of 1787 (which would have been three score and sixteen years earlier). Lincoln thereby reoriented our vision of nationhood from being a purely utilitarian bargain to a solemn commitment to liberty and equality. The Constitution aims at practical and often mundane ends, ranging from national defense to the post office. But standing behind these practical purposes, Lincoln saw a deeper goal of promoting human rights.

In this vision of America, the germ of future constitutional change was already present at Gettysburg. Lincoln surely did not foresee the constitutional developments that were to come after his death. Yet, he helped set the stage for a transformation of the constitutional order. The upshot was to be a new constitutional regime, one that fulfilled Madison’s dream of constitutional protection against human rights abuses by state governments. Many people contributed to the realization of that constitutional regime in the century after Lincoln’s death. But Lincoln deserves credit for his part in setting the process in motion.
It is hardly an arresting new insight to see Lincoln and his era as a turning point in American constitutional law. What is striking, however, is the extent to which Lincoln’s accomplishment was more than just a defense of the existing constitutional order. Instead, Lincoln took the lead in filling critical gaps and ambiguities in the Constitution bequeathed by Madison and his generation. Our pledge of allegiance speaks of “one nation . . . indivisible, with liberty and justice for all.” But neither the true nationhood of the United States, nor its indivisibility, nor its commitment to “liberty and justice for all,” was obvious when Lincoln took office. It was similarly unclear whether the one significant, nationally elected officer of the federal government, the president, would play a decisive role in government.

That we take such things for granted is in no small degree a legacy of Lincoln’s. We may continue to call James Madison the father of the Constitution. But Madison’s constitution was flawed and incomplete. We would not have the constitutional law we have today had it not been for Lincoln.